>> ALL RISE.
>> THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.
BE SEATED.
>> WE NOW COME TO THE THIRD CASE ON OUR DOCKET, THE ESTATE OF MCCALL VERSUS THE UNITED STATES OF AMERICA.
>> MAY IT PLEASE THE COURT, I'M HERE ON BEHALF OF THE ESTATE.
THIS TRAGIC CASE PRESENTS TWO BASIC ISSUES.
THE FIRST IS WHETHER THE PER INCIDENT CAP VIOLATES EQUAL PROTECTION BECAUSE IT TREATS CLAIMANTS DIFFERENTLY ON WHETHER THERE ARE MULTIPLE CLAIMANTS ARISING OUT OF A SINGLE
>> THERE'S A PROBLEM I SEE WHEN WE GET QUESTIONS CERTIFIED BY THE 11TH CIRCUIT.
THEY ANSWERED THE EQUAL PROTECTION CHALLENGE.
UNDER THE FEDERAL CONSTITUTION, WE HAVE CONSISTENTLY APPLIED THE STATE CONSTITUTION EQUAL PROTECTION IN A SIMILAR WAY.
SO LET'S JUST ASSUME I AGREE WITH YOU.
I LOOKED AT THE WISCONSIN CASE THAT WAS WRITTEN SEVERAL YEARS AGO AND I THINK THAT CASE IS VERY WELL REASONED AND JUST SAY I AGREE WITH YOU.
BUT OUR HANDS ARE NOW TIED IN THIS CASE BECAUSE A DECISION ON THE MERITS WAS MADE BY THE 11TH CIRCUIT ON THE EQUAL PROTECTION.
SO ALL YOUR ARGUMENTS MIGHT BE VERY GOOD, BUT I DON'T SEE HOW THEY'RE DIRECTED TO US AT THIS POINT IN THIS CASE.
>> YOUR HONOR, THIS COURT HAS CONSISTENTLY SAID THAT WHILE PERSUASIVE, THE MOST A FEDERAL DECISION UNDER THE EQUAL PROTECTION CLAUSE IS IS ADVISORY TO THIS COURT.
>> OF COURSE.
IF WE WERE NOW NEXT TIME WE HAD A CASE FROM FLORIDA NOT INVOLVING THE FEDERAL GOVERNMENT, INVOLVING A PRACTITIONER THAT COMMITTED MEDICAL MALPRACTICE AND IT WAS AN EXTREMELY BRAIN DAMAGED INDIVIDUAL AND THERE WAS AN ARGUMENT ABOUT THE CAP IN THAT SITUATION, WE'D LOOK AT IT AND WE'D LOOK AT THE 11TH CIRCUIT OPINION AND SAY THAT'S MAYBE THAT PERSUASIVE, THAT OPINION, BUT IT'S NOT BINDING.
BUT THAT'S NOT WHAT WE'RE HERE ON.
WE'RE HERE ON A CERTIFIED QUESTION.
SO HOW DO WE HAVE AUTHORITY TO ANSWER THE QUESTION AS TO THE EQUAL PROTECTION UNDER OUR STATE CONSTITUTION DIFFERENTLY IN A CERTIFIED QUESTION POSTURE?
>> WELL, BECAUSE
>> YOU UNDERSTAND WHAT I'M ASKING.
>> I UNDERSTAND EXACTLY WHAT YOU'RE SAYING, AND OF COURSE THE PROVISION IN FLORIDA'S CONSTITUTION NEED NOT BE INTERPRETED EXACTLY THE SAME AND THERE ARE DECISIONS OF THIS COURT THAT HAS DONE SO.
IN FACT, THE 11TH CIRCUIT ASSUMED THAT THE FLORIDA CONSTITUTION WOULD BE SUFFICIENTLY DIFFERENT THAT IT CERTIFIED THE EQUAL PROTECTION QUESTION TO THIS COURT SO THEREFORE DID NOT BELIEVE IT WAS DECIDING THAT QUESTION IN A CASE THAT'S BINDING UPON IN COURT.
>> DO YOU KNOW ANY THAT INTERPRETS OUR CONSTITUTION DIFFERENTLY THAN THE FEDERAL CONSTITUTION?
I DON'T KNOW ONE.
>> NO.
THERE ONE OBVIOUS EXAMPLE WOULD BE BUSH VERSUS GORE, WHICH THIS COURT DECIDED FIRST, FINDING NO
>> NO.
WE DIDN'T DECIDE THAT.
WE DIDN'T EVEN ADDRESS AN EQUAL PROTECTION ARGUMENT.
WE DIDN'T ADDRESS AN EQUAL PROTECTION ARGUMENT IN THAT CASE.
NO CONSTITUTIONAL ARGUMENT WAS PRESENTED TO THIS COURT.

>> AND, YOU KNOW, WHILE THERE WAS ALSO A THE PRIVACY PORTION OF THE DECISION DEALING WITH PARENTAL CONSENT
>> YOU KNOW, YOU'RE HONESTLY, BUSH V GORE, WE DIDN'T INTERPRET EQUAL PROTECTION.
IF WE HAD, WE MIGHT NOT HAVE BEEN WHERE WE WERE, BUT WE WEREN'T PRESENTED WITH A CONSTITUTIONAL ARGUMENT.
SO THERE'S MY PROBLEM.
MY SUGGESTION IS IS LET'S LOOK AT THE RIGHT OF ACCESS TO THE COURT ARGUMENT.
>> I'M HAPPY TO DO SO, BUT LET ME POINT OUT THAT I THINK, AS WE POINTED OUT IN OUR BRIEF, THAT ONE FLAW THAT MAKES A DIFFERENCE HERE IN THE 11TH CIRCUIT'S EQUAL PROTECTION ANALYSIS IS ITS FOCUS ON INCIDENT AS BEING THE POINT ON WHICH THE QUESTION TURNED.
IN ITS FAMOUS DECISION ON ONE PERSON, ONE VOTE, THE UNITED STATES SUPREME COURT REMINDED US THAT IT'S PEOPLE, NOT TREES, NOT ACREAGE THAT COUNTS AND HERE I WOULD SUBMIT UNDER THE FLORIDA CONSTITUTION IT'S PEOPLE, NOT MEDICAL INCIDENTS ON WHICH THE EQUAL PROTECTION TURNS.
>> THE ANALYSIS ON ALL OF THESE ISSUES, THAT IS, THE EQUAL PROTECTION, THE RIGHT OF ACCESS TO THE COURTS, THE OTHER CONSTITUTIONAL CHALLENGES THAT YOU MAKE, RIGHT TO JURY TRIAL, IS IT THE EXACT SAME FOR WRONGFUL DEATH, WHICH IS WHAT THIS CASE IS, IN A CATASTROPHICALLY INJURED INDIVIDUAL?
BECAUSE I HAVE PROBLEMS MAKING THE SAME ANALYSIS, ESPECIALLY BECAUSE WRONGFUL DEATH IS A CREATURE OF STATUTE THAT DIDN'T EXIST AT COMMON LAW.
AND THIS IS A WRONGFUL DEATH.
AND IT IS IRONIC THAT WE'RE EVEN GOING TO BE LOOKING AT RIGHT TO JURY TRIAL WHEN THE CASE INVOLVES A NONJUROR BENCH TRIAL IN A FEDERAL TORT CLAIM ACT SITUATION.
SO IT'S IT IS THAT'S PART OF THE FRUSTRATION.
I REALIZE WE HAVE WE'RE ASKED TO DECIDE THESE QUESTIONS, BUT I'M SORT OF WONDERING WHY CAN'T WE JUST TELL THE 11TH CIRCUIT UNDER THE POSTURE OF THIS CASE WE DON'T WANT TO ANSWER THESE QUESTIONS?
>> WELL, BECAUSE THE 11TH CIRCUIT IN CERTIFYING THAT QUESTION SPECIFICALLY SAID THAT THEIR CONSTRUCTION OF THE FEDERAL TORTS CLAIMS ACT WHICH IS BINDING ON THIS COURT REQUIRES A DECISION ON WHETHER OR NOT THE CAP APPLICABLE TO ANY OTHER MEDICAL MALPRACTICE CLAIMANT VIOLATES ACCESS
>> DO YOU AGREE WE CAN LIMIT IT TO WRONGFUL DEATH CAPS REGARDING WRONGFUL DEATH CASES, WHICH MIGHT BE DIFFERENT THAN A CAP FOR CATASTROPHIC DAMAGES?
I MEAN, SOMEBODY WHO HAS AND I READ THE DISTRICT COURT OPINION, VERY WELL DONE DISTRICT COURT JUDGE.
A TEN YEAR OLD BOY WHO IS SEVERELY INJURED AND IS LIMITED TO $1 MILLION FOR THE REST OF HIS LIFE IS TO ME MARKEDLY DIFFERENT QUALITATIVELY THAN A YOU KNOW, AGAIN, A DEATH, A TRAGIC DEATH FOR THE SURVIVORS WHO, YOU KNOW, MIGHT HAVE THE PAIN AND SUFFERING.
SO I JUST I THINK WE'VE DISTINGUISHED WRONGFUL DEATH FROM OTHER KINDS OF CASES AND I WONDERED IF YOU WERE COMFORTABLE IN OUR LIMITING THIS TO WRONGFUL DEATH CASES.
>> WELL, AS I SUGGESTED IN MY BRIEF, THE FACT IS THIS CAP APPLIES IN CAUSES OF ACTION BASED ON MEDICAL MALPRACTICE.
IT MIGHT BE A DIFFERENT ANALYSIS IF THE CAP WAS CONTAINED AND APPLIED TO ALL WRONGFUL DEATH CASES.
AND BECAUSE THE TASK OF THE JURY IN DETERMINING THE FACTS, INCLUDING THE AMOUNT OF COMPENSATION, IS THE SAME REGARDLESS OF THE EXTENT OF THE INJURIES
>> BUT WE'VE APPROVED IN A CASE I DISSENTED ON THE EXACT SITUATION IN A WRONGFUL DEATH CASE WHERE NO ADULTS COULD, YOU KNOW, CHILDREN COULD RECOVER IF THEIR ELDERLY PARENT DIES IN A AS A RESULT OF MEDICAL MALPRACTICE.
THE MISS RAHEE CASE.

>> THE DIFFERENCE THERE IS THERE WAS NO CAUSE OF ACTION AT ALL FOR THOSE ADULT CHILDREN.
ON THE OTHER HAND, THERE IS A CAUSE OF ACTION FOR ALL MEDICAL MALPRACTICE CLAIMANTS HERE.
IT'S JUST THAT SOME WILL GET MORE THAN OTHERS.
>> WELL, YOU MISUNDERSTAND FLORIDA LAW.
JUST BECAUSE IT'S A MEDICAL MALPRACTICE ACTION WOULD NOT REMOVE IT FROM A WRONGFUL DEATH SITUATION.
>> I UNDERSTAND THAT, BUT WHAT I'M SAYING IS IF THIS WERE A CAP ON WRONGFUL DEATH, IT WOULD TAKE ADVANTAGE OF THE FACT THAT THE LEGISLATURE HAD CREATED THE CAUSE OF ACTION OF WRONGFUL DEATH.
BUT BECAUSE THIS IS A MEDICAL MALPRACTICE CAP
>> THAT WOULD BE APPLIED IN THAT CONTEXT, SHOULD MAKE NO DIFFERENCE IS WHAT YOUR ARGUMENT IS.
>> IT SHOULD NOT MAKE ANY DIFFERENCE BECAUSE AS THIS COURT'S PRECEDENCE AND THE UNITED STATES SUPREME COURT PRECEDENCE UNDER THE 7TH AMENDMENT INDICATE, THAT CAUSES OF ACTION THAT ARE SIMILAR IN NATURE, THAT HAVE THE SAME LEGAL CONTENT, IN OTHER WORDS THAT IS A CAUSE OF ACTION FOR DAMAGES OUGHT TO BE TREATED THE SAME.
>> IT SEEMS TO ME, THOUGH, THAT THAT CASE WAS DEALING WITH WHETHER THERE WAS AN EQUAL PROTECTION VIOLATION AND IT HELD, DID IT NOT, WE'VE GOT THE CASE OF ESCHARTE AND JUSTICE BARCET'S DISSENT.
AREN'T WE BOUND, WHETHER YOU MIGHT LIKE IT OR I MIGHT LIKE IT OR NOT BY THE PRECEDENT OF THIS COURT IN A SERIES OF DECISIONS?
>> WELL, I WOULDN'T SAY YOU ARE BOUND, BUT I WOULD SAY YOU ARE BOUND BY SMITH VERSUS DEPARTMENT OF INSURANCE.
>> IF WE'RE DEALING WITH MEDICAL MALPRACTICE, HOW COULD SMITH BE MORE APPLICABLE THAN CHARTE.
>> BECAUSE THAT CASE WAS ACCESS TO COURT PROVISION.
WHILE IT MENTIONED OTHER CONSTITUTIONAL PROVISION IT DID NOT HAVE ANALYSIS TO THAT, THEREFORE IT IS MERE DICTA THAT DOES NOT HAVE PERSUASIVE VALUE.
AT THE SAME TIME IT NOTED THAT THE THE DECISION TURNED ON THE FACT THAT THERE WAS COMMENSURATE BENEFIT TO THE PLAINTIFF.
EVEN IN THE INSTANCE WHERE ONLY THE DEFENDANT ELECTED TO GO TO ARBITRATION, THERE WERE BENEFITS THAT FLOWED TO THE PLAINTIFF IN THE FACT THAT THEY NO LONGER HAD TO PROVE LIABILITY, THAT THEY HAD AN OPPORTUNITY TO PAY ATTORNEY'S FEES.
LIKE SMITH, THERE ARE NO BENEFITS THAT FLOW TO THE PLAINTIFF IN A MEDICAL MALPRACTICE CASE.
>> CAN YOU JUST GIVE ME AND I KNOW WE MADE THIS CONNECTION, BUT I'M STILL HAVING TROUBLE WITH IT.
HOW I UNDERSTAND UNDER KLUGER YOU HAD THE PIP STATUTE, SO PEOPLE WERE EXCLUDED FROM GOING TO COURT.
HERE THERE WAS A SITUATION WHERE IF THEY ACCEPTED THE ARBITRATION, YOU'D END UP NOT IN COURT.
HOW IS IF YOU TAKE SOVEREIGN IMMUNITY, THERE ARE CAPS ON DAMAGES.
HOW IS THAT AN ACCESS TO COURTS ISSUE?
I KNOW SOMEONE MADE THOSE LEAPS, BUT AS I WAS LOOKING AND THE RIGHT AND A VIOLATION OF THE RIGHT TO JURY TRIAL.
WHERE IS IT THAT IF YOUR CLIENT, IF THIS WAS A JURY TRIAL, RECEIVED THE CLIENTS AGAIN, THIS IS A HORRIBLE FACTS AS FAR AS THIS TERRIBLE MALPRACTICE OCCURRED HERE.
BUT THE JUDGE AWARDED SAY WITH A JURY AWARDED ALMOST A MILLION DOLLARS IN NON ECONOMIC AND ECONOMIC DAMAGES AND THEN HAD AWARDED 750, WHAT WOULD HAVE BEEN $2 MILLION, SO IT'S REDUCED.
SO IT'S A MILLION DOLLARS LESS.

HOW DOES THAT IF THAT WAS A JURY TRIAL, SAME THING, HOW DOES THAT LIMIT ACCESS TO COURTS?
>> TO THE EXTENT THAT THERE IS $1 MILLION IN COMPENSATORY INJURY THAT IS NOT BEING COMPENSATED, THERE IS A LIMIT ON THE ACCESS TO COURTS TO RECEIVE THAT COMPENSATION.
>> SO IT'S ONLY THE DIFFERENCE BETWEEN WHAT WAS YOU COULD HAVE GOTTEN UNDER, WHAT, THE COMMON LAW?
BECAUSE THAT'S WHERE WE GO BACK TO WRONGFUL DEATH.
OR IS IT IS THAT WHAT IT IS?
>> WHAT THE FACT FINDER FOUND WAS THE PROVEN FACTS THAT REQUIRE COMPENSATION TO THAT EXTENT IS WHAT IS MISSING.
AND SO THAT DIFFERENCE BETWEEN THE $1 MILLION THAT THE CAP PERMITS AND THE $1 MILLION THAT IS NOT BEING COMPENSATED IS THE DIFFERENCE.
IT'S BASICALLY SAYING YOU HAVE A PARTIAL ACCESS TO COURTS.
>> IS THAT, THOUGH SHOULD THE ANALYSIS FOR THOSE SITUATIONS, VERSUS WORKER'S COMP, PIP, WHERE YOU'RE ACTUALLY THERE'S PRE SUIT MEDIATION WHICH
>> BUT
>> IN THE CRISIS, BUT SHOULD THE ANALYSIS BE DIFFERENT BECAUSE
>> THE ANALYSIS HAS TO BE
>> WELL, MAYBE IT SHOULD BE YOU'RE NOT BEING DENIED ACCESS.
YOU'RE JUST NOT GETTING AS MUCH MONEY AS YOU'D LIKE TO GET.
WHY SHOULD THAT BE THE SAME KRUGER VERSUS WHITE WHETHER YOU ARE DENIED ACCESS COMPLETELY VERSUS THAT YOU'RE LIMITED IN YOUR DAMAGES?
>> AGAIN, I THINK THE SMITH CASE SPEAKS TO THIS AND SAYS THIS IS NOT ACCESS TO COURT AS IT HAS HERE TO BEFORE BEEN UNDERSTOOD.
THE FACT OF THE MATTER IS THAT WORKER'S COMPENSATION, NO FAULT ARRANGEMENTS, PIP STATUTES, THOSE ARE EITHER STATUTORILY CREATED CAUSES OF ACTION THAT DEFINE THE EXTENT OF INJURY THAT YOU CAN CLAIM OR IN THE CASE OF WORKER'S COMPENSATION THERE ARE OFFSETTING BENEFITS.
AND THOSE OFFSETTING BENEFITS MAKE ALL THE DIFFERENCE, WHICH IS WHY REMOVAL FROM THE JURY'S PROVINCE TAKES PLACE IN WORKER'S COMPENSATION CASES.
>> GO AHEAD.
>> BUT AS I UNDERSTOOD KRUGER, WHETHER YOU HAVE ON THESE ACCESS TO COURTS ISSUES, YOU CAN EITHER HAVE AND THIS IS FROM THE COMMON LAW, YOU CAN EITHER HAVE SOMETHING THAT THE LEGISLATURE HAS PUT IN PLACE THAT SORT OF AUGMENTS THAT RIGHT.
>> THE ALTERNATIVE BENEFIT, SURE.
>> THE ALTERNATIVE BENEFIT.
OR THAT THERE'S SOME GREAT PUBLIC NECESSITY FOR IT.
>> RIGHT.
>> AND SO IN SMITH, THE SECOND PART WAS NOT ARGUED.
IT WAS SIMPLY THE FIRST PART, WHICH WAS THE ALTERNATIVE BENEFIT, AND THEY SAID THERE'S NO ALTERNATIVE BENEFIT.
>> RIGHT.
>> BUT IN THIS CASE DON'T WE HAVE THE SECOND POSSIBILITY, WHICH IS THE PUBLIC YOU KNOW, THE GREAT PUBLIC INTEREST HERE.
>> RIGHT.
>> AND THE INSURANCE CRISIS THAT THE LEGISLATURE HAS
>> BUT THOSE SAME CLAIMS OF OVERPOWERING PUBLIC NECESSITY EVEN THOUGH NOT DECIDED BY THIS COURT WERE PRESENT IN THE LEGISLATIVE FINDINGS IN THE STATUTE CHALLENGED IN SMITH.
AND WHAT YOU HAVE HERE
>> BUT WAS THAT ACTUALLY THE BASIS OF SMITH.
>> IT WASN'T THE BASIS OF SMITH, BUT THE LEGISLATURE SAID IT WAS MOTIVATED BY A CRISIS IN THE INSURANCE INDUSTRY.

IT SAID DOCTORS WERE LEAVING THE STATES.
BUSINESSES WERE HAVING AN IMPOSSIBLE TIME GETTING LIABILITY INSURANCE.
THEY WERE ALL THE SAME KIND OF DETAILED AND THE SMITH COURT REFERRED TO THIS AS DETAILED LEGISLATIVE FINDINGS AND THEY FOUND THAT THAT DID NOT CHANGE THE EQUATION.
HERE WE KNOW FINANCIAL LIABILITY REQUIRES DOCTORS TO HAVE ONLY $250,000 IN MEDICAL MALPRACTICE INSURANCE.
TESTIMONY INDICATED THAT 85% OF THEM ONLY HAVE $500,000.
>> WOULD YOU HAVE BEEN HAPPIER IF THEY MADE THE CAP AT $250,000?
>> NO.
NO.
>> I MEAN, HAPPY.
WOULD YOU BE CONSTITUTIONALLY
>> IT TILL EXISTS.
IT'S JUST AS IF IF THE LEGISLATURE HAD THE PLENARY AUTHORITY THAT THE UNITED STATES CLAIMS IT HAS TO ADDRESS A CRISIS, IT COULD CHANGE ALL DAMAGES TO $1.
BUT THAT CLEARLY WOULD NOT GIVE YOU ACCESS TO THE COURTS, PROVIDE REDRESS OF GRIEVANCES.
NO MATTER WHAT THE OVERPOWERING NECESSITY MIGHT BE WHICH I CONTEND IS NOT HERE BECAUSE IT DOES NOT YOU KNOW, WHAT WE'VE SHOWN IS PART OF THE FINDINGS THAT MOTIVATED THIS LEGISLATURE WERE IN THE LEGISLATION BEFORE THE HEARINGS.
THE TASK FORCE INDICATED THAT THERE WAS GREAT AMBIGUITY ABOUT THE NATURE OF WHAT THEY WERE FINDING AND THAT THERE WAS NOT NECESSARILY A CRISIS, BUT THERE COULD BE ONE.
AND IF YOU LOOK AT ALL THAT AND YOU LOOK AT WHAT NARROW AMOUNT OF CASES, 2% OF ALL MEDICAL MALPRACTICE CLAIMANTS BRING CASES.
95% OF PEOPLE END UP SETTLING.
THE MEDIAN SETTLEMENT IS $213,000.
>> BUT ISN'T THE FACT THAT YOU HAVE A PREDICTABILITY ON THE NON ECONOMIC DAMAGES HELPS TO THEN IN THE NEGOTIATION PROCESS BECAUSE IT'S NOT THAT THERE'S JUST THIS UNKNOWN AMOUNT OUT THERE.
I MEAN, AGAIN, I UNDERSTAND EVERYTHING YOU'VE SAID, BUT IT SEEMS TO ME THAT REASONABLE OR OVERPOWERING PUBLIC NECESSITY, YOU'RE ASKING US TO MAKE OUR OWN DECISION AS TO WHETHER IN 2003 THERE WAS AN OVERPOWERING PUBLIC NECESSITY.
AND I DON'T READ OUR PRECEDENT AS ALLOWING US TO MAKE OUR OWN SEPARATE EVALUATION OF THE WISDOM OF WHAT THE LEGISLATURE DID.
I MEAN, I DON'T THINK YOU CAN HAVE A CRISIS IN ONE 2003 AND IT JUST KEEPS ON GOING FOR 40 YEARS.
I MEAN, THERE'S BUT THAT'S YOU HAVEN'T REALLY RAISED THAT ISSUE.
>> BUT FRANKLY IF YOU LOOK AT THE SECOND PART OF THAT, THAT IT NOT ONLY HAS TO BE OVERPOWERING PUBLIC NECESSITY, BUT THERE HAS TO BE A LACK OF ARBITRARINESS THAT ACTUALLY LEADS TO RESOLVING THAT PROBLEM OR ADDRESSING THE PROBLEM.
WHAT I'M SUGGESTING TO YOU IS BY VIRTUE OF THE NATURE OF THE JUDGMENTS THAT ARE RENDERED IN COURTS OF FLORIDA, WE ARE NOT SEEING THE KIND OF UNPREDICTABILITY.
THAT JUSTICE DEPARTMENT REPORT WHICH WE CITE INDICATES THAT LESS THAN 5.5% OF ALL CASES IN FLORIDA, MEDICAL MALPRACTICE CASES, RESULT IN JUDGMENT, ECONOMIC AND NON ECONOMIC, ABOVE $1 MILLION.
SO THE NUMBER OF CASES THAT INVOLVE A JUDGMENT OF NON ECONOMIC DAMAGES ABOVE THE CAP IS EVEN A SMALLER PERCENTAGE OF THAT.
AND OF COURSE THE LEGISLATURE MADE THE DECISION THAT IN DEATH CASES LIKE THIS ONE A LARGER CAP OUGHT TO APPLY.
SO THOSE CASES ARE EXTRAORDINARILY RARE.
THERE IS NO WAY THAT SUCH A TINY INCIDENT OF MEDICAL MALPRACTICE CASES CAN HAVE THAT EFFECT OR BE UNPREDICTABLE.

MOREOVER, WE KNOW ECONOMIC DAMAGES ARE BASED ON THE FACTS PRODUCED IN THE RECORD.
WE FIND THAT TO BE A FACTUAL FINDING BY THE JURY.
IT IS NOT SOMETHING THAT'S SPECULATIVE UNDER OUR LAW.
AND IN FACT IT'S NO MORE UNPREDICTABLE THAN ECONOMIC DAMAGES BECAUSE THIS PERSON MAKES A LOT OF MONEY AND SO THEIR LOST WAGES ARE HIGH AND THIS PERSON DOESN'T MAKE A LOT OF MONEY, SO THEIR LOST WAGES ARE LOW.
THE FACT THAT SOMEONE HAS A CAREER AS A PIANIST AND THEY'VE INJURED THEIR HAND AND NO LONGER CAN PURSUE IT MAKES A DIFFERENCE TO SOMEONE WHO'S INJURED THEIR HAND AND DOESN'T HAVE TO USE THAT HAND FOR ANY KIND OF ECONOMIC LABOR.
SO THE UNPREDICTABILITY AND THE FACT THAT MEDICAL INFLATION CONTINUES TO OUTSTRIP CONSUMER INFLATION SHOWS THAT THIS IS NOT A PROBLEM OF PREDICTABILITY.
MOREOVER, AS I SAID, THE DECISION OF A JURY DETERMINING NON ECONOMIC DAMAGES ARE A FACT.
FLORIDA'S CONSTITUTION REQUIRES THAT THE JURY'S VERDICT BE TREATED INVIOLATE.
THE ONLY WAY THAT WE CHANGE THAT VERDICT IS A SUGGESTION OF REMITTITUR WITH THE RIGHT TO PURSUE A NEW JURY TRIAL IF YOU'RE UNSATISFIED WITH THE REMITTITUR.
THERE'S NO AUTHORITY TO CHANGE WHAT THE FACT IS THAT'S BEEN FOUND BY THE JURY.
AND THIS AMOUNTS TO A FUNDAMENTAL, STRUCTURAL ASSIGNMENT OF AUTHORITY TO THE JURY THAT NEITHER A COURT NOR THE LEGISLATURE CAN INFRINGE.
AND THIS STATUTE CLEARLY INFRINGES THAT.
TWO YEARS AGO THE GEORGIA SUPREME COURT INVALIDATED THEIR CAP AND OTHER STATES HAVE DONE THE SAME.
>> COUNSEL, YOU HAVE USED ALMOST ALL YOUR TIME.
I WILL NONETHELESS GIVE YOU AN ADDITIONAL TWO MINUTES FOR REBUTTAL.
>> THANK YOU.
>> MR. CHIEF JUSTICE, AND MAY IT PLEASE THE COURT, DANIEL FOR THE UNITED STATES.
19 YEARS AGO THIS COURT ADDRESSED THE CONSTITUTIONALITY UNDER THE FLORIDA CONSTITUTION OF SIMILAR CAPS ON NON ECONOMIC DAMAGES AS ARE AT ISSUE HERE.
>> ISN'T BUT I THOUGHT AND I HAVE READ ALL THE CASES.
JUST THEY'RE ALL BLENDING TOGETHER RIGHT NOW.
THAT THAT DID HAVE TO DO WITH THE WHAT WOULD HAPPEN IF YOU WENT TO ARBITRATION?
>> THERE WERE TWO CAPS AT ISSUE IN THAT CASE, YOUR HONOR, ONE OF WHICH WAS A $250,000 CAP ON ECONOMIC DAMAGES IF BOTH PARTIES AGREED TO ARBITRATION.
THE SECOND CAP WAS IF THE DEFENDANT OFFERED ARBITRATION AND THE PLAINTIFF REJECTED IT AND NONETHELESS WENT TO COURT, THERE WAS A $350,000 CAP ON NON ECONOMIC DAMAGES.
SO THAT CAP APPLIED NOTWITHSTANDING THE FACT THAT ARBITRATION WAS NOT IMPLICATED IN THAT CASE.
THIS COURT FOUND THAT DID NOT VIOLATE THE CONSTITUTION'S ACCESS TO COURTS, DID NOT VIOLATE EQUAL PROTECTIONS GUARANTEE AND JURY TRIAL RIGHT.
>> LET'S GO TO THE ACCESS OF COURTS BECAUSE THAT'S NOT BEEN ADDRESSED BY THE 11TH CIRCUIT.
THE TEST IN THE CASE, YOU RECOGNIZE THERE HAS TO BE AN OVERPOWERING PUBLIC NECESSITY?
>> WELL, YOUR HONOR, THE COURT ADDRESSED BOTH PRONGS OF THE KLUGER TEST, THE OVERWHELMING PUBLIC NECESSITY.
>> AND HOW DO YOU LOOK AT YOU KNOW, THERE HAVE BEEN FOR AS LONG AS I'VE, JUST ABOUT, BEEN IN PRACTICE, DIFFERENT TYPES OF MEDICAL MALPRACTICE CRISES USUALLY RELATED TO BUSINESS CYCLES.
IS IT ANYTHING THAT THE LEGISLATURE SAYS THERE'S A CRISIS AND THERE'S TESTIMONY.
THERE'S A CRISIS, THAT THE COURT HAS TO ACCEPT THE FACT THERE'S A CRISIS.
IN OTHER WORDS, HOW DO WE WHAT IS THE EVALUATION OF THOSE STATEMENTS?

>> YOUR HONOR, THIS COURT'S REVIEW OF LEGISLATIVE FACT FINDING IS EXTREMELY DIFFERENTIAL.
THIS COURT HAS CONSISTENTLY DEFERRED TO LEGISLATIVE FACT FINDING UNLESS THOSE FACTS ARE PROVEN TO BE CLEARLY ERRONEOUS.
IF THE COURT DETERMINES THAT THE EXISTENCE OF A CRISIS IS IN FACT A FACT SUBJECT TO DETERMINATION, I THINK THE COURT SHOULD NONETHELESS DEFER TO THE LEGISLATURE'S JUDGMENT, AS IT HAS REPEATEDLY DONE, NOT ONLY IN THE ECHARTE CASE, BUT IN OTHER CASES SUCH AS
>> SO IF IT'S AN OVERPOWERING PUBLIC NECESSITY, THERE'S A CRISIS, DOES THAT CRISIS THAT STARTS IN THIS CASE IN 2003, IS IT ARE THEY ENTITLED TO SAY THERE'S A CRISIS IN PERPETUITY?
SAY IT'S A MORTGAGE FORECLOSURE CRISIS AND THERE'S STATUTES PASSED AND THEY RESTRICT RIGHTS.
DOES THAT GET TO STAY IN THE LAW FOREVER?
I MEAN, YOU KNOW, WITHOUT IT EVER BEING QUESTIONED?
BECAUSE IN 2003 THERE WAS A CRISIS?
>> WELL, YOUR HONOR, I HAVE SEVERAL ANSWERS TO THAT QUESTION.
ONE IS THAT WHILE PLAINTIFFS MENTION THAT A CRISIS CAN ABATE, THERE IS NOT AN ISSUE THAT HAS BEEN DIRECTLY PRESENTED TO THIS COURT HERE.
SECOND, I WOULD SAY THAT THERE'S NO EVIDENCE THAT THE FUNDAMENTAL CIRCUMSTANCES IN FLORIDA HAVE CHANGED SUCH THAT THE CRISIS NO LONGER EXISTS.
WHAT THE EVIDENCE SHOWS AS THE FLORIDA OFFICE OF INSURANCE REGULATION HAS FOUND IS THAT THE CHANGES TO THE LAW IN 2003 HAVE STABILIZED THE MEDICAL NEGLIGENCE INSURANCE INDUSTRY IN FLORIDA.
SO
>> CAN YOU LOOK AND I DID SEE THAT STUDY, BUT THERE WERE A LOT OF CHANGES.
LIKE THERE'S PRE SUIT MEDIATION.
YOU'VE GOT TO FIND AN EXPERT.
YOU KNOW, THERE WAS A WHOLE HOST OF THINGS.
AND SO LET'S ON THIS ONE, CONCERN I HAVE ALWAYS HAD WITH THESE CAPS, TRY TO UNDERSTAND HOW IT HELPS DOCTORS OR THE INSURANCE COMPANIES, IS IT IS, AGAIN, NO QUESTION IT IS UNEQUALLY IMPACTING THE MOST SERIOUSLY INJURED AND CATASTROPHIC INJURED PEOPLE AND CHILDREN.
TEN YEAR OLD LOSES HIS SIGHT AND THAT PAIN AND SUFFERING IS CAPPED FOR THE REST OF HIS LIFE.
IT'S $1 MILLION.
WHEREAS SOMEBODY THAT HAD A BAD RESULT FROM A SURGERY, THAT'S YOU KNOW, THEY GET THE FULL MEASURE OF COMPENSATION IS REALLY THEIR ARGUMENT.
IF IT'S TRUE AND IN THOSE CASES WITH THE CATASTROPHICALLY INJURED, THE BULK OF THE DAMAGES ARE THE ECONOMIC DAMAGES, WHICH HAVE, AS WE KNOW WITH THE NEUROLOGICAL BIRTH INJURIES, WHICH ARE CAN HAVE THAT'S WHERE THE BIG DAMAGES ARE.
SO WHERE WAS IT EVER ESTABLISHED THAT THE AMOUNT OF THE NON ECONOMIC DAMAGES, JUST LIMITING IT WASN'T A SCHEDULE SO THAT SOMEBODY, YOU KNOW, IT'S $100,000 IF YOU ONLY HAVE THIS KIND OF INJURY, BUT IT'S ONLY FOR THE MOST CATASTROPHICALLY INJURED, THAT CURBING THOSE TO $1 MILLION WAS GOING TO HAVE ANY EFFECT ON ANYTHING.
AND, YOU KNOW, WAS THAT AM I MISSING SOMETHING?
DO YOU UNDERSTAND WHAT I'M ASKING?
>> I UNDERSTAND YOUR QUESTION.
>> I DON'T SEE THE CONNECTION.
I APPRECIATE THE CRISIS.
I KNOW THAT DOCTORS IT'S A FOR THEM TO ALWAYS BE UNDER THE THREAT OF FEELING LIKE THEY'RE GOING TO BE SUED AND ANYTHING THEY CAN DO WHERE IT FEELS LIKE IT'S GOING TO BE A LITTLE BIT BETTER, YOU KNOW, IT FEELS BETTER.

BUT HOW IS IT REALLY HELPING DOCTORS, YOU KNOW, IN THOSE KINDS YOU KNOW, IF IT'S SUCH A SMALL PERCENTAGE OF CASES?
>> WELL, YOUR HONOR, I THINK THE ANSWER IS THAT THE FLORIDA LEGISLATURE BUILT A MECHANISM INTO LAW TO ENSURE THAT MEDICAL NEGLIGENCE INSURANCE BECAME MORE AFFORDABLE.
THAT'S THE PROVISION WE POINTED OUT THAT REQUIRED THE FLORIDA OFFICE OF INSURANCE REGULATION TO DETERMINE THE SAVINGS THAT WOULD BE PROVIDED BY THE 2003 LAW, INCLUDING THE CAPS, AND TO MANDATE THAT MEDICAL NEGLIGENCE INSURERS IN FLORIDA INCORPORATE THAT SAVINGS INTO THEIR NEXT YEAR'S RATE FILING.
SO THAT'S WHAT OCCURRED IN 2003.
THE FLORIDA OFFICE OF INSURANCE REGULATION DETERMINED THAT THIS STATUTE WOULD PROVIDE A7.8% DECREASE IN PREMIUMS AND IT MANDATED INSURERS INCORPORATE THAT DECREASE INTO THEIR NEXT YEAR'S RATE FILINGS.
AND SO THAT PRECISE MECHANISM IS WHAT THE FLORIDA LEGISLATURE USED TO ADDRESS TO ENSURE THAT THE MEDICAL NEGLIGENCE INSURANCE PROVIDERS IN FLORIDA WOULD PASS THE SAVINGS PROVIDED BY THESE CAPS ON TO DOCTORS, THUS ENSURING THAT DOCTORS CONTINUE TO PRACTICE IN HIGH RISK SPECIALTIES, CONTINUE TO TREAT HIGH RISK PATIENTS, DID NOT LEAVE UNDESIRABLE PERHAPS UNDESIRABLE AREAS AND THEN ENSURING FLORIDIANS ACCESS TO THE NECESSARY HEALTH CARE.
AND THE FLORIDA OFFICE OF INSURANCE REGULATION, AS I POINTED OUT, FOUND IN ITS 2010 ANNUAL REPORT THAT THESE CAPS AND THAT THE LEGISLATIVE REFORMS ENACTED IN 2003 WERE WORKING, THAT THEY HAD STABILIZED THE INSURANCE MARKET IN FLORIDA, THAT INSURERS THAT WERE THREATENING TO LEAVE THE STATE DID NOT LEAVE THE STATE, THAT SOMETHING LIKE 18 NEW INSURERS ENTERED THE STATE AFTER THE FORM.
ONE OF THE AMICUS BRIEFS GOES INTO MORE DEPARTMENT THIS IN THIS ISSUE.
BUT THESE INSURANCE REFORMS HAVE WORKED AND CONTINUED TO WORK.
PLAINTIFF'S SUGGESTION THAT THE CRISIS HAS ABATED BECAUSE THE REFORMS WORKED IF TAKEN TO ITS CONCLUSION WOULD REQUIRE THIS COURT TO OVERTURN THIS LAW, SENDING FLORIDA INTO ANOTHER CRISIS AND REQUIRING THE LEGISLATURE TO REACT AND IT WOULD PERPETUATE THIS BOOM AND BUST CYCLE THAT HAS AFFLICTED MEDICAL NEGLIGENCE INSURANCE IN FLORIDA.
THESE CAPS HAVE WORKED FOR THE PAST NINE YEARS, AND THERE'S NO SUGGESTION THAT THEY'RE NOT CONTINUED TO BE NEEDED GOING INTO THE FUTURE.
>> IS THERE A DIFFERENCE IN TERMS OF THE ANALYSIS I APPRECIATE THAT'S I THINK A VERY SUBSTANTIVELY HELPFUL ANSWER THAT YOU PROVIDED.
IS THE DOES IT MATTER THAT WE'RE DEALING WITH A WRONGFUL DEATH VERSUS I WAS ASKING THAT TO THE PLAINTIFF'S COUNSEL, VERSUS A CATASTROPHICALLY INJURED INDIVIDUAL IN TERMS OF ANY OF THE ARGUMENTS?
>> I THINK IT CERTAINLY MATTERS FOR PLAINTIFF'S JURY TRIAL ARGUMENT, YOUR HONOR. AS WE POINTED OUT ON OUR BRIEF, IN THIS COURT'S PRECEDENCE IN THE 1978 CHEVROLET VAN CASE, WHEN EVALUATING WHETHER THE JURY TRIAL RIGHT HAS BEEN VIOLATED, THE COURT LOOKS TO WHETHER THE CAUSE OF ACTION AT ISSUE PREDATED FLORIDA'S FIRST CONSTITUTION IN 1845, I BELIEVE IT WAS.
AND AS THIS COURT HAS POINTED OUT, THERE WAS NO CAUSE OF ACTION FOR WRONGFUL DEATH AT COMMON LAW.
SO THERE WAS NO CAUSE OF ACTION AS EXISTS HERE AT COMMON LAW PREDATING THE FLORIDA CONSTITUTION'S FIRST ENACTMENT.
AND THUS THE CAPS ON THESE DAMAGES CANNOT POSSIBLY VIOLATE THE FLORIDA CONSTITUTION'S JURY TRIAL PROVISION.
>> WHAT ABOUT ACCESS TO COURTS?
>> I'M NOT SURE THAT THE FACT THAT THIS IS A WRONGFUL DEATH ACTION VERSUS A MEDICAL NEGLIGENCE ACTION IMPLICATES ACCESS TO COURTS INQUIRY OTHER THAN THE FACT THAT I'M NOT SURE THAT IT IMPLICATES, BUT I HAVEN'T FOCUSED ON THAT ISSUE.

>> I GUESS WHAT I SEE IS BECAUSE, AGAIN, I LOOK AT MISS I DON'T KNOW IF I'M SAYING IT RIGHT.
IT SEEMS BECAUSE THE LEGISLATURE CREATES THE CATEGORIES, ADULT CHILDREN, MINOR CHILDREN, YOU KNOW, THEY'VE CHANGED THAT OVER THE YEARS, IT JUST SEEMS IN TERMS OF THE CONSTITUTIONAL RIGHTS, IT JUST SEEMS THAT THE ANALYSIS HAS TO BE DIFFERENT IN SOME WAY.
IT'S A FRIENDLY QUESTION.
THAN IF IT WERE JUST A CASE OF PERSONAL INJURY THAT HAS RECOGNIZED ELEMENTS THAT HAVE BEEN THERE SINCE, YOU KNOW, COMMON LAW.
>> I UNDERSTAND.
YOUR HONOR, WE HAVEN'T MADE THIS ARGUMENT IN OUR BRIEF, BUT IN THE KLUGER CASE THE COURT LOOKED AT WHETHER THE CAUSE OF ACTION EXISTED IN 1968, AT THE TIME OF THE REENACTMENT OF THE FLORIDA CONSTITUTION AT THAT TIME.
HOWEVER, THE ACCESS TO COURTS PROVISION PREDATES THE FLORIDA'S 1968 CONSTITUTION.
IT EXISTED IN THE CONSTITUTION THAT PREDATED THE 1968 CONSTITUTION.
I'M NOT SURE IF THERE WAS A THIRD CONSTITUTION FLORIDA CONSTITUTION BEFORE THAT.
SO IT COULD BE THAT IF THE COURT WANTED TO DISTINGUISH WRONGFUL DEATH FROM MEDICAL NEGLIGENCE DIRECTLY AFFECTING THE PLAINTIFF THAT IT COULD SAY THAT THAT PART OF KLUGER WAS WRONG, THAT THE COURT SHOULD LOOK AT THE ACCESS TO COURTS PROVISION HISTORICALLY, NOT SIMPLY THE 1968 ENACTMENT OF THE ACCESS TO COURTS PROVISION.
AND IN THAT WAY THE COURT COULD MOVE THE LINE BACK AND LIKE THE JURY TRIAL PROVISION, THERE WAS NO COMMON LAW RIGHT TO SUE FOR WRONGFUL DEATH.
THAT WAY THE COURT COULD DISTINGUISH THE CASE AT ISSUE HERE FROM THE MEDICAL NEGLIGENCE CASE THAT COULD COME DOWN THE LINE AND FIND NO ACCESS TO COURTS VIOLATION BECAUSE THERE WAS NO COMMON LAW RIGHT TO THIS CAUSE OF ACTION.
I WOULD SIMILARLY SAY THAT YOUR HONOR ASKED PLAINTIFF'S COUNSEL IF THERE IS AN ACCESS TO COURTS VIOLATION HERE BECAUSE ACCESS TO COURTS HAS NOT BEEN ALTOGETHER DENIED, SIMPLY A LIMIT HAS BEEN PLACED ON DAMAGES.
AGAIN, WE HAVE WORKED WITHIN THIS COURT'S PAST PRECEDENCE IN ECHARTE AND OTHER CASES, THE SMITH CASE, THAT HAVE FOUND THAT CAPS ON NON ECONOMIC DAMAGES DO IMPLICATE THE ACCESS TO COURTS PROVISIONS.
IT WOULD NOT BE WITHOUT A BASIS IN LAW TO SAY THERE'S A DIFFERENCE BETWEEN OUTRIGHT ELIMINATION OF A CAUSE OF ACTION AS EXISTED IN KLUGER AND MANY OF THE NO FAULT INSURANCE CASES AND THE LIMITATION ON DAMAGES.
MISS MCCALL'S SURVIVORS WERE ABLE TO GO INTO COURT AND SUE THE UNITED STATES.
THEY RECOVERED SUBSTANTIAL ECONOMIC AND NON ECONOMIC DAMAGES.
WITHIN THAT FRAMEWORK IT WOULDN'T BE IT WOULD NOT BE UNUSUAL FOR THIS COURT TO FIND NO ACCESS TO COURTS
>> IF THEY WERE SUING THE STATE OF FLORIDA, THEY WERE BE SEVERELY LIMITED JUST BY SOVEREIGN IMMUNITY ON WHAT THEY COULD GET.
THE FEDERAL TORT CLAIM ACT, EVEN THOUGH IT'S NONJURY, GIVES CLOSER COMPENSATION I MEAN BETTER COMPENSATION IT LOOKS LIKE.
WHAT IS YOUR ARGUMENT ON HIS MAIN SUPPORT OF SMITH?
HOW IS THAT DISTINGUISHABLE?
>> WELL, YOUR HONOR, ON THE ACCESS TO COURTS PROVISION, AS JUSTICE QUINCE POINTED OUT, SMITH DID NOT ADDRESS THE SECOND PRONG OF THE TEST AT ALL.
IT FOUND THERE WAS NO COMMENSURATE BENEFIT.
WE HAVE NOT ARGUED THAT THIS STATUTE PROVIDES A COMMENSURATE BENEFIT.
WE HAVE SIMPLY ARGUED THAT IT SATISFIES THE SECOND PRONG, AS THIS COURT FOUND SIMILAR CAPS TO SATISFY IN ECHARTE.
WE THINK THAT IS DIRECTLY ON POINT AND SMITH HAS NO BEARING ON THE ACCESS TO COURTS QUESTION.

>> THIS CASE WAS BROUGHT UNDER 766.118(2)?
>> THAT'S CORRECT, YOUR HONOR.
>> IN THE EQUAL PROTECTION ANALYSIS DO WE LOOK AT THE OTHER SUBSECTIONS OF THIS STATUTE TO DETERMINE OVERALL IF THIS CAP ON DAMAGES VIOLATES EQUAL PROTECTION? BECAUSE, YOU KNOW, I FIND IT VERY INTERESTING THAT, YOU KNOW, THERE'S A SECTION ON NONPRACTITIONERS AND WHAT THE CAP ON THEIR DAMAGES THE ECONOMIC DAMAGES ARE FOR THOSE PATIENTS.
AND THEN YOU HAVE THE SECTION WHERE THERE'S A DIFFERENT CAP ON ECONOMIC DAMAGES IF YOU A PERSON ON MEDICAID.
AND SO I'M WONDERING IF YOU LOOK AT ALL OF THESE OTHER SUBSECTIONS IN MAKING OUR DETERMINATION ABOUT THE EQUAL PROTECTION, WHETHER THERE'S A VIOLATION OF EQUAL PROTECTION.
>> WELL, I THINK THE FACT THAT THERE ARE OTHER LIMITATIONS ON DAMAGES THAT APPLY IN DIFFERENT CIRCUMSTANCES UNDERSCORES THE FACT THAT THE LEGISLATURE WAS ACTING CAREFULLY HERE AND DREW THESE LINES FOR A REASON.
FOR EXAMPLE, TO ENCOURAGE PHYSICIANS TO CONTINUE TO PRACTICE HIGH RISK SPECIALTIES SUCH AS EMERGENCY ROOM CARE, THE LEGISLATURE ENACTED A LOWER LIMIT ON NON ECONOMIC DAMAGES IN EMERGENCY SITUATIONS.
>> SO WHY IS THERE A LOWER CAP ON ECONOMIC DAMAGES FOR MEDICAID PATIENT?
>> I'M NOT AWARE OF THAT PROVISION AND I DON'T THINK IT'S AT ISSUE HERE.
THE SECOND PART OF MY ANSWER WAS MISS MCCALL AS I UNDERSTAND IT FROM HER ESTATE BRINGS AN AS APPLIED CHALLENGE.
THE STATUTE AS APPLIED TO HER AN UNCONSTITUTIONAL.
THE ONLY PROVISION OF THE STATUTE APPLIED TO MISS MCCALL WAS SECTION 2.
MISS MCCALL I MEAN CERTAINLY UNDER FEDERAL UNDERSTANDING OF STANDING I DON'T BELIEVE WOULD HAVE STANDING TO ARGUE THAT THE STATUTE'S UNCONSTITUTIONAL.
>> THAT GOES BACK TO DO WE LOOK AT THOSE SECTIONS IN DETERMINING THE EQUAL PROTECTION ISSUE?
>> I DON'T THINK THAT THE COURT COULD RULE THAT IT VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT FINDS A FLAW WITH ONE OF THE OTHER SECTIONS.
HOWEVER, I WAS POINTING OUT THAT THE OTHER SECTIONS CAN INFORM THE COURT'S ANALYSIS AS TO WHETHER THE LEGISLATURE WAS ACTING RATIONALLY.
AND IN FACT HERE IT DIDN'T JUST DRAW SOME ARBITRARY LINE, AS PLAINTIFFS HAVE SUGGESTED, BUT AFTER EVALUATING THE 345 PAGE TASK FORCE REPORT, AFTER HEARING EXPERT WITNESS TESTIMONY, AFTER LOOKING AT THOUSANDS OF AFFIDAVITS FROM FLORIDIANS, THE LEGISLATURE DEVELOPED A RELATIVELY COMPLEX STRUCTURE OF CAPS ON NON ECONOMIC DAMAGES.
>> I MEAN, ACTUALLY, AS WAS POINTED OUT, THIS IS MORE, QUOTE, GENEROUS, I MEAN, FOR THAN THE THAN THE TASK FORCE RECOMMENDED, RIGHT?
THEY RECOMMENDED A LOWER CAP.
>> THAT'S RIGHT, YOUR HONOR.
THE TASK FORCE RECOMMENDED A $250,000 CAP.
THE LEGISLATURE FOUND THAT THAT CAP WAS NOT APPROPRIATE AND INSTEAD CREATED A SCHEME OF MORE MOVING PARTS.
>> DOES THE AMOUNT OF MONEY MATTER?
THERE'S A SUGGESTION, WELL, IF YOU ALLOW THE $1 MILLION CAP, THEY COULD ONE DAY MAKE IT $10.
HOW DOES THAT AFFECT THE ANALYSIS?
>> WELL, I THINK THE COURT HAS TO LOOK AT THE CAPS THAT ARE BEFORE IT AND THE SAVINGS THEY WERE FOUND TO PROVIDE.
CLEARLY IF THE LEGISLATURE CAPPED NON ECONOMIC DAMAGES AT A DOLLAR, THERE WOULD BE A QUESTION A DIFFERENT QUESTION AS TO WHETHER THAT PARTICULAR CAP WAS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL INTEREST.
>> OBVIOUSLY THE LESS COMPENSATION YOU PROVIDE, PRESUMABLY THE LOWER THE INSURANCE PREMIUM, SINCE THE RISK IS REDUCED SUBSTANTIALLY.

SO ANYTIME YOU LOWER THE BENEFITS THAT ARE GOING TO BE PAID OUT, YOU PRESUMABLY ARE GOING TO GET A LOWERING OF THE PREMIUM.
>> I UNDERSTAND THAT, YOUR HONOR.
I'M SIMPLY SAYING THAT WHILE IT MAY PRESENT A DIFFICULT QUESTION FOR THE LEGISLATURE TO HAVE PUT A $1 CAP ON NON ECONOMIC DAMAGES, THEY DIDN'T.
THEY GAVE A $500,000 CAP ON NON ECONOMIC DAMAGES AGAINST PRACTITIONERS.
THAT'S INCREASED TO A MILLION DOLLARS.
>> LET ME ASK YOU ON A RIGHT TO TRIAL BY JURY, JUDGE ROGERS IN FOOTNOTE 37 OR OPINION AS I UNDERSTAND IT DID NOT REACH THAT ISSUE.
IS THAT YOUR UNDERSTANDING, THAT THE DISTRICT COURT DID NOT REACH THE ISSUE OF A TRIAL BY JURY BECAUSE IT'S UNDER THE FEDERAL TORT CLAIMS ACT?
>> MY UNDERSTANDING IS THAT THE I READ JUDGE ROGERS' OPINION AS SAYING THAT THE JURY TRIAL GUARANTEE BECAUSE THE ACT GIVES NO RIGHT TO A JURY TRIAL.
THE UNITED STATES DID NOT MAKE THAT ARGUMENT BEFORE THE 11TH CIRCUIT AND HAS NOT MADE IT HERE.
>> SO SHOULD WE EVEN REACH THE THIRD ISSUE AS TO WHETHER OR NOT IT VIOLATES THE RIGHT TO TRIAL BY JURY?
>> IF THIS COURT DOESN'T THINK IT APPROPRIATE TO REACH THAT ISSUE ON THE BASIS OF THE DISTRICT COURT'S DECISION, I WOULD NOT I'M NOT GOING TO ASK THE COURT TO REACH IT.
HOWEVER, I THINK IT'S AN EASY ISSUE FOR THE COURT TO DECIDE BECAUSE THIS CAUSE OF ACTION DID NOT EXIST AT COMMON LAW, THE JURY TRIAL RIGHT ISN'T IMPLICATED.
EVEN IF THE JURY TRIAL RIGHT WERE IMPLICATED, I THINK IT'S QUITE APPARENT THAT THE STATUTE DOESN'T INFRINGE ON THE RIGHT TO A TRIAL BY JURY.
IT SIMPLY DELINEATES THE MATRIX OF LAWS UNDER WHICH A JURY TRIAL DECISION IS APPLIED.
AND I WOULD EMPHASIZE THE FACT THAT ECHARTE THE DISSENTING JUSTICES WOULD HAVE FOUND THAT THOSE STATUTES VIOLATED THE FLORIDA'S CONSTITUTION'S JURY TRIAL GUARANTEE AND IT REJECTED THAT AND HELD THAT THERE WAS NO JURY TRIAL VIOLATION.
>> YOU DO HAVE LANGUAGE IN ST. MARY'S THAT SEEMS TO BE CONTRARY TO ECHARTE.
>> WELL, THERE'S A SENTENCE IN SMITH, BUT SMITH WAS FROM 1987.
>> I'M TALKING ABOUT THE ST. MARY'S CASE.
>> I UNDERSTAND, YOUR HONOR, BUT THE JURY TRIAL LANGUAGE IS IN SMITH FROM 1987.
IT'S A SINGLE LINE.
IT'S DICTA.
ECHARTE HELD THERE WAS NO VIOLATION OF THE JURY TRIAL GUARANTEE AND THAT WAS IN 1993.
THE ST. MARY'S CASE HAS LANGUAGE ABOUT THE EQUAL PROTECTION CLAUSE, NOT ABOUT THE JURY TRIAL GUARANTEE.
I SEE THAT MY TIME IS UP.
IF THERE ARE NO FURTHER QUESTIONS, THANK YOU.
>> JUSTICE PARIENTE, YOU ASKED DO WE HAVE TO JUST ACCEPT WHEN THE LEGISLATURE DECLARES OVERPOWERING PUBLIC NECESSITY.
IN SMITH THIS COURT EXPLICITLY HELD THAT THAT WAS NOT SUFFICIENT.
>> HOW ABOUT HIS ARGUMENT THAT THIS LOOKS LIKE IT ACTUALLY HELPED THE SITUATION BY LOWERING PREMIUMS?
AND WE COULD ALL SPECULATE THERE MIGHT BE OTHER REASONS
>> I RECALL THE EVIDENCE IS CONTRARY TO THAT.
EMPIRICAL EVIDENCE ESTABLISHES THERE WAS NO CRISIS.
THE NUMBER OF MEDICAL MALPRACTICE CASES CONTINUED TO DECLINE BEFORE THE CAP, HAS NOT CHANGED AFTER.
THERE WAS NO DOCTOR EXODUS.
IN FACT, FLORIDA CONTINUED TO ENJOY GROWTH IN THE NUMBER OF DOCTORS BOTH IN RURAL AREAS, NONRURAL AREAS, IN ALL SPECIALTIES.
THERE WAS NO IMPACT ON INSURANCE PREMIUMS.

AS I SAID, IT'S IMPLAUSIBLE TO THINK SUCH A NARROW NUMBER OF CASES CAN HAVE THAT KIND OF IMPACT.
THERE'S NO IMPACT ON INSURANCE PROFITABILITY.
ONE OF THE INSURERS WHO TESTIFIED IN FRONT OF THE LEGISLATURE SAID FLORIDA WAS ITS MOST PROFITABLE MARKET.
THERE IS NO IMPACT ON HEALTH CARE COSTS BECAUSE MEDICAL MALPRACTICE ACCOUNTS SO LITTLE OF IT AND THIS AFFECTS SO A LITTLE OF THAT MEDICAL MALPRACTICE.
CONSTITUTIONAL PROTECTIONS EXIST REGARDLESS OF THE NATURE OF THE INSURANCE INDUSTRY, ITS BUSINESS CYCLE AND THE NATURE OF THE HEALTH CARE INDUSTRY.
JUSTICE, YOU ASKED WHETHER BECAUSE OF JUDGE ROGERS' RULING WHETHER THE JURY TRIAL ISSUE WAS BEFORE YOU.
THE 11TH CIRCUIT REVERSED THAT RULING.
IT EXPLICITLY HELD THAT EVEN THOUGH THIS WAS A FEDERAL TORTS CLAIMS ACT CASE, THEY WANTED TO KNOW WHETHER FOR ANOTHER LITIGANT THE MEDICAL MALPRACTICE CAP WOULD BE AN UNCONSTITUTIONAL VIOLATION OF THE RIGHT TO JURY TRIAL AND THEY CERTIFIED THAT QUESTION TO YOU.
THEY INDICATED THAT THEY REJECTED THE UNITED STATES ARGUMENT THAT IT DOESN'T APPLY TO
>> ANOTHER LITIGANT IN THIS CASE?
>> NO.
ANOTHER LITIGANT GENERALLY.
THE UNITED STATES ENJOYS ONLY THE RIGHTS OF ANY OTHER LITIGANT?
>> THE WHOLE ANOTHER LEVEL OF ADVISORY OPINIONS?
>> BUT THAT IS THE INSTRUCTIONS YOU'VE RECEIVED IN ANSWERING THE QUESTION OF THE 11TH CIRCUIT.
SO BECAUSE OF ALL THOSE THINGS, BECAUSE THE FACT OF THE MATTER IS THAT WE HAVE PLAINTIFFS WHO ARE NOT RECEIVING THE FULL BENEFIT OF THE FACTUAL FINDING OF WHAT THEIR COMPENSATORY INJURY IS, THERE IS NO FURTHER BENEFIT THAT FLOWS TO THEM THAT THEIR RIGHT TO TRIAL BY JURY IS VIOLATED, THAT THE LEGISLATURE IS ESSENTIALLY MAKING A JUDICIAL DECISION BY TAKING AWAY YOUR AUTHORITY TO REMIT DAMAGES WHEN THEY'RE NOT SHOWN BY THE RECORD, WE WOULD ASK THAT THIS COURT HOLD THE STATUTEN CONSTITUTIONAL.
>> WE THANK YOU BOTH FOR YOUR ARGUMENTS.