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**THE CONSTITUTIONAL FOUNDATION  
FOR  
FEDERAL MEDICAL LIABILITY REFORM**

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## INTRODUCTION

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Efforts to address soaring medical liability insurance premiums and the resulting patient access problems find their origins in landmark medical liability reform legislation adopted by California over thirty years ago. Among other reforms, California's Medical Injury Compensation Reform Act of 1975 (MICRA) permits awards of noneconomic damages (e.g., pain and suffering) up to \$250,000 in any action against a health care provider based on professional negligence.<sup>1</sup> This limit has been upheld as constitutional.<sup>2</sup> Based on MICRA's success in stabilizing California's medical liability climate, physicians and other healthcare providers have called for similar limits on noneconomic damages in other states and at the federal level. Noneconomic damages are a substantial part of tort costs. Limits such as those in MICRA target the particularly detrimental effects of inherently subjective noneconomic damages on access to healthcare services.

In addition to California, statutory limits in many states have successfully stabilized and, in some cases, significantly reduced, medical liability insurance rates. These laws have also expanded access to physicians, particularly specialists practicing in high-risk areas and in rural communities. State action has substantially improved the medical liability environment in many areas of the country. The states have indeed served as laboratories for innovation.

Most state supreme courts have upheld limits on noneconomic damages as an appropriate exercise of legislative authority.<sup>3</sup> In some states, however, restrictions in state constitutions that have no federal corollary (e.g., "open courts" or "right to a remedy" provisions) and the placement of politics over the public interest have prevented reforms from being enacted.<sup>4</sup> Federal legislation is needed to provide a comprehensive, national solution.

H.R. 5, the "Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011," looks to successful state reforms such as MICRA as a model for improving the healthcare environment for all Americans; the legislation will fill in the gaps left by states that have not been able to adopt their own reforms.<sup>5</sup>

This paper establishes that federal medical liability reform legislation is constitutional, consistent with federalism principles, and represents sound public policy. The analysis is based on existing United States Supreme Court precedent and does not propose new legal theories to expand the application of the United States Constitution's Commerce Clause.

## H.R. 5 IS CONSTITUTIONAL

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H.R. 5 is consistent with Congress's authority to regulate interstate commerce given the cross-border impact of medical liability on doctors and patients, and considering the federal government's significant role in the healthcare system. The authority of Congress to adopt medical liability reform legislation such as H.R. 5 is clear and cannot be seriously disputed.

**The Commerce Clause.** Article 1, Section 8, Clause 3 of the United States Constitution provides Congress with authority “to regulate commerce . . . among the several states.” This enumerated power is the source of Congress’s authority to enact medical liability reform legislation. The United States Supreme Court “has made clear that the commerce power extends not only to ‘the use of channels of interstate or foreign commerce’ and to ‘protection of the instrumentalities of interstate commerce,’ but also to ‘activities affecting commerce.’”<sup>6</sup> In determining whether Congress has acted within its authority under the Commerce Clause, a court will look to whether the activity is economic in nature, whether there are discernable ties to commerce, whether the activity as a whole has an effect on commerce, and what congressional findings have been made with respect to the activity’s effects on commerce.<sup>7</sup> A federal statute will survive a Commerce Clause challenge if the law regulates activities that, when “viewed in the aggregate,” substantially affect interstate commerce.<sup>8</sup>

Since the 1942 case of *Wickard v. Filburn*, involving Congress’s power to regulate the production of homegrown wheat, the United States Supreme Court has interpreted the Commerce Clause quite broadly with respect to the regulation of economic activity. In *Wickard*, the Court found that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . .”<sup>9</sup> The Court rejected a Commerce Clause challenge to the statute, concluding that wheat farming as a whole substantially affects interstate commerce. The Court later reaffirmed that “even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.”<sup>10</sup>

More recently, the Supreme Court has placed restrictions on how far Congress may go in using the Commerce Clause to justify federal action, but the application of this law to H.R. 5 is not even a close call. For example, the Court invalidated the Gun Free School Zones Act of 1990, which provided a federal criminal penalty for possession of a firearm in a local school zone.<sup>11</sup> Similarly, the Court overturned the Violence Against Women Act for its reliance on the Commerce Clause in making domestic violence against women a federal crime.<sup>12</sup> These cases simply caution Congress that the Court will not allow the Commerce Clause to be stretched to the point of supporting “criminal statute[s] which by [their] terms ha[ve] nothing to do with ‘commerce’ of any sort of economic enterprise, however broadly those terms are defined.”<sup>13</sup>

Congress continues to have broad authority to regulate economic activity, including the field of medical liability through legislation such as H.R. 5. For example, while the Supreme Court struck down the criminal penalty for possession of a firearm in a school zone, courts have uniformly upheld the constitutionality of a recent federal law which protects federally licensed manufacturers and sellers of firearms from most civil liability for injuries independently and intentionally inflicted by criminals who use their non-defective products (i.e., the Protection of Lawful Commerce in Arms Act).<sup>14</sup>

The nonpartisan Congressional Research Service (CRS) has closely analyzed judicial precedent and concluded that “there seems little doubt that tort reform legislation, in general,

would be within Congress's commerce power."<sup>15</sup> Under its power to regulate interstate commerce, Congress may "make such legislation applicable to intrastate torts, because tort suits generally affect interstate commerce."<sup>16</sup> The only arguable exception, CRS recognized, is when a federal tort reform applies to a particular intrastate tort, such as an assault by one individual resident on another, that has no connection with any commercial activity.<sup>17</sup> CRS concluded that "[t]here would appear to be no due process or federalism (or any other constitutional) impediments to Congress' limiting a state common law right of recovery."<sup>18</sup> With respect to the HEALTH Act, CRS has specifically recognized that "[m]edical malpractice liability is governed by state law, but Congress has the power, under the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) to regulate it."<sup>19</sup>

Healthcare is truly national in scope and fundamental to interstate commerce. Congress promotes access to healthcare by making health insurance a tax-free benefit for employees and their families.<sup>20</sup> In addition, the Medicare and Medicaid programs are the financing system for tens of millions of Americans. The FY 2011 federal budget recognizes that "[t]he key drivers of the long-range deficit are the Government's major health and retirement programs: Medicare, Medicaid and Social Security."<sup>21</sup> Based on the federal expenditures for these and other programs, and the interstate nature of the medical liability insurance market, Congress has authority to "regulate" the field of medical liability. By placing an upper limit on subjective and otherwise limitless pain and suffering damages against doctors and other medical professionals, Congress can promote a more cost-effective healthcare delivery system.

***The Tenth Amendment.*** H.R. 5 is consistent with the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>22</sup> ATRA strongly supports the prerogative of state legislatures to make public policy in the area of civil justice.

The United States Supreme Court has interpreted the Tenth Amendment to prohibit Congress from "compe[ling] the States to implement, by *legislation* or *executive* action, federal regulatory programs."<sup>23</sup> In 1992, in *New York v. United States*, the Court invoked the Tenth Amendment to invalidate a federal statute that required states to enact legislation to provide for the disposal of radioactive waste or "take title" to the waste.<sup>24</sup> The Court ruled that Congress may not "command a state government to enact *state* regulation" even if the federal government might regulate the area directly – it may not "conscript state governments as its agents."<sup>25</sup> Five years later, in *Printz v. United States*, the Court applied similar reasoning to invalidate the Brady Handgun Violence Prevention Act.<sup>26</sup> The Brady Act required chief law enforcement officers of the states to conduct a background check of individuals applying for handgun permits. *Printz* spoke on "the compelled enlistment of state executive officers for the administration of federal programs," which the Court referred to as "executive-commandeering."<sup>27</sup> The Court ruled that Congress violates the Tenth Amendment when "the whole *object* of the law is to direct the functioning of state *executives*, and hence to compromise the structural framework of dual sovereignty."<sup>28</sup>

In contrast, H.R. 5 does *not* require states to enact legislation, nor does it compel state executive branch action.<sup>29</sup> H.R. 5 simply provides legal rules to be applied in medical liability actions. Presently, federal courts sitting in diversity and state courts routinely engage in a choice-of-law analysis to determine which law to apply in a particular tort case. For example, under current law, a federal or state court in California may choose to apply Oklahoma law if Oklahoma has a greater nexus to the case.<sup>30</sup> After enactment, the provisions in H.R. 5 would be factored into the same type of calculus. It is also worth noting that because of the familiarity of courts with choice-of-law analyses, and the courts' frequent application of state laws that are similar (if not identical) to H.R. 5, the legislation would not result in confusion when courts begin to apply it post-enactment.

***The Guarantees of Due Process and Equal Protection.*** The Fifth Amendment provides that a person shall not be “deprived of life, liberty, or property, without due process of law.” Constitutional principles also prohibit the government from denying to any person the equal protection of the laws. In cases involving such challenges to economic regulation, such as liability limits, courts traditionally apply a deferential test that requires only that the law have a rational relationship to a legitimate government objective. H.R. 5 is rationally related to addressing healthcare costs and the practice of “defensive medicine,” while ensuring that people with meritorious claims receive adequate compensation.

Tort reform legislation unavoidably involves a certain element of line-drawing. Consequently, plaintiffs' lawyers have claimed that it is unconstitutional for a law to treat individuals in medical liability claims differently than those with other personal injuries or impose a limit that will have a greater impact on those with more serious injuries than those with lesser injuries. The United States Supreme Court, however, has firmly rejected such arguments in other tort liability contexts.<sup>31</sup> In addition, federal appellate courts have upheld noneconomic damages limits as “classic example[s]” of economic regulation—“a legislative effort to structure and accommodate ‘the burdens and benefits of economic life.’”<sup>32</sup> As the Tenth Circuit explained, “When a legislature strikes a balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance, it is engaging in its fundamental and legitimate role of “structur [ing] and accommodat[ing] ‘the burdens and benefits of economic life.’”<sup>33</sup>

***Right to Jury Trial.*** The Seventh Amendment states that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” Federal appellate courts recognize that the jury's role “as factfinder [is] to determine the extent of a plaintiff's injuries” not “to determine the legal consequences of its factual findings.”<sup>34</sup> Furthermore, a judge that “merely implement[s] a policy decision of the legislature in applying the law enacted by the legislature when it predetermined the extent and amount of damages that it, the legislature, would allow in a malpractice action” does not “reexamin[e] a ‘fact tried by a jury’” within the meaning of the Seventh Amendment.<sup>35</sup> State high courts have also found that statutory limits on noneconomic damages do not intrude on the role of the jury.<sup>36</sup>

When opponents of limits on noneconomic damages have challenged state statutes, they have sometimes pointed to case law holding that a *judge* may not unilaterally reduce a jury's verdict.<sup>37</sup> These cases recognize that a judge who finds that a verdict is excessive or otherwise not supported by the evidence must offer the plaintiff a choice – accept the lower verdict or face a new trial, a process known as “remittitur.”<sup>38</sup> Statutory limits on noneconomic damages, however, reflect a public policy choice by the *legislature*, not a legal decision by a lone *judge*. In addition, opponents of limits on civil tort damages have argued that a decision involving federal copyright law, *Feltner v. Columbia Pictures Television, Inc.*,<sup>39</sup> supports their view. It does not. *Feltner* found only that the plaintiff had a right for a jury to determine the amount of his or her statutory damages, not that a plaintiff had a right to have a jury exceed the limits set by Congress on such damages. Any question that *Feltner* prohibits such limits is discredited by the fact that the Copyright Act itself authorizes damages either “in a sum of not less than \$500 or more than \$20,000,” or “a sum of not more than \$100,000,” depending on the circumstances.<sup>40</sup>

***Courts Routinely Uphold Federal Civil Justice Reform Laws.*** For over a century, courts have consistently upheld federal tort reform laws as constitutional.<sup>41</sup> Early laws regulated liability for personal injury and property damage on railroads and ships.<sup>42</sup> In the 1970s and 1980s, courts upheld federal laws addressing liability stemming from a wide range of issues, including black lung disease,<sup>43</sup> nuclear power,<sup>44</sup> swine flu<sup>45</sup> and childhood vaccinations,<sup>46</sup> and atomic weapons testing,<sup>47</sup> among others. Since that time, the judiciary has upheld federal laws limiting the liability of general aviation aircraft manufacturers,<sup>48</sup> rental car companies,<sup>49</sup> and firearms manufacturers.<sup>50</sup> Federal securities litigation reform legislation has also been upheld as constitutional.<sup>51</sup> In recent years, Congress has promoted various socially desirable activities by providing liability relief for school teachers,<sup>52</sup> volunteers,<sup>53</sup> suppliers of materials used in implantable medical devices,<sup>54</sup> donors of grocery products to nonprofit organizations,<sup>55</sup> good Samaritans who use automated external defibrillators (AEDs) to help people in medical emergencies,<sup>56</sup> and Amtrak.<sup>57</sup> As the United States Supreme Court has recognized:

Our cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’ The ‘Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,’ despite the fact that ‘otherwise settled expectations’ may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.<sup>58</sup>

***Time After Time, Courts Reject Federal Constitutional Challenges to State Medical Liability Reform Laws.*** Decisions upholding the constitutionality of state medical liability reforms also support the constitutionality of H.R. 5. Numerous federal courts rejected challenges to state noneconomic damages limits under the United States Constitution as meritless.<sup>59</sup> Even personal injury lawyers have long understood that the United States Constitution does not bar civil liability reform. That is why they have bluntly counseled their members that “most state constitutions are far superior to the federal constitution” for nullifying tort reform laws.<sup>60</sup>

## H.R. 5 RETAINS STATE AUTHORITY AND PROVIDES SIGNIFICANT FLEXIBILITY FOR STATE-BASED SOLUTIONS

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H.R. 5 preserves state medical liability laws that are already on the books, regardless of whether a state has enacted a limit on noneconomic damages that is higher or lower than the \$250,000 provided in the federal legislation. Thus, H.R. 5 would not impact states such as Mississippi, which has enacted a \$500,000 limit on noneconomic damages in medical liability cases,<sup>61</sup> or Maryland, where the noneconomic damage cap applicable to medical liability claims currently stands at \$680,000 and increases \$15,000 each year.<sup>62</sup> Nor would it impact laws in states such as Indiana, Nebraska, or Virginia, which have chosen to place aggregate limits on compensatory damages in medical liability lawsuits.<sup>63</sup>

H.R. 5 also provides states with the flexibility to adopt their own limits on damages in healthcare lawsuits *after* its enactment. States will continue to have a wide range of options for addressing medical liability. For instance, with respect to noneconomic damages, states could set a higher limit in all cases or in cases involving catastrophic injury, opt to include an annual inflation adjustment, or determine the maximum noneconomic damages that an individual may receive based on his or her remaining life expectancy. These are all approaches currently employed by various states.

The federal limits on noneconomic and punitive damages in medical liability claims would therefore serve as the default rule, governing only when state law would otherwise allow for unlimited damages. The federal limit would apply in states such as Alabama, Georgia, Illinois, New Hampshire, and Washington, where state legislators enacted limits on noneconomic damages, only to have them struck down by activist courts on state constitutional grounds.<sup>64</sup> The \$250,000 federal noneconomic damage limit would also apply in at least fifteen states and the District of Columbia unless and until these jurisdictions enact their own limits on damages in medical liability actions. In a few of these states, the state constitution explicitly precludes legislative limits on damages in personal injury lawsuits, which leaves federal reform as the only option aside from a constitutional amendment.

State law would continue to govern other aspects of medical liability unless there is a specific requirement provided by H.R. 5. States also may provide stronger protections than the federal law.

## FEDERAL ACTION IS NEEDED AND APPROPRIATE

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***The Adverse Effects of Excessive Medical Liability Extend Beyond State Borders.*** When faced with high medical liability insurance premiums, experience shows that doctors will curtail their practices to avoid high-risk areas and often relocate to states with reasonable limits on liability.<sup>65</sup> Congress may appropriately exercise its authority under the Commerce Clause to safeguard the ability of doctors to treat patients without costs that are excessive in comparison to colleagues working in jurisdictions that limit liability.

***The Federal Government Has a Large Financial Stake in the Healthcare System.*** In March 2011, the Congressional Budget Office (CBO) estimated that nationwide implementation of the medical liability reforms similar to H.R. 5, including caps on noneconomic damages, would reduce federal budget deficits by \$62.4 billion over ten years.<sup>66</sup> These savings would come from a \$49.5 billion reduction in costs for federal programs including Medicare, Medicaid, the Children’s Health Insurance Program, the Federal Employees Health Benefits program, and subsidies for coverage purchased through health insurance exchanges. The CBO also found that because employers would pay less for health insurance for employees, more of their employees' compensation would be in the form of taxable wages and other fringe benefits, leading to an additional \$12.9 billion in federal revenue over the next 10 years. Medical liability reform would reduce discretionary spending on federal programs by about \$1.6 billion over the next decade, according to the CBO.

In addition to reducing the deficit, the CBO found that medical liability reform would lead to lower medical liability premiums. As a result, patients would benefit from lower prices for healthcare services. The CBO also found that reducing the liability pressures on doctors would lead them to engage less defensive medicine, saving the cost of expensive, but unnecessary, services.<sup>67</sup> Credible estimates of the annual nationwide costs of defensive medicine conservatively begin at \$50 billion.<sup>68</sup>

***There Is Bipartisan Recognition that Federal Action Is Needed.*** In its December 2010 report, President Barack Obama’s National Commission on Fiscal Responsibility and Reform discussed many of the reforms included in H.R. 5, including modifying the collateral source rule, imposing a one- to three-year statute of limitations, and eliminating joint liability. The report also stated that many of the Commissioners “believe that we should impose statutory caps on punitive and non-economic damages, and we recommend that Congress consider this approach and evaluate its impact.” The Commission found that such changes would save taxpayers \$17 billion through 2020.<sup>69</sup>

***The Benefits of Healthcare Liability Reform Are Well Documented.*** In California, medical liability insurance rates have remained relatively stable while mushrooming in many states that have not enacted reforms. Adoption of reform in Mississippi restored access to healthcare<sup>70</sup> in a state that had the lowest number of physicians per capita in the country and where many communities did not have a local obstetrician.<sup>71</sup> Likewise, after Texas enacted a package of reforms that included limits on noneconomic damages, thousands of physicians came to the state, with many settling in underserved communities.<sup>72</sup> Many of these physicians provide essential specialties, such as obstetrics, orthopedics, and neurosurgery.<sup>73</sup> In West Virginia, where emergency rooms lacked trauma surgeons to treat serious bone, brain, and spinal injuries,<sup>74</sup> doctors have seen their average premium decrease by one-third to one-half since the state adopted reforms.<sup>75</sup> In addition, limits on subjective and widely fluctuating noneconomic damages reduce pressure on doctors to engage in defensive medicine, such as ordering costly tests out of excessive caution because of concern over potential liability.<sup>76</sup> Adoption of a federal medical liability law ensures that all Americans benefit from access to more affordable healthcare.

## **CONCLUSION**

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More than a century of United States Supreme Court precedent, the consistent rejection of federal constitutional challenges to state medical liability reform, and the Congressional Research Service's expert opinion prove that H.R. 5 would pass constitutional muster if challenged. By retaining significant flexibility for states to enact their medical liability laws, H.R. 5 respects states' rights and federalism principles.

## **ABOUT THE AUTHOR**

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## ENDNOTES

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<sup>1</sup> See Cal. Civ. Code § 3333.2.

<sup>2</sup> See *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); see also *Van Buren v. Evans*, 2009 WL 1396235 (Cal. App. May 20, 2009) (unpublished), *review denied* (Cal. Aug. 12, 2009).

<sup>3</sup> See, e.g., *C.J. v. Dep't of Corrections*, 151 P.3d 373 (Alaska 2006); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002); *L.D.G., Inc. v. Brown*, 211 P.3d 1110 (Alaska 2009); *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571 (Colo. 2004); *Univ. of Miami v. Echarte*, 618 So. 2d 189 (Fla. 1993); *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115 (Idaho 2000); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990), *overruled in part on other grounds*, *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991); *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992); *Peters v. Saft*, 597 A.2d 50 (Me. 1991); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45 (Md. 2010); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); see also Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005) ("Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps.").

<sup>4</sup> See Victor E. Schwartz, Mark A. Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

<sup>5</sup> The core of H.R. 5 is a \$250,000 limit on noneconomic damages in healthcare liability actions, following the MICRA model. Other reforms in H.R. 5 include: (1) a statute of limitations of three years after the date of manifestation of injury or one year after the claimant discovers the injury, with certain exceptions; (2) fair share liability reform to provide that each party is liable based on its percentage of responsibility; (3) sliding scale limits on attorney contingency fees depending on the amount of damages; (4) permitting the jury to consider compensation the plaintiff received from collateral sources; (5) reserving punitive damages to the most reprehensible conduct by requiring clear and convincing evidence that a healthcare provider acted with malicious intent to injure the claimant or deliberately failed to avoid unnecessary injury the claimant was substantially certain to suffer; (6) limiting punitive damages to the greater of two times the amount of economic damages awarded or \$250,000; (7) a compliance with standards defense to punitive damages for manufacturers and distributors of FDA-approved medical products; and (8) authorizing periodic payments of future damages. As of the time of publication, H.R. 5 had 130 co-sponsors and was reported favorably by the House Judiciary Committee on February 16, 2011.

<sup>6</sup> *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981) (quoting *Perez v. United States*, 402 U.S. 146, 150 (1971)).

<sup>7</sup> See generally *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>8</sup> *Id.* at 561.

<sup>9</sup> *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

<sup>10</sup> *Hodel*, 452 U.S. at 276-77 (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)).

<sup>11</sup> *Lopez*, 514 U.S. at 567-68.

<sup>12</sup> *Morrison v. United States*, 529 U.S. 598 (2000); see also *United States v. Wilkinson*, 626 F. Supp. 2d 184 (D. Mass. 2009) (holding that Congress exceeded its powers under the Commerce Clause and Necessary and Proper Clause by enacting statute authorizing civil commitment of a sexually dangerous person).

<sup>13</sup> *Lopez*, 514 U.S. at 550.

<sup>14</sup> See *Ileto v. Glock, Inc.*, 565 F.3d 1126 (11<sup>th</sup> Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir.), *cert. denied* 129 S. Ct. 1579 (2008); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009).

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<sup>15</sup> Henry Cohen & Vanessa K. Burrows, *CRS Report for Congress: Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes 2* (No. 95-797, Congressional Research Service, 2008).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 18.

<sup>19</sup> Henry Cohn, *CRS Report for Congress: Medical Malpractice Liability Reform: Legal Issues and Fifty-State Survey of Caps on Punitive Damages and Noneconomic Damages*, at 2 (No. RL31692, Congressional Research Service, 2004), available at [http://assets.opencrs.com/rpts/RL31692\\_20050208.pdf](http://assets.opencrs.com/rpts/RL31692_20050208.pdf).

<sup>20</sup> Tax-free health insurance is estimated to cost the federal government more than \$1 trillion in foregone revenue between 2011 and 2015. See Office of Management & Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2011*, tbl. 16-1, at 211 (2010), available at <http://www.gpoaccess.gov/usbudget/fy11/pdf/spec.pdf>.

<sup>21</sup> Office of Management & Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2011*, at 45 (2010), available at <http://www.gpoaccess.gov/usbudget/fy11/pdf/spec.pdf>.

<sup>22</sup> See generally Victor E. Schwartz, Mark A. Behrens & Leavy Mathews III, *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 Harv. J. of Legis. 269 (1999).

<sup>23</sup> *Printz v. United States*, 521 U.S. 898, 925 (1997) (emphasis added).

<sup>24</sup> *New York v. United States*, 505 U.S. 144, 175-76 (1992).

<sup>25</sup> *Id.* at 179 (emphasis in original).

<sup>26</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>27</sup> *Id.* at 916.

<sup>28</sup> *Id.* at 932 (emphasis added).

<sup>29</sup> *Cf. Reno v. Condon*, 528 U.S. 141, 142 (2000) (finding that Congress, in enacting the Drivers' Privacy Protection Act had an adequate grounding in interstate commerce, under *Lopez*, and properly regulated the sale or release of drivers' personal information because even while placing some obligations on state agencies, "it does not require the South Carolina Legislature to enact any laws or regulations . . . and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals . . .").

<sup>30</sup> See, e.g., *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010).

<sup>31</sup> See *supra* note 22.

<sup>32</sup> See, e.g., *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4<sup>th</sup> Cir. 1989) (holding that Virginia's limit medical liability awards had reasonable relation to valid legislative purpose and did not violate due process or equal protection) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

<sup>33</sup> *Patton v. TIC United Corp.*, 77 F.3d 1235, 1247 (10<sup>th</sup> Cir. 1996) (quoting *Boyd*, 877 F.2d at 1196), *cert. denied*, 518 U.S. 1005 (1996).

<sup>34</sup> *Boyd*, 877 F.2d at 1196; see also *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6<sup>th</sup> Cir. 2005), *cert. denied*, 347 U.S. 1111 (2006); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989).

<sup>35</sup> *Davis*, 883 F.2d at 1162.

<sup>36</sup> See, e.g., *Fein*, 695 P.2d at 680 ("[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."); *Peters v. Saft*, 597 A.2d 50, 53-54 (Me. 1991) (in upholding a statute placing a \$250,000 limit on nonmedical damages recoverable against servers of liquor, finding that the right to jury trial "means that, with respect to those questions of fact that the substantive law makes material, the party has the right to have a determination made by the jury. Plaintiff does not have the right to have the jury determine any question he desires. Nor does plaintiff have a right to an unlimited remedy. . . ."); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992) (in upholding a statutory limit on noneconomic damages, recognizing that a jury finds the facts, a court applies the

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law to the facts, and once the jury assesses liability and determines damages, it completes its constitutional task; a statutory limit only comes into play once the jury's job is done); *Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 75 (Neb. 2003) (same); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 431 (Ohio 2007) ("So long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered as a matter of law."); *DRD Pool Serv., Inc. v. Freed*, 5 A.3d 45, 57 (Md. 2010) ("[T]he right to a jury trial is likewise unaffected by the Cap. The Cap reflects a policy judgment by the General Assembly which does not interfere with the underlying right to a trial by jury because plaintiffs will still have a jury determine the facts and assess liability."); *Pulliam v. Coastal Emergency Serv.*, 509 S.E.2d 307, 312 (Va. 1999) ("The medical malpractice cap, we said, does nothing more than establish the outer limits of a remedy; remedy is a matter of law and not of fact; and a trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function.") (citing *Etheridge v. Med. Ctr. Hosp.*, 376 S.E.2d 525 (Va. 1989)).

<sup>37</sup> See *Hetzel v. Prince William County, Virginia*, 532 U.S. 208 (1998).

<sup>38</sup> Federal courts have used remittitur for nearly 200 years. See *Blunt v. Little*, 3 F. Cas. 760, 761-62 (No. 1578) (C.C.A. Mass. 1822). Despite its firm establishment in federal law and practice, some opponents of medical liability limits continue to question the constitutionality of remittitur, citing *Dimick v. Scheidt*, 293 U.S. 474 (1935). *Dimick*, however, involved whether a judge may increase a jury's verdict, not reduce it, a distinction the Supreme Court recognized as significant because no jury would have passed on the increased amount. See *id.* at 484-85; see also *Tezak v. Montgomery Ward & Co., Inc.*, 33 Fed. Appx. 172 (6<sup>th</sup> Cir. 2002) (unpublished); *Al-Kindi v. Edwards Bros., Inc.*, 2005 WL 2265914 (D. Idaho 2005). Furthermore, the *Dimick* "decision was directed at the power of judges, not of the legislature and, by virtue of the very context of the decision, related to modification of a jury verdict by a judge, not an enactment of a statute." *Franklin*, 704 F. Supp. at 1331.

<sup>39</sup> 523 U.S. 340, 355 (1998).

<sup>40</sup> 17 U.S.C. § 504(c).

<sup>41</sup> See *supra* note 22.

<sup>42</sup> See *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883) (upholding the Limitation of Vessel Shipowners' Liability Act and the Harter Act); *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1 (1912) (upholding the Federal Employers' Liability Act of 1908); *Crowell v. Benson*, 285 U.S. 22 (1932) (upholding the Longshore and Harbor Workers' Compensation Act).

<sup>43</sup> See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding the Black Lung Benefits Act of 1972).

<sup>44</sup> See *Duke Power Co. v. Carolina Emtl. Study Group, Inc.*, 438 U.S. 59, 86-88 (1978).

<sup>45</sup> See *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977); *DiPappa v. United States*, 687 F.2d 14 (3d Cir. 1982); *Ducharme v. Merrill-Nat'l Labs., Inc.*, 574 F.2d 1307 (5<sup>th</sup> Cir.), *cert denied*, 439 U.S. 1002 (1978); *Wolfe v. Merrill-Nat'l Labs., Inc.*, 433 F. Supp. 231 (M.D. Tenn. 1977); *Jones v. Wyeth Laboratories, Inc.*, 583 F.2d 1070 (8<sup>th</sup> Cir. 1978).

<sup>46</sup> See *Black v. Secretary of Health & Human Servs.*, 93 F.3d 781, 787 (Fed. Cir. 1996) (upholding \$1,000 eligibility requirement for participation in federal no-fault compensation program).

<sup>47</sup> See *Hammond v. United States*, 786 F.2d 8 (1<sup>st</sup> Cir. 1986); *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982 (9<sup>th</sup> Cir. 1987).

<sup>48</sup> See, e.g., *Lyon v. Augusta S.P.A.*, 252 F.3d 1078 (9<sup>th</sup> Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002); *Robinson v. Hartzell Propeller Inc.*, 326 F. Supp. 2d 631 (E.D. Pa. 2004), *appeal dismissed*, 454 F.3d 163 (3d Cir. 2006).

<sup>49</sup> See, e.g., *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11<sup>th</sup> Cir. 2008), *cert denied*, 129 S. Ct. 1369 (2009); *Carton v. General Motors Acceptance Corp.*, 639 F. Supp. 2d 982 (N.D. Iowa 2009); *Green v. Toyota Motor Credit Corp.*, 605 F. Supp. 2d 430 (E.D.N.Y. 2009); *Flagler v. Budget Rent A Car Sys., Inc.*, 538 F. Supp. 2d 557 (E.D.N.Y. 2008); *Stampolis v. Provident Auto Leasing Co.*, 586 F. Supp. 2d 88 (E.D.N.Y. 2008); *Jasman v. DTG Operations, Inc.*, 533 F. Supp. 2d 753 (W.D. Mich. 2008); *Berkan v. Penske Truck Leasing Canada, Inc.*, 535 F. Supp. 2d 341 (W.D.N.Y. 2008); *Vargas v. Enterprise Leasing Co.*, 2011 WL 1496474 (Fla. Apr. 21, 2011); *Rodriguez v. Testa*, 993 A.2d 955 (Conn. 2010); *Graham v. Dunkley*, 50 A.D.3d 55 (N.Y.A.D. 2 Dept.), *appeal dismissed*, 889 N.E.2d 484 (N.Y. 2008).

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<sup>50</sup> See *supra* note 14.

<sup>51</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (holding that heightened pleading standards prescribed by the Private Securities Litigation Reform Act did not violate Seventh Amendment).

<sup>52</sup> Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. §§ 2361 to 2368.

<sup>53</sup> Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501 to 14505.

<sup>54</sup> Biomaterials Access Assurance Act of 1998, 21 U.S.C. §§ 1605 to 1606.

<sup>55</sup> Bill Emerson Good Samaritan Food Donation Act of 1996, 42 U.S.C. § 1791.

<sup>56</sup> Cardiac Arrest Survival Act of 2000, 42 U.S.C. § 238q.

<sup>57</sup> Amtrak Reform and Accountability Act of 1997, 49 U.S.C. § 28103.

<sup>58</sup> *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal citations omitted).

<sup>59</sup> See, e.g., *Hoffman v. United States*, 767 F.2d 1431 (9<sup>th</sup> Cir. 1985) (California's \$250,000 limit on noneconomic damages in medical malpractice suits did not violate equal protection); *Patton v. TIC United Corp.*, 77 F.3d 1235 (10<sup>th</sup> Cir. 1996) (upholding Kansas's \$250,000 limit on noneconomic losses in health care liability actions); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6<sup>th</sup> Cir. 2005) (Michigan's limit on noneconomic damages in medical malpractice cases did not implicate protected jury rights, and thus, did not violate the Seventh Amendment), *cert. denied*, 347 U.S. 1111 (2006); *Boyd v. Bulala*, 877 F.2d 1191 (4<sup>th</sup> Cir. 1989) (Virginia's limit on recovery in medical malpractice actions had reasonable relation to valid legislative purpose-maintenance of adequate health care services and did not violate due process or equal protection); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D. N.M. 2002) (New Mexico's medical liability limit was not arbitrary and capricious); *Owen v. United States*, 935 F.2d 734 (5<sup>th</sup> Cir. 1991) (finding medical malpractice liability limit valid under the Louisiana Constitution), *cert. denied*, 502 U.S. 1031 (1992); *Davis v. Omitowoju*, 883 F.2d 1155 (3d Cir. 1989) (Virgin Islands' limit on noneconomic damages did not violate Seventh Amendment); *Simms v. Holiday Inns, Inc.*, 746 F. Supp. 596 (D. Md. 1990) (upholding Maryland's \$350,000 limit on noneconomic damages in personal injury actions); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (noneconomic damage limit not unconstitutional); see also *Watson v. Hortman*, 2010 WL 3566736 (E.D. Tex. Sept. 13, 2010) (Magistrate Report and Recommendation) (recommending that the Eastern District of Texas reject a challenge to the \$250,000 limit on noneconomic damages in health care liability claims adopted by the Texas Legislature in 2003); *Estate of McCall v. United States*, 2009 WL 3163183 (N.D. Fla. Sept. 30, 2009) (upholding Florida's statutory limit on noneconomic damages); *Atkisson v. United States*, 2010 WL 26534552 (S.D. Fla. July 2, 2010) (same).

<sup>60</sup> Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907, 917 (2001) (quoting Comments of Ned Miltenberg, Constitutional Challenges to Tort Reform, Learn How to Develop Substantive and Procedural Challenges to Tort Reform Legislation, Annual Meeting Session of Association of Trial Lawyers of America (1999)).

<sup>61</sup> Miss. Code Ann. § 11-1-60(2)(a).

<sup>62</sup> Md. Code, Cts. & Jud. Proc. § 3-2A-09.

<sup>63</sup> See Ind. Code Ann. § 34-18-14-3 (limiting the total amount recoverable in medical malpractice cases to \$1.25 million and to \$250,000 per health care provider with any amount in excess of these limits is to be paid from a Patient's Compensation Fund); Neb. Stat. Ann. § 44-2825 (limiting total damages in medical malpractice cases to \$1.75 million and the liability of each health care provider liability to \$500,000 with any excess of total liability paid from an Excess Liability Fund).

<sup>64</sup> See *Moore v. Mobile Infirmary Assoc.*, 592 So. 2d 156 (Ala. 1991); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *LeBron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010); *Best v. Taylor Mach. Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997); *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989).

<sup>65</sup> See Chiu-Fang Chou & Anthony T. Lo Sasso, *Practice Location Choice by New Physicians: The Importance of Malpractice Premiums, Damage Caps, and Health Professional Shortage Area Designation*, 44 Health Serv. Res.

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1271 (2009); Daniel P. Kessler *et al.*, *Impact of Malpractice Reforms on the Supply of Physician Services*, 293 *J. of Am. Med. Ass'n* 2618 (2005); Jonathan Klick & Thomas Stratmann, *Does Medical Malpractice Reform Help States Retain Physicians and Does it Matter?* (2005), available at [http://www.usc.edu/schools/business/FBE/seminars/papers/AE\\_2-17-06\\_STRATMANN-medmal.pdf](http://www.usc.edu/schools/business/FBE/seminars/papers/AE_2-17-06_STRATMANN-medmal.pdf); Fred Hellinger & William Encinosa, *The Impact of State Laws Limiting Malpractice Awards on the Geographic Distribution of Physicians* (U.S. Dep't of Health & Human Servs. 2003), available at <http://www.ahrq.gov/RESEARCH/tortcaps/tortcaps.pdf>.

<sup>66</sup> See Congressional Budget Office, *Reducing the Deficit: Spending and Revenue Options* 35-36 (Mar. 2011), available at [www.cbo.gov/doc.cfm?index=12085](http://www.cbo.gov/doc.cfm?index=12085). CBO has also provided various other estimates of cost savings, which may vary based on the methodology and types of reforms considered. See Congressional Budget Office Cost Estimate, H.R. 5, Mar. 10, 2011, available at <http://www.cbo.gov/ftpdocs/120xx/doc12095/hr5.pdf> (estimated that enacting H.R. 5, as reported by the House Judiciary Committee on February 16, 2011, would reduce the federal deficit by \$40 billion over the next decade); Congressional Budget Office, Letter to the Honorable Orrin G. Hatch regarding CBO's Analysis of the Effects of Proposals to Limit Costs Related to Medical Malpractice, Oct. 9, 2009, available at [http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort\\_Reform.pdf](http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf) (estimating that nationwide implementation of medical liability reforms would reduce federal budget deficits by \$54 billion over ten years).

<sup>67</sup> See Congressional Budget Office, *Reducing the Deficit: Spending and Revenue Options* 36 (Mar. 2011).

<sup>68</sup> A 2010 study published in *Health Affairs* found that defensive medicine wastes \$45.6 billion annually (in 2008 dollars). See Michelle M. Mello *et al.*, *National Costs of the Medical Liability System*, *Health Affairs*, vol. 29, no. 9, at 1569-77 (2010). Other studies have reached significantly higher estimates. See PricewaterhouseCoopers' Health Research Inst., *The Price of Excess: Identifying Waste in Healthcare Spending* at 17 n.18 (2010), available at <http://pwchealth.com/cgi-local/hregister.cgi?link=reg/waste.pdf> (estimating \$210 billion); Lawrence J. McQuillan & Hovannes Abramyan, *The Facts about Medical Malpractice Liability Costs*, *Health Policy Prescriptions*, vol. 7, no. 10 (Pacific Research Inst. Oct. 2009), available at [http://www.pacificresearch.org/docLib/20091007\\_HPPv7n10\\_1009.pdf](http://www.pacificresearch.org/docLib/20091007_HPPv7n10_1009.pdf) (estimating \$191 billion).

<sup>69</sup> National Commission on Fiscal Responsibility and Reform, *The Moment of Truth* 39-40 (Dec. 2010) (Recommendation 3.3.12, "Medical malpractice reform"), available at [http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12\\_1\\_2010.pdf](http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf).

<sup>70</sup> See Leonard J. Nelson *et al.*, *Medical Malpractice Reform in Three Southern States*, 4 *J. Health & Biomed. L.* 69, 139 (2008) (finding that, as result of tort reform, by late 2004 "the problems in [Mississippi] malpractice insurance seem to have abated"); *Tort Reform Brings Insurance Firm Back to Miss.*, *Dale Says*, *Clarion Ledger*, Oct. 8, 2004, at A1 (reporting that, after several years of premium increases, doctors covered by the Medical Assurance Company of Mississippi did not receive an increase in 2005); Interview with Mississippi Governor Haley Barbour, *Your World with Neal Cavuto*, *Fox News*, Sept. 22, 2009 (stating that Mississippi's tort reforms lowered medical liability premiums by as much as 60% and reduced medical liability claims 91% from their peak); See Lynne Jeter, *Tort Reform Impact Ripples Out Through the Economy*, *Miss. Bus. J.*, Nov. 29, 2004, at S30 (reporting that soon after the noneconomic damage limit took effect, "[p]hysicians young and old stopped leaving the state en masse and insurance companies began to return to Mississippi").

<sup>71</sup> See Lynne Jeter, *Tort Reform Impact Ripples Out Through the Economy*, *Miss. Bus. J.*, Nov. 29, 2004, at S30, at 2004 WLNR 14445074 (reporting that in 2002, Mississippi had the lowest number of physicians per 1,000 residents in the country and was losing physicians to other states); Sarah Domin, Comment, *Where Have All the Baby-Doctors Gone? Women's Access to Healthcare in Jeopardy: Obstetrics and the Medical Malpractice Insurance Crisis*, 53 *Cath. U. L. Rev.* 499, 501 (2004) (noting that Mississippi was "perhaps the hardest hit of the [American College of Obstetricians and Gynecologists] 'red alert states'"; most Mississippi cities with populations of less than 20,000 people no longer had local obstetricians); John Poretto, *Some Doctors in Mississippi Delta Giving Up Obstetrics*, *Baton Rouge Advocate*, Nov. 19, 2001, at 2B (reporting that physicians who continued to deliver babies faced increases in premiums ranging between 20% and 400% in 2001); Cassandra Perry, *Lawsuit Abuse Affects Medical Care*, *Delta Dem. Times* (Greenville, Miss.), June 24, 2001, at A1 (reporting that in the decade prior to enactment of the noneconomic damage ceiling, over 300 Mississippi doctors stopped delivering babies).

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<sup>72</sup> See Office of the Governor, *Lawsuit Reforms will Expedite Justice for Legitimate Claims and Help Strengthen Texas' Economic Climate*, Mar. 14, 2011 (remarks of Texas Gov. Rick Perry), available at <http://governor.state.tx.us/news/speech/15823/> ("In the first five years after tort reform passed, more than 14,000 doctors either returned to practice in Texas or began practicing here for the first time."); Joseph Nixon, Editorial, *Why Doctors Are Heading for Texas*, Wall St. J., May 17, 2008, at A9 (reporting that after Texas enacted tort reform legislation in 2003 and 2005 that included a \$250,000 limit on noneconomic damages, over 7,000 physicians reportedly flooded into Texas, with many going into underserved regions).

<sup>73</sup> Ralph Blumenthal, *More Doctors in Texas After Malpractice Caps*, N.Y. Times, Oct. 5, 2007; Jason Roberson, *How Lawsuit Reform Has Affected Patients and Doctors*, Dallas Morning News, June 17, 2007 (reporting that, without tort reform, patients with critical illnesses might have otherwise gone untreated without access to such doctors).

<sup>74</sup> High insurance costs led to the absence of neurosurgeons in Wheeling, Logan, and Beckley and those remaining in other areas of the state steadily departed. See Therese Smith Cox, *Doctors Facing Dilemma: Neurosurgeons Must Pay Big Malpractice Fee or Leave*, Charleston Gazette, Apr. 10, 2002, at 1A. The lack of trauma surgeons to treat emergency bone, brain, and spinal injuries led West Virginia's Department of Health and Human Resources ("DHHR") to downgrade the Charleston Area Medical Center (CAMC) trauma center from a Level I to a Level III facility in August 2002. See Dawn Miller, *CAMC Loses Trauma Status: People With Serious Multiple Injuries to go to Morgantown, Elsewhere*, Charleston Gazette, Aug. 24, 2002, at 1A. Due to the distance needed to obtain emergency care, West Virginia residents who experienced serious injuries stemming from car accidents to gunshots may have died or become paralyzed when they might have been otherwise saved. See Joy Davia, *Trauma Patients Forced to Make Longer Trips to Get Care*, Charleston Gazette, Sept. 11, 2002, at 1C.

<sup>75</sup> The average premium per physician nearly dropped in half between 2004 and 2008 from \$40,034.93 to \$21,026.19, respectively. See West Virginia Office of the Ins. Comm'n'r, *Medical Malpractice Report, Insurers With 5% Market Share 51* (Nov. 2009), available at <http://wvinsurance.gov/LinkClick.aspx?fileticket=KHt9sy2Fod4%3d&tabid=207&mid=798>. In fact, physicians insured with the state's largest medical liability insurer, West Virginia Mutual Insurance Company, have experienced an overall average decrease in premiums of 32% with many specialists receiving as much as a 55% reduction since 2004. See West Virginia Mut. Ins. Co., *Annual Report 2* (2009), available at <http://www.wvmic.com/docs/2009%20WV%20Mutual%20Annual%20Report.pdf>. Thus, premiums are down one-third to one-half compared to 2004, depending on the area of practice. See *id.* at 4-5. In 2010, West Virginia Mutual provided a 10% dividend credit to all renewing doctors as additional premium relief. See West Virginia Mut. Ins. Co., *Quarterly Coverage*, at 3 (Summer 2010), available at <http://www.wvmic.com/docs/Summer%202010%20Newsletter.pdf>. The insurer directly attributes its ability to provide rate relief for policyholders to tort reform legislation. See *id.* at 1.

<sup>76</sup> See Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Quarterly J. of Econ. 353 (1996) (finding that tort reforms can reduce health care costs by five percent to nine percent without substantial effects on mortality or medical complications).