STATE OF WISCONSIN
SUPREME COURT

ASCARIS MAYO and ANTONIO MAYO,

Plaintiffs-Respondents-Cross-Appellants,

UNITED HEALTHCARE INSURANCE COMPANY and WISCONSIN STATE DEPARTMENT OF HEALTH SERVICES,

Involuntary-Plaintiffs,

v.

WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

Defendant-Appellant-Cross-Respondent-Petitioner,

PROASSURANCE WISCONSIN INSURANCE COMPANY, WYATT JAFFE, MD, DONALD C. GIBSON, INFINITY HEALTHCARE, INC. and MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC.,

Defendants.

Appeal No. 2014AP002812

Appeal from the Circuit Court for Milwaukee County
The Honorable Jeffrey A. Conen, presiding
Circuit Court Case No. 12-CV-6272

NON-PARTY BRIEF OF WISCONSIN HOSPITAL ASSOCIATION AS *AMICUS CURIAE*

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INTRODUCTION

The Wisconsin Hospital Association ("WHA") was organized in 1920 as a statewide not-for-profit business association to advocate for the provision of quality, affordable and accessible healthcare for all Wisconsin communities. Today, the WHA has more than 130 member hospitals serving urban and rural communities across Wisconsin. Hospitals cannot provide care to their communities without an adequate supply of physicians, and communities are disadvantaged when health care is not accessible. It is not unreasonable for a physician to make a business decision whether to practice in a Wisconsin community based in part on a noneconomic damage cap. This Court's review of the challenge to Wisconsin's Medical Malpractice Laws, including, but not limited to, its Cap on noneconomic damages, will have a substantial impact on the accessibility of health care across Wisconsin.

After public hearings and consideration of more than 173 separate reports, academic articles, journal publications, witness testimony, and legal memoranda,[1] the Legislature

[1] Though many of those materials are included in the parties' Appendix and record on appeal, the Committee materials that were not appended are available at:

determined it was in Wisconsin's interest to establish this Cap to eliminate disincentives for physicians to practice in Wisconsin. Some injured patients will have their noneconomic damages reduced because of the Cap, but the Legislature considered this effect and Wisconsin's unique mandated unlimited Fund coverage available only to injured patients when it concluded that the Cap was necessary to help ensure quality, accessible care across Wisconsin.

Upsetting the Legislature's informed policy choice to help reduce disincentives for physicians to practice in Wisconsin jeopardizes WHA members' ability to recruit and retain healthcare professionals in their communities and ultimately to provide accessible care throughout Wisconsin. WHA submits that the Legislature's recognition of these facts is essential to this Court's consideration of this appeal.

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https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/ac_insurance/miscellaneous_misc (see Parts pt01 through pt69c). This Court may take judicial notice of the same, pursuant to WIS. STAT. § 902.01(2) and (6).

ARGUMENT

I. A RATIONAL RELATIONSHIP EXISTS BETWEEN THE CAP AND ACCESS TO AFFORDABLE, QUALITY HEALTHCARE FOR ALL WISCONSIN COMMUNITIES.

There is no better place to look for policy reasons for the Cap than those stated in WIS. STAT. § 893.55. Research shows caps lower the cost of premiums for consumers, as well as for physicians and hospitals purchasing medical liability and Fund coverage, and limits further increases. Research also shows that a stable medical liability environment reduces the use or overuse of healthcare resources by providers seeking to reduce their exposure to liability claims. These aspects of the Cap create a stable liability environment for physicians, which increases Wisconsin' ability to attract and retain providers. The Cap also protects the integrity of Fund resources for future claimants, and guarantees that even the most gravely injured recover all of their economic damages. Wisconsin patients are protected because they receive the full amount of their economic damages and their recoveries are not dependent on the provider's personal assets or insurance limits.

The Legislature, faced with no cap after ***Ferdon v. Wis. Patients Comp. Fund***, 2005 WI 125, 284 Wis. 2d 573, 701

N.W.2d 440, went to work to reestablish a constitutional cap within Wisconsin's unique statutorily created comprehensive medical liability system. It reestablished a cap on noneconomic damages after balancing multiple interests, including preserving guaranteed payment of permissible economic and noneconomic awards and keeping healthcare accessible and affordable. WIS. STAT. § 893.55(1d)(a).

Bipartisan co-sponsors introduced 2005 Assembly Bill 1073 ("Bill"), which proposed the Cap at issue on appeal. Public Hearings on the Bill were held on February 27, 2006 and March 6, 2006, before the Committee on Insurance and the Committee on Agriculture and Insurance, respectively.[2] Testimony at the Public Hearings was long on detail and in duration. 173 separate reports, academic articles, journal publications, witness testimony, and legal memoranda are included in the Committees' files on this issue.[3]

Not only was the Legislature's consideration broad, it was also targeted to address concerns raised by ***Ferdon***. For

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[2] On the February 27, 2006, the Bill was introduced in the Assembly by 38 Republicans and 10 Democrats and co-sponsored in the Senate by 13 Republicans.

[3] *See* footnote 1.

example, it received actuarial studies specifically focusing on options for cap amounts and the impacts of caps on current and prospective healthcare providers. Pinnacle Actuarial Resources, Inc., *The Potential Impact of Caps on Non-Economic Damages on Medical Malpractice Insurance in Wisconsin*, pp. 1-2 (September 2005) https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/ac_insurance/miscellaneous_misc/05hr_ac_in_misc_pt57c.pdf. (Pet.App. 567-593).

The $750,000 cap was also scrutinized by legal scholars and the Legislature received those legal analyses concluding that the $750,000 cap was constitutional. (Pet.App. 000002-000026) *See* https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/sc_agriculture_and_insurance/bills_resolutions/05hr_sc_ai_ab1073_pt01.pdf. *See* Gordon Baldwin letter and former Justice William Bablitch testimony, pp. 29-32.[4] (Pet.App. 227-336; 222-226).

[4] Governor Doyle previously vetoed 2005 Assembly Bill 766 which provided a lower cap amount. In his veto message, he cited to two legal scholars that opined the lower cap amount would not meet constitutional

After weighing the plethora of information,[5] the Committees voted to recommend passage of the Bill to the Governor and it was approved by the Legislature on a broadly bipartisan vote.[6] (*See* Pet.Br. at 11-13, tracing legislative history; *see also* Pet. App. 211-566).

The Legislature's efforts have borne fruit. Wisconsin leads the nation in healthcare quality.[7] Furthermore, for more than a decade since ***Ferdon***, Wisconsin's statutorily-enacted comprehensive medical liability system has guaranteed injured patients full compensation for economic damages and allowed

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scrutiny. In comparison, Governor Doyle did not veto 2005 Assembly Bill 1073 and it was enacted into law.

[5] Contrary to Plaintiffs' contentions, the data were neither dated, nor obsolete. Of the 173 submissions in the legislative record, 104 were from either 2005 or 2006. *See* https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/ac_insurance/miscellaneous_misc (Parts pt01 through pt69c).

[6] The votes in both houses occurred on March 2, 2006 and March 7, 2006, respectively. On the floor of the Assembly, the votes were: Ayes: 74 (58 Republicans, 16 Democrats); Noes: 22 (22 Democrats); Paired 2 (1 Republican, 1 Democrat); Absent or not voting 1 (1 Republican). On the floor of the Senate, the votes were: Ayes: 25 (19 Republicans, 6 Democrats); Noes: 8 (8 Democrats).

[7] U.S. Department of Health & Human Services, Agency for Healthcare Research and Quality, *National Healthcare Quality and Disparity Reports*, available at https://nhqrnet.ahrq.gov/inhqrdr/Wisconsin/snapshot/summary/All_Measures/All_Topics; Wisconsin Technology Council, *Wis. Business: Federal Agency for Healthcare Research and Quality Ranks Wisconsin as Top State for Health Care* (August 23, 2017), available at http://wisconsintechnologycouncil.com/2017/wisbusiness-federal-agency-for-healthcare-research-and-quality-ranks-wisconsin-as-top-state-for-health-care)

recovery for noneconomic damages up to $750,000, something both unique from other states and to other plaintiffs in Wisconsin. The Legislature's actions have continued the viability of a medical liability system that helps protect all Wisconsin communities' needs for accessible health care. That accessibility to quality health is not just a good unto its own, but it is also a key economic development asset for Wisconsin communities.[8]

To conclude that the Legislature's bases for implementing the Cap bear no rational relationship to providing access to affordable, quality healthcare for all Wisconsin residents ignores the evidence and the rational basis test. As this Court has recognized:

> [The Equal Protection Clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

[8] Wisconsin Technology Council, *Taking the Pulse: How Quality HealthCare Builds a Better Bottom Line*, (2017) p.1 (http://wisconsintechnologycouncil.com/wp-content/uploads/2017/11/Taking-the-Pulse-Healthcare-Quality-Report.pdf.); Wisconsin Economic Development Corporation, *Quality Healthcare–A Wisconsin Advantage, Insource* (April 22, 2014), available at: http://inwisconsin.com/insource-newsletter/quality-health-care-a-wisconsin-advantage.

> equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Ferdon, 2005 WI 125, at ¶71, *quoting* ***McGowan v. Maryland***, 366 U.S. 420, 425-26 (1961) (emphasis added). This standard obligates courts to locate, and even to construct, a rationale that might have influenced the legislature's judgment, and once the court identifies one, it must assume the legislature passed the statute on that basis and that it found all facts that might reasonably be conceived to support that basis. ***Id.*** at ¶¶74-75. The test also requires the Court to defer to the Legislature's chosen means even if it believes a better way existed to achieve the same goal. ***Id.*** at ¶76. Finally, this standard requires doubts to be resolved in favor of constitutionality, and that the party challenging the constitutionality of a statute prove, beyond a reasonable doubt, that the statute is unconstitutional. ***Id.*** at ¶68. Under these standards, the Cap must be upheld.

II. FOCUSING ON THE FUND'S ASSETS IGNORES THAT THE FUND IS NOT RISK-FREE AND THAT UNLIMITED EXPOSURE TO CLAIMS COULD BE CATASTROPHIC.

Focusing on data from the Fund's last ten years showing its assets have increased ignores much of the reasoning behind the Cap, including the statutory objectives that the Fund not

become insolvent in the future. Citing to the amount currently held by the Fund or the amount the Fund has paid out over the past decade disregards the concept that current assets do not guarantee the Fund is risk-free or that it will face a similar claims experience in the future. Several large noneconomic damage awards could have a catastrophic effect.

Before the present Cap was enacted after ***Ferdon***, the Fund's undiscounted, unpaid liabilities increased by about $173 million, which decreased the surplus. Payments for claims that accrued prior to implementation of the present Cap that were paid between the 2005-2006 and 2008-2009 fiscal years were significantly larger than either the old or the current limits. *See* Wisconsin Legislative Audit Bureau, Injured Patients and Families Compensation Fund, Office of the Commissioner of Insurance, p. 13 (March 2013). The Fund's provider assessments also increased by 25% between 2005 and 2007. *See* ***Wis. Med. Soc'y, Inc. v. Morgan***, 2010 WI 94, ¶22, 328 Wis. 2d 469, 787 N.W.2d 22; Wisconsin Legislative Fiscal Bureau, *Injured Patients and Families Compensation Fund*, pp. 6-7, (Jan. 2009). This demonstrates that without the Cap,

the Fund could have unlimited exposure to future claims regardless of whether past claims reached catastrophic levels.

Questioning the Fund's balance amounts to impermissibly asking the Court to act not only as legislators, but also as actuaries. At the time of the Bill, the Cap was supported by actuarial studies. Pinnacle Actuarial Resources, Inc., *The Potential Impact of Caps on Non-Economic Damages on Medical Malpractice Insurance in Wisconsin*, pp. 1-2 (September 2005). (pet.App. 567-593). The study concluded that because caps limited the most volatile element of medical liability claims, *i.e.*, noneconomic damages, states with caps were more attractive to current and prospective healthcare providers. ***Id.***

These conclusions are just as valid today. While the Fund has a higher balance today, a more recent actuarial report confirms that "***[i]n the event that the caps are overturned, the fund is exposed to the potential of significantly larger claims than if the caps remain in place***," and that overturning the caps would require reconsideration of the appropriateness of the "recommended net asset balance range to in light of the change

in large loss potential." *See* Pinnacle Actuarial Resources, *Wisconsin Injured Patients and Families Compensation Fund: Actuarial Analysis as of September 30, 2014*, p. 19 (December 2014); *see also* Congressional Budget Office Cost Estimate, *Protecting Access to Care Act of* 2017 (*capping awards at $250,000, lowers costs and spending*)(WHA.App. 001-038; 103-106). These are just some examples in the record establishing that there was, and continues to be, ample evidence supporting the Legislature's rationale for implementing the Cap.

III. REMOVING BARRIERS TO ACCESSIBLE, AFFORDABLE, HIGH-QUALITY HEALTHCARE INCLUDES ADDRESSING PHYSICIAN SHORTAGES AND REDUCING DISINCENTIVES FOR PROVIDERS TO PRACTICE IN WISCONSIN.

Data from The Wisconsin Department of Health Services shows that there is a shortage of primary care physicians relative to the general population for 32 counties in the state. For 13 of those counties, there is a negative number of full-time equivalents. This indicates that the population to primary care physician ratio for these areas is even lower than the threshold set by the federal Office of Shortage Designation, which itself is not an optimal ratio to meet the need for care.

See Wisconsin Department of Health Services, *Number of Primary Care Physician FTEs To Remove Shortages for the Resident Population* (February 2013), https://www.dhs.wisconsin.gov/publications/p0/p00460.pdf.

The Legislature was keenly aware of these shortfalls and the impact on their communities.[9] It was within the Legislature's ambit to redress the problem through the reimplementation of a cap to ensure accessible, high-quality, cost-effective healthcare for all 72 counties and to attract and retain qualified physicians to serve their constituents.

Wisconsin will continue to face a shortage of physicians over the next 20 years, and Wisconsin's policies will impact the future availability of physicians throughout Wisconsin. In 2011, the WHA estimated that 100 additional new physicians per year were necessary to keep pace with the demand, and that

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[9] Wisconsin Hospital Association and Wisconsin Medical Society, *Who Will Care for Our Patients* (March 2004). This report was among the 173 sources of information relied on by the Legislature. https://docs.legis.wisconsin.gov/2005/related/public_hearing_records/ac_insurance/miscellaneous_misc/05hr_ac_in_misc_pt57b.pdf. The report noted that "[e]arly in 2003, Wisconsin Hospital Association staff began to hear from member hospitals that they were having increasing difficulties recruiting physicians. **While many rural and inner city communities have struggled with this issue for years**, the statewide nature of these reports created a new urgency." ***Id.*** at 4.

if this number were not obtained, Wisconsin's projected physician shortage would rise to over 2,000 physicians. The Wisconsin Council on Medical Education and Workforce's ("WCMEW") more recent study predicts that by 2035, Wisconsin could be 4,000 doctors short of what is needed to take care of patients. *See* Wisconsin Council on Medical Education and Workforce, *A Work in Progress: Building Wisconsin's Future Physician Workforce*, p. 10 (August 2016) (WHA.App. at 051-102). Both of these reports recommended the preservation of Wisconsin's balanced medical malpractice systems. Wisconsin must compete with other states to attract and retain physicians, including the majority of states that have a noneconomic damage cap. Without the Cap, Wisconsin will face an even greater physician supply challenge. Invalidating the Cap will not simply affect Wisconsin's ability to attract and retain physicians, as testimony from the legislative hearings underscored, it will undermine the healthcare system as a whole.

Evidence provided by physician recruitment and relocation firms demonstrated that one of the reasons physicians leave their practice and relocate to other states is

high malpractice insurance premiums. Just one example is Illinois' experience. Illinois has not had a cap since 2010, and roughly "[h]alf of all graduating medical residents or fellows trained in Illinois leave the state to practice medicine elsewhere, in large part due to the medical liability environment in Illinois."[10] The same study warns that given the toxic malpractice environment in Illinois, Illinois could face a shortage of physicians especially in rural areas.

Prior to the invalidation of Illinois' cap, the Illinois Department of Insurance observed a decrease in medical malpractice premiums, an increase in competition among malpractice insurance companies, and the entry of new companies offering medical liability insurance.[11] After the cap was invalidated, medical providers in Illinois experienced a projected 18% increase in the cost of insurance.[12]

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[10] Northwestern University News, *Graduating Doctors Flee Illinois, Cite Malpractice Policy: Illinois Faces Critical Physician Shortage, New Study Warns* (November 11, 2010), http://www.northwestern.edu/newscenter/stories/2010/11/doctors-flee-illinois.html.

[11] Illinois Department of Insurance, *Illinois Department of Insurance Encourages Insurers to Comply with 2005 Medical Malpractice Reforms* (February 20, 2010) https://insurance.illinois.gov/newsrls/2010/02202010_a.pdf.

[12] Crain's Chicago Business, *Illinois Med-Mal Ruling to Boost Insurers' Costs 18%* (February 22, 2010),

Wisconsin must maintain the policies that make it an attractive place to practice medicine. As the Wisconsin Council on Medical Education and Workforce has cautioned, "[j]ust as surveys show that a state's litigation environment is an important factor in the decisions businesses make when deciding where to locate, ***a state's medical liability environment affects physician decisions to practice in a particular state.***"[13] Robust evidence exists that noneconomic damage caps impact physician populations.[14] "[S]tates that have implemented economic damages caps, joint and several liability reforms, and patient compensation funds see their physicians move away less frequently than states that do not have these reforms."[15] Research also confirms that states that have enacted such reforms experience greater growth in physician supply than states without such limits.

The Legislature has worked to maintain this advantage over other states by preserving Wisconsin's comprehensive

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http://www.chicagobusiness.com/article/20100222/NEWS03/200037194/illinois-med-mal-ruling-to-boost-unsurers-costs-18-study.

[13] WCMEW, *A Work in Progress: Building Wisconsin's Future Physician Workforce*, at 26 (August 2016), http://www.wcmew.org/wp-content/uploads/2016/08/2016physicianReportWCMEW.pdf

[14] ***Id.***

[15] 47 Business Economics 3, *Medical Malpractice Liability and Physician Migration*, at 203 (2012)(WHA.App. 039-050).

and balanced medical liability system. The Legislature's efforts should not be undermined and its reliance on the substantial evidence presented during the public hearings should not be disregarded by this Court.

CONCLUSION

The WHA respectfully requests that this Court hold that WIS. STAT. § 893.55(4)(d) is constitutional on its face and as applied, and remand this matter with directions to enter judgment in accordance with the statute.

Dated this 17th day of January, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c) for a non-party brief produced using the following font: Proportional serif font – minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,816 words.

Dated this 17th day of January, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of WIS. STAT. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief with the Court and served on all opposing parties.

Dated this 17th day of January, 2018.

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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this Amicus Brief, either as a separate document or as part of this Brief, is an appendix that complies with WIS. STAT. §§ 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) a copy of any unpublished opinion cited under WIS. STAT. § 809.23(3)(a) or (b); and (3) publications of which the Court may take judicial notice under WIS. STAT. § 902.01.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 17th day of January, 2018.

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CERTIFICATION OF DELIVERY

Pursuant to WIS. STAT. §§ 809.80(3)(b) & (4), I certify that on January 17, 2018, the requisite number of paper copies of this brief and appendix were delivered to a third-party commercial carrier (UPS) for overnight delivery to the Clerk of the Wisconsin Supreme Court and all parties of record. I further certify that the brief was correctly addressed.

Dated this 17th day of January, 2018.

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