IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0077

ALEXIS NUNEZ and HOLLY McGOWAN,

Plaintiffs/Appellees,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Defendants/Appellants,

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WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs, Appellants,

v.

MAXIMO NAVA REYES and IVY McGOWAN-CASTLEBERRY,

Third-Party Defendants.

# BRIEF OF ATTORNEY GENERAL

On Appeal from the Montana Twentieth Judicial District Court,
Sanders County, The Honorable James A. Manley, Presiding

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## STATEMENT OF THE ISSUE

Whether Appellees have met their burden of proving that Montana's statutory cap on punitive damages is unconstitutional.

## STATEMENT OF THE CASE AND INTERVENOR'S INTEREST

The jury below awarded Appellee Alexis Nunez $4 million in compensatory damages and $30 million in punitive damages. (D.C. Docs. 128, 129.) Montana law caps punitive damages at $10 million. Mont. Code Ann. § 27-1-220(3). Instead of reducing the award to the statutory maximum, the district court ruled that the statutory cap on punitive damages was unconstitutional. (D.C. Doc. 138 at 4.)

Appellants raise a number of issues in their appeal related to whether the district court erred in its summary judgment ruling, whether sufficient evidence justified a punitive damages award, whether the district court erred in striking Montana's statutory cap on punitive damages, and whether the jury's punitive damages award violated the United States Constitution. (*See* Appellants' Br. at 13-17.) In addition to responding to these issues, Appellees argue that Montana's punitive damages cap is unconstitutional. (Appellees' Br. at 37-40.) Appellees also argue that the punitive damages award was reasonable under the federal and state due process clauses. (*Id*. at 41-46.)

The Attorney General intervenes on appeal solely to defend the constitutionality of Mont. Code Ann. § 27-1-220(3), the statutory punitive damages

cap. The Attorney General takes no position on the underlying liability in this case, on the district court's summary judgment ruling, on whether punitive damages were properly awarded, or on whether the punitive damages award comports with due process, as none of these questions present a constitutional challenge to a Montana statute.[1]

## STATEMENT OF THE FACTS

In 2003, the Montana Legislature enacted SB 363, which established the current cap on punitive damages. The law permits a jury to award punitive damages of up to "$10 million or 3% of a defendant's net worth, whichever is less." Mont. Code Ann. § 27-1-220(3). The law was enacted in response to the perceived adverse consequences of unlimited punitive damages, including rising insurance costs, increased costs of litigation, and negative impacts on existing and prospective businesses. *See, e.g.*, Mont. S. Jud. Comm., *Hearing on SB 363*,

[1] This Court scheduled oral argument in this case prior to the Attorney General's intervention, and argument is scheduled for September 13, 2019. Due to the numerous issues presented by Appellants and Appellees and the limited amount of time allotted to the parties, the Attorney General is not seeking to present oral argument and intends to rely on this brief to defend the constitutionality of Mont. Code Ann. § 27-1-220(3). However, counsel for the Attorney General will be present at the oral argument to answer any questions from the Court.

58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes at 2-4, Exs. 1, 2 (legislative history available from State Law Library of Montana) (App. A at 2-4, 15-21).[2]

In 2019, a jury found that Alexis Nunez had been injured by the negligence of Watchtower Bible and Tract Society of New York, Inc. (Watchtower) and others, and it awarded her $4 million in compensatory damages. (D.C. Doc. 128.) The jury further found that Watchtower had acted with malice, and it awarded $30 million in punitive damages. (*Id*. at 2; D.C. Doc. 129.) Watchtower moved to reduce the punitive damages award to $10 million to comply with Mont. Code Ann. § 27-1-220(3).

Nunez opposed the motion and asserted that Montana's statutory cap violated her right to a jury trial under Mont. Const. art. II, § 26, her right to equal protection under Mont. Const. art. II, § 4, and substantive due process. (D.C. Doc. 131 at 2.) Rather than presenting any argument in support of these assertions, Nunez incorporated two district court orders, one of which had found the 3% statutory cap unconstitutional, but did not address the $10 million cap; and one of which had found the statutory cap unconstitutional as applied to the facts of a particular case. (*See* D.C. Doc. 131 at 2; *Id.* Ex. A. at 4-5; *Id.* Ex. B. at 7, 11.)

[2] For the Court's convenience, minutes from the Senate and House Committee hearings and cited exhibits are attached as Appendix A and Appendix B. In addition to the compiled legislative history on file in the State Law Library, audio and video recordings of the legislative hearings related to SB 363 are available at the Montana Historical Society.

Without a hearing, the court issued an order striking down Montana's statutory cap. (D.C. Doc. 138 at 4.) The court first identified Nunez's challenges, noting that she challenged the cap under art. II, § 26, the right of trial by jury; art. II, § 4, equal protection; and the Constitution's guarantee of substantive due process. (*Id*. at 3.) In cursory fashion, the court found the due process argument the most persuasive, reasoning that for some defendants $10 million might serve the statutory purpose of punitive damages, while for others it might not. (*Id*. at 4.) The court also determined that the cap violated equal protection. The entirety of the court's analysis was that "[t]he statute also denies equal protection in that it sets up unequal classes: a favored class (class action plaintiffs) and a disfavored class (all individual plaintiffs)." (*Id*.) The court did not address Nunez's claim that the cap violated her right to a jury trial.

## SUMMARY OF THE ARGUMENT

The district court's decision striking down Mont. Code Ann. § 27-1-220(3) ignored the presumption of constitutionality and burden of proof, failed to apply this Court's deferential standard of review, and overlooked longstanding precedent recognizing the Legislature's authority and prerogative to limit or restrict punitive damages.

Appellees' arguments on appeal similarly ignore the presumption of constitutionality and do little more than make perfunctory assertions that the statute

violates equal protection, due process, and the right to a jury trial. The Court should reject these conclusory assertions both because they fall short of the requirements of the appellate rules and because they fail to overcome the presumption that statutes are constitutional.

Moreover, it is settled law that there is no constitutional right to punitive damages and that the Legislature has the authority to limit or eliminate punitive damages. Because there is no constitutional right to punitive damages, the appropriate standard of review in this case is the rational basis test. That standard is satisfied here because the Legislature enacted the cap to address legitimate governmental objectives including rising insurance premiums, abusive litigation practices, and instability to new and existing businesses. Applying this deferential standard, the Court should reject Appellees' constitutional challenges and uphold the statute.

## STANDARD OF REVIEW

This Court exercises plenary review of constitutional issues. *Montana Cannabis Industry Assn. v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131. When reviewing constitutional challenges to a statute, this Court indulges every possible presumption in an effort to uphold the statute as constitutional. *State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203. The challenger must prove beyond a reasonable doubt that the statute is unconstitutional, and this

Court resolves all doubts in the statute's favor. *Satterlee v. Lumberman's Mutual Casualty Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566.

## ARGUMENT

### I. This Court should uphold Mont. Code Ann. § 27-1-220(3) because Nunez has failed to address, much less overcome, the presumption that the statute is unconstitutional.

A party seeking to have a statute declared unconstitutional has a heavy burden. *Flathead Joint Board of Control v. State*, 2017 MT 277, ¶ 9, 389 Mont. 270, 405 P.3d 88. Courts presume that statutes are constitutional, and a challenger can overcome this presumption only by proving "'beyond a reasonable doubt' that the challenged statute is unconstitutional." *Id*. (quoting *Molnar v. Fox*, 2013 MT 132, ¶ 49, 370 Mont. 238, 301 P.3d 824). This standard has applied for more than a century. *See State v. Camp Sing*, 18 Mont. 128, 138, 44 P. 516, 517 (1896). Additionally, this Court asks "'not whether it is possible to condemn, but whether it is possible to uphold'" the challenged statute. *Satterlee*, ¶ 10 (quoting *Powell v. State Compensation Insurance Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877).

Here, the Court should uphold Mont. Code Ann. § 27-1-220(3) because Nunez has failed throughout this case to meaningfully attempt to overcome the presumption that the statute is constitutional. In district court, Nunez presented no argument to overcome the presumption of constitutionality; instead, she filed a

page-and-a-half brief, asserting that Montana's statutory cap on punitive damages was unconstitutional. (D.C. Doc. 131.) But other than asserting that the statute violated her rights, the brief contained no argument supporting her view. *Id*. at 2.

Rather than making any legal arguments, Nunez "relie[d] upon" and "incorporate[d]" two district court decisions. *Id*. But incorporating by reference non-binding trial court decisions, without any accompanying analysis, cannot be sufficient to prove beyond a reasonable doubt that a statute is unconstitutional. Certainly, it would fall short in this Court, which bars parties from incorporating arguments into briefs by reference and has stated that the "mere reference to arguments and authorities in district court proceedings is no substitute for developing and presenting appellate arguments." *State v. Ferguson*, 2005 MT 343, ¶ 41, 330 Mont. 103, 126 P.3d 463.

But even if incorporating other decisions could suffice, Nunez's cited authorities were inapplicable. One decision addressed whether the statute capping punitive damages at 3% of a defendant's net worth was unconstitutional, which, as the district court recognized, is a statutory provision that "is not at issue here." (D.C. Doc. 138 at 2.) The other district court had found that the statutory cap on punitive damages was unconstitutional *as applied* in that particular case. (*See* D.C. Doc. 131 at Ex. B. at 7, 11.) Merely pointing to a couple of trial court rulings, without providing any accompanying legal analysis or argument, should not be

sufficient to overcome the presumption that a statute is constitutional and prove beyond a reasonable doubt that the statute is unconstitutional. On appeal, Nunez does little more than she did in district court. In the few pages she devotes to three separate constitutional challenges, she fails to acknowledge the constitutional burden, fails to set out the governing standards, and relies primarily on conclusory assertions.

The district court erred by failing to require Nunez to prove beyond a reasonable doubt that Mont. Code Ann. § 27-1-220(3) was unconstitutional. Montana's legislative enactments should not be struck down in the absence of a reasoned challenge. This Court should hold that Nunez's arguments in the district court fell short and apply the presumption that statutes are constitutional to uphold the statute.

## II. On the merits, this Court should uphold Mont. Code Ann. § 27-1-220(3) because it does not violate equal protection, due process, or the right to a jury trial.

### A. The statutory cap on punitive damages does not violate equal protection.

Nunez asserts that Mont. Code Ann. § 27-1-220(3) violates equal protection because it creates a favored class of plaintiffs, class action plaintiffs, and a

disfavored class of plaintiffs, individual plaintiffs. (*See* Appellees' Br. at 37-38).[3] The Court should reject this challenge because Nunez has failed to demonstrate that the identified classes are similarly situated and because the statute is rationally related to a legitimate government objective.

This Court considers three steps when analyzing an equal protection challenge. The first step is to identify the classes involved and determine whether they are similarly situated. *Kohoutek, Inc. v. State*, 2018 MT 123, ¶ 34, 391 Mont. 345, 417 P.3d 1105. Determining whether the classes are similarly situated is a threshold consideration, and if the challenging party fails to meet this criterion, then the inquiry ends, and the Court rejects the challenge. *Id.* If the classes are similarly situated, the Court next determines the level of constitutional scrutiny to apply. *Id.* Lastly, the Court applies the appropriate level of scrutiny to the challenged statute. *Id*.

**1. Nunez has not met her burden to show that the identified classes are similarly situated.**

Nunez's equal protection claim stumbles on the first step because she has failed to make any argument that the classes she identifies are similarly situated.

[3] Appellees also state that plaintiffs who sue large corporations are treated less favorably than plaintiffs who sue small corporations because of the 3% cap on punitive damages. (*See* Appellees' Br. at 37-38). The Court should ignore these assertions given that Appellees have expressly disclaimed any challenge to the 3% cap. (*See* Appellees' Br. at 37; Appellees' Not. of Constitutional Challenge at 2.)

(*See* Appellees' Br. at 37-38.) While Nunez asserts that, as an individual plaintiff, she is "treated less favorably than plaintiffs who bring class action lawsuits," she offers no argument or analysis to explain how she is similarly situated to class action plaintiffs. *Id*. This is fatal to Nunez's equal protection claim because the fact that a statute might benefit a class does not, in itself, violate equal protection. *Gazelka v. St. Peter's Hospital*, 2018 MT 152, ¶ 16, 392 Mont. 1, 420 P.3d 528 ("a 'statute does not violate the right to equal protection simply because it benefits a particular class,' as discrimination only exists when people in *similar circumstances* are treated unequally.") (quoting *Wrzesien v. State*, 2016 MT 242, ¶ 9, 385 Mont. 61, 380 P.3d 805) (emphasis in original).

Rather than simply identifying classes, as Nunez has done, Montana law requires plaintiffs to make "a showing" that the statute treats "similarly situated groups in an unequal manner." *Kohoutek*, ¶ 34 (quoting *Powell*, ¶ 22). The challenging party must "demonstrate" that the identified classes are similarly situated. *See Kershaw v. Montana Dept. of Transportation*, 2011 MT 170, ¶¶ 17, 20, 361 Mont. 215, 257 P.3d 358.

Moreover, the number of this Court's decisions rejecting equal protection challenges because the parties were not similarly situated illustrates that this prerequisite is not an empty requirement. *See, e.g.*, *Gazelka*, ¶¶ 17-20, 24 (holding that proposed classes of hospital patients were not similarly situated after

discussing cases finding classes similarly situated and cases that had not); *Kohoutek*, ¶ 37 ("Storeowners fail to make the threshold showing that they are part of two or more similarly situated classes and therefore fail to prove an equal protection violation"); *Montana Cannabis Industry Assn.*, ¶¶ 16, 18 (holding that class of persons with debilitating medical condition for whom marijuana was the most effective medical treatment was not similarly situated to class of persons with debilitating medical condition who could be treated with pharmaceutical drugs); *Kershaw*, ¶ 20 ("As in *Powell* and *Rausch*, we conclude that Kershaw has not carried his burden of demonstrating that the classes are similarly situated.").

Because Nunez fails to make any argument that the classes she identifies are similarly situated, she has failed to make the threshold "showing" or demonstration that the classes are similarly situated. It is well settled that "it is not this Court's obligation to conduct legal research on behalf of a party, to guess at his or her precise position, or to develop legal analysis that may lend support to that position." *Johnston v. Palmer*, 2007 MT 99, ¶ 30, 337 Mont. 101, 158 P.3d 998. But that is what this Court would have to do to consider Nunez's equal protection claim. It should decline to do so and simply reject Nunez's challenge.

Moreover, there are significant differences between class action plaintiffs and individual plaintiffs. For example, unlike a suit with an individual plaintiff who may bring a claim to vindicate her own rights without regard for other

individuals with similar claims, a class action must be made up of numerous plaintiffs with common questions of law or fact that predominate over any question that might affect only an individual member. *See* Mont. R. Civ. P. 23(a), (b). Further, while an individual plaintiff has control over her case, including which attorneys to hire and whether to settle any claims, issues, or defenses, a class action plaintiff's attorney must be appointed by a court, and the plaintiffs may settle their claims only with the court's approval. Mont. R. Civ. P. 23(e),(g). And as Appellants point out, any award for class actions must be divided among the members. *See* Appellants' Br. at 49. Nunez has failed to show that the classes she identifies are similarly situated, and therefore, her equal protection claim fails. *Gazelka*, ¶ 24.

**2. Even if the classes are similarly situated, rational basis review applies, and the exception for class actions is rationally related to a legitimate objective.**

If this Court were to determine that the classes were similarly situated, the next step in an equal protection analysis is to determine the appropriate level of constitutional scrutiny. *Kohoutek*, ¶ 34. If the statute discriminates against a suspect class or threatens a fundamental right, then strict scrutiny applies. *Powell*, ¶ 17. If the legislation affects a right found in the Montana Constitution, other than in article II, then middle-tier scrutiny applies. *Powell*, ¶ 18. If neither strict scrutiny nor middle-tier scrutiny applies, then the standard is rational basis review. *Powell*,

¶ 19. Nunez does not argue that she is a member of a suspect class or that the statute affects a right found in the Montana Constitution. *See* Appellees' Br. at 37-39. Thus, the appropriate standard of review is the rational basis test.

The rational basis test requires a statute to bear a rational relationship to a legitimate governmental interest. *Rohlfs v. Klemenhagen, Inc.*, 2009 MT 440, ¶ 31, 354 Mont. 133, 227 P.3d 42. Under this standard, the party challenging the statute has the burden to show that a statute is not rationally related to a legitimate interest. *Rohlfs*, ¶ 26. In determining whether a legitimate government interest exists, the Court is not bound to considering only the actual purpose of legislation; rather, it "may be any possible purpose of which the court can conceive." *Montana Cannabis Industry Assn.*, ¶ 22 (citation omitted); *Rohlfs*, ¶ 31. Moreover, "[w]hat a court may think as to the wisdom or expediency of the legislation is beside the question and does not go to the constitutionality of a statute." *Id*., ¶ 31 (quoting *Rohlfs*, ¶ 31).

Under rational basis review, the statutory exception for class action plaintiffs survives scrutiny because, if the punitive damages cap applied to class actions, it would likely frustrate both the purpose of class action lawsuits and the purposes that the Legislature was addressing by enacting the cap itself. The primary purpose of class actions is to promote efficiency and economy of litigation. *Crown v. Parker*, 462 U.S. 345, 349 (1983). But as discussed above, without an exception to

a punitive damages cap, class members would have to divide any punitive damages award. Notably, the manner in which class action damages are disbursed formed part of the discussion on the amendment exempting class actions from the punitive damages cap, with one representative describing that, in a typical class action suit, attorneys would receive up to 40%, one or two lead plaintiffs would get a large settlement, and then the rest of the hundreds or thousands would get "zippo." *See* Mont. H. Comm. on Business and Labor, *Executive Action on SB 363*, 58th Leg., Reg. Sess. (March 24, 2003) (unidentified Representative's comment).[4]

Given this, it is not difficult to see how the purposes of class actions would be frustrated if class actions were subject to the same cap as individual lawsuits. Rather than joining a class, hundreds of individual plaintiffs would file suit to avoid dividing any punitive damages award that would otherwise be reduced because of the number of class action plaintiffs. In addition to defeating the purposes of class actions, the increased number of individual suits would also run counter to the concerns the Legislature was addressing with the punitive damages cap, which included escalating litigation driven by punitive damages. *See* Mont. S. Jud. Comm., *Hearing on SB 363*, 58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes at 4 (App. A at 3-4).

[4] Executive action on the bill is located on the cassette for March 24, 2003, Tape: 2; Side: B.

In summary, Nunez has failed to demonstrate that the identified classes are similarly situated, and thus, this Court should reject her equal protection challenge. If the Court finds that Nunez has shown that the classes are similarly situated, it should nonetheless uphold the cap because the statute is rationally related to legitimate government objectives.

### B. The statutory cap on punitive damages does not violate substantive due process.

Nunez also asserts that Mont. Code Ann. § 27-1-220(3) violates due process. *See* Appellees' Br. at 39. Other than the constitutional provision, Nunez cites no authority in support of her view. This Court should reject Nunez's claim because it falls short of the requirements set forth in Mont. R. App. P. 12(g). Additionally, under the due process analysis that this Court employs, the cap survives constitutional scrutiny and should be upheld.

In determining whether a statute comports with due process, this Court applies rational basis review and considers: "(1) whether the legislation in question is related to a legitimate governmental concern, and (2) whether the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained." *Kohoutek*, ¶ 17 (quoting *Montana Cannabis Industry Assn.*, ¶ 21). As discussed above, rational basis review is the most deferential standard of review, and the Court will uphold a statute if it is rationally related to any legitimate interest that the Court can conceive. *Id*., ¶ 21.

### 1. The Legislature enacted the punitive damages cap to address legitimate governmental purposes.

In enacting the punitive damages cap, the Legislature was pursuing legitimate governmental purposes. Notably, this Court has previously held that there is "no constitutional right to punitive damages" and that it is within the Legislature's province to restrict or eliminate punitive damages if it chooses. *Meech v. Hillhaven W.*, 238 Mont. 21, 47-48, 776 P.2d 488, 504 (1989). Restricting damages and placing statutory limits "'on recovery is a classic economic regulation . . . [which] must be upheld if it is reasonably related to a valid legislative purpose.'" *Id.* (quoting *Boyd v. Bulala*, 647 F. Supp. 781, 786 (W.D. Va. 1986)).

Further, this Court recognizes that "promoting the financial interests of businesses in the State or potentially in the State to improve economic conditions in Montana constitutes a legitimate state goal." *Meech*, 238 Mont. at 48, 776 P.2d at 504. And other states have observed that discouraging frivolous litigation, decreasing the costs of litigation, limiting excessive punitive damages awards, and controlling the increase of insurance premiums are legitimate state goals. *See, e.g*, *Evans v. Alaska*, 56 P.3d 1046, 1053-54 (Alaska 2002) (determining that punitive damages cap did not violate constitution and holding that legislative goals were legitimate).

Here, while this Court can rely on "any possible purpose," the legislative history shows that the Legislature was pursuing legitimate governmental purposes in enacting the cap on punitive damages and that the statute was rationally related to the Legislature's concerns. For example, the bill's sponsor explained that, in recent years, punitive damages had skyrocketed and had shifted from punishing individuals to punishing corporations, which in turn ended up punishing the Montana public through increased insurance premiums and costs of products. Mont. S. Jud. Comm., *Hearing on SB 363*, 58th Leg., Reg. Sess. (Feb. 17, 2003), 03:00-03:15; Minutes at 2 (opening statement by Sen. Walter McNutt) (App. A at 2). Senator McNutt clarified that the bill only capped punitive damages; it did nothing to limit the amount of actual, compensatory damages that a plaintiff might be awarded. *Id*. at 03:40-03:50; Minutes at 2 (App. A at 2).

Senator McNutt also described abuses of punitive damages with the "threat of punitives being used in cases that never are tried, never get to the courts" to drive up settlements. *Id*. at 05:35-5:50; Minutes at 2 (App. A at 2). He described a culture where failing to include a claim for punitive damages was considered bordering on malpractice. Mont. H. Comm. on Business and Labor, *Hearing on*

*SB 363*, 58th Leg., Reg. Sess. (Mar. 18, 2003) (opening statement by Sen. Walter McNutt);[5] Minutes at Ex. 2 (App. B at 2).

Witnesses from medical groups, business groups, automobile dealers, trucking groups, and others echoed Senator McNutt's concerns. For example, representatives from the Montana trucking industry testified that the threat of unlimited punitive damages was driving insurance costs up and was also used to drive up settlement costs. *See* Mont. S. Jud. Comm., *Hearing on SB 363*, 58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes, Ex. 1; Ex. 2 at 2 (App. A at 15-18). Mark Cole, a part owner in a local Montana trucking company, testified that Montana small businesses were reaching the point where they could no longer afford to pay the exorbitant insurance premiums. *Id*., Ex. 2 at 4 (App. A at 20).

Another trucking company stated that, due to its increasing insurance premiums, it would have to start laying off employees, estimating that it would go from 145 employees to 51 employees over a three-year period. Mont. S. Jud. Comm., *Hearing on SB 363*, 58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes, Ex. 2 at 5 (App. A at 21); *see also*, Mont. H. Comm. on Business and Labor, *Hearing on SB 363*, 58th Leg., Reg. Sess. (Mar. 18, 2003), Minutes at Ex. 2 (App. B at 15). Witnesses testified that punitive damages created a "lottery mentality" and

[5] This hearing is located on the cassette for February 17, 2003, Tape: 1; Side: A; Approx. Time Counter: 70 – 82.

escalated litigation. *See* Mont. S. Jud. Comm., *Hearing on SB 363*, 58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes at 4 (App. A at 4). Others described how punitive damages had changed insurance and banking practices, which made it difficult for new businesses to get started. *Id*.

Addressing frivolous litigation and the increasing costs of litigation, controlling increasing costs and insurance premiums to Montana citizens and businesses, and promoting the financial interests of Montana businesses are all legitimate governmental goals. *See Meech*, 238 Mont. at 48, 776 P.2d at 504; *Evans*, 56 P.3d at 1053-54. The testimony presented highlights that concerns in these areas were not illusory, and, in enacting the cap on punitive damages, the Legislature was attempting to address them.

**2. The punitive damages cap was rationally related to addressing these legislative goals.**

Under rational basis review, unless Nunez can "establish that the statutes are unreasonable or arbitrary, the Legislature's judgment should not be disturbed." *Montana Cannabis Industry Assn.*, ¶ 26. The testimony presented to the Legislature establishes that the punitive damages cap was not an unreasonable or arbitrary response to the abuses associated with punitive damages. For example, the Legislature heard testimony that the bill would help bring down the costs of insurance, reduce frivolous litigation, and reduce costs that ultimately get passed on to citizens of the state. *See, e.g.*, Mont. S. Jud. Comm., *Hearing on SB 363*,

58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes at 3-4, Exs. 1, 2 (App. A at 3-4, 15-21). Witnesses testified that SB 363 would "go a long way in bringing down the cost of liability insurance." *See* Mont. S. Jud. Comm., *Hearing on SB 363*, 58th Leg., Reg. Sess. (Feb. 17, 2003), Minutes at 4 (testimony of Brad Griffin, Montana Retail Association) (App. A at 4).

Similarly, Carl Schweitzer testified that obtaining insurance was a major issue in the construction industry and that capping punitive damages would help in "reducing rates and making insurance more available." *Id*. (testimony of Carl Schweitzer, Bozeman and Kalispell Chambers and American Subcontractors Association of Montana). The owner of a transportation insurance agency testified that limiting punitive damages could bring some stability to the market, restore normalcy in the system, signal that Montana has a fair system, and bring new business to the State. Mont. H. Comm. on Business and Labor, *Hearing on SB 363*, 58th Leg., Reg. Sess. (Mar. 18, 2003), Minutes at Ex. 2. at 5-6 (written testimony of Walter D. Stieg, Stieg & Associates Insurance, Inc.) (App. B at 13-14).

Based on the testimony presented, the Legislature's decision to cap punitive damages was neither arbitrary nor unreasonable. While other witnesses presented contrasting testimony, the Legislature nonetheless determined that the correct policy choice was to enact the punitive damages cap. This Court should defer to the Legislature's policy choice. As this Court has recognized, the Legislature

occupies a better position than the courts to develop the State's economic direction, and thus, the Court "assume[s] that the Legislature was in a position and had the power to pass upon the wisdom of the enactment." *Montana Cannabis Industry Assn.*, ¶ 31 (quoting *Rohlfs*, ¶ 31).

Nunez bases her assertion that the cap violates due process on her views that the cap is not rationally related to the purpose of punitive damages and that the $10 million cap is an arbitrary number. *See* Appellees' Br. at 39. Neither of these is persuasive. First, the question under rational basis review is not whether the legislative enactment is rationally related to a specific previously enacted statute, but rather, whether the legislative action is "reasonably related to a permissible legislative objective at the time the legislation is enacted." *Kohoutek*, ¶ 27. As explained above, the punitive damages cap was reasonably related to curbing the abuses that had arisen under the culture of unlimited punitive damages; thus, it was reasonably related to a permissible legislative objective and does not violate due process.

Further, Nunez's claim regarding the $10 million limit is nothing more than a disagreement with the number or formula that the Legislature chose as a limit on punitive damages. Nunez's argument challenges the wisdom or usefulness of the statute. As this Court has made clear, though, under rational basis review, whatever a court (or a plaintiff) "may think as to the wisdom or expediency of the legislation

is beside the question and does not go to the constitutionality of a statute." *Montana Cannabis Industry Assn.*, ¶ 31 (quoting *Rohlfs*, ¶ 31).

Moreover, the limit was not arbitrary given the statute's objectives. As discussed, the cap was a response to rising frivolous litigation, increasing costs of litigation brought about by the threat of punitive damages, promoting business, and controlling the cost of increasing insurance premiums. Rather than limiting punitive damages, the Legislature could have simply eliminated punitive damages to address these issues. *Meech*, 238 Mont. at 47-48, 776 P.2d at 504. But instead, the Legislature left punitive damages on the books and enacted a cap to address the abuses associated with lawsuits being viewed as a "lottery," while still allowing for substantial damages awards to set an example and to punish defendants. This Court should reject Nunez's challenge because the limit was reasonably related to addressing the perceived harms of punitive damages. *See Montana Cannabis Industry Assn.*, ¶ 38 (concluding that, "[a]lthough any limit the Legislature chooses may be attacked as an arbitrary number," the 25-patient limit was not arbitrary given the statute's objectives.)

### C. The statutory cap on punitive damages does not violate the right to a jury trial.

Nunez asserts that the punitive damages cap violates Mont. Const. art. II, § 26, the right to a jury trial. (Appellees' Br. at 40.) Nunez's assertions again fall short of the requirements set forth in Mont. R. App. P. 12(g). Her arguments in the

district court were equally deficient, and the district court did not even address them. *See* Docs. 131 at 2, 138 at 4. Nunez's conclusory assertions cannot overcome the presumption that the statute is constitutional, and this Court should summarily reject Nunez's claims.

Additionally, Nunez's assertion fails at the outset because it rests on the mistaken premise that the right to a jury includes the right to have a jury determine punitive damages at any monetary level without the possibility of restriction. But no specific language in the Montana Constitution grants juries this authority. On the contrary, this Court has held that the Legislature may completely divest a jury of the opportunity to award damages. *See Meech*, 238 Mont. at 47-48, 776 P.2d at 504 ("no constitutional right to punitive damages" and Legislature may "at its will" restrict or eliminate punitive damages); *see also Moran v. Shotgun Willies*, 889 P.2d 1185, 1188 (1995) ("The flaw in Fugate's reasoning lies in inferring that her constitutional right to nondiscrimination results in a right to the remedy of punitive damages. There is no constitutional right to an award of punitive damages.") (citing cases); *see also*, *Spackman v. Ralph M. Parsons, Co.*, 147 Mont. 500, 511, 414 P.2d 918, 924 (1966) (A "plaintiff is never entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts.").

Moreover, even where a jury awards punitive damages within the limit, its determination is not unassailable because a district judge has discretion to increase or decrease the award. Mont. Code Ann. § 27-1-221(7)(c). Further, there are several circumstances where juries are precluded from awarding punitive damages at all. *See, e.g.*, Mont. Code Ann. § 2-9-105 (prohibiting punitive damages awards against the State or governmental entities); Mont. Code Ann. § 27-1-220(2)(a) (prohibiting punitive damages for breach of contract); Mont. Code Ann. § 39-2-905(2), (3) (limiting the availability of punitive damages in wrongful discharge cases). This Court rejected a constitutional challenge to Mont. Code Ann. § 2-9-105, which prohibits punitive damages awards against the State, in *White v. State*, 203 Mont. 363, 371, 661 P.2d 1272, 1276 (1983), *overruled on other grounds*, *Meech*, 238 Mont. at 21, 776 P.2d at 491.

Notably, most states to consider whether a punitive damages cap violates a state constitutional right to a jury trial have determined it does not. A number of these state courts distinguish between the jury's constitutional role as a fact finder and the legislature's power to alter the applicable law and set policy for a state. For example, the Virginia Supreme Court ruled that "[o]nce the jury has ascertained the facts and assessed the damages . . . the constitutional mandate is satisfied, [and] it is the duty of the court to apply the law to the facts." *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 529 (Va. 1989). In other words, the jury can

determine damages, but the amount that is recoverable is limited by the laws that the legislature enacts. *Id*.

The Alaska Supreme Court followed the Virginia court's reasoning in rejecting a challenge to a cap based on the constitutional right to a trial by jury in *Evans*, 56 P.3d at 1051. In rejecting the challenge, the court reasoned that the "decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury." *Evans*, 56 P.3d at 1051. The court noted that, in addition to Virginia, eight other courts had followed similar reasoning. *Id*.

That number has grown as states that previously questioned punitive damages caps have reconsidered. For example, the Ohio Supreme Court distinguished a prior decision that had struck down a punitive damages cap after the United States Supreme Court clarified that, "[a]s in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, ¶ 94 (Ohio 2007) (quoting *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001)). The Ohio court concluded that the recent precedent "conclusively establishes that regulation of punitive damages is discretionary and that states may regulate and limit them as a matter of law without violating the right to a trial by jury." *Arbino*, ¶ 95.

Similarly, the Alabama Supreme Court questioned whether a prior decision striking down a punitive damages cap remained good law based on the United States Supreme Court's more recent discussion of due process and punitive damages. *Oliver v. Towns*, 738 So. 2d 798, 804 n.7 (Ala. 1999) ("Given the post-*Henderson* developments in the concept of due-process law, *see, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559[] (1996), and the forceful rationale of the dissents in *Henderson* . . . we question whether *Henderson* remains good law."). Not all courts agree. For example, the Missouri Supreme Court recently struck a $500,000 punitive damages cap because a party seeking punitive damages for fraud when the state constitution was adopted would have had a right to a jury determination of the amount of punitive damages. *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. 2014). Nunez has not claimed that the right to have a jury determine unlimited punitive damages for negligence existed when the 1972 Montana Constitution was adopted, and the case law indicates the opposite. *See Spackman*, 147 Mont. at 511, 414 P.2d at 924 (a "plaintiff is never entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts.").

If Nunez's position—that the right to a jury trial can undermine the Montana Legislature's authority to limit or restrict punitive damages—were adopted, it is difficult to see why it would be limited to only punitive damages.

After all, a trial, whether by judge or jury, requires application of the law, including limitations on the scope or availability of punishment. Criminal sentencing statutes contain maximum incarceration penalties as well as maximum monetary penalties. If the inviolate right to jury trial is infringed by the Legislature setting maximum penalties in civil trials, such an argument would seem to require juries, not judges, to determine levels of punishment in the criminal context as well.

The bottom line is that there is no constitutional right to punitive damages. This Court's decisions in *Meech*, *White*, *Moran*, and others remain good law and should be retained. The decision of whether to allow punitive damages at all or whether to limit damages are matters of policy that properly belong in the Legislature. *Meech*, 238 Mont. at 47-48, 776 P.2d at 504 ("the legislature may, at its will, restrict or deny the allowance of [punitive] damages.") (citation omitted). The cap does not limit or affect compensatory damages that are intended to make a plaintiff whole and it does not involve reexamining whether punitive damages are appropriate; it simply sets the upper limit on the amount that is recoverable, which is a quintessential legislative function. *Meech*, 238 Mont. at 45, 776 P.2d at 502 (a statutory limitation on recovery is a "classic example" of legislative economic regulation). Rather than asking this Court to delve into matters held to be the Legislature's arena, opponents of a punitive damages cap should propose

legislation or use the ballot initiative process to change the law. The debate for or against punitive damages belongs in the legislative branch, and this Court should reject the invitation to use the Montana Constitution to decide questions of policy.

## CONCLUSION

For the reasons set forth above, this Court should reverse the district court's ruling striking Montana's punitive damages cap as unconstitutional.

Respectfully submitted this 23rd day of August, 2019.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,491 words, excluding certificate of service and certificate of compliance.

*/s/ Matthew T. Cochenour*
MATTHEW T. COCHENOUR

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0077

ALEXIS NUNEZ and HOLLY McGOWAN,

Plaintiffs/Appellees,

v.

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Defendants/Appellants,

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WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.; CHRISTIAN CONGREGATION OF JEHOVAH'S WITNESSES and THOMPSON FALLS CONGREGATION OF JEHOVAH'S WITNESSES,

Third-Party Plaintiffs, Appellants,

v.

MAXIMO NAVA REYES and IVY McGOWAN-CASTLEBERRY,

Third-Party Defendants.

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**APPENDIX**

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## CERTIFICATE OF SERVICE

I, Matthew Thompson Cochenour, hereby certify that I have served true and accurate copies of the foregoing Brief - Intervenor to the following on 08-23-2019:

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