Case No. **A138234**

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION ONE

JESSICA CHAN,
Plaintiff and Appellant,

vs.

PETER CURRAN, M.D., and BREALL, O'BRIEN, LEE, SOTO, CHUN, TENG, AND CURRAN, M.D.s,
Defendants and Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,
HON. WALLACE P. DOUGLASS, RET., CASE NO. CGC-10-502053.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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Prometheus Press * Sacramento, CA

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INTRODUCTION: IMPORTANCE OF ISSUE AND INTEREST OF AMICUS

A. IMPORTANCE OF ISSUE

The importance of the issue presented – whether the $250,000 statutory ceiling on recoverable non-economic damages by plaintiffs in medical malpractice lawsuits is constitutional – is evinced by the consequences should plaintiff prevail.

Striking down Civil Code section 3333.2 would, according to the California Legislature's former Analyst, be catastrophic for future access to health care. Specifically, "raising the cap on non-economic damages from $250,000 to $1,000,000 or more would increase health care costs in California by approximately $9.9 billion per year – an average of $261 per resident, or more than $1,000 for a family of four."[1] If

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[1] William G. Hamm, H.E. Frech III & C. Paul Wazzan, *MICRA AND ACCESS TO HEALTH CARE*, *Executive Summary* (2014) & Pp. 35-36 ("*HAMM REPORT*"). William Hamm was formerly the Legislative Analyst for California.

that is the result of raising the ceiling to $1 million, it would obviously be worse if the lid were invalidated pursuant to plaintiff's challenge.

Enticed by the prospect of larger pay-outs should the "cap" be declared void, enterprising contingency fee counsel would, plaintiff tells us, shoulder the pent-up demand for representation the "cap" has created. Since the constitutional grounds plaintiff advances for striking down the cap would, if accepted, also endanger other health care liability reforms which treat medical malpractice plaintiffs differently from general negligence plaintiffs[2] (as well as threaten other statutory and common-law classifications that preclude or limit recoverable non-economic damages in a variety of situations), a further up-tick in litigation and its attendant costs is likely to follow.

Plaintiff undoubtedly disputes this prediction about the havoc to be wreaked by an opinion abrogating the cap; in fact, she seeks to buttress her legal position by supposed factual claims to the contrary – e.g., that Proposition 103 passed in 1989, not the "cap" and accompanying medical liability reforms enacted in 1975, was responsible for making medical professional liability insurance premiums affordable. But debate over facts and statistics and what they mean when it comes to review on constitutional grounds of statutory classifications based on economic criteria, is something courts wisely eschew. Resolution of these kinds of issues, no matter how fervently a party

[2] See, *e.g.*, Bus. & Prof. Code § 6146 [limiting contingency fees in medical malpractice actions]; Civ. Code § 3333.1 [admitting evidence of collateral source payments and precluding subrogation on behalf of collateral sources]; Code of Civ. Proc. § 667.7 [authorizing periodic payments for future damages in excess of $50,000, with termination of benefits in the event of death]; Code of Civ. Proc. § 1295 [encouraging binding arbitration as an alternative to court lawsuits].

seeks to shoehorn them into a constitutional sheath, are peculiarly the decisional province of the Legislature or the voters.

A ruling for plaintiff here would necessarily upend more than a half-century of settled constitutional jurisprudence and foist upon the judiciary the self-destructive obligation of a super-legislature, henceforth free to substitute its judgment for that of the Legislature or voters in determining the wisdom or desirability of statutes. This looming jurisprudential shake-up is no secret to the primary beneficiaries behind jettisoning or raising the "cap"—plaintiff medical malpractice lawyers who, as in this case, are compensated on a contingency or "piece of the action" basis.[3] That is why plaintiff attorneys have, through their trade association, the Consumer Attorneys of California (CAOC), rhythmically but unsuccessfully sought to persuade the Legislature to raise the "cap" on non-economic damages;[4] and it is why they are now endorsing and promoting a ballot initiative to raise the cap substantially.[5] Change via the Legislature or a voter approved initiative is, to be sure, the correct way to deal with the "cap," not

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[3] "[A]wards for pain and suffering serve to ease plaintiffs' discomfort and to pay for attorney fees for which plaintiffs are not otherwise compensated." *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 511 (dissenting opinion by Justice Roger Traynor).

[4] See, e.g., AB 1380 (Villaraigosa, 1999-2000), a measure authored by the Assembly Speaker to index the ceiling in Civ. C. § 3333.2 for inflation; and AB 250 (Kuehl 1997-1998), which would have raised the "cap" to $700,000 and made exceptions to that limit under a variety of circumstances. Both bills were strongly supported and lobbied by the CAC and both failed passage.

[5] Kathy Robertson, *Initiative to Lift Malpractice Cap Pits Lawyers against Doctors*, *SACRAMENTO BUSINESS J.*, May 16, 2014 ("An initiative that seeks to raise the cap on medical malpractice damages in California has qualified for the November ballot. [¶] The cap was set at $250,000 in 1975 by the Medical Injury Compensation Reform Act, better known as MICRA. The ballot measure would index that amount to inflation, which would raise the amount to $1.1 million this year.").

repetitive constitutional challenges like this that have been rejected, and properly so, by the California Supreme Court and every intermediate appellate court to entertain them.

B. INTEREST OF AMICUS

The Civil Justice Association ("CJAC") is a nonprofit organization of businesses, professional associations, and local governments. CJAC was formed in the aftermath of the medical malpractice crisis of 1975 and enactment of the Medical Injury Compensation Reform Act ("MICRA") that same year. From our inception we have defended MICRA against political and legal attack. We do this because we believe MICRA is a "model"[6] law containing several legal reforms (besides the ceiling on non-economic damage recovery) that are appropriate for adoption in *all* personal injury litigation. Indeed, we favor a $250,000 cap for "pain and suffering" damages incurred by clients who are victimized by the malpractice of their attorneys instead of the present and long standing denial of non-economic damages for such plaintiffs. See, e.g., *Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1693 (emotional distress damages are not generally recoverable in cases of attorney malpractice related to litigation); *Holliday v. Jones* (1989) 215 Cal.App.3d 102, 112 (plaintiffs not entitled to recover emotional distress damages inflicted on them by attorney's malpractice).[7]

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[6] See, e.g., Donald J. Palmisano, *Health Care in Crisis* (2005) 5 *YALE J. HEALTH POL'Y L. & ETHICS* 371, 379 (strongly endorsing California's MICRA legislation as the "model" to pursue to fix the medical liability crisis); and Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps* (2005) 80 *N.Y.U. L. REV.* 391, 394 ("MICRA has served as a model for other states' adoption of damages caps as part of successive tort reform waves in the 1970s, 1980s, and 2000s . . .").

[7] Strangely, the organized contingency fee bar seems unconcerned that clients of attorneys subjected to legal malpractice are barred from recovering damages for their pain and suffering, preferring instead to focus their efforts on getting rid of or increasing the $250,000 (continued...)

Our support for MICRA and for extension of its civil justice reforms to other personal injury contexts, serves our primary purpose of promoting "fairness, efficiency, economy and certainty" in our civil justice system in determining who gets paid, how much, and from whom when careless conduct by some occasions harm to others. In seeking this goal, we are mindful of the complementary roles our coequal and coordinate branches of government occupy under the constitution's "separation of powers" provision, and do not expect courts to cure the denial of all non-economic damages for legal malpractice plaintiffs by resort to constitutional claims, no more than we expect them to strike-down the $250,000 "cap" for medical liability claims. That, as stated earlier, is a job for the Legislature or voters, not courts; and certainly not trial or intermediate appellate courts who would have to go against well-settled and reasoned opinions of the California Supreme Court to provide plaintiff the relief she seeks.

SALIENT FACTS AND PROCEEDINGS BELOW[8]

Plaintiff Jessica Chan sued Dr. Peter Curran for medical negligence she claimed occasioned the death of her mother, Michelle Woo, in 2009. Specifically, Dr. Curran was accused of failing to adequately monitor the anticoagulation effect of Coumadin, a blood thinner prescribed to Mrs. Woo after she had mitral valve replacement surgery at Stanford Hospital and then began her post-surgical care from defendant.

The jury returned a unanimous verdict in 2012, finding defendant liable and

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[7](...continued)
cap health care providers are liable to pay for their patients "pain and suffering" due to medical negligence.

[8] This summary is taken mainly from Appellant's Opening Brief (AOB).

awarding plaintiff $1 million for past and future non-economic loss, $63,088 for past economic loss and $73,560 for future economic loss. Defendant moved to reduce the non-economic damage award to $250,000 pursuant to Civ. Code § 3333.2, which the trial court did.

In opposition to defendant's motion for reduction of non-economic damages, plaintiff introduced a bevy of documents, including declarations from numerous plaintiff contingency fee counsel "stating they were unable to handle [medical malpractice] cases because of the $250,000 cap;" a statement made by Dr. Curran in his capacity as President of the San Francisco Medical Society that, in his opinion, "there is no greater deterrent to malpractice lawsuits than [the cap];" declarations from an "expert" attesting that, in his opinion, the "cap is not rationally related to any legitimate state interest" that would support it against an equal protection challenge; and a declaration from a "Ph.D." accompanied by statistics from the U.S. Bureau of Labor Statistics, attesting that, in his opinion, the cap "created a barrier to access to justice [in] securing legal representation for malpractice victims."

Defendant filed opposition to plaintiff's materials, including declarations from experts contradicting plaintiff's experts. The parties then filed additional briefs arguing over the meaning and persuasiveness of each others' submissions about the salutary or deleterious effect of the cap.

The trial court granted Dr. Curran's 3333.2 motion, reducing the $1 million non-economic damages to $250,000. The court also reduced the award for past hospital billings before death (pursuant to *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541) from $55,481 to $8,996, which reduced the total past economic damage

award from $63,088 to $16,243. As is customary, future economic damages (for loss of economic support) were reduced from $73,560 to net present value of $55,319, leaving plaintiff with a total recovery of $321,562.

Plaintiff attorney's out-of-pocket costs amounted to $103,187 (most, if not all of which, are recoverable from defendant once he submits a "costs bill" for court approval); and his attorney fee from the judgment was $66,259.

SUMMARY OF ARGUMENT

MICRA's non-economic damage ceiling fully complies with the U.S. and California constitutions. It does not violate the guarantee to due process or equal protection of the laws, nor the right to jury trial. To hold otherwise and strike down this damage limitation would conflict with well-reasoned and settled opinions from our state Supreme Court and intermediate appellate courts that have consistently upheld it in the face of constitutional challenge.

No one has a right to a particular measure of damages or a right to have a limitation on those damages set aside because it does not provide for an inflationary cost of living increase. Legislatures and courts can, and regularly do, restrict recoverable damages or abolish entire causes of action. MICRA's lid on recoverable nonpecuniary loss is "key" to stemming runaway medical malpractice insurance premiums and litigation expenses. Time has proven the wisdom and efficacy of the cap. Its judicial invalidation would result in increased litigation and insurance costs and unfairly impede access to needed healthcare.

A judicial ruling that the cap is unconstitutional because it does not take into account the value of a money judgment over time, would destroy the purpose of the cap

and threaten the unraveling of other damage limitations. We should learn from history, especially the causal and demonstrative benefits to the public of MICRA's damage limitation, and strive to preserve it lest we have to repeat the sorry circumstances that spurred its enactment.

ANALYSIS

I. MICRA'S NON-ECONOMIC DAMAGE CEILING SATISFIES CONSTITUTIONAL GUARANTEES TO DUE PROCESS AND EQUAL PROTECTION.

Plaintiff argues that the due process and equal protection guarantees of the State Constitution are violated by MICRA's cap because it, *inter alia*, "discriminates" against medical malpractice plaintiffs in comparison to plaintiffs who sue for negligence against non-health care providers, hurts her access to justice by making it more difficult for her and others like her to secure lawyers, fails to account for inflation from 1975 when the cap was enacted, and disfavors those whose damages are entirely or mainly non-economic in nature. She urges this court to consider reams of documents she submitted below on these and related points and, based on legal authorities she references, annul section 3333.2.

None of plaintiff's contentions finds support in law.

A. The "Rational Basis" Standard, under which Courts Afford Great Deference to Legislative Classifications of an Economic Nature, Applies to the Due Process and Equal Protection Challenges Against Civil Code § 3333.2.

The standard of review courts use for both due process and equal protection challenges are essentially the same under the federal and California Constitutions. "[E]qual protection and due process analysis regarding the [constitutionality of statutory

classifications] is the same under both the United States and the California Constitutions." *People v. McKee* (2010) 47 Cal.4th 1172, 1215, citing *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1152, fn. 19.

For substantive due process challenges like those asserted by plaintiff, all that is necessary for defendant to prevail and §3333.2 to be upheld is that it bear a "rational relationship" to a legitimate government interest. See, e.g., *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 853–855; *Washington v. Glucksberg* (1997) 521 U.S. 702, 722–723. "When called upon to evaluate a substantive due process challenge to a legislative police power measure that does not impinge upon fundamental rights, constitutional principles require the reviewing court to apply the rational basis test." *Perkey v. Department of Motor Vehicles* (1986) 42 Cal.3d 185, 189 (holding there is no constitutional right of right of privacy to protect a driver license applicant from being fingerprinted because the right to drive is not a "fundamental right.").

Two distinct "bright line" standards are applied by California and federal courts in evaluating challenges made to legislation under the equal protection clause. "'The first is the basic and conventional standard for reviewing economic and social welfare legislation in which there is a 'discrimination' or differentiation of treatment between classes or individuals . . . [That standard] invests legislation involving such differentiated treatment with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear [,as with due process,]some *rational relationship* to a conceivable legitimate state purpose.'. . . [T]he burden of demonstrating the invalidity of a classification under this standard rests squarely upon *the party who assails it*." [Citation.] This first basic equal protection standard generally is referred to as the

'rational relationship' or 'rational basis' standard." *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 298-299; emphasis added.[9]

It is well-settled that the "rational basis" standard applies when measuring section 3333.2 under due process and equal protection guarantees. "The MICRA cases establish the general rule that the rational basis test is the appropriate standard for reviewing legislative classifications among personal injury plaintiffs." *Young v. Haines* (1986) 41 Cal.3d 883, 899. "[I]t has long been established that challenges to economic rights are afforded the *rational basis* test. [citation omitted.] Such economic rights include statutes restricting the recovery of damages. *American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.* (1984) 36 Cal.3d 359, 368-369." *Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 561, fn. 7; emphasis added. "[T]he Legislature retains broad control over *the measure,* as well as *the timing,* of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is *rationally related* to a legitimate state interest." *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 158 ("*Fein*"); emphasis original.

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[9] "[T]he second equal protection standard is '[a] more stringent test [that] is applied . . . in cases involving 'suspect classifications' or touching on 'fundamental interests.' Here the courts adopt 'an attitude of active and critical analysis, subjecting the classifications to strict scrutiny. . .. Under the strict standard applied in such cases, *the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose. [Citation.]' . . . This second standard generally is referred to as the 'strict scrutiny' standard." *Id.* at 299; italics original.

"Suspect criteria" include race, religion, national origin, sexual orientation and sometimes gender. "Fundamental interests" include the right to vote (*Kramer v. Union Free School Dist., No. 15* (1969) 395 U.S. 621), travel (*Shapiro v. Thompson* (1969) 394 U.S. 618), or marry (*Loving v. Virginia* (1967) 388 U.S. 1, 12-13). No suspect criteria or fundamental interests are implicated by section 3333.2.

B. Rational Basis Review Requires Merely That Distinctions Drawn by a Challenged Statute Bear Some Rational Relationship to a Conceivable Legitimate State Purpose and Precludes Judicial "Fact Finding" to Second Guess the Legislature's Determination of that Point.

Plaintiff asks this court to reexamine the continued "rational basis" for MICRA's lid on non-economic damage recovery in medical malpractice because of changed factual and legal circumstances that have occurred since its enactment. The factual arguments about changed circumstances and their purported effects do not withstand scrutiny; but even if true, plaintiff's invitation for the court to consider them must be rejected.

1. The Factual Changes Plaintiff Claims Warrant Reevaluation of section 3333.2's Current "Rational Basis" are not True.

a. Proposition 103 Did not Reduce Professional Medical Liability Premium Costs, MICRA did.

Plaintiff asserts that section 3333.2 and MICRA's other liability reforms failed "to curb [malpractice insurance] premium increases," but instead enactment of Proposition 103 achieved that goal, thus demonstrating the cap is no longer necessary and lacks a "rational basis." AOB 66-68. The best evidence indicates just the opposite. As the recent study by the team of economists and statisticians led by the former California Legislative Analyst William Hamm explains:

> Proposition 103 sought to control insurance *rates*, but did nothing to limit the determinants of insurance rates – insurance *costs*. Therefore, there is no reason to believe that the measure was effective in limiting rates. [¶] More importantly, the factual evidence clearly shows that Proposition 103 cannot be credited with the reduction in medical liability insurance premiums. . . . [P]remiums declined sharply during the three years after Proposition 103 took effect – a period that also followed the California

> Supreme Court's decision[s] upholding MICRA's constitutionality. During the same three-year period, the average rates for other insurance lines subject to Proposition 103's rate controls *increased*. The obvious explanation for this discrepancy is that MICRA reduced medical liability claim costs, but had no effect on claim costs for other lines of personal injury insurance [to which Proposition 103 also applied].[10]

The *Hamm Report* concludes, contrary to plaintiff's assertion, that section 3333.2 "has significantly reduced medical liability insurance premiums. Should the MICRA cap be eliminated or raised, these cost-savings will go away and insurance premiums will increase sharply." HAMM REPORT, *supra* at 19.

b. Plaintiff's Assertion that the Non-Economic Damage Limit for Medical Malpractice Prevents Plaintiffs with Modest or no Future Earnings Losses from Obtaining Counsel is Not Supported by the Evidence.

Obviously the return for contingency fee counsel in personal injury cases is greater when non-economic damage recovery is unlimited, but it does not follow, as a matter of logic or fact, that limits on such recovery prevent plaintiffs from securing competent counsel. When it comes to medical malpractice litigation, the evidence is that section 3333.2 does not have that effect.

Plaintiff's contention that the cap impedes injured plaintiffs with meritorious claims from finding counsel can be tested by examining data on the number of medical liability lawsuits filed in California since section 3333.2 was enacted, and comparing that trend to the trend in the number of other personal injury lawsuits. Once again, the

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[10] HAMM REPORT, *supra* at 21. See also H. E. Frech III, William G. Hamm, and C. Paul Wazzan, "Controlling Medical Malpractice Insurance Costs – Congressional Act or Voter Proposition?" *Indiana Health Law Review*, Volume 3, Issue 1 (2006).

Hamm Report shows that "per-capita filings generally were higher during the 1986-2004 period, after MICRA's constitutionality was upheld, than they were . . . before MICRA was enacted." *Id.* at 10.

Now it is true that medical liability filings have declined over time, but this drop-off has been significantly less than the reduction in other personal injury lawsuits not subject to caps on non-economic damage awards. *Id.* As the *Hamm Report* states: "[T]he available evidence indicates that the cap has not reduced access to the judicial system to any significant degree for individuals with meritorious claims. Notwithstanding the cap, Californians who believe they have experienced medical malpractice continue to find attorneys willing to take their cases, and for these claimants the door to the courthouse remains open." *Id.* at 12.

Moreover, other statistical evidence further buttresses the continued access to courts by California medical malpractice plaintiffs.

> A comparison of medical liability claims frequency in California with claims frequency in the other 49 states further undermines the contention that the MICRA cap, rather than other factors, has reduced the rate at which medical liability lawsuits are filed. Although MICRA represents the strongest set of medical liability reforms enacted in the U.S. to date, the incidence of medical liability claims in California remains significantly greater than it is outside California. In 2012, for example, the claims frequency rate was 11.3 percent in California – 50 percent higher than the average rate for the other 49 states. [¶] [W]hile the claims frequency rate in California has dropped by approximately 19% since the MICRA cap was found to be constitutional, the rate in the other states has, on

average, gone down by 53%.[11]

The *Hamm Report* concludes the evidence shows "individuals and their lawyers are suing California doctors and hospitals at a much higher rate than their counterparts in other states, notwithstanding the fact that MICRA limits the recovery of non-economic damages." *Id.* at 15.

2. Plaintiff's Other Purported "Factual" Evidence is Infected by Legally Erroneous Premises or Plaintiff's Biased Opinion.

Plaintiff's argument that the cap impacts more harshly claimants with modest economic losses is self-evident but, carried to the limits of its logic, would require constitutional abrogation of all non-economic damage restrictions. This would include the limitation of non-economic damages in multiple defendant actions to an amount based on the comparative or percentage of fault each bears in relation to the total fault,[12] the denial of non-economic damage recovery for those involved in automobile accidents who lack insurance,[13] and, as mentioned in our introduction, the bar on recovery of non-economic damages for those subjected to legal malpractice by their attorneys. See authorities cited *ante* at 4.

Nor does the assertion that the "cap" has not been indexed for inflation amount to anything more that a statement of the obvious. Any presumption from this undisputed observation that the cap is therefore constitutionally suspect finds no support in law. The lie to any such implication was given long-ago by *Feckenscher v.*

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[11] *Id.* at 14-15.

[12] Proposition 51, the Fair Responsibility Act of 1986, Civ. C. §§ 1431.1 *et. seq.*

[13] *Horwich v. Superior Court* (1999) 21 Cal.4th 272; Civ. Code § 3333.3 *et. seq.*

Gamble (1938) 12 Cal.2d 482, which rejected plaintiff's claim that an amendment to Civil Code section 3343 doing away with the "benefit of the bargain" measure of damages and substituting in its place "actual loss" was legally impermissible because it cost him a 25% loss of recovery. The amendment occurred after the filing of an action for fraud, but before trial. In repudiating plaintiff's argument, the court stated that "no one has a vested right in a measure of damages." *Id.* at 499. The "actual loss" measure was applied with the court explaining that the statute "cannot . . . be legitimately interpreted as requiring the application of the measure of damages in existence at the time of the accrual of the cause of action." *A fortiori*, plaintiff here has no right to a measure of damages that factors in inflation over time.

If the Legislature wanted to add inflation to the MICRA cap it surely could, but it has specifically refused to do this when it first enacted section 3333.2[14] and then reconsidered and rejected the idea in 1999.[15] "A court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of [what plaintiff views as] ill-considered legislation is a responsive legislature." *Cory v. Shierloh* (1981) 29 Cal.3d 430, 438.

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[14] "We rejected the concept of indexing the $250,000 figure because of the bad experience with inflation that was then hitting the . . . economy. Thus we decided that a single legislative cap leaving complete protection to the injured plaintiff for all economic losses was the most realistic approach." James E. Ludlam, *HEALTH POLICY – THE HARD WAY* 170, 183 (1998)(Ludlam).

[15] See legislative measures referenced *ante* at note 4.

C. None of the Purported "Evidence" Referenced by Plaintiff is Subject to Court Consideration in Determining whether the MICRA Cap is "Rationally Related" to the Legitimate Government Purpose of Reducing Medical Malpractice Litigation and Insurance Costs.

Whether the court agrees with the factual contentions made by plaintiff or amicus is of no relevance when it comes to constitutional review of the cap. That is because when conducting rational-basis analysis, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation *unsupported by evidence or empirical data*." *In re Jenkins* (2010) 50 Cal.4th 1167, 1181, quoting *Federal Communications Commission v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315. Rational basis review requires merely that "distinctions drawn by a challenged statute bear some rational relationship to a *conceivable* legitimate state purpose." *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784, vacated on other grounds (1971) 403 U.S. 915, emphasis added.

"[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Federal Communications Commission v. Beach Communications, Inc., supra,* 508 U.S. at 315, citing *United States Railroad Retirement Bd. v. Fritz* (1980) 449 U.S. 166, 179. The absence of "legislative facts" explaining the distinction "[o]n the record," has no significance in rational-basis analysis. See *Nordlinger v. Hahn* (1992) 505 U.S. 1, 15 (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification"). See also *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 466, where Justice Brennan explained, "Whether *in fact* the Act will promote [the legislative objectives] is not the question: the Equal Protection clause is satisfied by our conclusion

that the [state] Legislature *could rationally have decided* that [it] . . . might [do so] . . .." Emphasis original. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Carmichael v. Southern Coal & Coke Co.* (1937) 301 U.S. 495, 510.

D. Numerous Official Government Documents Underscore that the "Cap" is Rationally Related to the Legitimate Governmental Objective of Reducing the Costs of Medical Malpractice Litigation.

The law is clear that to repel plaintiff's equal protection and due process attacks against the cap, no evidence need be produced to show it bears a reasonable relation to a legitimate governmental interest. Nonetheless, since such evidence abounds in the form of statutory declarations, a proclamation by the Governor and official hearings and reports of committees of the Legislature, Congress and federal agencies, amicus references same for the court's consideration without the necessity of a request that they be judicially noticed. *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 54-46, fn. 9.

To begin with, the Legislature warned in 1974 of an impending crisis in the escalation of medical professional insurance premiums failing prompt legislative action. "[T]he medical malpractice insurance market is highly unstable . . . and, if rates continue to escalate as they have in the past few years, malpractice insurance carriers may be priced outside the market." *PRELIMINARY REPORT*, California Assembly Select Committee on Medical Malpractice, June 1974, Henry A. Waxman, Chairman.

That alarm unfortunately proved correct within a year of its sounding when the two largest medical liability insurance carriers for California physicians, Argonaut and

Travelers, announced premium increases of 384% and 400% and stated they would not write such insurance for California after that year.[16] As a sage observer of the scene reported about the effect of this cost increase:

> On May 1, 1975 a major group of anesthesiologists in Northern California announced their withdrawal from service. Of course, the impact on surgeries was immediate. This was followed by similar actions throughout the state . . . From the hospital point of view, we were concerned about our ability to keep emergency rooms open. Then we heard the devastating news that neurosurgeons and orthopods were following the anesthesiologists. Our greatest concern was that there would be . . . patients who died or suffered serious additional trauma from the inability to get care . . .."[17]

The legitimate governmental interest confronting California was further identified by the Proclamation of Governor Brown calling an extraordinary session of the Legislature to deal with the medical malpractice insurance crisis:

> The cost of *medical* malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people in this State, and threatens the closing of many hospitals. The longer term consequences of such closing could seriously limit the health

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[16] See also *CALIFORNIA MEDICAL MALPRACTICE INSURANCE STUDY*, A Report Prepared by Booz, Allen Consulting Actuaries for the Office of the Auditor General, State of California, Dec. 5, 1975, pp. 1-2 ("Premiums paid by doctors for medical malpractice insurance have increased significantly over the past fifteen years, but have not kept pace with increasing claim costs . . . The average premium in 1976 is expected to be about five times higher than the 1974 average.").

[17] Ludlam, *supra*, *HEALTH POLICY – THE HARD WAY* 170.

care provided to hundreds of thousands of our citizens.[18]

The Governor asked the Legislature to consider several proposals to alleviate this emergency, including a "limitation of compensation for pain and suffering while insuring fully adequate compensation for all medical costs and loss of earnings . . .."[19]

The notion that compensable non-economic damage ought to be curtailed in certain circumstances was neither novel nor radical. Former Chief Justice Roger Traynor, the father of modern products liability law and leading advocate for "spreading the loss" of injury compensation through insurance, recognized the need to cabin these subjective and highly elastic damages. In *Seffert v. L.A. Transit Authority*, *supra*, 56 Cal.2d at 498, Traynor dissented from approval of a non-economic damage award of $134,000 in a negligence action to a woman whose foot was injured while she was boarding a city bus and whose economic losses were about $54,000, stating:

> There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases. Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation . . . [¶] [A]ny change in this regard must await reexamination of the problem by the Legislature.[20]

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[18] Executive Proclamation of Governor Brown, May 16, 1975 (Proclamation).

[19] *PROCLAMATION*, *supra* at note 18. The other cost saving reforms mentioned by the Governor in his emergency proclamation that were incorporated into MICRA are voluntary binding arbitration, reasonable limits on the amount of contingency fees charged by attorneys, elimination of double payments ("collateral sources"), institution of periodic payments for future losses, and setting a reasonable statute of limitations.

[20] *Id.*

The Legislature responded to Chief Justice Traynor's and Governor Brown's call for "reexamination" of the practice of paying unlimited amounts for pain and suffering by holding numerous, extensive hearings on it and other proposals to address malpractice insurance and liability concerns.[21] Ultimately the Legislature by a large bi-partisan vote passed MICRA (Assembly Floor: 67 to 8; Senate Floor: 34 to 4)[22] as an urgency measure, finding and declaring that its enactment was animated by "a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state." Stats. 1975, Second Ex. Sess., ch. 2, § 12.5, p. 4007.

Since enactment of section 3333.2 – the "heart" of MICRA – numerous government studies have confirmed its continuing rational relationship to the objective of containing the costs of malpractice insurance by controlling liability for damages. See, e.g., U.S. Cong., Office of Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BP-H-119, p. 64 Washington, D.C.: U.S. Gov't. Printing Office, Oct. 1995 ("Caps on damage awards were the only type of State tort reform that consistently showed significant results in reducing the malpractice cost indicators.");

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[21] During the second extraordinary session of the legislature in 1975, 35 Assembly bills and 28 Senate bills were introduced in response to the medical malpractice insurance crisis. Assembly Committee on Finance, Insurance and Commerce, *PROCEEDINGS ON THE SUBJECT OF MEDICAL MALPRACTICE INSURANCE AND THE ROLE OF THE PRIVATE INSURANCE MARKET DURING THE POST-REFORM PERIOD*, Nov. 26, 1975, vii.

[22] Assembly Final History, September 12, 1975, AB1XX, p. 11.

Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System 12, 14 & 17 (Health and Human Services: July 24, 2002) ("States with limits of $250,000 or $350,000 on non-economic damages have average combined highest premium increases of 12-15%, compared to 44% in states without caps on non-economic damages."); and House Report 112-039-Part 1-*Help Efficient, Accessible, Low-Cost, Timely Healthcare (Health) Act of 2011*, 112th Cong., 1st Sess., March 17, 2001, p. 8 ("[T]he rate of increase in medical professional liability premiums in California since 1976 has been a relatively modest 387%, whereas the rest of the United States has experienced a 1,089% rate of increase, a rate of increase 281% larger than that experienced in California.").

These studies confirm the soundness of numerous, consistent opinions by California courts that section 3333.2 comports with constitutional guarantees to due process and equal protection because it is rationally related to controlling medical liability litigation and related insurance premium costs. *Fein, supra*, 38 Cal.3d at 158, 163, explained:

> [I]t is clear that section 3333.2 is rationally related to legitimate state interests. . . [¶] One of the problems identified in the legislative hearings was the unpredictability of the size of large non-economic damage awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the price tag which different juries placed on such losses. The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates.

Accord: *Stinnett v. Tam* (2011)198 Cal.App.4th 1412, 1432 ("[Plaintiff's] contention that section 3333.2 deprives her of equal protection . . . because her $250,000 in non-

economic damages does not have the same purchasing power that $250,000 . . . had in 1975 . . . fails [as] *Fein* . . . already decided this statute is 'rationally related to a legitimate state interest' and 'rationally related to the legislative purpose.' "); and *Rashidi v. Moser* (2013) 219 Cal.App.4th 1170, 162 Cal.Rptr.3d 446. 454-455, review granted on separate issue ("The Legislature had a rational basis for enacting the damages limitation, and . . .[plaintiff's] argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature.").

II. THE MICRA LIMIT ON RECOVERABLE NON-ECONOMIC DAMAGES DOES NOT VIOLATE THE RIGHT TO TRIAL BY JURY.

The argument that Civil Code section 3333.2 impermissibly infringes on the right to trial by jury,[23] both federal and state, has been considered and rejected, and for sound reasons. First, the greatest infringement on the right of jury trial imaginable is *abolition* of the cause of action for which trial by jury attends. Yet it is indisputable that the Legislature "possesses a broad authority both to establish and to abolish tort causes of action." *Cory, supra*, 29 Cal.3d at 439. "It is settled that the Legislature may attack the evils of unfounded litigation by abolishing causes of action altogether. Thus statutes abolishing civil actions for alienation of affection, criminal conversation, seduction and breach of promise to marry have . . . been upheld." *Langdon v. Sayre* (1946) 74 Cal.App.2d 41. "Whether there has been a serious increase in the evils of vexatious litigation in this class of cases . . . is for legislative determination, and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts." *Silver v. Silver* (1929) 280 U.S. 117, 122-123. This greater power of

[23] Cal. Const., art. I, § 16 provides that "[t]rial by jury is an inviolate right and shall be secured to all . . .."

the Legislature to abolish an action includes, of course, the lesser power to restrict recovery based on it. Because "the Legislature may abolish causes of action to prevent unfounded litigation, we cannot say that the Legislature could not reasonably conclude that the danger of excessive recoveries of general damages . . . justified limitation of recovery to special damages." *Werner v. Southern Cal. Etc. Newspapers* (1950) 35 Cal.2d 121, 128; Civ. Code § 3536 ("The greater contains the less").[24]

Second, numerous federal court opinions specifically hold that a legislature's substitution of a limited non-economic damage remedy, as opposed to the more draconian abolishment of the professional negligence action against health care providers altogether, does not infringe on the right to trial by jury. In *Tull v. United States* (1987) 481 U.S. 412, the Court alluded to this when it stated, "[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the *remedy phase* of a civil trial." *Id.* at 426 n.9; italics added. Other federal courts have found this reasoning instructive in dismissing seventh amendment jury trial challenges to state damage caps. The Fourth Circuit Court of Appeals, for instance, stated:

> [I]t is the role of the jury as factfinder to determine the extent of a plaintiff's injuries. . . . [I]t is not the role of the jury to determine the legal consequences of its factual findings. [This] is a matter for the legislature . . . . [O]nce the jury has made findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law.

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[24] *Fein* recognizes that the "general damage/special damage" distinction drawn by statute and upheld in *Werner*, *supra*, 35 Cal.2d 121 against an equal protection attack is similar to the "noneconomic damage/economic damage" distinction established by MICRA's section 3333.2. *Fein*, *supra*, 38 Cal. 3d at 158, n. 15.

Boyd v. Bulala (4th Cir. 1989) 877 F.2d 1191 (holding that Virginia's statutory cap on recovery in medical malpractice action did not violate the right of jury trial under the seventh amendment); see also Note, *Reforming Tort Reform: Is There Substance To The Seventh Amendment?* (1989) 38 *CATH. U.L. REV.* 737, 738-39 (stating that the nationally organized personal injury bar intends to challenge damage caps on federal and state jury trial grounds, judging by this case an apparently never-ending pursuit).

Damage caps do not violate the right to trial by jury because the jury's function ends *before* the damage cap is imposed. *Boyd*, *supra*, 877 F.2d at 1196. With this power, a legislature may also limit the damages which may be recoverable for a certain cause of action. *Id.*; see also *Franklin v. Mazda Motor Corp.* (D.Md. 1989) 704 F. Supp. 1325, 1331 ("power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action"). In other words, damage caps do not violate the seventh amendment because the existence of a *remedy* is a matter of law and not fact; and the law is interpreted and applied by the court, not the jury. *Franklin, supra*, 704 F. Supp. at 1333 (citing *Etheridge v. Medical Center Hosps.* (Va. 1989) 376 S.E.2d 525, 529 (Virginia Supreme Court upholds $750,000 damage cap)). Therefore, a damage cap merely sets the outer limits of a remedy provided by a legislature. *Franklin*, *supra*, 704 F. Supp. at 1333.

The history behind the seventh amendment underscores that damage caps do not abridge the right to a jury trial. Civil juries were provided for in the seventh amendment to protect "against the abuse of *judicial,* as distinct from *legislative,* power." *Davis v. Omitowoju* (3d Cir. 1989) 883 F.2d 1155, 1164 (emphasis in original). Since damage caps

are enacted by legislatures, abuse of judicial power is not at issue and seventh amendment protections are unnecessary.

While the peculiar wording of some state constitutions have invalidated damage limits enacted there, that is not the case in California with respect to our state's constitutional right to jury trial. "Defendant cites no authority, and we are aware of none, that compels the conclusion that the right to a jury trial under the California Constitution is . . . broader than the comparable right guaranteed by the federal Constitution." *People v. Betts* (2005) 34 Cal.4th 1039, 1054, fn. 9. Thus, *Yates v. Pollack* (1987) 194 Cal.App.3d 195 expressly held that the non-economic damage lid did not violate the plaintiff's right to a trial by jury. *Id.* at 200. Moreover, *American Bank & Trust's* holding that the periodic payment provision of MICRA, which like the non-economic damage ceiling effectively reduces the jury's finding as to the amount of damages owed plaintiff, does not violate the right to jury trial, applies *a fortiori* to Civil Code section 3333.2 and its impact on the right to jury trial.

Yates relies on the authority of *Fein*, and *Fein* relies upon *American Bank & Trust*, which makes it the primary opinion for why the right to jury trial is not abridged. *American Bank* explained, consistent with *Boyd's* reasoning, that "the guarantee of jury trial in the California Constitution operates at the time of trial to require submission of certain issues to the jury. Once a verdict has been returned, however, the effect of the constitutional provision is to prohibit *improper* interference with the jury's decision." *American Bank, supra*, 36 Cal.3d at 376; italics added.

Under MICRA's periodic payments provision, the court, upon the jury's determination of the amount of future damages owed in excess of $50,000, is

authorized to "fashion the details of a periodic payment schedule." *Id.* This statute also provides that upon the plaintiff's death "a defendant's continuing liability for future damages other than damages for loss of future earnings [is] . . . subject to termination . . .," an obvious reduction in damages from their payment in lump-sum. *Id.* at 368, fn. 8. These features of the periodic payments statute are not, the court declared, "incompatible with the jury trial guarantee," (*id.* at 377) and are "similar to the authority long exercised by courts in the disbursement of the proceeds of a judgment under a number of well-established statutory schemes." *Id.* at 376.

While, as mentioned, some state courts have, primarily due to the unique wording of their constitutional provisions, found contrary to California, it is significant that overall "jury-trial challenges have been brought against non-economic damages caps laws in 14 states, and the claim has failed in 11 of those."[25] Most of those states have found, echoing *Fein*, *Yates* and *American Bank*, that there is no abridgment of the right to jury trial because the jury still determines damages while the court applies the statutorily prescribed remedy as to the recoverable amount of those damages. This division of roles between court and jury is traditional and well-accepted: the jury determines the facts, including the fact of and amount of damage, and the court then applies the legal remedy that sets the amount of allowable recovery.

[25] Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation* (2005) 33 *J.L. MED. & ETHICS* 515, 521.

CONCLUSION

California's $250,000 ceiling on non-economic damages recoverable in medical malpractice actions reasonably relates to its objective of insuring the continued availability of health care services to the public. It comports fully with the California and federal constitutions with respect to equal protection, and with the California Constitution's guarantees to jury trial, separation of powers and the judicial functions. It was properly applied by the court to award to plaintiff in this case $250,000 for her pain and suffering. This court should decline appellant's invitation to strike it down on constitutional grounds and affirm its validity and continuing viability.

Dated: June 4, 2014

Respectfully submitted,

/s/ Fred J. Hiestand
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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 7,800 words.

Dated: June 4, 2014

/s/Fred J. Hiestand
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PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Street, Suite 1, Sacramento, CA 95817.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 4th day of June 2014 at Sacramento, California.

/s/ David Cooper
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