IN THE
MISSOURI SUPREME COURT

No. SC98977

MARIA DEL CARMEN ORDINOLA VELAZQUEZ,

Plaintiff/Appellant-Respondent,

v.

UNIVERSITY PHYSICIAN ASSOCIATES, et al.

Defendants/Respondents-Appellants.

Appeal from the Circuit Court of Jackson County
The Honorable John M. Torrence
Case No. 1716-CV20186

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, AND AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS/RESPONDENTS-APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiff-appellant/respondent Maria Ordinola Velazquez ("Plaintiff") and defendants-respondents/appellants ("Defendants") each appealed from an amended judgment entered by the Circuit Court of Jackson County on March 2, 2020 (the "Judgment"), after a jury returned a verdict in Plaintiff's favor on her claims alleging medical malpractice against Defendants. Before entering the Judgment, the trial court granted in part Defendants' motions for remittitur of the jury's award of non-economic damages, pursuant to the limitation on non-economic damages in §538.210.2(2), RSMo.[1]

On June 4, 2020, Plaintiff filed in the Missouri Court of Appeals, Western District, a motion to transfer the appeal to this Court on the grounds that this Court had exclusive jurisdiction of the case because "Plaintiff has raised a real and substantial challenge to the validity of" §538.210. The Court of Appeals entered an Order on July 17, 2020, taking Plaintiff's motion with the appeal.

After briefing and argument, the Court of Appeals transferred the consolidated appeals to this Court on February 16, 2021, under Article V, §11 of the Missouri Constitution on the ground that Plaintiff's appeal "raises a real and substantial challenge to the constitutionality of § 538.210, and thereby invokes the Supreme Court's exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution." Slip Op. at 2. This Court therefore has exclusive jurisdiction over all issues in the case under Article V, §3 of the Missouri Constitution. *See, e.g., In re Estate of Austin*, 389 S.W.3d 168, 170 n.9 (Mo.

[1]All statutes referenced herein are Missouri Revised Statutes. Section 538.210 is reproduced in the Appendix to this brief (Apdx-A5).

2013) ("[O]nce this Court's jurisdiction attaches, it extends to all issues in the case.") (cited in Slip. Op. at 11).

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Missouri Chamber of Commerce and Industry is the largest business association in Missouri. Representing more than 40,000 employers, the Missouri Chamber advocates for policies and laws that will enable Missouri businesses to thrive, promote economic growth, and improve the lives of all Missourians. The Missouri Chamber also advocates for legislative policy and court outcomes that make Missouri attractive to job creators, and encourage existing job creators to stay and grow within Missouri.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

Each of these *Amici* has an interest in ensuring that Missouri's civil litigation environment is fair and predictable and reflects sound policy, and that Missouri employees have access to affordable health care. These goals are furthered by §538.210's limitations on non-economic damages in cases arising from the provision of health care services. *Amici* also hold a broader interest in ensuring that the Missouri legislature retains authority to replace a common law action with a statutory scheme that promotes important social and economic policies while balancing the interests of all affected parties. *Amici* have a substantial interest in the constitutionality of §538.210, as the potential for unrestrained liability will negatively affect the health care available to their members' employees in Missouri.

CONSENT OF PARTIES

Defendants and Respondent-Intervenor the State of Missouri have consented to the filing of this brief. Counsel for Plaintiff have indicated that they do not consent. Defendants have therefore conditionally filed this brief along with a motion for leave to file it, as required by Rule 84.05(f)(3).

STATEMENT OF FACTS

Amici adopt and incorporate herein the Statement of Facts set forth in the Brief of Respondents Jennifer Reeves, M.D. *et al*.

ARGUMENT

I. Section 538.210.2's Limitation on Non-Economic Damages Is A Valid Exercise of Legislative Authority and Is Consistent with the Missouri Constitution. (Responding to Point Relied On in Brief of the Appellant-Respondent).

As the Court of Appeals correctly noted,

> [t]he Missouri Supreme Court has not considered the precise question that [Plaintiff] raises here: whether the legislature may constitutionally limit the damages recoverable on a cause of action which *did* exist at common law, but which has now been 'replaced' by a statutory cause of action. The legal effect of the legislature's rechristening of a common-law cause of action as 'statutory' has not previously been decided by the Supreme Court.

Slip Op. at 10. Although the "precise question" here is novel, a review of this Court's decisions in cases addressing earlier versions of §538.210, the right to jury trial generally, and the legislative prerogative to eliminate common-law causes of action demonstrates that the answer is yes. We begin by looking at how the General Assembly has sought, through enacting and amending §538.210, to respond to the detrimental effects rising non-economic damage awards have had on health care costs and malpractice insurance premiums, which in turn negatively impact Missourians' access to quality health care.

A. History of Missouri's Efforts to Limit Non-Economic Damages and Impacts on Missouri Physicians, Insurers, and Residents.

1. Litigation and economic climate before the 2005 amendment to §538.210.

The General Assembly first enacted a non-economic damages cap for medical negligence actions in 1986. *See* 1986 Mo. Laws 879, §538.210. The cap was initially set at $350,000 "per occurrence," to be adjusted annually for inflation. This Court upheld that cap in a common-law medical negligence action, *Adams v. Childrens' Mercy Hospital*, 832

S.W.2d 898 (Mo. banc 1992), *overruled in part, Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. banc 2012).

Although the cap initially had its intended effect and stabilized liability insurance premiums, by the late 1990s increasing damages limits and lawsuits threatened to mute its benefits. *See* Tom Holloway, *Missouri Health Care Headed for Catastrophe Without Tort Reform* 423-25, Mo. Med. 109(6) (Nov.-Dec. 2012) ("Holloway Rep."), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6179607. In 2002, the Court of Appeals, Eastern District, held the cap could be "stacked" across defendants or applied to each discrete act of malpractice from a single individual. *Scott v. SSM Healthcare*, 70 S.W.3d 560, 569-71 (Mo.App. E.D. 2002); *see also Cook v. Newman*, 142 S.W.3d 880, 889-91 (Mo.App. W.D. 2004) (following *Scott*). *Scott* and *Cook* effectively voided the 1986 cap by allowing plaintiffs to parse the treatment at issue into multiple "occurrences" of negligence. By 2005, the cap had crept up to $579,000, and Missouri's medical liability environment progressively worsened. *See* Holloway Rep. (recounting how, "just as the crisis of rising caps began to boil over," *Scott* was decided, making "all health care providers liable for a multitude of non-economic damage caps, not just one," leading to sharp increases in lawsuits, insurance payouts, and insurance premiums as well as insurance industry losses and the departure of insurers from Missouri).

The results were disastrous for Missouri physicians, insurers, and citizens needing access to medical care, particularly those in low-income and rural communities. For example, according to several reports issued by the Missouri Department of Insurance, Financial Institutions & Professional Regulations (DIFP), the average malpractice award

increased from $166,623 in 2001 to $253,304 in 2005. *See* 2005 Med. Malpractice Ins. Rep., at 26 (Sept. 2006), *available at* https://insurance.mo.gov/Contribute%20Documents/2005_Medical_Malpractice_Report.pdf.

Over the same period, Missouri insurers experienced "depressed and even negative returns for the period of 1999-2003." 2008 Med. Malpractice Ins. Rep., at iv (July 2009), *available at* https://insurance.mo.gov/Contribute%20Documents/2008Medical MalPracticeReport.pdf. In addition, insurers' "costs had exceeded 100 percent of [earned] premium during seven of the eight years preceding 2004." *Id.* As a result, insurers had to increase premiums to avoid a collapse within Missouri's insurance market. *E.g.*, Holloway Rep. (noting average increase of 61.2% for individual premiums from 2001 to 2002, 78% from 2002 to 2003, and 38% from 2003 to 2004, per a survey by the Missouri State Medical Association).

Higher premiums placed greater financial strain on the medical community. Many physicians, particularly those in specialized practices, could no longer afford to maintain their insurance or chose to relocate in light of premium increases. *See* Holloway Rep. (reporting that, according to a 2003 study, 27% of Missouri's neurosurgeons were considering leaving the state and 40% were considering early retirement); Dan Margolies, Doctors Assail State for Soaring Premiums, *Kan. City Star*, July 16, 2004, at C1, at 2004 WLNR 19108743 (reporting that 40% of neurosurgeons in Missouri had retired and almost 27% percent had relocated over the span of a few years); Bill Bell Jr., Doctors Make House Call, *St. Louis Post-Dispatch*, Jan. 30, 2003, at A1, at 2003 WLNR 1743817 (reporting medical liability insurance rates for obstetrician/gynecologists ranged from $60,000 to

$120,000 per year). Even those physicians who sought to maintain their practices in Missouri could not easily obtain coverage. *See* U.S. Dept. of Health & Human Servs., *Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care* 20 (Mar. 2003), *available at* https://aspe.hhs.gov/system/files/pdf/72871/medliab.pdf (reporting that of the 32 carriers writing medical malpractice coverage in Missouri in 2001, only eight were still writing policies for doctors by the end of 2002, and insurers who were still in business in the state "are charging more and offering fewer discounts"). That was especially true for specialty practices, such as obstetrics-gynecology, orthopedics, neurosurgery, radiology, and trauma. *Id.*

The combination of increasing average awards, higher insurance premiums, and departing and retiring medical professionals had predictably negative consequences for Missourians. Medical liability insurance became less available and less affordable. *See* Mo. Dept. of Ins., 3 Public Policies 1, 3 (2004) (quoting then-Missouri Director of Insurance, Scott B. Lakin, regarding the problem in convincing companies to enter and compete in the Missouri market). In an effort to limit liability, physicians and hospitals were forced to restrict their services to avoid high-risk patients and procedures. *See* Holloway Rep. (citing an Aug. 2002 report by the Missouri State Medical Association). Given rising costs, physicians also were forced to cut staff positions and to avoid updating or acquiring new technology. *Id.* Access to necessary health services decreased, particularly among women, *id.*, and the Holloway Report quotes a 2003 report from the U.S. Congress's Joint Economic Committee noting that "[t]he negative aspects of the medical liability system

have a particularly adverse effect on women, low-income individuals and rural residents." And of course, rising costs of health care negatively affect both employees and their employers, as they internalize some of those costs.

2. The 2005 amendment to §538.210.

This worsening environment prompted the General Assembly to amend §538.210 in 2005 to set the non-economic damages limit at $350,000 per plaintiff, regardless of the number of defendants. House Bill 393, amending §538.210, received overwhelming bipartisan support, passing 112-47 in the House and 23-8 in the Senate. *See* Mo. House J., Mar. 16, 2005, at 664-66; Mo. Sen. J., Mar. 16, 2005, at 478-79.

The 2005 revision had a beneficial impact on the state's health care delivery. Before the law took effect, the number of newly opened medical liability claims had spiked to 2,425 claims, far exceeding the previous record of 2,128 claims in 1986, when the original cap was enacted. 2005 Med. Malpractice Ins. Rep., Exec. Summary. Since 2005, the number of medical liability claims has declined and remained steady at levels roughly one-third lower than the 2000-2004 numbers. *See* 2012 Med. Malpractice Ins. Rep., at v (Sept. 2013) *available at* https://insurance.mo.gov/reports/medmal/documents/2012MedicalMalpractice Report.pdf; 2019 Med. Malpractice Ins. Rep., at v (noting low of 639 in 2019), *available at* https://insurance.mo.gov/reports/medmal/documents/MedMalReport2019.pdf.

The 2005 law also resulted in significant decreases in the average medical malpractice award. In 2012, the average recovery per claimant was $296,400, approximately 13% less than in 2005. 2019 Med. Malpractice Ins. Rep., at vi. Those more

manageable award amounts enabled some insurers to *cut* medical liability insurance rates. *See* Terry Ganey, Doctors vs. Lawyers, *Colum. Daily Trib.*, Oct. 4, 2009, at 2009 WLNR 19611660 (Medical Liability Alliance, which underwrites about 5% of Missouri's medical insurance market, announced 6% across-the-board rate reduction in July 2007; Physicians Professional Indemnity Association, which underwrites about 4% of the market, implemented 14% base rate reduction at the beginning of 2008).

3. *Watts* and the 2015 amendment to §538.210.

In 2012, the landscape changed once more with this Court's decision in *Watts,* in which the jury awarded $1.45 million in non-economic damages on a plaintiff's medical negligence claim. 376 S.W.3d at 636. The Court held the $350,000 cap set forth in §538.210, as applied to that common-law claim, violated the plaintiff's right to a jury trial because "the common law did not provide for legislative limits on the jury's assessment of civil damages." *Id.* at 640;[2] *but see id.* at 649-50 (stating, "[t]he right to jury trial does not limit the legislature's authority to determine what the elements of damages shall be") (Russell, J., dissenting in part). The Court noted that it previously had held that the legislature could abrogate a cause of action cognizable at law and replace it with a statutory action, but also observed that its holding did not "suggest[] a legislature can take constitutional protections from a plaintiff seeking relief under existing [common law] causes of action." *Id.* at 642-43 (citing *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 649 (Mo. Div. 1 1931)). The Court had no occasion in *Watts* to address the damages cap

[2]In so holding, *Watts* overruled *Adams* on this issue. *Id.* at 645-46.

as applied to a statutory medical negligence action, and as noted below, it has consistently upheld such caps against constitutional attacks applied to statutory actions.

In response to *Watts*, in 2015 the General Assembly amended §538.210 to create a statutory cause of action for medical malpractice and to "replac[e] any such common law cause of action." §538.210.1. The General Assembly further amended §1.010, the common law reception statute, to add a new subsection, §1.010.2, which reads as follows:

> The general assembly expressly excludes from [section 1.010] the common law of England as it relates to claims arising out of the rendering of or failure to render health care services by a health care provider, it being the intent of the general assembly to replace those claims with statutory causes of action.

See Apdx-A4. The 2015 law sets forth separate non-economic recovery caps of $400,000 for personal injury and $700,000 for catastrophic personal injury or death.[3] §538.210.2(1)-(3). In addition, §538.210.10 provides for an annual increase in these caps by a constant rate of 1.7%.[4] Thus, in 2020 the caps for non-catastrophic injury and catastrophic injury or death were $435,176 and $761,504, respectively. Mo. Dept. of Ins., Medical Malpractice Limits, *available at* https://insurance.mo.gov/industry/medmal.php. The statute further provides that actions brought under it are triable to a jury and that the jury cannot be informed of the non-economic damages limitation. §538.210.6.

[3]Section 538.205(1) defines "[c]atastrophic personal injury" as "a physical injury resulting in" (a) quadriplegia; (b) paraplegia; (c) "[l]oss of two or more limbs"; (d) a brain injury "that results in permanent cognitive impairment resulting in the permanent inability to make independent decisions or engage in one or more" specified "activities of daily living"; (e) "[a]n injury that causes irreversible failure of one or more major organ systems"; or (f) "[v]ision loss" that meets specified criteria.

[4] The annual increase in the limitations was re-codified from §538.210.8 to §538.210.10 in 2017.

4. Current challenges to health care delivery in Missouri.

Even with the limitations on non-economic damage awards in the 2015 amendment, Missouri continues to face challenges to the equitable delivery of health care services throughout the state, with the need particularly acute in rural areas. A bill was recently introduced in the Missouri House to address the severe shortage of primary care physicians in rural areas by providing an annual grant to physicians who commit to working in a rural county for a five-year period. *See* Wicker Perlis, Missouri Lawmakers Consider Creating Fund to Bring Doctors to Rural Areas, *Fulton Sun*, Mar. 13, 2021, https://www.fultonsun.com/news/local/story/2021/mar/13/missouri-lawmakers-consider-creating-fund-to-bring-doctors-to-rural-areas/863371/.

As of April 2020, at least seven rural hospitals had closed in Missouri since 2014. *See* Gaby Morera Di Nubila et al., Rural Missouri Residents in Limbo Following Hospital Closure, *Columbia Missourian*, April 10, 2020, https://www.columbiamissourian.com/news/state_news/residents-in-limbo-one-year-after-sweet-springs-hospital-closure/article_6a72ac12-7490-11ea-94f3-a7bd06fb375a. html ("Missourian article"); *see also* Michele Munz, Missouri Gets $5 Million to Address Growing Primary Care Doctor Shortage, *St. Louis Post-Dispatch*, Sept. 5, 2019, https://www.stltoday.com/lifestyles/health-med-fit/health/missouri-gets-5-million-to-address-growing-primary-care-doctor-shortage/ article _2966f344-7c4e-514d-b004-89a29cd7c059.html (2019 article referencing closure of "[e]ight acute hospitals in rural Missouri … in the past five years," and noting that "the state ranks 39th nationally in a collection of numerous health measures … according to the United Health Foundation."). Those closures adversely impact the health

and well-being of area residents, and more broadly impair the community's efforts to create and attract jobs. *See* Missourian article (member of community board of defunct Sweet Springs, Missouri hospital stating, "I think the closing of the hospital has probably hurt any chances of further economic development.").

The pressures on health care systems in Missouri, which have been exacerbated by the Covid-19 pandemic, will only intensify if the current version of §538.210 is invalidated. But as shown below, the General Assembly properly exercised its authority both in abrogating the common-law cause of action for medical negligence and enacting the new statutory action.

B. The General Assembly Enjoys Broad Authority to Create Statutory Causes of Action.

1. The legislature's authority to eliminate common law causes of action and create statutory actions is preserved in the Constitution and has long been recognized by this Court.

The basic authority of the legislature to establish policy both by enacting laws and by modifying or abrogating the common law is well established in Missouri. *See, e.g.*, §1.010.1 (2018) (providing in relevant part that "no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, *for the reason that it is in derogation of, or in conflict with, the common law*") (Apdx-A4) (emphasis added); Mo. Const. 1945, Art. XII, Schedule §2 ("All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly."). As the Court of Appeals, Western District, recognized, "It is axiomatic that the General Assembly, which

specifically adopted the common law, *retains the authority to abrogate it in its statutes*." *State v. Bouse*, 150 S.W.3d 326, 333 (Mo.App. W.D. 2004) (emphasis added).

This Court consistently has acknowledged the authority of the General Assembly "to create causes of action and to prescribe their remedies." *Dodson v. Ferrara*, 491 S.W.3d 542, 556 (Mo. banc 2016); *accord Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. banc 2012). "To hold otherwise would be to tell the legislature it could not legislate; it could neither create *nor negate causes of action*, and in doing so could not prescribe the measure of damages for the same." *Dodson*, 491 S.W.3d at 556 (emphasis added).

This legislative authority includes the power to modify or eliminate the common law. *See, e.g.*, *Adams*, 832 S.W.2d at 906 (rejecting the plaintiffs' "open courts" challenge stating, "by statute and decision, the common law is in force in Missouri *only to the extent that it has not been subsequently changed by the legislature* or judicial decision") (emphasis added); *Blaske v. Smith & Entzeroth*, 821 S.W.2d 822, 833-34 (Mo. banc 1991) ("[T]he legislature could totally eliminate a cause of action for personal injury …. The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'") (citation omitted); *Holder v. Elms Hotel*, 92 S.W.2d 620, 624 (Mo. Div. 2 1936) ("'[T]he constitution does not forbid the creation of new rights, *or the abolition of old ones recognized by the common law*, to attain a permissible legislative object.' … '[T]he legislative power exists to change or abolish existing statutory and common-law remedies.'") (emphasis added) (citations omitted).

That is precisely what occurred in 2015. The General Assembly, acting within its legislative authority, abrogated the common-law claim for medical negligence. As this Court acknowledged in *Watts*, it previously held in *De May* "'that if there is no cause of action, there is nothing to which the right to jury trial can attach.'" *Watts*, 376 S.W.3d at 643 (quoting *De May*, 37 S.W.2d at 649). The General Assembly then replaced the common law action with a statutory cause of action with different rights and remedies.

2. Substantive limits on damages do not invade the constitutional right to a jury trial.

Legislative prerogative to define the substance of statutory actions – including damages caps – is, moreover, fully consistent with the jury trial right set forth in Article I, section 22(a), of the Missouri Constitution, as this Court has explained time and again. The former "is a question of the contours of the substantive right to recover, which the legislature alone must decide," while the latter "is a question of procedure, which the constitution protects." *Dodson*, 491 S.W.3d at 570 (Fischer & Wilson, JJ., concurring); *see also Estate of Overbey v. Chad Franklin National Auto Sale North*, 361 S.W.3d 364 at 375-76, 377 n.4 (Mo. banc 2012) (distinguishing between "the judicial process by which claims are determined [and] the substance of the claims themselves," and explaining that the right to jury trial applies only to the procedures for adjudicating statutory claims and not to their legislatively determined parameters; the statute "sets the limits of the right, not merely the limits of recovery as might be the case in a common law action.") (citation omitted); *De May*, 37 S.W.2d at 645, 648 (holding that the Workmen's Compensation Act is "of recent origin" and did not violate constitutional right to jury trial; the "right or remedy so created

by the act is wholly substitutional in character, and supplants all other rights and remedies, at common law or otherwise").

Thus, in *Adams* the Court upheld the 1986 version of the §538.210 cap on non-economic damages in a medical malpractice action. The jury returned a verdict in excess of $20 million, including more than $13 million in non-economic damages. 832 S.W.2d at 900. On appeal, the plaintiffs raised multiple constitutional challenges to the limits set forth in §538.210, including that those limits denied plaintiffs their constitutional right to a jury trial. The Court rejected the plaintiffs' argument, observing that the legislature has constitutional power "to abrogate a cause of action cognizable under the common law" and, therefore, "also has the power to limit recovery in those causes of action." *Id.* at 907. Moreover, this Court opined that §538.210 did not invade the jury's fact-finding role, as it was "not applied until after the jury has completed its constitutional task." *Id.* Section 538.210 instead "establishe[d] *the substantive, legal limits of the plaintiff's damages remedy*," a matter of law that was "not within the purview of the jury." *Id.* (emphasis added). *Adams* remained the law in Missouri for two decades until its partial overruling by *Watts* in 2012.

In a distinct line of cases, the Court has considered the separate question of whether a jury trial right attaches to a statutory claim when, unlike here, the statute does not explicitly so provide. In such cases, the Court has analyzed whether the claim is "analogous to" a proceeding triable by jury at common law. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), for example, the Court held that a plaintiff who proceeded under the Missouri Human Rights Act (MHRA) had a constitutional jury trial right even

though the statute set forth no such right. The Court reasoned that "an action for damages for discrimination based upon age, sex and retaliation for filing a discrimination complaint … is analogous to those kinds of actions triable by juries at the time of the Constitution of 1820." *Id.* at 87.

But this Court has repeatedly made clear that the question whether a jury trial right attaches to a statutory cause of action is distinct from the question at issue here, where the statute expressly grants a right to jury trial. As Judges Fischer and Wilson have observed, *Diehl* did not address "the *decidedly different question* of whether the constitutional right to a jury trial prohibited the enforcement of legislatively enacted caps on damages recoverable under common law or statutory causes of action." *Dodson*, 491 S.W.3d at 569 (Fischer & Wilson, JJ., concurring) (emphasis added). Indeed, the analysis in *Diehl* "has never been used to answer this question." *Id.* at 570 (Fischer & Wilson, JJ., concurring).

When this Court later held that a jury trial right attached to a claim under the Missouri Merchandising Practices Act (MMPA), it distinguished between the legislature's authority to decide the *substance* of an action it has created (which expressly includes "the power to create or abolish *or otherwise limit the remedy*") and the procedural limits of the "judicial process by which claims are determined." *Scott v. Blue Springs Ford Sales*, 176 S.W.3d 140, 142 (Mo. banc 2005) (emphasis added).

Consistent with the legislature's power to define statutory claims, this Court repeatedly has upheld damages caps in statutory actions in the face of challenges based on the right to a jury trial. In *Estate of Overbey v. Chad Franklin National Auto Sales North*, 361 S.W.3d 364 (Mo. banc 2012), the trial court reduced the plaintiffs' punitive damages

award under the MMPA to the $500,000 cap set forth in §510.265. *Id.* at 370-71. On appeal, the plaintiffs asserted the cap violated their constitutional right to a jury trial. *Id.* at 374-75. This Court disagreed, explaining that "the legislature has the authority to choose what remedies will be permitted under a statutorily created cause of action such as the MMPA or MHRA." *Id.* at 375. A damages cap on a statutory action "did not intervene in the judicial process or establish a procedure for adjudicating a substantive claim … but rather limited the substance of the claims themselves. Indeed, [the legislature] could have precluded recovery of punitive damages altogether." *Id.* at 376 (quotations omitted). Thus, "the jury can [decide damages] only up to the substantive limit of recovery set out in the statutes themselves in a statutory cause of action such as this, for that sets the limits of the right, not merely the limits of recovery as might be the case in a common law action." *Id.* at 377 n.4. And it reached that conclusion despite finding that the constitutional jury trial right attached to the statutory claim by analogy to the common law. *See id.* at 375 (discussing *Scott*).

Twice over the past decade, the Court has upheld the non-economic damages cap applied to wrongful death actions. In *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. banc 2012), the Court held that the pre-2005 version of §538.210 did not offend the right to trial by jury with respect to a wrongful death claim because "[t]he legislature has the power to define the remedy available if it creates the cause of action." *Id.* at 203-04 (citation omitted). The Court stated:

> [T]he General Assembly created the law through which the wrongful death cause of action operates. The fact-finder—whether judge or jury—makes a factual determination when returning its verdict. The judge then enters

> judgment by applying the law to the fact-finder's determination. The limit on damages within section 538.210 interferes neither with the jury's ability to render a verdict nor with the judge's task of entering judgment; rather, it informs those duties…. To hold otherwise would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same. This Court never has so held and declines to do so now. The General Assembly has the right to create causes of action and to prescribe their remedies.[5]

Id. at 205.

Four years later, this Court again held that the statutory cap on a wrongful death action did not violate the plaintiff's jury trial right. *Dodson*, 491 S.W.3d at 553-54, likewise was a wrongful death action that addressed the 2005 amendment to §538.210. The plaintiffs, citing *Diehl*, claimed that legislative limits on damages were prohibited because their claim was "analogous to" actions that existed at common law. The Court disagreed, explaining that "*Diehl*, which focuses exclusively on whether the claimant brings a civil action for damages as opposed to an equitable claim … is of no relevance in determining whether the constitutional right to a jury trial bars enforcement of legislatively created limitations on the amount of damages recoverable under a statutory wrongful death cause of action." *Id.* at 555. The Court acknowledged the power of the legislature "to choose what

[5] Although the Court went on to add, "The General Assembly may negate causes of action or their remedies *that did not exist prior to 1820*," *id.* (emphasis added), the italicized words plainly did not disclaim the power of the General Assembly to negate causes of action or their remedies that did not exist prior to that date. Even assuming the 1820 Constitution, and not the operative 1945 Constitution, were the proper point of reference, Schedule §2 of the 1820 Constitution provided that then-existing laws were subject to legislative abrogation: "All laws now in force in the Territory of Missouri, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the general assembly." *See also* Mo. Const. of 1945, Art. XII, Schedule §2.

remedies will be permitted under a statutorily created cause of action." *Id.* at 556-58; *see also id.* at 571 (Fischer & Wilson, JJ., concurring) (noting "the line drawn" in cases including *Overbey*, *Sanders*, and *Watts* "that the constitutional jury trial right prohibits the enforcement of statutory caps on amounts recoverable on a common law cause of action but is not offended by such caps on amounts recoverable under a statutory cause of action").

This case calls upon the Court to apply this line of precedent once again. The Court has previously distinguished between caps applied to statutory claims, which fall within the legislature's purview, and caps applied to common-law actions, which may "'infringe[] on the right to trial by jury.'" *Dodson*, 491 S.W.3d at 556 (quoting *Watts*, 376 S.W.3d at 640); *see also Lewellen v. Franklin*, 441 S.W.3d 136, 142-43 & n.9 (Mo. banc 2014) (punitive damages cap violated jury trial right when applied to common-law misrepresentation claim but was permissible as applied to MMPA claim). Here, the General Assembly exercised its legislative prerogative to abrogate the common-law action for medical negligence and enact a statutory cause of action under §538.210. Under this Court's jurisprudence, that action does not violate the jury trial right.

3. Validating §538.210's limitations on non-economic damages is consistent with this Court's recognition of legislative authority to establish tort policy rules.

Beyond approving the efforts described above to limit difficult-to-quantify and subjective non-economic or punitive damages, the Court has traditionally respected the legislature's authority to decide broad tort policy rules for Missouri. Examples include:

- a $100,00 limit on tort recoveries against State agencies, *see Richardson v. State Hwy. & Transp. Comm'n*, 863 S.W.2d 876 (Mo. banc 1993) (statute

did not violate equal protection provisions of Missouri or United States Constitutions); *Fisher v. State Hwy. Comm'n*, 948 S.W.2d 607 (Mo. banc 1997) (statute did not violate state constitutional rights regarding "the enjoyment of the gains of their own industry," equal protection, or open courts and certain remedy);

- a ten-year statute of repose for improvements to real property, *see Blaske v. Smith & Entzeroth*, 821 S.W.2d 822 (Mo. banc 1991) (statute did not violate equal protection or due process provisions of Missouri or U.S. Constitutions, did not constitute prohibited special legislation, and did not violate open courts provision of Missouri Constitution); *Magee v. Blue Ridge Prof Bldg.*, 821 S.W.2d 839 (Mo. banc 1991) (statute did not violate open courts provision of Missouri Constitution or due process or equal protection provisions of Missouri or U.S. Constitutions);
- Missouri's Dram Shop Act, *see Snodgras v. Martin & Bayley*, 204 S.W.3d 638 (Mo. banc 2006) (Act did not violate open courts provision of Missouri Constitution or equal protection provisions of Missouri or U.S. Constitutions);
- a punitive damages "sharing" statute, *see Hoskins v. Business Men's Assurance*, 79 S.W.3d 901 (Mo. banc 2002) (statute did not violate excessive fines provisions of Missouri or U.S. Constitutions); *Fust v. Attorney General*, 947 S.W.2d 424 (Mo. banc 1997) (statute did not violate single subject, "clear title," due process, equal protection, or special law provisions of the

Missouri Constitution, the separation of powers, or represent an unconstitutional attempt to grant money to private persons in contravention of the Missouri Constitution);

- a sovereign immunity statute, *see Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324 (Mo. banc 1982) (sovereign immunity law permitting tort claims only if arising from public employee's operation of a motor vehicle did not violate equal protection under the Missouri or United States Constitutions);
- an affidavit of merit requirement for medical malpractice actions, *see Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503 (Mo. banc 1991) (statute did not violate right to jury trial, open courts, or separation of powers provisions of Missouri Constitution or equal protection or due process provisions of Missouri or U.S. Constitutions); and
- a statute that exempted health service corporations from some forms of liability for injuries to patients, *see Harrell v. Total Health Care*, 781 S.W.2d 58 (Mo. banc 1989) (statute did not violate open courts provision of Missouri Constitution and did not violate equal protection or due process provisions of Missouri or U.S. Constitutions).

Indeed, as this Court has recognized numerous times, "'it is not within the Court's province to question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination.'" *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. 2010) (quoting *Winston*, 636 S.W.2d at 327).

The United States Supreme Court has voiced the same deference to the legislative prerogative:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Duke Power v. Carolina Envtl. Study Grp., 438 U.S. 59, 88 n.32 (1978) (citations omitted).

The long-standing recognition of the separation of powers, both by this Court and by the United States Supreme Court, is validated by the inherent strengths of the legislative process. For example, the iterative nature of the legislative process allows the legislature to make adjustments over time, calibrating the laws to protect competing interests and to account for evolving circumstances, unforeseen consequences, or judicial interpretations that may not align with legislative intent. The legislature also has extensive access to information and can receive comments from persons representing different perspectives, allowing it to engage in broad policy deliberations and to formulate policy carefully. Moreover, legislators are accountable to constituents through the political process:

> The legislature has the ability to hear from everybody – plaintiffs' lawyers, health care professionals, defense lawyers, consumers groups, unions, and large and small businesses. ... [U]ltimately, legislators make a judgment. If the people who elected the legislators do not like the solution, the voters have a good remedy every two years: retire those who supported laws the voters disfavor. These are a few reasons why, over the years, legislators have received some due deference from the courts.

Victor E. Schwartz, *Judicial Nullifications of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 689 (2001).

Courts, in contrast, are best equipped to adjudicate individual disputes concerning discrete issues and parties. *See, e.g., Knopik v. Shelby Investments, LLC*, 597 S.W.3d 189, 195 (Mo. banc 2020) ("A court's power extends only to the cases and controversies brought before it.") (Wilson, J., concurring). The focus on individual cases does not provide the same kind of comprehensive access to pertinent information as the legislative process does, and judicial changes in tort law may not provide prospective "fair notice" to everyone potentially affected.

Amici respectfully submit that it is critical that the General Assembly retain the authority, expressly reserved in Article XII, Schedule §2 of the Constitution, to abrogate common-law actions and to define and refine the substance of statutory actions. That authority is part and parcel of the legislature's constitutional role. Here, for example, the legislature replaced the cause of action and calibrated potential damages, taking into account the way such damages affect the availability and cost of health care, as well as the state's ability to retain existing employers and attract new ones. As this Court recognized in upholding the 1986 version of §538.210 against an equal protection challenge, "it is the province of the legislature to determine socially and economically desirable policy and to determine whether a medical malpractice crisis exists," and limiting non-economic damages "is a rational response to the legitimate legislative purpose of maintaining the integrity of health care for all Missourians." *Adams*, 832 S.W.2d at 904. If this Court were to hold that the legislature lacked authority to take such action, it would be at odds with the

text of the Missouri Constitution and would significantly hamper the legislature's ability to act on behalf of the common good.

CONCLUSION

Amici respectfully submit that the General Assembly was well within its constitutional authority in enacting §538.210's limit on non-economic damages, and therefore strongly urge this Court to affirm that authority and uphold the circuit court's remittitur. A contrary conclusion not only would be inconsistent with this Court's precedent, it would have a detrimental impact on Missouri employees' access to affordable health care.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief for *Amici Curiae* complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 7,320 words, excluding the cover, this certificate, and the signature block, as determined by the Microsoft Word 2010 Word-counting system.

/s/*James F. Bennett*

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2021, pursuant to Supreme Court Rule 103.08, I electronically filed the foregoing Brief for *Amici Curiae* with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

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