IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0031

Kayla Moss and Michael Moss, as Father and as next friend of A.M., an infant,

Plaintiffs, Petitioners,

vs.

The United States of America,

Defendant, Respondent.

On Certified Questions from the United States District Court for the Northern District Court of West Virginia

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases: ***Page Nos.***

Statutes: ***Page Nos.***

I. QUESTIONS PRESENTED

On December 1, 2020, Gina M. Groh, Chief United States District Judge for the Northern District of West Virginia entered a Memorandum Opinion and Certification Order which was submitted to this Court on January 15, 2021 that presented the following the following two (2) Certified Questions to this Court:

1. Does West Virginia Code §55-7B-9(a) or §55-7B-9(d) violate Article V, Section 1 of the West Virginia Constitution because of the Rulemaking clause of Article VIII, §3 provides the Supreme Court of Appeals of West Virginia solely possesses authority to promulgate rules of evidence and procedure?

2. Does West Virginia Code §55-7B-9(a) or §55-7B-9(d) violate West Virginia's Equal Protection Clause because all medical malpractice claimants are not treated equally under its provisions? (JA 61 – 64)

Petitioners respectfully request this Honorable Court to answer the Certified Questions in the affirmative.

II. ARGUMENT

1. West Virginia Code §55-7B-9a and §55-7B-9d Violate the Separation of Powers Clause Contained in the Article V, §1 of the West Virginia Constitution Because the Rule-Making-Clause of Article VIII, §3 Grants the West Virginia Supreme Court the Sole Authority to Promulgate Rules of Evidence and Procedures

When the arguments of the United States are distilled to their essence it agrees that West Virginia's Collateral Source Rule is, in substantial part, a rule of evidence. It also agrees that if not preempted by §55-7B-9a and/or §55-7B-9d, Kayla Moss and Michael Moss, as Father and Next Friend of A.M., an infant, (hereinafter "Moss"), are entitled under West Virginia's Collateral Source Rule to recover all her medical bills if she prevails in this litigation. As a result, they do not challenge this Court's holding in *State Farm v. Prinz*, 743 S.E.2d 907 (W.Va. 2013) which declared that the: "...Court unquestionably possesses paramount authority to adopt

and amend rules of evidence for trial courts" and that the Court will "...[n]ot hesitate to invalidate a statute that conflicts with our inherent-ruling making and authority". As a result, there appears to be a concession by the United States that if either of the challenged Code Sections are found to be an attempt by the West Virginia Legislature to legislate a rule of evidence or if either of the challenged Code Sections infringe upon a rule of evidence already adopted by the West Virginia Supreme Court (in this case the Collateral Source Rule) the statutes would violate the Separation of Powers Clause contained in Article V, Section 1 of the West Virginia Constitution because of the Rule-Making Clause in Article VIII, Section 3. Nonetheless, in a nuanced argument, the United States suggests (albeit incorrectly) that because neither Code Section precludes a medical malpractice victim from presenting evidence of all of their medical expenses to the trier of fact, the Code Sections do not infringe upon this Court's rule-making authority because the Collateral Source Rule is simply not implicated. So, according to the United States, the Code Sections are no different than the MPLA's post-verdict damage reduction provisions for noneconomic damages found constitutional by this Court in *Robinson v. Charleston Area Medical Center Inc.*, 414 S.E.2d 877 (W.Va. 1991); *Verba v. Ghaphery*, 552 S.E.2d 406 (W.Va. 2001); and *MacDonald v. City Hospital Inc.*, 715 S.E.2d 405 (W.Va. 2011).

§55-7B-9d

At first blush the United States' argument, especially as it relates §55-7B-9d, has some facial appeal. If the Court blindly adopts its suggestion that §55-7B-9d does not preclude a plaintiff from presenting evidence of all of his or her medical bills to the trier of fact and instead merely involves a post-verdict damage reduction identical to the non-economic damage caps found constitutional in *Robinson v. Charleston Area Medical Center Inc.*, 414 S.E.2d 877 (W.

Va. 1991); *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001); and *MacDonald v. City Hospital, Inc.*, 715 S.E.2d 405 (W. Va. 2011) then there is at least some plausibility to its suggestion that the subject statutes do not invade this Court's exclusive right to determine trial procedure including rules of evidence. The problem the United States has is that when its argument is examined more closely it fails because §55-7B-9d is not simply a post-verdict damage reduction provision. This is what the United States overlooked telling the Court.

First, §55-7B-9d (and for the that matter §55-7B-9a) bears no similarity to §55-7B-8 which is the MPLA Code Section whose limits on non-economic loses were found constitutional in *Robinson*, *Verba,* and *MacDonald.* §55-7B-8 simply caps non-economic losses at certain preset limits. It does not mention, discuss, involve, or have anything to do with what evidence may be presented to the trier of fact regarding a medical malpractice victim's past medical bills, it does not require the introduction of any post-verdict evidence, and it literally has nothing to do with West Virginia's judicially established Collateral Source Rule. So, §55-7B-9d (as well as §55-7B-9a) bear no similarity to the damage caps that were found constitutional in *Robinson*, *Verba*, and *MacDonald.* The bottom line is that any comparison between §55-7B-8, with §55-7B-9d/§55-7B-9a is illusionary.

Next, the United States' argument that §55-7B-9d is merely a post-verdict damage reduction mechanism fails for the following reasons. In the case of *Goodman v. United States*, 2018 W.L. 37157470 (S.D.W.Va. August 3, 2018) the plaintiff brought a Federal Tort Claim Action against the United States asserting that one of its deemed employees had committed medical malpractice while treating the plaintiff. The plaintiff's medical bills significantly exceeded the amounts that had been paid for those same bills by Medicaid. The United States (the same United States that is a defendant in this litigation) filed a Motion in Limine arguing

that plaintiff's attempt to recover past medical bills was "[l]imited by W.Va. Code §55-7B-9d to the amounts actually paid by Medicaid for or on behalf of the plaintiff". Because of this, the United States requested that the "...Court enter an Order excluding any evidence of amounts paid for past medical expenses in excess of amounts actually paid for or on behalf of the plaintiff". (Emphasis added.) (*Goodman* ECF 55, Page Id. No. 282) In its Reply Memorandum of Law filed in support of its Motion in Limine, the United States argued that §55-7B-9d should be interpreted as follows:

> "...[t]he express language of the statutory provisions of the MPLA requires that the limit on past medical expenses be applied when the verdict is calculated and not when offsets for collateral source payments are subsequently calculated and applied to the verdict to determine the final judgment. The calculation of potential damages for past medical expenses is a separate and distinct issue from the application of collateral source payments to offset an award of damages for past medical expenses. In summary, since W.Va. Code Section 55-7B-9d applies to limit any verdict awarding past medical expenses to the amounts actually paid by or on behalf of the plaintiff, the proper course for the Court is to exclude any evidence to the contrary during the trial of the case. Any evidence of the value of the past medical expenses in excess of the amounts actually paid by or the for the plaintiff is irrelevant in light of the express statutory language of W.Va. Code §55-7B-9d." (*Goodman* ECF 64, Page Id. No. 346)

Judge Chambers adopted the argument made by the United State specifically declaring that:

> "Section 55-7B-9d applies to the verdict itself... Because §55-7B-9d's language limits the jury's verdict regarding past medical expenses, the statute's limits will be extended to the evidence this Court will allow to be presented at trial. Defendant's MOTION IS GRANTED, and plaintiff will be prohibited from presenting or admitting into evidence any evidence of amounts paid for past medical expenses in excess of amounts paid for her or on her behalf at trial."

So, while the United States tries to convince this Court that §55-7B-9d is merely a post-verdict damage reduction mechanism, it argued exactly the opposite in *Goodman* claiming that §55-7B-9d precludes the presentation to the trier of fact of any evidence of medical bills beyond that amount which a collateral source paid. And Judge Chambers has adopted the United States' position finding that §55-7B-9d is a legislatively drafted rule of evidence that precludes a plaintiff from being able to present evidence of all of their past medical expenses in a medical malpractice action to the trier of fact.

The same conclusion as to how §55-7B-9d should be applied by Judge Chambers in *Goodman* was adopted by Judge Volk in a medical malpractice action brough in the case of *Estate of Burns v. Cohen*, 2020 WL 3271047 (S.D.W.Va. June 17, 2020). In that case the defendant physician filed a Motion in Limine seeking to exclude evidence of plaintiff's gross medical bills from being presented to the jury arguing that §55-7B-9d prevented the introduction of evidence of a medical malpractice victims' gross medical bills and instead limited that evidence to only what their medical insurers had paid – directly the opposite of what West Virginia's Collateral Source Rule requires. Judge Volk agreed with this interpretation of §55-7B-9d ordering that only evidence of the amount of medical bills actually paid would be permitted to be presented to the jury. Judge Volk ordered that:

> "In deciding a similar motion, my colleague Judge Chambers - - the longest serving Speaker of the West Virginia House Delegates - - concluded that the post-trial adjustment for collateral sources "does not limit or usurp" the statutory pronouncement that a verdict be limited to the medical expenses actually paid or owed... So reasoning, Judge Chambers excluded at trial those medical expenses in excess of the amounts paid or owed. In as much as written off or adjusted expenses are neither paid nor obligated to be paid by Ms. Burns or anyone on her behalf, they cannot be considered damages at trial under the plain language of the MPLA. See W.Va. Code Section 55-7B-9d." ...According, Dr. Cohen's

> motion in limine to exclude certain medical expenses is a GRANTED...

So, Judge Volk has likewise interpreted §55-7B-9d in a manner completely contradictory to the way the United States now urges it should be interpreted by this Court.[1]

Finally, it is not just Judge Chambers and Judge Volk who have ruled and the United States who has previously urged that §55-7B-9d is not just a post-verdict damage reduction provision. Counsel for the Amicus Curiae has also urged for the adoption of that same interpretation of §55-7B-9d. In the case of *Mays v. Prime Care, et al.*, Civil Action Number 16-C-1039 (Circuit Court of Kanawha County), the Amicus Curiae's counsel was representing Prime Care in a medical malpractice action. A Motion to Compel depositions on behalf of Prime Care was filed and as part of that argument this is how City Hospital's current counsel urged the Court to interpret §55-7B-9d:

> "West Virginia Code Section 55-7B-9d provides more support for the proposition that written-off amounts are not to be included as part of the medical expenses. That provision states: A verdict for past medical expenses is limited to: (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.
>
> W.Va. Code §55-7B-9d (2015) (emphasis added). Written-off amounts are not medical expenses that the plaintiff or anyone is obligated to pay. Thus, under W.Va, Code §55-7D-9d, they cannot he included in any verdict for past medical expenses. There is nothing in this code provision that specifies that the adjustment of past medical expenses must occur post-trial; indeed, the use of the term "verdict" suggests that this reduction must occur before the jury issues a verdict. Also, if the Legislature intended this provision to be part of the post-verdict collateral source reduction hearing, it would have included it as part of West Virginia Code Section 55-7B-9a. Instead, it placed it in a separate section that

[1] In both the *Goodman* and *Estate of Burns* cases the Court was not presented with any challenge as to the constitutionality of §55-7B-9d.

> makes it abundantly clear that medical bills that are not paid and is obligated to pay shall not he included in any verdict".

If this Court interprets §55-7B-9d in the same manner that Judge Chambers and Judge Volk have and if this Court interprets §55-7B-9d in the same manner the United States and counsel for Amicus Curiae have previously urged that it should be interpreted, then the Court should reject the United States' suggestion that §55-7B-9d is just some type of post-verdict damage reduction provision. Instead, the Court should find that §55-7B-9d is an impermissible legislative attempt to adopt a rule of evidence that infringes on the West Virginia Supreme Court's rule-making authority because it precludes a plaintiff from presenting evidence of all their medical bills to the trier of fact in direct violation of the Collateral Source Rule. As a result, the Court should find that the Code Section is unconstitutional.

§55-7B-9a

§55-7B-9a poses an even bigger problem for the United States. The Collateral Source Rule in West Virginia "operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages" suffered by an injured plaintiff by precluding the introduction of collateral source evidence. *Ratlief v. Yokum*, 280 S.E.2d 855 (W.Va. 1981). As this Court in *Pack v. VanMeter*, 354 S.E.2d 581 (W.Va. 1986) held, in West Virginia "[O]ur law is quite clear that the amount of the money that an injured plaintiff receives from a collateral source is not admissible". Yet, that is actually what §55-7B-9a does.

By its very terms, §55-7B-9a requires that prior to the entry of a judgment in a medical malpractice action a defendant is entitled to admit into the record "evidence of payments the plaintiff has received for the same injury from collateral sources" - something that is in direct contravention of West Virginia's judicially adopted Collateral Source Rule. The Code Section

then requires the plaintiffs to present evidence regarding the value of payments or contributions they made to secure the benefits paid by the collateral source, and then the Judge subtracts the collateral source payments from any potential award to the plaintiff which is exactly what the Collateral Source Rule says cannot be done. Here is just some of the evidentiary language in §55-7B-9a that is in direct contravention of the decades long firmly established judicial Collateral Source Rule in this State:

> "(a) In any action arising after the effective date of this section, a defendant who has been found liable to the plaintiff for damages for medical care, rehabilitation services, lost earnings or other economic losses may present to the court, after the trier of fact has rendered a verdict, but before entry of judgment, evidence of payments the plaintiff has received for the same injury from collateral sources.
> (b) In a hearing held pursuant to subsection (a) of this section, the defendant may present evidence of future payments from collateral sources if the court determines that:
> (c) In a hearing held pursuant to subsection (a) of this section, the plaintiff may present evidence of the value of payments or contributions he or she has made to secure the right to the benefits paid by the collateral source.
> (d) After hearing the evidence presented by the parties, the court shall make the following findings of fact:
> (3) The total amount of allowable collateral source payments received or to be received by the plaintiff for the medical injury which was the subject of the verdict in each category of economic loss; and
> (4) The total amount of any premiums or contributions paid by the plaintiff in exchange for the collateral source payments in each category of economic loss found by the trier of fact.
> (e) The court shall subtract the total premiums the plaintiff was found to have paid in each category of economic loss from the total collateral source benefits the plaintiff received with regard to that category of economic loss to arrive at the net amount of collateral source payments.
> (f) The court shall then subtract the net amount of collateral source payments received or to be received by the plaintiff in each category of economic loss from the total amount of damages awarded the plaintiff by the trier of fact for that category of economic loss to arrive at the adjusted verdict."

The very Title to §55-7B-9a shows that it is a direct attempt to circumvent West Virginia's judicially adopted Collateral Source Rule stating that its purpose involves the "Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury". And as noted above, it includes an intricate process whereby plaintiffs and defendants are required to present evidence before any verdict is entered regarding collateral sources with the Court ultimately making adjustments for awards for medical expenses based upon evidence of payments by collateral sources. The cases decided by this Court dealing with the Collateral Source Rule have consistently held that the Collateral Source Rule precludes the offsetting of payments by health and accident insurance companies or other collateral sources as against damage caused by a defendant. This Court has never suggested that the Collateral Source Rule disappears at any particular stage in the proceedings. Instead, the rule establishes an absolute mandate which precludes at any stage of the litigation the introduction of evidence regarding collateral source payments. See *Kenney v. Liston*, 760 S.E.2d 434 (W.Va. 2014):

> "Stated another way, the Collateral Source Rule permits an injured person to recover all of his or her reasonable medical costs that were necessarily required by the injury."

And, *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983) which also held that:

> "Simply put, the Collateral Source Rule excludes payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants."

The pronouncements of the West Virginia Supreme Court in *Kenney* and *Ilosky* confirm that the Collateral Source Rule excludes payments from other sources to a plaintiff from being used in any manner to reduce a damage award because the very purpose of the Collateral Source Rule permits an injured person to recover all of his or her reasonable medical costs that were necessarily incurred by their injury. As a result, evidence of collateral source payments is

excluded at every stage of litigation. For this reason the Court should find that §55-7B-9a also infringes on the West Virginia Supreme Court rule-making authority because it deals directly with the presentation of evidence in direct violation of West Virginia's Collateral Source Rule.

Conclusion of Separation of Powers Argument

In the end, at a minimum, there is no argument but that the Collateral Source Rule is at least in part a rule of evidence. This Court has consistently, diligently, and aggressively rendered opinion after opinion declaring that our Separation of Powers Clause is not merely a suggestion, but instead is part of the fundamental law of our State, that must be strictly construed, and cannot be violated or infringed upon by the Legislature. *State ex rel. Barker v. Manchin*, 279 S.E.2d 881 (W.Va. 1981); *State ex rel. Affiliated Construction Trades Found. v. Vieweg*, 520 S.E.2d 854 (W.Va. 1999); *State ex rel. v. Carmichael*, 819 S.E.2d 215 (W.Va. 2018)

> In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016) ("The provision in W. Va. Code§ 3-7-3 (1963) requiring oral argument to be held in an appeal of a contested election, is invalid because it is in conflict with the oral argument criteria of Rule 18 of the West Virginia Rules of Appellate Procedure."); Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013) ("Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule-Making Clause, Article VIII, §3 of the West Virginia Constitution, W. Va. Code §57-3-1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."); Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005) ("The provisions contained in W. Va. Code §55-7B-6d (2001) were enacted in violation of the Separation of Powers Clause, Article V, §1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code §55-7B-6d, in its entirety, is unconstitutional and unenforceable."); *Garnes-Neely ex rel. W. Virginia State Police v. Real Property*, 211 W. Va. 236,

245, 565 S.E.2d 358, 367 (2002) ("Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes W. Va. Code §60A-7-705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order."); *Oak Cas. Ins. Co. v. Lechliter*, 206 W. Va. 349, 351 n.3, 524 S.E.2d 704, 706 n.3 (1999) ("We note, however, that to any extent that W. Va. Code §56-10-1 may be in conflict with W. Va. R. Civ. P. Rule 22, it has been superseded."); *W. Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 150, 516 S.E.2d 769, 773 (1999) ("if W.Va. Code§ 37-14-1 et seq., unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to article eight, section three of our Constitution, and, thus, the prohibition would be void."); *State v. Jenkins*, 195 W.Va. 620, 625 n.5, 466 S.E.2d 471,476 n.5 (1995) (finding W.Va. R. Evid. Rule 901 superseded W.Va. Code §57-2-1); Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370,445 S.E.2d 757 (1994) ("W.Va. Code §56-1-1 (a)(7) provides that venue may be obtained in an adjoining county '[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court ....' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of judges."); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (finding W.Va. Code §55-7B-7, which outlined the qualifications of an expert in a medical malpractice case, was superseded by W.Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) ("a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid."); Syl. pt. 2, *State ex rel. Gains v. Bradley*, 199 W. Va. 412, 484 S.E.2d 921 (1997) ("Rule lB of the Administrative Rules for Magistrate Courts supersedes W.Va. Code§ 50-4-7 (1992), and prospectively provides there is no automatic mandatory right of a party to have a magistrate disqualified."); *Gilman v. Choi*, 185 W. Va. 177, 178, 406 S.E.2d 200, 201 (1990), overruled on other grounds by *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("W.Va. Code, 55-7B-7 [1986], being concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence."); Syl. pt. 2, *State v. Davis*, 178 W. Va. 87, 88, 357 S.E.2d 769, 770 (1987), overruled on other grounds *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994) ("Rule 7(c)(l) of the West Virginia Rules of Criminal Procedure

> supersedes the provisions of W.Va. Code, 62-9-1, to the extent that the indorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such indorsement and attestation are sufficient if they appear on the face of the indictment."); *Bechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute in part that was in conflict with W. Va. R. App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422,425, 306 S.E.2d 233, 236 (1983)("W.Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State."); Syl. pt. 2, in part, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982) "(West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by ... the Judicial Reorganization Amendment of our Constitution, Article VIII."); *State ex rel. Askin v. Dostert*, 170 W. Va. 562, 567, 295 S.E.2d 271 ,276 (1982)(holding that to the extent W.Va. Code §30-2-1 required security from attorneys to insure their good behavior, it "conflicts with the rules promulgated by this Court [and] must fall.")

What this Court must now decide is whether it will continue to follow its prior pronouncements. In deciding which way to go, Moss respectfully asserts that the Court must take into consideration the indisputable fact that §55-7B-9d and §55-7B-9a do not involve a slight infringement around the edges of the Collateral Source Rule. Their enactment is not some minimal overlapping between the functions of the legislative and judicial branches. Their effect does not involve nominal changes to the Collateral Source Rule. Instead, §55-7B-9d and §55-7B-9a if left to stand literally eviscerate West Virginia's judicially-adopted Collateral Source Rule in every malpractice action. The Legislation does exactly what this Court refused to do in *Kenney*. Both Code Sections represent direct and fundamental encroachments by the legislative branch into the traditional powers held by this Court. If found to be constitutional they each, for all practical purposes, abolish the Collateral Source Rule. It is for these reasons that the Court should find that §55-7B-9d and §55-7B-9a violate the Separation of Powers Clause and contain

an Article V, Section 1 of the West Virginia Constitution because of the Rule Making Clause found in Article VIII, Section 3.

2. §55-7B-9a and §55-7B-9d are Unconstitutional Based Upon an Equal Protection Analysis

§55-7B-9a and §55-7B-9d are unconstitutional based upon an equal protection analysis. This Court has consistently acknowledged that courts must look at two (2) criteria to determine whether a statute is constitutional under an equal protection analysis. The first is whether the legislation bears a reasonable relationship to a proper governmental purpose (something that is not raised by Moss in her Motion) and secondly "whether all persons within the class are treated equally". In its most elementary form, the West Virginia Equal Protection Clause provides that:

> "Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally..." *Atchinson v. Erwin*, 302 S.E.2d 78 (W. Va. 1983); *Hartsock – Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 320 S.E.2d 144 (W. Va. 1985); *Gibson v. West Virginia Department of Highways*, 406 S.E.2d 440 (W. Va. 1991); and *Robinson v. Charleston Area Medical Center*, 414 S.E. 2d. 877 (W. Va. 1991) *Emphasis added.*

And even *Robinson supra* which specifically addressed the constitutionality of the MPLA's caps on non-economic damages continued to hold that:

> "Where economic rights are concerned, we look to see whether the classification of the rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally..."

As was set forth in Moss' original Brief, §55-7B-9a and §55-7B-9d do not treat all medical malpractice victims equally.

The United States agrees that if either Code Section does not treat all members of the class equally then the Code Sections are unconstitutional under an equal protection analysis. So, the pivotal question that the Court must answer is how should the class be defined so we can then decide whether all members are treated equally. That question is easily answered because unfortunately for the United States this Court has already defined what the class if for purposes of determining whether all members are treated equally in an equal protection constitutionality analysis involving the MPLA. In *Robinson supra*, a constitutional challenge under an equal protection analysis was made regarding the non-economic damage caps under §55-7B-8. The parties challenging the constitutionality of the caps argued that they did not treat all personal injury victims equally (the class) because the non-economic damage caps only applied to medical malpractice plaintiffs and as such the Code Sections should be found unconstitutional. This Court declined to define the class for purposes of an equal protection argument in cases involving the MPLA to be all personal victims. Instead, the Court defined the class when the MPLA is involved to be all "medical professional liability victims". Thus, in an equal protection attack involving a provision of the MPLA all "medical professional liability victims" most be treated the same.

What the United States attempts to do in its brief is redefine the class that has already been defined by this Court. When it does so, it subdivides "medical professional liability victims" into multiple subclassifications based upon whether they are insured or not insured, whether their medical care was provided gratuitously, and then subdivides them once again in multiple manners based upon the type of insurance they have, and who issued the insurance may or may not exist in the policies. If its argument is accepted, it would make the prior

pronouncements by this Court holding a statute only passes equal protection muster if all persons within the class are treated equally meaningless.

Conclusion of Equal Protection Argument

This Court has previously defined the class when the MPLA is involved to be all "medical professional liability victims." West Virginia's Equal Protection Clause involves an assessment of "whether all persons within the class are treated equally." If they are not treated equally, the statute must be found to be unconstitutional, even if the statute bears a reasonable relationship to a proper governmental purpose. In this instance, §55-7B-9a and §55-7B-9d do not treat the defined class (all medical professional liability victims) equally. It divides the class into subgroup after subgroup. Doing so is prohibited under West Virginia's Equal Protection Clause, and for that reason the Court should find that both statutes are unconstitutional based upon an equal protection analysis.

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CERTIFICATE OF SERVICE

I, Arden J. Curry, II, attorney for the within named Petitioners, Kayla Moss and Michael Moss as Father, and next friend of A.M., an infant, do hereby certify that I have this 7th day of June, 2021 served true copies of the **PETITIONERS' REPLY BRIEF** and **JOINT APPENDIX** upon the parties by mailing the same, postage prepaid, to the following addressees:

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