STATE OF WISCONSIN
SUPREME COURT

No. 2014AP002812

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.

BRIEF OF AMICI CURIAE WISCONSIN MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici, the Wisconsin Medical Society (the "Society") and the American Medical Association ("AMA"), are organizations representing the voice of physicians in this State. Their members provide high-quality health care and advocate on behalf of their patients. The Society and the AMA bring unique expertise to this case.

The Society is the largest physician-advocacy organization in Wisconsin, representing over 12,500 physicians, residents, and medical students. The Society is a trusted leader in health-care policy, with a mission of improving the health of the people of Wisconsin by supporting and strengthening physicians' ability to practice high-quality patient care in a changing environment.

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents, and medical

students are represented in the AMA's policy-making process. AMA members practice in every state, including Wisconsin, and in every medical specialty.

This case presents issues directly affecting physicians and their patients: patient care, the integrity of Wisconsin's health-care system, and the medical liability system in Wisconsin. The lower courts' decisions upend the comprehensive statutory medical liability system established in Chapter 655, which serves as a foundation for Wisconsin's ability to ensure access to high-quality, patient-centered care for its citizens.

The Court of Appeals did this by eliminating the $750,000 cap on noneconomic damages in medical-malpractice actions (the "cap"). Petition App. 002. A majority declared the cap "unconstitutional on its face," on equal-protection grounds. *Id.* The concurring judge determined the cap to be unconstitutional as applied to plaintiffs. Petition App. 022. The Court of Appeals erred.

The cap is an essential component of the comprehensive medical liability system in Wisconsin, whose ability to provide a safety net for patients is unmatched by other states. Elimination of the cap will harm the protections provided by the Wisconsin Injured Patients and Families Compensation Fund (the "Fund"). *See* Wis. Stat. § 655.27. Elimination of the cap also will harm the ability of physicians and other health care providers to provide high-quality and affordable health-care.

The legislature set forth an extensive and direct rationale for the $750,000 cap, as stated in 2005 Wisconsin Act 183, Wis. Stat. § 893.55(1d). Yet, this rationale was not given "great weight" by the Court of Appeals, as is required. *See State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 508, 261 N.W.2d 434, 442 (1978). Additionally, amici will demonstrate other reasons, even beyond that stated by the legislature, demonstrating the value of the cap to the citizens of Wisconsin and the significant costs of its elimination.

This case presents "special and important reasons" for the Court's review as set forth in the criteria of Wis. Stat. § 809.62(1r). For one, the Court of Appeals' decision upsetting the legislative actions that have resulted in Wisconsin's well-balanced, relatively stable medical liability system present a "real and significant question" of "state constitutional law." Wis. Stat. § 809.62(1r)(a). Further, this case presents the Court with an opportunity to "develop, clarify or harmonize the law" as the Court of Appeals' decision striking down the cap presents an issue whose "resolution . . . will have statewide impact." *Id.* § 809.62(1r)(c).

The Court of Appeals' decision—despite its stated justification of seeking to protect the rights of severely injured patients—would harm the unique benefits provided to all Wisconsin patients (including and especially the severely injured) by the State's comprehensive medical liability system. This Court's review is warranted.

ARGUMENT

This case presents legal questions of statewide importance reviewable under Wis. Stat. § 809.62(1r). The lower courts' decisions would destabilize a medical liability system that provides unparalleled protections to Wisconsin's citizens. That comprehensive system was enacted by the legislature based on well-reasoned rationale supported by data and experience. *See, e.g.,* 2005 Wisconsin Act 183, Wis. Stat. §893.55(1d), and Petition App. 091-109. The Court of Appeals' decision also imperils Wisconsin's successful health-care system with ramifications for all stakeholders, including physicians, patients and the Fund.

I. "Special and Important Reasons are Presented" for This Court's Review: The Court of Appeals' Elimination of the Cap Destabilizes the Rights and Obligations of Parties Essential to the Health Care System.

The medical liability system set up by the legislature relies upon a balance of three main components: (1) mandatory primary insurance; (2) the Fund; and (3) a cap on noneconomic damages recoverable in medical malpractice claims. As explained by the legislature, all three are necessary to success of the system:

> the legislature finds that a ***limitation on the amount of noneconomic damages*** recoverable by a claimant or plaintiff for acts or omissions of a health care provider, together with ***mandatory liability coverage for health care providers*** and ***mandatory participation in the injured patients and families compensation fund by health care providers***, while compensating victims of medical malpractice in appropriate circumstances ***by the availability of unlimited economic damages***, ensures that these objectives [of affordable and accessible health care] are achieved.

Wis. Stat. § 893.55(1d)(a) (emphasis added). This statutory provision makes clear that the cap is integral to the functioning of the system. This is further underscored by the fact that since creation of Wisconsin's comprehensive medical liability system in 1975, Chapter 655 has contemplated a cap as part of the system. *See Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 190, 284 Wis. 2d 573, 677, 701 N.W.2d 440, 492 (Crooks, J., concurring). Nevertheless, the Court of Appeals' decision struck down the cap without regard to the consequences to all other aspects of the medical liability system. A decision by this Court "will help develop, clarify or harmonize the law," Wis. Stat. § 809.62(1r)(c): specifically the level of deference owed to the

legislature in its shaping of the comprehensive medical liability system.

A. The Cap Protects Patients.

The result of the Court of Appeals' decision—eliminating the cap—removes an essential component of a comprehensive system allowing Wisconsin to guarantee that 100 percent of all economic damages of an enforceable judgment will actually be recovered should medical malpractice occur. The Court of Appeals' decision does not protect the rights of severely injured patients (as it asserts, *see* Petition App. 018); it actually harms them as well as other patients in Wisconsin. Resolution of this question will have "statewide impact."

Statutes enacted by the legislature "enjoy a presumption of constitutionality." *Wisconsin Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶36, 328 Wis. 2d 469, 490, 787 N.W.2d 22, 33. Nonetheless, the Court of Appeals concluded that the existence of the noneconomic cap "impos[es] an unfair and illogical burden only on catastrophically injured patients, thus denying them the equal

protection of the law." Petition App. 002. The majority of the Court of Appeals stated that "there is no rational basis linking the amount of the current noneconomic damage cap to the legislature's articulated purposes for enacting the cap." Petition App. 005. The concurrence concluded that the cap was "unconstitutional as applied" in this case based on "equal protection grounds." Petition App. 022-024.

The Court of Appeals' decision improperly second-guessed the legislature's stated considerations, *see* 2005 Wisconsin Act 183, Wis. Stat. §893.55(1d). In so doing, it failed to give appropriate regard to the substantial evidence considered by the legislature as well as updated information supporting the rationale underlying the cap and its amount. Further, the Court of Appeals expounded a misunderstanding of the role and benefits of the cap, supposedly based on *Ferdon*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, that this Court should take the opportunity to address.

In Wisconsin, patients are guaranteed every cent of economic damages in an enforceable medical-malpractice judgment. This is accomplished through mandatory primary liability insurance, *see* Wis. Stat. §655.23(3)(a),(4)(b) (requiring most physicians to maintain primary insurance coverage of $1,000,000 per occurrence and $3,000,000 aggregate) and mandatory participation in, and financing of, the Fund, *see* Wis. Stat. §655.002, §655.27(3). This guarantees payment of all past and future medical costs, wage loss and other economic damages for a patient, no matter the judgment amount. *See* Wis. Stat. §§655.006, 655.007, 655.009, 655.27.

This promise can be made to every Wisconsin patient because the Fund's ultimate exposure is significantly controlled by the cap. Without the cap, the Fund's exposure would be unreasonably and unpredictably high, thus threatening the viability and purpose of the Fund. *See, e.g.,* 2005 Wisconsin Act 183, Wis. Stat. § 893.55(1d)(a)(4).

Indeed, it is the severely injured who benefit the most from the protections of the cap and the Fund. For example, Ms. Mayo has already received $8,842,096, representing the entirety of past and future medical expenses and past and future wage loss awarded by the jury, as well as $750,000 in noneconomic damages. (R. 209, 210, 212.)

Had Ms. Mayo's injuries occurred as a result of vehicular negligence instead of a lack of adequate informed consent, there would be no guarantee that she would receive compensation sufficient to cover all of her medical expenses, let alone her other economic damages or *any* noneconomic damages. No fund ensures that economic damages are paid in these circumstances. *See generally* Chapters 345, 604, 895, Wisconsin Statutes.

Had Ms. Mayo's injury occurred in a state other than Wisconsin, there is no guarantee that she would receive compensation sufficient to pay her past medical expenses. In many states, physicians and other health-care providers are not required by the state to have any minimum amount of insurance,

as reported by the AMA in 2015.[1] As explained by the AMA in 2008, in most states there is no patient compensation fund to pay any portion of an economic damages claim in excess of insurance limits.[2] In such states, the money a successful claimant in a medical malpractice action actually receives depends less on the size of a verdict, capped or uncapped, and more on the amount of insurance and assets of the defendant. Ms. Mayo and other similarly-situated patients face no such concern in Wisconsin.

In sum, the Fund protects patients, the cap protects the Fund, and the combination provides a greater level of protection for the most severely injured patients than the alternatives.

Here, the Court of Appeals disregarded that the cap benefits patients (including the most severely injured patients)

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[1] AMA, Advocacy Resource Center, *State laws mandating minimum levels of professional liability insurance*, found in Medical Group Management Association 2015 Annual Conference materials (2015) http://s36.a2zinc.net/clients/mgma/MGMA15/Custom/Handout/Speaker0_Session907_5.pdf

[2] AMA, Advocacy Resource Center, *State Patient Compensation Funds* (2008) https://www.scribd.com/document/181171839/AMA-state-Patient-Compensation-Funds

through guaranteed recovery. This case presents the Court with an opportunity to address this issue of "statewide impact." Wis. Stat. § 809.62(1r)(c)(2).

B. The Cap Helps Health Care Providers Ensure Patient Access to High-Quality and Affordable Health Care.

The cap is an important part of the comprehensive, well-balanced medical liability system that makes Wisconsin a good place to practice medicine. Indeed, the cap is crucial to attracting and retaining top-quality physicians to care for Wisconsin's citizens.

The cap, as part of the comprehensive liability system, provides a measure of financial stability for physicians. Unlike in states without mandatory liability insurance or a patient compensation fund, Wisconsin physicians do not face personal exposure for professional care. *See* Wis. Stat. §655.27(1), (1m). The system also makes liability coverage more affordable and removes incentives to practice defensive medicine. 2005 Wisconsin Act 183, Wis. Stat. § 893.55(1d)(a). Eliminating the cap will make it harder to attract and retain high-quality

physicians at a time when most states, including Wisconsin, face worsening physician shortages.

The cap also plays an important role in Wisconsin's medical litigation climate. Were unlimited, guaranteed recovery available to patients or their representatives without a cap on exposure, the system would present an attractive target for questionable claims. Lawsuits are based in part on the economics of bringing a claim as compared to the likelihood of success and the level of recovery if successful. Unlimited, guaranteed recovery provided by the Fund without a cap would change that analysis. Removing the cap would invite more lawsuits, potentially with little or no merit, in hopes of a jury verdict that would permit unlimited, guaranteed recovery. This would raise the costs of insurance, increase the Fund's defense and indemnity costs, and subject physicians to meritless accusations of negligence.

C. The Cap Protects the Viability of the Fund.

The Fund is an essential component of Wisconsin's medical liability system that makes this State's system one of the most beneficial in the country to patients. Removing the cap endangers the Fund's ability to provide a safety net for Wisconsin's patients.

Eliminating the cap would dramatically shift the purpose of the Fund and its ability to fulfill its mission. The purpose of the Fund is to provide injured patients and their families with "unlimited liability coverage for economic damages exceeding the primary limits" as well as limited noneconomic damages. *See Ferdon*, 2005 WI 14, ¶ 25, 284 Wis. 2d at 594, 701 N.W.2d at 450.

The Fund is financed by assessments charged to physicians and other participants in the Fund. *See State ex rel. Strykowski,* 81 Wis. 2d at 500, 261 N.W.2d at 438. The cost of those assessments is based on the actuarial risk of the Fund, which includes past experience and the amount of money necessary to pay all anticipated claims. *See* Wis. Stat. §655.27(3) Removal of

the cap would increase the Fund's exposure and is not only likely to raise assessment rates charted to finance the Fund, but also make it difficult to set rates at all (or at least in any reasonable amount) that would not diminish the benefit of the Fund as a means of controlling the cost to practice medicine.

No state provides unlimited, guaranteed recovery to successful claimants in medical malpractice suits. As the AMA has reported, of the approximately eight states that have some form of active patient compensation fund, none provides an unlimited, guaranteed means of recovery without pairing that means with a cap on either noneconomic damages or on total damages.[3] Funds financed by assessments on participating providers simply cannot adequately account for unlimited, fully-insured risk.

Put another way, a fund as beneficial as Wisconsin's cannot exist without a cap. The Fund's history demonstrates why this is

[3] See supra note 2 and AMA, Advocacy Resource Center, *Caps on Damages* (2015) https://www.ama-assn.org/sites/default/files/media-browser/premium/arc/caps-on-damages_0.pdf

true: "[t]he two largest claim payments [in the Fund's history] were for incidents that occurred prior to April 2006, and included significant noneconomic damage awards that were not subject to any limit." Legislative Audit Bureau, *Injured Patients and Families Compensation Fund*, Report 16-4 ("Report 16-4"), at 6 (March 2014).[4]

Fund assessments went up 25 percent during the brief period without a cap, reflecting the start of increased costs to finance an unlimited, guaranteed recovery for Wisconsin medical malpractice plaintiffs. *See* Report 16-4 at 4-7.

The Fund's current relative stability should not lull courts or policy makers into believing it is too healthy to need a cap (nor is it a valid reason to overrule the legislature's policy decisions). When the state of Wisconsin illegally removed $200 million from the Fund in 2007, the Fund's net position fell below zero; it did

[4] https://legis.wisconsin.gov/lab/reports/16-4full.pdf

not have enough money to cover expected expenses. *See* Report 16-4 at 9 (Figure 1).

If the cap remains eliminated and the Fund must provide unlimited, guaranteed recovery for economic *and noneconomic* damages, its exposure would likely rise by significantly more than $200 million within a few years. Indeed, the 2016 Fund audit report notes that "[a] small number of large-value claims can significantly affect the Fund's operations and cash flow." Report 16-4 at 7.

The Fund provides a safety net to ensure that injured patients will be compensated for their medical and economic damages—in an unlimited way. *See* Wis. Stat. § 655.009. Wisconsin patients can seek medical care confident that, if they are injured by medical negligence, the means of recovery are assured. The Court of Appeals' decision jeopardizes the long-term protection provided by the Fund and calls for this Court's review.

II. "Special and Important Reasons Are Presented" for This Court's Review: The Court of Appeals' Decision Triggers a Need for Clarity in the Medical Liability System.

Plaintiffs sought and the Court of Appeals delivered a decision that calls into question the cap on noneconomic damages and thus the limit on the financial exposure of the Fund. Malpractice suits will be filed. Courts will face a "question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. §809.62(1r)(c)(3).

With respect to the as-applied challenge raised by the plaintiffs in the lower court and by the concurring judge in the Court of Appeals, this Court should take the opportunity to clarify the role of as-applied challenges in relation to comprehensive statutory systems such as that in Chapter 655. Permitting as-applied challenges to the cap based on the rationale employed by the circuit court and the concurrence in this case belies the purpose of the cap. It would effectively create an exception swallowing the rule.

Clarity is essential to the continued success of a system that has attracted high-quality physicians to serve the people of Wisconsin. To date, the Fund, whose fiscal integrity has been maintained in good part by the existence of the cap, has ensured that all successful claimants, now and in the future, have access to the guaranteed recovery for unlimited economic damages and capped noneconomic damages that Ms. Mayo and her family have already received. That may not be the case for other similarly situated-patients moving forward if the cap is removed.

The time to decide the issue is now. This case satisfies the Court's criteria for granting review under Wis. Stat. § 809.62(1r): the constitutionality of the cap on noneconomic damages is a "significant question" of "state constitutional law" that requires this Court's review to "help develop, clarify, or harmonize the law," on a "recur[ring]" legal issue and one with "statewide impact."

CONCLUSION

The Society and the AMA ask that the Court grant review in this case.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief of Amici Curiae Wisconsin Medical Society and American Medical Association in Support of Petition for Review conforms to the rules contained in s. 809.62(4) for a brief produced with a proportional serif font. The length of this brief is 3000 words.

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CERTIFICATION REGARDING ELECTRONIC BRIEF
PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this Brief of Amici Curiae Wisconsin Medical Society and American Medical Association in Support of Petition for Review, excluding the appendix, if any, which complies with the requirements of section 809.62 and 809.19(12), Stats.

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 filed with the court and served on all opposing parties.

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MAILING CERTIFICATION

I, Anne Berleman Kearney, do hereby certify that the Motion of Wisconsin Medical Society and American Medical Association for Leave to File Brief as Amici Curiae In Support of Petition for Review and Brief of Amici Curiae Wisconsin Medical Society and American Medical Association in Support of Petition for Review was hand-delivered to a third-party carrier (Federal Express) on August 9, 2017 for delivery to Ms. Diane Fremgen, Clerk of Court, Wisconsin Court of Appeals, 110 E. Main Street, Suite 215, Madison, Wisconsin 53703.

I further certify that on Wednesday, August 9, 2017 three copies of the motion and brief of amici curiae were mailed via the United States Postal Service, postage prepaid, addressed to the following counsel:

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