IN THE SUPREME COURT OF THE STATE OF ALASKA

ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS REGIONAL HOUSING AUTHORITY, Appellant/Cross-Appellee, v. DIETRICH MAEL, on his own behalf and on behalf of his minor children, D.K. and E.M.; Rose Mael; and Thomas Mael, Appellees/Cross Appellants, v. STATE OF ALASKA, Appellee. Trial Court Case No.: **4BE-17-00061 CI**	)	Supreme Court Nos.: **S-17802/S-17821**

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT BETHEL
THE HONORABLE TERRENCE HAAS, PRESIDING

BRIEF OF APPELLEE STATE OF ALASKA

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ALASKA STATUTES:

AS 09.17.010. Noneconomic Damages.

(a) In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

(b) Except as provided under (c) of this section, the damages awarded by a court or a jury under (a) of this section for all claims, including a loss of consortium claim, arising out of a single injury or death may not exceed $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater.

(c) In an action for personal injury, the damages awarded by a court or jury that are described under (b) of this section may not exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater, when the damages are awarded for severe permanent physical impairment or severe disfigurement.

(d) Multiple injuries sustained by one person as a result of a single incident shall be treated as a single injury for purposes of this section.

ISSUES PRESENTED

1. *Appropriate standard of review for substantive due process claim.* This Court held in *C.J. v. State, Department of Corrections*, that AS 09.17.010's cap on noneconomic damages affects economic interests only and is therefore subject to minimum scrutiny under the due process clause, even in cases involving grievous injury.[1] Does the severity of Mael's injury change the nature of his interest in recovering noneconomic damages such that AS 09.17.010 should be subject to heightened scrutiny in his case?

2. *Rational relationship between legitimate government interest and statutory provision.* This Court has already determined that AS 09.17.010's cap on noneconomic damages is rationally related to the legitimate government interest of reducing liability and malpractice insurance premiums in Alaska.[2] Is AS 09.17.010's damages cap rationally related to the legitimate government interest of reducing insurance premiums, even though it does not index the cap to inflation or provide an exemption for the most severely injured plaintiffs?

3. *Substantial relationship between legitimate government interest and statutory provision.* This Court held in *C.J. v. State, Department of Corrections* that AS 09.17.010's cap on noneconomic damages is substantially related to the legitimate

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[1] *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 379 (Alaska 2006).

[2] *Id.* at 382 (holding that statute is substantially related to legitimate government interest); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) (explaining that if a statute is substantially related to a legitimate government interest, it is necessarily rationally related to a legitimate government interest, as well).

government interest of reducing liability and malpractice insurance premiums in Alaska.[3] Mael has not argued that *C.J.* was wrongly decided, that it is no longer sound because of changed conditions, or that more good than harm would come of overturning it. Should the Court upset stare decisis and overturn its holding in *C.J.*?

STATEMENT OF THE CASE

Dietrich Mael was severely injured when the boiler in his home exploded, throwing him against the wall and causing burn injuries on his face and hands. [9/19 Tr. 9, 200, 202]. After the incident, he developed severe and persistent back pain. [9/18 Tr. 112-13] Mael filed suit against the Association of Village Council Presidents Regional Housing Authority (AVCP)—which held title to his house under a home ownership opportunity program [9/23 Tr. 51-53, 77; Exc. 2, 7]—alleging negligence and breach of contract for failure to maintain the boiler. [Exc. 1-5] Mael's parents and children, who were present at the time of the accident, also claimed breach of contract and negligent infliction of emotional distress. [Exc. 1-5]

Following a trial, a jury awarded Mael $1,672,000 in past and future economic damages and $1,580,000 in past and future noneconomic damages. [Exc. 435; 9/27 Tr. 52]

AVCP objected to the proposed judgment and moved for remittitur, arguing, among other things, that under AS 09.17.010(c), Mael's noneconomic damages award

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3 *C.J.*, 151 P.3d at 382.

could not exceed $1,000,000. [Exc. 438-39, 457-58] Mael did not dispute the statute's applicability but argued that it was unconstitutional as applied to him. [Exc. 480-494, 520]

The court ruled that AS 09.17.010(c) was constitutional and reduced Mael's noneconomic damages award to $1,000,000. [Exc. 611, 614, 686-87]

Shortly thereafter, in accordance with Alaska Civil Rule 24(c), the court notified the Attorney General of Alaska that the constitutionality of a state statute had been called into question in the litigation. [R. 2154] The State moved to intervene to defend the constitutionality of AS 09.17.010, noting that although the court had upheld the statute, the issue was likely to be raised again on appeal. [R. 2147-2150] The court granted the State's motion. [Exc. 613]

AVCP appealed from the court's judgment, and the Maels cross-appealed. On appeal, Dietrich Mael challenges the constitutionality of AS 09.17.010(c) as applied to him. [Cross-At. Br. 10] The State of Alaska takes no position on any other issues raised on appeal, but participates in the case for the purpose of defending the constitutionality of AS 09.17.010's cap on noneconomic damages.

STANDARD OF REVIEW

"Issues relating to a statute's constitutionality" are "legal questions subject to de novo review."[4]

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[4] *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 377 (Alaska 2006) (citing *State v. Alaska Civil Liberties Union,* 978 P.2d 597, 603 (Alaska 1999)).

ARGUMENT

This Court has consistently held that AS 09.17.010's cap on noneconomic damages for tort claims is constitutional because the cap is not only reasonably, but substantially, related to the legitimate government purpose of reducing liability and malpractice insurance premiums in Alaska.[5] Mael argues that this Court should reconsider its established precedent or recognize an as-applied exception in several respects, but he has offered no compelling reason to do so.

First, because the recovery of damages is an economic interest, the level of scrutiny applied to statutes limiting damages is, and historically has been, rational basis review.[6] Mael's damages claim is not unique and does not compel overturning decades of jurisprudence.

Second, AS 09.17.010's damages cap need not be indexed to inflation to survive minimum scrutiny. Nor does the passage of time automatically render a fixed statutory dollar amount unconstitutional. A statutory dollar amount might eventually become so low that it would "shock the universal sense of justice"[7] and sever the nexus between the statute and its purpose, but Mael does not argue that AS 09.17.010's $1,000,000 cap is so

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5 *Id.* at 382; *Evans*, 56 P.3d at 1055.

6 *C.J.*, 151 P.3d at 379 n.23 (citing *Anderson v. Central Bering Sea Fishermen's Ass'n,* 78 P.3d 710, 718 (Alaska 2003) (plurality opinion); *Reid v. Williams,* 964 P.2d 453, 458 (Alaska 1998); *Chokwak v. Worley,* 912 P.2d 1248, 1254–55 (Alaska 1996); *McConkey v. Hart,* 930 P.2d 402, 407–08 (Alaska 1996); *Gilmore v. Alaska Workers' Comp. Bd.,* 882 P.2d 922, 926–27 (Alaska 1994); *Wilson v. Municipality of Anchorage,* 669 P.2d 569, 572 (Alaska 1983)).

7 *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019) (quoting *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999)).

low as to be insufficiently related to the legislative purpose behind it. Rather, he speculates that because the Legislature chose a $1,000,000 cap in the past, and today's dollars are worth less than yesterday's dollars, then $1,000,000 today is not as well related to the government's purpose as it could be. But even if that were true, that does not make the statute unconstitutional, and it is not the Court's role to rewrite a statute to better accomplish what it believes the Legislature's policy to be.

Finally, this Court has held that AS 09.17.010's cap is substantially related to legitimate government purposes even when the plaintiff's injury is most grievous, such that applying the cap seems "harsh."[8] Mael has provided no compelling reason to overturn this precedent and to undermine the legislative policy decision that the cap applies specifically to severe injuries such as Mael's.

At the core, Mael is asking this Court to reconsider its holdings in *C.J. v. State, Department of Corrections*[9] and *Evans ex rel. Kutch v. State*[10] and to declare AS 09.17.010 unconstitutional both on its face and as applied to severely injured plaintiffs. But because Mael has not attempted to make the requisite showing for this Court to upset stare decisis and overturn its clearly established precedent, the Court should decline Mael's invitation.

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8 *C.J.*, 151 P.3d at 381.

9 151 P.3d 373 (Alaska 2006).

10 56 P.3d 1046 (Alaska 2002).

I. Mael's due process claim challenging AS 09.17.010's noneconomic damages cap is subject to rational basis review.

The Alaska Constitution's due process clause provides that "[n]o person shall be deprived of life, liberty, or property without due process of law."[11] Due process encompasses procedural due process, which requires the State to employ "adequate and fair procedures,"[12] and substantive due process, which "guard[s] against unfair, irrational, or arbitrary state conduct that 'shock[s] the universal sense of justice.' "[13]

The first step of the substantive due process analysis is to determine the appropriate level of judicial scrutiny.[14] This Court applies one of three levels of scrutiny to substantive due process claims, depending on the nature of the individual interest at stake: strict scrutiny, intermediate scrutiny, or rational basis review.[15] In personal injury cases, the Court "ha[s] consistently held that restrictions on the types or amounts of damages that a plaintiff can pursue in court impair economic interests only and are therefore subject to minimum scrutiny review."[16] Thus, in prior cases involving the

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11 Alaska Const. art. I, § 7.

12 *Doe*, 444 P.3d at 124.

13 *Id. at* 125 (quoting *Church v. State, Dep't of Revenue*, 973 P.2d 1125, 1130 (Alaska 1999)).

14 *See, e.g.*, *id.* at 125-26 (beginning substantive due process analysis with discussion of appropriate level of judicial scrutiny).

15 *Id.*

16 *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1132 (Alaska 2009) (quoting *C.J. v. State, Dep't of Corrs.*, 151 P.3d 373, 379 (Alaska 2006)); *see also C.J.*, 151 P.3d at 379 n.23 (citing *Anderson v. Central Bering Sea Fishermen's Ass'n,* 78 P.3d 710, 718 (Alaska 2003) (plurality opinion); *Reid v. Williams,* 964 P.2d 453, 458 (Alaska 1998); *Chokwak v. Worley,* 912 P.2d 1248, 1254–55 (Alaska 1996); *McConkey v. Hart,* 930 P.2d 402, 407–

constitutionality of AS 09.17.010, the Court has held that the statute is subject only to minimum scrutiny.[17] The Court applies this minimal level of scrutiny even when noneconomic damages derive from egregious and severe harm, like the harm caused by a rapist violently dragging his victim off a jogging trail, threatening to kill her, and repeatedly sexually assaulting her.[18]

The economic nature of a plaintiff's interest in recovering damages does not change according to the severity of the plaintiff's injury. [Cross-At. Br. 21-26] Mael asserts that his interest is not purely economic, but rather is an interest in "continuing to live." [Cross-At. Br. 22] But his interest is not in life, but in damages (i.e., money). The *gravity* of his injury does not change the *nature* of his interest in obtaining damages for that injury. This Court has already confirmed that even when a plaintiff suffers the most grievous injury—the kind that can result in devastating and lifelong psychological consequences—the nature of the plaintiff's interest in recovering noneconomic damages is still purely economic, and a challenge to the damages cap is subject only to rational basis review.[19]

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08 (Alaska 1996); *Gilmore v. Alaska Workers' Comp. Bd.,* 882 P.2d 922, 926–27 (Alaska 1994); *Wilson v. Municipality of Anchorage,* 669 P.2d 569, 572 (Alaska 1983)).

[17] *C.J.*, 151 P.3d at 379; *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1052-53 (Alaska 2002).

[18] *C.J.*, 151 P.3d at 376.

[19] *Id.* at 379 ("[R]estrictions on the types or amounts of damages that a plaintiff can pursue in court impair economic interests only and are therefore subject to minimum scrutiny review.").

Indeed, a constitutional scheme in which the nature of a plaintiff's interest in recovering noneconomic damages depended on the severity of the injury would be untenable from a jurisprudential standpoint. Pain, suffering, and emotional trauma are inherently unquantifiable and not susceptible to comparison. A court is not well-positioned to say, for example, whether the emotional pain of a person with a chronic back injury is more or less severe than the emotional pain of a person who was violently raped by a stranger under threat of death.[20] Hanging the constitutionality of a statute on such a "vague, unverifiable, and subjective standard"[21] would result in arbitrary decisions and additional litigation over something manifestly ill-suited to judicial determination.

Likewise, Mael's interest in being believed and having the government take his grievances seriously does not support the application of heightened scrutiny [Cross-At. Br. 21-22] because these interests are shared not only by every tort plaintiff, but by nearly every litigant in our justice system. If these interests were enough to require intermediate scrutiny, then every challenge to government action would be subject to at least intermediate scrutiny—and this Court's jurisprudence establishing different levels of scrutiny for different types of interests would be rendered meaningless.

Relatedly, this Court has recognized that AS 09.17.010's noneconomic damages cap does not intrude on the jury's role or a plaintiff's right to a jury.[22] Mael's assertion that "an individual's right to retain the damages awarded by the jury" compels heightened

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20 *See id. at* 376.

21 *Sampson v. State*, 31 P.3d 88, 97 (Alaska 2001).

22 *Evans*, 56 P.3d at 1050-51.

scrutiny in this case is therefore unavailing. [Cross-At. Br. 21-22] To the extent Mael is arguing that his case is distinguishable from past cases because a jury had already awarded him damages in excess of the cap before the constitutionality of the cap was raised, the procedural posture of his case does not alter the level of scrutiny the court applies to his claim. Such an argument would mean that a rape victim's damages claim is subject to minimum scrutiny because she moved a court to find the damages cap unconstitutional before presenting her claim to a jury, while Mael's damages claim is subject to heightened scrutiny simply because he challenged the constitutionality of the cap after the jury award was announced.[23] This result would be illogical; the legal analysis of a constitutional claim does not change simply because a jury has already announced its award.

Applying minimum scrutiny to Mael's challenge is consistent not only with this Court's precedent, but also with the majority of jurisdictions to have considered constitutional challenges to statutory damages caps. The United States Supreme Court and at least twelve states apply rational basis review or its equivalent to challenges to

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23 *See C.J.*, 151 P.3d 373.

statutory limits on damages recovery.[24] By contrast, the State is aware of only three states and one U.S. territory that apply heightened scrutiny to such claims.[25]

Given this Court's long-established precedent holding that a plaintiff's interest in recovering damages is economic, and the absence of any compelling reason to apply

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24 *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 83 (1978) (applying rational basis review to due process challenge to statute limiting recovery for nuclear accident); *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 680 (Cal. 1985); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 598 (Ind. 1980), overruled on other grounds by *In re Stephens*, 867 N.E.2d 148 (Ind. 2007), and abrogated on other grounds by *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994); *Miller v. Johnson*, 289 P.3d 1098, 1120 (Kan. 2012), abrogated on other grounds by *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019) ("It is well-established that statutes limiting liability and recovery of damages, like the restriction on noneconomic damages in K.S.A. 60–19a02, are considered social and economic legislation that trigger application of the rational basis test."); *Murphy v. Edmonds*, 601 A.2d 102, 111 (Md. Ct. App. 1992) (applying rational basis test to equal protection claim that fell under ambit of state due process clause); *Phillips v. Mirac, Inc.*, 651 N.W.2d 437, 444, 445 (Mich. App. 2002), *aff'd*, 685 N.W.2d 174 (Mich. 2004) (applying rational basis review because cap on tort damages was "social or economic legislation"); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 71 (Neb. 2003) (applying rational basis test to equal protection claim because interest in unlimited damages is economic); *Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 71 (Neb. 2003) *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 433 (Ohio 2007); *Judd v. Drezga*, 103 P.3d 135, 143 (Utah 2004); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307, 318 (Va. 1999); *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 415 (W. Va. 2011) (applying rational basis test to equal protection claim because damages cap implicated an economic right); *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 684 (Wisc. 2018).

25 *See Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980); *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978); *In the Matter of the Certification of Questions of Law*, 544 N.W.2d 183, 189-91 (S.D. 19960); *Balboni v. Ranger American of the V.I., Inc.*, 70 V.I. 1048, 1096 (2019).

heightened scrutiny in this case,[26] the appropriate standard of scrutiny for Mael's substantive due process claim is rational basis review.

II. As this Court has already held, AS 09.17.010's cap on noneconomic damages is rationally related to a legitimate government interest.

This Court has consistently upheld the constitutionality of AS 09.17.010 because it is both reasonably and substantially related to the legitimate government interest of curbing excessive liability and malpractice insurance rates.[27] Because the Court has already held that the statute survives minimum scrutiny under the state equal protection clause[28]—a standard more stringent than minimum scrutiny under the state due process clause[29]—Mael's argument that the statute fails minimum scrutiny is foreclosed by precedent. But even if the Court is inclined to revisit its constitutional analysis as applied to Mael, the statute passes muster under the due process clause because the Legislature's choice to enact a fixed, across-the-board damages cap is rationally related to a legitimate government interest.

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[26] *See Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004) ("[A] party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling....").

[27] *C.J.*, 151 P.3d at 382; *Evans*, 56 P.3d at 1053, 1055 (citing Ch. 26, §§ 1(1)-(5), SLA 1997); *see also L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1130 (Alaska 2009) (upholding statute against challenge based on right to trial by jury).

[28] *C.J.*, 151 P.3d at 382.

[29] *Evans*, 56 P.3d at 1055 (explaining that Alaska's "substantive due process test is a more deferential version of the equal protection test" and holding that "[b]ecause [the Court] found that there was a fair and substantial relationship, there is necessarily a reasonable relationship as well").

Under rational basis review, a statute will survive a substantive due process challenge "as long as it bears any rational relation to a legitimate legislative goal."[30] To establish a due process violation, Mael must therefore show that "there is no rational basis for the challenged legislation."[31] This is a "heavy" burden, "for if any conceivable legitimate public policy for the enactment is apparent on its face or is offered by those defending the enactment, the opponents of the measure must disprove the factual basis for such a justification."[32] Mael cannot meet this burden because the Court has already held that AS 09.17.010's fixed cap on noneconomic damages is substantially related to the legitimate government interest of reducing liability and malpractice insurance rates in Alaska.[33] And this Court has held that the cap is constitutional as applied to "grievous injury," even when the result may be "harsh."[34]

In *Evans ex rel. Kutch v. State*, a plurality of this Court upheld AS 09.17.010 against an equal protection challenge, holding that the cap on noneconomic damages is substantially related to the Legislature's legitimate goals of

> (1) discourag[ing] frivolous litigation and decreas[ing] the costs of litigation; (2) stop[ping] "excessive" punitive damages awards in order to foster a "positive" business environment; (3) control[ling] the increase of liability insurance rates; (4) encourag[ing] "self-reliance and independence

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30 *State v. Niedermeyer*, 14 P.3d 264, 267 (Alaska 2000).

31 *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 126 (Alaska 2019).

32 *Id.*

33 *C.J.*, 151 P.3d at 382.

34 *Id.* at 381.

> by underscoring the need for personal responsibility"; and (5) reduc[ing] the cost of malpractice insurance for professionals.[35]

The plurality also held that the statute did not violate substantive due process, explaining that because the "substantive due process test is a more deferential version of the equal protection test," the statute was "necessarily" reasonably related to legitimate government interests.[36] The Court later explicitly adopted the *Evans* plurality's analysis in *C.J. v. State, Department of Corrections*.[37] Mael's substantive due process challenge therefore fails at the threshold.

Mael nonetheless urges the Court to strike down AS 09.17.010 "as applied" in his case for two reasons: (1) the Legislature did not index the damages cap to inflation, and (2) his injuries are particularly severe. [Cross-At. Br. 15-21] These characteristics do not render the statute unconstitutional, much less do they compel overruling precedent.

A. That AS 09.17.010's damages cap is fixed does not undermine the legitimate government interest of reducing liability and malpractice insurance rates, nor does it impair the cap's rational relationship to that interest.

As an initial matter, the statute's lack of an inflationary adjustment is not unique to Mael's claim and is not the basis for an as-applied challenge. Rather, Mael is simply arguing that the statute is facially invalid because it does not account for inflation. But

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35 *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053, 1055 (Alaska 2002) (citing Ch. 26, §§ 1(1)-(5), SLA 1997).

36 *Id.* at 1055.

37 *C.J.*, 151 P.3d at 378–81.

this Court has already held in *Evans* and *C.J.* that this particular cap on noneconomic damages is adequately related to the Legislature's legitimate tort reform goals.[38]

Because Mael is asking this Court to overrule controlling precedent, Mael "bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."[39] This Court "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[40] Mael has not attempted to make either showing. The Court should therefore decline his invitation to overrule *Evans* and *C.J.*

In any event, the Legislature's choice not to index the damages cap to inflation does not render the statute constitutionally infirm. The few courts in other jurisdictions that have considered challenges to damages caps based on inflation have uniformly rejected them—and for good reason.[41] Choosing not to index a damages cap to inflation

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38 *Evans*, 56 P.3d at 1053-55; *C.J.*, 151 P.3d at 379–82.

39 *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004).

40 *Id.*

41 *See Rashidi v. Moser*, 162 Cal. Rptr. 3d 446, 455 (Ct. App. 2013), as modified (Oct. 9, 2013), review granted and opinion superseded, 315 P.3d 1183 (Cal. 2014), and aff'd in part, rev'd in part on other grounds, 339 P.3d 344 (2014) ("Mr. Rashidi's argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature."); *Stinnett v. Tam*, 130 Cal. Rptr. 3d 732, 748 (Cal. 2011) ("Stinnett's contention that section 3333.2 deprives her of equal protection of the laws because her $250,000 in noneconomic damages does not have the same purchasing power that $250,000 in noneconomic damages had in 1975 also fails. *Fein* has already decided this statute is "rationally related to a legitimate state interest" and "rationally related to the legislative purpose." ... The fact that Stinnett might prefer a different statute, indexed for inflation, does not render unconstitutional the statute the Legislature enacted."); *Griffin v. Se. Pennsylvania Transp. Auth.*, 757 A.2d

is consistent with the Legislature's power to enact and amend laws and reflects the kind of public policy determination best left to the legislative branch.[42]

It is axiomatic that the Legislature could amend AS 09.17.010 every year, reducing or increasing the amount of the damages cap as it saw fit. If the Legislature were to lower the damages cap, an amended statute would not be unconstitutional merely because it imposed a lower damages cap than past statutes. So long as the lower cap was rationally related to a legitimate governmental interest, it would be constitutional.[43]

448, 452–53 (Pa. Commw. Ct. 2000) ("Griffin argues that because of inflation, the statutory cap of $250,000 enacted in 1978 has been eroded to merely a $100,000 value today and that to obtain the $250,000 in today's dollars, the cap should be increased to $625,000. SEPTA responds that it is for the legislature to modify its cap and not for this court to do so. We agree because if the legislature were to set the cap today at $250,000 given that it would not be violative of the constitution, as held above, the mere passage of time will not render the amount of the cap unconstitutional due to the influence of inflation."); *Verba v. Ghaphery*, 552 S.E.2d 406, 411–12 (W. Va. 2001) ("We do not believe that the mere passage of time has rendered the medical malpractice cap unconstitutional or invalid. 'Presumably the legislature was aware of the effects of inflation and could have opted for some cap indexed to inflation. That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional.'") (quoting *Griffin,* 757 A.2d at 453).

[42] *See, e.g.*, *Rashidi*, 162 Cal. Rptr. 3d at 455 ("Mr. Rashidi's argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature.").

[43] *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 381 (Alaska 2006) ("'[U]nder a minimum scrutiny analysis, we do not determine if a regulation is perfectly fair to every individual to whom it is applied.' Rather, 'we must decide only if the regulation bears a fair and substantial relationship to a legitimate government objective.' " (internal citations omitted)); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) ("[S]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose."); *See also Griffin v. Se. Pennsylvania Transp. Auth.*, 757 A.2d 448, 452–53 (Pa. Commw. Ct. 2000) ("Lastly, Griffin argues that because of inflation, the statutory cap of $250,000 enacted in 1978 has been eroded to merely a $100,000 value today and that to obtain the $250,000 in today's dollars, the cap should be increased to $625,000. SEPTA responds that it is for the legislature to

Indeed, the government can completely eliminate a category of damages if doing so is sufficiently related to a legitimate government interest.[44] Just as the Legislature has the power to decrease the damages cap (or eliminate a category of damages altogether), it also has the prerogative not to increase the cap over time. In other words, "the mere passage of time will not render the amount of the cap unconstitutional due to the influence of inflation."[45]

Mael does not argue that a $1,000,000 cap in today's dollars is itself inconsistent with substantive due process; he asserts only that it is unreasonable that his $1,000,000 award is worth less than $1,000,000 awarded to a plaintiff in 1997. [Cross-At. Br. 15-18] But under minimum scrutiny, the Court "must decide only if the regulation bears [the requisite] relationship to a legitimate government objective."[46] And even under heightened scrutiny, which requires a "substantial" nexus between a statute and a

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modify its cap and not for this court to do so. We agree because if the legislature were to set the cap today at $250,000 given that it would not be violative of the constitution, as held above, the mere passage of time will not render the amount of the cap unconstitutional due to the influence of inflation.").

44 *See C.J.*, 151 P.3d at 381 (recognizing the constitutionality of the Workers' Compensation Act that essentially eliminates all noneconomic damages).

45 *Griffin*, 757 A.2d at 452–53.

46 *C.J.*, 151 P.3d at 381 (applying minimum scrutiny in equal protection context, which required showing of "fair and substantial" relationship between statute and legitimate government purpose).

legitimate government purpose,[47] the statute need not be "perfectly fair to every individual to whom it is applied."[48]

A $1,000,000 cap in present-day dollars remains reasonably (as well as substantially) related to the Legislature's legitimate goal of reducing the cost of liability and malpractice insurance in Alaska. It is certainly not so low that it is "unfair, irrational, or arbitrary" or that it "shock[s] the universal sense of justice."[49] As a Pennsylvania court explained in a similar context, "the purpose of the cap was to protect the public fisc; with the passage of time, and the consequent decrease in the value of the absolute dollar figure, simply because the ... cap better promotes this purpose today than [when enacted] is no reason to declare it unconstitutional."[50]

The fact that Mael, or even this Court, might prefer an alternative iteration of the tort reform statute does not render the current statute unconstitutional. When the statute as enacted bears a reasonable relation to the Legislature's goals, it is irrelevant that

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47 Heightened scrutiny in the due process context and minimum scrutiny in the equal protection context both require a "substantial" relationship to a legitimate government interest. *C.J.*, 151 P.3d at 381 (requiring "fair and substantial" relationship for minimum scrutiny in equal protection context); *Sampson v. State*, 31 P.3d 88, 91 (Alaska 2001) (stating intermediate scrutiny in due process context requires "close and substantial" relationship).

48 *C.J.*, 151 P.3d at 381 (quoting *Eldridge v. State, Dep't of Revenue*, 988 P.2d 101, 104 (Alaska 1999)) (applying minimum scrutiny in equal protection context).

49 *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125 (Alaska 2019) (brackets in original).

50 *Griffin*, 757 A.2d at 452–53.

another possible alternative of the statute might be better policy.[51] The State need not prove that a statute without an inflation index is more rational than a statute with an inflation index.[52] The State need show only that the current statute is reasonably related to the Legislature's goal of reducing insurance premiums.

In enacting AS 09.17.010, the Legislature deliberately chose a fixed, rather than fluctuating, cap. The cap was meant to "inject[] predictability" into noneconomic damages awards, thereby reducing insurance premiums, because a "predictable number can be funded."[53] In fact, legislators considered and rejected an amendment that would have tied the cap on noneconomic damages to the Consumer Price Index.[54] The Legislature rejected the amendment in part because it did not want to require courts to make "constant CPI adjustments" to damages awards and because the statute could be revised to adjust the cap in the future.[55] The decision to impose a fixed, rather than

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51 *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 382 (Alaska 2006) ("[I]t is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people." (quoting *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1054 (Alaska 2002)).

52 *Id.* at 380 ("[P]olicies reviewed under minimum scrutiny are not unconstitutional simply because a litigant is able to propose a regulation that would further the legislative goal in a more rational manner.").

53 Minutes, House Judiciary Standing Committee, February 24, 1997, 1:12 pm, Tape 97-25, Side A, at 1974, 2046, and Side B, at 080 (testimony of Dr. David Johnson); *see also* Minutes, House Finance Committee, March 13, 1997, 1:40 pm, at 2 (testimony of Rep. Brian Porter, sponsor of the bill, explaining that the "uncertainty" present in the tort system at the time contributed to the "compelling need for substantial reforms in the civil justice system").

54 Minutes, House Finance Committee, March 14, 1997, 1:45 pm, at 5-6.

55 Minutes, House Finance Committee, March 14, 1997, 1:45 pm, at 5-6.

fluctuating, damages cap thus represents the Legislature's determination that simplifying the mathematics of tort claims and ensuring that insurance companies could predict liability better served the purposes of tort reform legislation than a variable cap indexed to inflation.[56]

Moreover, Mael's logic would call into question the constitutionality of numerous Alaska statutes. For example, under the Alaska Temporary Assistance Program, a family of one child and one non-needy adult is eligible for $452 per month in cash assistance.[57] The statute was last amended in 2002.[58] Because of the passage of time, needy families now receive less assistance in real dollars than needy families received in 2002. Similarly, a crime victim who is entitled to restitution may recover no more than $10,000 from the State's restorative justice account.[59] This statutory cap, which is not indexed to inflation, will entitle a victim in 2019 to recover more in real dollar value than a victim in 2035. And the Workers' Compensation Act contains multiple fixed compensatory

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56 That the Legislature has not yet elected to revise the damages cap upward indicates that the Legislature believes the $1 million cap continues to serve the statute's purpose. *See Verba v. Ghaphery*, 552 S.E.2d 406, 412 (W. Va. 2001) ("It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the legislature finds that it does not, it is within its power to amend the legislation as it sees fit."); *Rashidi v. Moser*, 162 Cal. Rptr. 3d 446, 455 (Ct. App. 2013), as modified (Oct. 9, 2013), review granted and opinion superseded, 315 P.3d 1183 (Cal. 2014), and aff'd in part, rev'd in part on other grounds, 339 P.3d 344 (Cal. 2014) ("Mr. Rashidi's argument regarding the need to adjust the MICRA cap so that it is indexed for inflation should be directed to the Legislature.").

57 AS 47.27.025(b)(1).

58 SLA 2002, Ch. 69, §§ 21-25.

59 AS 24.65.105(a).

amounts, such as a maximum award of $177,000 for permanent impairment[60] and up to $10,000 to cover funeral expenses.[61] The real value of these amounts will be greater in some years than in others.

In the criminal context, many statutes delineating criminal fines or defining the elements of crimes against property rely on dollar amounts fixed by the Legislature.[62] To take one example, first-degree theft—a felony—is defined as the theft of property worth $25,000 or more.[63] This statute was last amended in 1989.[64] Given the effects of inflation, a person who steals property worth $25,000 in 2021 will be guilty of a felony for stealing something of far less value than a person who stole property worth $25,000 in 1989. By Mael's logic, the State could be required to justify why all of these statutory schemes—and the many others that rely on a dollar amount fixed by the Legislature—are not indexed to inflation.

Because this Court has already concluded that AS 09.17.010's fixed damages cap is reasonably related to the Legislature's legitimate goals of "control[ling] the increase of

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60 AS 23.30.190.

61 AS 23.30.215(a)(1). The Legislature amends these amounts from time to time, as it sees fit. *See, e.g.*, SB 159, March 20, 2009 (increasing funeral allowance from $5,000—which was legislatively set in 2000—to $10,000).

62 *E.g.*, AS 11.46.120 ("A person commits the crime of theft in the first degree if the ... value of the property or services is $25,000 or more."); AS 11.46.130 ("A person commits the crime of theft in the second degree if ... the value of the property or services is $750 or more but less than $25,000...."); AS 12.55.035 (setting out maximum criminal fines for various offenses, in fixed amounts ranging from $500 to $2,500,000).

63 AS 11.46.120.

64 SLA 1989, Ch. 49, § 1.

liability insurance rates," "encourag[ing] 'self-reliance and independence by underscoring the need for personal responsibility,'" and "reduc[ing] the cost of malpractice insurance for professionals,"[65] it need not revisit the issue. Mael has not met his burden of showing compelling reasons for reconsidering *Evans* and *C.J.* The passage of time is not a compelling reason. The cap did not violate due process when *Evans* and *C.J.* were decided, and it does not violate Mael's substantive due process rights now.

B. A cap on noneconomic damages, regardless of the severity of the injury giving rise to those damages, is rationally related to the legitimate government interest of reducing liability and malpractice insurance rates in Alaska.

This Court's precedent also forecloses Mael's argument that AS 09.17.010 is unconstitutional because it does not provide an exception for plaintiffs with the most severe noneconomic injuries. [Cross-At. Br. 18] In *C.J.*, the plaintiff—who was violently attacked and raped by a stranger who threatened to kill her if she screamed—argued that the damages cap did not satisfy minimum scrutiny because "it is irrational to single out the most severely injured tort victims to pay for" the statute's goal of reducing insurance premiums.[66] The Court explained that the statute's across-the-board cap was not unreasonable: "[T]he legislature could reasonably have concluded that any alternative method of lowering insurance costs would have been less fair than a cap on noneconomic

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65 *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053, 1055 (Alaska 2002) (citing Ch. 26, §§ 1(1)-(5), SLA 1997).

66 *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 380 (Alaska 2006).

damages" and that "very large, uncapped awards may have a disproportionate effect on insurance premiums."[67]

The Court acknowledged that C.J.'s injury was "grievous" and that limiting her noneconomic damages seemed "harsh."[68] But the Court explained that "'under a minimum scrutiny analysis, we do not determine if a regulation is perfectly fair to every individual to whom it is applied.' Rather, 'we must decide only if the regulation bears a fair and substantial relationship to a legitimate government objective.' "[69]

Mael does not dispute *C.J.*'s holding that the statute is constitutional, even as applied to a rape victim's grievous injuries, because it is substantially related to a legitimate government interest.[70] [Cross-At. Br. 18-21] But he asserts that *C.J.* should not apply to his case because "the nature of [his] non-economic injury could not be more severe," and the damages cap is therefore arbitrary and unreasonable as applied to him. [Cross-At. Br. 20] But *C.J.* explicitly stated that the statute is constitutional even as applied to severely injured plaintiffs, however "harsh" it may seem.[71] The severity of Mael's injury thus does not exempt him from *C.J.'s* rule.

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67 *Id.* at 381.

68 *Id.*

69 *Id.* (internal citations omitted).

70 *Id.* at 382.

71 *Id.* ("[W]e appreciate that there will be severely injured persons who are under-compensated as a result of this legislation, and we are under no illusion that this result will seem fair to them.").

Mael may argue that the Court should overturn *C.J.*, but he "bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."[72] This Court "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[73] Mael essentially argues that although the Legislature chose to cap ordinary noneconomic damages at $400,000, and damages for "severe permanent physical impairment or severe disfigurement" at $1,000,000, this Court should create another category for claims involving even more severe injury.[74] But that is a policy determination the Legislature chose not to endorse and is therefore not a compelling reason for reconsidering *C.J.*

Moreover, as explained above, subjective and unverifiable claims to having suffered more than others cannot form the basis of a constitutional rule.[75] An additional exception for only the most "severe" noneconomic injuries would be unworkable. By their very definition, noneconomic injuries are intangible and subjective. These injuries cannot be meaningfully compared or ranked—a court could not, for example, determine whether Mael's loss of enjoyment of life is more severe than the loss of enjoyment of life suffered by the plaintiff in *C.J.*, or whether Mael's suffering is greater than the suffering

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72 *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004).

73 *Id.*

74 *See* AS 09.17.010(c).

75 *See Sampson v. State*, 31 P.3d 88, 97 (Alaska 2001) (rejecting argument that would "hinge the exercise of [a] right on a vague, unverifiable, and subjective standard").

of two children whose mother was murdered.[76] With no objective means to compare noneconomic injuries, a rule exempting only the most severe noneconomic injuries from the damages cap would result in arbitrary decisions and additional litigation over inherently unverifiable claims.

C.J. forecloses Mael's argument. Alaska Statute 09.17.010 is reasonably related to the Legislature's legitimate interest of reducing insurance premiums in Alaska, and the absence of an exception for the most serious injuries does not render the statute unconstitutional.[77]

III. Alaska Statute 09.17.010's cap on noneconomic damages is also substantially related to a legitimate government interest.

For the reasons enumerated above, rational basis review is the appropriate level of scrutiny for Mael's due process claim. But even under intermediate scrutiny, AS 09.17.010 passes muster: As Mael concedes, the Court has already held that the statute is substantially related to a legitimate government interest.[78] [Cross-At. Br. 24]

Under intermediate scrutiny, the State must demonstrate "a legitimate state interest and a 'close and substantial relationship' between that interest and the chosen means of achieving it."[79] In *C.J.*, the Court upheld AS 09.17.010 against an equal protection challenge, holding that the statute is substantially related to the Legislature's legitimate

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76 *See L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1116 (Alaska 2009).

77 *C.J. v. State, Dep't of Corr.*, 151 P.3d 373, 381 (Alaska 2006).

78 *Id.* at 378–79 (Alaska 2006) (citing *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053, 1055 (Alaska 2002)); *see also Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.*, 993 P.2d 1018, 1024 (Alaska 1999).

79 *Doe v. Dep't of Pub. Safety*, 444 P.3d 116, 125–26 (Alaska 2019).

objective of lowering insurance rates in Alaska.[80] Mael's argument that AS 09.17.010 is not substantially related to a legitimate government interest is therefore foreclosed by precedent.

Mael cannot avoid binding precedent by characterizing his claim as an as-applied challenge. [Cross-At. Br. 24-25] Mael argues that the statute fails intermediate scrutiny as applied to him for two reasons: first, because more than twenty years have passed since the statute's enactment, and second, because his personal injury claim is "obviously not frivolous." [Cross-At. Br. 24-25] But both of these arguments set out facial challenges to the statute's validity—not as-applied challenges. The passage of time since the statute's enactment is not unique to Mael; it is, in substance, an argument that the statute is outdated and therefore unconstitutional on its face. Similarly, the fact that Mael's injuries are real and significant does not give rise to an as-applied challenge. [Cross-At. Br. 25] (Indeed, the damages cap, almost by definition, applies only to claims that are "obviously not frivolous,"[81] because frivolous claims will not result in noneconomic damages awards in excess of $1,000,000. [Cross-At. Br. 25])

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80 *C.J.*, 151 P.3d at 378–79 (citing *Evans*, 56 P.3d at 1053, 1055). Intermediate scrutiny in the due process context is nearly identical to minimum scrutiny in the equal protection context. *Compare C.J.*, 151 P.3d at 381 (requiring "fair and substantial" relationship for minimum scrutiny in equal protection context), *with Sampson*, 31 P.3d at 91 (stating intermediate scrutiny in due process context requires "close and substantial" relationship).

81 *See C.J.*, 151 P.3d at 381 (stating that "high-damage cases" are "viable almost by definition").

Mael is entitled to argue that the Court should overrule *C.J.* and hold that AS 09.17.010 fails intermediate scrutiny because changed circumstances have rendered *C.J.* unsound.[82] But because "[t]he stare decisis doctrine rests on a solid bedrock of practicality," "a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling."[83] This Court "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent."[84]

Mael has not attempted to make either showing. He asserts only that "the current record contains no evidence that the legislature's goals have been served by the means that it chose." [Cross-At. Br. 25] But as the party asking the Court to overturn its precedent, he—not the State or AVCP—bears the burden of demonstrating a compelling reason for doing so. Because he has not attempted to meet his burden, the Court should decline his invitation to overrule *C.J.*

CONCLUSION

For these reasons, the Court should affirm the superior court's ruling that AS 09.17.010 is constitutional on its face and as applied to Dietrich Mael.

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82 *See Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937, 943 (Alaska 2004) (setting out criteria for overturning precedent).

83 *Id.*

84 *Id.*