

In the  
**Supreme Court of Ohio**

DONALD KRIEGER, et al.,	:	Case No. 2008-1463
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
CLEVELAND INDIANS BASEBALL	:	
CO., et al.,	:	Court of Appeals Case
	:	Nos. 89314
Defendant-Appellant.	:	89428
	:	89463

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**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO  
IN SUPPORT OF DEFENDANT-APPELLANT CITY OF CLEVELAND**

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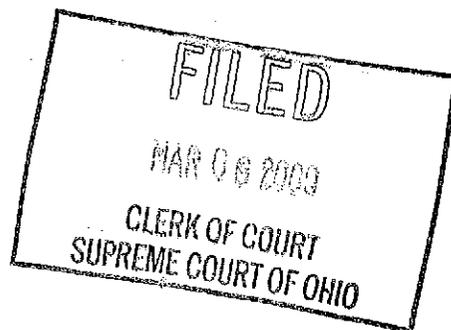
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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF AMICUS INTEREST.....	2
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT.....	5
 <b><u>Amicus Curiae State of Ohio’s Proposition of Law No. I:</u></b>	
<i>A cap on awards for non-economic injuries against political subdivisions does not violate the right to jury trial or the guarantee of equal protection under the Ohio Constitution.....</i>	
	5
A. Statutory caps on non-economic damages do not violate the right to trial by jury. ....	5
B. Statutory caps on non-economic damages do not violate the right to equal protection. ....	7
 <b><u>Amicus Curiae State of Ohio’s Proposition of Law No. II:</u></b>	
<i>A cap on awards for non-economic injuries against political subdivisions does not violate the right to due process as applied to plaintiffs who did not suffer catastrophic injury.....</i>	
	10
A. Appellees’ right to due process is not violated by the lack of an exception for catastrophic injuries in R.C. 2744.05(C)(1); they have not suffered such an injury. ....	10
B. Due process does not require that a statutory damages cap on awards against political subdivisions contain an exemption for catastrophic injuries. ....	13
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	unnumbered

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Arbino v. Johnson &amp; Johnson</i> , 116 Ohio St. 3d 468, 2007-Ohio-6948 .....	passim
<i>Conley v. Shearer</i> (1992), 64 Ohio St. 3d 284 .....	9
<i>Fabrey v. McDonald Village Police Dep't</i> , 70 Ohio St. 3d 351, 1994-Ohio-368 .....	9, 11
<i>Fahnbulleh v. Strahan</i> , 73 Ohio St. 3d 666, 1995-Ohio-295 .....	9, 11
<i>Gladon v. Greater Cleveland RTA</i> (1996), 75 Ohio St. 3d 312 .....	6
<i>Gladon v. Greater Cleveland RTA</i> (8th Dist.), 1994 Ohio App. Lexis 902.....	5, 6, 8
<i>Grange Mut. Cas. Co. v. City of Columbus</i> (10th Dist. 1989), 49 Ohio App. 3d 50.....	14
<i>Groch v. GMC</i> , 117 Ohio St. 3d 192, 2008-Ohio-546 .....	13
<i>Haverlack v. Portage Homes, Inc.</i> (1982), 2 Ohio St. 3d 26 .....	1, 2, 10, 13
<i>Krieger v. Cleveland Indians Baseball Co.</i> (8th Dist.), 176 Ohio App. 3d 410, 2008-Ohio-2183 .....	passim
<i>Menefee v. Queen City Metro</i> (1990), 49 Ohio St. 3d 27 .....	8, 9, 11, 14
<i>Mominee v. Scherbarth</i> (1986), 28 Ohio St. 3d 270 .....	11
<i>Morris v. Savoy</i> (1991), 61 Ohio St. 3d 684 .....	12, 13
<i>Richardson v. Bd. of County Comm'rs</i> (5th Dist.), 1996 Ohio App. Lexis 6178.....	6
<i>State ex rel. Ohio Acad. of Trial Lawyers v. Sheward</i> , 86 Ohio St. 3d 451, 1999-Ohio-123 .....	12, 13

<i>State ex rel. White v. Koch</i> , 96 Ohio St. 3d 395, 2002-Ohio-4848 .....	13
<i>State v. Williams</i> , 88 Ohio St. 3d 513, 2000-Ohio-428 .....	8
<i>Strohofer v. City of Cincinnati</i> (1983), 6 Ohio St. 3d 118.....	14
<i>Wargetz v. Villa Sancta Anna Home for the Aged</i> (1984), 11 Ohio St. 3d 15 .....	8
<i>Wooster v. Arbenz</i> (1927), 116 Ohio St. 281 .....	11

**Constitutional Provisions, Statutes, and Rules**

John A. Gleason & Kenneth Van Winkle Jr., <i>The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity</i> (1986), 55 U. Cin. L. Rev. 501 (1986) .....	11
Ohio Const., art. I, § 2.....	7
Ohio Const., art. I, § 5.....	5
Political Subdivision Tort Liability Act, R.C. Chapter 2744.....	1
R.C. 2315.18 .....	6, 7, 12
R.C. 2744.05(C)(1) .....	<i>passim</i>

## INTRODUCTION

When this Court abolished the common law doctrine of municipal immunity, thereby subjecting political subdivisions to liability for ordinary tort actions, it invited the legislature to fill the void. See *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St. 3d 26, 30. The General Assembly responded to that call two years later by enacting the Political Subdivision Tort Liability Act, R.C. Chapter 2744, which defines the tort liability and immunities of political subdivisions. Central to that effort was a statutory cap on jury awards for non-economic injuries. Except in cases of wrongful death, R.C. 2744.05(C)(1) limits plaintiffs to their “actual loss” plus \$250,000 in recovery for pain and suffering and other non-economic harms.

The Eighth District invalidated the \$250,000 damages cap on two constitutional grounds: the cap infringes on the right to jury trial, and it violates the guarantee of equal protection. Each holding rests on a fundamental misunderstanding of this Court’s precedents. As the Court recently stated, legislative or judicial modifications to jury awards—remittiturs, treble damages provisions, or, as here, statutory damages caps—do not violate the constitutional right to jury trial because the modifications “simply apply the limits as a matter of law to the facts found by the jury.” *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, ¶ 40. Further, the statutory damages cap does not violate equal protection. R.C. 2744.05(C)(1) is a facially neutral law that advances a legitimate governmental purpose—protecting the fiscal integrity of local and county governments from the unpredictability of the tort system. *Id.* ¶¶ 65-66. The Eighth District was wrong to say otherwise.

For their part, Appellees have asserted that R.C. 2744.05(C)(1) is unconstitutional because it imposes “an arbitrary limit on non-economic damages” by omitting “an exception for catastrophic injuries.” Opp Jur. at 8. But their suggestion that the statute operates in an arbitrary fashion is a due process claim. The Eighth District did not invalidate R.C. 2744.05(C)(1) on

these grounds, and with good reason. Although Appellees have suffered real and compensable non-economic injuries in this case, they have not suffered *catastrophic* injuries. As a result, Appellees have no basis to argue that R.C. 2744.05(C)(1)'s cap on non-economic damages infringes on their due process rights because it lacks a "catastrophic injuries" exception. Furthermore, even if a due process claim were squarely presented in this case, R.C. 2744.05(C)(1) passes muster. After *Haverlack*, the General Assembly has clear authority to immunize political subdivisions from tort liability, either in whole or in part, without violating the Ohio Constitution.

At bottom, the Eighth District refuses to acknowledge the force of this Court's decision in *Arbino*. A straightforward application of that decision confirms that the General Assembly's decision in 1985 to restore partial immunity to political subdivisions, thereby protecting them from large jury awards for non-economic pain and suffering, violates neither the right to jury trial nor the guarantee of equal protection. This Court should affirm the constitutionality of R.C. 2744.05(C)(1) and reverse the Eighth District.

#### **STATEMENT OF AMICUS INTEREST**

The court below held that a statute duly enacted by the Ohio General Assembly is unconstitutional under two provisions of the Ohio Constitution. The Attorney General of Ohio has a duty to defend the legislative actions of the General Assembly against constitutional attack.

#### **STATEMENT OF THE CASE AND FACTS**

On June 11, 2002, the Appellees—Donald Krieger and Clifton Oliver—attended a Cleveland Indians baseball game at Jacobs Field with Andrew Mendez and two other persons. See *Krieger v. Cleveland Indians Baseball Co.* (8th Dist.), 176 Ohio App. 3d 410, 2008-Ohio-2183, ¶¶ 2-3. The group's seats were on the upper-deck in the right-field section. *Id.* ¶ 2. During the game, Krieger and Oliver moved to two open seats in the lower-deck on the third-

base side of the stadium. *Id.* ¶ 3. The two men eventually left those seats in the ninth inning to return to the upper deck and rejoin their friends. *Id.* ¶ 4. While they were heading back to their original seats, an explosion occurred in the stadium. *Id.*

When Krieger and Oliver returned to the upper deck, Cleveland police officers and security personnel were questioning Mendez because they thought that an explosive device had been dropped from the right-field upper-deck area. *Id.* ¶ 5. Police then questioned and searched Krieger and Oliver on the suspicion that they were involved in the explosion. *Id.* ¶ 6. The two men denied any knowledge of the incident, but consented to be searched. *Id.* Thereafter, the police escorted Krieger and Oliver to the basement of Jacobs Field, placed them in a holding cell, and handcuffed them. *Id.* ¶ 7. The two men were taken to jail along with Mendez. *Id.*

Upon arrival at the jail, the police issued paper jumpsuits to Krieger and Clifton and placed them in cockroach-infested cells. *Id.* ¶ 8. The men were not given mattresses, pillows, or blankets, nor were they allowed to shower or brush their teeth. *Id.* Guards also harassed the men and deprived them of sleep. *Id.* ¶ 9. Three days later, on June 14, 2002, Krieger and Oliver were each charged with three counts of aggravated arson and felonious assault. *Id.* ¶ 11.

The Cleveland police detective handling the case, Ralph Peachman, admitted to Krieger's and Clifton's attorneys that the men had nothing to do with the explosion, and that the charges would be dropped if their clients implicated Mendez. *Id.* ¶¶ 10, 12-13. Both men responded that they had no knowledge of Mendez's involvement with the explosion. *Id.* Accordingly, Detective Peachman characterized Krieger and Oliver as "terrorists" at a bail hearing on June 15, 2002, and he urged the trial court to set bail at \$1 million. *Id.* ¶ 14. Krieger and Oliver thereafter posted bond, having spent a total of four days in jail. *Id.* ¶ 15.

Four weeks later, the grand jury indicted both men on four counts of aggravated arson and felonious assault. *Id.* Several months later, the Cuyahoga County Prosecutor's Office released the Jacobs Field surveillance tapes, which confirmed that Krieger and Oliver were in the lower deck when the explosion occurred. *Id.* ¶ 16. Furthermore, the Bureau of Alcohol, Tobacco, and Firearms reported that its analysis of Krieger's and Oliver's clothes revealed no explosive residue. *Id.* On January 29, 2003, one week before trial, the prosecutor dismissed the charges. *Id.*

Krieger and Oliver then filed suit for false imprisonment, malicious prosecution, slander, negligence, and intentional infliction of emotional distress against the Cleveland Indians, the Cleveland Police Department, Detective Peachman, and other officers. *Id.* ¶ 18. After extensive pretrial litigation over issues unrelated to the matter now before the Court,<sup>1</sup> the trial court substituted the City of Cleveland as a defendant and the case went to trial. *Id.* ¶¶ 18-20. A jury found in favor of Krieger and Oliver and awarded each plaintiff compensatory damages of \$400,000 and punitive damages of \$600,000. *Id.* ¶ 21. After post-trial motions by both parties, the trial court entered the following judgment for each plaintiff: \$400,000 in compensatory damages, \$50,000 in attorneys' fees, and \$144,102.08 in prejudgment interest. *Id.* ¶ 22. The court vacated the jury's punitive damages award. *Id.*

The parties cross appealed. The Eighth District affirmed the trial court's decision to vacate the punitive damages award and vacated the attorneys' fee award, holding that neither sum was recoverable from a municipality. *Id.* ¶¶ 65, 74. The Eighth District affirmed the trial court's judgment in all other respects. Of relevance to this case, the court rejected the City's argument that Krieger's and Oliver's non-economic damages were limited to \$250,000 under R.C.

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<sup>1</sup> The trial court and the Eighth District held that the City had waived its defense of complete immunity under R.C. Chapter 2744 by not raising it in a timely fashion. See *Krieger*, 2008-Ohio-2183 at ¶¶ 24-33.

2744.05(C)(1). The Eighth District held that the damages cap was unconstitutional for two reasons: first, it “violates the constitutional right to a jury trial, because it impairs the function of the jury to determine the amount of damages,” and second, it “violates the constitutional guarantees of equal protection, because it creates arbitrary and irrational differing classifications between non-wrongful death tort claimants and wrongful death tort claimants.” *Id.* ¶ 68.

On December 3, 2008, this Court accepted the City’s request for jurisdiction on the question whether R.C. 2744.05(C)(1) impairs the right to a jury trial under Article I, Section 5 of the Ohio Constitution, and whether the statute violates the right to equal protection.

### ARGUMENT

#### **Amicus Curiae State of Ohio’s Proposition of Law No. I:**

*A cap on awards for non-economic injuries against political subdivisions does not violate the right to jury trial or the guarantee of equal protection under the Ohio Constitution.*

The General Assembly’s decision to limit jury awards of non-economic damages against political subdivisions to \$250,000 does not offend the Ohio Constitution. R.C. 2744.05(C)(1) does not intrude upon any of the traditional core functions of a jury, namely the obligation of the jury to determine issues of disputed fact in a case. Nor does the statute create impermissible distinctions among suspect categories. Rather, R.C. 2744.05(C)(1) is a facially neutral law that is rationally related to a legitimate state interest—protecting the financial health of political subdivisions from unpredictable, inflationary, and inherently subjective jury awards for non-economic injuries.

#### **A. Statutory caps on non-economic damages do not violate the right to trial by jury.**

The Ohio Constitution provides that “[t]he right of trial by jury shall be inviolate.” Ohio Const., art. I, § 5. The Eighth District held that R.C. 2744.05(C)(1)’s damages cap violated that right, summarily adopting the reasoning of its earlier opinion in *Gladon v. Greater Cleveland*

*RTA* (8th Dist.), 1994 Ohio App. Lexis 902. The court, however, failed to recognize that *Gladon* is no longer good law in light of intervening authority from this Court.

In *Gladon*, the Eighth District pondered the same question that is now pending in this case—the constitutionality of R.C. 2744.05(C)(1). It first explained that “the right to a jury trial includes the right to have the jury pass on all of the factual issues in dispute,” including “the liability, the dollar amount of the liability, and the finality of that amount.” *Id.* at \*10. The court then reasoned that, as part and parcel of that right, “the jury not only finds the damages but *mandates* the amount of those damages.” *Id.* (emphasis added). The statute’s \$250,000 cap on non-economic damages unconstitutionally impaired that right by decreasing the jury’s mandate:

If the jury in its collective judgment based on its collective wisdom, life experiences, common sense, sense of fairness and justice, and its collective deliberation finds that the noneconomic damages are \$2.7 million or more, or less, it is not the prerogative of the General Assembly to interfere with that process.

*Id.* at \*10-11; accord *Richardson v. Bd. of County Comm’rs* (5th Dist.), 1996 Ohio App. Lexis 6178, \*20-21. This Court reversed *Gladon*, but on different grounds. See *Gladon v. Greater Cleveland RTA* (1996), 75 Ohio St. 3d 312.

The Eighth District’s expansive interpretation of the right to a jury trial in *Gladon* is no longer authoritative after *Arbino*, where this Court addressed the constitutionality of Ohio’s general tort-reform statutes in R.C. Chapter 2315. One of the provisions, R.C. 2315.18(B)(2), capped the amount of non-economic damages that could be recovered against private parties at either \$250,000 or \$350,000, depending on the circumstances of the case. The *Arbino* plaintiff had argued that these caps violated her “right to have a jury determine the full amount of [her] damages.” 2007-Ohio-6948 at ¶ 33.

This Court disagreed. It recognized that the core function of the jury was to “determine all issues of fact,” including “the extent of damages suffered by a plaintiff.” *Id.* ¶ 34. The right to a

jury trial in the Ohio Constitution protects “this factfinding function” by preventing “another entity” from “substitut[ing] its own findings of fact” for those of the jury. *Id.* ¶ 35. However, the Court then reaffirmed what it had long recognized—that jury “awards may be altered *as a matter of law.*” *Id.* ¶ 37. It offered two illustrative examples: the inherent authority of trial courts to order remittiturs of jury awards, and the General Assembly’s statutory authority to order the trebling of jury awards for certain injuries. *Id.* ¶¶ 38-39. As to the latter category, the Court specifically noted that it “ha[d] never held that the legislative choice to *increase* a jury award as a matter of law infringes upon the right to a trial by jury.” *Id.* ¶ 39. As such, “the corresponding *decrease* [of an award] as a matter of law cannot logically violate that right.” *Id.*

Based on this framework, the *Arbino* Court concluded that R.C. 2315.18’s cap on non-economic damages did not infringe upon the right to a jury trial in the Ohio Constitution: “Courts must simply apply the limits as a matter of law to the facts found by the jury; they do not alter the findings of facts themselves, thus avoiding constitutional conflicts.” *Id.* ¶ 40.

That analysis squarely controls this case. The cap on jury awards of non-economic damages against political subdivisions in R.C. 2744.05(C)(1) does not, as the Eighth District thought, “impair[] the function of the jury to determine the amount of damages.” *Krieger*, 2008-Ohio-2183 at ¶ 68. Rather, the jury issues its findings of fact as to the plaintiff’s non-economic injuries, and the courts then “apply the limits [in the statute] as a matter of law to the facts.” *Arbino*, 2007-Ohio-6948 at ¶ 40. Because the jury’s factfinding function is preserved, R.C. 2744.05(C)(1) is a constitutional enactment.

**B. Statutory caps on non-economic damages do not violate the right to equal protection.**

The Ohio Constitution also guarantees that all citizens shall enjoy “equal protection and benefit” of the State’s laws. Ohio Const., art. I, § 2. In this case, the Eighth District held that R.C. 2744.05(C)(1)’s damages cap offended that guarantee because it “creates arbitrary and

irrational differing classifications between non-wrongful death tort claimants and wrongful death tort claimants.” *Krieger*, 2008-Ohio-2183 at ¶ 68. Again, the court summarily relied on its earlier opinion in *Gladon* to reach that conclusion. And again, the court failed to identify the fatal flaws in *Gladon*’s constitutional analysis.

R.C. 2744.05(C)(1)’s cap on non-economic jury awards against political subdivisions does not apply to “wrongful death actions.” The Eighth District in *Gladon* criticized this disparate treatment of “non-wrongful death tort sufferers” and “wrongful death tort suffers.” 1994 Ohio App. Lexis 902 at \*14. It first held that R.C. 2744.05(C)(1) impairs the rights of plaintiffs in the first category “to have a jury fully litigate the factual issues of damages in their cases.” *Id.* Having found an inconsistent impairment of the “fundamental right to a jury trial” between the two groups, the court applied strict scrutiny and invalidated the damages cap as a violation of equal protection. *Id.*

The Eighth District took a wrong turn in *Gladon*. Because R.C. 2744.05(C)(1) does not impair plaintiffs’ constitutional right to a jury trial, it cannot offend the equal protection guarantee.

The starting point for claims of equal protection is well established: “A statutory classification which involves neither a suspect classification nor a fundamental interest does not violate the Equal Protection Clause of the Ohio Constitution if it bears a rational relationship to a permissible governmental objective.” *Wargetz v. Villa Sancta Anna Home for the Aged* (1984), 11 Ohio St. 3d 15, 17-18; see also *Menefee v. Queen City Metro* (1990), 49 Ohio St. 3d 27, 29 (same). When a statute infringes upon a fundamental right or employs a suspect classification, it is reviewed under the lens of strict scrutiny. See *State v. Williams*, 88 Ohio St. 3d 513, 530, 2000-Ohio-428.

As explained in the preceding section, R.C. 2744.05(C)(1) does not impair the constitutional right to a jury trial. Furthermore, the damages cap on non-economic injuries does not operate based on race, gender, age or other suspect classification. It is facially neutral in its application. See *Arbino*, 2007-Ohio-6948 at ¶ 65 (“[F]acially neutral laws . . . do not violate the Equal Protection Clause.”). Accordingly, the General Assembly’s decision to exempt wrongful-death plaintiffs from the reach of R.C. 2744.05(C)(1) need only survive the rational-basis test.

The statute clears that very modest hurdle. This Court has long acknowledged that “conserv[ing] the fiscal resources of political subdivisions by limiting their tort liability” is a legitimate state interest. *Menefee*, 49 Ohio St. 3d at 29; see also *Fahnbulleh v. Strahan*, 73 Ohio St. 3d 666, 668-69, 1995-Ohio-295 (same); *Fabrey v. McDonald Village Police Dep’t*, 70 Ohio St. 3d 351, 353, 1994-Ohio-368 (same). And there is no question that a statutory cap on non-economic damages against political subdivisions furthers that important interest. “[N]oneconomic-damage awards are inherently subjective and difficult to evaluate,” leading to a “lack of predictability” and “the occasional influence of irrelevant factors” when the jury deliberates over the proper amount of the award. *Arbino*, 2007-Ohio-6948 at ¶ 69. The damages cap in R.C. 2744.05(C)(1) reduces that uncertainty and the accompanying fiscal vulnerability for political subdivisions. *Id.* ¶ 72.

At bottom, R.C. 2744.05(C)(1) is facially neutral statute that advances a legitimate state interest without infringing on a fundamental right. As such, the General Assembly’s decision to exempt wrongful-death plaintiffs from its scope does not, and cannot, violate equal protection. *Id.* ¶ 71; see also *Conley v. Shearer* (1992), 64 Ohio St. 3d 284, 291 (“The state voluntarily consents to be sued and may qualify and draw perimeters around the granted right without violating equal protection.”).

**Amicus Curiae State of Ohio's Proposition of Law No. II:**

*A cap on awards for non-economic injuries against political subdivisions does not violate the right to due process as applied to plaintiffs who did not suffer catastrophic injury.*

When opposing the City of Cleveland's request for jurisdiction, Appellees argued that R.C. 2744.05(C)(1) "imposes an arbitrary limit on non-economic damages in all tort cases against political subdivisions." Opp. Jur. at 8. The \$250,000 cap is arbitrary, they said, because the statute "does not contain the exception for catastrophic injuries." *Id.* Accordingly, Appellees claim that R.C. 2744.05(C)(1) violates their right to due process under Article I, Section 16 of the Ohio Constitution. *Id.* at 9. The Eighth District did not find the statute unconstitutional on due process grounds.

Should Appellees again raise these due process concerns, their position is fatally flawed on two fronts. First, regardless of whether R.C. 2744.05(C)(1) can be applied constitutionally to plaintiffs who have suffered a catastrophic injury, the statute is unquestionably constitutional as applied to *these* Appellees. They have not suffered catastrophic injury and, therefore, have no basis to claim a violation of due process. Second, the General Assembly's decision to set a \$250,000 cap on non-economic damages awards was not an arbitrary or unreasonable exercise. R.C. 2744.05 is not a run-of-the-mill general tort reform statute, but a partial restoration of immunity to local and county governments. After *Haverlack's* abrogation of common-law municipal liability, this Court has recognized the General Assembly's authority to grant sovereign immunity to political subdivisions by statute. And the measure of the immunity afforded is left to its discretion.

**A. Appellees' right to due process is not violated by the lack of an exception for catastrophic injuries in R.C. 2744.05(C)(1); they have not suffered such an injury.**

Because R.C. 2744.05(C)(1) does not impair or restrict the fundamental right to a jury trial, it need only pass the rational-basis test to satisfy due process. Under that test, a statute is valid

“[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.” *Mominee v. Scherbarth* (1986), 28 Ohio St. 3d 270, 274 (citation omitted).

The statute satisfies the first prong. As discussed in the preceding section, preserving the financial health of political subdivisions from unpredictable and subjective non-economic damages awards is a legitimate state interest. See *Fahnbulleh*, 73 Ohio St. 3d at 668-69; *Fabrey*, 70 Ohio St. 3d at 353; *Menefee*, 49 Ohio St. 3d at 29. Indeed, the original motivation behind the common-law doctrine of municipal immunity was the recognition that governmental entities had “obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property.” *Wooster v. Arbenz* (1927), 116 Ohio St. 281, 284. Exposing political subdivisions to full tort liability as if they were private citizens would chill the performance of these essential functions. See, e.g., *Fahnbulleh*, 73 Ohio St. 3d at 668 (noting that immunity “encourages rapid response of emergency vehicles and personnel” in responding to alarms).

There also can be no dispute that the damages cap in R.C. 2744.05(C)(1) has a “real and substantial relation” to that interest. Given that “noneconomic damages are difficult to calculate and lack a precise economic value,” *Arbino*, 2007-Ohio-6948 at ¶ 54, the damages cap protects municipal budgets from the dangers of crippling jury awards. It also provides a measure of predictability and uniformity. See John A. Gleason & Kenneth Van Winkle Jr., *The Ohio Political Subdivision Tort Liability Act: A Legislative Response to the Judicial Abolishment of Sovereign Immunity* (1986), 55 U. Cin. L. Rev. 501, 523 (1986) (“By placing a cap on amounts recoverable and eliminating punitive damages, it is more feasible for municipalities to acquire commercial insurance as well as establish self insurance funds.”).

Turning to the second prong of the due process analysis, Appellees have focused on the lack of an exception for catastrophic injuries in R.C. 2744.05(C)(1). They say that treating plaintiffs with catastrophic injuries on par with those suffering from non-catastrophic injuries is arbitrary, unreasonable, and, therefore, impermissible under due process. See Opp. Jur. at 7-9.

When evaluating the constitutionality of a cap on non-economic jury awards against private parties, this Court has often looked to whether the cap applies to victims with catastrophic injuries. To that end, the \$250,000/\$350,000 cap in *Arbino* passed muster because it exempted plaintiffs who had suffered catastrophic injuries: a “[p]ermanent and substantial physical deformity,” the “loss of use of a limb,” the “loss of a bodily organ system,” or a “[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.” R.C. 2315.18(B)(3)(a)-(b), cited in *Arbino*, 2007-Ohio-6948 at ¶ 60. By contrast, the blanket \$200,000 cap on non-economic medical malpractice awards in *Morris v. Savoy* (1991), 61 Ohio St. 3d 684, was arbitrary because it applied to everyone. No exception was made for those patients with the most severe injuries. *Id.* at 690-91; accord *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 490, 1999-Ohio-123 (in dicta).

The facts of this case do not give rise to those concerns because the two Appellees have not suffered catastrophic injuries. Rather, Krieger has experienced nightmares, received threatening phone calls, and endured unwanted notoriety in the media. See *Krieger*, 2008-Ohio-2183 at ¶ 17. Oliver has suffered depression stemming from his discharge from the Marine Corps, his inability to obtain new employment, and the negative media attention. *Id.* While genuine and compensable, these are traditional non-economic injuries that do not give to the due process concerns discussed in *Morris*, *Sheward*, and *Arbino*.

As a consequence, the damages cap in R.C. 2744.05(C)(1) can be applied constitutionally to *these* plaintiffs without offending *their* due process rights. As such, any due process attack on the statute brought by these plaintiffs will fail; they cannot show that the statute is facially unconstitutional or that it is unconstitutional as applied to them. Cf. *Groch v. GMC*, 117 Ohio St. 3d 192, 2008-Ohio-546, ¶ 26 (“[A] party raising a facial challenge must demonstrate that there is no set of circumstances in which the statute would be valid.”). The question of whether R.C. 2744.05(C)(1) can be applied constitutionally to another plaintiff that has suffered catastrophic injury can and should wait for that other plaintiff. Any comment on that hypothetical situation would have no bearing on this case. See *State ex rel. White v. Koch*, 96 Ohio St. 3d 395, 2002-Ohio-4848, ¶ 18 (noting “[the Court’s] well-settled precedent that [it] will not indulge in advisory opinions”).

**B. Due process does not require that a statutory damages cap on awards against political subdivisions contain an exemption for catastrophic injuries.**

Even if this Court were to apply a facial analysis to the statute, R.C. 2744.05(C)(1) would still satisfy due process. The damages caps in *Morris*, *Sheward*, and *Arbino* were part of major tort-reform efforts by the General Assembly; they curtailed the long-established right of plaintiffs to recover the full measure of the jury’s damages award from a *private tortfeasor*. By contrast, the damage cap at issue here was a provision of the Political Subdivision Tort Liability Act; it was a partial restoration of sovereign immunity to *municipalities*. And as this Court has recognized, the General Assembly can grant immunity to political subdivisions without violating due process because the legislature is simply reinstating a benefit that had long been available at common law.

In *Haverlack*, the Court stated that the General Assembly could use its statutory authority to restore sovereign immunity to political subdivisions: “[T]he defense of sovereign immunity is

not available, in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by [negligence].” 2 Ohio St. 3d at 30; see also *Strohofer v. City of Cincinnati* (1983), 6 Ohio St. 3d 118, 121 (same). That restorative power is plenary. The General Assembly “could have extended sovereign immunity to *all* claims against a political subdivision” without violating the Ohio Constitution. *Menefee*, 49 Ohio St. 3d at 29. Had the legislature exercised that option, then *all* plaintiffs regardless of their injury—ordinary, catastrophic, or fatal—would have been left without a remedy.

The General Assembly chose a different path. It instead “carved out limited classifications in response to reasonable concerns.” *Id.* These carving efforts cannot be characterized as arbitrary. If the legislature can grant complete immunity to municipalities without regard to the severity of the plaintiff’s injuries (ordinary, catastrophic, or fatal), then it can also grant partial immunity to municipalities without regard to those distinctions. The greater power necessarily includes the lesser. See *Grange Mut. Cas. Co. v. City of Columbus* (10th Dist. 1989), 49 Ohio App. 3d 50, 52 (“When the state consents to be sued, it may qualify and draw perimeters around that granted right without violating due process . . .”).

Put simply, the General Assembly could have denied all recovery to all plaintiffs bringing claims against a political subdivision. It has instead allowed some measure of recovery—actual loss plus up to \$250,000 in non-economic damages—to all plaintiffs. The fact that the legislature did not permit greater recovery by some plaintiffs is of no constitutional import: “When a state has the power to give, it may give only part and limit that which is granted.” *Id.*

## CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Defendant-Appellant City of Cleveland was served by U.S. mail this 6th day of March, 2009, upon the following counsel:

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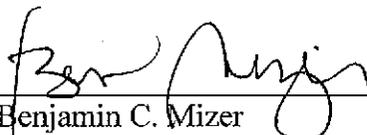
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