

IN THE SUPREME COURT OF OHIO

CASE NO. 06-1212

MELISA ARBINO,
Petitioner

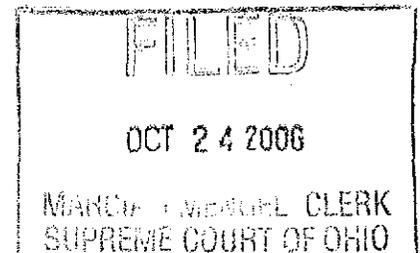
-vs-

JOHNSON & JOHNSON, *et al.*,
Respondents

BRIEF OF *AMICI CURIAE*,
OHIO EMPLOYMENT LAWYERS ASSOCIATION, THE OHIO NOW EDUCATION
AND LEGAL DEFENSE FUND, THE COMMITTEE AGAINST SEXUAL
HARASSMENT, THE OHIO CONFERENCE OF THE NAACP,
AND THE COLUMBUS NAACP,
IN SUPPORT OF
PETITIONER MELISA ARBINO

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

The *amici* are engaged in various activities aimed at promoting equal opportunity in the educational, economic and political institutions of this state. Collectively, they provide advice, counsel and/or legal representation to tens of thousands of working men and women in Ohio regarding numerous aspects of employment law, including the laws governing equal employment opportunity. These men and women will be directly affected by decisions limiting the remedial and deterrent effect of Ohio's anti-discrimination laws.

These *amici*, individually and collectively, have participated in many of the most important judicial proceedings affecting Ohio's laws governing discrimination and employment.¹ Collectively, they have a great deal of experience and knowledge

¹ See, e.g., *Kish v. Akron* (2006), 109 Ohio St.3d 162, 846 N.E.2d 811; *Williams v. Akron* (2005), 107 Ohio St.3d 203, 837 N.E.2d 1169; *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 773 N.E.2d 526; *Smith v. Friendship Village of Dublin, Ohio, Inc.*, (2001) 751 N.E.2d 1010; *Gliner v. Saint-Gobain Norton Indus. Ceramics Corp.*, 89 Ohio St.3d 414 (2000); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999); *Genaro v. Cent. Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999); *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 138; *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125; *Fox v. City of Bowling Green* (1996), 76 Ohio St.3d 534; *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578; *Ohio Civ. Rights Comm. v. Case Western Reserve University* (1996), 76 Ohio St.3d 168, 173, 666 N.E.2d 1376, 1382; *Hood v. Diamond Products, Inc.* (1996), 74 Ohio St.3d 298, 301, 658 N.E.2d 738, 741; *Wright v. Honda of America Mfg., Inc.* (1995), 73 Ohio St.3d 571; *Haynes v. Zoological Soc'y of Cincinnati* (1995), 73 Ohio St.3d 245; *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, 281; *Ohio Civil Rights Commission v. Ingram* (1994), 69 Ohio St.3d 89; *Bellian v. Bicron Corp.* (1993), 67 Ohio St.3d 1435 (order granting leave to participate as *amicus curiae*); *Burnworth v. Ohio Bell Telephone Co.* (1993), 67 Ohio St.3d 1480 (same); *Ricciardi v. Babcock & Wilcox Co.* (1993), 66 Ohio St.3d 1490 (same); *Schwartz v. Comcorp, Inc.* (1993), 66 Ohio St.3d 1468 (same); *Elek v. Huntington National Bank* (1991), 60 Ohio St.3d 135, 573 N.E.2d 1056; *Baker v. Pease Co.* (1991), 60 Ohio St.3d 703 (order granting leave to participate as *amicus curiae*); *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143; *Kerans v. Porter Paint Co.* (1991), 58 Ohio St.3d 709 (order

related to the necessity for and impact of non-economic and punitive damage awards in employment related tort cases and the important role played by juries in the struggle against prejudice.

These *amici* recognize that common law and statutory employment related causes of action are the primary tools for remedying and deterring all forms of wrongful discharge, discrimination, retaliation, and harassment in the workplaces of Ohio. These *amici* believe that America is one of the few places in the world where the humblest among us may hold the most powerful in our society accountable before a jury of everyday citizens who have no vested interest in the outcome. The role of juries in enforcing the nation's commitment to laws guaranteeing equal opportunity regardless of race, gender, religion, age and other impermissible considerations has helped America avoid the violence associated with racial, religious and gender hatred in other parts of the world.

Discrimination and other workplace torts cannot be effectively prevented and deterred without broad remedies and, when appropriate, substantial compensatory and punitive damage awards. Even the most wanton and willful forms of discrimination can be treated simply as a cost of doing business in the absence of the availability of

granting leave to participate as *amicus curiae*); *Little Forest Medical Center of Akron v. Ohio Civil Rights Commission* (1991), 57 Ohio St.3d 704 (same); *Manning v. Ohio State Library Board* (1991), 57 Ohio St.3d 713 (same); *Masek v. Reliance Electric Corp.*(1991), 57 Ohio St.3d 723 (same); *Kohmescher v. Kroger Co.*(1991), 61 Ohio St.3d 501; *Russ v. TRW, Inc.* (1990), 51 Ohio St.3d 708 (order granting leave to participate as *amicus curiae*); *Greeley v. Miami Valley Maintenance Contractors, Inc.*(1990), 49 Ohio St.3d 228; *Parsons v. Denny's Restaurants* (1989), 44 Ohio St.3d 704 (same); *Karnes v. Doctors Hospital* (1989), 44 Ohio St.3d 710 (order granting leave to participate as *amicus curiae*); *Helmick v. Cincinnati Word Processing, Inc.* (1989), 41 Ohio St.3d 719 (same).

substantial compensatory and punitive damages not limited by some arbitrary mathematical formula.

The Ohio Employment Lawyers Association (OELA) is a state-wide professional membership organization comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have denied equal opportunity or fairness in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity. OELA has participated as an amicus in most of the employment and employment related civil rights cases heard by this Court over the past 20 years.

The Ohio Now Education and Legal Defense Fund is a nonprofit corporation originally founded in 1981 by the Trustees of the Ohio Chapter of the National Organization for Women. The NOW Legal Defense and Education Fund provides assistance to bring women into full participation in all activities of American life and conducts research and education concerning discrimination in our society. As part of its activities, the NOW Legal Defense and Education Fund provides legal counsel or other support to victims of employment discrimination and conducts regular programs to prevent discrimination.

The Committee Against Sexual Harassment (CASH) is an Ohio voluntary association of individuals which focuses on the difficulties faced by female and male victims of sexual harassment. CASH operates as a service offered through the Young Women's Christian Association (YWCA) which provided counseling to victims of sexual harassment and workshops for employees seeking policies and procedures to avoid and remedy sexual harassment. Workshops and other assistance have been provided to a number of employers in the Central Ohio area where CASH is located. CASH has a profound interest in assuring that meaningful remedies for sexual harassment exist.

The Ohio Conference of the NAACP is the statewide affiliate of the NAACP and **the Columbus NAACP** is the Columbus affiliate. Both are devoted to obtaining equal rights for blacks and minority citizens by lawful and peaceful means. The NAACP is a membership corporation with approximately 1,700 local affiliates in all 50 states and the District of Columbia. The basic aims and purposes of the organization are to secure full and equal citizenship rights for blacks and other minorities without restrictions, burdens, limitations or barriers based upon race or color.

II. STATEMENT OF THE CASE AND FACTS

These *amici* adopt the petitioner's statement of the case and facts.

III. ARGUMENT

Proposition of Law:

Revised Code Sections 2315.18 and 2315.21 violate Ohio's constitutional guarantee of the right to trial by jury while arbitrarily denying due process and equal protection to Ohioans who have been the targets of malicious discrimination, retaliation, harassment or other intentional employment related torts causing loss of career, family and mental well-being.

Despite repeated decisions from varying majorities of this Court over the last twenty years striking legislation in conflict with the Ohio constitution's guarantee that a "right to a jury trial is inviolate," Amended Senate Bill 80 ("SB 80") included two provisions which directly usurp the function of juries by setting arbitrary limits on the amount of non-economic and punitive damages which can be awarded in almost all civil actions brought in Ohio regardless of the specific facts and circumstances involved in the cases. Indeed, provisions of the law would bar enforcement of any jury award of punitive damages in some cases, no matter how outrageous and intentional the misconduct involved.

These *amici* will not repeat here the plethora of court opinions and historical writings by our nation's founders extolling the value of the right to trial by jury as the cornerstone of our system of government and the best tool ever devised by humankind to provide justice and prevent tyranny. The litany of Ohio and federal cases and writings reiterating these points will surely be extensively reviewed in the briefs of the parties and other *amici* in this case. Probably every member of this Court has, either in a court opinion or in public speeches, paid homage to the constitutional right to trial by jury which is such a vital and prominent part of both our national and state civil justice

systems. This case will test the depth of this Court's commitment to this cherished and well established constitutional doctrine.

The decision in this case will effectively determine whether the guarantee that trial by jury shall be inviolate will continue to be a reality or a ghost of the past. This case will decide whether damage awards to the victims of the most virulent racist, sexist and corrupt elements in our society are to be set by legislators who have not heard nor seen a single witness or document concerning the injuries involved instead of jurors who have considered such evidence. This Court must keep in mind that the power to arbitrarily set a cap on compensatory or punitive damages is equivalent to the power to eliminate them. If this Court holds that the General Assembly may constitutionally set a limit of \$350,000 on non-economic or punitive damages, there will be no constitutional basis to prevent a limit of \$100.00. There is no single one-size-fits-all damage cap unrelated to the facts of individual cases. Determining entitlement to and the amount of damages is the very function of our juries.

This brief will focus on the constitutional infirmities and arbitrariness of the limitations on non-economic and punitive damages contained in Revised Code Sections 2315.18 and 2315.21 as illustrated by their impact on individuals who have been severely, but not physically, injured by intentional and malicious forms of discrimination and other workplace torts.

A. Non-economic and punitive damages in the context of employment related discrimination and tort cases.

A fundamental component of damage theory is that a plaintiff must be "made whole," or indemnified for his losses. In employment related torts, including

discrimination and retaliation, the injuries suffered by an employee go far beyond lost pay and benefits. Reinstatement and back pay do not address the devastating impact that a discharge or persistent harassment has on an employee's emotional and physical health, reputation and family well-being. Indeed, in some cases, a wrongful discharge permanently eliminates career opportunities, results in irreparable damage to one's reputation and leads to the loss of family. Divorces and separations are associated with more severe wrongful discharge cases. Drawn out court proceedings increase the length of time between an employee's termination and a final judicial decision. An unlawfully terminated employee often faces a "lengthy wait for vindication," as well as "often traumatic disruptions to his personal and economic life." *Cleveland Board of Education v. Loudermill* (1985), 470 U.S. 532, 550, 105 S.Ct. 1487

(Justice Marshall's concurring opinion):

During this period the employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered * * * Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to cash before becoming eligible for public assistance. Even in that instance "[the] substitution of a meager welfare grant for a regular paycheck may bring with it painful and irremediable personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected.

Id.)

Faced with emotional and economic turmoil, a discharged employee's problems can be further compounded by mental and physical health problems, lack of health insurance, and a tarnished reputation in the community and work place. In cases in

which discrimination and retaliation are accompanied by sexual, racial or other harassment, all of these problems are exacerbated.

An equally important goal of damages in employment related discrimination and tort actions is deterrence. "The purpose of punitive damages is not to compensate a plaintiff but to punish the guilty, deter future misconduct, and to demonstrate society's disapproval." *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St. 3d 77, 105, 2002--Ohio--7113, 781 N.E.2d 121. Clearly, if deterrence is ever an important goal in this Court's common law jurisprudence and the public policies embodied in statutes, it must be foremost in discrimination, retaliation and harassment cases. When is deterrence more important than in connection with protecting citizens asserting their right without fear of harm or punishment? As a result, legal damages in the form of punitive damages are not incidental. They are essential to the underlying policies served by wrongful discharge actions.

This Court must consider this case in light of the importance and purpose of Ohio's anti-discrimination laws. Equal opportunity (and tolerance) are among the most cherished principles reflected in our society and constitution. Both the United States Supreme Court and this Court have repeatedly recognized the importance of deterring the exclusion of individuals from our economic, political and social institutions because of immutable characteristics such as their sex, age, race, or disability, which have nothing to do with performance and ability. Individual achievement unobstructed by bias or prejudice is a hallmark of our success as a nation. Discrimination damages society as a whole. It is because of our success in implementing the principles of tolerance and equal opportunity and enforcing the notion that each individual must be

allowed to succeed or fail based on their abilities that we have been so successful in comparison with most other nations. As we all know from recent international events, race hatred, gender bias and religious persecution and other forms of discrimination can destroy societies.

B. The definition of tort in SB 80 encompasses common law and statutory discrimination, retaliation, harassment, and other workplace torts.

It must be stressed that the definition of a "tort" under this legislation has an enormous sweep. As defined in Revised Code 2315.18(A)(7),

'Tort action' means a civil action for damages for injury or loss to person or property. 'Tort action' includes a civil action upon a product liability claim or an asbestos claim. 'Tort action' does not include a civil action upon a medical claim, dental claim, optometric claim, or chiropractic claim or a civil action for damages for a breach of contract or another agreement between persons.

The tort definition makes no distinction between claims based on common law or claims based on statute. The definition does not exclude or make exceptions for even the most malicious and intentional misconduct. As a result, the statutes' damage limitations apply to virtually all causes of action for wrongful discharge, discrimination, retaliation and harassment (with an extremely narrow exception excluding cases involving felonious conduct with a *mens rea* of purposeful or knowingly which result in criminal prosecution and conviction). As will be discussed further below, many forms of vicious and humiliating discrimination are not felonies even though they can have life and career altering impacts. Even when discrimination or harassment reaches the level of a felony, criminal prosecution, much less criminal conviction, is uncertain, at best, and beyond the control of the target of the unlawful conduct.

- C. **The legislature may not constitutionally burden the victims of proven malicious wrongdoing by protecting intentional tortfeasors through arbitrary limits on the amount of a jury award which will be enforced under the pretense that these limits will benefit insurance carriers and the business climate in Ohio.**

This Court's jurisprudence makes it clear that the Ohio Constitution's guarantee of the right to trial by jury in Article I, Section 5 is inviolate. *Sorrell v. Thivener* (1994), 69 Ohio St.3d 415; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552; *Cleveland Ry. Co. v. Halliday* (1933), 127 Ohio St. 278; and *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393. This constitutionally protected jury trial right applies equally to the determination of compensatory and punitive damages. *Zoppo, supra* (holding that statute investing only judges with authority to determine amount of punitive damages in tort cases unconstitutionally violated right to trial by jury). As to due process and equal protection challenges to governmental action, this Court has applied varying standards depending on whether a fundamental right is involved. Where no fundamental right is involved, this Court has described the test for the constitutionality of legislation under the Ohio constitution due process provision (Section 16, Article I), as whether the legislation bears a "real and substantial relationship to the health, safety, morals or general welfare," and "whether the legislation is unreasonable and arbitrary." *Sorrell v. Thivener, supra*, 69 Ohio St.3d at 423 quoting *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270.

In connection with equal protection challenges involving legislation unrelated to a fundamental right, this Court has held "the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate

legislative objection." *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 689, quoting *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115.

Most recently, this Court has applied a strict scrutiny analysis to due process and equal protection challenges to legislation affecting fundamental rights, particularly affecting the right to trial by jury. *Sorrell v. Thivener, supra*. Under a strict scrutiny analysis, "a statute will be considered unconstitutional unless it is shown to be necessary to promote a compelling governmental interest." *Id.*, 69 Ohio St.3d at 423. Both Ohio and U. S. Supreme Court precedent make it clear that a compelling governmental interest is demonstrated only in extraordinary circumstances.

D. The caps in SB 80 are arbitrary and do not actually further the legislative purposes asserted by the General Assembly.

There is no reasonable or rational basis, and certainly no emergency or crisis, identified by the legislature which can justify limiting the damage exposure of the enormous range of intentional tortfeasors protected by this legislation – including racial and other harassers, bigoted managers, corrupt employers, and sexual predators in the workplace -- while denying their victims full compensation and the public the benefit of deterrence.

At the time of its enactment, SB 80 contained a statement of findings and intent which set forth the bases for the legislation. See, Section 3 of SB 80. The overall purposes of the enactment were to address the "challenge to the economy of the state" presented by civil litigation, to strike a balance between "the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued," and to

insure a "fair, predictable system of civil justice." As to the last, the General Assembly stated that it wanted to preserve "the rights of those who have been harmed by negligent behavior, while curbing the number of frivolous lawsuits," which the legislature reported increased the cost of doing business, threatened Ohio jobs, increased consumer costs and "may" stifle innovation. The General Assembly also listed the "evidence" supporting the legislation.

The problem with the legislature's statement of findings and intent is that it is contradicted by facts and logic. Even worse (and as noted by this Court in previous decisions), there is no rational connection between the damage caps and the legislatively identified problems which were the purported purpose for their enactment. *Morris v. Savoy, supra.*

For example, SB 80's statement of purpose nowhere mentions malicious or intentional torts. Instead, it mentions and focuses upon "the rights of those who have been harmed by negligent behavior." Yet, the definition of "tort" includes intentional unlawful conduct, including all forms of discrimination, retaliation and harassment actionable under the common law and statutes. *International Broth. of Teamsters v. U.S.* (1977), 431 U.S. 324, 97 S.Ct. 1843 (employment discrimination is in nearly every instance an intentional act). No data or evidence is included in the legislative findings demonstrating any crisis or economic impact associated with jury damage awards based on proven malicious and intentional discriminatory conduct.

Equally important, the legislature's desire for predictability runs contrary to the very purposes of punitive damage awards. Both the Ohio Supreme Court and the United States Supreme Court have emphasized that in order to achieve the deterrent

purposes of our civil rights laws, there can be no bright line mathematical test for the amount of punitive damage awards. As both scholars and the courts have explained, deterrence through punitive damage awards can only be achieved through unpredictability. If discriminating employers can predict or anticipate the costs of their unlawful conduct, it is a simple matter for them to make discrimination a cost of doing business.

The need for individual assessment and unpredictability has been reiterated over and over again by scholars and other courts. "Unpredictability is the essence of deterrence." *Statutory Punitive Damage Caps*, 40 Emory L.J. at 324. "Although a quantitative formula would be comforting, it would be undesirable. The deterrent effect of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance." *Mallor & Roberts, Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 666 (1980); see also *Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) ("Flexibility is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability"); *Leonen v. Johns-Manville Corp.*, 717 F.Supp. 272, 284 (D.N.J. 1989) (under a ratio approach, "[r]ather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages"); *Palmer v. A.H. Robins Co.* (1984), 684 P.2d 187, 218 (Colo.) ("[i]f punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctable defect"); *Campus*

Sweater & Sportswear Co. v. M.B. Kahn Construction Co. (1979), 515 F. Supp. 64, (D.S.C.) ([p]unitive damages add an 'open-ended' factor to the equation which company officials must take into consideration Logically, this forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective product, or an untested product").

More important, there is no conceivable rational basis for concluding that minimizing and standardizing non-economic and punitive damages to be paid by companies or individuals who discriminate will benefit the business climate or businesses that do not discriminate. Insulating proven bigots who refuse to hire, discharge or deny promotions to qualified women or minority candidates will not help Ohio's economy. Indeed, the consequences of protecting employers who intentionally discriminate disadvantages other businesses who comply with the law in two ways. First, it diminishes the benefit from the costs these honest businesses incur to train their managers to comply with EEO laws. Yet, these costs add to their overhead. Second, intentional discrimination in Ohio's economic and educational institutions limits the diversity of Ohio's workforce. As the United States Supreme Court stressed in *Grutter v. Bollinger* (2003), 539 U.S. 306, 123 S.Ct. 2325, virtually every sector of American society (including the military, business and educational sectors) have reported that diversity helps rather than hinders competitiveness, effectiveness and innovation.

The legislature's cap on punitive damage awards actually undermines one of the principal stated purposes of SB 80. The legislative statement of intent and findings specifically represented that it was seeking to "address lawsuits which threaten Ohio jobs." Yet the very purpose of punitive damage awards in discrimination cases is to

deter employers who are denying qualified minority, female, and the disabled applicants employment because of their color, sex, or disability. Ironically, the legislature's cap actually discriminates by benefitting employers who are only willing to provide employment opportunities to white males. The cap adopted by the legislature is perverse. If it helps employment at all, in the context of discrimination cases it will primarily help those who did not need the protection of civil rights laws.

Nor does capping punitive damages have anything to do with any solution for any purported insurance crisis or rise in insurance premiums. As this Court is well aware, it is the long established law of this state that punitive damages in any case and all damages in direct intentional tort cases cannot be covered by insurance, as it is against public policy to encourage wrongdoers in this manner. *State Farm Mut. Ins. Co. v. Blevins* (1990), 49 Ohio St.3d 165, 551 N.E.2d 955; *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 551 N.E.2d 962. To the extent that the legislative statement of purpose related to the defense of frivolous or meritless cases was meant to include insurance costs or premiums, there is no conceivable rational connection between the purported problem and a solution based on damage caps.

Similarly, the caps on non-economic and punitive damages only affect meritorious non-frivolous cases in which jurors (and presumably trial and appellate judges) have determined there is sufficient evidence of malicious, intentional conduct warranting the award of punitive damages and sufficient evidence of severe non-economic injury warranting the award of damages related to anguish, loss of family relations, fear, rage, reputational damage, or even diagnosed psychological or mental conditions in excess of the caps. These caps bear no relationship to frivolous cases as

frivolous cases, by definition, can never result in awards of substantial non-economic and punitive damages. In fact, the General Assembly and this Court have already enacted independent procedures to deter and remedy frivolous cases.²

Other scholars and commentators have carefully analyzed the “findings” which the General Assembly cited in SB 80 as a basis for its enactment. These reviews clearly demonstrate that for the provisions at issue in this case there was no meaningful evidence. In most cases, the existing evidence actually contradicts the findings. See, e.g., Abaray, J., *Deja Vu All Over Again: Ohio’s 2005 Tort Reform Act Cannot Survive a Rational Basis Challenge*, 31 Dayton L. Rev. 141 (2006); Chimerine, L. and Eisenbrey, R., *The Frivolous Case for Tort Law Change*, Economic Policy Institute (May 2005).

The dearth of a predicate basis establishing any facts demonstrating SB 80’s caps will remedy any identified problem or crisis is most transparent as to the caps on punitive damages. In connection with the draconian limits, no data verifying the number, amount, or nature of punitive damage awards in Ohio (or elsewhere) appear in the findings. Nor is there any evidence cited relating punitive damages to the cost of doing business or insurance premiums in Ohio. Notably, the General Assembly never

² See, e.g., Revised Code 2323.51 (courts may punish attorneys and parties who engage in frivolous conduct in a lawsuit including dismissing the case and ordering them to pay the other side’s fees and costs); Ohio Civil Rule 11 (providing for punishment of attorneys and parties who sign pleadings not supported by good grounds, that are interposed only for delay, or that contain scandalous or indecent matter); Ohio Civil Rule 12(B)(6) (judges can dismiss cases that have no basis); Ohio Civil Rule 41(B)(1) (courts may dismiss cases where the party suing fails to pursue it or fails to comply with the civil rules); Code of Professional Responsibility DR 2-109 (a lawyer may be punished, including the loss of his or her license, for representing clients “merely for the purpose of harassing or maliciously injuring any person” or on a claim “that is not warranted under existing law”).

mentions that punitive awards and some intentional torts cannot be covered by insurance as a matter of law. While the legislature referenced "occasional multiple awards" of punitive damages "that have no rational connection to the wrongful actions or omissions of the tortfeasors," not a single illustration of even one such irrational "multiple" award is referenced.

The General Assembly even distorts the United States Supreme Court precedent in its finding that the limits on punitive damages as specified in the statute were based on *State Farm Mutual Insurance v. Campbell* (2003), 123 S. Ct. 1513. The legislature noted that the *Campbell* Court commented that few punitive damage awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process. However, the actual legislation uses a single digit multiplier of two rather than seven, eight, or nine, which are wholly consistent with the opinion in *Campbell* and the legislature ignored the Court's statement in *Campbell* that the particular facts of a case may warrant constitutionally permissible higher ratios or multiples.

The arbitrariness of the General Assembly in this context is evident from the lack of any explanation of why a multiplier of two rather than nine was used, and, more important, why the General Assembly eliminated determination of such awards on the actual facts and circumstances of the case, including the reprehensibility of the conduct, the disparity between the actual and potential harm suffered, and the amount of punitives awarded, and the difference between punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases. These latter factors are the actual guidelines identified by the U. S. Supreme Court. *BMW of North*

America, Inc. v. Gore (1996), 517 U.S. 599. In other words, the General Assembly represented that it was using the guidelines of the U.S. Supreme Court but actually eschewed the literal guidelines. Even worse, the General Assembly never provides any explanation, much less a rational one, of how the heightened review of punitive damages required by the Supreme Court in the very cases the legislature references is insufficient to prevent excessive or "multiple" awards that have no "rational connection to the wrongful action of the tortfeasor." In *Campbell, supra*, cited by the legislature, the Court threw out a punitive damage award, in part, because it was based on out of state evidence the Court found to be irrelevant to the misconduct of State Farm at issue in the case. In fact, the legislature provides not a single example of a purportedly excessive or unwarranted punitive damage award that was not reversed or modified by the courts.

The reason for the absence of data or other evidence in the legislative findings demonstrating a "problem" related to punitive damage awards is that there is none. Juries have generally demonstrated tremendous caution and fairness in assessing punitive damage awards, fulfilling their constitutional role. Contrary to the suggestions in the popular press of a "crisis" with respect to punitive damages, empirical studies of real world jury verdicts indicate that punitive damage awards are not arbitrary, seldom awarded and typically modest in amount. One detailed overview of the results of these objective empirical studies was prepared by the U. S. Dept. of Justice, *Civil Trial Cases and Verdicts in Large Counties, 2001*, Bureau of Justice Statistics, 2004, U. S. Dept. of Justice (NCJ 206240) (punitive damages awarded in only 5% of successful tort actions

with median award of \$23,000); also see, Rustad, M., *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L Rev. 15 (1998); Isenberg, T., Joerdts, J., Ostrom, B., Rottman, D., and Wells, M., *The Predictability of Punitive Damages*, 26 J. L. Stud. 623 (1997); Merritt, D. and Berry, K., *Is The Tort System In Crisis? New Empirical Evidence*, 60 Ohio St. L. J. 315 (1999); and Vidmar, N. and Rose, M., *Punitive Damages By Juries in Florida: In Terrorem and In Reality*, 38 Harv. J. Legis. (2001) ("Frequency of punitive damages was strikingly low").

The cap on non-economic damages also lacks any rational basis as a solution for the purported problems identified by the legislature. Obviously, where a jury awards substantial non-economic damages and that award is not set aside by a trial or appellate court, the case is not frivolous. Like the punitive damage cap, the cap on non-economic damages has no relevance or connection to deterring meritless actions. Capping non-economic damages in discrimination, retaliation and harassment cases also goes far afield of the legislature's concerns with the relationship of negligently caused injuries to insurance costs and the business climate as they are awarded only in the context of intentional, unlawful acts.

While the legislature does include references to several items of evidence which purportedly reflect some relationship between jury damage awards and business costs, including insurance rates, examination of the specific references demonstrate they do not provide any basis for the cap or the existence of any emergency or crisis. See, Abaray, J., *Deja Vu All Over Again*, *supra*; and Chimerine, L. And Eisenbrey, R. *The Frivolous Case for Tort Law Change*, Economic Policy Institute (2005), www.epinet.org.

The disingenuous of the legislative findings are highlighted by the fact that there has been a decline in the number of tort cases filed nationwide, and that the trend of awards in tort cases has been downward. U. S. Dept. of Justice, *Civil Trial Cases and Verdicts in Large Counties, 2001, supra*; and *Examining the Word of State Courts, 2003*, National Center for State Courts, 2004, at 23.

E. The caps unconstitutionally interfere with the right to jury trial, due process and equal protection, in the most egregious cases.

To fully appreciate the constitutional infirmities of the limitations on non-economic and punitive damages enacted in SB 80, the applicable law must be considered in the context of actual cases.

Case No. 1: *Kerans v. Porter Paint* (1991), 61 Ohio St.3d 486, 575 N.E.2d 428.

In this case, a female employee was sexually molested by her store manager on five different occasions in a single day of employment. She worked alone with the male manager. The sexual molestation included grabbing her breasts, putting his hand up her dress against her will, exposing himself to her in a backroom, forcing her to touch his genitalia, and finally appearing naked before her and demanding that she watch him masturbate. The manager's employer had received a number of previous complaints from other female employees reporting "perverse sexual proclivities" on the part of the store manager, which included similar behavior. The employer's response to one of the women who complained was to state that "boys will be boys." When another female reported sexual molestation of a female co-worker, company management instructed that the offending manager should be taken "to Newport [Ky] and let him get his rocks

off, take him over and show him a good time in Newport." The store manager was never disciplined in any way. Ms. Kerans resigned.

Case No. 2: *EEOC, et al. v. Commercial Coating Service, Inc.* Civil Action No. H-03-3984 (S. D. Tex.) as reported on the U. S. Equal Employment Opportunity Commission webpage at www.eeoc.gov/press/3-21-06.html. In this case, the charging party, a black man, was subjected to a barrage of racial epithets, including being called the N-word and a monkey, culminating in an incident where white co-workers placed a noose around his neck in the bathroom and choked him. The complaint alleged that the company was aware of the unlawful conduct and did not stop it. The EEOC settled the case for \$1 million.

Case No. 3: *EEOC, et al. v. Rio Bravo International, et al.*, Civil Case No. 99-1371-CIV-T-17A, as reported on the U. S. Equal Employment Opportunity Commission webpage at www.eeoc.gov/press/6-23-03. This case involved five former waitresses and hostesses who were subjected to outrageous verbal and physical conduct by assistant managers including touching, groping and rubbing their breasts, legs and buttocks in a sexually offensive manner; forcing the women to sit on the assistant manager's lap; attempting to kiss them; and making graphic, offensive sexual remarks to them. Despite repeated complaints by the women to management, management failed to take appropriate steps. After a 12-day jury trial, the jury awarded each of the five women \$10,000 for emotional pain and suffering, and awarded punitive damages in the amount of \$500,000 each for three of the five women.

Case 4: *Orlando v. Alarm one, Inc.* Case Nos. 04cECG01288, 04CECG03545, 04CECG01585 (Cal. Super. Ct. Fresno County, 04/28/06), as reported in Jury Verdict Research's Employment Practice Liability Verdicts and Settlements, Vol. 8, Issue 3 (June 2006). This case involved a female supervisor who sued for humiliating company practices including punishing employees in sales competitions by making them eat baby food, spanking losers, and making them don diapers. A jury awarded her \$10,000 in economic loss, \$40,000 for future medical costs, \$450,000 for emotional distress, and \$1.2 million in punitive damages.

Case No. 5: *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 729 N.E.2d 726. In this case, a male cook was sexually harassed by the constant and unrelenting abusive conduct of his male supervisor which included grotesque, graphic, sexual comments which need not be reprinted here but are reported in the Court's decision. Following complaints by the cook to management, the company refused to allow him a number of transfers away from the supervisor while giving the supervisor a pay raise, and threatened the cook with discipline. The cook eventually resigned, suffering from recurring nightmares about the supervisor holding a gun to his head and demanding oral sex, depression, post-traumatic stress disorder, and severe emotional distress, and experienced stomach cramps, shortness of breath, and sleeping problems. The jury awarded him \$368,750 in compensatory damages and assessed punitive damages in the amount of \$1,280,000.

Case No. 6: *Mendenhall, Sr. v. Mueller Streamline Co.*, (2005) 419 F.3d 686 (7th Cir.). In this case the court of appeals remanded for trial an action for retaliatory

discharge and hostile work environment. The black plaintiff adduced evidence that he was continually harassed by co-workers who made insulting references to his mother, called him "black monkey" and "dog" and spread feces across his locker. He was also subjected to the word "Nigga" written in graffiti at 17 different locations throughout the warehouse in which he was employed. When he complained to his supervisor, no investigation was undertaken and no disciplinary action resulted. The offensive graffiti was not removed. When the plaintiff persisted in complaining, the supervisor challenged him to "sue all you like, go to the EEOC; I am the law, I don't care about the EEOC; this company's got deep pockets; it will overwhelm you." The plaintiff was subsequently fired, purportedly for working too slowly and making a threatening gesture to one of the offending co-workers.

F. The limitations on non-economic and punitive damages enacted by the General Assembly impairs the constitutionally protected right to jury trial which applies to common law and statutory actions for discrimination, retaliation, harassment and wrongful discharge in violation of public policy.

The Ohio Constitution explicitly guarantees the right to trial by jury: "[t]he right of trial by jury shall be inviolate." Ohio Const., art I, § 5. Notably, the right to trial by jury is substantive, not merely procedural. See *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, 356, 533 N.E.2d 743.

Article I, Section 5 applies to common law and statutory employment related torts. The gravamen of this Court's decisions regarding the right to jury trial is that forms of action that existed prior to the formation of the Ohio Constitution carry with them a constitutionally-protected right to a jury trial. See *Hoops v. United Tel. Co.*

(1990), 50 Ohio St.3d 97, paragraph 1 of syllabus, 553 N.E.2d 252; *Belding v. State ex rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301. This Court has never held that a modern form of action constituting an intentional tort (historically referred to as an action in trespass) does not trigger the right to a jury trial simply because the specific statute or claim was only recently enacted or recognized. This Court has made it clear that the public policy wrongful discharge tort is an intentional tort. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981. In fact, this Court has expressly concluded that at least two elements of the public policy wrongful discharge claim (first recognized in 1990) are to be decided by a jury. *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 70, 652 N.E.2d 653, quoting Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U.Cin.L.Rev. 397, 398-99; 2 Ohio Jury Instructions (2005), Section 302.17. This Court has also recognized the common law tort of sexual harassment. *Kerans v. Porter Paint Co., supra*.

Under the common law, trespass actions covered a myriad of circumstances and claims involving intentional wrongdoing. This Court has explained that trespass actions represented “[A]ny transgression or offense against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. * * * [A]ny misfeasance or act of one man whereby another is injuriously treated and damnified.” *Id.* More specifically, the Ninth District Court of Appeals explained that trespass involved “volition, i.e., a conscious intent to do the act.” *Durasin v. Jakmas*

Plumbing & Heating, Inc. (2005), 2005--Ohio--867. In essence, trespass served as a pre-code version of a common law intentional tort.

Article I, Section 5 clearly applies to workplace common law torts, such as intentional infliction of emotional distress, sexual harassment, wrongful discharge in violation of public policy, invasion of privacy, and defamation, all of which are descendants of the common law trespass upon the case and involve intentional misconduct.

The precedent of this Court and the United States Supreme Court indicate that statutory discrimination and retaliation actions also implicate the constitutional right to trial by jury.

As the United States Supreme Court indicated in *Curtis v. Loether* (1974), 415 U.S. 189 (involving a housing discrimination law) and *City of Monterrey v. DelMonte Dunes at Monterrey, Ltd.* (1999), 526 U.S. 687 (involving civil rights actions under 42 U.S.C. Sec. 1983), the Seventh Amendment to the United States Constitution's guarantee of a right to trial by jury applies to modern civil rights statutes. As explained by Justice Kennedy in a unanimous portion of the opinion (with a separate concurrence by Justice Scalia), "it is undisputed that when the Seventh Amendment was adopted there was no action equivalent to Section 1983, framed in specific terms for vindicating constitutional rights. It is settled law, however, that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'soun[d] basically in tort' and seek legal relief." *Id.*, 526 U.S. at 709. The United States Supreme Court has also repeatedly held that federal civil rights

laws sound in tort: *Wilson v. Garcia* (1985), 471 U.S. 261; *Heck v. Humphrey* (1994), 512 U.S. 477; *Memphis Comm. School Dist. v. Stachura* (1986), 477 U.S. 299; *Smith v. Wade* (1983), 461 U.S. 30; and *Carey v. Piphus* (1978), 435 U.S. 247.

This Court's opinion in *Hoops, supra*, is consistent with this precedent of the United States Supreme Court. In *Hoops*, this Court determined that actions under Revised Code 4101.17 for age discrimination did not implicate the constitutional right to a jury trial because the legislature limited the provision to equitable remedies and, as a result, the discrimination provision could not be said to have existed at common law. However, the *Hoops* Court noted that the legislature had later implicated the constitutional right to jury trials in other civil rights statutes, Revised Code 4112.99 and 4112.02(N) by allowing for such damages. The Court explained: "The language of Revised Code 4112.02(N) and 4112.99 shows that when the legislature wants to provide legal relief (and hence a right to a jury) in addition to equitable relief, it uses specific language to do so." *Id.*, 50 Ohio St.3d at 102.

The restrictions on non-economic and punitive damages embodied in SB 80 clearly violate the constitutional right to jury trials in discrimination and other intentional workplace tort cases. Using the above cases for illustrative purposes, this interference becomes transparent.

Under SB 80, any award of more than \$350,000 to Ms. Kerans for non-economic damages would be unenforceable. In essence, the Ohio General Assembly, without hearing any evidence, decided Ms. Kerans' case could never entitle her to more than \$350,000 for the fear, anguish and emotional trauma she experienced. This is true

even if the forced contact with her manager's genitalia, the groping she suffered, along with the experience of being compelled to watch a strange naked adult man masturbate in her presence caused her permanent psychological harm, permanently affected her relationships with her husband and children, as well as diminished her ability to work with male supervisors.

Indeed, the legislature has so structured its mandatory bifurcation provision in cases involving claims for both punitive and compensatory damages (which is common in discrimination and other intentional tort claims) so as to make recovery of non-economic damages impossible. In Revised Code 2315.18(C)(1), the General Assembly has directed, in contravention of this Court's rules of evidence, that "in determining an award of compensatory damages for non-economic loss in a tort action, the trier of fact shall not consider any of the following: (i) evidence of a defendant's wrongdoing..."

It is difficult to understand how any plaintiff can recover non-economic damages if they are not allowed to demonstrate that a defendant engaged in wrongful, unlawful conduct. This prohibition is especially arbitrary in an intentional discrimination or tort case where the nature of the conduct is part and parcel of the evidence establishing the severity of the emotional impact caused to the plaintiff. Ms. Kerans' case is a perfect example. Without evidence of the store manager's grotesque sexual misconduct, a jury could not possibly reach a fair verdict on the extent of harm experienced by Ms. Kerans.

Similarly, assuming Ms. Kerans' employer had fewer than 100 employees, a jury award in excess of \$350,000 of punitive damages would be unenforceable.³ This would

³ Revised Code 2315.21(D)(2)(b) provides that for a "small employer or individual" the court shall not enter judgment for punitive damages "in excess of the

be true even if the jury were instructed on the guidelines set out in *Campbell, supra*, requiring them to take into consideration the reprehensibility of the conduct involved and other pertinent factors. The legislature set this limit in cases like Ms. Kerans' without ever having heard the evidence that Ms. Kerans' employer had repeatedly ignored complaints from other female employees about the manager's "perverse sexual proclivities" and rewarded the store manager by sending him to Kentucky to "get his rocks off" instead of disciplining him.

Even worse, under the General Assembly's limitations for punitive damages, Ms. Kerans would be prevented from collecting any punitive damages if one of the other women who had previously been subjected to the store manager's gross predatory and sexual behavior had gone to court and already received a punitive damage award of \$350,000. Revised Code 2315.21(D)(5)(a) requires an offset for prior punitive damage awards against the defendant based on the "same course of conduct." Here, the course of conduct applicable to the employer was the failure to take steps to discipline or discharge the store manager. Ms. Kerans, like a number of other female employees, suffered from the employer's continued failure to discipline. The "course of conduct" language in this provision appears to grant every discriminating employer immunity from punitive damages after the first act of discrimination by one of its managers or officers for subsequent acts of discrimination which are occurring only because the employer continues to tolerate the misconduct.

lesser of two times the amount of compensatory damages awarded to the plaintiff from the defendant or 10% of the employer's or individual's net worth up to a maximum of \$350,000, . . ."

Similarly, the impact of SB 80 on the jury's award of punitive damages in *EEOC, et al. v. Rio Bravo International, et al.*, *supra*, is also evident. First, Revised Code 2315.18(C)(1) could well have prevented any non-economic damage award as the provision would have prohibited introduction of the relentless harassment the five plaintiffs endured. In addition, the legislature has predetermined, without the benefit of having heard the experiences of these five women, that the employer's indulgence for this campaign of harassment cannot be a basis for any punitive damage award in excess of \$20,000 per plaintiff, thus reducing each of the plaintiff's punitive damage awards by \$480,000 each. This is true regardless of any evidence that this had been an ongoing problem at the establishment and continually ignored even as to earlier female employees.

As can be seen, each of the other case examples provided above demonstrates the arbitrary and senseless manner in which the legislature's limitations in SB 80 would have deprived these victims of extreme unlawful discrimination of a full remedy and the benefit of their right to a jury determination of appropriate punitive damages.

G. The limitations on non-economic and punitive damages deny low income wage earners and the unemployed (disproportionately women, minorities, the elderly and people with disabilities) due process and equal protection of the law.

In the context of claims of discrimination and other employment related torts, the caps encompassed in Revised Code 2315.18 arbitrarily create a presumption that higher wage earners are entitled to greater compensation for mental anguish and other non-economic damages than lower wage earners or the unemployed. In most employment related litigation, the economic damages are almost entirely wage and

benefits related, with the benefits such as pension also directly tied to salary. As a result, under the provisions in the statute, a single male executive not supporting a family employed at a brokerage firm who is wrongfully discharged from a \$250,000 per year job may recover up to \$350,000 in non-economic damages from a jury. In contrast, a single African American woman supporting two children who works as a hotel housekeeper who is discriminatorily discharged from her \$20,000 a year job may only recover a maximum of \$250,000, regardless of the evidence or the severity of the treatment associated with the discharge. This is the result because Section 2315.18(B)(2) states that recoverable non-economic damages is the greater of three times the economic loss or \$250,000, with an absolute maximum of \$350,000.

As a result, the statute's provisions affecting non-economic damages clearly creates two classes of litigants and treats them differently even if they suffered the same injury. Indeed, in the above example, even if the housekeeper's discharge was under exactly the same circumstances with exactly the same mistreatment as the male executive, the housekeeper will never be able to recover as much as the higher paid executive. The General Assembly has no basis whatsoever for creating this irrebuttable presumption that higher paid wage earners will experience greater emotional distress when subjected to the same wrongful treatment as lower paid wage earners or the unemployed. This classification, since it relates to the fundamental right to have a jury determine damages, certainly cannot withstand strict scrutiny. *Sorrell v. Thivener, supra*. But even under the lesser rational basis test, it is arbitrary and cannot be justified by any conceivable set of facts. *Id.* (Noting a statutory classification violates

the equal protection clause of the Ohio Constitution even absent strict scrutiny if it treats similarly situated people differently based upon an illogical and arbitrary basis.)

Strict scrutiny is especially appropriate to this equal protection violation because it not only affects the fundamental right to a jury trial, but also disproportionately targets the most vulnerable among us, including individuals who belong to protected classes. Research has demonstrated that tying non-economic damages to wages will disproportionately deny equal treatment and appropriate relief to women, the elderly and children. See, e.g., Finley, L., *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 Emory L. J. 1263 (2004) (reporting that awards for non-economic damages are a more significant proportion of recoveries for women, minorities and the elderly, and caps on non-economic damages disproportionately impact these groups). Independent of this type of research, government statistics and studies clearly demonstrate that minorities, women, the elderly, and the disabled are disproportionately represented among the under- and unemployed.

Revised Code 2315.21 suffers from the same constitutional infirmity under the equal protection clause. It also discriminates against lower wage earners and the unemployed. Where "small" employers (as defined in the law) are involved, one of the limitations on the amount of a punitive damage award which may be collected is tied to amount of compensatory damages (which, as discussed above, are directly tied to wage loss combined with the non-economic losses which are also tied to the wages involved).

It should also be noted that the punitive damage provisions independently violate the due process and equal protection clauses of the Ohio Constitution because of the

distinction made related to the size of an employer. If an individual engages in intentional employment discrimination or sexual harassment against his or her employee, the punitive damages may not exceed \$350,000 under any circumstances. This is true even if the employee who is sexually harassed or discriminated against is employed by someone with the income and net worth of Bill Gates. By way of comparison, a woman who is discriminated against or harassed by her manager at a nearly bankrupt steel company in Youngstown, Ohio which employs more than 500 employees has no limit on the amount of punitive damages she may recover.

Similarly, two employees of companies who experience the same discriminatory treatment will be treated differently as litigants in civil rights actions as to punitive damages if one of them is employed by a "small" employer while the other is employed by a "large" company.

These differences in treatment with respect to punitive damages based solely on the number of employees of a defendant company without regard to its actual net worth or wealth highlight the arbitrariness of these legislative classifications. How does denying equal enforcement of punitive damage awards to employees of small but wealthy companies while granting the right to unlimited punitive damages to employees of large but financially unstable companies promote any of the purported objectives of this legislation?

The legislation is also arbitrary in its classification of large versus small companies. According to the U. S. Census Bureau, as of 2004 96% of Ohio businesses had fewer than 100 employees. www.census.gov/epcd/susb/2004/oh/OH-.HTM. of As the members of this Court are well aware, the number

of employees is not a proxy for a company's net worth. We are all familiar with small realty firms which have resources which far exceed the assets of manufacturing firms with hundreds of employees. By identifying a standard for limiting punitive damages based solely on the number of employees without any evidence correlating employee count with factors recognized by this Court and the U. S. Supreme Court as relevant to the permissible size of a punitive damage awards, the legislature has acted irrationally. Essentially, the legislature has effectively immunized most corporate employers as well as individuals, regardless of their wealth and regardless of the outrageousness of their intentional, tortious conduct and the harm caused, from any punitive damage award exceeding \$350,000.

Perhaps the most egregious of the equal protection and due process violations resulting from SB 80's limitations on jury awarded non-economic and punitive damages is that the caps affect the individuals whose injuries from intentional discrimination or other malicious workplace torts are the most serious. Caps of \$350,000 on punitive damages and non-economic damages impact individuals who suffer extreme mental anguish, fear, family or marital turmoil and reputation damage and who are the victims of malicious misconduct which is so reprehensible that juries award punitive damages in excess of the caps. In other words, the legislation treats the class of litigants with the worst damages (at least as to non-economic injuries) who are the targets of the most malicious and reprehensible treatment less favorably than litigants with more modest injuries and less severe experiences. The statutes discriminate by allowing those who have less serious cases and injuries obtain full recovery while those who have experienced the harshest treatment resulting in the greatest harm are denied a full

recovery. There is no constitutional or rational basis to deny those most severely injured full recovery while allowing all others full justice. As this Court noted with approval in *Morris v. Savoy, supra*, when it quoted from an unreported decision of the Stark County Court of Appeals, “* * * [I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of the most severely injured . . .”

As discussed above, the caps in SB 80 cannot and will not actually further the goals described for them by the General Assembly. But even if there was a remote possibility that caps would somehow improve business climate and prevent frivolous lawsuits, it is unconstitutional to visit the burden of these ephemeral benefits upon the limited class of individuals who are most harmed by virulent forms of discrimination in our society.

IV. CONCLUSION

The limitations on the enforceability of jury awards of non-economic and punitive damages in SB 80 violate the Ohio Constitution's guarantees of the right to trial by jury, due process, and equal protection of law. This Court has previously thrown out caps noting the irrationality and arbitrariness of attempting to legislate individual damages outside the context of the evidence in individual cases. It did so in the context of legislation which focused on non-malicious and unintentional injuries related to medical malpractice. *Morris v. Savoy, supra*.

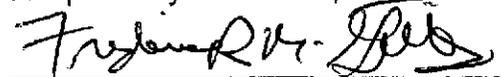
Here, the equal protection, due process and jury trial right issues are magnified a hundred fold by the fact that the General Assembly is now attempting to place such

limits even in cases involving intentional, malicious and even criminal conduct resulting in severe injuries. Whether intended or not, the legislation offers safe harbor to the worst among us at the expense of their victims and the public interest.

Certainly, this Court's clear guidelines regarding *stare decisis*, considering the reach of SB 80, require the same conclusion as enunciated by this Court in *Morris v. Savoy*. There is nothing to indicate that *Morris* was wrongly decided or has proven unworkable. *Westfield Ins. Co. V. Galatis* (2003), 100 Ohio St.3d 216. Abandoning *Morris* and its progeny, in the absence of some compelling state interest, to benefit companies and individuals proven to have engaged in intentional wrongdoing would make a mockery of the notion of *stare decisis*. The hardship that would be visited upon society as a whole and vulnerable citizens in particular is constitutionally impermissible.

This Court should respond to the certified questions by indicating that Revised Code 2315.18 and 2315.21 violate the Ohio Constitution.

Respectfully submitted,



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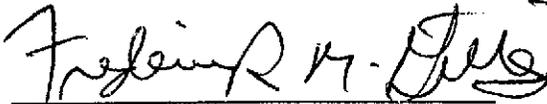
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of *Amici Curiae*, Ohio Employment Lawyers Association, the Ohio Now Education and Legal Defense Fund, the Committee Against Sexual Harassment, the Ohio Conference of the Naacp, and the Columbus Naacp, in Support of Petitioner Mellisa Arbino was served upon the following, via regular, U.S. Mail, postage prepaid this 24th day of October, 2006:

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