IN THE SUPREME COURT OF OHIO

Amanda Brandt,	:	
	:	
Appellant,	:	Case No. 2021-0497
	:	
v.	:	On appeal from the Cuyahoga County
	:	Court of Appeals, Eighth District
Roy Pompa,	:	
	:	Court of Appeals
Appellee.	:	Case No. CA 20 109517
	:	

MOTION FOR RECONSIDERATION OF APPELLEE ROY POMPA

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MOTION FOR RECONSIDERATION
OF APPELLEE ROY POMPA

Appellee Roy Pompa moves and requests that the Supreme Court of Ohio reconsider its decision issued December 16, 2022 in the above-styled case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

> *"In addition, over my objection,* ***the court did not follow the regular and orderly internal rules of operation and practice in this case*** *…. This case involves many constitutional issues that deserve to be more completely analyzed and debated so that they may be resolved appropriately.* ***The litigants deserve full and fair consideration of their case, which has been shortchanged here****. We should do better."*
>
> [*Brandt v. Pompa*, Slip Opinion No. 2022-Ohio-4525 ("Decision") (emphasis added)]

Not only have the Court's internal rules of operation and practice been disregarded, the Decision ignores, and runs headlong into, settled Ohio jurisprudence compelling an order ultimately affirming, not reversing, the two prior lower court decisions rejecting Appellant's ***factual*** arguments on multiple, alternative grounds. The fundamental errors here are many, with the Decision in many respects offering little or a flatly-wrong analysis on several fundamental issues. Among other errors, the Decision impermissibly:

- Is the product of a process undertaken inconsistent with the Court's own internal rules, thus casting a dark shadow of, at least, ***an appearance of impropriety*** as to (a) the Decision itself—which precluded at least one dissenter from completing his Dissent, thus denying both the majority and the public the well-recognized benefits of dissenting opinions; (b) the timing of the Decision's issuance; and (c) the apparent posturing taken to manipulate the ordinary process for the consideration of reconsideration requests—a manipulation which is inconsistent with this Court's Rules of Practice and its historical (and recent) practices. Ohio authorities are clear that the appearance of impropriety taints the integrity of the judicial process and is just as damaging to public confidence as actual bias. So clear is Ohio law that such appearance must be absolutely avoided, that a judge must be disqualified from hearing a matter where an appearance of impropriety exists. Under Ohio's Code of Judicial Conduct, "impropriety" includes conduct that violates "court rules."

- Renders an advisory opinion merely to create a platform for the announcement of a result-oriented opinion. The Decision affords the Appellant no practical or meaningful benefit. This matter was improvidently considered with no constitutional necessity existing for the consideration of this case.

- Adopts an analysis dismissive of, and ***flatly inconsistent*** with, the Court's decision in *Simpkins v. Grace Brethren Church of Delaware*, 149 Ohio St. 307, 2016-Ohio-8118, 75 N.E.3d 122. Key aspects of *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, are casually disregarded or, at most, purportedly distinguished on grounds of no substantive or practical effect.

- ***Fails*** to properly consider the facts, apply the correct evidentiary test, and defer to the Trial Court's factual findings. In unfairly criticizing the Eighth District's consideration of the facts, the Decision relies extensively on the jury's findings, which required Appellant to prove her case only by a preponderance of the evidence. But the Decision has it all wrong. ***It was the Trial Court, not the jury, which considered Appellant's as-applied constitutional claim*** subject to the clear and convincing standard test articulated under *Simpkins v. Grace Brethren Church of Delaware*. The jury's findings were irrelevant on this point. The Decision inexplicably and improperly ignores such basic matters as the Trial Court's role and decision making responsibility. Compounding these errors, the Court refuses to defer to the Trial Court's factual findings, as a legion of Ohio cases have held must be done, and then purposefully ignores the substantial evidence adverse to Appellant's position. As the Eighth District correctly held, Appellant's evidence did not satisfy the demanding clear and convincing standard. At best, the evidence was "equivocal."

- Takes an as-applied constitutional challenge, which necessarily focuses on the application of a statute to the particulars of Appellant's case, and boot straps on to it class relief for persons whose claims were not before the Court. ***It does so even though Appellant never perfected this issue before the Trial Court—as noted in Appellee's Merit Brief***.

- Purports to apply the rational-basis test in scrutinizing Appellant's claim, but obviously did not, as further explained below.

Simply put, the Decision is, as the Dissenting Justices expressly observed, "result-oriented judicial activism." Slip Opinion ¶ 74. Indeed, the Decision literally begins with the result-oriented conclusion in its first sentence, and what follows, as apparent to any discerning reader, is a failed attempt to justify the conclusion as the

majority purposefully usurps the General Assembly's role and assumes the mantle of legislative policy-maker in direct violation of Ohio's Constitution. But the end cannot, and should not be permitted, to justify the means.

Ohio's highest Court now finds itself in rarefied air. Only infrequently in the history of American jurisprudence have courts, be they federal or state, held a statute unconstitutional by applying a rational-basis test—but the Decision does. It indirectly acknowledges that the tort-reform measures prescribed by the General Assembly do not implicate a fundamental constitutional right, so a strict-scrutiny analysis is inapplicable. Thus the only narrow question remaining is whether the statutory caps can withstand scrutiny under the extremely deferential rational-basis test—a test that almost invariably compels affirmance of the constitutionality of the statute.

In all constitutional challenges, legislation is presumed to be constitutional, and where a rational-basis test is applied, an appellant must carry "the burden to negate every conceivable basis that might support the legislation." *Pickaway County Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 2010-Ohio-4908, 936 N.E.2d 944, ¶ 20. And, "if under any possible state of facts the sections of the law would be constitutional, [the] court is bound to presume that such facts exist." (Emphasis added.) *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 159 (1955). The legislative history of R.C. 2315.18 established those facts. This Court has already held, and it remains binding precedent, that R.C. 2315.18(b) bears a real and substantial relationship to the general welfare of the public. *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 58. The Decision does not appear to challenge this proposition. Instead, the Decision declares that the General Assembly's drawn

distinctions between physical catastrophic injuries and psychological injuries is unreasonable, even though the "General Assembly was required only to be rational and unarbitrary" in establishing this distinction, which is a low bar easily cleared here. Slip op. ¶ 66. The end result, as the Dissent aptly observed, was the majority unconstitutionally decreeing itself the arbiter and legislator of Ohio policy. This violates Ohio' settled separation of powers.

While Appellant makes this Motion, it is the Ohio Constitution, and Ohioans themselves, who demand reconsideration of the Decision.

II. LAW AND ANALYSIS

A. The Violation Of This Court's Internal Rules And Practices Prematurely Terminated The Court's Analysis; Improperly Prevented The Full Consideration Of The Merits; And As Justice Fischer States, "Shortchanged" The "Fair Consideration" Of This Case, To The Material Detriment of The Parties, The Public, And The Court.

Albeit incomplete, Justice Fischer's dissent, firmly rooted in precedent and hornbook propositions of Ohio law, offers a complete rebuttal to the majority's analysis. The Dissent also foreshadows there is even more to be said on this important subject—if Justice Fischer had merely been afforded the time permitted under the Court's internal rules. But in the rush to issue a result-oriented Decision, the Court was not afforded the opportunity to consider Justice Fischer's completed dissent or even reflect upon his Dissent as written, which is inconsistent with the recognized importance of dissents generally and before this Court specifically. *See* Hon. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 144 (1990); Hon. William O. Douglas, *The Dissent: A Safeguard of Democracy*, 32 J. Am. Judicature Soc'y 104, 106 (1948);

Melvin I. Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 Pepp. L. Rev. 919, 926–27 (2012).

1. Inhibiting Justice Fischer's Ability To Dissent Harms The Public – And The Court.

Dissents are written for a dual audience. One, undoubtedly, is the public. The "citizens of Ohio," as Justice Fischer noted, deserve the same careful analysis and debate of significant constitutional issues as the litigating parties. Another is what the late Supreme Court Justice Ruth Bader Ginsburg referred to as an "in-house" audience: the other members of the Court. She commented: "My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation." Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 3 (2010). She cited an illustration: "[T]he Virginia Military Institute (VMI) case, decided by the Court in 1996, held that VMI's denial of admission to women violated the Fourteenth Amendment's Equal Protection Clause. [*See United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 135 L.Ed.2d 735 (1996).] [She] was assigned to write the Court's opinion. [She commented] [t]he final draft, released to the public, was ever so much better than [her] first, second, and at least a dozen more drafts, thanks to Justice Scalia's attention-grabbing dissent." *Id.*

"Vigorous written debate of the issues" provoked by the dissent improves the majority's opinion "by forcing the prevailing side to deal with (or to ignore at its peril) the toughest objections that can be raised to its position as urged by the losing side." *See* Hon. Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 Roger Williams U. L. Rev. 401, 408 (1999). Justice Scalia shared Justice Ginsburg's experience in this regard. He

wrote, “When I have been assigned the opinion for the Court in a divided case, nothing gives me as much assurance that I have written it well as the fact that I am able to respond satisfactorily . . . to all the onslaughts of the dissents or separate concurrences.” Hon. Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33, 41. Justice Brennan did too: “A dissent,” he wrote, “challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority’s reasoning can continue to be evaluated, and perhaps, in time, superseded.” Hon. William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L.J. 427, 435 (1986). After all, “[i]f the majority cannot answer these arguments effectively, or at all, then perhaps its opinion is less deserving of respect, let alone of being slavishly followed as precedent, when analogous factual situations arise in the future.” *See* Flanders, *The Utility of Separate Judicial Opinions*, 4 Roger Williams U. L. Rev. at 408.

2. Dissents That Improve The Majority Opinion *By Becoming* The Majority Opinion.

Of course, “the best way in which a separate judicial opinion can improve the majority’s opinion is by ***becoming*** the court’s opinion.” *See* Flanders, *supra*, 4 Roger Williams U. L. Rev. at 409 (Emphasis added.) “If the vote at conference was four to three,” for example, “it only takes one convert to turn [a] dissent into a majority opinion. That is not a fanciful possibility” – not even, apparently, at the United States Supreme Court. *See* Hon. Kermit V. Lipez, *Some Reflections on Dissenting*, 57 Me. L. Rev. 313, 319 n.4 (2005). “On occasion—not more than four times per term,” Justice Ginsburg estimated, “a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court. I had the heady experience once of writing a dissent for myself and just one other Justice; in time, it became the opinion of the Court from

which only three of my colleagues dissented." *See* Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. at 4.

A tendency to underestimate this important function of dissents may be attributable to the fact that it occurs behind the closed doors. As former United States Solicitor General Paul Clement, a one-time clerk to Justice Scalia, explains. "Probably the single most successful dissents are the ones that we on the outside never see . . . . Because if a dissenting opinion convinces the majority to completely change its reasoning or causes a justice who indicated after argument that he or she was going to vote with the majority to switch their vote, then the dissent becomes the majority… So you could almost say we see nothing but failed dissents." Anastasia Boden & Elizabeth Slattery, *Supreme Court Dissents' Role In Shaping Our Laws*, Pacific Legal Foundation, Nov. 16, 2020, available at https://pacificlegal.org/supreme-court-dissents-role-in-shaping-our-laws/ (last accessed Dec. 17, 2022).

Yet this is also where the ***time afforded to the dissenting Justice to carefully draft his opinion is the most important***. "Oral objections to the result and/or to the reasoning of the majority that are communicated during one of the court's conferences, or even in written form, do not tend to be as fully articulated, as pointedly researched, or as convincingly argued as they are when they have been embodied in a written draft of a formal dissenting or concurring opinion that the author has prepared for eventual publication." Flanders, *The Utility of Separate Judicial Opinions*, 4 Roger Williams U. L. Rev. at 409. Thorough consideration of a colleague's persuasive writing can, and has, changed minds. It also can, and has, changed the law – ***including in this Court***. *See*, *e.g.*, *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539, 548, 697

N.E.2d 181 (1998) (Lundberg Stratton, J., concurring) ("In reconsidering *Buckeye Community Hope Found*., and in weighing all of those heavy thoughts and constitutional issues, about which volumes have been written, I now join the new majority because I believe it has arrived at the right analysis; I now believe my former view was wrong."); *see also State v. Braden*, 158 Ohio St. 3d 462, 2019-Ohio-4204, 145 N.E.3d 235, ¶ 15 ("Braden argues . . . that our decision in *Braden I* is inconsistent with our recent decision in *Thompson*, and we agree. Although the dissenting opinion in *Braden I* presented that analysis . . . there is no indication in the majority opinion that the majority fully considered and rejected it.").[1] "Thus, even if they are never published, dissents serve the internal corrective functions of checking the court's preliminary thinking, of opening other vistas on the problems presented by the case at bar, and of giving those judges in the majority one last chance to opt out of skiing down that steep, mogul-strewn trail that they have started to take in lieu of what the dissenter believes is a wider, safer, or straighter path to the bottom of the case." Flanders, *supra*, 4 Roger Williams U. L. Rev. at 409.[2]

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[1] *Buckeye Cmty*. and *Braden II* involved motions for reconsideration wherein the majority embraced what had at first been the dissent's opinion – because a change upon a motion for reconsideration is the only time the public is privy to one or more of this Court's Justices being persuaded by a dissenting colleague.

[2] Even when they do not change minds in the present, dissents can play a defining role in shaping the legal landscape of the future. Consider, for example, "[t]he first of the great canonical dissents," that of Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). *See* Urofsky, *Mr. Justice Brandeis and the Art of Judicial Dissent*, 39 Pepp. L. Rev. 919 at 924. While the Court's majority announced the "separate but equal" doctrine, resigning Black Americans to second class citizenship, Justice Harlan advocated for the sincere application of the Equal Protection Clause as we recognize it today: "[I]n view of the constitution . . . there is in this country no superior, dominant, ruling class of citizens. . . Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy*, 163 U.S. at 559 (Harlan J., dissenting).

There is every reason to believe that a completed dissent would have avoided the material errors identified herein. Accordingly, the Court's violation of its own rules is the first grounds for an order compelling reconsideration of this matter.

B. Ohio Law Forbids The Issuance Of Advisory Opinions—The Facts Do Matter.

Aside from internal rule violations, the initial, obvious question presented by this appeal was why would the Court accept for review a case where the Appellant possessed a $114 million uncollectable judgment and a successful appeal would afford her a $134 million uncollectable judgment, aside from the explanation offered by the dissenters? This is especially true where the Court had already considered these same issues in *Simpkins v. Grace Brethren Church of Delaware*.

Any one of multiple propositions of Ohio law found in this Court's precedent make clear this matter should not be considered. The Court has repeatedly held it will not indulge in advisory opinions, and thus "[e]very court must 'refrain from giving opinions on abstract propositions and * * * avoid the imposition by judgment of

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Similarly, Justice Brandeis' dissent in *Olmstead vs. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) – wherein he objected to the government's warrantless wiretap – became the foundation for a number of contemporary opinions that secure critical individual rights. "The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478 (Brandeis J., dissenting). Closer to today is Justice Stevens' blistering dissent in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 92 L.Ed.2d 140 (1986), which, only 17 years later served as the cornerstone for the Court's about face on the same issue in *Lawrence v. Texas*. *See* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.E.d2d 508 (2003) ("Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. . . The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

premature declarations or advice upon potential controversies.'" *Arbino* at ¶ 84. Similarly, "[i]t has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts ***and to render judgments which can be carried into effect***." (Emphasis added.) *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). Where a constitutional challenge is advanced, "Ohio law abounds with precedent to the effect that constitutional issues should not be decided ***unless absolutely necessary***." (Emphasis added.) *Hall China Co. v. Pub. Utils. Comm'n*, 50 Ohio St.3d 206, 210, 364 N.E.2d 852, 854 (1977).

The Decision implicitly concedes the Court proceeded in violation of this precedent. Specifically, in its closing paragraph, the Decision proclaims that what, if anything, Appellant ultimately recovers "is irrelevant to determining whether R.C. 2315.18 is unconstitutional as applied to [Appellant] and ***similarly situated plaintiffs***. [And then adds that] [a]ny suggestion otherwise serves to prejudice the reader and should be seen for what it is: a distraction from the legal question before this court." Slip Op. at ¶ 45 (emphasis added).

This quoted excerpt is revealing and ultimately prejudicial to the Decision, as readily apparent to an informed reader. The majority declares the underlying facts do not matter in resolving whether the Court should have, in the first instance, even considered Appellant's claim. It further concedes that it elected to resolve a legal issue, irrespective of whether the judgment has an effect beneficial for Appellant, for the benefit of similarly situated plaintiffs not before this Court. By any measurement, this is a quintessential advisory opinion on a constitutional issue where no need for resolution

existed. Two mutually exclusive choices, therefore, existed for the majority. It could have (and should have) not proceeded to consider the "legal issue" or, alternatively, it should have plainly stated that it was reversing over a hundred years of precedent and now affirmatively taking the position the Ohio Supreme Court is open to considering legal issues for non-certified classes of persons not before the Court even where the Court's resolution is of no actual or practical import for the actual parties. We submit these two mutually exclusive choices ultimately were not choices at all. The Court's precedent compelled adoption of the first.

C. The Decision Violated This Court's Precedent For Considering The Factual Issues—The Trial Court's Factual Determinations Must Be Accepted Unless Clearly Erroneous.

Appellant's "as applied" constitutional challenge raises factual issues. "A party raising an as-applied constitutional challenge must prove ***by clear and convincing evidence*** that the statute is unconstitutional when applied to an existing set of facts." (Emphasis added.) *Simpkins* at ¶ 22. In the Decision, the majority "conclude[s] that [Appellant] has shown by clear and convincing evidence that R.C. 2315.18 is unconstitutional as applied to her under the due-course-of-law provision in Article I, Section 16 of the Ohio Constitution." Slip op. ¶ 37.

The majority's conclusion, however, is utterly flawed and is so in many basic respects. First, the majority cites with approval the jury's determination and makes extensive reference to the jury instructions. But the jury's award is completely irrelevant as to whether Appellant has carried her burden by ***clear and convincing evidence***. The jury considered, as made clear in the jury instructions, Appellant's evidence under the substantially lower burden of a ***preponderance of the evidence***.

Second, the majority is critical of the Eighth District and its review of the evidence. The criticism is greatly misplaced. The majority inexplicably confuses the role of a jury and a judge in considering an as-applied constitutional challenge. ***The jury was not, as the majority suggests, "the trier of fact" on this constitutional issue***. Slip Op. ¶41. It was the Trial Court. It was Appellant's burden to prove her case, by clear and convincing evidence, to the Trial Court, and it was the Trial Court's purview to weigh the evidence and credibility in resolving this issue—determinations that were subject to only a clearly erroneous standard of review by this Court.

Under this deferential standard, a trial court's factual findings will not be reversed so long as "some competent, credible evidence" supports the decision. *Kinney v. Mathias*, 10 Ohio St.3d 72, 74, 461 N.E.2d 901 (1984). *Accord: State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8 (mixed questions of law and fact require appellate court to "accept the trial court's findings of fact if they are supported by competent, credible evidence"). An appellate court reviewing a trial court's factual findings "should not substitute its judgment for that of the trial court…." *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 355, 671 N.E.2d 1136 (1993). After all, the trial court "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *In re Jane Doe 1*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991). *See Stevens v. Highland Cty. Bd. of Comm'rs*, 4th Dist. Highland No. 04CA21, 2005-Ohio-2338, ¶ 10 (same).

The Trial Court "is presumed to [have] follow[ed] the applicable law in all respects." *In re Disqualification of Martin v. Marsh*, 36 Ohio St.3d 603, 603, 522 N.E.2d

457 (1987). *State v. Lloyd*, 12th Dist. Warren No. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶ 28 (12th Dist.) (same). Ohio law also presumes the trial court properly "considered the evidence and appropriately applied the evidence to the applicable law." *Stevens,* at ¶ 15 (where court did not issue findings of fact and conclusions of law, the reviewing court "must, therefore, presume the regularity of the proceedings and that the trial court considered the evidence and appropriately applied the evidence to the applicable law"). The lack of specific factual findings does not diminish this presumption. *See State v. Adams*, 37 Ohio St.3d 295, 297 (1988) ("we hold that a silent record raises the presumption that a trial court considered the [sentencing factors] contained in R.C. 2929.12"); *State ex rel. Fulton v. Halliday*, 142 Ohio St. 548, 549 (1944) ("The proceedings of a trial court are deemed correct unless error affirmatively appears on the face of the record.").

The Trial Court found, based upon its assessment of the record evidence, that Appellant failed to establish by clear and convincing evidence that application of R.C. 2315.18(B)(2) to her damages was unconstitutional. The Eighth District's role was to determine whether the trial court's determination was clearly erroneous. It held it was not and outlined the contra-evidence showing that Appellant's evidence was ***equivocal*** and did not satisfy the clear and convincing standard.

Nevertheless, as part of its critique of the Eighth District, the Decision offers select citations to the record, while simply excluding the balance of the evidentiary record. The record is clear, however. There is substantial evidence in the record raising significant questions as to the cause of Appellant's alleged "permanent and severe psychological injuries, ranging, on the one hand, from Dr. Yingling's testimony

concerning Appellant's exaggerated responses in response to testing inquiries and how it ultimately rendered her responses invalid to, on the other hand, the assortment of other, often times self-induced, stressors in her life. The Decision cherry picks facts for its conclusion, and proceeds to perform tasks not properly undertaken by the highest appellate court: a determination of the facts by weighing the evidence and assessing credibility.

In short, there is nothing correct about the majority's Decision. It identified the wrong trier of fact, it misconstrues the Eighth District's role in the review process, and conveniently ignores the evidence in the record as it erroneously assumes the role of the trier of fact.

D. An As Applied Challenge Is Limited To The Parties Before The Court; It Does Not Include A Non-Certified Class Of Similarly Situated Plaintiffs.

Throughout the Decision and in considering only an as-applied constitutional challenge, the majority rules on behalf of purportedly "similarly situated" individuals not before this Court. This is plainly erroneous for multiple reasons. The first is Appellant ***did not even properly perfect*** this claim before the Trial Court. In support of her argument that R.C. 2315.18 violated her right to due course of law under Article I, Section 16, of the Ohio Constitution, Appellant's briefing before the Trial Court merely introduced this constitutional provision and then confined her argument to one sentence: "The application of R.C. 2315.18's damage caps to Amanda Brandt, a minor victim of sexual abuse, is not rationally related to the public's health, safety or welfare and is both unreasonable and arbitrary." [Plaintiff's Memorandum in Opposition to Defendant's Post-Trial Brief, at 2.] That was the entirety of the argument, as Appellee

noted in its Merit Brief. This limited argument cannot be expanded before this Court to include an uncertified class.

Second, ***challenges that "reach beyond the particular circumstances" of a case*** must satisfy "standards for a facial challenge to the extent of that reach." (Emphasis added.) *John Doe No. 1 v. Reed*, 561 U.S. 186, 194, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010).[3] Here, the majority affirmatively stated it ***did not*** consider Appellant's facial challenge. As a result, the only claim (possibly) proper before this Court was Appellant's. Consideration of an uncertified class ignores the basic and universally recognized differences between an as-applied and facial constitutional challenge. Once again, precedent must prevail absent this Court reversing its precedent under *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, and adopting a position inconsistent with courts across the country, including the United States Supreme Court, for considering as-applied constitutional challenges, which necessarily is limited to the litigant actually before the Court.

Of course, by considering the interests of a de facto uncertified class notwithstanding Appellant's failure to perfect the issue, the Court squarely placed

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[3] In *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509 (6th Cir. 2012), for example, the Sixth Circuit held that a purportedly as-applied challenge to legislation requiring warning labels for tobacco products should be analyzed as a facial challenge. The concurring opinion explained the reasoning for this holding. The act required textual and graphic warning labels, which the FDA was required to design and promulgate. *Id.* at 552. The plaintiffs claimed their suit was as-applied because it challenged the specific images the FDA selected. *Id.* Rejecting this argument, the concurring opinion explained that the "relief flowing from [plaintiffs' claim that the warnings violated the First Amendment], should they prevail, would render the warnings unconstitutional with respect to any tobacco-product manufacturer, retailer, distributor, or importer, ***not just the specific entities that are a party to this lawsuit*****."** (Emphasis added.) *Id. at 554.* Because of the broad impact of the relief, *John Doe # 1 v. Reed* required analyzing this issue as a facial challenge. *Id.*

Appellant's facial challenge front and center for consideration. It could not simply ignore this claim, although it is apparent it did so because even Appellant implicitly acknowledged in her merit briefing she had not advanced a proper facial challenge. Therefore, only two options exist: Address the invalid facial challenge or limit the as-applied claim to Appellant. There is no other choice available that is consistent with this Court's precedent.

E. The Majority Misapplied The Rational Basis Analysis And Unconstitutionally Supplanted The Role Of The General Assembly.

On this issue, the Dissent of Justices Kennedy, DeWine and Fischer and separate Dissent of Fischer offer the most comprehensive explanation of the majority's errors. What stands out most, however, is that the Dissents announce no new standard. Their analysis does not turn on authorities from outside this state or some controversial proposition of law. Rather, the Dissents are predicated upon long-established precedent from this Court and a straightforward application of the law to the legislative deliberations and process culminating not only in the challenged statutory caps, but also passage of R.C. 2315.21(D)(6), which ***created an exception from the tort reform statutory caps to provide unlimited punitive damages for this precise fact pattern***. It is impossible to suggest that the General Assembly did not consider the specific competing public concerns underlying this case in enacting the statutory limitations given the care it took to create an exemption for punitive damages for these very circumstances.

The Court's majority may have reached a different conclusion if they had been charged with enacting legislation, but this was not the majority's decision to make. That

decision lies exclusively in the province of the General Assembly. Policy disagreements are not a basis for overruling the legislative process.

CONCLUSION

For these many reasons, the Decision should be reconsidered and vacated, and the decision of the Eighth District Court of Appeals affirmed.

Respectfully submitted,

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