IN THE SUPREME COURT FOR 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., and ROSE MAEL, and THOMAS MAEL, Appellees/Cross-Appellants, v. STATE OF ALASKA, Appellee.	)	Nos. S-17802/17821

Superior court: 4BE-17-00061CI

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

REPLY BRIEF OF CROSS-APPELLANT DIETRICH MAEL

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Filed in the Supreme Court
for the State of Alaska on
this 30th of March, 2021
Meredith Montgomery, Clerk
of the Appellate Courts

By: Sarah E. Anderson
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AS 09.17.010

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

ARGUMENTS

THE STATUTORY CAP ON NON-ECONOMIC DAMAGES IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

A. DIETRICH MAEL'S CHALLENGE IS AN AS-APPLIED CHALLENGE.

In the trial court and on appeal, Dietrich Mael made clear that he is not challenging the facial constitutionality of AS 09.17.010(b) and (c). [Exc. 481-83; X-At. Br. 13] Dietrich's opening brief explicitly acknowledged that this Court has rejected facial challenges to the statute. [X-At. Br. 11-12][1] He did not then (and does not) ask this Court to overrule any precedent on the constitutionality of the statute. The large portion of AVCP RHA's appellee brief devoted to defending the statute's constitutionality addresses issues not raised in this case.[2]

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[1] *See Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1049 (Alaska 2002) (plurality opinion) ("The Caps on Noneconomic . . . Damages . . . Are Facially Constitutional."); *C.J. v. State, Dep't of Corrs.*, 151 P.3d 373, 379 (Alaska 2006) (adopting the equal protection analysis of the damages caps from the plurality opinion in *Evans*).

[2] *See* Brief of Cross-Appellee AVCP RHA ("X-Ae. Br.") 9-19. As part of its defense, AVCP RHA asserts, "Empirical evidence has shown that damages cap statutes have reduced insurance premiums." [*Id.* at 14-15 (footnote omitted)] That claim is still controversial. For example, a study published by the Center for Justice and Democracy at New York University Law School concluded: "Our findings once again show that 'tort reform' remedies pushed by the insurance industry have been colossal failures. There is no correlation between enactment of tort limits and insurance rates. States that enacted new limits on patients' legal rights in medical malpractice cases (caps on damages plus other traditional tort reforms) saw an average 22.7 percent decrease in pure premiums from 2002 to the present – but states that did nothing saw a larger average drop of 29.5 percent." J. Robert Hunter & Joanne Doroshow, *Premium Deceit 2016: The Failure of "Tort Reform" to Cut Insurance Prices* at 6 (Nov. 2016), available at https://centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices; *see also* J. Robert Hunter & Joanne Doroshow, *Stable Losses, Unstable Rates 2016* at 3 (Nov. 2016) ("The data make clear that enacting 'tort reform' does not lower rates or

Contrary to assertions in the appellee briefs of AVCP RHA and the State [X-Ae. Br. 19-21; State Br. 5, 13], Dietrich's claims *are* as-applied challenges. He raises two distinct arguments:

(1) Twenty-five years after the damages-cap legislation was enacted, application of the damages cap violates substantive due process as applied to a plaintiff who was so severely injured that the jury awarded him damages exceeding the statutory cap, because there is no rational basis for limiting such a plaintiff to an award worth only 60% of the value of the award the legislature approved. [X-At. Br. 15-18] The fact that this claim may not be unique to Dietrich Mael does not mean it is not an as-applied challenge.[3] Under the principle of *stare decisis*, any successful as-applied challenge could benefit others in a similarly situated subclass of all potential plaintiffs, but that does not deprive the successful plaintiff's claim of its character as an as-applied challenge.[4]

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prevent future crises [in the cost or availability of medical malpractice premiums]."), available at https://centerjd.org/content/stable-losses-unstable-rates-2016.

[3] *Compare State, Dep't of Revenue v. Beans*, 965 P.2d 725, 728 (Alaska 1998) ("A statute is facially unconstitutional if no set of circumstances exists under which the Act would be valid." (internal quotation marks omitted)) *with Dapo v. State, Office of Children's Servs.*, 454 P.3d 171, 180 (Alaska 2019) ("An as-applied constitutional challenge requires evaluation of the facts of the particular case in which the challenge arises." (internal quotation marks and brackets omitted)).

[4] *See, e.g., Club SinRock, LLC v. Municipality of Anchorage*, 445 P.3d 1031, 1039 (Alaska 2019) (holding closing hour restriction unconstitutional *as applied to any* adult cabaret based on the content of its entertainment, but not unconstitutional as applied to other adult establishments); *Barber v. State, Dep't of Corrs.*, 314 P.3d 58, 66 (Alaska 2013) (holding statute requiring prisoners to pay a filing fee unconstitutional *as applied to any* prisoner who is entirely denied access to the court because of inability to pay, while not striking the statute as applied to prisoners with funds); *Beans*, 965 P.2d at 728 (upholding statute that permits CSED to take action against the driver's license of a parent in arrears for child support, but holding the statute would be unconstitutional *as applied to any* parent

(2) Application of the statutory damages cap violates substantive due process when it is applied to a plaintiff who is so grievously injured that the cap fails to provide the plaintiff fair compensation for his harm, despite the legislature's intent not to "diminish[] the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others."[5] [X-At. Br. 18-21] To deny such a seriously injured plaintiff full compensation for the injuries he proved, while allowing full compensation to less severely injured plaintiffs, is "unfair, irrational, or arbitrary," "shock[s] the universal sense of justice," and has no rational basis.[6] Dietrich's fact-specific claim is clearly a challenge to the constitutionality of the statute as applied in this case.

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who is unable to pay); *Williams v. State*, 151 P.3d 460, 471 (Alaska App. 2006) (holding statute that categorically forbids criminal defendant accused of domestic violence from returning home while on bail is unconstitutional *as applied to any* defendant seeking pretrial release, while offering no opinion about whether the statute could be applied constitutionally to defendants seeking release post-conviction).

[5] SLA 1997, ch 26, § 1(1).

[6] *Doe v. State, Dep't of Public Safety*, 444 P.3d 116, 125-26 (Alaska 2019) (internal quotation marks omitted).

B. THE CAP VIOLATES THE GUARANTEE OF SUBSTANTIVE DUE PROCESS AS APPLIED IN THIS CASE BECAUSE IT UNREASONABLY FAILS TO ACCOUNT FOR INFLATION.

AVCP RHA and the State do not dispute the significance and impact of inflation in the quarter-century since the legislature enacted the caps in AS 09.17.010: By 2019, $1,000,000 was worth only 62% of what it was worth in 1997. [Exc. 484; R. 1936] In constant dollars, the jury's award of $1,580,000 for past and future non-economic damages gave Dietrich Mael less than the value the legislature authorized as an award in 1997[7] – but the failure to allow for inflation meant that the court took away from Dietrich over one-third of his award.

The AVCP RHA and State briefs correctly note a point Dietrich Mael overlooked in his opening brief: On March 14, 1997, the House Finance Committee did consider adding an adjustment for inflation.[8] However, the minutes reflect little discussion of the proposal.[9] One of the legislators opposed to the amendment observed that the "legislation contains an accelerator."[10] It is entirely unclear what he might have meant. After he said that, the proposed amendment was rejected on a vote of 3-6.[11] The full legislature never considered or debated adding an inflation adjustment.

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7 *See* www.usinflationcalculator.com ($1,580,000 in 2019 is equivalent to $991,914.95 in 1997) (last visited March 21, 2020).

8 *See* Minutes, House Finance Committee Hearing on HB 58 (March 14, 1997) at 5.

9 *See id.* AVCP RHA's brief sets forth in full the relevant minutes of the hearing. [X-Ae. Br. 23]

10 *See* Minutes, *supra* n.8, at 5.

11 *See id.*

AVCP RHA implies that the legislature addressed the problem of inflation by adopting a cap that is somewhat larger than that adopted by other states at that time. [X-Ae. Br. 24-26] However, the legislative history reflects no linkage between the absence of a statutory mechanism to adjust for inflation and the caps that the legislature adopted.

The version of the bill considered by the House Finance Committee on March 14, 1997, set the non-economic damages cap at $300,000 for most cases and $500,000 for certain more serious cases.[12] The version passed out of the Committee, after the vote to reject adding an inflation adjustment, did not change those limits.[13]

A month later, the Senate Rules Committee passed out to the full Senate a version that set the non-economic damages caps at $500,000 for most cases and $1,500,000 for the most serious cases.[14] The full Senate considered and defeated an amendment that would have changed the definition of those entitled to the higher cap.[15] The Senate then reconsidered the bill and passed an amended version that reduced the caps to $400,000 and $1,000,000 and adopted the language on qualifying for the higher cap that is found in AS 09.17.010.[16] That version was approved by the House and signed by the Governor.[17] In

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12 *See* CSSSHB 58(JUD) § 8 (Feb. 27, 1997) (referred to Finance).

13 *See* CSSSHB 58(FIN) § 9 (Mar. 17, 1997); CSSSHB 58(FIN) am § 9 (Mar. 18, 1997).

14 *See* SCS CSSSHB 58(RLS) § 9 (Apr. 16, 1997) (referred to Calendar).

15 *See* 1997 Senate Journal 1179-80 (Apr. 16).

16 *See* 1997 Senate Journal 1256 (Apr. 17), 1297-1300, 1303 (Apr. 18); SCS CSSSHB 58(RLS) am S § 9 (Apr. 16, 1997).

17 *See* 1997 Senate Journal 1305 (Apr. 18); 1997 House Journal 1222-23 (Apr. 21), 1276 (Apr. 22), 1296 (May 10).

short, the legislative record does not show that the legislature chose to increase the caps rather than include a provision to account for inflation. Instead, the fairest way to read the legislative record is that the legislature adopted the caps that in 1997 it thought were appropriate in light of all the goals of the statute, and the legislature as a whole did not consider whether those caps would be reasonable and appropriate a quarter of a century later. If some legislators believed that future legislatures would amend the caps as appropriate to account for inflation, that faith in future legislatures was unfounded.

In sum, this case comes before this Court without a record indicating a legislative intent that the 1997 caps should remain static unless and until a future legislature chose to amend them. The 1997 legislature as a whole simply did not consider the effects of inflation.

The inflation-based due process argument *is* a matter of first impression for this Court. AVCP RHA contends that in *Evans* this Court effectively rejected an argument that the lack of inflation adjustment violates due process. [X-Ae. Br. 21-22] AVCP RHA points to the portion of *Evans* that rejected an argument that the caps violate the equal protection clause because the cost of living in rural Alaska is so much higher than the cost of living in urban Alaska. [*Id.*][18] Regional differences in the cost of living, which may affect the relative value of the dollar as between two otherwise similarly situated plaintiffs, are not legally or factually equivalent to the differences in the value of a dollar over time. People can move within Alaska – or even to other states – if they believe their dollars will

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[18] *See Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002) (plurality opinion).

go further elsewhere. People cannot move to a different year to minimize the effect of inflation in reducing the value of the award they receive for their injuries.

AVCP RHA notes that some states' statutory caps on non-economic damages are lower than Alaska's caps. [X-Ae. Br. 19 n.61, 25-27] Dietrich discussed this in his opening brief. [X-At. Br. 15 & n.35] Other states' statutes do not demonstrate that Dietrich's right to substantive process was not violated by applying a decades' old damages cap to him without an adjustment for inflation. Dietrich's case does not challenge the initial amount the legislature adopted as its view of the appropriate cap on non-economic damages. In this litigation, Dietrich accepts that the legislature was entitled to weigh a variety of competing policies and to adopt the cap that, in its view, best accommodated all those policies.[19] Dietrich's challenge focuses on how arbitrary and irrational it is to apply the same cap in 2019 that the legislature adopted 22 years earlier, and how it "shocks the universal sense of justice" to insist that an Alaskan injured in 2016, who got his day in court in 2019, may not recover nearly as much for his losses as someone else who suffered the same losses more than 20 years earlier.

The AVCP RHA and State briefs also stress the holdings of other state courts that the lack of inflation-adjustment does not violate the equal protection or due process clauses in those states' constitutions.[20] Dietrich's opening brief acknowledged some of this

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[19] *See* SLA 1997, ch 26, § 1(1), (3)-(5) (setting forth at least five often-competing principles that the legislature had to reconcile in adopting the caps it chose on non-economic damages).

[20] *See* X-Ae. Br. 28 (citing California cases and a case from West Virginia); State Br. 17-19 (citing the West Virginia case and cases from California and Pennsylvania).

contrary case law. [X-At. Br. 16-17] Plainly, decisions from other courts, interpreting their states' constitutions, do not bind this Court in interpreting the Alaska Constitution.[21] The other state courts, in upholding their legislatures' inaction regarding caps on non-economic damages eroded by inflation, did not apply the substantive due process definition this Court has articulated: whether the statute, as applied in the case at bar, is so unfair, irrational, or arbitrary as to offend the universal sense of justice.[22] Neither did courts in other states examine how the passage of time affects the specific goals the Alaska legislature stated that it intended to serve when it adopted the caps in AS 09.17.010(b) and (c).[23] Most pertinently, those courts did not examine whether the passage of time requires

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[21] This Court has interpreted the rights guaranteed by the Alaska Constitution's substantive due process protections generously, protecting rights not guaranteed in other jurisdictions. *See, e.g., State v. Rice*, 626 P.2d 104, 110-15 (Alaska 1981) (holding substantive due process is denied by forfeiture of innocent owner's property used by another to commit a crime, without an opportunity to seek remission, although federal courts hold that comparable statutes do not violate the U.S. Constitution); *see generally Doe v. State, Dep't of Public Safety*, 444 P.3d 116, 124-36 (Alaska 2019) (relying on state constitution's substantive due process guarantee to require allowing a sex offender an opportunity to terminate life-time registration as a sex-offender by proving he poses no risk to the public sufficient to require continued registration); *State v. Murtagh*, 169 P.3d 602, 608-23 (Alaska 2007) (relying on state constitution's substantive due process guarantee to invalidate certain restrictions on criminal defense investigations).

[22] *See Doe*, 444 P.3d at 125-26 (setting out Alaska's tests for evaluating whether a statute denies substantive due process). In contrast, the California cases rejecting challenges based on the effects of inflation relied on that state's "changed circumstances" doctrine, a provision without parallel in this Court's jurisprudence. *See Chan v. Curran*, 188 Cal. Rptr. 3d 59, 68-75 (App. 2015); *Stinnett v. Tam*, 198 Cal. App. 4th 1412, 1428-32 (2011). The Pennsylvania and West Virginia courts provided no legal analysis of the rationality or "fit" between the statute and its goals; they simply stated in a conclusory fashion that whether or not to index a damages cap to inflation is exclusively a legislative decision. *See Griffin v. Southeastern Pa. Transp. Auth.*, 757 A.2d 448, 453 (Pa. Commw. Ct. 2000); *Verba v. Ghaphery*, 552 S.E.2d 406, 411-12 (W. Va. 2001).

[23] *See* SLA 1997, ch 26, § 1.

revisiting the fit between the means chosen and the goal to "encourage the efficiency of the civil justice system by discouraging frivolous litigation and by decreasing the amount, cost, and complexity of litigation *without diminishing the protection of innocent Alaskans' rights to reasonable, but not excessive, compensation for tortious injuries caused by others.*"[24]

This Court should find that the arguments presented by AVCP RHA and the State do not persuasively refute Dietrich's claims that applying the 1997 damages cap to him in 2019 is arbitrary, irrational, and unfair, and that it offends the universal sense of justice to allow the passage of time to restrict increasingly the amount a seriously injured plaintiff may receive. The legislature expressly intended not to diminish the right of innocent Alaskans to receive "reasonable, but not excessive, compensation for tortious injuries caused by others."[25] In *Evans*, in responding to a facial challenge to the damages cap, this Court deferred to the legislature's determination of what amount was reasonable and not excessive in 1997.[26] With the passage of time and the effects of inflation, the most grievously injured Alaskans, like Dietrich, no longer receive what the legislature decreed is reasonable compensation for their injuries. The Court should declare that applying AS 09.17.010(c) to Dietrich in 2019 violates his substantive due process rights.

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24 *Id.* § 1(1) (emphasis added).

25 *Id.*

26 *See Evans*, 56 P.3d at 1053-54; *see also C.J. v. State, Dep't of Corrs.*, 151 P.3d 373, 381-82 (Alaska 2006).

C. THE CAP VIOLATES THE GUARANTEE OF SUBSTANTIVE DUE PROCESS AS APPLIED IN THIS CASE BECAUSE IT UNREASONABLY FAILS TO ALLOW FOR FAIR COMPENSATION TO THE MOST GRIEVOUSLY INJURED PLAINTIFFS.

When the legislature established caps on the maximum non-economic damages an injured plaintiff could receive in a tort case, the legislature defined two categories of plaintiffs: Most injured plaintiffs fit into the first category and are subject to one cap; those few who suffer "severe permanent physical impairment" or "severe disfigurement" are subject to a higher cap.[27] The jury in this case received proper instructions and determined that Dietrich fits into the second category. [R. 1701; Exc. 433 (special verdict question no. 3)]

As Dietrich described in his opening brief, in *C.J.* this Court considered the hypothetical situation of "severely injured persons who are under-compensated as a result of [the cap in AS 09.17.010]."[28] The *C.J.* opinion acknowledged that the cap will not "seem fair" to such people, but the Court concluded that the legislature constitutionally could establish caps as a way of addressing the perceived problem with high insurance rates.[29] As support for this conclusion, this Court noted two other statutory schemes that limit compensation for injured people: AS 23.30.175-.215 (the Workers' Compensation Act) and AS 09.50.250 (Alaska's limited waiver of sovereign immunity).[30] Dietrich's opening

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27 *See* AS 09.17.010(b), (c).

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

29 *See id.*

30 *See id.* at 381.

brief showed that neither of these statutory schemes offers a fair analogy. The Workers' Compensation Act is based on a deliberate quid pro quo: an injured worker is denied the opportunity to receive full compensation from his or her employer, but in exchange the worker is guaranteed speedy and certain compensation for a workplace injury even when he or she is at fault. The sovereign immunity statute, while it denies recovery to some people, *expands* the common law right of recovery among people injured by actions of the state. [X-At. Br. 18-19] The cap on non-economic damages differs because it denies injured Alaskans the right to recover full damages on a common law claim without simultaneously providing a benefit to tortiously injured Alaskans as a group.

Neither AVCP RHA nor the State defends the analogies. AVCP RHA asserts that the reference to other statutes is not a critical part of this Court's analysis, and this Court discussed them "almost as after-thoughts." [X-Ae. Br. 33 n.109] Dietrich does not assume this Court was quite so casual in drafting its opinion.

The imperfect analogies used to justify the legislature's action in capping common law damages provide a reason for taking a close look at the substantive due process rights of a grievously injured person, such as Dietrich, who was awarded damages in excess of the cap, then was denied the right to receive full compensation for his injuries. AS 09.17.010 involves no quid pro quo as between the most seriously injured plaintiffs and the tortfeasors who caused their harm. Plaintiffs such as Dietrich are harmed by the cap and receive nothing in exchange; tortfeasors like AVCP RHA benefit from the cap and suffer no detriment. The legislature's justifications are entirely systemic: a belief that society as a whole might be better served because insurance premiums might decrease if

damages are capped.[31] As courts of other states have said, it is fundamentally unfair, and a denial of equal protection and/or substantive due process, to require the most injured victims to bear the entire brunt of an attempted social reform.[32]

AVCP RHA and the State nonetheless urge this Court to find that *C.J.* resolves the question of whether the $1 million cap ever can be too low. [X-Ae. Br. 31-33; State Br. 21-24] Dietrich respectfully disagrees that *C.J.* controls. First, *C.J.* involved a fact pattern where this Court held that the plaintiff could recover three times the statutory cap.[33] Second, neither *C.J.* nor any subsequent case before this one asked this Court to examine the constitutionality of reducing an award to a particular plaintiff because of the statutory cap. Just as this Court discovered in *Sands ex rel. Sands v. Green*, a concrete fact scenario

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31 *See* SLA 1997, ch 26, § 1(1), (3), (5).

32 *See Carson v. Maurer*, 424 A.2d 825, 837 (N.H. 1980) (invalidating cap on non-economic damages in medical malpractice cases, calling it "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation"); *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) (invalidating cap on damages in medical malpractice cases, saying: "Defendants argue that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by lower insurance premiums and lower medical care costs for all recipients of medical care. This *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act." (internal quotation marks omitted)); *In the Matter of the Certification of Questions of Law*, 544 N.W.2d 183, 191 (S.D. 1996) (invalidating cap on damages in medical malpractice cases for multiple reasons, including violation of substantive due process, and stating "the most basic is that the statute impermissibly gives all the benefits to the wrongdoer . . . while it places all of the corresponding detriment on the negligently injured victim"); *see also Busch v. McInnis Waste Systems, Inc.*, 468 P.3d 419, 432-33 (Or. 2020) (holding cap on non-economic damages in common law tort cases unconstitutional under Oregon constitution's "remedy clause" because of the absence of any quid pro quo for victims).

33 *See C.J.*, 151 P.3d at 382-84.

can require re-examining a rule announced in response to an abstract facial challenge.[34] To grant an as-applied challenge does not require overruling a holding that the statute is facially constitutional.

Dietrich described, with detailed citations to the record, how extreme his non-economic injuries are. [X-At. Br. 4-7] AVCP RHA attempts to refute that claim by retelling the facts in the light most favorable to itself, the version it wishes the jury had accepted, but clearly did not. [X-Ae. Br. 3-5][35] That perspective is inappropriate. When reviewing a record to determine whether a jury verdict is supported, this Court must accept the facts in the light most favorable to upholding the verdict.[36]

At the trial in this case, evidence presented to the jury contradicted, or put in context, each "fact" that AVCP RHA recites in its effort to show that Dietrich really wasn't badly injured and therefore was adequately compensated despite the slashing of the jury's award

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34 156 P.3d 1130, 1133-36 (Alaska 2007) (declaring that applying a statute of limitation provision in SLA 1997, ch 26 to a particular plaintiff violated due process, after *Evans* upheld the facial validity of the provision on equal protection grounds).

35 *Compare* 9/26 Tr. 160-65 (AVCP RHA closing argument attempting to diminish Dietrich's pain) *with* 9/26 Tr. 135-38, 145-46; 9/27 Tr. 22-23, 29-30 (plaintiffs' closing arguments describing Dietrich's pain).

36 *See Recreational Data Servs., Inc. v. Trimble Navigation Ltd.*, 404 P.3d 120, 125 (Alaska 2017) (when court assesses whether there is sufficient evidence to support a jury verdict, court reviews the evidence presented to the jury in the light most favorable to upholding the verdict); *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017-18 (Alaska 2011) (courts should consider motions to set aside a verdict under the principle of least interference with the right of jury trial and may grant a directed verdict or jnov only when the evidence, viewed in the light most favorable to the prevailing party, was insufficient to allow a reasonable juror to find for the prevailing party); *City of Fairbanks v. Rice*, 20 P.3d 1097, 1107 (Alaska 2000) (court may grant a remittitur only to the maximum possible amount that a reasonable jury could award).

for non-economic damages.[37]

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[37] A few examples illustrate why AVCP RHA's one-sided view of the evidence was properly rejected by the jury:

AVCP RHA states that Dietrich suffered intense back pain in the past, implying that his back pain after the explosion results from a pre-existing condition. [X-Ae. Br. 3 n.6] However, testimony at trial established that Dietrich had entirely recovered from his previous injuries; he had no back pain immediately prior to the explosion, and he was living a full and active life. [9/17 Tr. 101-02; 9/18 Tr. 51-52, 139-40; 9/19 Tr. 139, 193-96; 9/20 Tr. 34-35, 41, 65-66]

AVCP RHA states that Dietrich did not complain of back pain until two weeks after the explosion. [X-Ae. Br. 3] However, the record is clear that Dietrich was given strong pain medicine during, and even before, his hospitalization, to help him deal with the intense pain of his burns. [9/25 Tr. 158, 175-77; R. 3918-20 (received morphine and fentanyl in the village clinic and on the medevac flight)] He complained of back pain when the medication was reduced, though not eliminated. [9/20 Tr. 32; 9/25 Tr. 177-78] Experts called by both Dietrich and AVCP RHA testified that the strong pain medicine for his burns likely masked the pain from his back. [9/19 Tr. 10-11; 9/25 Tr. 124-25, 159]

AVCP RHA states that Dietrich drove a snow machine in May 2016, four months after the explosion. [X-Ae. Br. 3] Contrary to AVCP RHA's representation about the incident, Dietrich testified that he was not going fast; his face was hit by the handlebar when a runner got caught and the machine fishtailed. [9/20 Tr. 64-65] He was forced to quit subsistence hunting because all the steps of hunting (including riding a snow machine to access game) were painful. [9/17 Tr. 103; 9/20 Tr. 63-64]

AVCP RHA states that Dietrich admitted that he took "lots of flights" to and from Bethel and Anchorage. [X-Ae. Br. 4] The preceding question made clear the flights were for medical appointments. [9/20 Tr. 32-33] The medical records show that Dietrich generally requested and received extra pain medication to make the plane travel bearable, and he traveled with an escort to help him with his wheelchair or walker and to carry his baggage. [9/18 Tr. 49; *E.g.*, R. 4038, 4062, 4073, 4081, 4089, 4216, 4328]

AVCP RHA points to a reference in the medical records to treatment for a sexually transmitted disease, suggesting this is evidence that Dietrich could engage in normal sexual relations (a subject on which there was no testimony). [X-Ae. Br. 4] That medical record is from April 2016; it reflects that the village clinic was asked by the Bethel hospital to assist with treatment for chlamydia. [R. 3989] The records do not show when the chlamydia was diagnosed or contracted. Most people with chlamydia do not know they are infected because they have no symptoms, so the April 2016 record does not indicate recent sexual activity. *See Chlamydia – CDC Fact Sheet (Detailed),* https://www.cdc.gov/std/chlamydia/stdfact-chlamydia-detailed.htm (last visited March 21, 2021). [*footnote continues next page*]

Jurors saw Dietrich in the courtroom for eight days of trial; they heard him testify about his excruciating pain. [9/20 Tr. 32-34, 37] They heard his parents corroborate his depression due to his inability to do anything meaningful. [9/18 Tr. 65, 166] They heard AVCP RHA's retained expert testify that Dietrich's pain is real, and that Dietrich is not pretending to be hurt. [9/25 Tr. 109-10] The jury's verdict on non-economic damages is amply supported by the record. If this Court were reviewing a standard motion for remittitur, there would be no basis for reducing the jury's award. In this case, too, this Court must accept the facts in the light most favorable to the jury's verdict when assessing whether Dietrich's guarantee of substantive due process was violated by denying him the right to retain the jury's full award.

Given the severity of Dietrich's injury, precluding him – but not less seriously injured plaintiffs – from retaining the full amount awarded by the jury has no rational basis and shocks the universal sense of justice. Thus, this Court should hold that applying the $1 million cap to Dietrich violates his guarantee of substantive due process.

AVCP RHA asserts that its CEO, Mark Charlie, observed Dietrich drive a car in Bethel, get out of the car carrying a package, and walk normally, without apparent pain, into the Ravn Alaska building. [X-Ae. Br. 4, citing 9/23 Tr. 64-67] AVCP RHA stresses Charlie's certainty that he had not confused Dietrich with his brother. [*Id.*] However, at trial multiple other witnesses testified that Dietrich has no driver's license and has never driven a car, in Bethel or otherwise, but that Dietrich's brother lived in Bethel, owned a vehicle, had a driver's license, and took packages to Ravn Alaska to mail to the village. [9/18 Tr. 49-51; 9/19 Tr. 164-65; 9/20 Tr. 36-37] A photo admitted as evidence showed the close resemblance between Dietrich and his brother, and witnesses testified how the Mael brothers frequently were mistaken for each other. [9/18 Tr. 50; 9/20 Tr. 60; R. 4587 (Exh. 32)]

D. DIETRICH'S INTEREST IN COMPENSATION FOR HIS NON-ECONOMIC DAMAGES IS NOT "JUST" AN ECONOMIC INTEREST, SO THIS COURT SHOULD APPLY INTERMEDIATE SCRUTINY WHEN ANALYZING THE CONSTITUTIONALITY OF THE DAMAGES CAP.

The preceding arguments all assume that this Court will scrutinize the statute that limits Dietrich's award of non-economic damages only at the lowest end of the sliding scale, based on the case law that declares that low-level scrutiny applies when a statute infringes on a mere economic interest.[38] As Dietrich discussed in his opening brief, other courts have determined that the interest in fair compensation for tortiously-caused injuries is sufficiently important that statutory caps on compensation should receive intermediate scrutiny.[39]

Dietrich urges this Court to conclude that its earlier decisions incorrectly assessed the significance of an award for non-economic injuries as purely an economic interest. Pain and suffering and the loss of the desire to live cannot be measured in economic terms. The very name the legislature used – "non-economic damages" – suggests that this Court's earlier decisions misapprehended the true nature of the interest at stake. Dollars are awarded at a trial because the court system has no other way to recognize the importance to an individual of losing, through no fault of his own, so much

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38 *See C.J.*, 151 P.3d at 379-80; *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1052-53 (Alaska 2002) (plurality opinion); *Reid v. Williams*, 964 P.2d 453, 458 (Alaska 1998).

39 X-At. Br. 22-23, citing *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980) (right to recover for personal injuries is an "important substantive right"), *reaff'd in Brannigan v. Usitalo*, 587 A.2d 1232, 1234-36 (N.H. 1991); *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 (S.D. 1996); *Balboni v. Ranger American of the V.I., Inc.*, 70 V.I. 1048, 1096 (2019).

of his personhood that the joy of living is gone, and life is an unrelenting struggle. Given the importance of a person's interests in a pain-free life, this Court should not regard a jury award of dollars for non-economic injuries as "only" an economic interest. In recognition of the importance of the individual interest, this Court should scrutinize the statute that limits recovery of compensation for non-economic injuries at a higher level on the sliding scale.

Like other courts that have applied an intermediate level of scrutiny, this Court should conclude that there is no fair and substantial relationship between any important governmental interest and precluding Dietrich Mael from retaining the jury's award to compensate him in the only way the court system can for his intense suffering and pain.[40] Consequently, this Court should hold that applying the damages cap to Dietrich violates his substantive due process rights.

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[40] *See Brannigan*, 587 A.2d at 1234-36; *Carson*, 424 A.2d at 836-38; *Arneson*, 270 N.W.2d at 135-36; *In the Matter of the Certification of Questions of Law*, 544 N.W.2d at 191.

CONCLUSION

This Court should reverse the judgment in this case in favor of Dietrich Mael to the extent that it applies the $1,000,000 cap on non-economic damages. This Court should remand with directions to enter judgment in accordance with the jury's verdict, or, at minimum, remand with directions to the superior court to apply standards that this Court articulates for evaluating whether the cap is unconstitutional as applied in this case.

Respectfully submitted, this 23 day of March, 2021.

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