IN THE SUPREME COURT OF OHIO

CASE NO. 06-1212

MELISA ARBINO
Petitioner

-vs-

JOHNSON & JOHNSON, *et al.*
Respondents

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BRIEF OF *AMICUS CURIAE*, OHIO ACADEMY OF TRIAL LAWYERS IN SUPPORT OF MELISA ARBINO, PETITIONER

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Academy Trial Lawyers (hereinafter "OATL"). OATL is comprised of approximately 1,715 attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* intervenes in this appeal on behalf of Petitioner, Melisa Arbino. OATL urges this Court to carefully consider the issues presented herein. The United States District Court for the Northern District of Ohio, Western Division, has certified three (3) questions which present this Court with the opportunity to examine some of the more controversial elements of the "tort reform" legislation that was adopted by 2004 S.B. 80 (eff. April 7, 2005). As will be developed further herein, the General Assembly has attempted to override well-established Supreme Court precedents interpreting and applying the Ohio Constitution. These enactments seriously encroach, moreover, upon core judicial and jury functions and threaten the continued viability of the doctrine of "separation of powers" that is the bedrock of our State government. This Court's resolution of these certified questions will have a profound effect upon the lives and financial well-being of countless tort victims for years to come.

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ARGUMENT

In accordance with *Sup. Ct. Prac. R. XXVIII,* three questions of state law have been certified by the United States District for the Northern District of Ohio, Western Division. Each will be addressed separately herein.

> **CERTIFIED QUESTION 1: IS OHIO REVISED CODE §2315.18, AS AMENDED BY SENATE BILL 80, EFFECTIVE, APRIL 7, 2005, UNCONSTITUTIONAL ON THE GROUNDS AS STATED BY THE PLAINTIFFS?**

I. OVERVIEW.

Effective April 7, 2005, S.B. 80 enacted R.C. §2315.18. The primary objective of this provision is to impose a ceiling upon non-economic damages in certain tort claims at the greater of $250,000.00 or three times the economic loss (to a maximum of $350,000.00 per plaintiff/$500,000.00 per occurrence). *R.C. §2315.18(B)(2).* Excluded from the purview of this statute are causes of action based upon medical malpractice, governmental torts, and wrongful death. *R.C. §2315.18(A)(7) & (H).* A plaintiff can also avoid the caps upon a demonstration of a permanent and substantial physical deformity, loss of use of a limb, loss of a bodily organ system, or a functional injury that permanently prevents him/her from being able to independently care for himself/herself and perform life-sustaining activities. *R.C. §2315.18(B)(3).*

Admittedly, legislative enactments enjoy a strong presumption of validity. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 631, 576 N.E.2d 722, 727. It is equally well-settled that the courts will not tolerate legislation that offends the Ohio Constitution.

> Manifestly, when the Constitution of the state declares and defines certain public policies, such public policies must be paramount, though a score of statutes conflict and a multitude of judicial decisions be to the contrary. No General Assembly is above the plain potential provisions of the Constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes and nullifies the rights

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declared in the Constitution.

Kentz v. Harriger (1919), 99 Ohio St. 240, 247, 124 N.E. 168, 170, *rev'd on otr. grnds. Stephenson v. McCurdy* (1931), 124 Ohio St. 117, 177 N.E. 204; *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 46, 512 N.E.2d 626, 628.

The explicit terms of the Ohio Constitution and the established judicial precedents leave little doubt that damage caps designed to serve special political interests (*i.e.*, insurance carriers and businesses) cannot be squared with the guarantees of due process, jury trials, open courts, equal protection, and separation of powers. As will be developed further herein, this Court has forcefully and unequivocally established over the years that damage awards can be restricted only through a Constitutional amendment.[1] Notably, one of the stated goals of S.B. 80 is to establish a "predictable system of civil justice." *Section 3(A)(1) - (3) of Am. Sub. S.B. No. 80, Ohio Revised Code 2004 Legislation 1294.* There is no surer method of promoting judicial "predictability" than through adherence to the venerable doctrine of *stare decisis*.[2] Disruption

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[1] It is safe to assume that if the proponents of tort reform felt that their cause enjoyed the support of a majority of Ohio's citizenry, such an approach would have been pursued. This Court should have no part of the effort to effectively amend the Constitution through legislative decree.

[2] It should go without saying that the "orderly conduct of judicial affairs" requires courts of law to abide by their own precedents. *State v. George* (10th Dist. 1975), 50 Ohio App.2d 297, 310, 362 N.E.2d 1223, 1231. A former member of this Court has wisely commented that:

> I believe in the doctrine of *stare decisis*, and I will continue to support this doctrine, regardless of my personal predilections as to public policy in some particular area of the law. Precision and consistency are values of the highest order in judicial decision-making. Populist jurisprudence only creates unpredictability in the law. While understanding that the common law is not immutable, we should strive to follow past experience and precedent.

Scott v. News-Herald (1986), 25 Ohio St.3d 243, 263, 496 N.E.2d 699, 715-716 (Wright, J., concurring). In urging his fellow Justices to follow prior precedents, Justice Holmes cautioned that:

> To do otherwise again completely demolishes any remaining semblance of the doctrine of *stare decisis* in this state. The only change that has taken place which would conceivably alter our

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of established case law is too steep a price to pay for "judicial reform."

II. RIGHT TO A JURY TRIAL.

A. THE INVIOLATE RIGHT TO A JURY TRIAL IS THE CORNERSTONE OF THE AMERICAN LEGAL SYSTEM.

Section 5, Article I, of the Ohio Constitution guarantees citizens that:

> The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. [emphasis added]

The unqualified right to a trial by jury in a civil action has long been recognized in Ohio. As early as 1853, this Court stated that "it is beyond the power of the General Assembly to impair the right [to a trial by jury] or materially change its character." *Work v. State* (1853), 2 Ohio St. 296 (syllabus, at 2); *see also Gibbs v. Village of Girard* (1913), 88 Ohio St. 34, 102 N.E. 299, (syllabus, at 2) ("The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree".)

This Court has interpreted the constitutional protection as affording a substantive right, rather than a merely procedural entitlement:

> The right to a jury trial does not involve merely a question of procedure. The right to jury trial derives from [sic] Magna Carta. It is reasserted both in the Constitution of the United States and in the Constitution of the State of Ohio. For centuries it has been held that the right of trial by jury is a fundamental constitutional right, a substantial right, and not a procedural privilege.

> position as announced in those cases has been an intervening change of personnel on the court--precisely the type of changed circumstance that the doctrine of *stare decisis* has been relied upon to maintain the stability of the case law of this jurisdiction. What confidence may attorneys, judges and litigants have in the stability of the decisional law of this court? This query is self-answering.

Wilfong v. Batdorf (1983), 6 Ohio St.3d 100, 109, 451 N.E.2d 1185, 1193 (Holmes, J., dissenting), overruled in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489.

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Cleveland Ry. Co. v. Halliday (1933), 127 Ohio St. 278, 284, 188 N.E. 1, 3; S*ee also Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d at 356, 533 N.E.2d at 746. Chief Justice Rehnquist has commented that:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co., Inc. v. Shore (1979), 439 U.S. 322, 343-344, 99 S.Ct. 645, 658, 58 L.Ed.2d 552 (Rehnquist, J., dissenting).

It is not necessary to sift through immemorial opinions to find support for the right to a jury trial. For example, Chief Justice Moyer, in his 1997 State of the Judiciary address, praised the right to a jury trial as the "essence of democracy in our courtrooms":

> Juries are the essence of democracy in our courtrooms. The belief that citizens should be judged by their peers is held more strongly in our country than in any other. Thomas Jefferson described the citizen jury as the only anchor by which a government can be held to the principles of its constitution.

See also Chief Justice Moyer's 1999 Speech: "That right [to a jury trial] is a bedrock of the judicial system." Similarly, Justice Maureen O'Connor has described the jury system as the "crown jewel of our liberty," and has recognized that it applies to "claims for injury arising from negligence or intentional torts":

> The right to a trial by jury is a venerable one derived from Magna Carta, embodied first in the federal Constitution, then in the Northwest Ordinance of 1787, and thereafter in the Ohio Constitution.... Designed to prevent government oppression and to promote the fair resolution of factual issues..., trial by jury is "the crown jewel of our liberty," the "'most cherished institution of free and intelligent government,'" and the "'best institution for the administration of justice.....'" **It is well understood that the right is "fundamental," "substantial,"... and "inviolate."** Section 5, Article I, Ohio Constitution. [emphasis added]
>
> * * *

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> Claims for injuries arising from negligence or intentional torts...were recognized at common law. Today, those claims typically retain a right to trial by jury.

Arrington v. Daimler Chrysler Corp., 109 Ohio St. 3d 539, 545, 2006-Ohio-3257, 849 N.E.2d 1004 ¶ 24. Perhaps the United States Supreme Court has most succinctly and repeatedly made the point that the right is not to be trifled with:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry (1990), 494 U.S. 558, 565, 110 S.Ct. 1339, 1344-45, quoting *Dimick v. Schiedt* (1935), 293 U.S. 474, 486, 55 S.Ct. 296, 301.

B. THE INVIOLATE RIGHT TO A JURY TRIAL APPLIES TO ALL ASPECTS OF TRADITIONAL COMMON LAW CAUSES OF ACTION.

The guarantee of a trial by jury applies to those common law causes of action that existed before the adoption of the Constitution. *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 396, 169 N.E. 301, 302; *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 556, 1994-Ohio-461, 644 N.E.2d 397, 401. Negligence actions undoubtedly qualify for such protections. *See generally, Kneisley*, 40 Ohio St.3d at 356-357, 533 N.E.2d at 746-747; *Brady*, 61 Ohio St.3d at 640, 576 N.E.2d at 733 (Brown, J. concurring). There also can be no serious dispute that the right to jury specifically applies to all phases of the fact-resolution process, most notably the determination of damages:

> This court has held that there is a fundamental constitutional right to a trial by jury in negligence actions. *** Included in that right is the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled.

Galayda v. Lake Hosp. Systems, Inc., 71 Ohio St.3d 421, 425, 1994-Ohio-64, 644 N.E.2d 298,

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301, citing *Sorrell v. Thevenir,* 69 Ohio St.3d 415, 422, 1994-Ohio-38, 633 N.E.2d 504, 510; *See also Seth v. Capitol Paper Co.* (Aug. 29, 1990), 2nd Dist. No. 11539, 1990 W.L. 125724, p. *9. Chief Justice Moyer has written that: "I agree with the majority that the right to a trial by jury includes a determination by the jury of all questions of fact, as well as the amount of compensatory damages to which the plaintiff is entitled." *Galayda*, 71 Ohio St.3d at 436, 644 N.E.2d at 308.

The fundamental right to trial by jury was recognized in *Sorrell*, 69 Ohio St.3d 415, which involved former R.C. §2317.45. That statute had abrogated the collateral source rule and required trial judges to reduce jury verdicts by any payments the plaintiff was entitled to receive from insurance or other third parties. *Id.*, 69 Ohio St.3d at 420. Just as with the limits that had been imposed upon general tort recoveries by S.B. 80, the legislation had been passed for the avowed purpose of "reducing the causes of the current insurance crisis and preventing future crises, and ensuring the availability and affordability of insurance coverages required by charitable nonprofit organizations, public organizations, political subdivisions, individual proprietors, small businesses, and commercial enterprises." *Id.*, at 419-420. In finding that the statute was unenforceable, the majority reasoned that:

> The statute merely directs the trial court to deduct the amount of the collateral benefit from the total jury award. In this respect, courts may, consistent with R.C. §2317.45, enter judgment in disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages. [citation omitted]

Id., at 422.

The sanctity of the constitutional right to a jury trial was re-affirmed in *Galayda*, 71 Ohio St.3d 421, 694 N.E.2d 298. At issue in that instance was another tort reform enactment that allowed health care providers to pay judgments entered against them in periodic installments over time. While the typical tort plaintiff would be entitled to immediately pursue

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collection of the full award, the victim of medical malpractice had to wait years before the jury's verdict was satisfied. *Id.*, 71 Ohio St.3d at 425-426. The majority concluded that:

> *** [W]e find that R.C. §2323.57(C) invades the jury's province to determine damages, and that the statute violates a plaintiff's right to a trial by jury as guaranteed by Section 5, Article I of the Ohio Constitution.

Id., at 426.

The Respondents will also no doubt point to Chief Justice Moyer's dissents in *Sorrell* and *Galayda*. A careful reading of those opinions confirms that finding the statutory maximums here unconstitutional will be consistent with the Chief Justice's stated positions.

In *Sorrell*, Chief Justice Moyer's dissent was founded squarely upon a concern for "double recoveries." In fact, the Chief Justice was careful to note that his argument began from a presumption that the plaintiffs received the full amount of damages awarded by the jury:

> In both cases before us, as well as in every conceivable factual situation, the plaintiffs after the setoff will receive at least as much total compensation from all sources as *the amount awarded by the jury*. If the underlying purpose of tort law is to wholly compensate victims, due process is satisfied when the plaintiff recovers, from all sources, *the amount that the jury deems a just and appropriate award.*

Sorrell, 69 Ohio St. 3d at 427, 633 N.E.2d at 514 (Moyer, C.J., dissenting) (emphasis added).

In *Galayda*, Chief Justice Moyer's dissent focused on the fact that periodic payments for future damages related to the process by which a judgment might be satisfied, and in no way actually reduced the measure of damages as determined by the jury:

> I agree with the majority that the right to a trial by jury includes a determination by the jury of all questions of fact, as well as the amount of compensatory damages to which the plaintiff was entitled.***
>
> It is the province of the legislative branch to determine policy issues relating to the method by which jury awards are satisfied.
>
> R.C. §2323.57 does nothing more than provide a remedy in the

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> form of periodic payments *of the award determined by the jury* or by a court in a bench trial. R.C. §2323.57 does not infringe upon the right to a jury trial because the statute does not apply *until after the jury has completed its assigned function in the judicial process.*

Galayda, 71 Ohio St. 3d at 436, 644 N.E. 2d at 308-09 (Moyer, C.J., dissenting) (emphasis added).

Thus, dissents by Chief Justice Moyer in both *Sorrell* and *Galayda* are entirely consistent with the principle that a litigant is entitled to recover the full amount determined by a jury to be appropriate. And, while the OATL may disagree as to whether periodic payments or set-offs for collateral benefits invade the province of the jury, those issues are not present here.

What has been brought to a head here is the statutory limitation on non-economic damages, and Chief Justice Moyer's dissents in *Sorrell* and *Galayda* seem to reject such an approach as unconstitutional. Both dissents confirm that Chief Justice Moyer believes that the jury must measure the damages, and neither dissent included any explicit embrace of the idea of statutory maximums. Therefore, a finding that the statutory maximums on non-economic damages invades the right to trial by jury would be entirely consistent with those dissents.

C. IF A COURT CANNOT CONSTITUTIONALLY REDUCE AN AWARD OF PUNITIVE DAMAGES AWARDED BY A JURY ON A CASE-BY-CASE BASIS, THE GENERAL ASSEMBLY MAY NOT DO SO ON A WHOLESALE BASIS.

The conclusion that the General Assembly may not impair the Ohio constitutional right to have damages determined by a jury is also supported by the time-honored decisions of Ohio courts regarding the propriety of a remittitur. This procedural device has long allowed the damages awarded by the jury to be reduced when the court finds, based upon the specific evidence in that case, that the amount assessed is "excessive." In such instances, it has been consistently held that a remittitur may **not** be made without the consent of the plaintiff, because

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to do so without such acquiescence would violate the constitutional right a jury:

> The authorities are unanimous in holding that, in an action for unliquidated damages, **a court is powerless to reduce a verdict rendered by a jury** and render a judgment for a lesser amount without the consent of the party in whose favor the verdict was rendered. **This is for the plain and very sufficient reason that a reduction under such circumstances invades the province of the jury.**

Chester Park Co. v. Schulte (1929), 120 Ohio St. 273, 287, 166 N.E. 186 (emphasis added). Clearly, if a court, on a case-by-case basis, cannot constitutionally reduce, without the plaintiff's consent, a jury's award of admittedly excessive damages, the legislature certainly cannot mandate, in advance, an unconsented-to and across-the-board "remittitur".

In this regard, it should be noted that Ohio courts, including this Court, historically have not been shy about ordering a remittitur when it is deemed that the amount of damages are excessive. In *Wightman v. Conrail* (1999), 86 Ohio St.3d 431, 715 N.E.2d 546, this Court affirmed the action of the trial court in ordering a 40% remittitur of the amount of damages awarded by the jury, and, in *Dardinger v. Anthem*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 121, this Court ordered a substantial remittitur of the amount of punitive damages awarded by the jury. In this light, it can be seen that R.C. §2315.21, in effect, mandates an automatic, unconsented-to, remittitur, which is unconstitutional.

"Day in and day out, inroads are attempted to weaken this basic institution of American democracy." *Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St.3d 76, 82, 545 N.E.2d 76, 82 (Justice Douglas concurring in part and dissenting in part). This Court should view such attacks with alarm, as did Sir William Blackstone, in his Commentaries, as quoted by this Court in *Hoffman v. State* (1918), 98 Ohio St. 137, 149-50, 120 N.E. 134, in which he stated that, regardless how "convenient" or "expeditious" such assaults on the right to a jury trial may be in ameliorating any perceived societal ill, they should not be tolerated:

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> Therefore, it is well for the people of this age to observe the warning of Sir William Blackstone, one of the greatest law writers of any age. In answering the argument of convenience and expedition urged against the right of trial by jury, he said: "However convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), let it be again remembered that delays, and little inconveniences in the form of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposed to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 Blackstone, 350.

It is hoped that the "people of this age," *i.e.*, the members of this Court, will heed Blackstone's admonition and remember the importance of the right to a trial by jury and not be swayed by political rhetoric, because, as stated by Chief Justice Moyer in his 1997 State of the Judiciary address, judges are not supposed to base their decisions on "popular will":

> The state of the judiciary in Ohio is strong and vibrant due to the strength we inherit from our independence, and because of the cooperative efforts with the legislative and executive branches that enable us to exercise our constitutional role.
>
> Our strength, in fact, derives from our responsibilities which are quite different from those of the other two branches. As Chief Justice Judith Kaye of New York explains: "Other public officials are supposed to be responsive to the popular will. Judges are not."
>
> By design, there is tension among the three branches. It is what the founding fathers intended -- not to create disputes and gridlock -- but to constrain the powers of each and generate debate and solutions. In Ohio, we have met the challenge.

The instant case once again "challenges" this Court to fulfill its constitutional role, and asks it to show the courage and conviction to set aside the politics of the day and enforce its role as a co-equal branch of the government, and the protector of the constitutional rights of Ohio citizens.

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D. APPLYING THE STATUTORY MAXIMUMS WOULD BE ARBITRARY *PER SE*.

One further point that should be beyond dispute is that application of the statute here would be purely arbitrary: *if* the jury awards Petitioner non-economic compensatory damages in an amount greater than the statutory maximums and *if* the federal court is instructed to apply those caps, the reduction in damages awarded will be capricious in that it would be without regard to any of the evidence adduced at trial and without regard to any particular facts or circumstances as to the actual extent of those injuries and losses.

In fact, the General Assembly itself recognized this basic truth when it enacted *Am.Sub. S.B. No. 80. Section 3(6)(a)* and *(d)* of the Act, two of the sections dealing with the General Assembly's statement of intent, include the following statements, apparently without the General Assembly noticing the obvious incongruity they foster:

> Non-economic damages include such things as pain and suffering, emotional distress, and loss of consortium or companionship, which do not involve an economic loss and have, therefore, no precise economic value. *** Pain and suffering awards are intended to compensate a person for the person's loss. ***
>
> *While pain and suffering awards are inherently subjective*, it is believed that this inflation of non-economic damages is partially due to the improper consideration of evidence of wrong doing ***. (Emphasis added.)

While these statements of intent may have been calculated for a different purpose, their explicit terms and implicit connotations are unavoidable: even the General Assembly recognized that applying the statutory maximums would be arbitrary. Undoubtedly because calculating awards of non-economic damages is difficult and "inherently subjective", the framers of the Ohio Constitution entrusted this profoundly important responsibility solely to juries. It is safe to assume that specific provisions would have been made if legislative supervision of civil

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recoveries was believed to be necessary and appropriate.[3] The text of the Constitution contains no such grant of authority, and this Court should decline to fashion one through *fiat*.

E. MOST STATE COURTS HAVE FOUND THAT STATUTORY MAXIMUMS VIOLATE THE RIGHT TO TRIAL BY JURY.

This Court is not alone in enjoying a history of protecting the jury trial against assault by so-called "tort reformers." In *Sofie v. Fibreboard Corp.* (1989), 112 Wash.2d 636, 771 P.2d 711, the Washington Supreme Court reversed a judgment that had reduced the jury's award of non-economic damages under a then-existing Washington statute. The statute applied a formula that reduced non-economic damages by a calculation that included the age of the plaintiff as a multiplier, resulting in lower statutory maximums as the age of the plaintiff increased.

Construing a constitutional provision nearly identical to Ohio's, the Washington Supreme Court forcefully held that the guarantee of a jury trial included the right to have the jury determine the measure of damages in civil suits:

> Finally, the plain language of Article I, Section 21 provides the most fundamental guidance: "The right of trial by jury shall remain inviolate." **The term "inviolate" connotes deserving of the highest protection.** Webster's Third New International Dictionary 1190 (1976), defines "inviolate" as "free from change or blemish: pure, unbroken... free from assault or trespass: untouched, intact..." Applied to the right to trial by jury, this language indicates that the right to trial by jury must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees. In Washington, those guarantees include allowing the jury to determine the amount of damages in a civil case. [emphasis added]

Id., at 656, 771 P.2 at 721-22.

[3] The framers of Section 5, Article I did see fit to authorize the legislature to pass laws permitting "verdict[s] by the concurrence of not less than three-fourths of the jury." The absence of a second exception empowering the legislature to override a jury's damage award is unlikely just an oversight.

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In *Lakin v. Senco Products, Inc.* (1999), 329 Or. 62, 987 P.2d 463, the Supreme Court or Oregon affirmed a finding from the lower Court of Appeals that a $500,000 statutory maximum for non-economic damages was unconstitutional. Interestingly, the defendant in *Lakin* was an Ohio corporation, which, of course, raises the question as to how *Am.Sub. S.B. No. 80* will necessarily work to protect Ohio businesses, especially the largest of those enterprises, where those operations extend into commerce in other states.

Interpreting a constitutional provision that declared that "the right of trial by jury shall remain inviolate" in all civil cases, the Oregon Supreme Court likewise held that permitting the legislature to prescribe statutory maximums on the recoverable non-economic damages would be an unconstitutional impairment to the jury trial right:

> We conclude that to permit the legislature to override the effect of the jury's determination of non-economic damages would "violate" plaintiffs' right to "Trial by Jury." Limiting the effect of a jury's non-economic damages verdict eviscerates "Trial by Jury" as it was understood in 1857 and, therefore, does not allow the common-law right of jury trial to remain "inviolate."

Id., at 79, 987 P.2 at 473.

Other states that have found either statutory maximums on non-economic damages or statutory damage limitations generally unconstitutional include Alabama, *Moore v. Mobile Infirmary Ass'n*, (Ala. 1991), 592 So.2d 156; Kansas, *Kansas Malpractice Victims Coalition v. Bell*, (1988), 243, Kan. 333, 757 P.2d 251; Utah, *Condemarin v. University Hosp.*, (Utah 1989), 775 P.2d 348; North Dakota, *Arneson v. Olson*, (N.D. 1978), 270 N.W.2d 125; Illinois, *Wright v. Central Du Page Hosp. Assn.*, (Ill. 1976), 347 N.E.2d 736; and New Hampshire, *Trovato v. DeVeau*, (N.H. 1999), 736 A.2d 1212, and *Brannigan v. Usitalo*, (N.H. 1991), 587 A.2d 1232.

Thus, this Court will certainly not be blazing a judicial trail in finding the statutory maximums here unconstitutional; the greater weight of authority is in favor of doing so.

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F. EXISTING CONTROLS UPON EXCESSIVE JURY AWARDS DO NOT JUSTIFY ABSOLUTE CAPS.

Based primarily on certain foreign cases, we can presume that Respondents (and their *Amicus Curiae*) will rely upon certain unpersuasive arguments. Specifically, Respondents no doubt will maintain that because judges are permitted to order a remittitur (or additur) or judgment notwithstanding the verdict, it supposedly follows that the General Assembly has the same authority to invade the measure of the verdict. *Civ.R. 50(A).* Alternatively, Respondents may contend that the "verdict," decided by the jury, is distinct from the entry of "judgment," and that, again, because the judge has the obligation to enter the "judgment," the General Assembly purportedly possesses the authority to impose statutory maximums on that judgment. These arguments are specious for at least three reasons.

First, if the right to trial by jury is to be preserved "inviolate," then the full measure of that right must be protected and cannot be restricted or reduced. This Court has repeatedly held that the test for determining whether the jury-trial right attaches to a cause of action is whether that theory of recovery was recognized at the time the Ohio Constitution was adopted. It is sheer folly to suggest that the guarantee of a trial by jury is still preserved when judges are prohibited from entering the full award that the jury has determined to be appropriate.

Section 5, Article 1 of the Ohio Constitution was adopted effective September 1, 1851. As of that date, both remittiturs and judgments notwithstanding the verdict (JNOV) were well recognized under Ohio law. *See Alter v. Shearwood* (1926), 114 Ohio St. 560, 564, 151 N.E. 667, 668; *Sterret v. Creed* (1826), 2 Ohio 343; *Likes v. Van Dike* (1848), 17 Ohio 454. These judicial tools actually protect the integrity of the jury on a case-by-case basis by allowing the trial judge to intercede when an injustice has been perpetrated. Any plaintiff who disagrees with a court's reduction of an award through remittitur always has the option of a new trial with a different jury. *Bartlebaugh v. Pennsylvania R. Co.* (1948), 150 Ohio St. 387, 388-389, 82

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N.E.2d 853, 854.

By contrast, the General Assembly did not enjoy any right to enact statutory maximums upon jury verdicts as of 1851 (or even today). Such practice simply did not exist. Unless and until the Ohio Constitution is amended, the "inviolate" right to a jury trial does not tolerate legislative caps on damages.

Second, the statutory maximums on the one hand and remittitur and JNOVs on the other hand are not applied analogously, and are therefore irrelevant for purposes of the present question. Remittitur is an unusual occurrence that requires very specific findings and protects the right to a jury verdict:

> In *Chester Park v. Schulte* (1929), 120 Ohio St. 273, 166 N.E. 186, paragraph three of the syllabus, this court set forth the specific criteria that must be met before a court may grant a remittitur: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages.

Wightman, 86 Ohio St.3d at 444, 715 N.E.2d at 557.

The procedures controlling a motion for judgment notwithstanding the verdict are set forth in Civ.R. 50 (B)-(E), and include a specific requirement that the trial court "shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment." Thus, both remittitur and JNOV may be granted only on specific findings by the trial judge who had the opportunity to hear the evidence at trial, and who has been required to consider the matter based on that evidence.

By contrast, the statutory maximums on non-economic damages are applied without regard to any specific facts and without any specific findings by the trial judge. In *Wightman*, Chief Justice Moyer, in his dissent, argued that where a "trial court deems the jury award not to be excessive, the trial court lacks authority to offer a remittitur, and that it is an abuse of

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discretion to grant a new trial or offer a remittitur to reduce damages." *Id.*, at 446 (Moyer, C.J., concurring in part and dissenting in part).

If remittitur requires a specific finding by the trial judge that a specific award was excessive based on the facts actually heard by the judge, it necessarily follows that the General Assembly cannot invade the jury's province by setting an arbitrary, one-size-fits-all statutory maximum.

Third, arguing that a "verdict" is distinct from the "judgment" entered on that verdict is a sophism of the highest order. The right enjoyed by the citizens of Ohio is to have a jury determine the measure of damages, including non-economic damages. To enter a "judgment" based upon a pronouncement of the General Assembly that ignores the finding of the jury regarding non-economic damages would render the right nugatory.

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 753 N.E.2d 1062, this Court found that certain provisions of *Am.Sub. S.B. No. 350* were unconstitutional relating to punitive damages. The statutory section at issue set a statutory maximum for the award and provided that certain tortfeasors were immune from judgment for such damages, while at the same time directing that both "liability of a defendant for punitive or exemplary damages and the amount of those damages to be awarded" were to be decided by the trier of fact. This Court rejected the General Assembly's attempted prestidigitation, holding that the citizens of Ohio are constitutionally entitled to the benefit of the jury's determination:

> These amendments create the illusion of compliance by permitting the jury to assess the amount of punitive damages to be awarded, but requiring the court to nullify the jury's determination and substitute the will of the General Assembly in any case where a jury awards punitive damages in excess of the amounts specified***. This is a Constitution we are dealing with. "The right to a trial by jury is a fundamental constitutional right which derives from the Magna Carta." [citation omitted]

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> The right belongs to the litigant, not the jury, and a statute that allows the jury to determine the amount of punitive damages to be awarded but denies the litigant the benefit of that determination stands on no better constitutional footing than one that precludes the jury from making the determination in the first instance.

Id., at 484-85, 715 N.E.2d at 1091. The same reasoning applies here.

G. LIMITS ON DAMAGE AWARDS CAN BE ACCOMPLISHED ONLY THROUGH CONSTITUTIONAL AMENDMENT.

As discussed elsewhere in this Brief, the OATL disputes the General Assembly's "findings" that substantial verdicts for non-economic damages (as well as the other purported ills addressed by *Am.Sub.S.B. No. 80*) pose a substantial and emergent problem justifying a legislative intrusion into judicial affairs. But even if we presume that a problem exists, *at an absolute minimum* Section 5, Article II would have to be amended to permit the imposition of statutory maximums.

At least three (3) methods exist for effecting a constitutional amendment: (1) an initiative may be placed on the ballot by petition of the electors by Section 1a, Article II, *See Hockett v. State Liquor Licensing Bd.* (1915), 91 Ohio St. 176, 110 N.E. 485; (2) under Section 1, Article XVI, either branch of the General Assembly may propose an amendment, which is then submitted to the electors if agreed to by 60% of the members elected to each house, *See State ex rel. Foreman v. Brown* (1967), 10 Ohio St.2d 139, 226 N.E.2d 116; and (3) Section 2, Article XVI also permits the General Assembly to call a constitutional convention by recommendation to the electors, on a vote of two-thirds of the members elected to each branch. In fact, as recently as December 2004, an amendment to the constitution was voted upon and adopted by the citizens of Ohio, in the prohibition against homosexual marriages found at Section 11, Article XV. Thus, amendments can and do occur.

The General Assembly was well aware that *Am.Sub. S.B. No. 80* implicated

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constitutional questions: Section 3 (E) of the Act specifically requested that this Court "uphold [the General Assembly's] intent in the courts of Ohio, to **reconsider** its holding on damage caps in *State v. Sheward* (1999), Ohio St.3d 451 [*sic*], [and] to **reconsider** its holding on the deductibility on collateral source benefits in *Sorrel* [*sic*] *v. Thevenir* (1994), 69 Ohio St.3d 415***" (emphasis added). The General Assembly, therefore, obviously knew that it was striding upon constitutional ground in enacting the statutory caps. One might reasonably wonder *why* the legislature did not simply pass a joint resolution submitting a proposed amendment to the citizens for their consideration and approval.

But again, the point here is that we are not insisting upon a judicial decision that will impose an impossible burden upon the proponents of so-called tort reform and leave them without any remedy. If purportedly excessive verdicts for non-economic damages truly are crippling the business interests in this state, then the citizens of Ohio should have the opportunity to determine the extent to which the Ohio Constitution should be amended. For sound reasons, none of the three (3) branches of Ohio's government possesses the authority to unilaterally override clear and unequivocal constitutional restraints. That is precisely what Am.Sub. S.B. 80 seeks to accomplish.

III. OPEN COURTS/RIGHT TO A REMEDY.

Section 16, Article I, of the Ohio Constitution proclaims that:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

This constitutional provision has been interpreted as providing all citizens with a right to a remedy. *Williams v. Marion Rapid Trans., Inc.* (1949), 152 Ohio St. 114, 117, 87 N.E.2d 334, 335; *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 1994-Ohio-322, 639 N.E.2d 425, 430;

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Galayda, 71 Ohio St.3d at 426, 644 N.E.2d at 302. "It is fundamental to the law of remedies that parties damaged by the wrongful conduct of others are entitled to be made whole." *Collini v. City of Cincinnati* (1993), 87 Ohio App.3d 553, 556, 622 N.E.2d 724, 726 (citations omitted). At a minimum, this provision requires the General Assembly to keep the courthouse doors open. *Brennaman*, 70 Ohio St.3d at 466, 639 N.E.2d at 430. Injured parties must be afforded an opportunity at a reasonable time and in a reasonable manner to seek redress. *Burgess v. Eli Lilly & Co.*, 66 Ohio St.3d 59, 61-62, 1993-Ohio-193, 609 N.E.2d 140, 142.

This fundamental constitutional guarantee requires more than simply allowing the injured party to recover "some" compensation. Rather, "[w]hen the Constitution speaks of remedy and injury to person, property, or reputation, it requires an opportunity granted at a meaningful time and in a meaningful manner." *Hardy*, 32 Ohio St.3d at 47 (citations omitted). The Court thus explained in *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 60, 514 N.E.2d 709, that:

> Denial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse. This result cannot be countenanced. [emphasis original]

It is readily apparent that R.C. §2315.18 will serve to ensure that those who are most seriously injured (but not killed or rendered permanently disfigured) will receive a remedy that is incomplete. Regardless of the particular circumstances surrounding their loss, any award of non-economic damages assessed by the jury in excess of the applicable cap cannot be recovered. The Ohio Constitution is not satisfied simply by allowing partial compensation, as it was explained in *Sorrell*, 69 Ohio St.3d at 426, that:

> While R.C. §2317.45 does not completely abolish the right to open courts for tort victims, its effect is to hinder the fundamental right of victims to obtain satisfaction for injuries or damages sustained. In our view, Section 16, Article I not only protects the right to file a lawsuit, **but also protects the right to a judgment or verdict properly rendered in the suit, since obtaining**

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> **damages is the ultimate goal of any tort action.** [emphasis added; citation omitted]

If allowed to stand, R.C. §2315.18 will create an insular class of claimants who are denied all the compensation that a jury has determined to be appropriate. At the same time, those whose non-economic losses are less than the cap and those who have either been catastrophically maimed or killed will be entitled to full and complete restitution. In essence, the guarantee of "open courts" is being denied to a small (and politically powerless) group of individuals who are being asked to bear the costs of "tort reform." The provisions of Am.Sub. S.B. 80 further deny a "meaningful remedy" to those persons injured by intentional and malicious misconduct, by prohibiting them from collecting the punitive damages which the jury held they were entitled to recover from the defendant. The Ohio Constitution was specifically designed to prevent such abuses by a legislative majority.

IV. EQUAL PROTECTION.

A. S.B. 80 IMPLICATES FUNDAMENTAL RIGHTS AND MUST BE SUBJECT TO STRICT SCRUTINY.

Section 2, Article I of the Ohio Constitution guarantees that citizens shall not be denied "equal protection" of the law. *Kinney v. Kaiser Alum. & Chem. Corp.* (1975), 41 Ohio St.2d 120, 322 N.E.2d 880. All legislative enactments are subject to the limitations imposed by this fundamental right. *State ex rel. Doersam v. Industrial Commn. of Ohio* (1988), 40 Ohio St.3d 201, 202, 533 N.E.2d 321, 323. In particular, the Ohio Supreme Court has recognized that "[w]hile the General Assembly also has the power to define the contours of the state's liability, it must operate within the confines of equal protection ***." *Adamsky v. Buckeye Loc. Sch. Dist.*, 73 Ohio St.3d 360, 361-362, 1995-Ohio-298, 653 N.E.2d 212, 214.

Equal protection analysis requires an initial inquiry into whether the legislation imposes distinctions "between those within and those outside a designated class," *Schwan v. Riverside*

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Methodist Hospital (1983), 6 Ohio St.3d 300, 302, 452 N.E.2d 1337, or between members of the same class. *Sorrell*, 69 Ohio St.3d 415. When the legislation at issue creates classifications involving a "fundamental right," courts must apply the "strict scrutiny test." *Primes v. Tyler* (1975), 43 Ohio St.2d 195, 198-199, 331 N.E.2d 723, 726; *Sorrell*, 69 Ohio St.3d at 424-425, 633 N.E.2d at 512; *Crowe v. Owens Corning Fiberglass* (Oct. 29, 1998), 8th Dist. No. 73206, 1998 W. L. 767622. Such a standard is required in the instant case since, as previously discussed, the constitutional guarantees of a right to a remedy and a jury trial are at stake. *Sorrell*, 69 Ohio St.3d at 424-425; *Galayda*, 71 Ohio St.3d at 425. In *Beatty v. Akron City Hosp.* (1981), 67 Ohio St.2d 483, 492, 424 N.E.2d 586, 592, the Court explained that:

> If the discrimination infringes upon a fundamental right, it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest. That is, once the existence of a fundamental right or a suspect class is shown to be involved, the state must assume the heavy burden of proving that the legislation is constitutional. [citations omitted].

Even when the complaining party is not a member of a specifically protected group, legislation creating class differences must still be rationally based upon legitimate governmental interests. *Adamsky*, 73 Ohio St.3d at 362, 653 N.E.2d at 214. The equal protection clause generally requires that all similarly situated individuals be treated in a similar manner. *State ex rel. Patterson v. Industrial Commn. of Ohio*, 77 Ohio St.3d 201, 204, 1996-Ohio-263, 672 N.E.2d 1008, 1011; *Doersam*, 45 Ohio St.3d at 119, 543 N.E.2d at 1173; *State ex rel. Nyitray v. Indust. Comm.* (1983), 2 Ohio St.3d 173, 175, 443 N.E.2d 962, 964.

B. BY DESIGN, AM.SUB. S.B. 80 CREATES SHARP CLASS DISTINCTIONS.

Pursuant to R.C. §2315.18(B), an injury victim's damages are capped at the greater of $250,000.00 or three (3) times economic damages; but if the product of three (3) times economic damages exceeds $350,000.00, then damages (for the single injury victim) are

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capped at $350,000.00. However, if the injury victim's condition qualifies for one of the four exemptions articulated in R.C. §2315.18 (B)(3), then no restriction applies. Thus, persons who suffer the least severe injuries (*e.g.*, a soft tissue injury in a minimal impact collision with minimal economic damages) will almost never be affected by the caps. Similarly, individuals whose injuries satisfy any of the four (4) statutory exemptions from the cap set forth in R.C. §2315.18 (B)(3) -- *i.e.*;

- permanent and substantial physical deformity;
- loss of use of a limb;
- loss of a bodily organ system;
- permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities;

– will never be affected by the cap.

The ***only*** injury victims who ***will*** be affected by the legislative cap are those mid-tier category of individuals who have suffered substantial physical injury – with the accompanying pain, suffering, and other legally cognizable noneconomic losses – but whose condition does not qualify for exempted status as set forth in R.C. §2315.18 (B)(3). A graphic illustration of how the statute operates is set forth in the chart below. This chart illustrates the statute's effects on single plaintiffs[4] whose injuries do not satisfy the R.C. §2315.18 (B)(3) exemptions. An asterisk next to the dollar figure illustrates which cap applies under the various circumstances.

Economic Loss	**Econ. x 3 = NonEcon.Loss**	**Cap If Econ x 3 = Less Than $250,000**	**Cap If Econ x 3 = More than $250,000**

[4] The chart does not attempt to illustrate the further complexity created by the statutory provision that "a maximum [cap] of five hundred thousand dollars [applies] for each occurrence that is the basis of that tort action" -- a provision which presumably applies to circumstances where the injury victim's spouse and/or children join the lawsuit with loss of consortium claims.

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$5,000	$15,000	$250,000*	
$10,000	$30,000	$250,000*	
$50,000	$150,000	$250,000*	
$80,000	$240,000	$250,000*	
$83,000	$249,000	$250,000*	
$84,000	$252,000*	$250,000	
$100,000	$300,000*	$250,000	
$116,000	$348,000*	$250,000	
$116,666.66	$349,999.98		$350,000*
$117,000	$351,000		$350,000*
$120,000	$360,000		$350,000*
$150,000	$450,000		$350,000*
$300,000	$900,000		$350,000*

As the foregoing chart suggests, the individuals who are most greatly harmed by the caps established in R.C. §2315.18 (B) are those whose injuries do not fall within the statutory exemption categories but who, nonetheless, have significant injuries, with substantial economic losses, and, presumably, substantial corresponding non-economic consequences. In this respect, note that once the injury victim's economic damages exceed $116,666.66, any jury award for economic damages that exceeds three (3) times the economic value will be reduced to reflect the maximum single injury cap of $350,000.00.

For an individual whose non-economic losses are great but who does not fall within the statutory exemptions, the reduction of the jury verdict is both enormous and unjustified. Examples of persons who may fall within this mid-tier classification are those suffering from a serious condition – such as Reflex Sympathetic Dystrophy (RSD) – the main feature of which is extensive, long-term pain, but that does not necessarily constitute physical deformity, or result in the loss of use of a limb, or prevent the injured person from being able to

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independently care for him or herself or perform life-sustaining activities. Awards in such cases for non-economic damages frequently exceed $350,000.00. *See, e.g.*, *Genova v. United States* (N.D. Cal.), 2000 U.S.Dist. LEXIS 13004 (Charles R. Breyer, J.) (awarding a total of $4.79 million in a bench trial to an RSD injury victim, $1 million of which was for pain and suffering; and noting that $1 million for pain and suffering "is well within RSD pain and suffering jury verdicts submitted by the [defendant]"); *Marstaeller v. Montana Rail Link* (9th Cir.), 1993 U.S.App. LEXIS 30551, *6-7 (for RSD injury victim, jury awarded $337,000.00 for economic damages, and $503,000.00 for non-economic damages. In affirming this award, the court noted that it "agree[d] that an award of $503,000.00 for Martsaeller's bodily injuries and resulting pain and suffering was not grossly excessive"); *Brown v. City of New York* (N.Y. App. 2003), 309 A.D.2d 778, 765 N.Y.S.2d 803 (RSD case where jury awarded plaintiff $372,266.00 for lost earnings, $200,000.00 for past pain and suffering, and $1,000,000.00 for future pain and suffering. The court, on appeal, held that: "The damages awarded for past and future pain and suffering were not excessive").

Similarly, the Petitioner in the instant case has suffered an extremely traumatic injury with significant non-economic damages, though her condition potentially may not fall within any of the four exemptions from non-economic damages caps. Among other things, the long-term effects of the injury inflicted upon her by the Respondent's product (the Ortho Evra Patch), include the fact that she is considered high risk for pregnancy in the future, and that, if she does become pregnant, she will have to undergo twice-daily injections of heparin, as well as the fact that she can no longer be prescribed hormonal contraceptives and, in the future, will not be a candidate for hormonal replacement therapy. Additionally, the pain she experienced during her hospitalizations resulting from the blood clots caused allegedly by the Respondent's product was significant. In short, like the RSD victim hypothesized above, Petitioner falls

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within that discreet mid-tier of injury victims upon whom the entire burden of the damages cap set forth in R.C. §2315.18 (B)(2) rests.

C. AM. SUB. S.B. 80 UNACCEPTABLY BURDENS A NARROW CLASS OF INJURY VICTIMS AND IMPAIRS THEIR FUNDAMENTAL RIGHTS.

The non-economic damages caps imposed by R.C. §2315.18 single out a particular class of injury victims – *i.e.*, persons who suffer serious injuries with significant non-economic damages, but whose injuries do not fall within the exemptions of R.C. §2315.18 (B)(3) – to bear the entire brunt of the damages caps, and hence of the legislature's articulated goal of "reforming" the ostensible imbalances in the "civil litigation system." The discriminatory treatment of this discrete class of injury victims is so ill-tailored to achieving the statute's purported goals as to violate the Ohio Constitution's equal protection clause – regardless of whether the classification is subjected to strict scrutiny or to the more lenient rational basis test.

The interests the General Assembly sought to promote by enacting these caps are set forth in Section 3 of Am.Sub. S.B. No. 80. There, the legislature states its "findings and intent" in enacting Am.Sub. S.B. 80 to include the following:

> - The finding that the "current civil litigation system represents a challenge to the economy of the State of Ohio, which is dependent on business providing essential jobs and creative innovation."
> - The finding that the General Assembly "recognizes that a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed[5] and the rights of those who have been unfairly sued."
> - The finding that the "state has a rational and legitimate... interest in making certain that Ohio has a fair, predictable system of civil justice that preserves the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits, which increases the cost of doing business, threatens Ohio jobs, drives up costs to consumers, and may stifle innovation..."

[5] Presumably, this odd phrasing was meant to suggest injury victims legitimately entitled to damages, as opposed to injury victims upon whom harm was ***legitimately inflicted***.

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Section 3 (A) (1) - (3) of Am.Sub. S.B. No. 80, ORC 2004 Legislation 1294.

Setting aside for the moment whether the legislature has identified valid police power objectives[6], it is doubtful they rise to the level of "compelling state interests." But assuming, *arguendo*, that they do, they still fail to justify – much less ***necessitate*** – the non-economic damages caps imposed on a select group of injury victims whose injuries may warrant jury awards for non-economic damages in excess of the caps.

The problem is that there is no valid connection between the goals the legislature seeks to promote and the creation of the legislative classification. The OATL has no quarrel with the legislature's decision to exempt those persons suffering from the most visible and easily understood types of injuries. *R.C. §2315.18(B)(3)*. But this act of legislative largesse does not justify unfairly taking away a portion of the non-economic damages awarded by the jury to *other* individuals who are *also* seriously injured, but whose conditions do not satisfy the R.C. §2315.18(B)(3) exemptions. It does *not* prevent the filing of frivolous lawsuits; for the claimants who successfully recover jury awards *ipso facto* have established their claims to be meritorious – or, at least, compliant with Civ. R. 11 and R.C. §2505.02. Conversely, those lawyers and litigants who favor frivolous lawsuits undoubtedly will be more than content with the prospect of a recovery of up to $250,000.00/$350,000.00 in non-economic damages.

Moreover, assuming, *arguendo,* that the capping of damages has some tendency to discourage the filing of lawsuits, because fewer attorneys are willing to pursue risky cases, this hardly justifies reducing damages awards of plaintiffs whose right to recover is legitimate.[7]

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[6] The goal of making jury verdicts "predictable" is the most dubious on this list. The notion is that predictable awards will assist insurers and businesses in quantifying their potential exposure. Such logic raises the specter of the cost-benefit analysis that motivated the Ford Motor Company's decision in the 1970's not to include a part on its Pintos that would have prevented horrendous injuries and deaths.

[7] Indeed, the goal of discouraging individuals from filing claims of disputed liability is hardly legitimate – much less compelling – given that the Ohio Constitution expressly provides the

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Indeed, because the statutory cap has no effect at all on persons with the *least* serious injuries, the ostensible legislative goal of curbing frivolous lawsuits is not furthered at all by this cap, as the least injured persons may still file suit and collect their full damages award without any effect at all on their recovery.[8]

Nor is the goal of creating a "predictable system of civil justice" suitably furthered – much less *necessitated* – by the capping of noneconomic damages for a limited class of injury victims. To begin with, creating a predictable system of civil justice can hardly be said to constitute a "compelling state interest" -- particularly when no new and comprehensive system is created, but the existing system is merely distorted to limit the financial accountability of some tortfeasors and insurance companies in seemingly random cases. Moreover, the capping provisions in R.C. §2315.18(B) by their terms defeat any predictability the legislature might have aspired to; for, not only do the caps not apply to economic damages, but four (4) categories of seriously injured persons are completely exempted from the caps. Indeed, the only thing predictable about the caps is that some seriously injured individuals will have legitimate jury awards for non-economic damages arbitrarily reduced to placate special interest groups.

Finally, the amorphous objective of addressing the "challenge to [Ohio's] economy" presented by the "current civil litigation" system certainly does not justify imposing caps on a limited group of injury victims with severe injuries that the jury determines warrant greater damages than the caps permit. The legislative objectives purport to seek a fair and balanced system where the rights of injury victims and tort defendants are *both* respected. If this is the goal, it is incomprehensible how depriving certain injury victims of their non-economic

citizens of Ohio with a right to a remedy and open courts.

[8] This is not to say that the damages of persons with less serious injuries should be capped, or that persons with less serious injuries should be discouraged from filing lawsuits. Rather, the point is that if the goal is to prevent the filing of frivolous lawsuits, the means undertaken to achieve that goal is haphazard, random, and certainly does not satisfy strict scrutiny.

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damage awards – when such awards are supported by the evidence – constitutes a valid means of reforming the current litigation system, much less furthers the more attenuated goal of aiding Ohio's economy. If the jury's award is supported by the evidence, the injury victim to whom the award is made is no less entitled to that award than are injury victims in the exempted categories whose awards will not be reduced by the caps. In essence, then, with respect to this mid-tier group the caps create an irrebutable presumption that any non-economic damages award greater than the cap is excessive; while the injury victims in the exempted classes (as well as the least severely injured whose non-economic damages awards do not reach the caps' limits) are subject to no similar presumption (rebuttable or otherwise). This is doubly discriminatory to the mid-tier class of injury victims as it, without any justification, treats them differently from other injury victims, and it creates an unconstitutional irrebutable presumption of excessive damages. *See, Primes*, 43 Ohio St.2d 195 (striking down, as violative of due process and equal protection, the Ohio guest statute in part because it created an irrebuttable presumption "that a lawsuit filed by any nonpaying guest is fraudulent or collusive").[9]

D. EVEN UNDER THE RATIONAL BASIS TEST, S.B. 80'S DISPARATE TREATMENT OF INJURY VICTIMS IS CONSTITUTIONALLY IMPERMISSIBLE.

In short, if Am.Sub. S.B. 80 is measured by the strict scrutiny standard as required by *Sorrell*, the caps imposed by R.C. §2315.18(B) clearly violate equal protection as the classifications they create are not necessary to support a compelling governmental interest. However, even if this Court were to disregard prior precedent[10] and proceed under the more

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[9] Statutes creating permanent irrebuttable presumptions have also been held to violate substantive due process, "especially when [those irrebuttable presumptions] are not necessarily or universally true in fact, and when the state has a reasonable alternative means of making the crucial determination." *Johnson v. Adams* (1985), 18 Ohio St.3d 48, 479 N.E.2d 866..

[10] If the doctrine of *stare decisis* is adhered to in this case, this Court's holding in *Sorrell* that strict scrutiny applies when the fundamental right to jury trial is implicated should be followed as nothing has changed since that holding except the composition of the Court. *See, e.g.*, Amy L. Padden, Note: Overruling Decisions in the Supreme Court: The Role of a Decision's Vote,

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lenient rational basis test, the discrimination leveled by R.C. §2315.18 (B) against a particular class of injury victims still fails to satisfy the mandates of equal protection.

Under the rational basis test, a statutory classification must be found unconstitutional if it cannot be shown that the disparate treatment contained therein "bears a rational relationship to a legitimate governmental interest," *Roseman v. Fireman & Policemen's Death Benefit Fund* (1993), 66 Ohio St.3d 443, 447, 613 N.E.2d 524, or that there are "reasonable grounds for making a distinction between those within and those outside a designated class." *Patterson*, 77 Ohio St.3d at 205. *See also*, *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 131, 2001-Ohio-109, 748 N.E.2d 1111. Moreover, "[f]or judicial review under rational basis to have any meaning, there must be a meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." *Ferdon v. Wisconsin Patients Compensation Fund* (Wis. 2005), 2005 Wis. 125, 701 N.W.2d 440, ¶ 77.

Here, the statute's singling out of the mid-tier group of injury victims as the *only* individuals who will have their damages award diminished – irrespective of whether the evidence justifies that award – is arbitrary and irrational for the very same reasons discussed under the strict scrutiny analysis. The singling out of these injury victims for disparate treatment does not further the goal of preventing frivolous lawsuits, for if their claims survive pre-trial dismissal and result in a favorable jury verdict they almost certainly are not frivolous. Similarly, the goal of actuarial predictability (to the extent proper at all) is not furthered by the isolation of this class of injury victims for damages caps, as a large portion of the most and least severely injured are exempt from the caps' effects, leaving only some speculative portion

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Age, and Subject Matter in the Application of Stare Decisis After *Payne v. Tennessee*, 82 Geo. L. J. 1689, 1719 ("[A] reversal fueled by a mere change in the Court's personnel is particularly damaging to the Court's image as a neutral decision maker. Overruling recent cases merely because they are recent is supported by no reasoned rational. If it is merely due to the fact that the Court's personnel has changed, then the image of legal decisions as the product of reasoned elaboration fails.")

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of the mid-tier group to bear the brunt of appeasing the tort reform agenda. Finally, the goal of improving the civil justice system has no rational relation to a damages cap that arbitrarily and irrationally singles out a limited class of injury victims for an irrebuttable presumption that any non-economic damages awarded to them in excess of the caps are excessive, irrespective of the particular circumstances and evidence in the case.

E. S.B. 80 IS UNENFORCEABLE AS A RESULT OF PRIOR OHIO SUPREME COURT PRECEDENTS.

The appropriateness of legislative interference with judicial recoveries was scrutinized in the analogous context of a due process challenge in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 576 N.E.2d 765. This Court was called upon in that instance to examine the constitutionality of former R.C. §2307.43, which had imposed a $200,000.00 cap on general damages in medical malpractice actions. *Id.*, 61 Ohio St.3d at 686. Those limits had been adopted as part of the "tort reform" efforts of the 1970s, during which "the medical fraternity [was] predicting dislocation of medical care as the result of soaring malpractice rates." *Id.*, at 686. Writing for the majority, Justice Craig Wright observed that only one Ohio jurist had ever found the caps to be constitutional, and did so only with great reservations. *Id.*, at 689-690. The Court noted that little evidence existed that limitations upon recoveries actually affected malpractice insurance rates, which was unlikely given that only a small fraction of such claims resulted in substantial damages. *Id.*, at 690-691. The high court then concluded that:

> "*** [I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice. ***" *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8.
>
> We hold, therefore, that R.C. §2307.43 is unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary.

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Id., at 691. This aspect of *Savoy* continues to stand as the law in Ohio and elsewhere. *Urban Imperial Bldg. and Rental Corp. v. City of Akron* (9th Dist. 2000), 139 Ohio App.3d 221, 743 N.E.2d 478; *See also Wright v. Central DuPage Hosp. Ass'n* (Ill. 1976), 63 Ill.2d 313, 347 N.E.2d 736; *Martin by Scoptur v. Richards* (Wis. 1995), 192 Wis.2d 156, 531 N.W.2d 70; *Knowles v. United States of Am.* (S.D. 1996), 544 N.W.2d 183.

Even though the statute presently at bar, R.C. §2315.18, is inapplicable to medical malpractice claims, there can be no doubt that the statute suffers from the same constitutional infirmities as former R.C. §2307.43. No compelling evidence exists that an uncompromising cap of $250,000 upon non-economic damages is necessary to protect general tortfeasors and insurance carriers from financial ruin. It is well-settled in the context of claims against governmental entities that "conserving funds is not a viable basis for denying compensation to those entitled to it." *Nyitray*, 2 Ohio St.3d at 177, 443 N.E.2d at 966; *Caruso v. Aluminum Co. of Am.* (Oct. 27, 1983), 8th Dist. No. 45872, 1983 W.L. 2686, p. *8.

Three (3) years later, the jury trial right and open courts requirements were directly at issue in *Sorrell*, 69 Ohio St.3d at 421-422, 426-427. Because the legislature's attempts to reduce jury verdicts by the amount of available collateral source benefits implicated these fundamental interests, the court applied strict scrutiny. *Id.*, at 424-425. The court recognized that the aspect of the *Savoy* decision addressing the equal protection challenge to the medical malpractice damages caps was thus "questionable at best." *Id.*, at 425. The majority then reasoned that:

> *** [A] statutory classification violates the Equal Protection Clause of the Ohio Constitution if it treats similarly situated people differently based upon an illogical and arbitrary basis. [citations omitted]

Id., at 425. The Justices concluded that the perceived "insurance crisis" was an insufficient justification for deducting collateral source benefits from the recoveries that had been secured

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by the victims of medical malpractice. *Id.*, at 425-426. *See also Gladon v. Greater Cleveland Reg. Trans. Auth.* (Mar. 10, 1994), 8th Dist. No. 64029, 1994 W.L. 78468, rev'd on otr. grnds., 75 Ohio St.3d 312, 1996-Ohio-137, 662 N.E.2d 287; *Richardson v. Board of County Commrs.* (Dec. 4, 1996), 5th Dist. No. 95-AP-110114, 1996 W.L. 753188.

In short, whether measured under strict scrutiny or the rational basis test, R.C. §2315.18 arbitrarily and unfairly seeks to burden an insular and relatively powerless minority for the supposed benefit of the majority. As Chief Justice Rehnquist noted, preventing such tyrannical injustices is precisely what the right to jury trial was supposed to accomplish. *Parklane Hosiery*, 439 U.S. at 343-344. Since Respondents and their supporters will be unable to meet their burden of demonstrating that a significant and overriding governmental objective is actually being served by the noneconomic damages caps, the statute must be held to be invalid as a violation of the guarantees of equal protection.

V. SEPARATION OF POWERS.

The Ohio Constitution grants this Court the exclusive authority to promulgate procedural rules to be followed by Ohio courts, and provides that any statutes enacted by the General Assembly in conflict with such provisions are invalid:

> The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right....**All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.** [emphasis added]

Ohio Const. Art. IV, § 5(B). Chief Justice Moyer has written that:

> The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. [citation omitted]

State of Ohio v. Hochhausler, 76 Ohio St.3d 455, 463, 1996-Ohio-374, 668 N.E.2d 457, 459.

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Each branch must be prevented from encroaching upon the authority of the others. *City of South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136, 158-159. "A statute that violates the doctrine of separation of powers is unconstitutional." *Sheward*, 86 Ohio St.3d at 475.

Historically, this Court has zealously guarded the constitutional authority that has been granted to the judicial branch in Ohio's tripartite system of government. For example, in *State v. Greer* (1988), 39 Ohio St. 3d 236, 244-246, 530 N.E.2d 382, the Court invalidated R.C. §2945.21(A)(2) on the ground that it conflicted with the provisions of Ohio Crim.R. 29(C) regarding peremptory challenges. Similarly, in *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221 (syllabus), the Court struck down R.C. §2309.01 on the ground that it conflicted with Ohio Civ.R. 8. A year later, in *Hiatt v. S. Health Facilities* (1994), 68 Ohio St. 3d 236, 611 N.E.2d 789 (syllabus), this Court held that "R.C. §2307.42 [which required the filing of a certificate of merit along with certain types of malpractice claims] is in conflict with Civ.R. 11 and is invalid and of no force and effect." It should be noted that, although the General Assembly then attempted to finesse the provisions of Article IV, §5(B) by enacting R.C. §2305.011 and characterizing its provisions as substantive, this Court stymied this end-run:

> The notion that the General Assembly can direct our trial courts to apply a legislative rule that this court has already declared to be in conflict with the Civil Rules simply by denominating it "jurisdictional" or "substantive" is so fundamentally contrary to the principle of separation of powers that it deserves no further comment.

Sheward, 86 Ohio St.3d 451, 478-479.

The caps on damage awards promulgated through Am.Sub. S.B. 80 strike at the heart of one of the very purposes of the civil justice system – compensating injured parties. By authority of Civ.R. 59(A)(4), excessive verdicts may already be remedied through a remittitur or new trial. Given his/her superior vantage over the course of the proceedings and familiarity

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with the relevant facts and circumstances, such decisions are left to the trial judge's sound exercise of discretion. *Wightman*, 86 Ohio St.3d at 444-445, 715 N.E.2d at 557; *Lance v. Leohr* (9th Dist. 1983), 9 Ohio App.3d 297, 298, 459 N.E.2d 1315, 1316. The General Assembly has plainly attempted to usurp this authority by proclaiming that certain awards of non-economic damages in excess of $250,000.00/$350,000.00 must always be reduced. If R.C. §2315.18 is held to be enforceable, judges will no longer be able to find that such recoveries are reasonable and appropriate under the particular facts of the case.

The Ohio Rules of Civil Procedure are, as the title implies, generally "matters of practice and procedure within the rule-making authority of [the Supreme Court] under Section 5, Article IV of the Ohio Constitutional." *Alexander v. Buckeye Pipe Line Co.* (1977), 49 Ohio St.2d 158, 159-160, 359 N.E.2d 702, 703 (citation omitted). The legislature has no right to tinker with these judicial standards. *Sheward*, 86 Ohio St.3d at 491. This Court has thus remarked, without deciding, that:

> Legislatively imposed remittiturs may well violate the doctrine of separation of powers. *See Murphy v. Edmonds* (Md. 1992), 325 Md. 342, 380, 601 A.2d 102, 120 (Chasanow, J., dissenting), citing *Sofie v. Fibreboard Corp.* (1989), 112 Wash.2d 636, 652-654, 771 P.2d 711, 720-721.

Galayda, 71 Ohio St.3d at 426, fn.4. Accordingly, R.C. §2315.18 should be found to be an invalid legislative attempt to force the judiciary to grant remittiturs in all instances involving non-economic damages awards against political subdivisions in excess of $250,000.00/$350,000.00.

<u>CERTIFIED QUESTION 2:</u> IS OHIO REVISED CODE §2315.20, AS AMENDED BY SENATE BILL 80, EFFECTIVE, APRIL 7, 2005, UNCONSTITUTIONAL ON THE GROUNDS STATED BY PLAINTIFFS?

The collateral-source rule ensures that the defendant wrongdoer does not "get the benefit of payments that come to the plaintiff from a 'collateral source' (i.e., 'collateral' to the

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defendant)." *Pryor v. Weber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235, paragraph two of the syllabus. When properly understood, it is apparent that R.C. §2315.20 does little to alter the collateral source rule. Subsection (A) directs that:

> In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment.

In the view of the members of the OATL, this statute will be applicable only in rare instances. Nearly every collateral benefit that an injured party receives is subject to some form of subrogation rights. The two that typically are not, life and disability insurance, are specifically excluded from the statute.

It is the understanding of the OATL that subrogation rights are attendant to all of the collateral benefits potentially available to Petitioner in the federal proceedings. As long as R.C. §2315.20 is applied consistent with its plain and ordinary language, the statute thus will not come into play in this instance. A constitutional challenge thus does not appear to be ripe at this juncture.

<u>CERTIFIED QUESTION 3:</u> IS OHIO REVISED CODE §2315.21, AS AMENDED BY SENATE BILL 80, EFFECTIVE, APRIL 7, 2005, UNCONSTITUTIONAL ON THE GROUNDS STATED BY PLAINTIFFS?

I. OVERVIEW.

R.C. §2315.21 generally regulates punitive damages and has existed in one form or another since 1998. The amendments adopted by Am.Sub. S.B. 80 are dramatic and seek, among other objectives, to (1) mandate that trial judges bifurcate jury trials involving claims for punitive damages and (2) generally limit the amount recoverable to two times the

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compensatory damages (with special allowances being made for "small employers" and "individuals"). These two components of R.C. §2315.21, as modified by Am.Sub. S.B. 80, will be addressed herein in the context of the Ohio Constitution's guarantees of separation of powers, due process, and equal protection.

II. SEPARATION OF POWERS.

Prior to Am.Sub. S.B. 80, the question of whether a jury trial should be bifurcated had long been left to the trial judge's sound exercise of discretion. *Amerifirst Savs. Bank of Xenia v. Krug* (2nd Dist. 1999), 136 Ohio App.3d 468, 485, 737 N.E.2d 68, 80. The moving party was required to demonstrate to the Court's satisfaction that the prejudice that would be suffered without bifurcation would outweigh the many advantages to be gained from litigating all the claims in a single conclusive proceeding. *State, ex rel. Montgomery v. Lewis Trauth Dairy, Inc.* (S.D. Ohio 1995), 163 F.R.D. 500, 504. As revised by Am.Sub. S.B. 80, R.C. §2315.21(B) seeks to handcuff trial judges by dictating precisely how the bifurcated trials will be conducted any time punitive damages are sought.

Similarly, R.C. §2315.21(B)(2) mandates that a trial court "instruct the jury to return...a general verdict and...answers to interrogatories" and R.C. §2315.21(F) dictates that the trial court "shall not instruct the jury with respect to the limits on punitive damages...." These mandates conflict with the provisions of Civ.R. 49, which governs the presentation of interrogatories to the jury, and Civ.R. 51, which regulates jury instructions. Further, in R.C. §2315.21(B)(3), the General Assembly actually directs the trial court, in a non-jury trial, to make findings of fact: "[T]he court...shall make findings of fact." Ohio Civ.R. 52, however, already controls when a trial court must render "findings of fact." These attempts by the General Assembly to control the procedure to be followed by Ohio courts conflict with the Rules of Civil Procedure promulgated by this Court, such that they are unconstitutional under

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Art. IV, §5(B).

As discussed in Section V of the first certified question, any legislative attempt to dictate how proceedings will be maintained in courts of law necessarily runs afoul with the separation of powers that has been protected by Section 32, Article II of the Ohio Constitution. The judicial branch certainly has no authority to interfere with how the General Assembly conducts its own internal business. The converse must also necessarily be true. *Hochhausler*, 76 Ohio St.3d at 463; *City of South Euclid*, 28 Ohio St.3d at 158-159; *Sheward*, 86 Ohio St.3d at 475. Simply put, Am.Sub. S.B. 80's interference with core judicial functions is constitutionally impermissible. *Hochhausler*, 76 Ohio St.3d at 464, ("The legislative branch has no right to limit the inherent powers of the judicial branch of the government."); *State ex rel. Foster v. Board of Cty. Commrs. of Lucas Cty.* (1968), 16 Ohio St.2d 89, 242 N.E.2d 884, paragraph one of the syllabus ("The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers."); *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, 423 N.E.2d 80, paragraph one of the syllabus (same).

III. DUE PROCESS.

A. AM. SUB. S.B. 80'S PUNITIVE DAMAGE CAPS INTERFERE WITH THE FUNDAMENTAL RIGHT TO A JURY AND ARE UNCONSTITUTIONAL UNDER BOTH STRICT SCRUTINY AND RATIONAL BASIS TESTS.

The constitutional right to a jury trial "includes the right to have the jury determine the amount of damages to be awarded." *Sheward*, 86 Ohio St. 3d at 486, fn. 14. *See also Morris*, 61 Ohio St.3d at 690-91. This right embraces punitive damages. *Id.*, at 485. "In 1859, the common law right to have juries award punitive damages was regarded as 'settled' in Ohio." *Zoppo*, 71 Ohio St.3d at 556-57. Legislation that caps such damages triggers fundamental due process analysis and, therefore, must pass the highest level of constitutional scrutiny. *Morris*,

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61 Ohio St.3d at 690-91. Under "strict scrutiny," legislation is unconstitutional unless "necessary to promote a compelling governmental interest." *Sorrell*, 69 Ohio St.3d at 423; *Morris*, 61 Ohio St.3d at 688-89.

RC §2315.21, as amended by Am.Sub. S.B 80, seeks to restrict and, in some cases to deny, punitive damages. This legislation implicates the fundamental due process right to have a jury determine the amount of punitive damages. *Sheward*, 86 Ohio St.3d at 485-86. As a result, Ohio Rev. Code §2315.21 is unconstitutional unless necessary to promote a compelling governmental interest. The act cannot pass such scrutiny for the reasons previously articulated by this Court in denying nearly identical legislation on two prior occasions. *Sheward*, 86 Ohio St.3d at 484-86; *Morris,* 61 Ohio St.3d at 691. For these same reasons, the statute cannot even pass the lenient "rational basis" standard for legislation affecting non-fundamental rights. *See, e.g.*, *Sorrell*, 69 Ohio St.3d at 424; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 503 N.E.2d 717.

That is, no set of conceivable facts "bears a real and substantial relation" to the General Assembly's professed goal of "urgently reform[ing]" punitive damages "to restore balance, fairness, and predictability." *Id.*, at 274; Ohio Rev. Code §2315.21, Section 3, 4(a). The supposed punitive damage reforms are unreasonable, arbitrary, and unnecessary. They rest on a false foundation. The empirical evidence proves that punitive damages occur in a mere 5% of tort cases and, furthermore, that the median punitive damage jury award from 1992-2001 equals only $23,000.00. *See 3, infra.* Before turning to these social scientific and governmental studies, we must examine the General Assembly's competing "findings" in support of the reform agenda.

B. THE GENERAL ASSEMBLY'S "FINDINGS" ARE BASELESS AND HAVE PLAINLY BEEN CONTRIVED IN AN EFFORT TO AVOID A CONSTITUTIONAL CHALLENGE.

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The General Assembly offers five (5) bases for punitive damage reform:

> a. Punitive damages are "similar" to criminal fines and court costs;
>
> b. Punitive damages have on "occasion" been awarded multiple times with "no rational connection to the wrongful actions or omissions of the tortfeasor";
>
> c. Punitive damages affect business differently depending on the number of employees;
>
> d. Punitive damage awards should be guided by recent U.S. Supreme Court jurisprudence concerning excessiveness; and
>
> e. "[t]estimony asking members of the General Assembly to recognize the economic impact of occasional multiple punitive damages awards . . . ."

Section 3, 4(a)-(d) infra.

These claims are, in order of their appearance, circular, factually unsupported, banal, *non sequitur*, and bear no real or substantial relationship to Am.Sub. S.B. 80's professed goal of fixing alleged inadequacies. And the alleged inadequacies cannot stand up to minimal scrutiny. While the legislature's "findings" purport to be factual, they lack specific evidentiary basis or empirical foundation. Not a single instance of "occasional multiple punitive damages awards" is cited. Not a single instance of some implied or presumed negative "economic impact" from punitive damages is provided. Not a single instance of an award that "bears no rational connection to the wrongful action" is offered. Even if true, an "occasional multiple punitive damages award" cannot justify broad sweeping legislative reform that caps punitive damages in ***all cases regardless of previous awards.***

It is the *sine qua non* of rationality that verifiable reasons are offered in support of a factual conclusion. The General Assembly offers no verification whatsoever—its conclusions are anecdotal at best, irrelevant and false at worst. To be sure, it is now well-established

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empirically that punitive damage awards are exceedingly rare in Ohio and that no conceivable set of facts supports the legislative capping of punitive damages. On this precise point, the Court has admonished the General Assembly three separate times for failing to adduce empirical support for its claims about excessive damage awards.

In *Sorrell*, *Morris*, and *Sheward*, the Court took the legislature to task for failing to muster "credible empirical evidence" and for arbitrarily seeking to impose the entire cost of litigation reform on a small subset of severely injured who most need access to the judicial system. *Morris*, 61 Ohio St.3d at 691; *Sheward*, 86 Ohio St.3d at 486. The General Assembly is at it once again, but this time the evidence against punitive damage reform is even stronger than when H.B. 350 was passed in 1997 (and found to be constitutionally infirm in 1999).

The empirical data concerning punitive damages and our civil justice system demonstrates the following:

> a. From 1992-2001, tort claimants won 52% of the time and ***only* 5% of such winners received punitive damage awards. The median punitive damage award in jury trials was $23,000.00**. "Civil Trial Cases and Verdicts in Large Counties, 2001," Bureau of Justice Statistics, 2004, U.S. Dept. of Justice (NCJ 206240). This study includes Ohio in the sample group.
>
> b. The number of tort cases filed nationwide dropped by 31.8% between 1992-2001. *Id.*
>
> c. From 1998-2003, according to the Columbus Bar Association, the **median award for tort verdicts was $5,800**. Additionally, more than 80% of jury awards were for less than $100,000. Columbus Bar Association, "Jury Verdicts," at www.cbalaw.org. *See also* Bruce Cadwalladar, "Juries Tight with Awards—Civil Case Damages in Franklin County Often Aren't Huge," Columbus Dispatch, June 22, 2004.
>
> d. Moreover, from 1993-2001 personal injury filings are down 5% while non-tort or contract cases rose 21% over the same period. "Examining the Work of State Courts, 2003," National Center for State Courts, 2004, at 23.
>
> e. From 1996-2002, automobile tort filings, which comprise the

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majority of tort claims, have dropped 14% from their high in 1996. *Id.*, at 27.

f. Businesses account for 47% of all punitive damage awards, while only 6.4% of punitive damage awards arise from product liability and medical malpractice cases. Rand Institute for Civil Justice, 1996.

g. The trend in award size for tort cases has decreased: the median inflation adjusted award in all tort cases dropped 56.3% between 1992-2001 to $28,000.00. "Civil Trial Cases and Verdicts in Large Counties, 2001," Bureau of Justice Statistics, 2004, U.S. Dept. of Justice (NCJ 206240). This study includes Ohio in the sample group.

These specific, credible studies negate the General Assembly's false "findings" concerning punitive damages. In light of the uncontested empirical evidence showing significant decrease in tort awards and a relatively miniscule median punitive damage award, the General Assembly cannot rationally justify its attempts to cap or deny punitive damages on the ground that "reform . . . is urgently needed to restore balance, fairness, and predictability . . . ." Only one fact remains predictable: punitive damages will occur in 5% of successful cases at best and, even in those cases, the median jury award will be a mere $23,000.00. *See supra*, at 3(a). Nothing supports the General Assembly's alternative reality filled with crisis-inducing, multiple punitive awards that urgently require legislative reform.

C. THE PUNITIVE DAMAGES CAPS MUST BE FOUND TO BE UNCONSTITUTIONAL OUT OF RESPECT FOR *STARE DECISIS.*

Ohio Supreme Court precedents require rejection of Am. Sub. S.B. 80. In *Zoppo*, 71 Ohio St.3d 552, 644 N.E.2d 397, this Court considered the original version of R.C. §2315.21, which provided that, although the jury would decide whether the defendant should have to pay punitive damages, the court would determine the amount thereof, and held that this violated the plaintiff's constitutional right to have a jury determine the amount of damages:

Prior to the 1987 enactment of R.C. §2315.21(C)(2), 142 Ohio

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> Laws, Part I, 1661, 1691, juries in this state had the integral role of determining not only when punitive damages were justified but also of assessing **the amount of such damages**. Clearly, the assessment of punitive damages by the jury stems from the common law and **is encompassed within the right to trial by jury**. However, the legislature, by enacting R.C. §2315.21(C)(2) and by permitting only the court to determine the amount of punitive damages, has in effect abrogated **the common law right of the jury to assess the amount of punitive damages**.
>
> It is well settled that the right to trial by jury "'cannot be invaded or violated by either legislative act or judicial order or decree.'" *Sorrell v. Thevenir, supra*, 69 Ohio St.3d at 421, 633 N.E.2d at 510, *quoting Gibbs v. Girard* (1913), 88 Ohio St. 34, 102 N.E. 299, paragraph two of the syllabus. **Since R.C. §2315.21(C)(2) impairs the traditional function of the jury in determining the appropriate amount of damages, we hold that R.C. §2315.21(C)(2) violates the right to trial by jury under Section 5, Article I of the Ohio Constitution.**

Id., at 557 (emphasis added). *See also Wightman*, 86 Ohio St.3d at 433:

> *** [T]his court [has] declared R.C. §2315.21(C)(2) unconstitutional as a violation of the right to trial by jury. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397, paragraph two of the syllabus. Therefore, the amount of punitive damages to assess against Conrail became a jury issue.

In 1997, the General Assembly enacted H.B. 350 to amend the original version of R.C. §2315.21 that was at issue in *Zoppo* and *Wightman*. While the H.B. 350 version did not include the unconstitutional provision that mandated that the trial court, rather than the jury, determine the amount of punitive damages, it instead placed an arbitrary limit on the amount of punitive damages which the jury could award, and also immunized a defendant who had been held liable for punitive damages in another case from being held liable for punitive damages in a subsequent case.

This Court held that although the H.B. 350 version of R.C. §2315.21 was obviously designed to create the "illusion" of a jury trial, its provisions limiting the amount of punitive damages which could be awarded by the jury were unconstitutional. *Sheward*, 86 Ohio St.3d at

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484-485. This Court also reasoned that the provisions which immunized a defendant who had been previously held liable for punitive damages were unconstitutional:

> Indeed, R.C. §2315.21(D)(1)'s violation of the right to trial by jury becomes particularly egregious when considered in conjunction with the added provisions of R.C. §2315.21(D)(3). Under R.C. §2315.21(D)(3)(a), all tort victims are denied the right to have a jury determine punitive damages against a particular tortfeasor if, at some previous time, in any state or federal court, some tort victim or victims collected against that tortfeasor a punitive damage award the aggregate sum of which exceeds the amounts specified in R.C. §2315.21(D)(1). The constitutional right to have a jury determine both the liability and amount of punitive damages to be awarded thereby becomes a lottery prize, going to that victim or victims fortunate enough to be the first to win and collect it. All others simply lose their constitutional right to a jury trial as to punitive damages.

Id. In reaching these conclusions, this Court found that the General Assembly, in its amendment of R.C. §2315.21 by Am.Sub. S.B. 80, had, in effect, made its own determination of the constitutionality of punitive damages, when it is this Court's function to determine constitutional issues:

> Moreover, the General Assembly has in effect found that any punitive damage award in excess of the greater of three times the amount of compensatory damages or $250,000 is unconstitutional. This finding contravenes our decision in *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 479-480, 700 N.E.2d 859, 870-871, where we upheld the constitutionality of an award for $ 15,000.00 in compensatory damages and $1.5 million in punitive damages.

Id.

Because the version of R.C. §2315.21, as amended by Am.Sub. S.B. 80, is indistinguishable, at least for purposes of its constitutionality, from the version which this Court held was unconstitutional in *Sheward*, this Court should, pursuant to the doctrine of *stare decisis*, hold that R.C. §2315.21, as amended by Am.Sub. S.B. 80, violates the constitutionally protected right of Ohio citizens to have a jury of their peers decide their claims, including the

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amount of punitive damages which the defendant should have to pay. Since Am.Sub. S.B. 80 lacks rudimentary means-ends rationality, the caps violate due process under both strict scrutiny and rational basis analyses. This is not the only due process violation in Am.Sub. S.B. 80's punitive damage amendments. The *Sheward* Court remarked on the "particularly egregious" nature of legislation that immunizes a tortfeasor from successive or multiple punitive awards for the same course of misconduct, finding that,

> [t]he constitutional right to have a jury determine both the liability and amount of punitive damages to be awarded thereby becomes a lottery prize, going to that victim or victims fortunate enough to be the first to win and collect it. All others simply lose their constitutional right to a jury trial as to punitive damages.

Sheward, 86 Ohio St.3d at 485. This same capriciousness is built into Am.Sub. S.B. 80's revisions to Ohio Rev. Code §2315.21(D)(5). This revived section, as did its predecessor in *Sheward*, violates both the right to trial by jury and the correlative due process rights embodied in Article 1, §16. *Id.*, at 485-86. The two exceptions provided in Ohio Rev. Code §2315.21(D)(5)(b) aggravate the due process violation because they impose, again by mere happenstance, immense evidentiary and substantive burdens on all later victims. These burdens make the purported exception wholly illusory. Moreover, the exceptions do nothing to alleviate the fundamental due process violation suffered when the litigant is robbed of his or her constitutional right to have the jury determine all damages.

This conclusion emanates not only from *Sheward*, but also from earlier Ohio Supreme Court jurisprudence in *Morris v. Savoy*, 61 Ohio St.3d at 684. *Morris* likewise held that damage caps in medical malpractice cases violate due process. *Id.*, at 690-91. Indeed, the *Morris* Court found that such damage-capping legislation could not even survive the deferential means-ends rationality required for non-fundamental rights. *Id.* *Morris* is not alone.

Drawing on *Morris*, this Court in *Sorrell* found that legislation deducting collateral

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source payments from jury awards impinged on fundamental due process rights and could not survive strict scrutiny, at least not on the purported basis of rectifying a debatable "insurance crisis." *Sorrell*, 69 Ohio St.3d at 423. Nor again could such legislation withstand the lesser standard of mere rationality since it operated arbitrarily to reduce awards. *Id.*, at 424. These same flaws invalidated the collateral source legislation on equal protection grounds, with the Court reaffirming in the tort reform context that the constitution will not abide arbitrary, illogical treatment of similarly situated people. *Id.*, at 426. Such is again the case with Am.Sub. S.B. 80's arbitrary mistreatment of tort victims who seek punitive damages.

D. ANY LEGITIMATE CONCERNS HARBORED BY THE GENERAL ASSEMBLY CAN ALREADY BE RECTIFIED THROUGH EXISTING PROTECTIONS AGAINST EXCESSIVE AWARDS.

Ample protections already exist against "runaway" jury verdicts. For example, the Federal Constitution imposes a significant bulwark against excessive punitive awards. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 415, 123 S.Ct. 1513, 1519, 155 L.Ed.2d 585. This Court has acknowledged that:

> The United States Supreme Court has held that an award [of punitive damages] violates due process when it can be categorized as "grossly excessive" in relation to the state's legitimate interests in punishing unlawful conduct and deterring its repetition. *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. 443, 456, 113 S. Ct. 2711, 2719, 125 L. Ed. 2d 366, 378.

Wightman, 86 Ohio St.3d at 439. The U.S. Supreme Court has also set forth the guidelines a court must follow in determining whether an award of punitive damages is unconstitutionally excessive:

> The guideposts set forth in [*BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809,] include the degree of reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff and the amount of the punitive damages award, and the difference

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> between the punitive damages award and civil or criminal penalties authorized or imposed in similar cases.

Wightman, 86 Ohio St. 3d at 440. Thus, defendants are already adequately protected from excessive awards of punitive damages.

IV. EQUAL PROTECTION.

A. FOR SIMILAR REASONS, ARBITRARY RESTRICTIONS ON PUNITIVE DAMAGE AWARDS VIOLATE EQUAL PROTECTION.

The same constitutional analysis for due process applies to equal protection. *Sorrell*, 69 Ohio St.3d at 424. For the same reasons articulated above, Am.Sub. S.B. 80's punitive damage alterations violate the equal protection of the laws. Those alterations arbitrarily create separate classes of tort victims who are treated unfairly. Two hypothetical but realistic scenarios expose some of Am.Sub. S.B. 80's more obvious equal protection deficiencies.

Example 1: Plaintiff Jane Doe is subjected to an intentional, unlawful physical assault by a security guard. While fighting for her life, the tortfeasor either dies or escapes and is never found. Jane incurs $5,000.00 in medical bills and has permanent posttraumatic stress disorder. The jury awards her $500,000.00 in punitive damages. Despite the jury's findings and unbeknownst to them, pursuant to Am.Sub. S.B. 80 the judge must reduce the verdict so that Jane receives only two times her compensatory damages, or $10,000.00 in punitive damages. *Ohio Rev. Code. §2315.21(A)(5).*

Now consider the same fact pattern as above except that the criminal tortfeasor is caught and pleads guilty. Under this scenario, when a tortfeasor acts purposefully and knowingly, and has been convicted of or pleaded guilty to a criminal offence, the caps do not apply. Ohio Rev. Code §2315.21(D)(6). Consequently, the similarly situated plaintiff ends up with a completely different outcome.

In this first example, the plaintiff's punitive damages depend entirely on the vagaries of

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the criminal justice system. That system has its own set of procedures, a different burden of proof, and a farrago of variables beyond the civil claimant's control. Examples of such uncertainty and lack of control abound: the almost total discretion of a prosecutor or grand jury to bring certain related criminal charges; whether a corporation is even subject to criminal charges; what plea bargains are offered or entered; the size and efficiency of the criminal docket or system to achieve conviction; how long the criminal process takes; and so on. Tying one person's civil damages outcome to a separate criminal process creates dramatic, unjustified disparities in legal treatment that cannot withstand constitutional scrutiny.

Example 2: an Ohio paint company with less than 100 employees fraudulently repaints luxury cars causing total loss of value and other damages. The plaintiff brings suit and receives $5,000.00 compensation. Due to ongoing corporate conduct proven to be malicious and fraudulent in this and other cases, the jury awards a punitive damage verdict of $500,000.00. Again, under Am.Sub. S.B. 80 the judge must reduce the award to $10,000.00. If punitive damages in other cases or jurisdictions against this defendant exceed the cap, and even if the court were to find by clear and convincing evidence that the award is insufficient, the punitive damage verdict would be reduced to zero because the court must deduct previous punitive awards from any damages. *Ohio Rev. Code §2315.21(D)(5)(ii).*

This tort victim suffers a doubly disparate blow at the hands of Am.Sub. S.B. 80. First, she must endure the arbitrary cap that deprives her of the jury's award. Second, she must suffer the court's elimination of her entire punitive award merely because she was unlucky enough to have been a later victim of a serial corporate defrauder, as well as the victim of Am.Sub. S.B. 80's unfair classification of her claim. Moreover, the serially offending defendant corporation gets "a pass" on its malicious recidivism, thus irrationally defeating the purpose of punitive damages to deter future misconduct. Both the equal protection of the law and due process

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protections cannot permit this resulting, irrationally disparate treatment of tort victims.

B. STRONG PUBLIC POLICY CONCERNS MILITATE AGAINST ANY LEGITIMATE JUSTIFICATION FOR ARTIFICIALLY REDUCING PUNITIVE DAMAGE AWARDS.

Punitive damages are one of society's few viable legal safeguards to control and punish civil defendants for egregious conduct. Their existence provides a public means for a community to condemn and punish those who have engaged in disturbing, socially unacceptable conduct. Despite beliefs to the contrary, such public declarations are rare. While there are legitimate concerns that due process can be violated if a jury awards grossly excessive punitive damages, more compelling concerns surround the preservation of a process by which a jury can perform its duty in this regard, while the civil litigant knows that his or her due process rights are guaranteed.

The focus of punitive damages is and always has been on the defendant's conduct, and not necessarily the plaintiff's compensation. *Dardinger*, 98 Ohio St.3d at 77. Punitive damages exist on a firm moral and legal foundation in our society. That foundation means that greater sums must be paid for greater harms, and that the more reprehensible the conduct, the greater the penalty. Am.Sub. S.B. 80's baseline $350,000.00 cap perpetuates under-deterrence. Corporations can simply underwrite claims knowing with confidence in advance their maximum payout.

The larger societal impact of the punitive damage cap may result in the state's imprimatur to actuarial decisions that ultimately trivialize harms. Once dangerously unacceptable misconduct is distilled through money formulae that minimally impacts a wrongdoer, the impetus to do wrong is perpetuated. Am.Sub. S.B. 80's attempt to ensure mathematical certainty actually creates uncertainty for various classes of people in Court, *inter alia*. To be sure, this rationing of punitive damages – tying a miniscule multiplier to a

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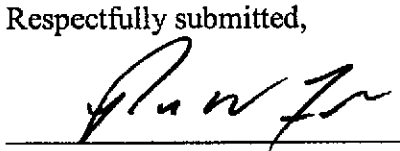
compensatory numerator with a maximum payment of $350,000.00 – is served at the expense of those who are older or poorer while the defendants are less severely punished. In numerically short order, Am.Sub. S.B. 80 compresses the damage numbers to a vanishing point where awful misconduct and in-kind civil deterrence never meet. By any reasonable account, the purpose and function of punitive damages will be destroyed.

For all the foregoing reasons, Am.Sub. S.B. 80's amendments to R.C. §2315.21 render the legislation unconstitutional. This Court should abide by two decades of Ohio jurisprudence and strike down the offending enactment.

CONCLUSION

For the foregoing reasons, the members of the OATL urge this Court to answer the first and third certified questions in the affirmative. The second certified question should be addressed only once a case arises involving non-subrogated collateral benefits that are potentially subject to the limited abrogation of the collateral source rule.

Respectfully submitted,



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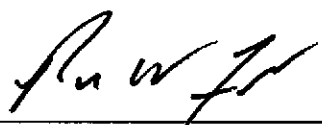

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