2008-CA-01713-SCTAC2

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

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Mississippi Manufactured Housing Association

Mississippi Manufacturers Association

Associated General Contractors of Mississippi, Inc.

Mississippi Hospital Association

Mississippi Nurses Association

Mississippi Asphalt Pavement Association, Inc.

Mississippi Road Builders Association

American Council of Engineering Companies – MS

Mississippi Association of Self-Insurers

The Mississippi Pharmacists Association

National Federation of Independent Business - Mississippi Chapter

Beverage Association of Mississippi

Mississippi Propane Gas Association

National Association of Manufacturers

Mississippi Health Care Association

Mississippi State Medical Association

Mississippi Consumer Finance Association

Mississippians for Economic Progress

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Mississippi Dental Association

Mississippi Bankers Association

Mississippi Concrete Industries Association

Mississippi Association of Realtors

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES & LEGISLATION

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

As organizations representing a wide range of Mississippi businesses, health care professionals, and their insurers, *amici* have an interest in ensuring that Mississippi's civil litigation environment is fair and balanced, predictable, and reflects sound policy. These goals are furthered by Miss. Code Ann. § 11-1-60(2)(b), which generally limits noneconomic damages to $1 million in civil cases.[1] *Amici*, therefore, have a substantial interest in the constitutionality of the statute and would be adversely impacted if the statute is struck down.

STATEMENT OF ISSUES ADDRESSED BY *AMICI CURIAE*

Amici intend to address the constitutionality of Miss. Code Ann. § 11-1-60(2)(b). *Amici* adopt the position of Appellant-Defendant and allied *amici* on the issue whether a convenience store has a duty to protect a customer from the criminal acts of third parties while on its property.

INTRODUCTION

Noneconomic damages awards, such as for pain and suffering, are highly subjective and inherently unpredictable. There is "no market for pain and suffering." Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 549 (2006). Consequently, legal scholars have long recognized that putting a "monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise." Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance,* 18 Law & Contemp. Probs. 219, 222 (1953). "[J]uries are left with nothing but their consciences to guide them." Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985). One commentator noted the difficulty expressed by jurors in putting a price on pain and suffering:

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[1] Miss. Code Ann. § 11-1-60(2)(a) limits noneconomic damages to $500,000 in health care liability actions. That law is not at issue, but the Court's decision here may impact it. Accordingly, organizations whose members fall under Miss. Code Ann. § 11-1-60(2)(a) also have a substantial interest in this appeal.

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

Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 Duke L.J. 217, 253-54 (1993).

Plaintiffs' lawyers understand these dynamics and suggest that juries award extraordinarily large amounts for pain and suffering. That was the situation here, where the jury awarded $4.1 million in compensatory damages, the exact amount suggested by the plaintiff's attorney in closing argument. The great bulk of the award was for noneconomic damages.

Huge pain and suffering awards such as the one at issue are of fairly recent vintage. Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses. That is not necessarily so today. In recent years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for statutory upper limits to guard against excessive and unpredictable outlier awards. Such awards may occur when juries are improperly influenced by sympathy for the plaintiff, bias against a deep-pocket defendant, or a desire to punish the defendant rather than compensate the plaintiff. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

Statutory limits such as Miss. Code Ann. § 11-1-60(2)(b) promote more uniform treatment of individuals with comparable injuries, *see* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 769 (1995) (unpredictability "undermines the legal system's claim that like cases will be treated alike"), facilitate settlements, address "over- or under precautions by affected industries and insurers," *id.*, and limit

arbitrariness that may raise potential due process problems. *See Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 n.22 (Mich. 2004) ("A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled 'punitive.'"), *reh'g denied*, 691 N.W.2d 436 (Mich.), *cert. denied*, 546 U.S. 821 (2005); *see also* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004) ("The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.").

This Court should respect the legislature's policy judgment. Miss. Code Ann. § 11-1-60(2)(b) was a sound and rational legislative response to outlier awards and a fear of excessive liability that was driving jobs out of the state. The noneconomic damage statute has played a significant role in restoring confidence in the state's civil justice system. It should be upheld.

Furthermore, as a matter of sound public policy, neither branch of government should have a tort law "monopoly." If that were true — if only "one voice" could be heard to the exclusion of all others — the public would lose out in the long run. The balanced development of tort law would suffer, and so would the public's perception of the judiciary. Indeed, if the Court were to strike down the cap, the Court would be violating the separation of powers by sitting as a "super legislature," which this Court has traditionally been reluctant to do.

I. THE EVOLUTION AND RISE OF PAIN AND SUFFERING AWARDS

A. Modest Beginnings

Initially, the common law rarely recognized damages beyond pecuniary harm. Until the mid-nineteenth century, damages that compensated plaintiffs for intangible losses were often referred to as "exemplary damages." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev.

583, 614-15 (2003). An early law review article recognized, "[t]he difficulty of estimating compensation for intangible injuries, was the cause of the rise of [exemplary damages] . . . [W]hen the early judges allowed the jury discretion to assess beyond the pecuniary damage, there being no apparent computation, it was natural to suppose that the excess was imposed as punishment." Edward C. Eliot, *Exemplary Damages*, 29 Am. L. Reg. 570, 572 (1881) (presently entitled U. Pa. L. Rev.); *see also* Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 519 (1957) ("In the 1760's some courts began to explain large verdicts awarded by juries in aggravated cases as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings"). By the mid-1900s, the law firmly established that pain and suffering awards were to compensate for intangible injuries; punitive damages punished a defendant for wrongful conduct.

Prior to the 20th Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 396 (2007). High noneconomic damage awards were uniformly reversed. *See id.* at 379-87. As recently as the 1930s, pain and suffering awards were generally modest. *See* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

B. The Turning Point

The size of pain and suffering awards took its first leap after World War II, as plaintiffs' lawyers such as Melvin Belli began a campaign to increase such awards. *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951). Plaintiffs' lawyers soon became adept at

increasing pain and suffering awards. For example, during a nine-month period in 1957, there were fifty-three verdicts of $100,000 or more. *See* Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy's First Reponses*, 34 Cap. U. L. Rev. 545, 568 (2006). Scholars began to question the proper role and measurements for such awards. *See* Charles A. Wright, *Damages for Personal Injuries,* 19 Ohio St. L.J. 155 (1958).

Overall, in inflation-adjusted terms, the average award grew from $38,000 in the 1940s and 1950s to $48,000 in the 1960s. *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989). The pace continued. For example, from the 1960s to the 1980s, pain and suffering awards in wrongful death cases grew 300%. *See id.* Pain and suffering awards became the most substantial part of tort costs. As the Third Circuit found, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

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

C. The Recent and Rapid Skyrocketing of Awards

In recent years, pain and suffering awards skyrocketed, both nationally and in Mississippi. Between 1994 and 2000, jury awards in personal injury cases grew by an alarming 176%. *See There is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at P3 (citing Jury Verdict Research). From 1994 to 2001, average jury awards rose from $187,000 to $323,000 in automobile cases, and from $1.14 million to $3.9 million in medical malpractice cases. *See* Robert P. Hartwig, *Liability Insurance and Excess Casualty Markets: Trends, Issue & Outlook*, at 51 (Ins. Info. Inst., Oct. 2003) *available at* http://server.iii.org/yy_obj_data/binary/686661_1_0/liability.pdf.

The bulk of this rise can be attributed to pain and suffering awards. For instance, one study found that pain and suffering awards accounted for 60-75% of jury verdicts between 1990 and 2000. *See Attack on Medical Profession, supra*, at 1 (citing Jury Verdict Research). Another study reports that pain and suffering overall totals more than half of all tort damages. *See* Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System 17 (2003), *available at* https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (pain and suffering awards represent 24% of U.S. tort costs; economic damages represent 22%). As the Honorable Paul Niemeyer of the United States Court of Appeals for the Fourth Circuit has recognized, "money for pain and suffering . . . provides the grist for the mill of our tort industry." Niemeyer, 90 Va. L. Rev. at 1401; *see also* Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (noting that pain and suffering awards in the United States are more than ten times those awarded in the most generous of the other nations).

In fact, the average pain and suffering award in 1989 was $319,000; just ten years later it was $1,379,000. *See* Kim Brimer, *Has "Pain and Suffering" Priced Itself Out of the Market*, Ins. J., Sept. 8, 2003, *available at* http://www.insurancejournal.com/magazines/southcentral/2003/09/08/partingshots/32172.htm. This rise may be due, at least in part, to increasing statutory and constitutional restrictions on punitive damage awards, which led lawyers to bolster other forms of recovery. *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C.L. Rev. 47 (2002).

II. THE PUBLIC POLICY BASES UNDERLYING MISSISSIPPI'S NONECONOMIC DAMAGES STATUTE

A. The Litigation and Economic Climate Preceding Enactment of the 2002 Reform

Prior to 1995, no Mississippi jury had ever returned a verdict over $9 million in actual or punitive damages. *See* David Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 Miss. L.J. 359, 363 (2001). That began to change between 1995 and 2001 when at least twenty-one Mississippi juries returned verdicts of $9 million or more, seven of which exceeded $100 million. *See id.* This spike in excessive awards was a factor contributing to Mississippi gaining a reputation among some as a "Judicial Hellhole," a "Mecca" for tort claims, and the home of "jackpot justice."

There appears to have been no rhyme or reason to these awards. For example, in one case a jury awarded ten plaintiffs $10 million each in damages even though the plaintiffs varied widely in age and alleged injury. *See Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004). In another, a Mississippi jury awarded $25 million each to six plaintiffs who alleged exposure to asbestos, even where the exposures came from different environments, ranging from schools to shipyards and industrial boiler rooms. *See 3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005) (reversing verdict and granting JNOV for defendant due to lack of

evidence).

Perhaps the most recognizable impact of boundless awards and uncertainty was in the healthcare arena. Between 1999 and 2000, malpractice suits in Mississippi surged 24%, with an additional 23% increase within the first five months of 2001. *See* Cassandra Perry, *Lawsuit Abuse Affects Medical Care,* Delta Democrat Times (Greenville, Miss.), June 24, 2001, at A1. Physicians who delivered babies faced increases in medical malpractice premiums ranging between 20% and 400% in 2001. *See* John Poretto, *Some Doctors in Mississippi Delta Giving Up Obstetrics,* Baton Rouge Advocate, Nov. 19, 2001, at 2B. In 2001, the President of the Mississippi State Medical Association noted that 324 Mississippi physicians stopped delivering babies in the last decade. *See* Perry, *supra.*

Excessive awards had a spiraling effect. Reports of such verdicts encouraged plaintiffs' lawyers to bring claims in Mississippi, particularly in areas with a history of returning large verdicts, such as the 22nd Judicial Circuit composed of Jefferson, Claiborne, and Copiah counties. As one reporter wrote in 2002: "Mississippi, largely because it is one of only a few states that does not cap verdicts on noneconomic damages, has become a hotbed for such litigation because jury verdicts have been unusually high, and drug and insurance companies fearful of paying tens of millions of dollars are quick to settle." Tim Lemke, *Best Places to Sue?; Big Civil Verdicts in Mississippi Attract Major Litigators*, Wash. Times, June 30, 2002, Special Report, at A1. The prospect of a hefty damage award led to a proliferation of lawsuits and ultimately culminated in a litigation crisis.

According to a 2002 report, "[t]he average Mississippian pa[id] $264 a year to fund the litigation here, the state where most businesses fear to tread and where getting malpractice insurance has become almost impossible for many doctors." Lemke, *supra.* Placing a reasonable limit on noneconomic damages, according to many, was "crucial to ensuring that

insurance rates remain[ed] affordable." *Id.*

Unchecked and unlimited liability for defendants was causing employers and insurers to leave the state or avoid doing business in Mississippi. *See generally* Sherman Joyce & Michael Hotra, *Mississippi's Civil Justice System: Problems, Opportunities and Some Suggested Repairs*, 71 Miss. L.J. 395 (2001). "By the summer of 2001, at least forty-four insurance companies had left Mississippi or stopped selling certain kinds of insurance because of large jury verdicts in the state." Clark, 71 Miss. L.J. at 364. Fewer insurers meant less competition in the marketplace.

Recognizing the impact of unlimited noneconomic damages on the availability and affordability of health care, the legislature passed legislation in 2002 to cap noneconomic damages in medical negligence suits against a health care providers at $500,000. *See* Miss. Code Ann. § 11-1-60(2)(a). The new law, which applied to all causes of action filed on or after January 1, 2003, received overwhelming support in both houses, passing 102-19 in the House and 41-6 in the Senate. *See* Miss. House J., Sept. 5, 2002, at 5; Miss. Sen. J., Oct. 7, 2002, at 83-84. The law had an immediate and beneficial impact. *See* Matt Volz, *Number of Lawsuits Declines in Mississippi's 'Jackpot Justice' County*, Assoc. Press State & Local Wire (Fayette, Miss.), Oct. 4, 2003.

B. The Impetus for the 2004 Reforms: Addressing Excessive Awards Outside of Medical Liability

While the 2002 legislation improved the healthcare liability climate in Mississippi, it did not address excessive awards that affected other aspects of the state's economy. Out-of-state companies continued to be deterred from entering Mississippi and existing employers were leaving the state, taking jobs with them. *See* Clark, 71 Miss. L.J. at 365-67. Between 1994 and 2001, for example, manufacturing jobs fell from 260,000 to 221,500, translating into a 15% loss of manufacturing jobs for the period. *See* John Porretto, *Rural County Known for Huge Verdicts*, Sun Herald (Biloxi, Miss.), July 2, 2001, at A1. "Plainly, the unbalanced judicial system [was]

hurting the state and the prospects for more and better jobs, better incomes, and available healthcare." Clark, 71 Miss. L.J. at 366.

Mississippi consumers also felt the effects of excessive awards. As one commentator noted, "[t]he cost of good[s] and services increases more in Mississippi because companies are trying to cover money that could be lost in civil court cases, and judicial reform in Alabama has slowed the increase." Timothy Brown, *Economic Group Says Legal System Hurting Mississippi*, Assoc. Press State & Local Wire, Apr. 17, 2002. Additionally, in 2002 Mississippi consumers paid almost $80 million more for goods and services because of the state's legal system. *Id.*

In his 2004, Governor Haley Barbour suggested that "the cap on non-economic damages should not apply just to medical liability cases. . . . We should also have a reasonable cap in general civil liability cases." Governor Haley Barbour, 2004 State of the State Address (Jan. 26, 2004), *at* http://www.governorbarbour.com/speeches/sos04.html. Prompted by his advocacy and the continuing effects of the litigation crisis, the 2004 legislation limited noneconomic damages in all non-medical liability civil suits to $1 million. *See* Miss. Code Ann. § 11-1-60(2).

C. Positive Results for Mississippi's Economy

Within months of the 2004 legal reform initiatives, "the impact of the turnaround on Mississippi courts, business and medicine was being felt. Physicians young and old stopped leaving the state en masse and insurance companies began to return to Mississippi." Lynne Jeter, *Tort Reform Impact Ripples Out Through the Economy*, Miss. Bus. J., Nov. 29, 2004, at 30. By November 2004, three major insurance companies returned to Mississippi, World Insurance Co., Equitable Life Insurance Co., and St. Paul Travelers. MassMutual Financial Group, announcing that Massachusetts Mutual Life Insurance Company and its affiliates would re-enter the Mississippi market, stated that "[b]y enacting significant legal reform, Mississippi has signaled that it is once again open for business. . . . This legislation has paved the way for possible

MassMutual investments supporting Mississippi schools, roads and senior citizens." *Tort Reform Convinces MassMutual to Re-Enter Miss. Municipal Bond Market,* Ins. J., June 17, 2004, *at* http://www.insurancejournal.com/news/southeast/2004/06/17/43318.htm.

The benefits to Mississippi from the noneconomic damage statute and other civil justice reforms are clear. "The state has gone from being the poster child of litigation abuse to a shining example of how a state can join the legal mainstream and foster economic growth through legal reform." Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C.L. Rev. 393, 395 (2005); *see also* Stephen Moore, *Mississippi's Tort Reform Triumph*, Wall St. J., May 10, 2008, at A9; Lynn Lofton, *Tort Reform: Insurance Rates Fall, Recruitment Up*, Miss. Bus. J., Nov. 6, 2006, at B3; Lex Taylor, Editorial, *Mississippi is Seeing the Benefits of Tort Reform*, Sun Herald (Biloxi, Miss.), Sept. 29, 2006, at D2. This Court has also played an important role in improving the state's legal climate. *See* David Maron & Walker W. Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 Miss. C.L. Rev. 253 (2007); Behrens & Silverman, *supra*; John W. Christopher, *Tort Reform by the Mississippi Supreme Court*, 24 Miss. C.L. Rev. 427 (2005).

III. MISSISSIPPI'S NONECONOMIC DAMAGES STATUTE REPRESENTS LEGITIMATE, CONSTITUTIONAL LEGISLATIVE POLICY

A. Numerous States Have Enacted and Upheld Limits on Noneconomic Damages

The Mississippi legislature is not alone in seeking to restore predictability and fairness in the civil justice system. Approximately two-thirds of the states have enacted outer limits on noneconomic damage awards. *See* Nat'l Ass'n of Mut. Ins. Cos., *Noneconomic Damage Reform, at* http://www.namic.org/reports/tortReform/NoneconomicDamage.asp (providing state-by-state citations of statutory limits on noneconomic damages). Mississippi is among several states that

have adopted a limit that is generally applicable to tort or civil cases.[2]

The clear trend among state supreme court decisions evaluating the constitutionality of such laws is to uphold the legislature's broad policy decision. *See* Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps."). More than two times as many state courts of last resort have upheld statutory limits on noneconomic damages awards,[3] than have struck them down.[4] For example, the Ohio Supreme Court recently found that a cap:

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[2] *See, e.g.*, Alaska Stat. § 09.17.010; Colo. Rev. Stat. § 13-21-102.5(3)(a); Haw. Stat. § 663-8.7; Idaho Code § 6-1603; Kan. Stat. Ann. § 60-19a02(b); Md. Cts. & Jud. Proc. Code § 11-108; Ohio Rev. Code Ann. § 2315.18.

[3] *See C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); *Van Buren v. Evans*, 2009 WL 1396235 (Cal. App. May 20, 2009), *review denied* (Cal. Aug. 12, 2009); *Scholz v. Metro. Pathologists*, 851 P.2d 901 (Colo. 1993); *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla.), *cert. denied*, 510 U.S. 915 (1993); *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992), *cert. denied*, 508 U.S. 909 (1993); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (Mich. App. 2004); *Zdrojewski v. Murphy*, 657 N.W.2d 721 (Mich. App. 2002); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo.), *cert. denied*, 506 U.S. 991 (1992); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001) (reaffirming *Robinson v. Charleston Area Med. Center*, 414 S.E.2d 877 (W. Va. 1991)); *see also Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 733-34 (Minn. 1990) (upholding statutory limit on loss of consortium claims); *Hughes v. Peacehealth*, 178 P. 3d 225 (Or. 2008) (reaffirming constitutionality of limit as applied to wrongful death cases in *Greist v. Phillips*, 906 P.2d 789 (Or. 1995)); *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996) ($500,000 limit on noneconomic damages "remains in full force and effect"). In addition, federal circuit courts have upheld noneconomic damages caps. *See Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Island's law); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (Va. law); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985) (Cal. law); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (N.M. law); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (2005) (Mich. law); *Owen v. United States*, 935 F.2d 734 (5th Cir. 1991) (La. law), *cert. denied*. 502 U.S. 1031 (1992).

[4] *See Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987); *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lakin v. Senco Prods. Inc.*, 987 P.2d 463 (Or. 1999); *Ferdon v. Wisconsin Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005).

> bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy. It noted that noneconomic damages are inherently subjective and thus easily tainted by irrelevant considerations. The implicit, logical conclusion is that the uncertain and subjective system of evaluating noneconomic damages was contributing to the deleterious economic effects of the tort system.

Arbino v. Johnson & Johnson, 880 N.E.2d 420, 435-36 (Ohio 2007); *Oliver v. Cleveland Indians Baseball Co., LP*, 915 N.E.2d 1205 (Ohio 2009). The Alaska Supreme Court said that laws such as the statute at issue here "bear[ ] a fair and substantial relationship to a legitimate government objective." *C.J. v. Dep't of Corrections*, 151 P.3d 373, 381 (Alaska 2006); *see also Murphy v. Edmonds*, 601 A.2d 102, 115 (Md. 1992) ("The General Assembly's objective in enacting the cap was to assure the availability of sufficient liability insurance, at a reasonable cost, in order to cover claims for personal injuries to members of the public. This is obviously a legitimate legislative objective."). These courts and others have recognized that "[i]t is not this court's place to second-guess the Legislature's reasoning behind passing the act," *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 69 (Neb. 2003), and that "it is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted.," *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 412 (W. Va. 2001).

B. This Court Has Respected the Legislature's Prerogative To Place Rational Bounds on the Civil Justice System

In Mississippi, statutes are "clothed with a heavy presumption of constitutional validity" and the party challenging the statute has a heavy burden of "carrying his case beyond a reasonable doubt." *State v. Mississippi Ass'n of Supervisors, Inc.*, 699 So. 2d 1221, 1223 (Miss. 1997). Plaintiff cannot meet this burden. Miss. Code Ann. § 11-1-60(2)(b) clearly promotes more uniform treatment of individuals with comparable injuries, facilitates settlements, addresses outlier awards that were driving jobs from Mississippi and making the insurance market less competitive, and limits arbitrariness that may raise potential due process problems.

Furthermore, this Court has traditionally respected the legislature's overlapping authority to decide broad tort policy rules for Mississippi.[5] The Court should continue this cooperative tradition. *See generally* Victor E. Schwartz, Mark A. Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).[6]

In contrast to this tradition and the greater weight of decisions from other states upholding caps similar to Miss. Code Ann. § 11-1-60(2)(b), Plaintiff seeks to convince this Court to use an expansive view of the Mississippi Constitution to sit as a "super legislature," relying on cases that represent the distinct minority view. Plaintiff's plea brings to mind a highly discredited period in the United States Supreme Court's history that began around the turn of the century and ended in the mid-1930s. During this period, known as the "*Lochner* era" (after the unsound decision, *Lochner v. New York*, 198 U.S. 45 (1905)), the Court nullified Acts of Congress that it disagreed with as a matter of public policy, using the United States Constitution as a cloak to cover its highly personalized decisions.

Lochner-like decisions create unnecessary tension between the legislative and judicial branches, undermine public confidence in the courts, and may raise potential problems under the

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[5] *See Thomas v. Warden*, 999 So. 2d 842 (Miss. 2008)) (upholding pre-suit notice requirement for medical malpractice actions); *Phipps v. Irby Constr. Co.*, 636 So. 2d 353 (Miss. 1994) (upholding statute of repose applicable to improvements to real property); *Flour Corp. v. Cook*, 551 So. 2d 897 (Miss. 1989) (same); *Reich v. Jesco, Inc.*, 526 So. 2d 550 (Miss. 1988) (same); *Moore v. Jesco, Inc.*, 531 So. 2d 815 (Miss. 1988) (same); *Anderson v. Fred Wagner and Roy Anderson, Jr., Inc.*, 402 So. 2d 320 (Miss. 1981) (same); *Vortice v. Fordice*, 711 So. 2d 894 (Miss. 1998) (upholding Mississippi Tort Claims Act); *Mohundro v. Alcorn County*, 675 So. 2d 848 (Miss. 1996) (same); *Wells v. Panola County Bd. of Educ.*, 645 So. 2d 883 (Miss. 1994) (upholding limits on injuries arising out of school bus accidents); *Walters v. Blackledge*, 71 So. 2d 433 (Miss. 1954) (upholding Workmen's Compensation Law).

[6] Similarly, the United States Supreme Court has acknowledged Congress's constitutional authority to modify or abolish common law remedies. *See, e.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.") (internal citations omitted).

United States Constitution. *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907 (2001); Stephen B. Presser, *Separation of Powers and Civil Justice Reform: A Crisis of Legitimacy for Law and Legal Institutions*, 31 Seton Hall L. Rev. 649, 664 (2001) ("If too many state courts insist on preserving an ahistorical, illegitimate law-making power to frustrate civil justice reform, perhaps it is not too far-fetched to imagine a federal court solution to the problem."). This Court should reject Plaintiff's invitation.[7]

CONCLUSION

For these reasons, this Court should uphold Miss. Code Ann. § 11-1-60(2)(b).

Respectfully submitted,

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Dated: December 9, 2009

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[7] *See* M. Margaret Branham Kimmel, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. Rich. L. Rev. 95, 118 n.161 (1987) ("Whether these measures are advisable as a policy matter is not the issue properly before the courts, for in a democracy it is vitally important that the judiciary separate questions of social wisdom from questions about constitutionality. Questions of wisdom are more appropriately retained for decision by the more representative legislative organs of government.").

CERTIFICATE OF SERVICE

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