IN THE SUPREME COURT OF THE STATE OF OREGON

SCOTT RAYMOND BUSCH,

Plaintiff-Appellant,
Respondent on Review,
and

DEANNA MARIE BUSCH,

Plaintiff,

v.

MCINNIS WASTE SYSTEMS, INC.,

Defendant-Respondent,
Petitioner on Review.

Multnomah County Circuit Court
Case No. 15CV13496

Court of Appeals No. A164158

Supreme Court No. S066098

Brief of *Amici Curiae* Chamber of Commerce of the United States of America, American Tort Reform Association, American Property Casualty Insurance Association, Medical Professional Liability Association, and Coalition for Litigation Justice, Inc. in Support of McInnis Waste Systems, Inc.

On Review of a Decision of the Court of Appeals,
on Appeal from a Judgment of the Multnomah County Circuit Court,
by the Honorable Michael A. Greenlick, Judge

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Other Authorities

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented: Does Oregon's statutory upper limit on noneconomic damages in personal injury cases, ORS 31.710(1), violate the remedy clause in Article I, section 10, of the Oregon Constitution?

Proposed Rule of Law: The remedy clause permits the legislature to limit damages so long as it leaves plaintiffs a substantial remedy. ORS 31.710(1) does not violate the remedy clause because it permits plaintiffs in personal injury cases to recover their full economic losses, which alone may provide a substantial remedy, in addition to collecting a substantial, though not unlimited, award for intangible, immeasurable, and subjective noneconomic losses.

STATEMENT OF INTEREST

Amici represent businesses and insurers that are concerned with the predictability and fairness of Oregon's civil justice system. *Amici* have a substantial interest in the constitutionality of ORS 31.710(1), which advances these goals by providing a reasonable limit on the subjective and immeasurable portion of awards in personal injury cases—those awarded for noneconomic damages—by confining them to $500,000 for any one person. *Amici* include the Chamber of Commerce of the United States of America, American Tort Reform Association, American Property Casualty Insurance Association, Medical

Professional Liability Association, and Coalition for Litigation Justice, Inc.[1] Full statements of interest for each organization are included in the motion for leave to file this brief.

STATEMENT OF THE CASE AND FACTS

Amici summarize the facts and procedural history relevant to this brief as follows. When crossing the street in downtown Portland, Plaintiff was struck by Defendant McInnis Waste Systems, Inc.'s ("McInnis") garbage truck, resulting in the amputation of his leg above the knee. McInnis admitted liability, and the case proceeded to trial on the sole issue of damages in the Multnomah County Circuit Court. A jury awarded Plaintiff $10,500,000 in noneconomic damages, in addition to $3,021,922 for past and future medical expenses. McInnis requested that the trial court apply Oregon's statutory limit on noneconomic damages, ORS 31.710(1). In response, Plaintiff challenged the constitutionality of the statute. The trial court granted the motion and reduced Plaintiff's noneconomic damage award to $500,000. The Oregon Court of Appeals reversed, holding Oregon's noneconomic damage limit violates the remedy clause as applied to the verdict in this case. *See Busch v. McInnis Waste Sys., Inc*., 292 Or App 820, 426 P3d 820 (2018).

[1] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; San Francisco Reinsurance Company, Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

SUMMARY OF ARGUMENT

Noneconomic damage awards are highly subjective and inherently unpredictable. "There is no standard for measurement of pain and suffering," *DeMaris v. Whittier*, 280 Or 25, 30, 569 P2d 605 (1977), or "even a conception of those damages or what they represent." Dan B. Dobbs, *Law of Remedies* § 8.1(4), at 383 (2d ed 1993).[2] Juries are "left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal L Rev 772, 778 (1985).

Historically, noneconomic damage awards were modest and noncontroversial. In the past half century, however, these awards have become inflated to the point that they outpace other types of liability. The increasing size of noneconomic damages, their unpredictability, and the potential for runaway awards threaten the economic stability of businesses, the medical profession, and the affordability of liability insurance. In response, many states place reasonable upper limits on such awards.

When the Oregon legislature enacted ORS 31.710(1), it struck a careful balance. The legislature left uncapped all economic recoveries, including for past and future medical expenses, rehabilitation expenses, lost earning capacity,

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[2] *See also* Restatement (Second) of Torts § 903 cmt a (1965) ("There is no scale by which the detriment caused by suffering can be measured and hence there can only be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.").

or other necessary costs. *See* ORS 31.710(2)(a). The legislature sought to maintain economic stability for all Oregonians by choosing a substantial, but not unlimited, remedy for the few Oregonians who may find themselves as plaintiffs seeking extraordinary noneconomic losses.

About half of the states limit noneconomic damage awards in certain cases. Oregon's $500,000 statutory limit is in the mainstream, as many states have limits that are in the same range. In fact, three of Oregon's neighbors have set their caps at a lower level. Most courts that have considered the constitutionality of these statutes have upheld them. Courts have found that laws constraining liability awards are a proper legislative function and do not infringe on a plaintiff's constitutional rights.

Upholding ORS 31.710(1) is consistent with the traditional respect this Court affords to the legislature's role in shaping the civil justice system. Many Oregon laws set rules for civil liability, including altering rights and remedies. Given the settled nature of these laws, it stands to reason that the legislature can constitutionally limit damages, particularly noneconomic damages, which are highly subjective, standardless, and unpredictable.

ARGUMENT

I. Noneconomic Damage Limits Respond to a Rise in Pain and Suffering Awards and Their Unpredictability

Historically, the availability of noneconomic damages and inability to objectively measure pain and suffering did not raise serious concern because

"personal injury lawsuits were not very numerous and verdicts were not large." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective Review of the Problem and the Legal Academy's First Responses*, 34 Cap U L Rev 545, 560 (2006). Further, prior to the twentieth century, courts often reversed large noneconomic awards. *See* Ronald J. Allen & Alexia Brunet Marks, *The Judicial Treatment of Noneconomic Compensatory Damages in the Nineteenth Century*, 4 J Empirical Legal Stud 365, 369 (2007) (finding "literally no cases affirmed on appeal prior to 1900 that plausibly involved noneconomic compensatory damages in which the total damages (noneconomic and economic combined) exceeded $450,000" in 2007 dollars (about $570,000 today)).

Early awards for pain and suffering in Oregon are consistent with this national experience. For example, in 1900, this Court affirmed a $10,000 pain and suffering award—the equivalent of about $300,000 today[3]—to 21-year-old passenger who lost *both* her legs due to a train starting suddenly as she exited. *See Smitson v. Southern Pac. Co*., 37 Or 74 (1900). In 1930, this Court found a $23,256.60 award for pain and suffering and loss of future earnings to a 38-year-old railroad worker who suffered a severe spinal injury, at times causing

[3] Estimate based on U.S. Dep't of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl, which indicates that $10,000 in 1913 (the earliest year available) has the same buying power as $261,998.98 in September 2019.

temporary paralysis, not to be excessive. *Adskim v. Oregon Washington R. & Nav. Co.*, 134 Or 574 (1930) (reversing judgment on other grounds). That amount is the equivalent of $350,000 today.[4] When medical malpractice resulted in a patient suffering complete loss of vision in one eye and partial vision loss in the other eye in 1942, this Court found a general damage award of $18,000 (about $284,000 today) "large" but permissible. *Shives v. Chamberlain*, 168 Or 676, 687, 126 P2d 28, 32 (1942).

In sum, today's multimillion noneconomic damage awards represent a dramatic and unwarranted departure from amounts that Oregon courts have traditionally found reasonable.

A. Jurors are Urged to Award Extraordinary Amounts for Noneconomic Damages

The average size of pain and suffering awards took its first leap after World War II, as personal injury lawyers became adept at finding ways to enlarge these awards. *See generally* Melvin M. Belli, *The Adequate Award*, 39 Cal L Rev 1 (1951); *see also* Merkel, 34 Cap U L Rev at 560-65 (examining

[4] Estimate based on U.S. Dep't of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl, which indicates that $23,256.60 in January 1930 has the same buying power as $349,201.25 in September 2019.

post-war expansion of pain and suffering awards).[5] Early academic concerns over the rise in noneconomic damage awards were voiced, but went unheeded. *See, e.g.*, Marcus L. Plant, *Damages for Pain and Suffering*, 19 Ohio St LJ 200, 210 (1958) (expressing concern over the ease of proof of pain and suffering and the unpredictability of such awards, and proposing "a fair maximum limit on the award").

By the late 1950s and 1960s, plaintiffs' lawyers began the controversial and now ubiquitous practice of summation "anchoring," in which they suggest to juries, who struggle with assigning a monetary value to pain and suffering, an extraordinary amount for such an award. *See* Joseph H. King, Jr., *Counting Angels and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 Tenn L Rev 1, 13 (2003). The anchor establishes an arbitrary but powerful baseline for jurors to accept or negotiate upward or downward. *See id* at 37-40. Empirical evidence confirms that anchoring "dramatically increases" noneconomic damage awards. John

[5] Scholars attribute the rise in noneconomic damages to (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in public attitude that "someone should pay"; and (5) better organization by the plaintiffs' bar. *See* Merkel, 34 Cap UL Rev at 553-66; Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L Rev 163, 170 (2004).

Campbell et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash U L Rev 1, 28 (2017). Research indicates that "the more you ask for, the more you get." Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol 519, 526 (1996). This Court initially questioned whether such arguments are permissible. *See Hoyle v. Van Horn*, 236 Or 205, 207-08, 387 P2d 985 (1963) (assuming, without deciding, that asking a jury to award $25 per day for pain and suffering was improper, but finding mistrial unnecessary when trial court instructed jury to disregard the reference). It later joined courts that permit anchoring practices, which drive up noneconomic damage awards. *See DeMaris v. Whittier*, 280 Or 25, 29-30, 569 P2d 605, 607-08 (1977); Campbell, 95 Wash U L Rev at 33-48 (providing fifty-state survey).[6]

By the 1970s, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience constitute[d] the largest single item of

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[6] Some courts prohibit anchoring practices, finding that they intrude into the jury's domain, are not founded upon admissible evidence, create an illusion of certainty, and can result in a noneconomic damage award of whatever amount counsel suggests. *See, e.g.*, *Henne v. Balick*, 146 A2d 394, 398 (Del 1958); *Caley v. Manicke*, 182 NE2d 206, 208 (Ill 1962); *Duguay v. Gelinas*, 182 A2d 451, 454 (NH 1962); *Botta v. Brunner*, 138 A2d 713, 722 (NJ 1958); *Stassun v. Chapin*, 188 A 111, 111 (Pa 1936); *King v. Ry. Exp. Agency, Inc.*, 107 NW2d 509, 517 (ND 1961); *Crum v. Ward*, 122 SE2d 18, 27 (W Va 1961); *Affett v. Milwaulkee & Suburban Transp. Corp.*, 106 NW2d 274, 279 (Wis 1960); *Henman v. Klinger*, 409 P2d 631, 634 (Wyo 1966).

recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F2d 289, 294 (3d Cir 1971).

This trend has continued. According to the Bureau of Justice Statistics, the median damage award in medical liability jury trials in state courts, adjusted for inflation, was 2.5 times higher in 2005 ($682,000) than in 1992 ($280,000). *See* Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, at 10 tbl 11 (Bur of Justice Stats, Apr 9, 2009). The median damage award in state court product liability jury trials grew even more substantially--adjusted for inflation, product liability awards were five times higher in 2005 ($749,000) than in 1992 ($154,000). *Id.* Noneconomic damages accounted for approximately half of these awards. *See* Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts,* 2005, at 6 fig 2 (Bur of Justice Stats, Nov 2009).

As Judge Paul Neimeyer of the U.S. Court of Appeals for the Fourth Circuit observed, in the modern era, "[m]oney for pain and suffering . . . provides the grist for the mill of our tort industry." Paul Neimeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System,* 90 Va L Rev 1401, 1401 (2004). Indeed, pain and suffering awards in the United States are often more than ten times those in the most generous of other nations. Stephen D. Sugarman, *A Comparative Look at Pain and Suffering Awards*, 55 DePaul L Rev 399, 399 (2006).

B. The Unpredictability of Noneconomic Damage Awards Leads to Due Process Concerns and Inequitable Treatment

Not only have noneconomic damage awards increased in size, but their subjective nature makes them "highly variable, unpredictable, and abjectly arbitrary." Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L Rev 163, 185 (2004). As one scholar observed:

> Some [juries] roughly split the difference between the defendant's and the plaintiff's suggested figures. One juror doubled what the defendant said was fair, and another said it should be three times medical[s]. . . . A number of jurors assessed pain and suffering on a per month basis. . . . Other jurors indicated that they just came up with a figure that they thought was fair.

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke LJ 217, 253-54 (1993). This unpredictability not only poses a due process concern for defendants and complicates the ability to settle personal injury cases, it raises significant issues of "horizontal equity" for plaintiffs. *See* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L Rev 763, 769 (1995) (observing that "variability****undermines the legal system's claim that like cases will be treated alike").

Juries may award two plaintiffs with similar injuries vastly different amounts for pain and suffering. *See* Merkel, 34 Cap U L Rev at 567 (noting that noneconomic damages "for the same injury" can "vary substantially from case

to case"); Randall J. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw U L Rev 908, 924 (1989) (observing an "absence of 'horizontal' equity" in noneconomic damage awards for similar injuries leads to similarly situated parties being treated differently, erodes confidence in the civil justice system, and undercuts the deterrence function of tort law). In other cases, one jury may award a plaintiff with severe lifelong injuries less money for pain and suffering than another jury awards a plaintiff with objectively less severe injuries.

In reaching such amounts, juries may be influenced by whether they relate to the plaintiff, or other conscious or subconscious biases for or against a party, rather than the level of the harm. *See generally* Dobbs, 2 Law of Remedies, § 8.1(4), at 398 ("[V]erdicts vary enormously, raising substantial doubts whether the law is evenhanded in the administration of damage awards or whether in fact it merely invites the administration of biases for or against individual parties."); Chase, 23 Hofstra L Rev at 770 (indicating that race and gender influence noneconomic damage awards). Juries may also be influenced by improper factors such as a desire to punish a defendant, which should be reserved for consideration of punitive damages, or a view that a defendant has "deep pockets" and can afford to pay more. *See generally* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into 'Punishment'*, 54 SC L Rev 47 (2002).

C. This Case Illustrates Why Juries Reach Inflated, Arbitrary Noneconomic Damage Awards

The case before this Court illustrates how juries can be led to reach extraordinary verdicts for pain and suffering and the unjustified variability of such awards.

Here, the jury was asked to award Mr. Busch $20 million in noneconomic damages. This amount was included in the jury instructions, Tr 920, and mentioned during the Plaintiff's closing, Tr 952. This anchoring tactic apparently worked, as the jury awarded the Plaintiff just over half what his attorney sought—still an exorbitant amount. This amount is the equivalent of what the average Oregon family earns in two lifetimes—150 working years. *See* U.S. Census, Historical Income Tables: Households, tbl H-8, Median Household Income by State, https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-income-households/h08.xls (reporting average household income in Oregon was $69,165 in 2018).

The noneconomic damages awarded in this case also demonstrate the arbitrariness of pain and suffering awards and how they do not necessarily reflect the level of harm. For example, here, the jury awarded $10.5 million in noneconomic damages to a 58-year old banker who lost part of his leg. A jury in the same county, however, awarded a 21-year-old laborer who was cut in half at the base of his spine and rendered permanently paraplegic $2.4 million less

($8.1 million) for his pain and suffering, which was reduced by forty percent to account for comparative fault. *See Vasquez v. Double Press Mfg., Inc*., 288 Or App 503, 507, 406 P3d 225, 227 (2017), *affirmed on other grounds*, 364 Or 601 (2019).[7] In another case, a 38-year-old mother who suffered permanent neurologic damage because of an untreated stroke received a $2.72 million noneconomic damage award—about one quarter of the amount awarded in this case for pain and suffering attributed to the loss of a portion of a leg. *See* Aimee Green, *Jury Awards $3.7 million to Young Stroke Victim Doctors Mistakenly Thought was in Emotional Crisis*, Oregonian, June 3, 2016, https://www.oregonlive.com/portland/2016/06/jury_awards_37_million_to_youn.html (discussing *Haveman v. Oregon Emergency Physicians*, Multnomah County Case No. 1404-04430).

II. Oregon is Among Many States that Have Enacted a Reasonable Upper Limit on Noneconomic Damages

This dramatic rise of pain and suffering awards, and their unpredictability, led many states, including Oregon in 1987, to adopt commonsense statutory ceilings on noneconomic damages. These limits recognize that the broader public good is served when liability remains

[7] Likewise, in *Rains v. Stayton Builders Mart, Inc*., 359 Or 610, 619, 375 P3d 490, 496 (2008), a jury awarded a construction worker who was rendered permanently paraplegic one third of the amount of damages for pain and suffering ($3,125,000) that the jury awarded in this case for loss of a leg.

reasonable and predictable. These laws were designed to address outlier cases, promote uniform treatment of individuals with comparable injuries, facilitate fair settlements, and limit arbitrariness that may raise due process and horizontal equity concerns.[8]

Today, about half of the states limit noneconomic damages. Some states, including Oregon, have adopted an upper limit that extends to all personal injury claims.[9] Without a statutory limit, a small business owner may face millions of dollars in liability for a common slip-and-fall. Likewise, a minor, everyday "fender bender" can result in demands for exorbitant awards for pain and suffering, driving up auto insurance rates for all drivers. A generally applicable limit on noneconomic damages significantly reduces the potential for runaway verdicts and unreasonable settlement demands.

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[8] *See Gilbert v. DaimlerChrysler Corp*., 685 NW2d 391, 400 n.22 (Mich 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"); Neimeyer, 90 Va L Rev at 1414 ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

[9] *See, e.g.*, Alaska Stat § 09.17.010; Colo Rev Stat § 13-21-102.5; Haw Rev Stat § 663-8.7; Idaho Code § 6-1603; Md Cts & Jud Proc Code § 11-108; Miss Code Ann § 11-1-60(2)(b); Ohio Rev Code Ann § 2315.18.

In addition, many states specifically limit noneconomic damages,[10] and a few states cap total damages,[11] in medical negligence cases. While the constitutionality of Oregon's limit on noneconomic damages arises in this case in a general personal injury action, the Court's decision will have significant implications for Oregon's healthcare environment. A substantial body of literature shows that limits on noneconomic damages lead to lower insurance

[10] *See, e.g.*, Alaska Stat § 09.55.549; Cal Civ Code § 3333.2; Colo Rev Stat § 13-64-302; Iowa Code § 147.136A; Md Cts & Jud Proc Code § 3-2A-09; Mass Gen Laws ch 231 § 60H, Mich Comp Laws § 600.1483; Mont Code Ann § 25-9-411; Mo Rev Stat § 538.210; Nev Rev Stat § 41A.035; NC Gen Stat § 90-21.19; ND Cent. Code § 32-42-02; Ohio Rev Code Ann § 2323.43; SC Code Ann § 15-32-220; SD Codified Laws § 21-3-11; Tex Civ Prac & Rem Code § 74.301; Utah Code § 78B-3-410; W Va Code Ann. § 55-7B-8; Wis Stat § 893.55.

[11] *See, e.g.*, Ind Code Ann § 34-18-14-3; La Rev Stat § 40:1299.42; Neb Rev Stat § 44-2825; Va Code Ann § 8.01-581.15; *see also* NM Stat Ann § 41-5-6 (limiting total damages in medical liability actions except damages for medical care or punitive damages).

premiums,[12] higher physician supply,[13] and a greater focus on the quality of care over the practice of defensive medicine that merely increases the quantity

[12] *See, e.g.*, Mark Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118 Obstetrics & Gynecology 335, 338-39 (Aug 2011) (documenting medical liability insurance premium reductions and refunds following Mississippi's adoption of a $500,000 noneconomic damage limit in most medical liability cases); Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Settlement Payments*, 36 J Legal Stud S183, S221 (June 2007) (study of more than 100,000 settled cases showed that caps on noneconomic damages "do in fact have an impact on settlement payments"); Michelle Mello, *Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms,* Research Synthesis Rep No. 10, at 12 (Robert Wood Johnson Found 2006) (reporting "the most recent controlled studies show that caps moderately constrain the growth of premiums"); Meredith L Kilgore et al., *Tort Law and Medical Malpractice Insurance Premiums*, 43 Inquiry 255, 268 (2006) (finding physicians in general surgery and obstetrics/gynecology experienced 20.7% and 25.5% lower insurance premiums, respectively, in states with damage caps compared to states without them); U.S. Dep't of Health & Human Servs, *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System* 15 (2002) ("[T]here is a substantial difference in the level of medical malpractice premiums in states with meaningful caps . . . and states without meaningful caps.").

[13] *See, e.g.*, Ronald Stewart et al., *Tort Reform is Associated with Significant Increases in Texas Physicians Relative to the Texas Population*, 17 J Gastrointest Surg 168 (2013); William Encinosa & Fred Hellinger, *Have State Caps on Malpractice Awards Increased the Supply of Physicians?*, 24 Health Aff 250 (2005); *see also* Robert Barbieri, *Professional Liability Payments in Obstetrics and Gynecology*, 107 Obstetrics & Gynecology 578, 578 (Mar 2006) ("Many studies demonstrate that professional liability exposure has an important effect on recruitment of medical students to the field and retention of physicians within the field and within a particular state.").

of care.[14]

Oregon's limit on noneconomic damages is well within the mainstream. Some states apply significantly lower limits than Oregon, including three neighboring states. *See* Cal Civ Code § 3333.2(b) ($250,000 limit in medical liability cases); Idaho Code § 6-1603 ($250,000 limit in personal injury cases adjusted for inflation to $372,865 in 2019); Nev Rev Stat § 41A.035 ($350,000 limit in medical liability actions). Many other states have noneconomic damage limits in the same range as Oregon.[15]

In short, limits on noneconomic damages are a rational and defensible legislative response to a growing distortion of liability law that has adverse

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[14] *See, e.g*., Steven Farmer et al., *Association of Medical Liability Reform with Clinician Approach to Coronary Artery Disease Management*, 10 JAMA Cardiology E1, E8 (June 2018) (finding that after adoption of damage limits, healthcare providers engaged in less invasive testing when treating coronary artery disease).

[15] *See, e.g.*, Haw Stat § 663-8.7 ($375,000 limit in personal injury cases, subject to certain exceptions); 18-A Me Rev Stat Ann § 2-804(b) and 24-A Me Rev Stat Ann § 4313(9)(B) ($500,000 limit in wrongful death cases and $400,000 limit in actions against health plan); Mass Gen Laws ch. 231, § 60-H ($500,000 limit in medical liability actions); Mo Rev Stat § 538.210 ($400,000 limit in medical liability actions rising to $700,000 for catastrophic injuries or death); ND Cent Code § 32-42-02 ($500,000 limit in medical liability actions); SD Codified Laws § 21-3-11 02 ($500,000 limit in medical liability actions); Tex Civ Prac & Rem Code Ann. § 74.301 ($250,000 limit against a single healthcare provider; $500,000 limit against multiple providers); W Va Code Ann § 55-7B-8 ($250,000 limit in medical liability cases rising to $500,000 in cases of catastrophic injury, which adjust for inflation but to no more than 150% of the statutory amounts).

consequences for businesses, healthcare providers, and the public. The limits have worked. Oregon's law should be upheld.

III. Most Courts Have Upheld Noneconomic Damage Limits

Courts have largely respected the prerogative of state legislatures to enact reasonable limits on awards for pain and suffering and other noneconomic damages. These courts have upheld limits on noneconomic damages that apply to all civil claims[16] and those that apply specifically to medical liability cases.[17] Courts have also upheld laws that limit a plaintiff's total recovery against

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[16] *See, e.g., C.J. v. Dep't of Corrections*, 151 P3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P3d 1046 (Alaska 2002); *Scharrel v. Wal-Mart Stores, Inc.*, 949 P2d 89 (Colo App 1998); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P3d 1115 (Idaho 2000); *DRD Pool Serv., Inc. v. Freed*, 5 A3d 45 (Md 2010); *Green v. N.B.S., Inc.*, 976 A2d 279 (Md 2009); *Murphy v. Edmonds*, 601 A2d 102 (Md 1992); *Simpkins v. Grace Brethren Church of Del.*, 75 NE 3d 122 (Ohio 2016); *Arbino v. Johnson & Johnson*, 880 NE2d 420 (Ohio 2007).

[17] *See, e.g., Fein v. Permanente Med. Group*, 695 P2d 665 (Cal 1985); *Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P3d 571 (Colo 2004); *Scholz v. Metro. Pathologists, P.C.*, 851 P2d 901 (Colo 1993); *Oliver v. Magnolia Clinic*, 85 So 3d 39 (La. 2012); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So 2d 517 (La 1992); *Zdrojewski v. Murphy*, 657 NW 2d 721 (Mich Ct App 2002); *Tam v. Eighth Jud. Dist. Ct.*, 358 P3d 234 (Nev 2015); *Condon v. St. Alexius Med. Ctr.*, 926 NW2d 136 (ND 2019); *Knowles v. United States*, 544 NW 2d 183 (SD 1996), superseded by statute; *Rose v. Doctors Hosp.*, 801 SW 2d 841 (Tex 1990); *Judd v. Drezga*, 103 P3d 135 (Utah 2004); *MacDonald v. City Hosp., Inc.*, 715 SE 2d 405 (W Va 2011); *Estate of Verba v. Ghaphery*, 552 SE 2d 406 (W Va 2001); *Robinson v. Charleston Area Med. Ctr.*, 414 SE 2d 877 (W Va 1991); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 NW 2d 678 (Wis 2018).

health care providers,[18] as well as damage limits that apply to various other types of claims or entities.[19]

Courts spanning from Maryland to Alaska have found that a limit on noneconomic damages represents a policy judgment that does not interfere with the right to trial by jury.[20] A jury still determines the facts and assesses liability; the statute applies only after the jury's determination. *See L.D.G., Inc. v. Brown*, 211 P3d 1110, 1131 (Alaska 2009); *DRD Pool Serv., Inc. v. Freed*, 5 A3d 45, 57 (Md 2010). For example, the Nevada Supreme Court concluded that the state's $350,000 medical malpractice noneconomic damage limit "does not interfere with the jury's factual findings because it takes effect only after the

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[18] *See, e.g., Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P3d 571 (Colo 2004); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc*., 663 NW 2d 43 (Neb 2003); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 SE 2d 307 (Va 1999); *Etheridge v. Med. Ctr. Hosps.*, 376 SE 2d 525 (Va 1989); *Ind. Patient's Comp. Fund v. Wolfe*, 735 NE 2d 1187 (Ind App 2000); *Bova v. Roig*, 604 NE 2d 1 (Ind App 1992); *Johnson v. St. Vincent Hosp*., 404 NE 2d 585 (Ind 1980), *overruled on other grounds by In re Stephens*, 867 NE 2d 148 (Ind 2007).

[19] *See, e.g., Quackenbush v. Super. Ct. (Congress of Cal. Seniors),* 60 Cal App 4th 454 (1997) (uninsured motorists, intoxicated drivers, and fleeing felons); *Peters v. Saft*, 597 A2d 50 (Me 1991) (servers of alcohol); *Phillips v. Mirac, Inc*., 685 NW 2d 174 (Mich 2004) (lessors of motor vehicles); *Wessels v. Garden Way, Inc*., 689 NW 2d 526 (Mich Ct App 2004) (product liability actions); *Schweich v. Ziegler, Inc*., 463 NW 2d 722 (Minn 1990) (loss of consortium damages); *Oliver v. Cleveland Indians Baseball Co., LP*, 915 NE 2d 1205 (Ohio 2009) (political subdivisions).

[20] *See, e.g, Arbino v. Johnson & Johnson*, 880 NE 2d 420, 432 (Ohio 2007); *Etheridge v. Med. Ctr. Hosps*., 376 SE 2d 525, 529 (Va 1989); *Judd v. Drezga*, 103 P3d 135, 144 (Utah 2004).

jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial." *Tam v. Eighth Judicial Dist. Ct.*, 358 P3d 234, 238 (Nev 2015).

This Court joined the majority view in *Horton v. Oregon Health & Sci. Univ*., 359 Or 168, 249-50, 376 P3d 998 (2016), by overruling *Lakin v. Senco Products, Inc*., 329 Or 62, 987 P2d 463, *modified*, 329 Or 369, 987 P2d 476 (1999). The Court observed that "it is difficult to see how the jury trial right renders a damages cap unconstitutional. Neither the text nor the history of the jury trial right suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies." *Horton*, 359 Or at 250.

Courts across the country have also rejected equal protection challenges to noneconomic damage limits. For example, this Court recognized in *Greist v. Phillips* that the legislature adopted the statutory limit to address rising insurance premiums and litigation costs, and to protect consumers from increases in the prices of goods and services that are affected by escalating awards. 322 Or 281, 299-300, 906 P2d 789, 799-800 (1995) (rejecting federal due process and equal protection challenges to statutory limit as applied in wrongful death action). Other courts have applied similar reasoning to uphold limits. For instance, the Ohio Supreme Court has recognized that a generally applicable limit on noneconomic damages in tort actions addressed the

subjectivity, unpredictability, and rising costs associated with such awards, which contributed to the deleterious economic effects of the tort system. *See Arbino*, 880 NE 2d at 435-36. More recently, the North Dakota Supreme Court rejected an equal protection challenge to the state's $500,000 limit on noneconomic damages in medical liability actions, recognizing that this constraint "does not prevent seriously injured individuals from being fully compensated for any amount of medical care or lost wages," but only prevents them from receiving "more abstract damages" above the cap. *Condon v. St. Alexius Med. Ctr*., 926 NW2d 136, 143 (ND 2019).

Courts have also recognized that laws constraining noneconomic damages are "rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available" to state residents. *Tam*, 358 P3d at 239; *see also Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 NW 2d 678, 693-95 (Wis 2018) (finding noneconomic damage limit does not violate equal protection or due process because it supports the legislature's "overarching goal of "ensur[ing] affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice") (quoting legislative findings, alteration in original).[21]

[21] *See also Patton v. TIC United Corp.*, 77 F3d 1155, 1246-47 (10th Cir 1996) ("When a legislature strikes a balance between a tort victim's right to

In addition, courts have rejected claims that constraints on noneconomic damages run afoul of the separation of powers doctrine. As the Idaho Supreme Court recognized, since the legislature has the power to abolish or significantly modify a common law cause of action, then it must be able to limit the damages recoverable for that action. *See Kirkland,* 4 P3d at 1119. It is a judicial function to decide the facts in a case, including the amount of damages, but it is a legislative policy decision to regulate the amount of damages available in particular circumstances. *See Arbino,* 880 NE 2d at 438.

Although a noneconomic damages limit may prevent some plaintiffs from obtaining the same dollar figures they may have received prior to the effective date of the statute, a person can still recover full economic damages, substantial noneconomic damages, and possibly punitive damages. *Id* at 477; *see also Judd,* 103 P3d at 144 (observing that while a noneconomic damages cap may deprive "a few badly injured plaintiffs of full recovery," it is "constitutionally reasonable").

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recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life.") (internal quotations and alterations omitted); *C.J. v. Dep't of Corrections*, 151 P3d 373, 381 (Alaska 2006) (recognizing limits on noneconomic damages "bear[ ] a fair and substantial relationship to a legitimate government objective").

In comparison, only a few state high courts have invalidated limits on noneconomic damages.[22] "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damage caps." Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 JL Med & Ethics 515, 527 (2005); *see also MacDonald*, 715 SE 2d at 421 (upholding $500,000 limit on noneconomic damages in medical liability case "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action").

In fact, recently, the Supreme Court of Wisconsin expressly overruled an earlier decision nullifying such a law. *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 NW 2d 678, 684 (Wis 2018) (overruling *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 701 NW2d 440 (Wis 2005), finding "*Ferdon* erroneously invaded the province of the legislature").

[22] *See, e.g., N. Broward Hosp. Dist. v. Kalitan*, 219 So 3d 49 (Fla 2017); *Hilburn v. Enerpipe Ltd*., 442 P3d 509 (Kan 2019); *Watts v. Lester E. Cox Med. Ctrs.*, 376 SW 3d 633 (Mo 2012); *Beason v. I.E. Miller Servs., Inc*., 441 P3d 1107 (Okla 2019).

In addition, federal appellate courts have uniformly upheld limits on noneconomic damages in both civil actions[23] and medical liability cases,[24] as well as upholding caps on total damages in other cases.[25]

This Court should find, consistent with the majority of states, that Oregon's statutory limit on noneconomic damages is constitutional.

IV. Upholding the Statutory Limit is Consistent With this Court's Respect for the Legislature's Role in Shaping the Civil Justice System

Following this Court's decision in *Horton* that Oregon's statutory limit on noneconomic damages is consistent with the right to jury trial, Plaintiffs invite this Court to invalidate the law on other grounds. *Amici curiae* do not

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[23] *See, e.g., Learmonth v. Sears, Roebuck & Co.*, 710 F3d 249 (5th Cir 2013) (Mississippi statute); *Patton v. TIC United Corp*., 77 F3d 1235 (10th Cir 1996) (Kansas statute). The Sixth Circuit recently found, in absence of a Tennessee Supreme Court ruling, that Tennessee's limit on *punitive* damages violates the Tennessee Constitution's right to jury trial. *See Lindenberg v. Jackson Nat'l Life Ins. Co*., 912 F3d 348 (6th Cir 2018). The correctness of that "guess" is in doubt as the Tennessee Supreme Court considers the constitutionality of the state's statutory limit on *noneconomic* damages. *McClay v. Airport Mgmt Servs., LLC*, No. M2019-00511-SC-R23-CV (Tenn, oral argument held Sept. 4, 2019).

[24] *See Estate of McCall v. United States*, 642 F3d 944 (11th Cir 2011) (Florida statute); *Smith v. Botsford Gen. Hosp*., 419 F3d 513 (6th Cir 2005) (Michigan statute); *Owen v. United States*, 935 F2d 734 (5th Cir 1991) (Louisiana statute); *Davis v. Omitowoju*, 883 F2d 1155 (3d Cir 1989) (Virgin Islands statute); *Hoffman v. United States*, 767 F2d 1431 (9th Cir 1985) (California statute).

[25] *See Schmidt v. Ramsey*, 860 F3d 1038 (8th Cir 2017) (Nebraska statute); *Boyd v. Bulala*, 877 F2d 1191 (4th Cir 1989) (Virginia statute).

evaluate the applicability of the remedy clause of Article I, section 10, of the Oregon Constitution to ORS 31.710(1), which would duplicate the arguments of the parties and Oregon-based *amici*. *Amici* generally observe, however, that upholding Oregon's statutory limit on noneconomic damages is consistent with the respect this Court has customarily afforded to the legislature in shaping the state's civil justice system. The statute is also consistent with numerous Oregon laws that set rules for civil liability, including altering rights and remedies.

Indeed, in *Greist*, 322 Or at 291, 906 P2d at 795, this Court held, in a wrongful death action, that Oregon's limit on noneconomic damages does not violate the remedy clause because the statute allows plaintiffs to recover a substantial amount: "100 percent of economic damages plus up to $500,000 in noneconomic damages."[26] This Court also found that the legislature could prohibit uninsured drivers from recovering noneconomic damages arising from an automobile accident without running afoul of the remedy clause or right to jury trial. *See Lawson v. Hoke*, 339 Or 253, 119 P.3d 210 (2005). It is also constitutionally permissible, this Court held, for the legislature to significantly reduce a plaintiff's ability to recover punitive damages by directing sixty percent of such awards to the state. *See DeMendoza v. Huffman*, 334 Or 425, 51

[26] *See also Hughes v. Peacehealth*, 344 Or 142, 178 P3d 225 (2008) (finding noneconomic damage limit constitutional when applied in wrongful death actions and upholding statute limiting the interest rate for judgments in medical liability actions).

P3d 1232 (2002) (finding no violation of the remedy clause, right to a jury trial, the takings or tax provisions, or the separation of powers).

This Court has upheld laws that significantly curtail the ability of plaintiffs to even seek recovery, such as an eight-year statute of repose for product liability actions[27] and the Court of Appeals has upheld a five-year statute of repose for medical liability actions, finding no violation of the remedy clause.[28] Other decisions have permitted the legislature to constrain liability without running afoul of the remedy clause or other constitutional provisions.[29]

Many other Oregon laws establish, constrain, or expand the remedy available in a civil action. Oregon's replacement of contributory negligence

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[27] *See Sealey v. Hicks*, 309 Or 387, 788 P2d 435 (Or 1990), *abrogated by Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 23 P3d 333 (2001), which was overruled by *Horton*); *see also Lunsford v. NCH Corp*., 285 Or App 122, 396 P3d 288 (2017) (product liability statute of repose did not violate remedy clause or right to jury trial).

[28] *Barke v. Maeyens*, 176 Or App 471, 31 P3d 1133 (2001), *rev den*, 333 Or 655 (2002) (five-year medical malpractice statute of repose did not violate right to remedy or privileges and immunities provisions of Oregon Constitution); *Christiansen v. Providence Health Sys. of Oregon Corp*., 210 Or App 290, 150 P3d 50 (2006) (statute did not violate remedy clause), *aff'd on other grounds*, 344 Or 445, 184 P3d 1121 (2008).

[29] *See, e.g*., *Storm v. McClung*, 334 Or 210, 47 P3d 476 (2002), *overruling Neher v. Chartier*, 319 Or 417, 879 P2d 156 (1994) (finding provision of Oregon Tort Claims Act granting tort immunity both to public bodies and to their employees for injury to any person covered by workers' compensation law did not violate remedy clause); *Brewer v. Dep't of Fish & Wildlife*, 167 Or App 173, 2 P3d 418 (2000), *rev den*, 334 Or 693 (2002) (holding statute that limited liability of property owners who made their land available for recreational use did not violate remedy clause).

with modified comparative fault, ORS 31.600(1), and its reallocation of uncollectable damages under joint and several liability, ORS 31.610(3), illustrate this point. Each of these laws modified in some manner the remedy available in tort actions under common law.

Finally, various Oregon laws require courts to enter a judgment for treble damages.[30] These laws are the mirror image of a limit on damages. They require *increasing* a jury's award in accordance with the law. If Oregon law can constitutionally require courts to triple a damage award where compensation for an injury is not quantifiable or where warranted by public policy, then it stands to reason that, where those same public policy concerns weigh otherwise, the legislature can limit recoverable damages, particularly when those damages are highly subjective, standardless, and unpredictable.

[30] *See, e.g.*, ORS 105.810 (requiring treble damages in cases of removal of trees of another without permission); ORS 124.100 (requiring treble damages in cases involving abuse of a vulnerable person); ORS 646.780(1)(a) (requiring treble damages in consumer protection and antitrust cases); ORS 659.785 (requiring treble damages in certain cases of impermissible adverse employment actions against an employee).

CONCLUSION

For these reasons, this Court should hold that Oregon's statutory limit on noneconomic damages in personal injury cases, ORS 31.710(1), does not violate the remedy clause, Article I, section 10.

Respectfully submitted this 24th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the 14,000 word-count limitation in ORAP 5.05(1)(b)(i)(A), and that the word count of this brief, as described in ORAP 5.05(1)(d)(i), is 6,899 words.

I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 24, 2019, I filed the foregoing Brief of *Amici Curiae* with the State Appellate Court Administrator by using the eFiling system.

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