No. 2025-0386

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NOS. 113687, 114019

JOHN PAGANINI,

Plaintiff-Appellee,

v.

THE CATARACT EYE CENTER OF CLEVELAND,

Defendant-Appellant.

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I. INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys' members include attorneys, corporate executives, and claims professionals dedicated to defending tort litigation and other civil actions throughout Ohio. For over 50 years, OACTA has provided a forum where professionals work together to improve the administration of justice in Ohio. OACTA promotes fairness, predictability, stability, and consistency in Ohio's civil justice system.

The medical claim tort reform measures in Amended Substitute Senate Bill 281, including R.C. 2323.43(A)(3)'s caps on noneconomic loss, align with OACTA's mission by making Ohio's civil justice system fairer and more predictable. Responding to a medical liability crisis, and after balancing policy concerns, the General Assembly decided to stabilize health care delivery costs by limiting inherently subjective noneconomic loss awards. Am.Sub.S.B. No. 281, §3(A)(3) ["Senate Bill 281"]; Benjamin, et al., *Final Report and Recommendations of the Ohio Medical Malpractice Commission*, at 3-7 (Apr. 2005), https://insurance.ohio.gov/about-us/reports ["Commission Report"]. Given the evidence before it, the General Assembly could rationally have found that limiting those awards would help stabilize these costs by alleviating incentives "to over prescribe, over treat, and over test" patients and reducing annual hikes in malpractice insurance premiums. *See* Senate Bill 281 at §3(A)(3)-(4). That is enough to uphold the caps under the rational basis test. So the Eighth District erred by declaring R.C. 2323.43(A)(3)'s second-tier limit of one million dollars unconstitutional on its face under Section 16, Article I's "due course of law" provision. *See Paganini v. Cataract Eye Ctr. of Cleveland*, 2025-Ohio-275, ¶ 64-67 (8th Dist.) ["App. Op."].

II. STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts in Appellant The Cataract Eye Center of Cleveland's Merit Brief.

III. ARGUMENT

Proposition of Law:

> **The "hard limit" on recoverable noneconomic loss in R.C. 2323.43(A)(3) that applies to "catastrophic injuries" does not violate the "due course of law" provision in Article I, Section 16 of the Ohio Constitution and is therefore constitutional.**

R.C. 2323.43(A)(3) sets a "two-tiered" cap on noneconomic loss in civil actions for medical claims. The Eighth District erred by declaring that: (i) the second tier lacks "a real and substantial relationship to medical-malpractice insurance rates," App. Op. ¶ 64; (ii) its "hard limit" is arbitrary and unreasonable, *id*. ¶ 66; and (iii) the rulings in (i) and (ii) address and resolve an as-applied constitutional challenge. *See id.* ¶ 64, 67.

A. Paganini requested and the Eighth District declared this "hard limit" unconstitutional on its face.

The Eighth District started off on the wrong foot by adopting Paganini's characterization that he was challenging R.C. 2323.43's constitutionality as applied to him. App. Op. ¶ 50. Paganini made arguments and received relief that reached beyond his case, meaning those arguments should be treated as a *facial* challenge.

As background, constitutional challenges are either facial or as-applied. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 26. Each carries a distinct burden of proof. A facial challenge requires proof beyond a reasonable doubt that no set of circumstances exists under which the statute would be valid. *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Edn.*, 2006-Ohio-5512, ¶ 21, citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St.

142 (1955). Described by this Court as a "strict standard of review," the upshot is that a statute cannot be held facially unconstitutional just because it "might operate unconstitutionally under some plausible set of circumstances[.]" *Arbino* at ¶ 26. An as-applied challenge, by contrast, requires clear and convincing evidence that the statute is unconstitutional as applied to the challenger's circumstances. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 22. Because the standards differ, it is critical to correctly categorize the challenge. *Wymsylo*, ¶ 20.

The Eighth District erred by uncritically accepting Paganini's assertion that he challenges the second-tier cap "as-applied" because it reduces his award for noneconomic loss. App. Op. ¶ 50 (stating that "Paganini's argument is specific to his unusual circumstances, namely that the statute requires him to forego 66.4% of the damages awarded to him by the jury"). This proves too much: *all* persons subject to R.C. 2323.43(A)(3)'s caps have their award for noneconomic loss reduced. Thus, under Paganini's approach, no constitutional challenge to a damage cap would ever be treated as a facial challenge.

Perhaps the Eighth District meant that losing 66% (or more) of a noneconomic loss award makes a constitutional challenge as-applied. But this framing makes matters worse, not better. The $500,000 statutory limit results in a 66% reduction only when a jury awards at least $1.4 million for noneconomic loss. Holding a cap unconstitutional "as-applied" in those cases effectively creates a new threshold: caps apply up to $1.4 million, but not beyond. That is policymaking, not adjudication. It replaces a clear legislative standard with an arbitrary judicial one, untethered to the statute's text, purpose, or any evidence in the record. Courts are not free to rewrite statutes because they disagree with the line the legislature drew. *See State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v.*

Dupuis, 2002-Ohio-7041, ¶ 21 ("The General Assembly is the ultimate arbiter of public policy."). No rationale supports a rule of law treating broad facial arguments on damage caps as though they were as-applied challenges targeting the percentage by which the cap reduced the noneconomic loss award.

Rather, the focus is on the breadth of a challenger's argument and the relief that follows from it when deciding whether to treat a challenge as facial. If the arguments and relief "reach beyond the particular circumstances of" the plaintiff, then the challenge is facial. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). That is true here, making Paganini's challenge facial, not as-applied.

Take the argument first. Paganini's argument reaches beyond his circumstances. He claims R.C. 2323.43(A)'s limit on noneconomic loss for catastrophic injuries is unconstitutional—full stop. *See, e.g.*, Pl. Mot. to Include in any Judgment the Full Amount Awarded for Noneconomic Damages at 4 (Feb. 6, 2024) ("Paganini asks this Court to . . . [conclude] that R.C. §2323.43 is unconstitutional on . . . due process grounds."); *id.* at 11 ("The statute is . . . unconstitutional under due process as applied to noneconomic damage caps in medical claims."). By arguing that the statute violates due process "as applied to noneconomic damage caps in medical claims," Paganini did not confine his position to his circumstances. R.C. 2323.43(A)(3) *is* the noneconomic loss cap for "medical claims," so Paganini effectively sought a declaration that the statute is unconstitutional in all applications. That is a facial challenge.

The Eighth District's analysis confirms that Paganini's challenge does not turn on his circumstances. The panel relied on data from an Ohio Department of Insurance (ODI) 2019 Closed Claim Report to find no "real and substantial relationship" between R.C.

2323.43(A)(3)'s second-tier cap and medical-malpractice insurance rates. App. Op. ¶ 64. Whatever else may be said about this data and the panel's reliance on it, the report has nothing to do with Paganini or his case. In short, the panel's decision to tackle whether a "real and substantial" means-ends relationship exists by examining ODI closed claim, App. Op. ¶ 63-64, confirms Paganini's constitutional challenge reaches beyond his circumstances.

So does the Eighth District's analysis of whether the cap is "arbitrary and unreasonable." App. Op. ¶ 65-66. On that front, the panel examined this Court's decision in *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), holding an earlier damage cap unconstitutional and declared R.C. 2323.43(A)(3)'s second-tier cap "arbitrary and unreasonable because it contains a hard limit like the unconstitutional provision in *Morris*." (Cleaned up.) App. Op. ¶ 66. Just like the means-ends analysis, this analysis reaches well beyond Paganini's circumstances.

As for the relief Paganini sought and received, that too reaches well beyond him. The Eighth District found that "Paganini has shown by clear and convincing evidence that R.C. 2323.43(A)(3)'s cap on noneconomic damages is arbitrary and unreasonable[.]" App. Op. ¶ 67. That finding is not limited to Paganini. To be sure, the panel then added that "applying that cap to Paganini violates his rights under the due course of law clause in the Ohio Constitution." *Id*. But that would be true whether the challenge was as-applied or facial. *See Wymsylo*, ¶ 21 (facial unconstitutionality renders a statute "utterly inoperative"). Paragraph 67's second clause thus does not narrow the first.

In sum, Paganini asserted—and the Eighth District addressed and resolved—a facial constitutional challenge, not an as-applied challenge. The court below erred by not requiring

Paganini to meet the heavy burden this challenge demands: proving beyond a reasonable doubt that R.C. 2323.43(A)(3) is unconstitutional in *all* applications.

B. This Court should hold that the "due course of law" provision does not prevent the General Assembly from adjusting common law remedies, which is all R.C. 2323.43(A)(3) does.

As to the merits, the panel misapplies the rational basis test and can be reversed for this reason alone. *See* pp. 12-21, *infra*. But the holding that R.C. 2323.43(A)(3)'s "hard limit" is unreasonable and therefore unconstitutional reveals a more pressing issue: whether statutes on remedies that do not violate Section 16, Article I's right to a remedy can be challenged on substantive due process grounds. Paganini likely made a substantive due process challenge because caps on noneconomic loss preserve the right to remedy this Court recognized under Section 16, Article I, known as the Open Courts Clause. *E.g., Brandt v. Pompa,* 2021-Ohio-845, ¶ 33-34 (8th Dist.), *rev'd on other grounds*, 2022-Ohio-4525 (R.C. 2315.18's cap on noneconomic loss does not violate the right to remedy, as the damages allowed under it are a meaningful remedy), quoting *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 2016-Ohio-8118, ¶ 30, citing *Arbino*, 2007-Ohio-6948, at ¶ 47. There is no basis for a second substantive hurdle that statutes on remedies must clear. This Court should hold that statutes preserving the right to remedy, as R.C. 2323.43(A)(3) does, receive no further scrutiny under the Open Courts Clause.

1. The Open Courts Clause's "due course of law" provision and federal Due Process Clause differ.

To begin with, Ohio's Open Courts Clause and the federal Due Process Clause are "textually and historically distinct." *Cf. State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶ 21, 24 (ending "lockstep" interpretation under the Open Courts Clause in another context). Dating to 1802, the former grants "every person" in Ohio a "remedy by due course

of law" dispensed "without denial or delay" for "an injury done him in his land, goods, person, or reputation." Ohio Const., art. 1, § 16;[1] *see State v. Aalim*, 2017-Ohio-3956, ¶ 17. The federal Due Process Clause, ratified many years later, requires that "no State" action "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. Given these differences, "it is not a forgone conclusion" that the former "is the 'functional equivalent' of" the latter. *Stolz v. J & B Steel Erectors, Inc.*, 2018-Ohio-5088, ¶ 30 (Fischer, J., concurring). Even so, the Eighth District deemed Ohio's Open Courts Clause and the federal Due Process Clause "equivalent," citing this Court's precedents. App. Op. ¶ 52, citing *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 544 (1941). But those precedents never say why the two provisions are equivalent.

2. This Court's unreasoned assumption that "due course of law" is equivalent to federal due process is ripe for reexamination.

True, this Court long ago said the Open Courts Clause and federal Due Process Clause were equivalent—at least as to the "due course of law" phrase in the former—but this Court did so without "any extended discussion[.]" *Adler v. Whitbeck*, 44 Ohio St. 539, 569 (1887); *see Wilson v. City of Zanesville*, 130 Ohio St. 286, 289 (1935) (noting that "the Ohio Constitution contains a *similar* provision in which the words 'due course of law' are *equivalent* in meaning to 'due process of law'") (emphasis added), *overruled on other grounds by City of Cincinnati v. Correll*, 141 Ohio St. 535 (1943); *Direct Plumbing Supply* at 544 (stating that the "'due course of law' clause" is "the equivalent of the 'due process of law' clause in the Fourteenth Amendment" and citing *Wilson*).

[1] A nearly identical version of this clause appeared in the Ohio Constitution of 1802. *See* Ohio Const. of 1802, art. 8, § 7 ("That all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without denial or delay.").

Still, despite equating "due course of law" to federal due process, this Court stopped short of "lockstepping." *Bloom*, 2024-Ohio-5029, at ¶ 21, quoting Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018). Rather, the Court developed its own test for alleged due process violations. *See, e.g., Benjamin v. Columbus*, 167 Ohio St. 103, 110 (1957) ("[I]t is well settled that an exercise of the police power [interfering with an interest protected by due process] will be valid if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary."), citing *City of Piqua v. Zimmerlin*, 35 Ohio St. 507, 511 (1880).

During the 1980s and 1990s, without calling it a "rational basis" test, this Court applied this "due process" test to strike down tort reform legislation. *See, e.g., Mominee v. Scherbarth*, 28 Ohio St.3d 270, 274 (1986) (declaring former R.C. 2305.11(B), which modified the limitations period for medical claims, unconstitutional as applied to minors); *Morris*, 61 Ohio St.3d at 688–91 (striking down as facially unconstitutional a prior cap on recovery of general damages in cases asserting medical claims).

After the turn of the century, this Court began to call this test a "rational basis" test when upholding tort reform legislation. *See, e.g., Arbino*, 2007-Ohio-6948, at ¶ 48-62 (calling *Mominee* "a rational-basis test" and upholding noneconomic loss caps in R.C. 2315.18); *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010-Ohio-1029, ¶ 69-78 (calling *Mominee* "a rational-basis test" and upholding R.C. 2745.01's codification of Ohio's employment intentional tort); *Simpkins*, 2016-Ohio-8118, at ¶ 35-36 (after articulating modern rational-basis test, applying *Mominee* test to reject as-applied due process challenge to R.C. 2315.18's noneconomic loss caps), *not followed by Brandt,* 2021-Ohio-845, at ¶ 38.

Along the way, this Court never grappled with *why* tort reform statutes must clear two substantive hurdles on remedies. *See, e.g., Arbino*, at ¶ 43-62 (separately analyzing the "right to a remedy" and "due course of law" provisions in Section 16, Article I without explaining why one phrase in one clause contains two substantive guarantees); *Groch v. Gen. Motors Corp.*, 2008-Ohio-546, ¶ 108-173 (same). This Court "may reexamine unreasoned pronouncements . . . that provisions of the Ohio Constitution mean the exact same thing as provisions of the federal Constitution." *Bloom* at ¶ 31. It should do so here.

3. Neither text nor history support deriving a due process guarantee from the Open Courts Clause's "due course of law" provision.

First, there is no textual support for reading substantive due process into the Open Courts Clause. In ordinary usage, "due course of law" is the means—that is, the *procedure*—by which "every person . . . shall have remedy." Ohio Const., art. 1, § 16; *see also* Crema & Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va.L.Rev. 447, 464 (2022) (explaining that "'due *course* of law' . . . simply meant a legal proceeding held in the 'usual manner,' following a '[s]tated and orderly method'") (internal citation omitted; emphasis in original). If "shall have remedy by due course of law" creates two guarantees, then the latter should "parallel[] our own modern understanding of *procedural* due process." Crema & Solum, 108 Va.L.Rev. at 464 (emphasis added). Substantive due process review thus conflicts with the ordinary meaning of "due course of law."

Second, substantive due process review under the Open Courts Clause lacks historical support. This clause simply "provide[d] a constitutional underpinning for protection of the common-law courts from improper meddling[.]" Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 Rutgers L.J. 1005, 1019-1020 (2001). As this Court recognized, it "can be traced directly to the 1682 Frame of

Government of the Colony of Pennsylvania and Laws Agreed Upon in England, signed by William Penn, which is the historical origin of the concept of 'open court' in the United States." (Cleaned up.) *Bloom*, 2024-Ohio-5029, ¶ 6. Ultimately, though, the Open Courts Clause's wording "comes from Magna Carta Chapter 40, as viewed through the lens of Sir Edward Coke's Second Institute." Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or.L.Rev. 1279, 1281 (1995).[2]

That pedigree matters. For one thing, it shows "due course of law" is not "due process of law" by another name: due process protections stem from a separate Magna Carta provision. *See* Hoffman, 74 Or.L.Rev. at 1289 ("due course of law" is "not a state due process clause," as "the former provision emanated from Chapter 40 of Magna Carta, whereas the latter emanated from Chapter 39"). In other words, as a historical matter, substantive due process is not within the ambit of the Open Courts Clause.

For another, tracing the "due course of law" provision to Coke's Second Institute shows that locating substantive protections for remedies in the Open Courts Clause is historically questionable. The best reading of "[t]he provision's key phrases . . . disclose[s] its true meaning as a guarantee of freedom of the judiciary from corrupt influence and improper meddling." *Id*. at 1288; *see also id.* at 1316 ("An open courts clause analysis consistent with

[2] Chapter 40 of Magna Carta says: "To no one will We sell, to no one will We refuse or delay, right or justice." (Cleaned up.) Hoffman, 32 Rutgers L.J. at 1006, fn 4. Coke reinterpreted this chapter as saying: "[E]very Subject of this Realm, for injury done to him in *bonis*, *terris*, *vel persona* [goods, lands, or person] by any other Subject, be he Ecclesiastical, or Temporal, Free, or Bond, Man or Woman, Old, or Young, or be he outlawed, excommunicated, or any other without exception, *may take his remedy by the course of the Law*, and have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay." *Id*. at fn. 5, quoting Coke, The Second Part of the Institutes of the Laws of England: A Commentary upon Littleton 55-56 (1642) (emphasis added).

the origins of the provision should focus not on whether the legislature has abolished a 'remedy' but on whether the challenged action compromises the judiciary as an independent branch of government."). Thus, historically, imposing two substantive hurdles on tort reform legislation under the Open Courts Clause is two too many.

Given this lack of textual and historical support, this Court should clarify that tort reform statutes preserving the right to remedy receive no further Open Courts Clause scrutiny. That right "protects against laws that completely foreclose a cause of action for injured plaintiffs or otherwise eliminate the ability to receive a meaningful remedy." *Groch*, 2008-Ohio-546, ¶ 234, quoting *Arbino*, 2007-Ohio-6948, ¶ 96. A statute preserving this right complies with the only substantive right that one could read into the Open Courts Clause. *Cf.* Hoffman, 32 Rutgers L.J. at 1027 (stressing that early nineteenth-century cases invalidating legislation under this clause did so only if "the legislation infringed on vested rights").

Third, as practiced below and in other cases striking down tort reform statutes, substantive due process review wrongly allows Ohio judges to substitute their views on the reasonableness of public policy choices for the General Assembly's views. *See, e.g.*, *Mominee*, 28 Ohio St.3d at 275; *Morris*, 61 Ohio St.3d at 690-691. That not only infringes on the separation of powers but conflicts with this Court's directive to "'grant substantial deference to the predictive judgment of the General Assembly' under a rational-basis review." *Arbino* at ¶ 58, quoting *State v. Williams*, 88 Ohio St.3d 513, 531 (2000); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981) (noting that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature").

In sum, the substantive due process principles applied below wrongly allow the judiciary to "sit as a superlegislature to judge the wisdom or desirability" of tort reform

legislation that "neither affect[s] fundamental rights nor proceed[s] along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). This Court should clarify that the Open Courts Clause does not include a substantive due process component allowing "courts to judge the wisdom, fairness, or logic of legislative choices[.]" *Fed. Communications Comm. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

C. At the very least, this Court should align due process review under the Open Courts Clause with the federal standard and confirm that R.C. 2323.43(A)(3) passes this review.

But if this Court still believes that "due course of law" creates substantive protections "equivalent" to federal due process, *Arbino*, 2007-Ohio-6948, at ¶ 48, then it should clarify Ohio law by aligning Ohio's test with the federal rational-basis test.

1. This Court has articulated several versions of rational-basis review under the rubric of due process.

The need for clarity stems from the different ways that this Court has articulated Ohio's due process test over the last two decades. This Court has said that "[u]nder rational-basis review, we will uphold the statute as long as it is rationally related to a legitimate government interest." *Stolz*, 2018-Ohio-5088, ¶ 19. But this Court sometimes requires a separate finding that the statute "is not unreasonable or arbitrary." *Stetter*, 2010-Ohio-1029, ¶ 71. Other decisions jettison the first test altogether, replacing that test with one upholding a statute only if "(1) 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." *Arbino*, 2007-Ohio-6948, at ¶ 49, quoting *Mominee*, 28 Ohio St.3d at 274.

2. This Court should adopt the version that aligns with federal rational-basis review.

The Eighth District applied the test from *Mominee* below. *See* App. Op. ¶ 53. But that rational-basis test differs from the federal one: the United States Supreme Court has long followed the *Stolz* version. *See, e.g., Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *accord State v. Lowe*, 2007-Ohio-606, ¶ 18 (addressing federal constitutional challenge and explaining that, "[u]nder the rational-basis test, a statute survives if it is reasonably related to a legitimate government interest"). For several reasons, this Court should align Ohio and federal law by clarifying that *Stolz* is the correct rational-basis test.

First, this Court often looks to United States Supreme Court decisions when applying a state analogue to a federal constitutional provision. *E.g., Aalim*, 2017-Ohio-2956, ¶ 15-21. Those decisions, this Court says, "giv[e] the true meaning of the guaranties of the Ohio Bill of Rights." *Id. ¶* 15, quoting *Direct Plumbing Supply*, 138 Ohio St. at 545. Thus, if "'due course' and due process of law'" are the same, *Adler*, 44 Ohio St. at 569, then United States Supreme Court precedent governs Ohio substantive due process. *Aalim* at ¶ 15-21. In that event, the Ohio rational-basis test should mirror the federal test, as the *Stolz* test does.

Second, *Mominee*'s test is no rational-basis test. It predates modern tiers of scrutiny and is not rooted in federal precedent. The United States Supreme Court developed those tiers in "the early-to-mid twentieth century[.]" Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 Geo.J.L.& Pub.Pol'y 475, 475 (2016). True, *Mominee* borrowed its test from a mid-twentieth century case. *Mominee* at 274, quoting *Benjamin*, 167 Ohio St. 103, paragraph five of the syllabus. But that case announced its test with no analysis of federal precedent,

proclaiming the standard "well settled" under an Ohio 1880s decision. *Benjamin* at 110, citing *City of Piqua*, 35 Ohio St. 507.

The *Mominee* test thus conflicts with the logic of *Aalim* and *Direct Plumbing Supply*. And it cannot be reconciled with this Court's analysis in *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ*., 87 Ohio St.3d 55 (1999). There, this Court held that Ohio's rational-basis test for equal protection challenges mirrored the federal rational-basis test. *Id.* at 59-60. Rational-basis review, this Court explained, "is only one part of a carefully conceived structure of equal protection review, with each section occupying its own place in a larger scheme." *Id*. at 60. Thus, applying a modified rational-basis test would disturb "every other step of the analysis[.]" *Id*. This Court saw "no reason to create such a disturbance when the existing federal standard is workable and exceedingly well reasoned." *Id*.

So too here. To be sure, *Mominee*'s test echoes the United States Supreme Court's *Lochner*-era due process test. *See*, *e.g.*, Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv.L.Rev. 943, 952-953 (1927) (describing the due process test used by the United States Supreme Court to strike down legislation in the early 1900s). But that is a reason to reject this test, not embrace it. *See State ex rel. Conrath v. LaRose*, 2022-Ohio-3594, ¶ 36 (Kennedy, J., dissenting) (describing *Lochner v. New York*, 198 U.S. 45 (1905), as the "very definition of judicial activism"); *Aalim*, 2017-Ohio-2956, at ¶ 47 (listing *Lochner* as one "of the most criticized judicial decisions in American history").

What is more, *Mominee* offers no standard to guide a court's judgment on whether a statute is unreasonable or arbitrary, leaving that prong to "the judges' own mental processes." Brown, 40 Harv.L.Rev. at 956. This invites subjective determinations that are ill-suited for judicial review. *Cf.* Grove, 14 Geo.J.L.& Pub.Pol'y at 485 (after the United States

Supreme Court's docket shifted from error-correction to settling issues of great importance, "the Court needed to dispense with the relatively indeterminate 'reasonableness' standard and instead articulate doctrines that would guide the lower . . . courts" in cases it could not review). And it "increase[s] the risk of good faith misunderstandings and create[s] opportunities for disguising deliberate noncompliance." *See id*., quoting Heytens, *Doctrine Formulation and Distrust*, 83 Notre Dame L.Rev. 2045, 2048 (2008).

Third, *Mominee* imposes a due process test that is stricter than equal protection rational-basis review. *Mominee* requires evidence supporting the means-ends relationship to show rationality. *E.g.*, *Mominee*, 28 Ohio St.3d at 275 (criticizing defendants' failure to "proffer any evidence" on the effect tort reform had on insurance premiums); *Morris*, 61 Ohio St.3d at 690 (same); *see also Arbino*, 2007-Ohio-6948, ¶ 49 ("Under this test, we must examine the record to determine whether there is evidence to support such a relationship."). But this Court rejected the argument that evidence is required for this purpose under an equal protection analysis, holding that "the state has no obligation to produce evidence to sustain the rationality of a statutory classification under Ohio's standard of rational-basis review." *Am. Assn. of Univ. Professors*, 87 Ohio St.3d at 60. No logic supports this difference.

Rather, the result under due process and equal protection rational-basis review should be the same, as this Court has repeatedly stressed. *See Stolz*, 2018-Ohio-5088, at ¶ 26 ("Our analysis of Stolz's substantive-due-process claim gives away the ending as to his equal-protection claim."); *State v. Grevious*, 2022-Ohio-4361, ¶ 39 (explaining that "his due-process argument is based on the same grounds as his equal-protection argument and therefore receives the same rational-basis review that applies in the equal-protection context"). This

Court should end this unexplained departure from the deferential federal rational-basis review and adopt the *Stolz* test.

3. Federal rational-basis review is highly deferential.

Several important principles flow from the *Stolz* test. *First*, the burden is on the challenger to show irrationality. *Columbia Gas Transm. Corp. v. Levin*, 2008-Ohio-511, ¶ 91 (challenger "bears the burden to negate every conceivable basis that might support the [action]"). Thus, he "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

Second, as discussed, the means-ends relationship need not be supported by admissible evidence. *Am. Assn. of Univ. Professors*, 87 Ohio St.3d at 60. Rather, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315.

Third, when legislative findings exist, this Court must give those findings "substantial deference." *State v. O'Malley*, 2022-Ohio-3207, ¶ 24, quoting *Williams*, 88 Ohio St.3d at 531. Deference is key, as the General Assembly "is an institution better equipped to amass and evaluate the vast amounts of data bearing on" the rationality of a legislative choice. *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 330 fn. 12 (1985). Thus, when "there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Clover Leaf Creamery*, 449 U.S. at 464. In other words, if the facts and assumptions underlying the statute are arguable, that "is sufficient, on rational-basis review, to 'immuniz[e]' the [legislative] choice from constitutional challenge." *Beach*

Communications, 508 U.S. at 320; *see also Clover Leaf Creamery*, 449 U.S. at 466 ("Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives.") (emphasis in original). The Eighth District was wrong to focus on whether the General Assembly's findings made the rationality of the relationship between a cap on noneconomic loss and lowering medical malpractice insurance rates "clear." App. Op. ¶ 63.

Fourth, rational-basis review does not require a precise "fit" between the General Assembly's goals and the means it uses to achieve them. *See O'Malley* at ¶ 24, quoting *Arbino*, 2007-Ohio-6948, ¶ 66 ("Under this review, 'a statute will not be invalidated if it is grounded on a reasonable justification, even if its classifications are not precise.'"). Defining the class of persons subject to an act "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications*, 508 U.S. at 315-316, quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). That means legislation is not unconstitutional "simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." (Cleaned up.) *Sherman v. Ohio Pub. Emp. Retirement Sys.*, 2020-Ohio-4960, ¶ 15.

4. R.C. 2323.43 is constitutional under this highly deferential standard.

R.C. 2323.43 passes this rational-basis review. As to the ends pursued, the General Assembly passed this two-tiered damage cap to "stabiliz[e] the cost of health care delivery

by limiting the amount of compensatory damages representing noneconomic loss awards in medical malpractice actions." Senate Bill 281, §3(A)(3). The General Assembly found several factors driving this cost up, including "that malpractice litigation causes health care providers to over prescribe, over treat, and over test their patients," and that medical malpractice insurance premiums were increasing. *Id.* at §3(A)(3). Worse, the increasing costs were causing medical malpractice insurers and doctors to leave the market. *Id*. at §3(A)(3)(b) -(c).

As for whether a cap on noneconomic loss helps stabilize the cost of health care delivery, the General Assembly could rationally decide it does. The legislature found that increasing health care costs flowed not from more paid medical claims but higher payments on the same number of claims. *Id*. at §3(A)(2) (while the number of paid claims remained constant year over year, the average award jumped and payments "exceeding one million dollars have doubled in the past three years"). The General Assembly then cited reports and the experience of other states to support its decision that a cap can mitigate annual increases in medical malpractice insurance premiums. *Id*. at §3(A)(3)(e), 4(d).

That decision was rational. An April 2005 report by the Ohio Medical Malpractice Commission shed more light on the medical liability crisis facing the General Assembly when it passed Senate Bill 281. *See generally* Commission Report. After addressing insurers who left the market, the inability of premiums collected by insurers to cover the losses, and the number of doctors retiring or planning to retire due to rising insurance costs, the Commission shared initial signs of recovery. *Id.* at 3-5. Those signs included a reduction in the average year-over-year insurance premium increase. *Id*. at 5. The Commission "strongly

recommend[ed] that [Senate Bill 281] remain in effect in Ohio with the expectation that it will help stabilize the medical malpractice market over time." *Id*. at 7.

Stabilization requires reducing paid losses and the costs of defending medical malpractice claims. *Id*. at 7 ("The commission acknowledges and agrees with the testimony of most witnesses, including insurance actuaries, that the primary driver of medical malpractice rates is the costs associated with losses and defense of claims."). And an economic analysis of damage caps across many states showed they reduce paid losses by up to 30 percent. Frech III, et al., *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law*, 16 Health Matrix 693, 706 (2006). This reduction in paid losses leads to lower insurance rate increases in states with caps. *Id.* at 708 (noting that "insurance premiums in states without caps are significantly higher").

Even if others view the effectiveness of a cap on noneconomic loss differently, "the question clearly is at least debatable," so the Eighth District "erred in substituting its judgment for that of the legislature." (Cleaned up.) *Clover Leaf Creamery Co.*, 449 U.S. at 469. The Eighth District made this substitution after crediting a 2019 ODI report and concluding it showed that capping noneconomic loss for catastrophic injuries would not affect medical malpractice insurance rates. App. Op. ¶ 64. But, as discussed, merely "tendering evidence in court that the legislature was mistaken" is not enough to invalidate a statute under rational-basis review. *Clover Leaf Creamery Co.*, 449 U.S. at 464. The Eighth District erred by not deferring to the General Assembly's findings when it enacted R.C. 2323.43.

The panel then compounded this error by requiring the General Assembly to show that the cap's second tier "will have an[] impact on malpractice insurance rates beyond [that]

provided by the cap on less severe injuries." App. Op. ¶ 64. *First*, as discussed, the burden is on the *challenger* (Paganini) to show irrationality; the General Assembly bears no burden under the rational-basis test. *Columbia Gas Transm. Corp.*, 2008-Ohio-511, at ¶ 91; *Vance*, 440 U.S. at 111. The panel thus erred by placing the burden on the General Assembly.

Second, the panel also erred by narrowly focusing on the cap's second tier and asking for evidence correlating a reduction in medical malpractice insurance rates with that tier. Whether the cap could have achieved a similar reduction in year-over-year insurance premium increases without a second tier "is irrelevant in rational-basis review." *Heller v. Doe by Doe*, 509 U.S. 312, 330 (1993). That is because the General Assembly need not choose "the least restrictive means of achieving its legislative end." *Id.* In other words, rational-basis review does not require perfection. *Vance*, 440 U.S. at 108 (explaining that "it is nevertheless the rule that in a case like this 'perfection is by no means required'"), quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960).

Even so, the Eighth District's analysis fails on its own terms. The court below found no rational relationship between capping noneconomic loss for catastrophic injury and reducing insurance rates based on a chart in the 2019 report that, the Eighth District said, showed only 30 cases between 2005 and 2019 with a verdict over the statutory caps. App. Op. 64. From this, the panel inferred that few cases involve catastrophic injuries and speculated this meant that capping noneconomic loss for those injuries might not affect malpractice insurance rates. *Id*. ¶ 63-64. But this speculation conflicts with the report's caution that it "is *not intended to be used* to evaluate past or current medical professional liability insurance rates." *See* ODI, *Ohio 2019 Medical Professional Liability Closed Claim Report*, § V (emphasis added). The Eighth District thus erred by treating the report as "clear

and convincing evidence" of the lack of "a real and substantial relationship to medical-malpractice insurance rates." App. Op. ¶ 64.

But beyond misusing the report, the decision below also ignores data on pre-Senate Bill 281 claims suggesting that the caps on noneconomic loss work. Remember, the goal is to stabilize costs, and stabilization requires reducing paid losses from medical claims. *See* pp. 18-19, *supra*. On that score, the data show average indemnity payments during the period studied were far higher for pre-Senate Bill 281 claims than post-Senate Bill 281 claims. *Compare* ODI, *Ohio 2019 Medical Professional Liability Closed Claim Report*, at 10 (pre-Senate Bill 281 claims) *with id*. at 11 (post-Senate Bill 281 claims). For example, 2018 average indemnity payments for pre-Senate Bill 281 claims were $2,670,061, while post-Senate Bill 281 claims that year averaged indemnity payments of $286,360. *Id*. at 10-11. All told, average losses during the studied period were 41% higher for pre-Senate Bill 281 claims than post-Senate Bill 281 claims. *Id*. (showing average indemnity of $417,381 for pre-Senate Bill 281 claims and $295,915 for post-Senate Bill 281 claims). Even if there is some noise in this figure due to the claim's age, the General Assembly could rationally find that average losses are lower after Senate Bill 281 and this reduction in average losses leads to lower insurance rate increases. *See* Commission Report at 7; Frech III, 16 Health Matrix at 706-708.

D. There is no rule that "hard limits" on noneconomic loss for "catastrophic injuries" are unconstitutional.

Finally, the Eighth District found R.C. 2323.43(A)(3) "arbitrary and unreasonable according to the reasoning provided in *Morris*," which the panel concluded bars any "hard limit" on noneconomic loss for "catastrophic injuries." App. Op. ¶ 66. The Court should eliminate this misguided inquiry from rational-basis review. *See* pp. 13-16, *supra*. Still, if this

Court keeps the *Mominee* test's arbitrary-and-unreasonable prong, it does not follow that the statute is unreasonable under *Morris*.

Recall that *Morris* declared a $200,000 medical malpractice cap on "*general damages*" unconstitutional. (Emphasis added.) *Morris*, 61 Ohio St.3d at 686. This statute was part of 1975 tort reform responding to a "health care crisis prompted by escalating medical malpractice insurance premiums." *Morris* at 686–687. This Court found this cap unconstitutional due to a lack of evidence establishing "a rational connection between awards over $200,000 and malpractice insurance rates." *Id.* at 690. Key to that finding was the General Assembly's omission of the cap from a list of statutes it "believed would have an impact on insurance premiums." *Id.* Given that omission, and a lack of evidence showing a rational relationship between the cap and insurance rates, this Court found it "irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Id*. at 691. *Morris* thus turned on uncodified law in the 1975 Ohio Medical Malpractice Act and the record.

Since then, this Court clarified that the "blanket of stare decisis" does not apply unless the statute is "phrased in language that is substantially the same as that which we have previously invalidated." *Arbino* at ¶ 23. Unlike the flat cap of $200,000 in *Morris*, R.C. 2323.43 has a tiered cap that allows awards over double that amount for injuries described as "catastrophic." *Compare Morris*, 61 Ohio St.3d at 686 *with* App. Op. ¶ 60. And unlike the 1975 Act, Senate Bill 281 contains legislative findings showing a rational relationship between this tiered cap and stabilizing medical malpractice insurance rates. *See* Senate Bill 281, § 3(A)(3)(a) -(b), (e). For both reasons, *Arbino* requires a "fresh review of [R.C.

2323.43(A)(3)'s] individual merits." *Arbino*, ¶ 24. The Eighth District thus erred by declaring R.C. 2323.43(A)(3) arbitrary and unreasonable under *Morris*.

A fresh rational-basis review confirms R.C. 2323.43(A)(3) does not violate Article I, Section 16's "due course of law" provision. *See* pp. 18-21, *supra*. As to the concern with burdening "those most severely injured by medical malpractice," App. Op. ¶ 66, the short answer is the burden does not fall *solely* on those claimants. *See Morris* at 691. Rather, the cap's first tier places much of the burden on claimants who are *not* among the most severely injured. The Eighth District tacitly acknowledges this when questioning the need for the cap's second tier. *See id.* ¶ 63-64. The "reasoning provided in *Morris*," *id*. ¶ 66, thus does not support striking down the cap's second tier.

As for the analogy to other tort actions that allow uncapped noneconomic loss awards for "catastrophic injury," *id*., it ultimately rests on a false equivalence between two caps pursuing different goals. The General Assembly allowed uncapped noneconomic loss awards for catastrophic injuries in other tort actions when pursuing the goal of "making certain that Ohio has a fair, predictable system of civil justice[.]" Am.Sub.S.B. No. 80, § 3(A)(3). That the General Assembly did not impose a second-tier cap when pursuing *that* goal says nothing about whether it could rationally have decided here that limiting noneconomic losses for "catastrophic injury" would help stabilize health care costs.

IV. CONCLUSION

This Court should reverse the Eighth District and hold that R.C. 2323.43(A)(3) does not violate Article 1, Section 16's "due course of law" provision and is thus constitutional.

Respectfully submitted,

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