

January 2022

IDAHO'S NONECONOMIC DAMAGE CAP ON WHISTLEBLOWERS: ADDING ANOTHER CLAIM TO THE LIST OF UNCONSTITUTIONAL CAPS IN IDAHO

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IDAHO'S NONECONOMIC DAMAGE CAP ON WHISTLEBLOWERS: ADDING ANOTHER CLAIM TO THE LIST OF UNCONSTITUTIONAL CAPS IN IDAHO

BROOKE KENNEY*

ABSTRACT

Whistleblower protections have grown in popularity throughout the United States and have occasionally obtained massive jury verdicts. This was the case in *Eller v. Idaho State Police* where the jury returned a verdict of \$1.5 million in noneconomic damages. On appeal, the Supreme Court of Idaho held that whistleblowers could obtain noneconomic damages and no statutory cap on noneconomic damages applied to the whistleblower claims. This was a major decision because it expanded the scope of remedies available to whistleblowers. The defendants settled for \$1.29 million. In direct response to the Supreme Court of Idaho's decision in *Eller*, Idaho legislators enacted House Bill 583 limiting noneconomic damages for whistleblowers to the noneconomic damage cap in section 6-1603 of the Idaho Code. This bill adds whistleblowers to the list of claimants subject to the limitations set forth in Idaho's noneconomic damage cap.

Noneconomic damage caps harm those with the most severe injuries—plaintiffs with legitimate claims of noneconomic harm surpassing the cap. These plaintiffs, who are hurt the most, are left unable to fully recover their damages. Damage caps also impact settlement discussions in favor of defendants, disproportionately affect women, and are unconstitutional in violation of equal protection and the right to a jury trial. For these reasons, the Idaho Legislature should cease enacting noneconomic damage caps, and the constitutionality of the cap should be challenged again in Idaho.

In practice, Idaho's noneconomic damage cap, section 6-1603, puts a ceiling on the amount of damages recoverable for otherwise meritorious claims for relief in medical malpractice, personal injury, and now, pursuant to House Bill 583, whistleblower cases. However, the cap has an exception for the most egregious cases to override the cap's limitations: a plaintiff is able to fully recover and surpass the cap if the tortfeasor's conduct was reckless or felonious in personal injury and medical malpractice cases. This exception is not available to whistleblowers. Thus, the noneconomic damage cap specifically harms whistleblowers because it does not afford them with the ability to override the cap's limitations. The statute is discriminatory and may be a violation of equal protection because it treats whistleblowers differently than other plaintiffs subject to the cap.

If the legislature is going to cap whistleblower damages, it should treat whistleblowing plaintiffs the same as personal injury and medical malpractice plaintiffs. Whistleblowers should be afforded the opportunity to override the cap. The legislature should either allow whistleblowers to recover in full or give them the ability to override the cap for the most egregious cases. This will ensure whistleblowers are fully compensated for the actual injuries suffered and

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encourage whistleblowers to come forward with evidence of wrongdoing despite the risk of retaliation.

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I. INTRODUCTION

The significance and meaning of one's employment are different for everyone. For many Americans, work is a chore, a source of stress, a burden to be borne; but work can also be a liberator, a source of security, a benefit of livelihood. People are free to choose the area of work they want to pursue, and in return, jobs become an important piece of one's identity. A person's job occupies a central role in his or her life and gives him or her a sense of self, security, and well-being. For these reasons, jobs are inextricably linked to who someone is, what he/she is interested in, and his/her status in society.

Due to the importance of employment, problems at work can lead to a deterioration in one's mental health. Therefore, when an employee is retaliated against for reporting an employer's wrongdoing it can have severe impacts on the emotional and mental well-being of the employee. In recent years, states have become increasingly active in enacting statutes protecting employees from

retaliation.¹ Idaho protects public employees in the Idaho Protection of Public Employees Act.² In *Eller v. Idaho State Police*, the Idaho Supreme Court expanded the scope of remedies available to whistleblowers under the Idaho Protection of Public Employees Act by ruling no caps on noneconomic damages apply to whistleblowers.³ Brandon Eller, the plaintiff who blew the whistle, was able to fully recover damages for the legitimate emotional distress he endured due to the retaliation he experienced at work.⁴

In the wake of that important whistleblower case, the Idaho State Legislature enacted House Bill 583 the following year severely limiting noneconomic damages for whistleblowers.⁵ This bill adds to the list of damage caps the state has imposed on otherwise meritorious claims for relief. Noneconomic damage caps do not allow plaintiffs to fully recover, negatively impact settlement negotiations for plaintiffs, and disproportionately affect women, children, elderly, and low-income persons.⁶ Additionally, noneconomic damage caps may be unconstitutional because they impermissibly discriminate depending on the type of tortfeasor and should be challenged again in Idaho.

This Note examines noneconomic damages, the tort reform movement to cap these damages, and how the whistleblower case, *Eller v. Idaho State Police*, sparked new legislation to cap damages for whistleblowers. Specifically, Part I describes noneconomic damages and their importance in the justice system. Part II describes the tort reform movement to cap noneconomic damages, Idaho's noneconomic damage caps, and the leading arguments opposing damage caps. Part III of this Note introduces Idaho's Whistleblower Act, the *Eller* case, and how this decision expanded the scope of remedies for whistleblowers. Part IV introduces the Idaho legislature's decision to cap whistleblower's noneconomic damages. It also provides an overview of the legislature's rationale for enacting House Bill 583, the harmful effects of the cap on whistleblowers, and an alternative approach to capping whistleblower damages. Part V explains how new claims challenging the constitutionality of damage caps in Idaho should arise. The Note concludes with a recommendation that Idaho legislators should reconsider the enactment of noneconomic damage caps.

1. MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* 493–94 (3d ed. 2017).

2. IDAHO CODE §§ 6-2101–2109 (1994).

3. *Eller v. Idaho State Police*, 443 P.3d 161, 171, 165 Idaho 147, 157 (2019).

4. *Id.* at 169, 165 Idaho at 155.

5. H.B. 583, 65th Leg., 2nd Reg. Sess. (Idaho 2020).

6. See discussion *infra* Section II.B Harmful Effects of Tort Reform.

II. NONECONOMIC DAMAGES

The basic goal of damages is to compensate for harm.⁷ Damages for tort claimants can be broadly separated into two categories: economic damages and noneconomic damages.⁸ Economic damages are out-of-pocket costs the plaintiff incurs.⁹ However, in many cases, some degree of pain, suffering, or emotional distress occurs that is not adequately compensated by economic damages alone.¹⁰ This is where noneconomic damages come in to assist economic damages in fully compensating the plaintiff. As the name implies, noneconomic damages compensate for harms that are not easily measured in dollars.¹¹

In Idaho, categories of noneconomic damages include, but are not limited to: “pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; loss of society and companionship; loss of consortium; or destruction or impairment of the parent-child relationship.”¹² Unlike quantifiable economic injuries, such as loss of income or expenses caused by physical injury, noneconomic damages are more difficult to calculate because how much a person has suffered mentally or emotionally is not easily quantified, the law does not provide clear guidelines on how to quantify them, and the amount given is unpredictably determined by the jury based on the evidence at trial.¹³ Therefore, states have varied in the methods used to calculate noneconomic damages and have debated whether such harms should be

7. See RESTATEMENT (SECOND) OF TORTS § 901 (AM. L. INST. 1965).

8. Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197, 199 (1993).

9. *Id.*

10. See Edward C. Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL ADVOC. 317 (1986); see also DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES, 159 (Rachel E. Barkow et al. eds., 5th ed. 2019) (“Damage awards for pain and suffering, even when apparently generous, may well under-compensate victims.”).

11. Martin, *supra* note 10, at 321.

12. IDAHO CODE § 6-1601(5) (2020).

13. F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 492 (2006); Ruda, *supra* note 8, at 202–03; see also Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 912 (1989):

Whatever the categories of non-economic damages allowed in a given jurisdiction, the law provides no objective benchmarks for valuing them. As one commentator notes, “Courts have usually been content to say that pain and suffering damages should amount to ‘fair compensation’ or a ‘reasonable amount,’ without any more definite guide.” Jurors are not to apply a kind of compensatory “golden rule” and ask what they themselves would want in compensation if they were in the shoes of the plaintiff; nor are they to measure what amount a volunteer might demand to undergo equivalent suffering, for there is no market in pain. *Id.* (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 8.1, at 545 (1973)).

compensated at all.¹⁴ But the difficulty in assessing the appropriate amount of noneconomic damages is not a suitable reason to discredit them, and the debate over whether persons should be awarded noneconomic damages is settled.¹⁵ Every American jurisdiction has recognized the importance of noneconomic damages by awarding them in some circumstances.¹⁶

The basic principle of awarding compensatory damages is to restore the plaintiff to his rightful position.¹⁷ A plaintiff's rightful position is "the position [the plaintiff] rightfully would have come to but for defendant's wrong."¹⁸ Noneconomic damages are necessary to return the plaintiff to his or her rightful position in circumstances where the injured plaintiff is not fully compensated with economic damages alone. In fact, many tort victims are not adequately compensated by economic damages alone and need noneconomic damages to fully recover to their rightful position.¹⁹

Noneconomic damages are important in the employment context. Loss of one's job, discrimination, retaliation, or sexual harassment in the workplace are examples of situations that can be extremely traumatic and may give rise to legitimate claims of emotional distress.

Despite their importance in tort cases, noneconomic damages for emotional distress have historically been marginalized and labeled as "arbitrary."²⁰ For example, cases have disregarded emotional harms by stating that these claims are only brought by ultrasensitive persons or those with a preexisting disposition for emotional injuries.²¹ Despite tort law's marginalization of emotional distress, these claims are valid and those who suffer emotional harms are deserving of compensation. In sum, noneconomic damages are an essential component of compensatory damages and assist economic damages in fully compensating an injured plaintiff to their rightful position.

14. Martin, *supra* note 10, at 322–25; see also Amanda E. Haiduc, *A Tale of Three Damage Caps: Too Much, Too Little and Finally Just Right*, 40 CASE W. RESV. L. REV. 825, 830 (1989).

15. Martin, *supra* note 10, at 318.

16. Ruda, *supra* note 8, at 200.

17. LAYCOCK & HASEN, *supra* note 10, at 9 (quoting U.S. v. Hatahley, 257 F.2d 920 (10th Cir. 1958)).

18. LAYCOCK & HASEN, *supra* note 10, at 12.

19. See LAYCOCK & HASEN, *supra* note 10, at 12–15, 131–39.

20. Ruda, *supra* note 8, at 202–05 (proponents assert noneconomic damages are "arbitrary" because they rely on jury sympathies rather than the claim's merits and are determined by jury speculation).

21. Ruda, *supra* note 8, at 213–15.

III. THE TORT REFORM MOVEMENT

A. History of the Tort Reform Movement

Noneconomic damages have been upheld in every American jurisdiction.²² However, many believe that the unpredictable nature of noneconomic damage awards threaten the liability insurance system that funds a majority of tort compensation.²³ In the 1970s, a crisis in rising healthcare costs was believed to be caused, in part, by “out of control jury verdicts” of noneconomic damages coupled with the increasing amount and availability of these awards.²⁴ Tort reformists blamed the healthcare insurance crisis on noneconomic damage awards.²⁵ Various proposals were made by tort reformists to curtail the rising healthcare and insurance costs.²⁶ Some of the most common proposals included: limiting recovery for noneconomic damages, abolishing punitive damages, and shortening the statute of limitations.²⁷ Since the tort reform movement began in the 1970s, every state has enacted at least one of their proposals.²⁸ Of the proposals, fixed limits on noneconomic damages, also known as damage caps, were the most prevalent.²⁹ The effort to put fixed limits on recovery for noneconomic damages was, and continues to be, at the center of the tort reform movement.³⁰

Noneconomic damage cap statutes are enacted by the legislature and limit recovery by defining the maximum amount recoverable.³¹ In other words, these caps create a ceiling for which a plaintiff’s recovery on noneconomic damages cannot surpass—even if the jury awards an amount greater than the cap. But if

22. Ruda, *supra* note 8, at 200.

23. Bovbjerg et al., *supra* note 13, at 917.

24. *See, e.g., Eller*, 443 P.3d at 161, 165 Idaho at 147 (jury initially awarded \$1.5 million in noneconomic damages for emotional distress); Martin, *supra* note 10, at 325; Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 406 (2005).

25. *Malpractice and Its Effects on the Healthcare Industry*, TEX. A&M UNIV. CORPUS CHRISTI (Sept. 27, 2016), <https://online.tamucc.edu/articles/malpractice-and-its-effects-on-the-healthcare-industry.aspx>; *see also* MARTIN D. WEISS ET AL., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NON-ECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE (2003), <https://www.floridasupremecourt.org/content/download/242740/file/SC11-1148%20Medical%20Malpractice%20Caps.%20Weiss%20Ratings.pdf>.

26. LAYCOCK & HASEN, *supra* note 10, at 153.

27. LAYCOCK & HASEN, *supra* note 10, at 153.

28. LAYCOCK & HASEN, *supra* note 10, at 153–54.

29. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1264 (2004).

30. *Id.*

31. W. McDonald Plosser, *United States: Sky’s the Limit? A 50-State Survey of Damages Caps and the Collateral Source Rule*, MONDAQ (Dec. 11, 2018), <https://www.mondaq.com/unitedstates/insurance-laws-and-products/762574/sky39s-the-limit-a-50-state-survey-of-damages-caps-and-the-collateral-source-rule>.

noneconomic damages are needed to fully compensate the plaintiff, why did tort reformists suggest capping noneconomic damages and not economic damages? Tort reformists focused their efforts on noneconomic damages because these losses are more speculative, not readily quantifiable, and historically marginalized compared to economic losses.³²

Initially, legislatures following the tort reform movement put damage caps solely on medical malpractice claims to decrease healthcare insurance costs.³³ But as tort reform grew in popularity, many states limited the juries' discretion to award damages by enacting caps on claims other than medical malpractice, such as personal injury or generally for all tort claims.³⁴ Today, noneconomic damage caps are enacted in twenty-three states, including Idaho, for various claims such as: medical malpractice,³⁵ products liability,³⁶ personal injury,³⁷ or general tort-related claims.³⁸ The tort reform movement began in response to the healthcare crisis, but it has escalated beyond its original purpose and now imposes limitations on a variety of meritorious claims for relief.

B. Harmful Effects of Tort Reform

Noneconomic damage caps are extremely controversial.³⁹ On one hand, the proponents of the tort reform movement have focused on the difficulty in measuring noneconomic damages and the punitive nature of imposing high noneconomic damage liability.⁴⁰ Tort reformists believe noneconomic damages are subjective, unpredictable, and should be limited or even abolished.⁴¹ Additionally, there is a belief that juries tend to be overly sympathetic to victims and award a

32. See Haiduc, *supra* note 14, at 830–31.

33. Bovbjerg, *supra* note 13, at 908–09.

34. LAYCOCK & HASEN, *supra* note 10, at 154.

35. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, CTR. FOR JUST. & DEMOCRACY 1, 2 (Aug. 22, 2020), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>. Twenty-three states have noneconomic damage caps in medical malpractice cases. *Id.*

36. *Id.* Eight states have noneconomic damage caps in products liability cases. *Id.*

37. *Id.* at 1. Eight states have noneconomic damage caps in personal injury or general tort cases.

Id.

38. *Id.*

39. Martin, *supra* note 10, at 329, 337–38; see also Ruda, *supra* note 8, at 206. States have not responded to the tort reform movement uniformly. Ruda, *supra* note 8, at 206.

40. Martin, *supra* note 10, at 329, 331–32.

41. Hubbard, *supra* note 13, at 493.

windfall judgment to the plaintiff if uncapped.⁴² Proponents, however, most frequently cite their concerns regarding the availability of insurance coverage and rising insurance premiums or costs.⁴³ This rationale is not surprising due to the origins of the tort reform movement beginning in response to the alleged crisis for rising healthcare costs.

However, the central rationale for imposing damage caps has had relatively no effect on the insurance industry.⁴⁴ Insurance industries have admitted that capping damages has relatively no effect on insurance rates.⁴⁵ For example, the American Institute of Insurance stated, “the insurance industry *never* promised that tort reform would achieve specific premium savings” in a press release.⁴⁶ The president of the American Tort Reform Association also admitted, “[w]e wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.”⁴⁷ Even though insurance insiders and the American Tort Reform Association admit capping damages has relatively no effect on insurance rates, legislators continue to list insurance costs as the primary purpose in enacting damage caps.⁴⁸

In addition to attacking the tort reform’s insurance rationale for capping noneconomic damages, opponents of the movement have stressed the importance of awarding noneconomic damages to fully compensate the victim for physical monetary harms as well as intangible harms.⁴⁹ Noneconomic damages, such as claims for pain and suffering or emotional distress, are just as real as economic damages and caps should not prevent plaintiffs from getting full recovery.⁵⁰ Treating noneconomic damages differently than economic damages reinforces the notion that mental and emotional harms are not real.⁵¹ In this day and age, it is widely understood that emotional and mental harms can be just as harmful, if not more harmful, than economic losses. Capping noneconomic harms and treating these injuries as unimportant perpetuates the marginalization of emotional trauma.

42. Martin, *supra* note 10, at 332; *Effect of Tort Reform on Personal Injury Cases*, ALL LAW, <https://www.alllaw.com/articles/nolo/personal-injury/effect-tort-reform.html> (last visited on Sept. 1, 2021).

43. Martin, *supra* note 10, at 329–37; J. Chase Bryan et al, *Are Non-Economic Caps Constitutional?*, 80 DEF. COUNS. J. 154, 154 (2013).

44. Alexander Calaway, *Idaho Noneconomic Damage Caps: Forty Years of Tort Liability Reform and Constitutional Questions*, 12 IDAHO CRIT. LEGAL STUD. J. 1, 11 (2018–2019).

45. CTR. JUST. & DEM., *Fact Sheet: “Caps” Do Not Lower Insurance Premiums for Doctors (and Insurance Insiders Admit It)* (Apr. 12, 2011), <https://centerjd.org/content/fact-sheet-caps-do-not-lower-insurance-premiums-doctors-and-insurance-insiders-admit-it>.

46. *Id.* (emphasis added).

47. *Id.*

48. H.B. 583 Statement of Purpose/Fiscal Note, 65th Leg., 2nd Reg. Sess. (Idaho 2020) (*see* Statement of Purpose/Fiscal Note).

49. Martin, *supra* note 10, at 333–37.

50. *See* Haiduc, *supra* note 14, at 830 (“[N]oneconomic damages are as genuine as economic damages.”).

51. Ruda, *supra* note 8, at 220.

Limiting noneconomic damages also “hurt[s] those [who] already hurt the most.”⁵² The noneconomic damage cap does not impact plaintiffs whose injuries recover less than the cap.⁵³ In fact, the majority of injuries probably do not reach the capped limit. Thus, plaintiffs with lesser injuries are not affected. Consequently, the cap only impacts those plaintiffs who have the most severe injuries – i.e., those who are awarded noneconomic damages greater than the cap.⁵⁴ The cap then unfairly benefits tortfeasors who cause the most severe harm. Furthermore, a tortfeasor who causes noneconomic harm less than the cap must pay in full, whereas the tortfeasor who causes severe noneconomic harm greater than the cap does not have to fully compensate the victim. Thus, noneconomic damage caps benefit tortfeasors who cause severe harm at the expense of the victims suffering that harm. Why should those who are already suffering the most bear the burden of the noneconomic damage cap?

Caps on noneconomic damages also have an impact on settlement and pre-trial negotiations. Proponents of tort reform argue that noneconomic damage caps encourage settlement and reduce litigation costs.⁵⁵ In fact, noneconomic damage caps do typically increase the amount of cases settled outside of the courts.⁵⁶ In a

52. Kurt Holzer, *The Idaho Non-Economic Damages Cap: A Bad Idea*, HEPWORTH HOLZER, <https://hepworthholzer.com/2019/01/28/idaho-non-economic-damages-cap/> (last visited Sept. 2, 2021).

53. See *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1116, 1120, 134 Idaho 465, 469 (2000) (an Idaho noneconomic damage cap case where the plaintiffs argued against caps and stressed the fact that it only impacts those with the most severe injuries: “I.C. § 6–1603 is arbitrary, capricious, or unreasonable because it arbitrarily discriminates between slightly and severely injured plaintiffs, and between tortfeasors who cause severe and moderate or minor injuries. The \$400,000 cap on noneconomic damages (adjusted for inflation) necessarily applies only to those cases where the plaintiff is severely injured, thereby allowing full recovery for those plaintiffs who suffer moderate injuries, but denying a full recovery to those who have suffered more severe injuries.”).

54. See, e.g., *Estate of McCall v. United States*, 134 So. 3d 894, 902 (Fla. 2014) (quoting *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1075 (Ill. 1997)) (an illustration of how noneconomic damage caps impact those who are hurt the most and need the most compensation: “Plaintiff A is injured moderately, and suffers pain, disability and disfigurement for a month. Plaintiff B is severely injured and suffers one year of pain and disability. Plaintiff C is drastically injured, and suffers permanent pain and disability. For purposes of this example, it is further assumed that a jury awards plaintiffs A and B \$100,000 in compensatory damages for noneconomic injuries. Plaintiff C receives \$1 million for his permanent, lifelong pain and disability. . . With respect to plaintiff C, [the noneconomic damage cap] arbitrarily and automatically reduces the jury’s award for a lifetime of pain and disability, without regard to whether or not the verdict, before reduction, was reasonable and fair.”).

55. Ronen Avraham & Alvaro Bustos, *The Unexpected Effects of Caps on Non-Economic Damages*, 30 INT’L REV. L. & ECON. 291 (2010), <https://law.utexas.edu/faculty/ravraham/unexpected-effects-of-caps.pdf>.

56. *Id.*

study that tested the effects of damage caps on settlement, not only did caps encourage settlement, but the settlement amount for those negotiating under a cap was less than half the amount awarded to uncapped negotiators.⁵⁷ In other words, the study found that noneconomic damage caps increase settlement rates while decreasing the amount of compensation awarded to plaintiffs.⁵⁸

Caps increase the settlement rate because they reduce the uncertainty of jury verdicts and eliminate the possibility for a so-called windfall recovery.⁵⁹ Since the expected recovery at trial is limited by the cap, the parties are more likely to agree on a settlement as opposed to costly litigation.⁶⁰ Specifically, plaintiffs are more likely to settle when a cap is in place because they are unable to gamble on the possibility of receiving an expansive verdict from a jury trial.⁶¹ This greatly favors defendants because they are able to presume lower trial verdicts, and therefore, offer lesser amounts at settlement negotiations with a higher probability of success.⁶²

Lastly, caps on noneconomic damages disproportionately affect women,⁶³ elderly,⁶⁴ and low-income persons,⁶⁵ in addition to the most seriously injured.⁶⁶ For instance, women are frequently awarded lower overall damages in comparison to men due to a disparity in the valuation of economic damages.⁶⁷ Economic damages provide the most relief to higher wage earners.⁶⁸ The valuation of economic damages is often less for a female plaintiff due to a female plaintiff receiving lower wages or no income at all.⁶⁹ Thus, women often rely on noneconomic damages for

57. Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341, 363 (1999) (“The mean settlement amount was \$182,098 for capped pairs and \$490,129 for uncapped pairs.”).

58. *Id.*

59. *Id.* at 363, 368 (finding “strong evidence that a cap reduces uncertainty about the trial outcome”); see also LAYCOCK & HASEN, *supra* note 10, at 153–58.

60. Avraham & Bustos, *supra* note 55 at 298.

61. Avraham & Bustos, *supra* note 55, at 298.

62. See Babcock & Pogarsky, *supra* note 57, at 368.

63. Finley, *supra* note 29, at 1266; Ruda, *supra* note 8, at 197.

64. Finley, *supra* note 29, at 1306 (“[E]lderly plaintiffs, have a much higher proportion of noneconomic damages than general tort awards, so damage cap laws will disproportionately affect the elderly.”); Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 335 (2006) (“Capping noneconomic damages is in effect a death penalty for many elder abuse and mistreatment claims because the victims are unable to find attorneys to represent them when noneconomic damages are downsized.”).

65. See Imrana Manzanares, *Capping Statutes and their Constitutionality*, 37 THE ADVOC. (TEXAS) 103, 106 (2006) (“[T]he cap discriminates against women, children, minorities, and low income workers, who may not recover any (or minimal) lost wages, and therefore receive minimal economic damages.”).

66. See Holzer, *supra* note 52; *Kirkland*, 4 P.3d at 1120–22, 134 Idaho at 469–71 and accompanying text.

67. Ruda, *supra* note 8, at 231.

68. Finley, *supra* note 29, at 1280.

69. Ruda, *supra* note 8, at 231–32.

compensation.⁷⁰ For these reasons, caps on noneconomic damages significantly affect women and their ability to recover as much as higher earning men.⁷¹

The discriminatory impact effecting women goes beyond wages. Many harms suffered by female plaintiffs, such as sexual assault, reproductive harm, and gynecological medical malpractice are largely alleged by women and compensated with noneconomic damages.⁷² Thus, a cap on noneconomic damages for these claims would unfairly limit recovery for female plaintiffs. Additionally, female plaintiffs statistically receive a higher percentage of relief from noneconomic damages compared to male plaintiffs. The average percent of a female plaintiff's damages are seventy-eight percent noneconomic and twenty-two percent economic.⁷³ On the other hand, the average percent of a male plaintiff's damages are forty-eight percent noneconomic and fifty-two percent economic.⁷⁴ This exemplifies the harmful effects noneconomic damage caps have on women. For those reasons, the discriminatory impact of damage caps makes them unfair and ill-advised.⁷⁵

Damage caps act as a hindrance for plaintiffs with low economic damages, specifically the disadvantaged groups described above, because lawyers may be unwilling to take their case.⁷⁶ Plaintiffs' attorneys strategically screen cases to determine whether they will be profitable.⁷⁷ Since most plaintiff attorneys work on a contingency fee basis, a cap on noneconomic damages might deter attorneys from taking low economic damage cases with a cap on noneconomic damages.⁷⁸ This especially disadvantages plaintiffs with low economic damages, such as women, children, the elderly, and minorities.⁷⁹ Although damage caps reduce unpredictable jury outcomes and increase settlement, caps overtly benefit the

70. Ruda, *supra* note 8, at 231–32.

71. Ruda, *supra* note 8, at 231–32.

72. Finley, *supra* note 29, at 1281.

73. Finley, *supra* note 29, at 1285.

74. Finley, *supra* note 29, at 1285.

75. Finley, *supra* note 29, at 1280.

76. In fact, the effect of damages caps may affect the willingness of plaintiffs' attorneys to take high-value claims more than other claims, said Steven Garber and his colleagues, because those cases are the most likely to be capped. If so, damages caps have not only a general negative effect on access to justice by reducing attorneys willing to accept contingency work but also the more specific and perverse effect of reducing the ability of the most severely injured claimants to get representation. Scott DeVito & Andrew W. Jurs, "Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform, 118 PENN. ST. L. REV. 543, 557 (2014).

77. Sharkey, *supra* note 24, at 488–89.

78. DeVito & Jurs, *supra* note 76, at 556–57; *see also* ALL LAW, *supra* note 42.

79. Sharkey, *supra* note 24, at 489–90.

defense, and again, harm the already injured plaintiff by reducing their access to adequate representation.⁸⁰

C. Tort Reform in Idaho

In Idaho, the legislature quickly showed support for the tort reform movement. In 1975, Idaho introduced its first provision limiting noneconomic damages in medical malpractice cases.⁸¹ However, a year later the cap was constitutionally challenged⁸² and subsequently repealed.⁸³ More than a decade later, Idaho enacted the “Limitation on Noneconomic Damages Act,” section 6-1603, limiting noneconomic damages generally for tort liability to \$400,000.⁸⁴ The new legislation differed from the previous damage cap, which imposed a limit on one area of tort law, medical malpractice, in that it indiscriminately limited recovery for all personal injury claims, including death and medical malpractice.⁸⁵ The constitutionality of section 6-1603 was upheld in 2000.⁸⁶ After the Supreme Court of Idaho upheld the cap’s constitutionality, the legislature amended the cap in 2003 substantially decreasing the cap to \$250,000.⁸⁷ However, this amount increases or decreases each year “in accordance with the percentage amount of increase or decrease by which the Idaho industrial commission adjusts the average annual wage as computed pursuant to section 72-409(2), Idaho Code.”⁸⁸ The yearly adjustment to the cap has gradually increased the amount recoverable since it was enacted.⁸⁹

Moreover, the Idaho noneconomic damage cap has a means for the most egregious cases to circumvent the cap. Section 6-1603(4) states that:

The limitation of awards of noneconomic damages shall not apply to:
(a) Causes of action arising out of willful or reckless misconduct. (b)
Causes of action arising out of an act or acts which the trier of fact finds

80. For example, in *Eller v. Idaho State Police*, Brandon Eller was awarded \$1.5 million in noneconomic damages and only \$30,528.97 in economic damages. *Eller*, 443 P.3d 161, 165 Idaho 147. If a cap were in place, the incredible attorneys who were able to get him that enormous noneconomic damage verdict might not have taken his case since economic damages were low.

81. IDAHO CODE §§ 39-4204 to -4205 (repealed June 1981). The Hospital Liability Act limited medical malpractice liability in an attempt to limit healthcare costs. *Id.*

82. *Jones v. State Bd. of Med.*, 555 P.2d 399, 404, 97 Idaho 859, 864 (1976). *See also infra* notes 140–51 and accompanying text for an analysis of the *Jones* case.

83. *Id.* §§ 39-4204 to -4205 (repealed 1981).

84. *Id.* § 6-1603 (amended 1987).

85. *Id.* § 6-1603(1).

86. *Kirkland*, 4 P.3d 1115, 134 Idaho 464; *see also infra* notes 152–61 and accompanying text.

87. IDAHO CODE § 6-1603 (2003) (amending the maximum judgment amount to \$250,000).

88. *Id.* § 6-1603(1).

89. IDAHO INDUS. COMM’N, NON-ECONOMIC DAMAGES CAP (2021) <https://iic.idaho.gov/non-economic-damages-cap/> (click the “Non-economic Damages Cap” PDF from the right-hand side menu).

beyond a reasonable doubt would constitute a felony under state or federal law.⁹⁰

In other words, Idaho limits noneconomic damages in personal injury and wrongful death cases, except where the tortfeasor acted recklessly or feloniously.⁹¹ If the tortfeasor acted recklessly or feloniously, then the plaintiff is eligible for noneconomic damages exceeding the cap.⁹² In determining whether a tortfeasor acted recklessly, such that the cap does not apply, a 2020 amendment added the definition of “willful or reckless misconduct” to section 6-1601.⁹³

This pathway around the noneconomic damage cap is necessary in order for tortfeasors in the most egregious cases of personal injury or wrongful death to fully compensate the victims of their actions and be held accountable. For example, the statutory cap did not apply to noneconomic damages when the tortfeasor acted recklessly in *Hennefer v. Blaine County School District*.⁹⁴ In that case, the tortfeasor was a school district driving instructor who ordered a new student driver to conduct a three-point turn in a highway during hazardous conditions.⁹⁵ During the three-point turn, the car was struck by another vehicle on the highway and killed the student driver.⁹⁶ The Supreme Court of Idaho upheld the jury’s verdict of \$3.5 million in noneconomic damages because the instructor acted recklessly, and thus, the cap did not apply.⁹⁷ Since the plaintiff could show the driving instructor acted recklessly, and not merely negligently, the parents of the deceased student driver were able to fully recover the jury verdict amount.⁹⁸ The *Hennefer* case exemplifies why Idaho’s noneconomic damage cap exception is an important addition for the most egregious cases of personal injury, wrongful death, or medical malpractice.

90. IDAHO CODE § 6-1603; see *Hennefer v. Blaine Cnty. School Dist.*, 346 P.3d 259, 158 Idaho 242 (2015) (Noneconomic damage cap did not apply in wrongful death action because driving instructor acted recklessly when he instructed student driver to conduct a three-point turn in dangerous conditions).

91. See IDAHO CODE § 6-1603(4).

92. See *id.*

93. Act of Mar. 24, 2020, ch. 294, § 1, 2020 Idaho Sess. Laws 846 (2020) (codified as amended at IDAHO CODE § 6-1601(10)) (“‘Willful or reckless misconduct’ means conduct in which a person makes a conscious choice as to the person’s course of conduct under circumstances in which the person knows or should know that such conduct both creates an unreasonable risk of harm to another and involves a high probability that such harm will actually result.”).

94. *Hennefer*, 346 P.3d 259, 158 Idaho 242.

95. *Id.* at 246.

96. *Id.* at 246–47.

97. *Id.* at 248–56.

98. *Id.*

D. The Constitutionality of Damage Caps

Opponents of the tort reform movement have challenged the constitutionality of damage caps with varying success. The constitutionality of damage caps has been challenged in almost every state in which damage caps are enacted.⁹⁹ In fact, only seven states with damage cap legislation have not determined the constitutionality.¹⁰⁰ Damage cap statutes are prohibited in four states: Arizona, Arkansas, Kentucky, and Pennsylvania;¹⁰¹ repealed in three states: Indiana,¹⁰² Maine¹⁰³ and Minnesota;¹⁰⁴ not enacted in eight states: Connecticut, Delaware, District of Columbia, Iowa, New Jersey, New York, Rhode Island, and Vermont;¹⁰⁵ struck down in violation of the respective state's constitution in twelve states: Alabama,¹⁰⁶ Florida,¹⁰⁷ Georgia,¹⁰⁸ Illinois,¹⁰⁹ Kansas,¹¹⁰ Mississippi,¹¹¹

99. Bryan et al., *supra* note 43, at 157–63.

100. See Bryan et al., *supra* note 43, at 157–63 (where Hawaii, Massachusetts, Montana, North Carolina, South Carolina, Tennessee, and Wyoming are undecided on the issue of constitutionality of caps); see, e.g., HAW. REV. STAT. § 663-8.7 (1995) (regarding where the Supreme Court of Hawaii heard oral arguments, but did not reach a decision, regarding the constitutionality of caps in *Ray v. Kapiolani Med. Specialists*, 259 P.3d 569 (Haw. 2011)).

101. Bryan et al., *supra* note 43, at 157–61.

102. IND. CODE ANN. §§ 27-12-14-1 to -5 (West 2021) (repealed Mar. 6, 1998).

103. ME. STAT. tit. 18-A, § 2-804 (repealed Sept. 1, 2019).

104. Bryan et al., *supra* note 43, at 160.

105. Bryan et al., *supra* note 43, at 158–62.

106. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156 (Ala. 1991) (medical malpractice cap on noneconomic damages unconstitutional as violation of right to jury trial and equal protection clause).

107. *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987) (showing noneconomic damage cap unconstitutional as unnecessarily restrictive access to courts and right to jury trial); *Estate of McCall*, 134 So. 3d 894 (medical malpractice noneconomic damage cap unconstitutional as violation of equal protection).

108. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010) (showing noneconomic damage cap for actions against medical facilities unconstitutional as violation of right to jury trial).

109. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057 (Ill. 1997) (showing noneconomic damage cap in actions for wrongful death unconstitutional as special legislation and in violation of separation of powers).

110. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019) (showing personal injury noneconomic damage cap violates constitutional guarantee of the right to jury trial). This is the most recent challenge on noneconomic damages and might be representative of a trend towards finding these caps unconstitutional. See *id.*

111. *Tanner v. Eagle Oil & Gas Co.*, No. 111-0013, 2012 WL 7748580 (Miss. Cir. Oct. 22, 2012) (finding a medical malpractice cap on noneconomic damages unconstitutional as violation of separation of powers, right to trial by jury, right to court access and remedies clause of Mississippi Constitution, due process and equal protection).

Missouri,¹¹² New Hampshire,¹¹³ Oklahoma,¹¹⁴ Oregon,¹¹⁵ Utah,¹¹⁶ and Washington;¹¹⁷ and upheld as constitutional in nineteen states: Alaska,¹¹⁸ California,¹¹⁹ Colorado,¹²⁰ Idaho,¹²¹ Louisiana,¹²² Maryland,¹²³ Michigan,¹²⁴

112. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (*en banc*) (finding a medical malpractice cap on noneconomic damages unconstitutional as violation of right to trial by jury).

113. *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) (finding a \$875,000 cap on personal injury noneconomic damages unconstitutional in violation of state equal protection clause).

114. *Beason v. I.E. Miller Servs., Inc.*, 441 P.3d 1107 (Okla. 2019) (finding a noneconomic damage cap on personal injury claims constitutes unconstitutional special legislation).

115. *Busch v. McClinnis Waste Sys., Inc.*, 468 P.3d 419 (Or. 2020) (finding a noneconomic damage cap unconstitutional in violation of the state constitution's remedy clause).

116. *Smith v. United States*, 356 P.3d 1249 (Utah 2015) (finding a medical malpractice cap on noneconomic damages unconstitutional when applied to cases of wrongful death).

117. *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (finding personal injury and wrongful death actions noneconomic damage cap unconstitutional as violation of right to jury trial).

118. *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (finding a noneconomic damage cap on personal injury and wrongful death facially constitutional).

119. *Fein v. Permanente Med. Grp.*, 695 P.2d 665 (Cal. 1985) (finding a noneconomic damage cap in medical malpractice cases constitutional).

120. *Scharrel v. Wal-Mart Stores*, 949 P.2d 89 (Colo. App. 1997) (finding a noneconomic damage cap constitutional).

121. *Kirkland*, 4 P.3d 1115, 134 Idaho 464 (finding a noneconomic damage cap constitutional). *See infra* notes 152–62 and accompanying text for analysis of the *Kirkland* case.

122. *Oliver v. Magnolia Clinic*, 85 So. 3d 39 (La. 2012) (finding a cap on noneconomic damages in medical malpractice constitutional).

123. *Murphy v. Edmunds*, 601 A.2d 102 (Md. 1992) (finding a cap on noneconomic damages in personal injury constitutional).

124. *Wiley v. Henry Ford Cottage Hosp.*, 668 N.W.2d 402 (Mich. Ct. App. 2003) (finding a cap on noneconomic damages in medical malpractice constitutional).

Nebraska,¹²⁵ New Mexico,¹²⁶ Nevada,¹²⁷ North Dakota,¹²⁸ Ohio,¹²⁹ South Dakota,¹³⁰ Texas,¹³¹ Virginia,¹³² West Virginia,¹³³ and Wisconsin.¹³⁴ The most recent decisions from 2019, determining the constitutionality of damage caps, came out of North Dakota and Kansas. These decisions demonstrate the split among courts because North Dakota held its damage cap did not violate equal protection, whereas Kansas held its damage cap violated the constitutional right to jury trial.¹³⁵ A majority of states have either prohibited, repealed, or struck down damage caps.

The constitutionality of damage caps has been challenged on several grounds. The most frequent and successful constitutional argument against noneconomic damage caps is that they violate the right to jury trial.¹³⁶ In these cases, opponents argue that the cap “disturb[s] the jury’s finding of fact on the amount of the award” thus substituting “the Legislature’s nonspecific judgment for the jury’s specific judgment,” which violates the right to trial by jury.¹³⁷ Opponents have also challenged the caps stating that they are impermissible special legislation or violate equal protection and due process rights.¹³⁸

125. *Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43 (Neb. 2003) (finding a cap on noneconomic damages in medical malpractice constitutional).

126. *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D.N.M. 2002) (finding a cap on noneconomic damages in medical malpractice constitutional).

127. *Tam v. Eighth Jud. Dist. Ct.*, 358 P.3d 234 (Nev. 2015) (finding a cap on medical malpractice noneconomic damages did not violate right to jury trial).

128. *Condon v. St. Alexius Med. Ctr.*, 926 N.W.2d 136 (N.D. 2019) (finding a cap on damages for medical malpractice did not violate equal protection).

129. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (finding a cap on noneconomic damages using sliding scale approach in tort actions constitutional).

130. *Matter of Certification of Questions of L. from U.S. Ct. of Appeals for Eighth Cir., Pursuant to Provisions of SDCL 15-24A-1*, 544 N.W.2d 183 (S.D. 1996) (finding a cap on noneconomic damages in medical malpractice could be constitutional).

131. *Watson v. Hortman*, 844 F. Supp. 2d 795 (E.D. Tex. 2012) (finding a cap on noneconomic damages in medical malpractice constitutional).

132. *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999) (finding a cap on noneconomic damages in medical malpractice did not constitute unconstitutional special legislation).

133. *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011) (finding a cap on noneconomic damages in medical malpractice did not violate state’s constitution).

134. *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 914 N.W.2d 678 (Wis. 2019) (finding a noneconomic damage cap on medical malpractice facially constitutional).

135. *Compare Condon*, 926 N.W.2d 136 with *Hilburn*, 442 P.3d 509.

136. *Bryan et al.*, *supra* note 43, at 154; *see also Hilburn*, 442 P.3d at 524 (holding cap violates right to jury trial).

137. *Hilburn*, 442 P.3d at 524.

138. *Bryan et al.*, *supra* note 43, at 155; *see also infra* Part V (describing the merits of future equal protection claims in Idaho).

Idaho is one of fifteen states to uphold damage caps as constitutional.¹³⁹ However, the first case to discuss the constitutionality of noneconomic damage caps in Idaho was *Jones v. State Board of Medicine*.¹⁴⁰ That case analyzed the constitutionality of Idaho's first noneconomic damage cap on medical malpractice claims.¹⁴¹ Although the court remanded, it expressly implied that the cap violated equal protection.¹⁴² To determine whether the cap violated equal protection, the court adopted a higher level of scrutiny, stating that "it is necessary to look beyond the minimal scrutiny test" and called this higher scrutiny the "means-focus test."¹⁴³ The court went on to state that the appropriate test "scrutinizes the means by which the challenged legislation is said to affect its articulated and otherwise legitimate purpose[.]" and "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute, then a more stringent judicial inquiry is required."¹⁴⁴

The *Jones* Court held that the noneconomic damage cap on medical malpractice claims created a discriminatory classification based on the degree of injury and harms suffered.¹⁴⁵ Then it questioned whether the statute had any reasonably conceived public purpose, and whether the apparently discriminatory classification had a fair and substantial relation to the legislature's objective and purpose.¹⁴⁶

Since the appellants argued the case on a minimal level of scrutiny standard, the court remanded the case to the trial court to examine the purported correlation between the statutory cap and the health care crisis with the appropriate higher standard of review.¹⁴⁷ Although the court remanded for further factual determinations, it nonetheless questioned whether the health insurance crisis even existed in Idaho.¹⁴⁸ Using the "means-focus test," the district court on remand held

139. See *Kirkland*, 4 P.3d at 1116, 134 Idaho at 465.

140. *Jones*, 555 P.2d 399, 97 Idaho 859.

141. *Id.*

142. *Id.*

143. *Id.* at 411; see also Mark D. Perison, *Equal Protection and Medical Malpractice Damage Caps: The Health Care Liability Reform and Quality of Care Improvement Act of 1991*, 28 IDAHO L. REV. 397, 410 (1992).

144. *Jones*, P.2d at 411, 97 Idaho at 871.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

the cap violated Idaho's equal protection clause.¹⁴⁹ After *Jones*, the legislature repealed the medical malpractice cap and enacted a new cap on damages.¹⁵⁰ For over two decades, the court did not revisit the constitutionality of caps.¹⁵¹

The current noneconomic damage cap in Idaho, section 6-1603, was constitutionally challenged in *Kirkland v. Blaine County Medical Center*.¹⁵² In *Kirkland*, plaintiffs filed a medical malpractice suit for birth-related injuries suffered by the mother and her newborn child.¹⁵³ A jury awarded plaintiffs \$15 million in noneconomic damages for the injured child and \$3.5 million in noneconomic damages for the parents.¹⁵⁴ Idaho's damage cap law excessively limited the plaintiff's recovery on noneconomic damages to approximately \$573,000.¹⁵⁵

Plaintiffs argued Idaho's damage cap was unconstitutional and that it violated the right to jury trial, constituted special legislation, and violated separation of powers.¹⁵⁶ Despite the *Jones* ruling implying a higher level of scrutiny for damage caps, an equal protection challenge was not argued.¹⁵⁷ In briefing, the parties mentioned the presiding judge did not certify the equal protection issues raised on appeal.¹⁵⁸ The court did not consider the *Jones* holding or its *dicta* on equal protection, and the noneconomic damage cap was upheld as constitutional for not violating the right to jury trial,¹⁵⁹ not constituting special legislation,¹⁶⁰ and not violating separation of powers.¹⁶¹

149. *Jones v. State Bd. of Med.*, No. 55586 (4th Dist. Ct. Ada County, Idaho Nov. 3, 1980) (unpublished); see also Edward W. Taylor & William G. Shields, *The Limitation on Recovery in Medical Negligence Cases*, 16 U. RICH. L. REV. 799, 837 (1982) ("When the 'means focused' test was applied in 1980 on remand to the Fourth Judicial District of the State of Idaho, the court found that the legislation adopted did not substantially affect the availability of a liability insurance market and, therefore, was unconstitutional based on equal protection grounds.").

150. IDAHO CODE ANN. §§ 39-4204, 39-4205 (West 2021) (repealed); IDAHO CODE ANN. § 6-1603 (West 2021).

151. See *Jones*, 555 P.2d 399, 97 Idaho 859; see also *Kirkland*, 4 P.3d 1115, 134 Idaho 464.

152. *Kirkland*, 4 P.3d at 1115, 134 Idaho at 464.

153. *Id.* at 1116–17, 134 Idaho at 465–66.

154. *Id.* at 1117, 134 Idaho at 466.

155. *Id.*

156. *Id.*

157. See *id.* at 1116, 134 Idaho at 465.

158. Respondents' Brief on Certified Questions of L. at 34, *Kirkland v. Blaine Cnty Med. Ctr.*, 4 P.3d 1115, 1120; 134 Idaho 464, 469 (2000) (No. 26044), 2000 WL 34432920, at *34.

159. *Kirkland*, 4 P.3d at 1117–20, 134 Idaho at 466–69 (plaintiffs were given jury trial, and the legal consequences of jury verdicts are for the legislature and judiciary, thus no violation of right to jury trial).

160. *Id.* at 1120–21, 134 Idaho at 469–70 (cap served the state's legitimate interest in protecting the availability of liability insurance thus the cap did not violate prohibition against special legislation).

161. *Id.* at 1121–22, 134 Idaho at 470–71 (legislature has the power to modify common law, and the cap modifies common law of personal injury, thus did not violate separation of powers).

The Supreme Court of Idaho was set to revisit the constitutionality of noneconomic damage caps in a subsequent medical malpractice case in 2019.¹⁶² In *Ackerschott*, the jury found, and the Supreme Court of Idaho affirmed, that the urgent care facility's treatment breached the standard of care and led to plaintiff's paraplegia.¹⁶³ Accordingly, the jury awarded damages to the injured plaintiff and his wife, which included noneconomic damages.¹⁶⁴ The jury-awarded damages, however, were reduced by over a million dollars due to Idaho's noneconomic damage cap.¹⁶⁵ The defendants appealed, and a stipulation was entered into by the parties that reserved the right of the plaintiffs to challenge the constitutionality of the cap.¹⁶⁶

On appeal, plaintiffs filed a cross-appeal alleging the noneconomic damage cap, section 6-1603, is unconstitutional in violation of Idaho's right to jury trial.¹⁶⁷ The cross-appeal relied upon the successful constitutional challenge in Kansas from 2019¹⁶⁸ and the importance of recognizing "that non-economic damages are as important to the notion of justice and remedy of wrongs as economic damages."¹⁶⁹

Although the plaintiffs strongly supported their cross-appeal and the parties stipulated to give plaintiffs the right to challenge the cap, the court declined to reach the merits of the constitutional claim on appeal.¹⁷⁰ Instead of revisiting the constitutionality of damage caps, the court refused to reach the merits of the claim, and it was dismissed on a timeliness issue.¹⁷¹ The untimeliness issue gave the court a free pass to avoid the debated constitutional claim. On speculation, the court likely did not want to revisit the issue due to the controversial and political nature of caps and gladly accepted the free pass.

Although the unsuccessful *Kirkland* challenge lays the foundation for the constitutionality of noneconomic *damage* caps in Idaho, plaintiffs are still

162. See *Ackerschott v. Mountain View Hosp., LLC*, 457 P.3d 875, 166 Idaho 223 (2019).

163. *Id.* at 880–81, 166 Idaho at 228–29.

164. *Id.* at 881, 166 Idaho at 229.

165. *Id.*

166. *Id.*

167. Cross-Appellants' Reply Brief at 5–10, *Ackerschott v. Mountain View Hosp., LLC*, 457 P.3d 875, 166 Idaho 223 (2020) (No. 46205), 2019 ID. S. CT. BRIEFS LEXIS 910, at *8–*18.

168. *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 524 (Kan. 2019) (This case was likely relied upon because it is one of the most recent successful constitutional challenges. Furthermore, the language in Kansas's right to jury trial is similar to that of Idaho's because both protect the right to jury trial as "inviolate.").

169. Cross-Appellants' Reply Brief, *supra* note 167, at 9.

170. *Ackerschott*, 457 P.3d at 889, 166 Idaho at 237; see also Appellant's/Cross-Respondent's Reply Brief at 22, *Sommer v. Misty Valley, LLC*, No. 48007, 2021 WL 6017844 (Idaho Dec. 21, 2021) (No. 48007), 2021 WL 2035285, at *22.

171. *Ackerschott*, 457 P.3d at 890, 166 Idaho at 238. Unfortunately, plaintiffs filed the applicable motion a day later than the imposed deadline. *Id.*

attempting to challenge the cap.¹⁷² The court in *Ackerschott* was able to avoid the constitutional question of damage caps, but that leaves the opportunity for other plaintiffs to raise the question in subsequent cases.¹⁷³ Precedent held the cap constitutional, but Idaho is not necessarily beholden to prior decisions that are incorrect or unlawful. Additionally, a constitutional challenge on equal protection grounds under the *Jones* “means-focus” test may merit greater success.¹⁷⁴

To summarize, Idaho’s legislators put a cap on noneconomic damages to limit the amount plaintiffs could recover in personal injury or wrongful death suits following the tort reform movement.¹⁷⁵ Idaho’s current noneconomic damage cap was constitutionally challenged and upheld in *Kirkland*, and subsequently challenged but dismissed in *Ackerschotts*.¹⁷⁶ The noneconomic damage cap challenged in those cases dealt with personal injury, medical malpractice, and wrongful death claims.¹⁷⁷ However, a recent Idaho Supreme Court case, *Eller v. Idaho State Police*, made Idaho’s legislators assess the noneconomic damage cap in regard to whistleblowers.¹⁷⁸ After that case decided caps did not apply to whistleblowers, legislators nonetheless decided to cap whistleblower claims as well.¹⁷⁹ The next section describes Idaho Tort Claims Act’s cap on noneconomic damages and how the Supreme Court of Idaho decided no cap exists for whistleblower’s noneconomic damages.

IV. ELLER V. IDAHO STATE POLICE

A whistleblower is someone who discloses, or “blows the whistle,” on an employer’s conduct that is believed to be unlawful, corrupt, or harmful.¹⁸⁰ Whistleblowers play a role in encouraging transparency and accountability in the workplace.¹⁸¹ But the threat of retaliation can silence these people from coming forward. For example, a whistleblower who “sounded the alarm” about former President Trump’s campaign with Ukraine played a major role in threatening his

172. *Kirkland v. Blaine Cnty Med. Ctr.*, 4 P.3d 1115, 1122, 134 Idaho 464, 471 (2000).

173. *Ackerschott*, 457 P.3d at 879, 166 Idaho at 227.

174. See *infra* Part V (analyzing the merits of future equal protection claims in Idaho); *Jones*, 555 P.2d at 412, 97 Idaho at 872.

175. IDAHO CODE § 6-1603 (2021).

176. *Ackerschott v. Mountain View Hosp., LLC*, 457 P.3d 875, 166 Idaho 223 (2020); *Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 134 Idaho 464 (2000).

177. *Ackerschott*, 457 P.3d at 879, 166 Idaho at 227; *Kirkland*, 4 P.3d at 1116–17, 134 Idaho at 465–66.

178. *Eller v. Idaho State Police*, 443 P.3d 161, 165 Idaho 147 (2019); see *infra* Part III.

179. See *infra* Part III.

180. *Why We Need Whistleblower Protections*, OPEN SOCIETY FOUNDS., <https://www.opensocietyfoundations.org/explainers/why-we-need-whistleblower-protections> (last updated Dec. 2019).

181. *Id.*

presidency in the impeachment, but this came with a price.¹⁸² When the former president publicly named the whistleblower who came forward, he invited others to retaliate against the whistleblower.¹⁸³ In effect, publicly naming the whistleblower and shaming him for coming forward with information discourages public officials and public employees from using the appropriate avenues to report wrongdoing.¹⁸⁴ For this reason, statutory protections are in place to safeguard whistleblowers.

Whistleblower statutes protect the rights of employees who “blow the whistle” and are subsequently retaliated against.¹⁸⁵ These statutory protections for whistleblowers are enacted in a majority of the states to provide legal remedies for whistleblowing employees who experience retaliation.¹⁸⁶ Protections vary in the degrees and ways in which they protect whistleblowers. For example, the most common whistleblower statutes protect employees from retaliation against good-faith whistleblowers in the public sector.¹⁸⁷ Other jurisdictions may protect whistleblowers in the private sector as well.¹⁸⁸ On the other hand, a minority of states have no statutory protections for whistleblowers.¹⁸⁹

Like the majority of the states, Idaho has statutory protections for whistleblowers in the public sector.¹⁹⁰ The Idaho Protection of Public Employees Act (the “Whistleblower Act”) provides “a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.”¹⁹¹ Under the Whistleblower Act, public

182. Bobby Allyn, *Trump Criticized After Sharing Name of Alleged Whistleblower on Twitter*, NPR (Dec. 29, 2019, 6:15 PM), <https://www.npr.org/2019/12/29/792222297/trump-comes-under-fire-after-sharing-name-on-twitter-of-alleged-whistleblower>.

183. See Neal Katyal (@neal_katyal), TWITTER (Dec. 27, 2019, 10:33 PM), https://twitter.com/neal_katyal/status/1210810936904142849. Neal Katyal, former solicitor general and now law professor at Georgetown University asked in a tweet, “[w]ho would want to live in a country where its leader could just name the identity of a whistleblower and invite retaliation against him?” *Id.*

184. See Barb McQuade (@BarbMcQuade), TWITTER (DEC. 28, 2019, 11:35 AM), <https://twitter.com/BarbMcQuade/status/1211007877399351297>. Barb McQuade is a law professor at the University of Michigan Law School and tweeted, “[o]uting and shaming whistleblowers harms national security by discouraging government officials from using official channels to report abuses. Alternatives are leaks or, perhaps even worse, silence.” *Id.*

185. See Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 318 (1993).

186. *Id.* at 321–22.

187. *Id.* at 318.

188. *Id.*

189. *Id.*

190. See IDAHO CODE ANN. § 6-2101 (West 2021); see also Lofgren, *supra* note 185, at 320–23.

191. § 6-2101.

employers cannot take adverse action against an employee who communicates information in good faith for various reasons listed in the statute.¹⁹² A plaintiff must bring a claim within 180 days of the retaliation under this act in order to obtain relief.¹⁹³ If the whistleblower is successful in bringing claims under this act, recoverable remedies include damages or injunctive relief.¹⁹⁴ Prior to 2020, there was no provision in the act capping noneconomic damages.¹⁹⁵

The Idaho Tort Claims Act also allows for a cause of action by government employees seeking damages for their employer's adverse actions.¹⁹⁶ But the ITCA and Whistleblower Act contain conflicting provisions regarding damages.¹⁹⁷ Under the ITCA, a plaintiff must bring an action within two years after the date the claim arose, and damages are capped at \$500,000 per occurrence.¹⁹⁸ The Idaho Supreme Court determined how the competing acts apply to whistleblower cases in *Eller v. Idaho State Police*.¹⁹⁹

A. Facts of the Case

Eller is a case that arose out of a series of retaliatory adverse actions the Idaho State Police took against one of its employees for testifying against another officer in a court hearing.²⁰⁰ This case was significant because the plaintiff was able to recover in full, without being limited by caps on noneconomic damages.²⁰¹

Brandon Eller was the lead reconstructionist from District 3 of the Idaho State Police's Crash Reconstruction Unit (CRU).²⁰² In 2011, Brandon Eller was assigned to conduct an investigation with other members of the CRU.²⁰³ The investigation centered around a crash that involved an on duty law enforcement officer, Payette County Deputy Sloan, and that fatally injured the other driver.²⁰⁴ The investigation revealed Deputy Sloan caused the accident, and the reconstruction report was reviewed and approved for filing.²⁰⁵ However, top commanders in District 3 intervened and had the officers change some of the findings in the report.²⁰⁶ Following the report, a felony vehicular manslaughter charge was brought against

192. IDAHO CODE § 6-2104 (2021).

193. IDAHO CODE § 6-2105(2) (2021).

194. *Id.*

195. IDAHO CODE § 6-2105 (1994), *amended by* Act of Mar. 24, 2020, ch. 295, 2020 Idaho Sess. Laws 295 (codified as amended at § 6-2105(5) (2021)).

196. IDAHO CODE § 6-911 (2021).

197. *See* IDAHO CODE § 6-2105 (2021); *see also* § 6-911.

198. § 6-911.

199. *Eller v. Idaho State Police*, 443 P.3d 161, 165 Idaho 147 (2019).

200. *Id.* at 165, 165 Idaho at 151.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Eller*, 443 P.3d at 165–66, 165 Idaho at 151–52.

206. *Id.* at 166, 165 Idaho at 152.

Deputy Sloan.²⁰⁷ At trial, Brandon Eller and another CRU officer testified at the preliminary hearing that Deputy Sloan drove in an unsafe reckless manner and that they were told by commanding officers to remove some statements from the reconstruction report.²⁰⁸

Following Deputy Sloan's trial, Idaho State Police retaliated in various ways against Brandon Eller.²⁰⁹ For example, Brandon Eller was accused of lying on the stand.²¹⁰ He also received a downgrade in his performance review, affecting his eligibility for a raise, and despite his previous near perfect reviews, was said to have caused problems within District 3.²¹¹ As a result of the Deputy Sloan preliminary hearings, Idaho State Police issued a new policy that required CRU officers to destroy peer review reports.²¹² Brandon Eller questioned the legality of the directive and refused to destroy peer review reports.²¹³ This further amplified the retaliation.²¹⁴

Next, Idaho State Police placed Brandon Eller on patrol duties, including night and weekend shifts, in addition to his reconstructionist duties even though he had previously only worked day shifts.²¹⁵ He was also notified that the police no longer needed a CRU, and therefore, he was no longer needed as its supervisor.²¹⁶ As a final blow, his application for pay increase was rejected, he was told he could no longer teach reconstruction, and his application for Sergeant promotion was halted.²¹⁷ Believing these events were related to his whistleblowing, Brandon Eller resigned and filed suit against the Idaho State Police under the Whistleblower Act.²¹⁸ He sought noneconomic damages for emotional distress in addition to economic damages for lost wages.²¹⁹

At trial, Brandon Eller testified about the extent of his emotional distress.²²⁰ According to his wife's testimony, Brandon Eller had a passion for his work and dedicated his career to the CRU.²²¹ Moreover, the retaliation had an effect on

207. *Id.*

208. *Id.*

209. *Id.* at 166–67, 165 Idaho at 152–53.

210. *Id.* at 166, 165 Idaho at 152.

211. *Eller*, 443 P.3d at 166, 165 Idaho at 152.

212. *Id.*

213. *Id.*

214. *Id.* at 166–67, 165 Idaho at 152–53.

215. *Id.*

216. *Id.*

217. *Eller*, 433 P.3d at 166–67, 165 Idaho at 152–53.

218. *Id.* at 167, 165 Idaho at 153.

219. *Id.*

220. *Id.*; Appellant Brandon Eller's Opening Brief at 12, *Eller v. Idaho State Police*, 433 P.3d 161, 165 Idaho 147 (2019) (No. 45699-2018), 2018 WL 4496256, at *12.

221. Appellant Brandon Eller's Opening Brief, *supra* note 220, at 12.

Brandon Eller's relationships with his family, his emotional wellbeing, and his physical wellbeing.²²² In fact, he lost fifteen to twenty pounds, "had trouble sleeping, headaches, started getting sick more often and ha[d] skin issues."²²³

Brandon Eller successfully alleged unlawful retaliation and negligent infliction of emotional distress.²²⁴ The jury awarded him \$30,528.97 dollars in economic damages under the Whistleblower Act and \$1.5 million for negligent infliction of emotional distress.²²⁵ Based on Idaho's damages cap under the ITCA, the Idaho State Police successfully moved to reduce Eller's noneconomic damages to \$1 million.²²⁶ Both parties appealed.²²⁷ On appeal, Brandon Eller argued the Whistleblower Act allowed recovery of noneconomic damages and that no cap applied.²²⁸

B. Idaho Supreme Court's Holding

The Idaho Supreme Court resolved the issue of whether the Whistleblower Act or the ITCA controlled Eller's noneconomic damages on appeal.²²⁹ The ITCA authorizes claims against government employees but imposes a \$500,000 cap on damages for each occurrence.²³⁰ The court concluded that the Whistleblower Act is more specific to whistleblower claims and should be applied over the ITCA following statutory interpretation and legislative intent.²³¹ In other words, the whistleblower law trumped the tort law which allows whistleblowers to recover uncapped noneconomic damages—the jury can award whistleblowers for emotional distress. The Whistleblower Act provides a remedy for all actual damages, including damages for emotional distress claims, and does not cap damages in any way so long as the claim arose within the 180-day window.²³² Eller's case was partially remanded to determine his noneconomic damages for his claims of negligent infliction of emotional distress solely under the Whistleblower Act.²³³ The Idaho State Police consequently settled the case for \$1.3 million on August 29, 2019.²³⁴

222. *Id.* Eller's wife testified that he was "grouchy," "lost the skill to communicate about the kids," and "stopped cooking for the kids." *Id.*

223. *Id.*

224. *Eller*, 443 P.3d at 167, 165 Idaho at 153.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 169, 165 Idaho at 155.

229. *Id.* at 168, 165 Idaho at 154.

230. *Eller*, 443 P.3d at 167, 165 Idaho at 153.

231. *Id.* at 169, 165 Idaho at 155.

232. *Id.* at 168, 165 Idaho at 154.

233. *Id.* at 178, 165 Idaho at 164.

234. Emma Nowacki, Bobbi Dominick & Gjording Fouser, CLE Presenters, Idaho State Bar Employment & Labor Law Section CLE Presentation: What's The Deal With All These Whistleblower Cases? (Sep. 25, 2019), <https://isb.idaho.gov/wp-content/uploads/EMP-Section-Meeting-Materials-sept.-25-2019.pdf>.

C. Significance of *Eller*

Eller was an important case for whistleblowers in Idaho. It exemplified the importance of noneconomic damages in the employment context and expanded the scope of remedies under the Whistleblower Act. To illustrate the impact this case had on public employees, Brandon Eller stated “[a]lthough this has been an extremely stressful undertaking, I close this chapter knowing that the jury’s verdict vindicated not just my rights, but the rights of every government employee in Idaho.”²³⁵ Since ISP’s retaliatory conduct effected Brandon Eller monetarily as well as emotionally, allowing him to recover economic damages and the full award of emotional distress damages more fully compensated him for the actual damages suffered.

This ruling incentivizes other whistleblowers to come forward with good faith reports of wrongdoing by government officials, notwithstanding the risk of retaliation and adverse treatment because claims of retaliation will be fully compensated for. By refusing to cap verdicts in whistleblower cases, the court furthers the Whistleblower Act’s goal of deterring retaliation and protecting employees. This case serves as a warning to public employers. At a minimum, the potential for expansive liability will dissuade public employers from engaging in retaliation.

The *Eller* case also shows how important noneconomic damage claims are specifically to whistleblowers. When most people think about damages for emotional distress or pain and suffering, they think of personal injury, wrongful death, or medical malpractice. However, a person’s claim for emotional distress in employment law is just as valid. In fact, many studies have shown that joblessness or other issues at work can lead to deterioration in mental health.²³⁶ A person’s work life directly correlates to their physical, mental, and emotional wellbeing. Workplace retaliation may cause “tremendous stress, inconvenience, and financial hardships for an employee.”²³⁷ These noneconomic harms should be compensated just like any other economic harm. ISP’s retaliatory acts had an overwhelming impact on Eller’s emotional wellbeing, and the court correctly acknowledged these harms and adequately compensated him.²³⁸

235. Idaho Press Staff, *ISP Resolves Whistleblower Lawsuit with Trooper*, IDAHO STATE J. (Aug. 31, 2019), https://www.idahostatejournal.com/news/local/isp-resolves-whistleblower-lawsuit-with-trooper/article_ff562567-e31a-5005-9b62-873e4e10a482.html.

236. See generally Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 J. OF SOCIOECONOMICS 333 (1996), <https://www.sciencedirect.com/science/article/abs/pii/S1053535796900098?via%3Dihub>.

237. Tom Spiggle, *Retaliating Employer Liable for Emotional Distress Under the FLSA*, THE SPIGGLE L. FIRM: SPLF EMP. BLOG (Dec. 27, 2016, 8:00 AM), <https://www.spigglelaw.com/employment-blog/retaliating-employer-liable-emotional-distress-flsa/>.

238. *Eller*, 443 P.3d 161, 165 Idaho 147 *passim*.

Although Brandon Eller's case represented the importance of noneconomic damages to compensate victims of emotional distress in the employment context,²³⁹ the victory was short-lived. The extensive noneconomic relief Brandon Eller received for his emotional distress will not be given to subsequent whistleblowers seeking noneconomic damages.²⁴⁰ Following the case, Idaho legislators directly responded to the case by enacting legislation to cap noneconomic damages for whistleblowers.²⁴¹ This response is analyzed in the following section.

V. NONECONOMIC DAMAGES FOR WHISTLEBLOWERS AFTER ELLER: HOUSE BILL 583

As previously established, the Idaho noneconomic damage cap and other caps, such as the one in the ITCA, did not apply to whistleblowers under *Eller*.²⁴² For these reasons, the plaintiff in *Eller* was able to fully recover uncapped noneconomic damages pursuant to his whistleblower claim.²⁴³ The Idaho legislature, however, was quick to change that.²⁴⁴ In March 2020, the Idaho State Legislature enacted House Bill 583, severely limiting noneconomic damages for whistleblowers.²⁴⁵ The legislature's response to cap these claims after the large uncapped verdict in *Eller* leads to the question of whether it will similarly respond to large uncapped verdicts in other areas of the law and cap those damages as well.

A. House Bill 583

House Bill No. 583 amends the Idaho Whistleblower Act, section 6-2105 of the Idaho Code, to include a provision limiting damages an employee may recover:

"In no action brought pursuant to this chapter shall a judgment for noneconomic damages be entered for a claimant exceeding the limitation on damages contained in section 6-1603(1), Idaho Code. The limitation contained in this subsection shall apply to the sum of noneconomic damages sustained by a claimant. Governmental entities and their employees shall not be liable for punitive damages on any claim allowed under the provisions of this section."²⁴⁶

239. *Id.*

240. *Id.*; see also IDAHO CODE § 6-2105(5)(a)-(c) (enacted H.B. 583, 65th Leg., 2nd Reg. Sess. (Idaho 2020)).

241. § 6-2105(5)(a)-(c)

242. *Eller*, 443 P.3d at 161, 165 Idaho 147.

243. *Id.*

244. Act of Mar. 24, 2020, ch. 295, 2020 Idaho Sess. Laws 295 (codified as amended at IDAHO CODE § 6-2105(5)(a)-(c) 2020)).

245. *Id.*

246. *Id.*

Prior to enacting this legislation, there was no cap on whistleblower claims for noneconomic damages.²⁴⁷ House Bill 583 therefore binds the Whistleblower Act to the limitations set forth in Idaho's noneconomic damage cap, section 6-1603(1), and exempts government entities from punitive damages.²⁴⁸ It is important to note that this bill does not give whistleblowers the opportunity to circumvent the cap in cases involving reckless or felonious behavior under section 6-1603(2).²⁴⁹ The limitations in section 6-1603(1) will effectively cap noneconomic damages correlated to the annual wages of the state.²⁵⁰

Singling out whistleblower claims and capping their noneconomic damages is somewhat unusual. Some states with whistleblower statutes cap noneconomic damages pursuant to the state's general noneconomic damage caps on torts.²⁵¹ Other states allow whistleblowers to recover noneconomic damages in full without a cap.²⁵² Idaho is one of the only states, if not the only state, that singles out whistleblowers in the whistleblower statute capping their damages.

B. Legislature's Purpose for Capping Whistleblower Damages

The legislature enacted House Bill 583 in order to directly address and respond to the ruling in *Eller* that "there was no cap on damages for public whistleblower claims."²⁵³ Stephen M. Kohn, one of the nation's leading whistleblower attorneys,²⁵⁴ stated that "awarding whistleblowers damages for emotional distress

247. See *Eller*, 443 P.3d at 168, 165 Idaho at 154.

248. IDAHO CODE §§ 6-2105(5)(a)–(c) (enacted H.R. 583, 65th Leg., 2nd Reg. Sess. (Idaho 2020)).

249. See *supra* Part V for an analysis of how the cap unfairly prejudices whistleblowers by not affording them with the ability to override the cap.

250. IDAHO CODE § 6-1603 (1987); see *supra* notes 88–90 and accompanying text. In 2019, the cap was set at \$372,865.27. IDAHO INDUS. COMM'N, *supra* note 89.

251. See *Iglesias v. City of Hialeah*, 305 So. 3d 20 (Fla. Dist. Ct. App. 2019); see also Jeffrey D. Slanker & Michael P. Spellman, *Florida Appellate Court Says Noneconomic Compensatory Damages are Available in FPWA*, 31 No. 7 FLA. EMP. L. LETTER 2 (Sept. 2019) (The Florida court in *Iglesias* ruled similarly to Idaho in *Eller* and held that claims under Florida Public Whistleblower Act were not subject to a statutory cap.).

252. See *McGill v. Univ. of S.C.*, 423 S.E. 2d 109, 112 (S.C. 1992) (similar to the *Eller* case, here the court held that the damages awarded under the state whistleblower act could not be capped by the state tort claim act); see also *Bailets v. Pa. Tpk. Comm'n*, 181 A.3d 324, 326 (Pa. 2018) (whistleblowing plaintiff's award of \$1.6 million in noneconomic damages was upheld and not excessive).

253. IDAHO STATE LEGISLATURE, SINE DIE REPORT 11 (2020), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/sinedie.pdf>; see also Justin Ruen, *AIC Legislative Update: March 6, 2020*, ASS'N OF IDAHO CITIES: AIC BLOG (Mar. 6, 2020), <https://idahocities.org/blogpost/1235530/341942/AIC-Legislative-Update-March-6-2020>.

254. About Page of Stephen M. Kohn, KOHN, KOHN & COLAPINTO LLP, <https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/stephen-m-kohn/> (last visited Oct. 21, 2021).

has been shown to encourage others to come forward with crucial information about fraud and misconduct” and thus, whistleblower lawsuits likely would have surged after the *Eller* case.²⁵⁵ However, by responding to the case ten months after the decision, the legislature did not give whistleblowers in Idaho a chance to come forward before enacting the bill capping their damages.²⁵⁶ The ruling in *Eller* signified that public employees’ claims of retaliation are valid and can reap extensive rewards.²⁵⁷ House Bill 583, on the other hand, does not encourage whistleblowers to come forward.²⁵⁸ In fact, it might do just the opposite.

Some of the Idaho legislators stated their rationale for enacting these caps. The bill’s sponsor, Representative Greg Chaney, stated that “the bill is an attempt to strike a balance between protecting the rights of whistleblowers to report legitimate claims of waste, fraud and abuse, and protecting Idaho taxpayers.”²⁵⁹ Senator Kelly Anthon also commented on the bill stating that “the legislation balanced the responsibility the state has to protect whistleblowers who report wrongdoing, while also protecting Idaho taxpayers,” and that the bill “protects the Idaho taxpayer from judgments of the courts that are without limits and that become punitive in nature.”²⁶⁰ According to these legislators, the bill’s main purpose was to protect whistleblowers *and* taxpayers.²⁶¹ However, while this legislation may protect Idaho taxpayers, it inadvertently benefits public employers at the expense of punishing its employees.

C. An Alternative Approach: Encourage Whistleblowing and Implement Training Procedures

Instead of capping noneconomic damages for whistleblowers, the legislature should allow whistleblowers to recover in full so that employers know not to retaliate against employees who blow the whistle. The legislature should encourage good faith whistleblowing because it holds public entities accountable for their wrongful actions. Capping whistleblower damages, however, does the exact opposite. By limiting the amount recoverable for the emotional effects of retaliation, the legislature’s cap effectively limits an employee’s incentive to blow the whistle on their employer. The purpose of whistleblower statutes is to balance

255. Maya Efrati, *Amicus Brief Filed in Support of Idaho State Police Whistleblower*, WHISTLEBLOWER NETWORK NEWS (Oct. 11, 2018), <https://whistleblowersblog.org/2018/10/articles/whistleblower-news/amicus-brief-filed-in-support-of-idaho-state-police-whistleblower/>.

256. See *Eller v. Idaho State Police*, 443 P.3d 161, 165 Idaho 147 (Idaho 2019); see also H.R. 583, 65th Leg., 2nd Reg. Sess. (Idaho 2020).

257. See *Eller*, 443 P.3d 161, 165 Idaho 147.

258. Idaho H.R. 583.

259. Justin Ruen, *AIC Legislative Update: March 6, 2020*, ASS’N OF IDAHO CITIES: AIC BLOG (Mar. 6, 2020), <https://idahocities.org/blogpost/1235530/341942/AIC-Legislative-Update-March-6-2020>.

260. Keith Ridler, *Inside the Statehouse: Bill Limiting Idaho Whistleblower Lawsuits Heads to Governor*, IDAHO NEWS 6, <https://www.kivitv.com/news/bill-limiting-idaho-whistleblower-lawsuits-heads-to-governor> (Mar. 19, 2020, 10:54 AM).

261. *Id.*

the interests of employers, employees, and the public. By capping whistleblower damages, however, the purpose of the whistleblower statute weighs in favor of the employer.

Capping whistleblower damages might reduce Idaho taxes, but it ignores the actual problem at hand. The actual problem, or triggering event, is wasting government resources or violating the law. That is the problem that Idaho should be trying to prevent. Idaho taxes would not rise due to whistleblower litigation if whistleblowers did not have to report wrongdoing in the first place. Instead of capping whistleblower damages, the legislature should attempt to prevent wrongful conduct from occurring and making sure the government workforce is one that does not waste government resources or violate the law.

Furthermore, the legislature could alternatively protect Idaho taxpayers by implementing training procedures to reduce the possibility of retaliation. If employers know that their adverse actions will be recognized in full by the justice system and cost a lot of money, then they will be encouraged to set forth training programs to avoid liability. Government training programs that educate employers on how to avoid whistleblowing violations and discourage retaliation against whistleblowers for reporting such conduct should be implemented as opposed to capping damages. If programs are set in place training public employers on how to avoid whistleblowing violations, retaliation, and subsequent liability, then whistleblowing claims would decrease. Thus, the legislature's goal of protecting Idaho taxpayers *and whistleblowers* will be more effective through training and uncapped liability.

D. Harmful Effects of the Noneconomic Damage Cap on Whistleblowers

The noneconomic damage cap imposed on whistleblowers should not have been enacted. The cap protects Idaho taxpayers at the expense of whistleblowers and the general public. Similar to other noneconomic damage caps, House Bill 583 punishes those with the most egregious harms who have otherwise meritorious claims for relief.²⁶² Noneconomic damages are an important piece of compensatory damages, and in most instances, noneconomic damages are necessary to return the plaintiff to their rightful position.²⁶³ If a whistleblower has noneconomic damages greater than the cap, then they will never recover to their rightful position because the cap reduces the amount they *should* receive to the capped amount. Therefore, the goal of compensatory damages—to return the whistleblower to their rightful position—is not satisfied when the harm exceeds the cap.

Prospectively, the cap for whistleblowers will also have harmful effects on settlement, disproportionately effect women, and reduce a whistleblower's access to adequate representation. These harmful effects are similar to the effects caps

262. See *supra* notes 53–55 and accompanying text.

263. See *supra* notes 17–19 and accompanying text.

have on other claims.²⁶⁴ Similar to the settlement rate of other capped claims, the settlement rate for whistleblower cases will likely increase and fewer cases will go to trial.²⁶⁵ However, this means that settlement negotiations will favor defendants and yield smaller settlement awards for whistleblowers.²⁶⁶

This cap will have a discriminatory effect on women.²⁶⁷ Unfortunately, women have historically received smaller wages compared to their male counterparts.²⁶⁸ Economic damages for whistleblowers are largely calculated by determining lost wages.²⁶⁹ Since women have historically been given fewer wages, they must rely on noneconomic damages more frequently to recover.²⁷⁰ This cap will disproportionately hurt women by reducing their damages.

The cap will also decrease the value of whistleblower cases and make it harder for plaintiffs with low economic damages to find adequate representation willing to take their case. For example, in *Eller* the whistleblower only received \$30,528.97 in economic damages.²⁷¹ Pursuant to the new legislation capping noneconomic damages, Brandon Eller might not have been able to find adequate representation willing to take his case due to his relatively low value of economic damages and capped noneconomic damages.

Most importantly, whistleblowers play a critical role in exposing government waste, financial fraud, and other wrongdoings. Blowing the whistle on your employer is a difficult decision that takes tremendous courage and strength, because whistleblowing can lead to hostility, mistreatment, and retaliation at work. Government employees should be encouraged to speak up about improper government conduct.

In reality, it is in the public's best interest to know about government misconduct. However, this cap disincentivizes whistleblowing. When whistleblowing is disincentivized, government waste and other misconduct might go undetected harming the general public. Whistleblowers will have to decide

264. See *supra* Part III Section B notes 35–76 and accompanying text for the harmful effects of noneconomic damage caps on claims other than whistleblowers.

265. See *supra* notes 56–63 and accompanying text for effects of settlement on personal injury and wrongful death caps.

266. See *supra* notes 56–63 and accompanying text for effects of settlement on personal injury and wrongful death caps.

267. See *supra* notes 63–75 and accompanying text for the discriminatory effect caps have on women.

268. See Rong Shi, Kerensa Kay & Ravi Somani (@WorldBank), MEDIUM, *5 Facts About Gender Equality in the Public Sector*, MEDIUM: WORLD OF OPPORTUNITY (Mar. 14, 2019), <https://medium.com/world-of-opportunity/5-facts-about-gender-equality-in-the-public-sector-e66c50c3c743>; see also *Research & Data: The Simple Truth About the Gender Pay Gap*, AAUW, <https://www.aauw.org/resources/research/simple-truth/> (last visited May 27, 2022).

269. Economic damages are calculated by monetary losses. Lisa M. Ruda, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197, 199 (1993). Thus, lost wages are a major source of economic damages in the employment law context.

270. See *supra* notes 68–76 and accompanying text.

271. *Eller*, 443 P.3d at 165, 165 Idaho at 151.

between blowing the whistle on their employer, risking retaliation, and not being fully compensated, or staying silent letting the improper conduct continue. Only time will tell whether Idaho whistleblowers will be silenced due to this new legislation.

VI. CONSTITUTIONAL QUESTIONS FOR THE NONECONOMIC DAMAGE CAPS IN IDAHO

Idaho's noneconomic damage cap, 6-1603, has been constitutionally challenged and upheld.²⁷² However, numerous states have struck down their noneconomic damage cap since that challenge.²⁷³ A subsequent constitutional challenge in Idaho that relies on those cases has the potential to yield a different result. Although another constitutional challenge focusing on the right to jury trial might be successful, I am going to focus my analysis on the merits of equal protection challenges.

Idaho's first noneconomic damage cap was challenged on equal protection grounds in *Jones*.²⁷⁴ The *Jones* Court implied the level of scrutiny for such cases would be heightened beyond minimal scrutiny using a "means-focus" test.²⁷⁵ The current noneconomic damage cap was challenged in *Kirkland*.²⁷⁶ That court, however, did not consider the *dicta* implicating higher scrutiny from *Jones* or whether the statutory cap was in violation of equal protection.²⁷⁷ The legislature amended the cap after *Kirkland* and added whistleblowers to the claimants affected by the cap.²⁷⁸ Thus, the current cap should be challenged again, but this time, on equal protection grounds in addition to other constitutional claims.

Noneconomic damage caps in other states have been struck down as unconstitutional in violation of equal protection.²⁷⁹ For example, the Florida Supreme Court, using rational basis review, held that a statutory cap on noneconomic damages in medical malpractice cases violates the right to equal protection under Florida's constitution because it discriminated against claimants

272. See *Kirkland*, 4 P.3d 1115, 134 Idaho 464.

273. See *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019).

274. See *Jones v. State Bd. of Med.*, 555 P.2d 399, 403, 97 Idaho 859, 863 (1976); see also *supra* notes 135–45 and accompanying text.

275. *Id.* at 407, 97 Idaho at 867.

276. See *Kirkland*, 4 P.3d 1115, 134 Idaho 464; see also *supra* notes 146–55 and accompanying text.

277. *Id.*

278. See IDAHO CODE §§ 6-2105(5)(a)–(c) (enacted H.B. 583, 65th Leg., 2nd Reg. Sess. (Idaho 2020)).

279. See *Est. of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). See also *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 701 N.W.2d 440 (Wis. 2005) for analysis of noneconomic damage caps violating equal protection.

who suffer the “most grievous injuries” and “no rational basis exists (if it ever existed) between the cap . . . and any legitimate state purpose.”²⁸⁰ Thus, the court in Florida was able to strike down a damage cap using the minimal scrutiny, rational basis.²⁸¹

The Florida court exemplified the discriminatory effects damage caps have on plaintiffs with the most severe injuries by explaining how moderately injured plaintiffs recover in full when their injuries are awarded less than the cap. However, severely injured plaintiffs awarded damages greater than the cap are unable to recover in full because their damages are reduced to the capped amount.²⁸² Additionally, the State’s purpose for enacting the cap—reducing insurance premiums—was not rationally related because there was absolutely no correlation between them.²⁸³ For these reasons, the court held noneconomic damages violate equal protection even under minimal scrutiny.²⁸⁴

In Idaho, a plaintiff subject to the cap could challenge the noneconomic damage cap on equal protection grounds and make an argument similar to that of the Florida Supreme Court. Unlike Florida, where the court used the minimal level of scrutiny,²⁸⁵ the Idaho Supreme Court in *Jones* gave heightened scrutiny to noneconomic damage challengers.²⁸⁶ Since the Florida court was able to strike down noneconomic damages under rational basis, the challenger here should be able to strike down noneconomic damages more easily if they are afforded heightened scrutiny.

Similar to the Florida argument, the Idaho challenger would examine the legislature’s purpose—such as alleviating insurance costs for personal injury plaintiffs or reducing Idaho taxes for whistleblowing plaintiffs—and argue that the proposed purpose is not related to the statute. As previously discussed and vindicated in the Florida case, tort reform has not alleviated rising insurance costs.²⁸⁷ For instance, the *Jones* court wondered whether there was ever an insurance or healthcare crisis at all.²⁸⁸ Thus, there is no correlation between capping noneconomic damages and the legislature’s purpose, which has allegedly been to address the insurance crisis.

In regard to whistleblowers, the challenger could argue that there is no correlation between Idaho taxes, whistleblower damages, and the statute. However, this argument does not have as much statistical support to back it up since Idaho is one of the only states that caps whistleblower damages.²⁸⁹ Nonetheless, regardless of whether a personal injury, wrongful death, medical

280. *Est. of McCall*, 134 So.3d at 914.

281. *Id.* at 901.

282. *Id.* at 915.

283. *Id.* at 910.

284. *Id.* at 901.

285. *See Est. of McCall*, 134 So. 3d 894 (Fla. 2014).

286. *See Jones v. State Bd. of Medicine*, 555 P.2d 399, 97 Idaho 859 (1976).

287. *Martin*, *supra* note 10.

288. *Jones*, 555 P.2d at 412, 97 Idaho at 872.

289. *See Iglesias v. City of Hialeah*, 305 So. 3d 20 (Fla. Dist. Ct. App. 2019).

malpractice, or whistleblowing plaintiff gets the opportunity to challenge Idaho's noneconomic damage cap, the plaintiff should take the opportunity to challenge it on equal protection grounds. If a plaintiff is able to challenge caps on equal protection grounds, it will be interesting to see whether the *Jones* heightened scrutiny test is applied, and whether the legislature's purpose for enacting these statutes survives the *Jones* test.

A whistleblowing plaintiff also has an additional equal protection argument. House Bill 583 limits these claims to section 6-1603(1) of Idaho's noneconomic damage cap.²⁹⁰ However, it does not afford whistleblowers the avenue around the cap under section 6-1603(4).²⁹¹ Under section 6-1603(4) of the Idaho noneconomic damage cap, plaintiffs with personal injury, wrongful death, and medical malpractice claims are not subject to the cap if the tortfeasor acted recklessly or feloniously.²⁹²

Allowing some plaintiffs an avenue around the cap but not offering the same opportunity to whistleblowers has a discriminatory impact. This favors victims of personal injury, wrongful death, and medical malpractice. It also unfairly benefits defendants to whistleblower actions. The cap allows the government and its employees to recklessly or feloniously retaliate against whistleblowers without any further expense, whereas other tortfeasors who act recklessly or feloniously must pay noneconomic damages in full.²⁹³

For these reasons, this bill could be challenged on equal protection grounds. This argument, however, is not particularly strong. In an equal protection analysis, the court identifies the classification being challenged, the standard to test the classification, and whether the standard has been met.²⁹⁴ The equal protection clause is "designed to ensure that those persons similarly situated with respect to a governmental action [are] treated similarly."²⁹⁵ Not affording whistleblowing plaintiffs the same avenue around the cap as other plaintiffs could be challenged as discriminatory in violation of Idaho's equal protection clause. However, in order to challenge the whistleblower cap as discriminatory, the whistleblowing plaintiffs and other plaintiffs must be similarly situated.²⁹⁶

290. IDAHO CODE §§ 6-2105(5)(a)–(c) (2020) (enacted H.B. 583, 65th Leg., 2nd Reg. Sess. (Idaho 2020)); *see supra* notes 66–74 and accompanying text.

291. IDAHO CODE §§ 6-2105(5)(a)–(c) (2020).

292. *Hennefer v. Blaine Cnty. Sch. Dist.*, 346 P.3d 259, 265, 158 Idaho 242, 248 (2015); *see supra* notes 94–98 and accompanying text (explaining plaintiffs' recovery was not capped because defendant's conduct was reckless).

293. IDAHO CODE §§ 6-2105(5)(a)–(c) (2020).

294. *State v. Rome*, 368 P.3d 660, 663, 160 Idaho 40, 43 (2016).

295. *Primary Health Network, Inc. v. State*, 52 P.3d 307, 314, 137 Idaho 663, 670 (2002) (citing *State v. Hayes*, 700 P.2d 959, 108 Idaho 556 (Ct. App. 1985)).

296. *Id.*

It could be argued that whistleblowing plaintiffs are similarly situated to other plaintiffs because they are both subject to Idaho's noneconomic damage cap. However, this classification of plaintiffs might not be sufficiently "similarly situated."²⁹⁷ For instance, whistleblowing plaintiffs cannot hold individual agents of the government employer liable while other plaintiffs subject to the caps are able to hold individual tortfeasors liable.²⁹⁸

When courts evaluate reckless or felonious conduct for purposes of the cap, they analyze the level of the tortfeasor's intent. Personal injury, wrongful death, and medical malpractice cases analyze the level of the tortfeasor's intent to determine whether the tortfeasor should be liable.²⁹⁹ Those types of cases also determine whether the tortfeasor acted negligently, recklessly, or feloniously.³⁰⁰ However, the whistleblower act does not examine the level of intent when the employer retaliates against an employee that blew the whistle.³⁰¹ Thus, the level of intent examined in other cases is not examined in whistleblower cases. Whistleblower cases and plaintiffs are sufficiently different from other cases and plaintiffs subject to the cap. If whistleblowing plaintiffs are not similarly situated to other plaintiff subject to the cap, then this argument will fail.

However, even if this argument fails to violate the constitution, it still unfairly prejudices whistleblowers. If the legislature is going to impose a cap on whistleblower claims under Idaho's noneconomic damage cap, it should afford whistleblowing plaintiffs the same exceptions under section 6-1603(4) as other plaintiffs. Even though whistleblower claims do not look at the tortfeasor's level of intent,³⁰² the legislature should allow plaintiffs to examine a tortfeasor's intent in order to circumvent the cap for particularly egregious retaliatory actions.

VII. CONCLUSION

Noneconomic damage caps directly oppose the goal of compensatory damages, which is to put the plaintiff back in their rightful position. In addition to opposing the goal of compensatory damages, noneconomic damage caps are unconstitutional and limit recovery for otherwise meritorious claims for relief. Damage caps have a harmful effect on settlement discussions, disproportionately effect women, and disincentivize attorneys from taking these cases. In addition to those reasons, caps do not alleviate the problems they were set to resolve. Thus, caps should be challenged again in Idaho for violating equal protection in addition to the right to jury trial. If a plaintiff is able to follow the *Jones* precedent and receive heightened scrutiny, then an equal protection challenge will be difficult to beat.

For whistleblowers, the *Eller* case was a major decision because it expanded the scope of remedies under Idaho's whistleblower act. The legislature undermined

297. *Id.*

298. See *Hammer v. City of Sun Valley*, 414 P.3d 1178, 163 Idaho 439 (2016) (finding provisions of the whistleblower act did not create individual liability for agents of the government).

299. *Id.* at 94–98.

300. *Id.*

301. See IDAHO CODE §§ 6-2105(5)(a)–(c) (2020).

302. *Id.*

this decision when it enacted House Bill 583 limiting the scope of damages under the act. The legislature should reconsider its decision to cap whistleblower damages because it has extremely harmful effects on whistleblowing plaintiffs and the general public. Due to the importance of whistleblowers, the legislature should encourage whistleblowing instead of protecting the State from expensive litigation. Only time will tell whether the cap amount will dissuade municipalities from retaliating, whether the legislature will reconsider its decision to cap whistleblower claims, and whether an upcoming challenger will render the noneconomic damage cap in Idaho unconstitutional.