FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

NADINE RAPHAEL, as Personal Representative of the Estate of HARVEY RAPHAEL,

Plaintiff/Appellant,
Cross-Appellee,

v.

JAMES SCHECTER, M.D., and EMERGENCY PHYSICIAN ENTERPRISES, INC.,

Defendants/Appellees,
Cross-Appellants.

DCA Case No. 4D08-432
L.T. Case No. 05-CA-008972-AB

BRIEF OF *AMICUS CURIAE*
FLORIDA JUSTICE REFORM INSTITUTE
IN SUPPORT OF APPELLEES

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PRELIMINARY STATEMENT

The Governor's Select Task Force on Healthcare Professional Liability Insurance will be referred to as the "Task Force," and the House Select Committee on Medical Liability Insurance will be referred to as the "Select Committee."

The Task Force Report will be cited as "TFR," and the Select Committee Report will be cited as "SCR," in each case followed by the page number.

All emphases are supplied unless otherwise indicated.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Florida Justice Reform Institute is a not-for-profit organization dedicated to reform of the state's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in civil justice.

This case presents an issue of paramount importance to Florida's healthcare system. Appellant asks the Court to declare the statutory limits unconstitutional and thereby nullify an essential component of the legislative response to serious and chronic threats to the availability and affordability of healthcare in Florida.

The Court's decision will have a direct impact on the mission of the Florida Justice Reform Institute to restore fairness, equality, predictability, and personal responsibility to civil justice. Invalidation of the statutory limits would subject medical malpractice defendants to limitless and standardless awards of arbitrarily-determined noneconomic damages. In doing so, it would undermine fundamental fairness, subvert needed predictability, encourage misuse of the court system, fuel an explosion in medical malpractice litigation, and impose new and heavy costs on a delicate marketplace. The equitable administration of civil justice, as well as the availability and affordability of healthcare in Florida, are squarely implicated.

SUMMARY OF ARGUMENT

Appellant asks this Court to confer upon the judiciary an unfettered right to discard the wealth of facts collected and considered by the Florida Legislature in support of statutory limits on noneconomic damages in medical malpractice cases, and to hold an evidentiary hearing to redetermine those facts *de novo* more than five years after they were investigated and ascertained by the Legislature. The constitutional separation of powers and controlling precedent forbid this approach.

The Court's limited role here is plain. If legislative findings are backed up by evidence and testimony in the legislative record, they are binding unless clearly erroneous. The Court's duty is not to assemble an independent factual record in competition with the Legislature, but to determine whether the legislative judgment finds support in the legislative record. Deference is proper from respect to the constitutional separation of governmental powers, and because the Legislature is uniquely equipped to assess the social and economic conditions that inform the performance of its constitutionally assigned functions. It also ensures that judicial determinations of constitutionality will not fluctuate from case to case according to the evidence presented by individual litigants regarding facts that often lie beyond their reach. Because the legislative record supports the legislative findings, the trial court correctly declined to overturn the well-informed legislative assessment of relevant social and economic conditions in a single evidentiary hearing.

ARGUMENT

Five years late, Appellant seeks to litigate the existence of the medical malpractice insurance crisis that impelled the Legislature to enact statutory limits on noneconomic damage awards in medical malpractice cases. The Task Force and the Legislature compiled an immense factual record over the course of many months and with the benefit of extensive input from all affected interests. On this basis, the Legislature specifically found the crisis—the threat to the affordability of medical malpractice insurance and to the availability of healthcare in Florida—to be real. The trial court properly deferred to the legislative determination.

I. THE FINDINGS OF FACT OF THE TASK FORCE AND THE LEGISLATURE ARE ENTITLED TO DEFERENCE.

The Court's duty is to defer to—not to disregard—the factual findings drawn from the tremendous volume of facts presented to the Task Force and the Legislature. Unless the legislative findings are clearly erroneous in light of the legislative record, those findings are not subject to judicial reevaluation.

The Florida Supreme Court so ruled in *University of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993). In *Echarte*, the plaintiffs claimed that statutory limits on noneconomic damage awards in medical malpractice cases involving an offer of arbitration violate the constitutional right of access to the courts. The Court stated at the outset that the "Legislature enacted the statutory scheme at issue following the recommendations and study made by the Academic Task Force for Review of

the Insurance and Tort Systems," and it recited the findings of the task force at length. *Id*. at 191, 192 n.12. In upholding the law, the Court deferred to the findings of the task force and the Legislature. *See id*. at 196-98. It noted that the preamble of the challenged law characterized the medical malpractice crisis as an "overpowering public necessity," and that the Legislature had "made a specific factual finding" that dramatic premium increases had curtailed the availability of medical malpractice insurance. *Id*. at 196. "The Legislature's factual and policy findings" were "supported by the Task Force's findings." *Id*. at 196. The Court summarized the task force's extensive research and fact-gathering efforts and its "many findings." *Id*. at 196 & n.17. The Court explained that the "Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts." *Id*. Critically, the Court held that "determinations of public purpose and facts are presumed correct and entitled to deference, unless clearly erroneous." *Id*. Rather than subject the legislative record to *ex-post* investigation, the Court accepted that record and upheld the law.

Pinillos v. Cedars of Lebanon Hospitals Corp., 403 So. 2d 365 (Fla. 1981), is also instructive. In *Pinillos*, the Court sustained the constitutionality of a statute that abolished the collateral-source rule in medical malpractice cases. It explained:

> The legislature, in the preamble to the Medical Malpractice Reform Act, . . . announced in detail the legitimate state interests involved in its enactment of this provision. *The legislature determined that there was a professional liability insurance crisis in Florida*. It found that

> professional liability insurance premiums were rising at a dramatic and exorbitant rate, that insurance companies were withdrawing from this type of insurance market making such insurance unavailable in the private sector, that the costs of medical specialists were extremely high, and that a certain amount of premium costs is passed on to the consuming public through higher costs for health care services. This insurance crisis, the legislature concluded, threatened the public health in Florida . . . .

Id. at 367. The Court affirmed the challenged law without further elaboration. The Chief Justice dissented, criticizing the Court's "unquestioning acceptance of the legislative findings" and urging "a closer examination of whether a medical malpractice insurance crisis exists." *Id*. at 369, 371. The Court was not persuaded.

The duty of deference is also outlined in *Panama City Beach Community Redevelopment Agency v. State*, 831 So. 2d 662 (Fla. 2002). There, the trial court invalidated a bond issuance when, after an evidentiary hearing, it disregarded a legislative determination of blight. The Supreme Court reversed, explaining that "legislative determinations are entitled to a presumption of correctness and should be upheld if supported by competent, substantial evidence in the record." *Id*. at 667. "Under Florida case law, the trial court should have simply examined these legislative findings to determine whether they were 'patently erroneous.'" *Id.* And, "because the city council's determination that the redevelopment area is blighted was a legislative function, Florida law requires that this action be sustained as long as it was fairly debatable." *Id*. at 669 (marks omitted). The Court held that the evidence before the city council supported its determination of

blight and counseled that the trial court "did not give the city council's legislative determinations the proper deference mandated by well settled Florida law." *Id*.; *accord Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 836 So. 2d 1040, 1052-53 (Fla. 4th DCA 2003) (deferring to legislative conclusions).[1]

American Bank and Trust Co. v. Community Hospital of Los Gatos-Sarasota, Inc., 683 P.2d 670 (Cal. 1984), is squarely on point. In *American Bank*, the California Supreme Court examined the constitutionality of a statutory reform adopted by the legislature in response to a perceived medical malpractice crisis. The plaintiff "challenged the factual accuracy" of the legislature's explanations for the state's medical malpractice problems. In fact, the plaintiffs invited the Court "to determine the 'true' cause of the medical malpractice insurance problems . . . and even to second-guess the Legislature as to whether a 'crisis' actually existed." *Id*. at 679. The Court refused: "It is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment." *Id*. It concluded:

> Whatever the reasons for the medical malpractice insurance problems, it is clear that *the Legislature—which thoroughly investigated this matter through numerous hearings, audits and the like—could rationally conclude from the information before it* that the high insurance costs in this particular area posed special problems with respect to the continued availability of adequate insurance coverage and adequate medical care and could fashion remedies . . . to meet these

[1] In *City of Parker v. State*, 992 So. 2d 171, 178 (Fla. 2008), the Court recently followed the reasoning set forth in *Panama City Beach* to affirm a finding of blight on the ground that evidence contemporaneously available to the municipality was competent to support the determination.

problems.

Id. As in *American Bank*, the Task Force and the Legislature in the present case "thoroughly investigated this matter." *See* Section II, *infra*. And, as in *American Bank*, it was not the function of the trial court to reweigh the evidence, discard the vast legislative record, and disregard the legislative judgment as it relates to well-substantiated, statewide social and economic conditions.

North Florida Women's Health and Counseling Services, Inc. v. State of Florida, 866 So. 2d 612 (Fla. 2003), is in accord. In *North Florida*, the Legislature did little more than recite purported "findings" without *any* real investigation. A bill emerged directly from the legislative drafting service with a number of "whereas" clauses, each of which purported to be a statement of fact or purpose. *Id.* at 628. Indeed, only a handful of witnesses testified at the hearings on the bill—for a total of twenty minutes. *Id.* at 629-30. There was so little evidence before the Legislature that the Court refused to defer to its "findings." To be entitled to deference, findings of fact "must actually be findings of fact" rather than empty "recitations amounting only to conclusions." *Id*. at 627.

The deference due to the Legislature's findings of facts owes its origin to the constitutional separation of powers and to the unique competence of the legislative authority to assess and evaluate social and economic conditions. As the United States Supreme Court explained in reference to Congress:

> We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions . . . . This is not the sum of the matter, however. We owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power.

Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180, 195-96 (1997) (marks omitted). In *Schabarum v. California Legislature*, 70 Cal. Rptr. 2d 745 (Cal. Ct. App. 1998), the Court expressed the need for deference to legislative fact-finding and described the dichotomy of governmental functions:

> The performance of the policymaking role of the Legislature necessitates that the Legislature engage in certain fact finding processes. These are not the type of case-specific factual determinations that are intrinsic to the judicial function, but are instead an indispensable incident and auxiliary to the proper exercise of legislative power. . . . The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the constitution upon those to whom it has given the power to legislate, and their decision that the facts exist is conclusive upon the courts . . . .

Id. at 753-54 (marks omitted). Thus, courts "must be cognizant that the factual determinations necessary to the performance of the legislative function are of a peculiarly legislative character," *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 272 (Cal. Ct. App. 2004), and the proper judicial inquiry is "whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based," *Staley v. City of Omaha*, 713 N.W.2d 457, 469 (Neb. 2006).

The trial court properly denied Appellant's request for an evidentiary

hearing. No known case has controverted legislative findings based on a record as ample and well-developed as that in question here. The vast record of evidence unambiguously demonstrates *on its face* and without recourse to extrinsic evidence that the legislative findings of fact were not irrational or clearly erroneous. This determination made, no further judicial inquiry is proper. And, like *Echarte* and unlike *North Florida*, the present case does not involve traditional strict scrutiny.[2] The core question here—whether limits on noneconomic damages in medical malpractice cases are constitutional—is the precise question presented in *Echarte*.

Confronted with a vast evidentiary record, Appellant argues that certain comments of the Task Force's executive director evince a predisposition to impose limits on non-economic damages and, to that end, to craft artificial findings of fact. (Br. at 25-26.) But the quoted comments were made after—not before—the Task Force conducted its study and made its findings and, viewed in context, establish only the Task Force's innocuous and indeed wholly appropriate concern to ensure

[2] In *North Florida*, Justice Pariente distinguished *Echarte's* deferential approach on the ground that *Echarte* was not a traditional strict scrutiny case. "When we undertake strict scrutiny review, we do not accept legislative statements of purpose at face value." *N. Fla. Women's Health & Counseling Servs., Inc.*, 866 So. 2d at 646 (Pariente, J., concurring); *accord Schabarum*, 70 Cal. Rptr. 2d at 755 n.8 (Cal. Ct. App. 1998) (concluding that the "usual rule of deference" is improper in strict scrutiny cases). She explained that *Echarte* was "*not* a strict scrutiny case in the traditional sense" and "has not been cited in a strict scrutiny case." *N. Fla. Women's Health & Counseling Servs., Inc.*, 866 So. 2d at 647 n.74 (emphasis in original). Rather, "*Echarte* was analyzed under a standard of review developed . . . to specifically address statutes that infringe on access to the courts." *Id.*

that its recommendations were constitutional. The evidence, moreover, speaks for itself. Regardless of its predispositions, the Task Force did not create the evidence it collected—evidence that completely pervades and amply supports its findings.

To reopen and reexamine the legislative record at this stage would be akin to the reconsideration of a judicial proceeding five years after all of the evidence had been gathered, weighed, and brought to bear on the relevant issues. Indeed, it would be worse. To subject the more-than-ample legislative record to searching judicial scrutiny would defy the rule of deference that arises from the constitutional separation of governmental powers. And it would allow successive reexaminations of legislative findings—from circuit court to circuit court *ad infinitum*—leading to divergent results according to the evidence marshaled by the parties in each case. The Court should decline the invitation to reassess facts of statewide application determined by the Legislature in its performance of its law-making function.

II. THE LEGISLATIVE FINDINGS OF FACT ARE SUPPORTED BY A ROBUST FACTUAL RECORD.

Governor Jeb Bush created the Task Force on August 28, 2002, appointing five distinguished and disinterested Floridians to study the relevant issues and make written recommendations: John C. Hitt, Ph.D., President of the University of Central Florida; Richard A. Beard, Trustee of the University of South Florida; Marshall Criser, Jr., President Emeritus of the University of Florida; Fred Gainous, President of Florida A & M University; and Donna E. Shalala, President of the

University of Miami and former Secretary of the Department of Health and Human Services. *See* Executive Order No. 02-041.

The Task Force's study, research, and conclusions were extensive. For five months the Task Force studied the history of medical malpractice and Florida's growing medical malpractice crisis. *See* TFR at 3. It considered extensive testimony, hundreds of letters, and its own independent research, including a wide-ranging review of published studies and literature. *Id.* It held ten public meetings throughout the state and heard from representatives of the healthcare professions, plaintiffs' lawyers, and those who had been injured by medical malpractice. *Id.* On January 29, 2003, after this thorough and exhaustive investigation, the Task Force issued a comprehensive 345-page report, along with thirteen volumes of reports, presentations, letters, and testimony. That report, and substantial other evidence gathered in the fact-finding process during regular and special sessions, formed the basis of the Legislature's enactment of the challenged law.

The Task Force carefully reviewed the history of Florida's efforts to control the spiraling cost of medical malpractice insurance. The first such effort occurred in 1975 after Florida's largest insurer of physicians threatened to discontinue its Florida business following the state's refusal to permit a rate increase. *Id.* at 33. The Legislature then determined that there was a medical malpractice insurance crisis, and it instituted a series of reforms including risk management programs,

alternative insurance, alternative dispute resolution, and tort reforms, including modifications to the statute of limitations. *Id.* at 34-35. The following year, the Legislature added three additional reforms: remittitur and additur, the collateral source rule, and the allowance of periodic payment of damages. *Id.* 35-36.

In 1984, noting the persistence of medical malpractice insurance problems, Governor Bob Graham created the Governor's Task Force on Medical Malpractice. *Id*. at 37. That task force recommended additional tort reform, alternative dispute resolution, and insurance reform. *Id*. at 29-41. The Legislature responded with a substantial legislative package that included, among other things, a new pre-suit screening and investigation requirement, a voluntary nonbinding arbitration process, an offer of judgment provision, and insurance reform. *Id.* at 42-44.

In 1986, the Legislature identified a financial crisis in the liability insurance market as a whole, including medical malpractice insurance. The result was the Tort Reform and Insurance Act of 1986. *Id*. at 44. Later in 1986, another special task force reported that the cost of medical malpractice insurance had increased dramatically during the previous eight years, the largest portion of the increase appearing in the most recent two years. TFR at 46. In 1988, the Legislature modified the pre-suit investigation rules and created a new pre-suit arbitration process that could limit awards of noneconomic damages. *Id*. at 52-53. *See Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993).

After reviewing this history, the Task Force concluded that Florida was again "facing a crisis in the availability and affordability of medical malpractice insurance" which was "causing a critical reduction in the quality of healthcare available in Florida." TFR at 56. Florida had lost several major carriers of medical malpractice insurance and had seen "astronomical" price increases for the remaining coverage offered. *Id.* at 56. Doctors reported doubling or tripling of premiums over the preceding two years, and the number of doctors using the state's insurer of last resort—the Joint Underwriting Association—had increased more than twenty-fold from November 2001 to November 2002. *Id*. at 60.

Examples of testimony before the Task Force included the following: In Broward County alone, four hundred physicians left the state or retired early during the preceding year. *Id*. at 72. Obstetrical centers were closing because of the soaring costs of liability insurance. *Id.* at 73. New residency graduates often could not practice in Florida because they were unable to obtain or afford the necessary insurance. *Id*. at 73-74. Fully eighty percent of Miami obstetricians carried no insurance and took legal measures to protect their assets as a result of soaring costs. *Id.* at 74. In the year preceding the Task Force report, Orlando lost twelve OB/GYNs—ten percent of the workforce. Twenty to twenty-five percent of those remaining worked without insurance. *Id.* The Task Force report includes scores of additional examples, setting forth summaries of the testimony of Florida

physicians who keenly felt the effects of the insurance crisis. *Id*. at 70-102.

The Task Force also considered official data which revealed that fewer insurance companies were writing new malpractice policies or renewing existing policies in Florida and that those still providing coverage had implemented additionally restrictive eligibility criteria. *Id.* at 102. A 2002 survey of members of the Florida Medical Association revealed that 98 percent of the 2,647 respondents believed they were impacted by the increase in malpractice insurance. *Id.* at 110. The Task Force also considered statistical and other reports submitted by the Florida Hospital Association and the Academy of Florida Trial Lawyers. *Id.*

Based on its findings, the Task Force recommended a variety of proposals. Most importantly, however, the Task Force concluded that limits on noneconomic damages were essential to alleviate the problems it identified: "[W]ithout the inclusion or a cap . . . , *no legislative reform plan can be successful* in achieving a goal of controlling increases in healthcare costs." *Id.* at 193. After twenty-seven years of experimentation alternatives that had failed to resolve the crisis, the Task Force concluded that limits on noneconomic damages were the only viable option:

> Since 1975, Florida has implemented (or attempted to implement) numerous alternatives to the cap on non-economic damages . . . . None, alone or together with the others, has solved the crisis of medical malpractice insurance availability and affordability. Instead, Florida's numerous attempts to solve this problem are nothing more than a failed litany of alternatives.

Id. at 219. The Task Force weighed the "potential benefits of other conceivable—

but untested—measures the proponents insist the Florida Legislature try before resorting to a cap on non-economic damages." *Id*. at 218-19. Further delay was unacceptable: "Florida can no longer afford to continue to rely on measures that have not worked. Nor can it delay action based upon speculation about the viability of any number of other conceivable approaches that opponents of tort reform may dream up to stall the resolution of the crisis." *Id*. at 219.

In light of the Task Force's findings, the Legislature devoted an enormous amount of time and effort to address the crisis. Even before the regular session began, the Select Committee reviewed the findings of the Task Force, held public hearings in four cities, heard reams of testimony from experts in all affected professional areas, and compiled an extensive hearing record. *See* SCR at 4, 5. It then published an 82-page report, exclusive of appendices, outlining its findings and noting that "the health care community is under intense pressure to provide quality care [despite] rapidly accelerating cost factors, including significant increases in the premiums charged for medical liability insurance." *Id*. at 5.

After the Legislature failed to pass reform legislation during its regular session, Governor Jeb Bush convened the Legislature for three separate special sessions. *See* Fla. H.R. Jour. 1 (Spec. Sess. B 2003); Fla. H.R. Jour. 1 (Spec. Sess. C 2003); Fla. H.R. Jour. 1 (Spec. Sess. D 2003). During these sessions, the Legislature received further evidence and added to its vast factual record.

The legislative record included not only days of oral testimony but also more than 1,600 sworn affidavits of Florida physicians. These physicians attested that, as a result of the malpractice insurance crisis, they had altered their practices, considered leaving their practices, or had in fact left their practices altogether. Because of the risk of tort liability and the exorbitant cost of malpractice insurance, large numbers of Florida physicians flatly refused to treat a variety of patients, including Medicaid patients, emergency room patients, and indigent and uninsured patients. Numerous physicians testified that they routinely referred "high-risk" patients to university centers, whose liability was capped by sovereign immunity.

Florida physicians also attested to avoiding "risky" procedures and practice areas. Physicians repeatedly indicated that they had voluntarily renounced their hospital privileges and that they refuse to perform complex surgeries, such as brain or cancer-related surgeries, or any invasive procedures at all. Some stated that they could no longer risk accepting new patients or delivering babies. Others pondered early retirement or had already been forced from the practice by the unaffordability of malpractice insurance. Still others were unable to find needed specialists.

In addition to curtailing or closing their practices, physicians had left or were considering leaving the state entirely. One physician stated: "I continue to reside in [Florida] but for the most part commute to other states in order to earn a living and continue to practice my specialties." Another was "actively looking to

relocate." Still another was "interviewing for possible out of state position." Some physicians terminated employees to reduce costs. Many noted the percentage increases in the malpractice premiums they paid, and others, while continuing to practice, had ceased to carry malpractice insurance altogether.

The Legislature, therefore, faced substantial evidence to support the overwhelming need for reform—and specifically for the limits on noneconomic damages. After its exhaustive investigation and its study of the Task Force Report, the Legislature adopted the findings of the Task Force. "The Legislature finds that the Governor's Select Task Force on Healthcare Professional Liability Insurance has established that a medical malpractice crisis exists in the State of Florida which can be alleviated by the adoption of comprehensive legislatively enacted reforms." Ch. 2003-416, § 1(10), at 7, Laws of Fla. It further found that "the high cost of medical malpractice claims can be substantially alleviated by imposing a limitation on noneconomic damages in medical malpractice actions." *Id.* § 1(1, 2, 15).

The process by which the Task Force and the Legislature assembled their evidence gave all Floridians a free and unfettered—indeed, unprecedented—opportunity to place their mark on the legislative record. Both the Task Force and the Legislature held numerous public hearings and invited submissions of evidence from all Florida citizens. Countless individuals availed themselves of this opportunity. They proffered facts and volunteered their opinions. The volumes of

letters, presentations, and other comments submitted by the citizens of Florida form a considerable part of the record, and of course cannot be recreated or even approximated in an evidentiary hearing. On this record—perhaps unparalleled in comprehensiveness—the trial court properly deferred to the legislative judgment.

III. THE ARBITRARY AND STANDARDLESS AWARD OF NONECONOMIC DAMAGES THREATENS DUE PROCESS.

Finally, for the same reason that punitive damage awards unguided by meaningful and objective standards violate due process, the standardless award of noneconomic damages threatens constitutional interests. With no manageable criteria or quantifiable limitations to regulate the discretion of the fact-finder, the arbitrary award of noneconomic damages destroys the rationality and predictability that undergird the law of torts and infringes upon protected property interests.

In a series of recent decisions, the Supreme Court has recognized that due process limitations curb the standardless award of punitive damages. Specifically, "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

The same absence of criteria to bridle the discretion of the jury renders arbitrary awards of noneconomic damages constitutionally infirm. It deprives defendants of proper notice of the probable consequences of their conduct, permits the jury to exercise an uncontrolled and arbitrary will rather than a reasoned

discretion, undermines the case-to-case consistency of verdicts, and establishes no precaution against the influence of improper or impertinent considerations on the jury. As the Supreme Court noted in the context of punitive damages:

> The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The reason is that [e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)) (citations and marks omitted).

The same concerns underlie the arbitrary and standardless award of noneconomic pain and suffering damages:

> The similarities between punitive damages and noneconomic compensatory damages—including their common history and treatment, the inadequate guidance available to juries, the amorphous nature of the jury's task, the absence of objective criteria to safeguard against consideration of improper factors, and the lack of clear standards to facilitate meaningful judicial review of verdicts—logically call for comparable treatment for purposes of procedural due process.

Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J.L. & Pub. Pol'y 231, 291 (2003). "[W]ithout rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before cases like *BMW of North America* and *Campbell*." Paul V. Niemeyer, *Awards for Pain and*

Suffering: The Irrational Centerpiece of Our Tort System, 90 Va. L. Rev. 1401, 1417 (2004). The Michigan Supreme Court noted this "overarching constitutional issue":

> While *State Farm* dealt with punitive damage awards, the due process concerns articulated in *State Farm* are arguably at play regardless of the label given to damage awards. A grossly excessive award for pain and suffering may violate the Due Process Clause even if it is not labeled "punitive."

Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 400 (Mich. 2004).

Despite the compensatory—rather than punitive—purpose of noneconomic damages, the absence of objective criteria and clear guidance in the award of noneconomic damages is no less hostile to the rights secured by due process than the same deficiencies in the award of punitive damages. The unbridled award of noneconomic damages, without clear guidance to direct the jury or a reviewing court, is an arbitrary deprivation of property that offends due process interests.

CONCLUSION

The Court should not place on trial the comprehensive product of a public fact-finding process conducted over a twelve-month period of study, investigation, and deliberation. "The Court simply does not sit as a 'super-legislature' to second-guess legislative factual conclusions when there is any basis at all for reaching them." *Operation Badlaw, Inc. v. Licking County Gen'l Health Dist. Bd. of Health*, 866 F. Supp. 1059, 1066 (S.D. Ohio 1992). The Court must defer to the findings of the Legislature and deny Appellant's request for an evidentiary hearing.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by United States Mail this 30th day of December, 2009, to the following:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that the font used in this brief is 14-point Times New Roman and is in compliance with the Florida Rules of Appellate Procedure.

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