IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. 25-0296

STATE OF MONTANA,

Petitioner and Appellee,

v.

Thomas Wilson as the Personal Representative of the ESTATE OF HALEY WILSON; and THOMAS WILSON as the conservator of Minor Child JMW,

Respondent and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from Montana First Judicial District Court
Lewis and Clark County, Cause No. DV-25 -2024-338-IL
Honorable Mike Menahan

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STATEMENT OF ISSUES

The District Court determined that Montana Constitution Article II, § 18 "[does] not place *any restrictions* on the type or extent of [] immunity, so long as the legislation is passed by a 2/3 vote of each house of the legislature." Doc. 30 at 6 (emphasis added).

The District Court's determination endorses a Montana Legislature with unchecked power. Under the lower court's logic, the Legislature could pass *any* limitation on injured Montanans' tort recovery, including a limitation which discriminates based on race, gender or class, so long as the limitation passes both houses by 2/3 vote. But no number of votes affords the Legislature lawmaking power free from judicial scrutiny. And certainly, no number of votes obviates the protection of Montanans' constitutional rights.

The following issues flow from the District Court's overreading of Article II, § 18 and are presented to this Court.

First, did the District Court err by sidestepping a comprehensive examination of whether the Tort Claims Cap violates the equal protection guarantee afforded to all citizens?

Second, given the demonstrated importance of Montanans' ability to hold the government accountable, is the Tort Claims Cap constitutional and what level of

scrutiny should apply to this constitutional challenge to the Cap, which has remained static since its passage in 1986 despite four decades of inflation?

Third, did the District Court err, or violate Appellant's right to a trial by jury, when it foreclosed the possibility of *any trial*—let alone a verdict at the end—by ordering the State "discharged from any and all further liability" upon the State's deposit of $750,000 with the District Court? Doc. 30 at 10, 22.

Fourth, even if the Court upholds the constitutionality of the Tort Claims Cap, did the District Court err by concluding that minor child JMW does not have an independent and non-derivative personal injury claim for negligent infliction of emotional distress because she was not present at the scene of the accident, in direct contravention of *Wages v. First National Insurance Company of America*, 2003 MT 309, 318 Mont. 232, 79 P.3d 1095?

STATEMENT OF CASE

Haley Wilson was killed when a State of Montana employee collided with Haley's car. Haley is survived by Respondent/Appellant Thomas Wilson (hereinafter, "Wilson") and Haley and Wilson's young daughter, JMW. In his capacity as the personal representative for Haley's estate, Wilson properly presented tort claims to the Montana's Department of Administration for survivorship damages and on behalf of Haley's heirs for wrongful death damages. *See* Mont. Code Ann. § 2-9-301(1) (setting out procedure for filing tort claims against the State of

Montana). In his capacity as JMW's conservator, Wilson also presented a separate and non-derivative claim for negligent infliction of emotional distress ("NIED") on JMW's behalf.

Before the statutory period for Wilson's administrative claims had run, Mont. Code Ann. §2-9-301(2), the State filed the instant petition in interpleader and declaratory judgment action. Doc. 1. The State asked the District Court to issue an order discharging the State and its employee, Jose Angel Sanchez Ruiz, from any liability beyond $750,000 arising out of Haley's death and JMW's NIED claim. Wilson opposed the State's petition and declaratory judgment action on several grounds.

First, Wilson argued that the Tort Claims Cap, Mont. Code Ann. § 2-9-108, violates several constitutional rights, including the right to equal protection. The District Court upheld the constitutionality of the Tort Claims Cap on several grounds. Centrally, the lower court admonished Wilson for ignoring the "plain language" of Montana Constitutional Article II, § 18, which in the District Court's view "[does] not place *any restrictions* on the type or extent of such immunity, so long as the legislation is passed by a 2/3 vote of each house of the legislature." Doc. 30 at 6 (emphasis added). The District Court refused to further engage with Wilson's constitutional challenge, because "only when a jury determines that plaintiff's damages exceed the statutory cap would Respondent's constitutional arguments

come into play." Doc. 30 at 10. In the same decision, however, the District Court "discharged" the State and its employee from "any and all further liability to Thomas." Doc. 30 at 22. Relatedly, and to the extent the District Court engaged in any meaningful constitutional analysis of the Tort Claims Cap, the District Court determined that "[a]ny award of damages that does not exceed the statutory cap would be both valid under the statute and would not violate any constitutional right Respondents (sic) identify." Doc. 30 at 10.

Second, Wilson argued that, even if the Tort Claims Cap were constitutional, the aggregate limit of the State and its employee's liability is not $750,000, but rather $1.5 million. The District Court disagreed, ruling that JMW's claim "arose from the death of her mother" and that "JMW was not present at the accident and did not receive 'an independent and direct injury *at the accident scene*.'" Thus, JMW could not bring a non-derivative NIED claim. Doc. 30 at 18 (emphasis original).

The District Court granted summary judgment in the State's favor and entered judgment against Wilson. Doc. 34 (citing Doc. 30). Wilson appeals.

STATEMENT OF FACTS

Haley Wilson was killed in a car crash when an employee of the State of Montana negligently crossed two lanes of traffic and a median in a state-owned vehicle before colliding with Haley's vehicle. Doc. 1. Haley was not responsible

whatsoever for the fatal collision, which left her minor daughter, JMW, without a mother. Haley was 34 years old.

SUMMARY OF ARGUMENT

The District Court's grant of summary judgment should be reversed and the Tort Claims Cap should be struck down as unconstitutional. In the alternative, this case should be remanded with instructions to allow discovery on the constitutional questions, and with further instructions to the District Court to apply heightened scrutiny to analyze whether the Tort Claims Cap violates the rights guaranteed to Wilson under Montana's Constitution.

The District Court failed to conduct an independent judicial review of the Tort Claims Cap, Mont. Code Ann. § 2-9-108, for compliance with the Montana Constitution. Instead, the District Court misinterpreted Article II, § 18 as granting the Legislature unfettered authority to limit tort recovery against the State, so long as the Legislature collects the requisite 2/3 vote from each chamber. The District Court engaged in no meaningful equal protection, due process, or jury trial right analysis.

Had the District Court analyzed the rights infringed upon by the Tort Claims Cap, it would have determined those rights to be fundamental or important rights, subject to a heightened level of scrutiny. And had the District Court scrutinized the Tort Claims Cap for constitutional compliance at any level of scrutiny, the

constitutional violations would have been readily exposed. The District Court amplified its error by failing to apply the requisite three-part test set forth by this Court to evaluate equal protection challenges. Rather, the District Court applied a "no set of circumstances" test, envisioning a hypothetical scenario where a plaintiff is not impacted by the Tort Claims Cap. Doc. 30 at 10. Indeed, in every equal protection challenge there is one hypothetical class whose constitutional rights are not violated while another class suffers. Rather than apply the requisite three-step test, the District Court's paradoxically found that a challenge to the Tort Claims Cap would not "come into play" until a jury returned a verdict in excess of the cap, while simultaneously discharging the State and its employee of all liability beyond $750,000. The District Court violated Wilson's right to due process and a jury trial.

Finally, even if the Tort Claims Cap could survive constitutional scrutiny, the District Court's order should be reversed, because it disregards Montana law regarding NIED claims. The District Court, relying in part on an outdated "presence at the scene" requirement, found that JMW's claim arose out of the death of her mother Haley, rather than JMW's own independent and non-derivative personal injury, and denied the right to pursue JMW's viable independent NIED claim under a separate per claim limit. The lower court's ruling on this issue cannot be squared with this Court's clear precedent in *Wages*.

In sum, the State's liability for the death of Haley as well as the independent and non-derivative claim for injury asserted on JMW's behalf should not be capped at $750,000; certainly, the State and its employee should not be "discharged" of any and all liability based on the State's deposit in the District Court of the "each claim" cap given the District Court's constitutional analysis, which is cursory at best, and paradoxical, at worst. The District Court's order and judgment in the State's favor should be reversed, and this case should be remanded for further proceedings consistent with constitutional protections and viable claims asserted.

STANDARD OF REVIEW

A district court's summary judgment ruling is reviewed *de novo*. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶16, 321 Mont. 432, 92 P.3d 620.

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* at ¶ 16.

ARGUMENT

I. The District Court Erroneously Read Article II, § 18 to Immunize the Tort Claims Cap from Constitutional Scrutiny.

Constitutional construction should not "lead to absurd results, if reasonable construction will avoid it." *Nelson v. City of Billings*, 2018 MT 36, ¶16, 390 Mont. 290, 412 P.3d 1058. Additionally, "[c]onstitutional provisions must not be read or construed in isolation." *Sheehy v. Commr. of Political Practices for State*, 2020 MT 37, ¶ 43, 399 Mont. 26, 458 P.3d 309 (McKinnon, J., specially concurring).

Constitutional construction "must, if possible, be adopted as will give effect to all of the Constitution's provisions." *Id.* (brackets omitted).

The District Court's determination that Article II, § 18 immunizes the Tort Claims Cap from constitutional challenges like Wilson's violates canons of construction by manufacturing a conflict between Article II, § 18—granting the Legislature the authority to legislate for sovereign immunity—and fundamental constitutional rights, including Article II, § 4 and Article II, § 17—guaranteeing the rights to the equal protection of the laws and due process, respectively.

Specifically, in the lower court's view, the Tort Claims Cap is an animal of a species different from other laws passed under the Legislature's "plenary power," which may be challenged for infringing individual constitutional rights. Doc. 30 at 11. Instead, "[r]ather than *infringing* a constitutional provision through a general law, Montana Code Annotated § 2-9-108 *implements* a specific grant of constitutional authority." *Id.* (emphasis original). That is, the lower court reasoned, the Tort Claims Cap merely "implements" Montana Constitution Article II, § 18, which provides:

> The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.

As such, the District Court found that challenges to the Tort Claims Cap (whether for violations of the equal protection guarantee, Mont. Const. Art. II, § 4,

or the right to due process, Mont. Const. Art. II, § 17, or infringement of other constitutional rights where the challenger protests that the Tort Claims Cap results in an injured party not receiving the full extent of damages awarded by a jury), "would render meaningless the [L]egislature's constitutional authority to provide governmental entities with immunity." *Id.* at 10–11. The District Court decided that Article II, § 18 "[does] not place *any restrictions* on the type or extent of such immunity, so long as the legislation is passed by a 2/3 vote of each house of the legislature." Doc. 30 at 6 (emphasis added).

Absurd problems would arise if this Court were to adopt the District Court's reasoning. For example, the Legislature could immunize the State from tort liability if the victim were African-American, so long as the discriminatory law is passed by a 2/3 vote, because the Legislature was simply "implementing" its authority under Article II, § 18. Or, "implementing" its Article II, § 18 authority, the Legislature could grant men a higher damages cap than women. Under the District Court's rationale, such laws would not only pass constitutional muster, they wouldn't even trigger analysis.

The District Court's analysis overreads Article II, § 18 to immunize the legislation borne of that "implementation" from judicial scrutiny for constitutional compliance. Reading Article II, § 18 so broadly not only contravenes canons of constitutional construction against absurdities and internal conflicts, but also forgets

that the Constitution "is not a grant of power [to the Legislature], but a limitation thereof." *State v. Cooney*, 70 Mont. 355, 225 P. 1007, 1014 (1924), *overruled on other grounds by Marshall v. State ex rel. Cooney*, 1999 MT 33, 293 Mont. 274, 975 P.2d 325 (1999). The constitutional rights of equal protection and due process, like any other fundamental rights, do not evaporate in the face of the Legislature's authority under Article II, § 18 to provide the State with specific immunities by a 2/3 vote.

Similarly, the District Court's reading of Article II, § 18 and attendant refusal to engage in meaningful constitutional analysis cannot be squared with Montana courts' unflagging obligation to review legislative enactments for compliance with the Constitution. *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 877 ("Notwithstanding the deference that must be given to the Legislature when it enacts a law, it is the express function and duty of this Court to ensure that all Montanans are afforded equal protection under the law."); *McLaughlin v. Mont. State Leg.*, 2021 MT 178, ⁋ 80, 405 Mont. 1, 493 P.3d 980 (Sandefur, J., concurring) (function of the judicial branch is "to conduct independent judicial review of legislative enactments for compliance with the supreme law of this state—the Montana Constitution"). Indeed, the courts' function and duty are of paramount importance where, as here, catastrophically injured people are targeted by legislative discrimination. As was explained by Justice Durham of the Utah

Supreme Court, the courtroom is the only place injured victims find protection from unconstitutional laws, because their interests are likely not of import at the ballot box or in the halls of the Legislature.

> At any one time, only a small percentage of the citizenry will have recently been harmed and therefore will need to obtain a remedy from the members of any particular defendant class. The vast majority of the populace will have no interest in opposing legislative efforts to protect such a defendant class because the majority will not readily identify with those few persons unlucky enough to have been harmed. And those few persons directly affected will, in all likelihood, lack the political power to prevent the passage of legislation that, in essence, requires every member of the citizenry who is injured by members of the defendant class to bear some or all of the cost of those injuries.

Condemarin v. Univ. Hosp., 775 P.2d 348, 358 (Utah 1989).

By reading more legislative power into Article II, § 18 than the provision provides, the District Court erroneously read *out* of the Montana Constitution (1) individual rights reserved by and guaranteed to Montana's people, and (2) the judiciary's independent obligation to ensure all laws are constitutional.

II. The Tort Claims Cap Infringes Upon the Right to Equal Protection.

"No person shall be denied equal protection of the laws." Mont. Const. Art. II, § 4. The equal protection guarantee checks governmental action when it treats similarly situated persons dissimilarly. *Caldwell v. MACo Workers' Comp. Tr.*, 2011 MT 162, ¶ 14, 361 Mont. 140, 256 P.3d 923. "The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of

the law must receive like treatment." *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 28, 374 Mont. 453, 325 P.3d 1211.

A court considering an equal protection challenge *must* follow a three-step process: "(1) identify the classes involved and determine if they are similarly situated; (2) determine the appropriate level of scrutiny to apply to the challenged legislation; and (3) apply the appropriate level of scrutiny to the challenged statute." *Id.* The District Court acknowledged Wilson's equal protection challenge to the Tort Claims Cap, but did not engage in this required three-step analysis. Instead, as already discussed, the District Court focused on the alleged potency of Article II, § 18 as an extinguishing force to any constitutional challenge to laws passed under the provision's sweeping authority. Doc. 30 at 3–11.

Further, rather than applying the three-step equal protection analysis, the District Court applied a "no set of circumstances" test, reasoning that, because a hypothetical scenario may exist where a plaintiff is not impacted by the unconstitutionality of the Tort Claims Cap, Wilson's facial challenge simply "failed." Doc. 30 at 10.

Applying the "no set of circumstances test," rather than the well-established three-step equal protection analysis was error. *See* Doc. 30 at 8 (citing *Montana Cannabis Industry Ass'n. v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131). Indeed, in the context of an equal protection challenge, there is necessarily

always one class doing well under the challenged legislation (i.e., whose constitutional rights are not violated) while another class suffers.

As shown below, a failure to apply the three-step analysis endorsed by this Court merits reversal of the lower court's decision.

A. Step 1: Identification of Similarly Situated Classes

"The goal of identifying a similarly situated class is to isolate the factor allegedly subject to impermissible discrimination." *Id.* In other words, "[d]iscrimination cannot exist in a vacuum; it can be found only in the unequal treatment of people in similar circumstances." *Id.* "[T]wo groups are similarly situated if they are equivalent in all relevant respects other than the [challenged legislation] constituting the alleged discrimination." *Planned Parenthood v. State*, 2024 MT 178, ¶ 27, 417 Mont. 457, 554 P.3d 153.

The Tort Claims Cap creates classes of similarly situated groups who are equivalent in all respects other than one factor: application of the Tort Claims Cap. *Id.* at ⁋ 28 (acknowledging that a law may create more than one set of classifications that implicate the right to equal protection).

First, the Tort Claims Cap creates a class of individuals, like Wilson, who have suffered catastrophic harm due to the negligence of the State, and a class of individuals who have suffered only minor injuries due to the negligence of the State. Both classes are composed of similarly situated persons: people injured by the State.

The Tort Claims Cap discriminates against members of the catastrophic injury class; it infringes upon that group's ability to fully recover their damages, while the class that suffers minor injuries are unaffected by the Tort Claims Cap. *See, e.g. Condemarin*, 775 P.2d at 353 ("Those whose injuries are minor may seek and recover all of their economic damages and some measure of noneconomic damages up to the recovery cap[]. Those whose economic losses approach or equal the statutory limit may recover only those losses and will receive no compensation for noneconomic losses. Finally, those whose economic losses exceed the statutory limit are precluded from even recovering out-of-pocket costs resulting from their injuries.").

Second, the Tort Claims Cap creates a class of individuals who are harmed by the State's negligence and a class of individuals harmed by private actors. Both classes are composed of individuals harmed as a result of third-party negligence. The classification discriminates against individuals injured by the State's negligence. This discrepant treatment was recognized by Montana's Constitutional Framers as "repugnant to the fundamental premise of American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency." *Verbatim Transcripts,* Montana Constitutional Convention, Vol. II, 637 (1972) (hereinafter "*Verbatim Transcripts*").

B. Step 2: Determining the Appropriate Level of Scrutiny

With our classes identified, the second step of the equal protection analysis is to determine the appropriate level of scrutiny. *Planned Parenthood of Mont.*, ¶ 29. "The extent to which the Court's scrutiny is heightened depends both on the nature of the interest and the degree to which it is infringed." *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996) (citation omitted). In other words, the equal protection analysis requires a court to examine *what right* is infringed by the statute's disparate treatment. *See Planned Parenthood of Mont.*, ¶ 29.

1. Strict Scrutiny

Strict scrutiny applies when the legislation in question implicates a fundamental right. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 . Strict scrutiny applies here, because the Tort Claims Cap infringes the fundamental rights to jury trial, due process, full legal redress, the right to provide for one's family, and the right to be free from discrimination on the basis of sex.

This Court has unequivocally held that "[t]he Montana constitutional rights to full legal redress and jury trial are fundamental rights entitled to the highest level of constitutional scrutiny and protection." *Lenz v. FSC Sec. Corp.*, 2018 MT 67, ¶ 19, 391 Mont. 84, 414 P.3d 1262; *Bucy v. Edward Jones & Co., L.P.*, 2019 MT 173, ¶ 30, 396 Mont. 408, 445 P.3d 812 ("full legal redress, jury trial, due process of law, and equal protection of law" are "fundamental Montana constitutional rights");

Kortum-Managhan v. Herbergers NBGL, 2009 MT 79, ¶ 25, 349 Mont. 475, 204 P.3d 693 ("rights to trial by jury (Article II, § 26) and access to the courts (Article II, § 16) are fundamental constitutional rights that deserve the highest level of court scrutiny and protection").

Many of our sister states have determined that damages caps, such as the Tort Claims Cap, must withstand strict scrutiny to survive because they infringe upon the fundamental right to receive the full amount of compensation determined appropriate by a jury. *See Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 656, 771 P.2d 711, 722 (1989); *Hillburn v. Enerpipe Ltd.*, 442 P.3d 509, 524 (Kan. 2019); *Atlanta Oculoplastic Surg. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010); *Watts v. L.E. Cox Medical Centers*, 376 S.W.3d 633, 637 (Mo. 2012); *Moore v. Mobile Infirm. Ass'n.,* 592 So.2d 156, 164 (Ala. 1991); *Smith v. Dept. of Ins.*, 507 So.2d 1080, 1088 (Fla. 1987).

The Tort Claims Cap also infringes upon the recognized fundamental right to provide for one's family. The right to employment is fundamental, because "as a practical matter, employment provides the only means to secure essentials of modern life, including health and medical insurance, retirement, and day care." *Wadsworth*, 275 Mont. 287 at 300, 911 P.2d at 1172. Haley enjoyed a fundamental right to provide for JMW, which she did through her employment until her death. Where, as here, an individual is unable to work as a result of disability or death, tort recovery

acts as the substitute means to provide for one's family and the basic necessities of life. Consequently, it is a fundamental right.

Additionally, Montana's Constitution has "unequivocal . . . intolerance for discrimination, which includes discrimination based on sex." *Cross v. State*, 2024 MT 303, ¶ 64, 419 Mont. 290, 560 P.3d 637 (McKinnon, J., concurring). (McKinnon, J., concurring). As recently explained by Justice McKinnon, strict scrutiny is the appropriate test for laws that discriminate on the basis of sex, "not because it is more analogous to the federal "heightened scrutiny" standard for sex discrimination," but because the Montana Constitution "provides even more individual protection than its federal counterpart." *Id.*

The lower court's analysis failed to acknowledge that damage caps, like the Tort Claims Cap, disproportionally impact women. Bernard S. Black *et al.*, "Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped," Cato Institute (2021). Research demonstrates that damage caps disproportionately impact women who—on average—are more reliant on tort recovery to provide for the basic necessities of life following a catastrophic injury than men due to several factors, including unequal pay and inequitable division of labor in the home. *Id.*

With these fundamental rights infringed, strict scrutiny should apply.

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2. Intermediate Scrutiny

At a minimum, intermediate scrutiny is appropriate. As this Court has recognized, the most lenient level of scrutiny, the rational basis test, carries with it the danger that government discrimination might be condoned for "the most whimsical reasons." *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 434, 712 P.2d 1309, 1314 (1986). Intermediate scrutiny, however, imposes a more stringent review than rational basis scrutiny, applying additional rigor to the investigation into the correlation between the statutory classification and the legislative goals, which is appropriate in this context. *Arneson v. Olson*, 270 N.W.2d 125, 132 (N.D. 1978). The rights infringed by the Tort Claims Cap demand protection from legislative whimsy.

a. Intermediate Scrutiny and its Widespread Adoption to Examine Limitations on Tort Recovery.

One of the earliest expositions on the inadequacy of a binary choice between strict and rational basis scrutiny was Justice Thurgood Marshall's in 1976. Dissenting in *Massachusetts Board of Retirement v. Murgia*, Justice Marshall wrote:

> If a statute is subject to strict scrutiny, the statute always, or nearly always, see is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all....
>
> But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld. It cannot be gainsaid that there remain rights, not now classified as 'fundamental,' that remain vital to the flourishing of a free society…that are unfairly burdened by

> invidious discrimination unrelated to the individual worth of their members. Whatever we call these rights and classes, we simply cannot forego all judicial protection against discriminatory legislation bearing upon them, but for the rare instances when the legislative choice can be termed 'wholly irrelevant' to the legislative goal.

427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (citations omitted).

Six years later, the United States Supreme Court recognized intermediate scrutiny in *Plyler v. Doe*, 457 U.S. 202 (1982). In 1986, the Montana Supreme Court similarly recognized that "a need exists to develop a meaningful middle-tier analysis." *Butte Cmty. Union*, 219 Mont. at 434, 712 P.2d at 1314.

Over the decades, intermediate scrutiny became recognized as appropriate to examine legislative infringement upon rights which are not "fundamental," but are nevertheless "important." As one legal scholar observed, "[b]roadly speaking, there are two circumstances that trigger heightened (intermediate) scrutiny. The first involves infringement of important, although not necessarily fundamental, rights or interests." Lawrence H. Tribe, *American Constitutional Law*, §§ 16–33 (2d ed. 1988). Professor Tribe noted that the emergence of the intermediate level of review was a judicial response to the growing awareness that:

> [the] all-or-nothing choice between minimum rationality and strict scrutiny ill-suits the broad range of situations arising under the equal protection clause, many of which are best dealt with neither through the virtual rubber-stamp of truly minimal review nor through the virtual death-blow of truly strict scrutiny, but through methods more sensitive to risks of injustice than the former and yet less blind to the needs of governmental flexibility than the latter.

Tribe, *American Constitutional Law*, §§ 16–32, at 1609–10.[1]

And soon after the recognition of intermediate scrutiny by the United States Supreme Court, legal scholars began advocating for intermediate scrutiny to be applied to damage caps, because caps infringe upon the important right to be compensated for injuries. *See, e.g.,* Mary Ann Willis, *Limitation on Recovery of Damages; Medical Malpractice Cases: A Violation of Equal Protection?,* 54 U. Cin. L. Rev. 1329–51 (Spr. 1986); *see also* Gail Harper, *Which Equal Protection Standard for Medical Malpractice Legislation,* 8 Hastings Const. L.Q. 125–52 (Fall 1980).

State courts heeded the call. The North Dakota Supreme Court was one of the first states to employ intermediate scrutiny to a statutory damages cap. The court recognized "three standards of scrutiny of equal-protection questions for a judicial adjudication of constitutionality." *Arneson*, 270 N.W.2d at 132. After discussing rational basis and strict scrutiny, the court set out and applied a "third, less clearly defined, category [which] requires a 'close correspondence between statutory classification and legislative goals'[which] closely approximates the substantive

[1] Justice Trieweiller similarly warned of "the belief by many constitutional scholars that the "rational basis" test is no test at all." *Stratemeyer* v. *Lincoln County*, 259 Mont. 147, 157–58, 855 P.2d 506, 513 (1993) (Trieweiller, J., dissenting) ("[I]t can clearly be said that the determination of which standard of review applies determines the outcome of any equal protection analysis under Montana constitutional law. Under the majority's "rational basis" standard of review, the Legislature need offer no reason for its discriminatory classifications. The beneficiary of the discrimination need offer no evidence in District Court that the statutory distinction is rationally related to a legitimate government objective, and the District Court need have no factual or evidentiary basis for upholding discriminatory legislation.").

due-process test historically used by this and other State courts." *Id.* The court undertook the "determination of whether the legislative limitation of recovery is arbitrary and unreasonable and violative of due process, or whether there is a sufficiently close correspondence between statutory classification and legislative goals so as not to violate the equal-protection requirements of the State and Federal Constitutions." *Id.*, 270 N.W.2d at 135. The court determined it was the latter; the cap law violated equal protection under both the state and federal constitutions. *Id.*, 270 N.W.2d at 136.

Idaho was another early adopter of intermediate scrutiny to examine a damage cap's compliance with equal protection. *Jones v. State Bd. of Med.*, 555 P.2d 399, 411 (1976) ("This Court has found it necessary to look beyond the minimal scrutiny test.").

Then, finding the right to compensation for injuries is amply important, courts across the nation began utilizing middle-tier scrutiny to evaluate equal protection challenges to damage caps. *See, e.g., Sibley v. Bd. of Sup'rs of Louisiana State U.,* 477 So.2d 1094, 1107–09 (La. 1985) (damage cap subject to intermediate scrutiny review); *Brannigan v. Usitalo,* 587 A.2d 1232 (N.H. 1991) (cap on noneconomic damages "precluded only the most seriously injured victims . . . from receiving full compensation for their injuries" and violated equal protection under intermediate scrutiny review); *Condemarin,* 775 P.2d at 353–56 (while right to

recover in tort was not a "fundamental" right under the Utah Constitution, the deference to legislation afforded by rational basis scrutiny "is inappropriate when dealing with a fundamental principle of American law that victims of wrongful or negligent acts should be compensated to the extent that they have been harmed").

Intermediate scrutiny is often utilized in states which have not recognized full legal redress as a fundamental right. For example, the Pennsylvania Supreme Court held that "although the right to a full recovery in cases brought against the Commonwealth has been constitutionally limited, that right is, nevertheless, generally an important right and its limitation by way of governmental classification requires a heightened scrutiny of the validity of the classifying statute." *Smith v. City of Philadelphia*, 516 A.2d 306, 311 (Pa. 1986); *see also Ernest v. Faler,* 697 P.2d 870, 875 (Kan. 1985); *Petition of New Hampshire Div. for Child., Youth & Fams.*, 294 A.3d 1134, 1138 (N.H. 2023) (internal citations omitted): see also *Condemarin*, 775 P.2d at 359 ('[T]his Court is not prepared to hold that the rights protected in article I, section 11 are "fundamental" in the traditional equal protection sense. [Nevertheless] we identified the right to recover for personal injuries as an important substantive right.")

In sum, the Court would be well-within the bounds of jurisprudence to adopt and apply intermediate scrutiny and determine that the rights implicated here are

"important," but not fundamental. As discussed below, the Court should certainly determine that the right to compensation is at least "important."

b. Governmental Accountability and the Right to Compensation for Injuries Caused by the Negligence of the State Are Sufficiently Important to Merit Intermediate Scrutiny.

The Delegates to the 1972 Constitutional Convention expressed the importance of governmental accountability and providing Montanans with recovery in tort for injuries caused by a governmental actor.

Contrary to the District Court's reading of the sweeping authority granted the Legislature under Article II, § 18, that section specifically *abrogated* the doctrine of sovereign immunity. The Delegates voted unanimously in support of Article II, § 18, which they included in the Declaration of Rights. Barry L. Hjort, *The Passing of Sovereign Immunity in Montana: The King is Dead!*, 34 Mont. L. Rev. 283 at 295 (1973). Their deliberations demonstrate the priority placed on the right to recovery in tort against the State:

> It's an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, regardless of whether he has the status of a governmental servant or not….
>
> We have an opportunity now, as long as in Montana no one else will accept it, to make sure that we have full redress and full justice for all of our citizens.

Verbatim Transcripts, Vol. II, 5439.

In addition to, but separate from, the rights to redress and compensation, the Delegates also recognized the importance of imposing accountability to encourage good government behavior. For example, Delegate Murray stated that liability for its wrongs makes the government "responsible to us." *Verbatim Transcripts*, Vol. II, 5434. This accountability would in turn "reduce public dissatisfaction with the administration of justice." *Id.* at 5439.

The importance to the people deterring government misconduct cannot be overstated.

> The association of negligence with purely compensatory damages has prompted the erroneous impression that liability for negligence is intended solely as a device for compensation. Its economic function is different; it is to deter uneconomical accidents. As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses.

R. Posner, *Economic Analysis of Law,* § 6.12, at 143 (1972) (footnote omitted).

Therefore, even if this Court determines that rights implicated by the Tort Claims Act fall short of classification as a fundamental, the importance of holding the State accountable cannot be ignored.

Nor should the Court disregard the origin of the right to hold the government accountable in Montana's Constitution. This Court recognized nearly 30 years ago that middle-tier scrutiny is appropriate "where the rights at issue have some origin in the Montana Constitution, such as welfare, but are not found in the Declaration of Rights." *Davis v. Union Pac. R. Co.*, 282 Mont. 233, 241, 937 P.2d 27, 31 (1997).

The right to hold the State accountable for its negligence has, at a minimum, "some origin in the Montana Constitution." Specifically, the Framers' enshrined the right to hold the State accountable with the abrogation of sovereign immunity in Art. II, § 18. Even when the people amended Article II, § 18 in 1974, they placed a heightened burden on the Legislature to garner a super-majority to pass any limitation of the right. Therefore, even if this Court does not apply strict scrutiny, the Court should apply intermediate scrutiny in recognition of the importance and constitutional origin of the right to hold the State accountable for its torts.

To the extent *Meech v. Hillhaven West Inc.*, 238 Mont. 21, 44–45, 776 P.2d 488, 502 (1989) can be construed as authority to reject intermediate scrutiny in this case, *Meech* should be reversed.[2] The entire discussion related to the rejection of intermediate scrutiny in *Meech* is as follows:

> We also refuse to employ middle tier scrutiny to analyze classifications created under the Act. The United States Supreme Court has employed the middle tier criterion in only a few situations which are not applicable here. This Court's decisions have applied the test only where specific directives in the Montana Constitution protected interests in education and welfare.

238 Mont. at 44–45, 776 P.2d at 502.

The *Meech* Court rejected intermediate scrutiny not only on distinguishable facts, but also before middle-tier scrutiny swept across American jurisprudence as

[2] A comprehensive discussion of the distinguishing factors of *Meech* follows.

appropriate where "important" rights are implicated. "[S]tare decisis [does not require] mechanical adherence to the latest decision and, of course, court decisions are not sacrosanct." *Montana v. Gatts,* 279 Mont. 42, 51 928 P.2d 114, 119 (1996). "[J]ust as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten." O. Holmes, *The Common Law*, 35 (1881).

Therefore, even if this Court does not require strict scrutiny, intermediate scrutiny should be employed. Rational basis scrutiny is inappropriately deferential to self-serving legislation limiting recovery against the State. As was explained by Justice Durham of the Utah Supreme Court:

> Under a rational basis standard of review, defendants conclude that the deprivation of common law rights to recovery and the arbitrary limitation of recovery to an amount that may or may not compensate victims even for their out-of-pocket medical expenses is rational. This conclusion reflects the almost total deference afforded legislative distinctions not based on suspect classifications under a traditional equal protection analysis. Such deference is inappropriate when dealing with the fundamental principle of American law that victims of wrongful or negligent acts should be compensated to the extent that they have been harmed.

Condemarin, 775 P.2d at 367.

C. Step 3: Apply the Appropriate Level of Scrutiny

If the Court does not strike down the Tort Claims Cap itself, this case should at least be remanded with instructions to examine, with strict or intermediate

scrutiny, whether the Tort Claims Cap violates the equal protection guarantee. Under intermediate scrutiny, the State must demonstrate that the law is reasonable and that the need outweighs the value of the right to the individual. *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶ 18, 325 Mont. 148, 154, 104 P.3d 445, 450. Under strict scrutiny, statutes will be found unconstitutional "unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest." *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 15, 314 Mont. 314, 65 P.3d 576 (internal quotations, emphasis, and citation omitted).

To be clear, even if this Court concludes rational basis review is appropriate, the Tort Claims Cap will not survive. Notably, this Court has struck down other limitations on injured persons' rights using the rational basis test. *Brewer v. Ski-Lift, Inc.*, 234 Mont. 109, 762 P. 2d 226 (1988); *Reesor v. Montana State Fund*, 2004 MT 370, ¶16, 325 Mont. 1, 103 P. 3d 1019; *Schmill v. Liberty Northwest Inc.*, 2003 MT 80, 315 Mont. 51, 67 P. 3d 290; *Henry v. State Compensation Ins. Fund*, 1999 MT 126, ¶33, 294 Mont. 449, 982 P. 2d 456; *Heisler v. Hines Motor Co.*, 282 Mont. 270, 937 P. 2d 45 (1997). Other courts similarly view unfavorably legislative efforts to discriminate on the basis of the monetary award. *Widhalm v. Tonjum*, Eight Judicial District Court, Cascade County, Cause No. ADV-02-554 (Mar. 8, 2004) (citing *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980)).

The rational basis test "requires the government to show that the objective of the statute was legitimate and bears a rational relationship to the classification used by the Legislature." *Davis*, 282 Mont. 233, 242, 937 P.2d at 32. Critical here, a "statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies." *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 59 (Fla. 2017).

Even if the Cap had some rational basis 1986, it cannot pass muster today. The Tort Claims Cap's monetary value has significantly reduced over the last 38 years as a result of inflation. For example, if the $750,000 per claim limitation kept up with inflation, it would now be valued at $2,165,634.[3] Ironically, the amount the Legislature determined unreasonably low when setting the cap in 1986 ($300,000) *exceeds* the inflation-adjusted value of the cap today. Adjusting for inflation, $300,000 in 1986 is equal to $866,253 today.[4]

It is hardly novel or complex for legislation to address the concern of sunsetting constitutionality by indexing a cap to inflation. Our Legislature knows how to do this. For example, during the 2025 Session, the Legislature passed a medical malpractice damages cap that includes an ongoing adjudgment to account for inflation. *See* House Bill 195, adopted March 27, 2025.

[3] https://www.dollartimes.com/inflation
[4] *Id.*

Because the Tort Claims Cap is not indexed to inflation, the State cannot establish that the Tort Claims Cap is now rationally related to any legitimate governmental objective. In 1986, the Legislature determined that the government could operate safely with liability limits of $750,000 per person and $1.5 million per occurrence. *See* Doc. 8, Ex. B at p. 17 (Testimony of Nathan Tubergen, Finance Director for Great Falls). The District Court undertook no investigation regarding whether that threshold was arbitrary or, more importantly, why it has not increased with the diminishing value of the dollar. It is an abdication of the role of the judiciary to refrain from that analysis. At a minimum, this case should be remanded to address Respondent's arguments and meaningfully asses the legitimacy of the Tort Claims Cap.

Setting aside the failure to index the Tort Claims Cap to inflation, the State did not demonstrate that the alleged tort "crisis" that existed in 1986 continues today. "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *N. Broward Hosp. Dist.*, 219 So. 3d at 59. ("[E]ven if the damages cap were rationally related to a legitimate government purpose when the statute was enacted, there is no evidence of a continuing crisis that would justify the arbitrary application of the statutory cap.").

In 1986, when the State spoke in favor of the Tort Claims Cap, it spoke almost exclusively about the frivolous claims it has to defend on a continual basis. *See* Doc. 8, Exh. B at pp. 12-17 (Testimony of John Maynard, Administrator of the Tort Claims Division of the Department of Administration). Yet the Tort Claims Cap does nothing to curb frivolous claims. Rather, only the most meritorious and catastrophic claims, like Respondent's, are affected. Further, even if a crisis of frivolity existed in 1986, there is no evidence that it continues to exist today.

Additionally, other means, such as legislation requiring the purchase of liability insurance by the State for its autos,[5] could adequately satisfy the government's interests while better preserving the rights infringed upon by the Tort Claims Cap. Indeed, the Delegates specifically addressed the financial impact abrogating sovereign immunity would have on the State's finances, and accepted that burden in large part because of the availability of insurance.

> Delegate Rygg: I'm just wondering, having been on the appropriations committee before, how is the state going to protect itself?
>
> Delegate Murray: In most instances, they have insurance to cover this particular thing.
>
> Delegate Rygg: Do you anticipate…extra insurance to cost the State a great deal of money?
>
> Delegate Murray: No, I really don't Sterling.

[5] The political subdivisions purchase automobile liability insurance well beyond the caps in Mont. Code Ann. § 2-9-108. *See Daniels v. Gallatin Cnty.*, 2022 MT 137, ¶ 4, 409 Mont. 220, 223, 513 P.3d 514, 516.

Verbatim Transcripts, Vol. II at 5433–34.

Again, there was *no scrutiny* applied to the Tort Claims Cap in the lower court. The District Court's Order should be reversed. At a minimum, the case should be remanded with instructions to allow discovery informing an inquiry into the legitimacy of the governmental interest and whether any other means exists to compensate Wilson, such as auto insurance.

III. *Meech* Does Not Control Any Issue Presented.

Meech remains the touchstone for damages cap defenders and was central to the District Court's decision. But *Meech* is distinguishable, outdated, and a poor North Star guide for analysis in this case. Wilson urges the Court to make clear on remand that *Meech* should not infect the analysis here.

The *Meech* court analyzed whether the Wrongful Discharge from Employment Act ("WDEA") violated the right to full legal redress in Article II, § 16. 238 Mont. at 26, 776 P.2d at 491. *Meech* specifically focused on the second sentence of § 16, which applies to employment disputes: "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state." *Id.*, 238 Mont at 35, 776 P.2d at 496. The *Meech* Court emphasized that the "[Workers' Compensation] Act's limitation on noneconomic

damages applies long-standing contract law" which disallowed noneconomic damages such as emotional distress. *Id.*, 238 Mont at 50, 776 P.2d at 505.

That analysis and rationale is completely irrelevant to the standard negligence claims brought by Wilson. Moreover, the language cited by the District Court from *Meech* concerns only the alleged violation of rights under Article II, § 16 by operation of the WDEA. Doc. 30 at 15. *Meech* speaks nothing at all to the challenges raised by Wilson to the Tort Claims Cap.

Nevertheless, the District Court relied upon *Meech* to conclude that "Article II, Section 16 does not guarantee a right to full legal redress to a particular cause of action or remedy. The legislature has the power to determine what injuries are recoverable, and to limit the remedies available for those injuries." Doc. 30 at 15. Contrary to the District Court's logic, *Meech* cannot be construed to allow *any* legislation limiting tort recovery. As posited above, *Meech* cannot be construed to condone a cap which affords recovery to one race but not another.

To be sure, *Meech* overruled *Pfost v. State*, 219 Mont. 206, 218, 713 P.2d 495, 502 (1985), to the extent that *Pfost* held "Article II § 16 of the Montana Constitution guarantees a fundamental right to full legal redress." *Meech*, 238 Mont. at 26, 776 P.2d at 491. However, *Meech* did not disturb *Pfost's* overall conclusion that the previous version of the Tort Claims Cap was unconstitutional. Critically, the *Pfost*

Court stated "we doubt that the legislation could pass even the lenient rational basis test." *Pfost*, 219 Mont. 206, 222, 713 P.2d at 505.

Indeed, the rationale in *Meech* actually supports Wilson's present challenge to the Tort Claims Cap. The *Meech* Court observed that the WDEA passed constitutional muster because all claimants were afforded the same remedy (up to four years of lost wages), and that the legislature supported the four-year period with statistical evidence that "most wrongful discharge claimants with reasonable diligence will obtain other employment within a four-year period." *Meech*, 238 Mont. at 48, 776 P.2d at 505. The same cannot be said about the Tort Claims Cap or to Haley Wilson, who was killed and will never have a chance to return to employment.

To more closely mirror the WDEA's limitations, the Tort Claims Cap could reduce total damages for every claim by a set percentage. Instead, the Tort Claims Cap employs a static ceiling on recovery for any claim, regardless of the damage. While a percentage reduction would spread the burden proportionately amongst claimants, akin to the WDEA's proportionate limitation of four years of damages, the static Tort Claims Cap punishes only the most seriously harmed. Even worse, while the WDEA was premised upon statistical evidence that most WDEA claimants are only harmed for four years (until they return to work), Haley Wilson and JMW's damages are undisputedly permanent.

In sum, the District Court's application of *Meech* was misplaced. *Meech* does not endorse the constitutionality of the Tort Claims Cap.

IV. The District Court's Constitutional Analysis and Summary Judgment Order, Together, Deprived Wilson of the Fundamental Rights to a Jury Trial and Due Process.

Montana Constitution Article II, § 26 provides that "[t]he right of trial by jury is secured to all and shall remain inviolate" and [i]n all civil actions, two-thirds of the jury may render a verdict, and a verdict so rendered shall have the same force and effect as if all had concurred therein." The right to a jury trial "has always been jealously guarded." *Consolidated Gold and Sapphire Mining Co. v. Struthers*, 41 Mont. 565, 572, 111 P. 152, 156 (Mont. 1910). This guaranteed right, including the right to have damages assessed by a jury, cannot be infringed by legislative enactment. *Chessman v. Hale*, 31 Mont. 577, 588, 79 P. 254, 257 (1905).

A plaintiff has a constitutional right to have the jury determine facts, including damages, and then enter a verdict. The verdict is diluted when the injured plaintiff is not fully compensated following the jury's assessment of damages. To allow the Legislature to prospectively substitute its judgment for the jury's judgment usurps the jury's constitutional role and makes the fundamental rights guaranteed to all citizens illusory. *See Maykuth v. Eaton*, 212 Mont. 370, 372–373, 687 P.2d 726, 727 (1984) (citing *Nelson v. Hartman*, 199 Mont. 295, 648 P.2d 1176, 1179 (1982)). It is well-established that, in personal injury actions, "there is no measuring stick by

which to determine damages awarded for pain and suffering other than the intelligence of a fair and impartial trier of fact governed by a sense of justice; each case must of necessity depend on its own peculiar facts." *Albinger v. Harris*, 2002 MT 118, ¶ 41, 310 Mont. 27, 48 P.3d 711.

The Kansas Supreme Court analyzed decisions of other states, including those upholding caps, and declared Kansas's $250,000 cap on noneconomic losses in all personal injury cases unconstitutional, holding "the cap's effect is to disturb the jury's finding of fact on the amount of the award. Allowing this substitutes the Legislature's nonspecific judgment for the jury's specific judgment." *Hillburn*, 442 P.3d, at 524.

Other jurisdictions where trial by jury is constitutionally guaranteed agree. *Watts*, 376 S.W.3d, at 637; *Nestlehutt*, 691 S.E.2d, at 223 ("By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, [the cap] clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."); *Moore*, 592 So.2d, at 164; *Smith,* 507 So.2d, at 1088.

Like the right to a jury trial, state constitutional rights of access to the court system for a remedy have been the bases for invalidation of damages caps in other states. *See, e.g., Lucas v. United States*, 757 S.W.2d 687, 690 (Texas 1988); *Smith*, 507 So.2d, at 1087-88.

Further, plaintiffs injured by an act of negligence are entitled to due process by having the amount of their damages determined by a jury based on the facts of the case. *Albinger*, ¶ 43; *Breuer v. State*, 2023 MT 242, ⁋ 32, n.29, 30, 414 Mont. 256, 539 P.3d 1147; Mont. Const. Art. II, § 17 ("[n]o person shall be deprived of life, liberty, or property without due process of law.").

In this case, the violations of the rights to jury trial, redress, court access, and due process are readily apparent. Indeed, the District Court's treatment of the constitutional questions presented and summary judgment order deprived Wilson of a jury trial altogether. Recall that this appeal derives from the *State's* petition for interpleader and declaration judgment action. Doc. 1. The State filed this declaratory judgment action, *affirmatively alleging* that "the State is not liable to Respondent in excess of $750,000" in recognition that any verdict will exceed $750,000. Doc. 1 at ⁋ 18. And the District Court adjudicated the State's allegation by discharging the State "from any and all further liability" upon the State's deposit of $750,000 with the District Court. Doc. 30 at 10, 22. The District Court's decision severed Wilson's right to a jury trial before Montana law even afforded the right to file a tort complaint against the State. In particular, and as discussed in more detail below, the District Court's decision eviscerates a claim by JMW for NIED before the action is even filed and before JMW even reaches the age of majority.

Moreover, the Tort Claims Cap violates Wilson's right of due process by disallowing the jury to ascertain and declare the amount of damages, and thereby "irrational[y] and arbitrar[ily] impos[ing] the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured."). *Morris v. Savoy*, 576 N.E.2d 765, 771 (Ohio 1991)

The unworkable and paradoxical ruling that Wilson's constitutional challenge to the Tort Claims Cap comes too early *and* that the State is relieved of all further "liability," cannot withstand any level of constitutional muster. The Court's summary judgment order should be reversed and remanded as a violation of Wilson's fundamental rights to trial, redress, court access and due process.

V. Constitutional Infirmities Aside, the State's Liability Is Not Capped at $750,000.

The District Court determined that there is but one conceivable "claim" in the underlying tort claims filed by Wilson, as defined by the Tort Claims Cap. Therefore, the lower court said, the State's liability exposure is limited to $750,000. Doc. 30 at 20. The District Court's decision was premised upon the fact that JMW was not present at the scene of the accident that killed her mother.

> *JMW does not have an independent claim as she was not present at the scene of the accident*. Her claim for negligent infliction of emotional distress along with the claims for wrongful death and survivorship are subject to the "per claim" limits of Montana Code Annotated § 2-9-108.

Id. (emphasis added).

The District Court's logic reflects an antiquated view of the independent and non-derivative tort of negligent infliction of emotional distress. In particular, Montana law now recognizes that, even where an individual was not present at the scene, she may bring a non-derivative action for negligent infliction of emotional distress.

For example, in *Wages*, this Court was faced with the issue of "whether Wages, as the father of a minor child *who did not witness the accident* that resulted in his child being seriously injured, is entitled to maintain *an independent, non-derivative claim* for negligent infliction of emotional distress." 2003 MT 309, ¶ 10, 318 Mont. 232, 235, 79 P.3d 1095, 1097 (emphasis added).

In *Wages*, the district court, relying on *Treichel v. State Farm Mut. Auto. Ins. Co.*, 280 Mont. 443, 930 P.2d 661 (1997), concluded that "'personal on the scene, direct physical and emotional impact' was still vital. Duty in a NIED case, therefore, exists only to those who actually witness the accident." *Wages*, ¶ 20.

This Court disagreed:

> [T]he Court in *Treichel* did refer to the fact that Carolyn, the spouse, experienced direct on-the-scene injury, [but] this was offered only to buttress the District Court's distinction between NIED and loss of consortium claims…

Id. at ¶ 21. After dispelling the notion that presence at the accident scene was dispositive, the *Wages* Court reiterated that "[a]n *independent* cause of action for negligent or intentional infliction of emotional distress arises under circumstances

where 1) serious or severe emotional distress to the plaintiff was 2) the reasonably foreseeable consequence of 3) the defendant's negligent or intentional act or omission. *Wages*, ¶ 11 (emphasis added). Ultimately, this Court held that, even though Wages was not present at the scene of the accident, it was for the jury to determine whether Wages suffered "severe" or "serious" distress, and thus may recover on his independent and, most critically here, *non-derivative* claim. *Id.* ¶ 26.

Similarly, in *King v. Geico Ins. Co.*, Magistrate Judge Anderson concluded that "in Montana, an emotional distress claim is *a separate stand alone claim*." No. CV 12-92-BLG-RWA, 2013 WL 6498994, at *7 (D. Mont. Dec. 11, 2013) (emphasis added), *as corrected* (Dec. 17, 2013). Judge Anderson found that, even though wife Louise did not witness her husband's accident, "Louise's claim of serious or severe emotional distress was reasonably foreseeable. Louise and Timothy King were husband and wife, and Timothy was killed when the motorcycle he was riding was struck head-on by another vehicle. Louise was thus a foreseeable plaintiff to whom a duty was owed." *Id.* As such, Louise had a claim for negligent infliction of emotional distress, that could be pled and proved as an "independent, stand alone cause of action." *Id.* at 6.

The District Court here simply made the same error as the district court in *Wages*, concluding, "unlike *Treichel*, JMW was not present at the accident and did

not receive 'an independent and direct injury *at the accident scene*.'" Doc. 30 at 18 (emphasis original). This clear error alone warrants reversal.

To be clear, the Tort Claims Cap, Mont. Code Ann. § 2-9-108, allows for two or more individuals who have suffered a personal injury or death to pursue damages under the per occurrence limit of $1,500,000 for a single act of negligence. Mont. Code Ann. § 2-9-101(1). The District Court erred when it determined that JMW's claim for emotional distress was not independent of the wrongful death claim because it "arose from the death of her mother." Doc. 30 at 20. Importantly, this Court directly addressed the "arising out of" argument with respect to NIED in *Treichel*, when it affirmed the District Court's holding that a widow's negligent infliction of emotional distress claim did not arise out of her husband's death but instead "Carolyn's claim for negligent infliction of emotional distress arose 'out of the traumatic personal impact upon her own emotional and physical well-being by actually and immediately experiencing the accident which killed her husband directly in front of her." *Treichel* 446.

Thus, if proof is presented that JMW suffered serious and severe emotional distress, she has an independent non-derivative claim for NIED arising out the traumatic personal impact upon her own emotional and physical well-being and independent of any claims the Estate may have for wrongful death.

In short, her claim for NIED does not arise out of her mother's death, and she does not have to be present at the scene in order to bring it. However, the District Court determined that, regardless of any proof JMW could present, the total possible exposure is the $750,000 per claim limit, rather than the occurrence limit of $1.5 million. In effect, the District Court dismissed JMW's NIED claim before she could even file it. This was reversible error.

The District Court's interpretation also raises several constitutional concerns. For example, the District Court's interpretation denies individuals with a meritorious NIED claim due process, a trial by jury and equal protection under the law. An NIED claimant may not be, and often isn't, an heir to the estate. Nor must an NIED claim be pursued by the personal representative. The District Court's over-reading of the "arising out of" language, however, lumps these independent and non-derivative claims in with recovery by the Estate, causing significant constitutional friction by depriving claimants of a recovery allowed against non-State defendants.

CONCLUSION

For the foregoing reasons, Wilson respectfully requests that this Court reverse the District Court. The Court should remand with instructions for the District Court to apply the appropriate level of constitutional scrutiny—at minimum, intermediate scrutiny—and to allow discovery and factual development necessary to evaluate the legitimacy and application of the Tort Claims Cap.

Even if this Court finds no constitutional problems, this Court should reverse the District Court's determination that JMW cannot bring a valid NIED claim. Accordingly, this Court should reverse the District Court's decision that the State's liability is limited to $750,000.

RESPECTFULLY SUBMITTED this 26th day of June 2025.

/s/ Justin Stalpes
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 9,940 words is less than the 10,000 word limit, exclusive of table and certificates.

RESPECTFULLY SUBMITTED this 26th day of June 2025.

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