No. S25C0132

In the Supreme Court of Georgia

The Medical Center of Central Georgia, Inc., et al.,

Petitioners,

vs.

Norkesia Turner, et al.,

Respondents.

On Petition for Writ of Certiorari from the
State Court of Bibb County, Georgia
(Civil Action No. 18-SCCV-089217)

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GEORGIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the federal and state courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Georgia Chamber of Commerce, Inc. (the Georgia Chamber) serves the unified interests of its nearly 50,000 members—ranging in size from small businesses to Fortune 500 corporations—covering a diverse range of industries across all of Georgia's 159 counties. The Georgia Chamber is the State's largest business advocacy organization and is dedicated to representing the interests of both businesses and citizens in the State. Established in 1915, the Georgia Chamber's primary mission is creating, keeping, and growing jobs in Georgia. The Georgia Chamber pursues this mission, in part, by aggressively advocating the business and industry viewpoint in the shaping of law and public policy to ensure that Georgia is economically competitive nationwide and in the global economy.

The Chambers represent businesses, large and small, with an interest in the fairness and predictability of the civil-justice system in general and damages awards in tort cases in particular. The Chambers take no position on the merits of Plaintiffs' claims. But they and their members have a substantial interest in the constitutionality of OCGA § 51-13-1, which advances fairness and predictability by providing a reasonable limit on noneconomic damages. Promoting those values is especially important because Georgia's tort costs as a percent of state GDP and tort costs per household are among the highest in America.[1]

The Court should take this opportunity to revisit its decision in *Nestlehutt* and uphold the constitutionality of the noneconomic damages cap in § 51-13-1. Doing so would discourage unpredictable awards and excessive settlement demands, to the benefit of the people and economy of Georgia.

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[1] *See* U.S. Chamber of Commerce Institute for Legal Reform, Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System 19-20 (Nov. 2022) ("*Tort Costs*"), https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Assessment-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below held that the constitutional right to trial by jury prevents the General Assembly from defining (in OCGA § 51-1-13(b)) the remedy for wrongful-death claims based on a medical-malpractice theory. The lower court did so even though claims for wrongful death historically did not exist at common law and were never tried to juries before 1798. The Court of Appeals did not attempt to independently justify that ruling. Instead, it claimed that its hands were tied because this Court's precedent, *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010), purportedly demands that outcome. That decision warrants this Court's review for several reasons.

First, the decision below overreads and misapplies *Nestlehutt*. In *Nestlehutt*, this Court prescribed a historical test for determining the scope of the right to a jury trial and applied that test to just one kind of claim: medical malpractice. The parties in *Nestlehutt* briefed only that question—not the question whether § 51-13-1(b) was invalid in *all* of its applications. Any broader statements in *Nestlehutt* were dicta and could not compel invalidation of a law duly passed by the General Assembly. And the application of the statute that the Court held was impermissible (to damages awarded on a medical-malpractice claim) is readily severable from the application of the statute in this case (to damages awarded on a wrongful-death claim). In reaching the opposite conclusion, the Court of Appeals' decision conflicts with

decisions establishing elementary principles of judicial review and decides an important question of state constitutional law—the validity of § 51-13-1(b) as applied to wrongful-death claims—that this Court has not addressed and should settle now. *See* R. 40(a), (c).

Second, and more fundamentally, the Court should reconsider *Nestlehutt*. *See* R. 40(b). *Nestlehutt* mistakenly transmuted the procedural jury-trial right into a substantive limit on the legislature's authority to modify the remedies available for common-law actions. In doing so, it failed to engage with contrary history, never acknowledged the far-reaching consequences of its holding, mistakenly inferred a *right* from a historical *practice*, and created an unworkable doctrine that cannot be consistently applied going forward. *Nestlehutt* should be overruled.

The Court's review of this important issue is badly needed. When it was enacted in 2005, § 51-13-1 was intended to help solve the healthcare crisis facing the State—as verdicts rose, so did medical professionals' liability insurance premiums, contributing to decreased access to vital healthcare services statewide. Those issues remain pressing today, as Georgia's rural hospitals and healthcare providers close their doors and nuclear jury verdicts continue to increase in both size and number. *Nestlehutt* and the decision below hamstring the General Assembly's ability to craft policy responses to these pressing healthcare and business issues. The Court should grant review and reverse.

ARGUMENT AND CITATION OF AUTHORITY

I. Fundamental Principles Of Judicial Review Prohibit Reading *Nestlehutt* To Invalidate The Cap On Noneconomic Damages In Wrongful-Death Cases.

Properly understood, *Nestlehutt* did not resolve the question in this case: the constitutionality of placing an upper limit on the damages recoverable for a wrongful death claim. The answer to that question is straightforward. Wrongful-death claims historically did not exist at common law, and juries did not award damages for the value of the life of the deceased. The Court should review the Court of Appeals' contrary ruling, as it conflicts with this Court's precedents and with basic principles of judicial review and decides an important question of state law that this Court has yet to pass upon. *See* R. 40(a), (c).

A. *Nestlehutt* did not resolve the question presented in this case.

The Court of Appeals held that *Nestlehutt* invalidated § 51-13-1(b) in all of its applications. But *Nestlehutt* merely held that § 51-13-1(b) was unconstitutional as applied to noneconomic damages awarded on medical-malpractice claims. It never passed upon wrongful-death claims or damages, and the Court of Appeals' contrary holding contradicts elementary principles of judicial review.

A. Start with *Nestlehutt*'s facts. Mr. and Mrs. Nestlehutt sued a plastic surgeon after Mrs. Nestlehutt was disfigured following a surgery. 286 Ga. 731, 731 (2010). The jury awarded $115,000 for medical expenses, $900,000 in noneconomic

damages for Mrs. Nestlehutt's pain and suffering, and $250,000 for Mr. Nestlehutt's loss of consortium. *Id.* *Nestlehutt* did not involve a wrongful-death claim, nor did it involve damages awarded for the value of any decedent's life—after all, there *was* no decedent.

Next take *Nestlehutt*'s reasoning. The Court held that § 51-13-1(b) could not, consistent with the jury-trial right, impose a limit on Mrs. Nestlehutt's $900,000 noneconomic damages award. *Id.* at 731, 738. The Court reached that conclusion by tracing "[t]he antecedents of the modern medical malpractice action" "back to the 14th century" and determining that juries typically determined the amount of compensatory damages in those cases. *Id.* at 733-35. The Court never so much as mentioned wrongful-death actions or damages. And it certainly never traced their historical pedigree to determine whether juries considered wrongful death actions prior to 1798. That silence reflected the parties' briefs, which mentioned wrongful death just once—in an allusion to a workers' compensation statute that places a separate cap on wrongful-death damages. *See* Appellant's Br., *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, No. S09A1432 (June 1, 2009), 2009 WL 2954781, at *19.

Nestlehutt's silence on wrongful-death claims and damages underscores that it addressed only the application of § 51-13-1(b) to medical-malpractice claims. As the Court has made clear, the "analytical framework" established in *Nestlehutt*

requires claim- and damages-specific historical analysis to determine whether a jury right existed for a specific claim and a specific kind of damages. *Nestlehutt* poses two specific questions. First, "whether in Georgia in 1798, the underlying claim … existed," "such that the right to trial by jury applied to the claim." *Taylor v. Devereux Found., Inc.*, 316 Ga. 44, 59 (2023). Second, "whether Georgia juries in 1798 determined" the particular kind of "damages that were sought by the plaintiff (and restricted by a modern statute)." *Id.* *Nestlehutt* asked and answered those questions about medical-malpractice claims and noneconomic damages for those claims. But it did not ask, let alone answer, those questions for other claims or damages not before the Court. The Court of Appeals was simply wrong to conclude it did so.

There can be no doubt that wrongful-death claims and damages are distinct from medical-malpractice claims and their accompanying damages. The claims are created by different statutes—in different chapters of the code, no less. *See* OCGA § 51-4-2 (creating action for wrongful death); OCGA § 51-1-27 (authorizing recovery for medical malpractice). They are brought by plaintiffs in different capacities, too; a wrongful-death claim belongs to the survivor in her own right, while a medical-malpractice claim belongs to the patient and, after his death, is brought by the administrator of his estate. *Tolbert v. Maner*, 271 Ga. 207, 208 (1999) (wrongful death); *Walden v. John D. Archbold Mem. Hosp., Inc.*, 197 Ga. App. 275,

276-77 (1990) (medical malpractice). The claims are subject to different accrual rules for statute-of-limitations purposes: The limitations period for wrongful-death claims does not begin to run until the death, while the limitations period for medical-malpractice claims generally runs from the date of the treatment. *See Miles v. Ashland Chem. Co.*, 261 Ga. 726, 727-28 (1991) (wrongful death); *McCord v. Lee*, 286 Ga. 179, 180 (2009) (malpractice). And, importantly, the claims have different histories. Georgia's wrongful-death "claim is entirely a statutory creation." *Tolbert*, 271 Ga. at 208; *see also Bibbs v. Toyota Motor Corp.*, 304 Ga. 68, 70 (2018). Meanwhile, medical-malpractice claims have a long history at common law, as *Nestlehutt* explained.

Because *Nestlehutt* created a claim-specific standard and analyzed only medical-malpractice claims, the Court has yet to pass on whether § 51-13-1(b) can constitutionally define the remedy for wrongful-death claims. And on a proper application of *Nestlehutt*'s test, the statute can do so.

B. No reason supports a different conclusion about *Nestlehutt*'s scope.

First, the Court of Appeals focused on the broad dicta *Nestlehutt* sometimes used to describe its holding. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *see McLeod v. Clements*, 297 Ga. 371, 373-75 (2015) (looking to "facts presented" in prior decision and "the context of its

statements" to identify dicta and holdings); *see also, e.g.*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2277-79 (2024) (Gorsuch, J., concurring) (explaining that the traditional role of common-law judges involves discerning the scope of holdings based on the opinion's essential reasoning and the limits of the adversarial process, including by looking to the facts presented and arguments made in each case). And the scope of an opinion's holding turns not on its language in a sentence here and there, but instead on the case's posture and facts. "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821) (Marshall, C.J.). So language reaching beyond the issues presented in *Nestlehutt*—purporting to cover wrongful-death questions not presented by *Nestlehutt* and not even referenced by the parties—is dicta that does not control the issue. The Court of Appeals erred in holding otherwise.

Relatedly, the Court of Appeals reasoned that *Nestlehutt*'s holding nonetheless covered wrongful-death claims because "the explicit terms of" § 51-13-1(b) define medical malpractice to "*include[] wrongful death*." *Med. Ctr. of C. Ga., Inc. v. Turner*, 2024 WL 3885503, at *7 & n.47 (Ga. App. Aug. 21, 2024). But that is beside the point. *Taylor* made clear that the jury-trial-right analysis is claim- (and

damages-) specific. *See supra* pp. 6-7; *Taylor*, 316 Ga. at 58-59. That is because distinct claims and forms of damages have distinct histories with distinct jury-trial-right implications. *See Taylor*, 316 Ga. at 58-59. So even if the *statute* treats the claims in the same way, the *Nestlehutt* rubric assesses their constitutional status separately. Otherwise, the General Assembly could manipulate the constitutional analysis simply by defining terms in statutes.

Second, *Nestlehutt* could have reached beyond the specific medical-malpractice question it presented if it considered a facial challenge. But there is no reason to think it did. A facial challenge requires the challenger "to establish that no set of circumstances exists under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep." *Olevik v. State*, 302 Ga. 228, 247 (2017) (citation omitted). *Nestlehutt* analyzed just one application of § 51-13-1(b): its application to medical-malpractice claims. It never mentioned, let alone analyzed, any other applications. *See supra* pp. 5-8. And it certainly never said it was considering a facial challenge, consistent with its omission of any argument or analysis on applications stretching beyond the facts of that specific case.

Third, *Nestlehutt*'s "invalidation" of the statute as applied to medical-malpractice claims could have likewise nullified its application to wrongful-death claims if the two applications are inseverable. But that would contradict the

severability clause the General Assembly included in the act creating § 51-13-1, as well as the well-established presumption of severability. *See* 2005 Ga. Laws 1, § 14.

"[N]o workable system of judicial review could function without a large role for severability," which dictates how much of the law should remain operative when one aspect of the law has been held unconstitutional. Michael C. Dorf, *Fallback Law*, 107 Colum. L. Rev. 303, 370 (2007). Severability doctrine can be triggered by invalid provisions of a law—say, a subsection—or by invalid applications of a single provision—as here, with *Nestlehutt*'s holding that the jury trial right precludes application of § 51-13-1(b) to noneconomic damages in medical-malpractice cases. Brian C. Lea, *Situational Severability*, 103 Va. L. Rev. 735, 743 (2017). Without severability, impossible questions would loom: "Does an invalid provision taint every other provision that passed [the General Assembly] in the same [bill]? Does it taint every other provision in the same title of the [Code]?" Dorf, *Fallback Law*, 107 Colum. L. Rev. at 310. Indeed, "[a] *real* rule of nonseverability would treat any invalid provision of law as invalidating the entire legal code." *Id.* (emphasis added). That drastic step "is never an option," so the question is only "how much to sever," not whether to sever at all. *Id*.

The answer is generally easy: Courts apply "a presumption of severability, under which courts assume that a legislature intends for any unlawful part of its handiwork to be severable from all lawful parts." Lea, *Situational Severability*, 103

Va. L. Rev. at 744. Thus, consistent with the general rule governing facial challenges, courts usually do not deem valid parts of a law inseverable from invalid parts; they presume that one bad application or provision should not take down the rest of the law. *See* OCGA 1-1-3 (statutes presumed to be severable); *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays*, 266 Ga. 393, 404 (1996) ("This Court has long favored upholding legislative enactments where invalid provisions therein are stricken.").

Properly understood, then, *Nestlehutt* addressed just one application of § 51-13-1(b), its application to noneconomic damages in medical-malpractice actions. But the Court's holding of unconstitutionality did not extend to other applications of the statute, because there is nothing to rebut the usual presumption of severability. To the contrary, the statute itself declares that it is severable, in line with the General Assembly's general rule of severability. *See* 2005 Ga. Laws 1, § 14; OCGA § 1-1-3; *see, e.g.*, *Jekyll Island-State Park Auth. v. Jekyll Island Citizens Ass'n*, 266 Ga. 152, 153 (1996). So *Nestlehutt* did not reach beyond its facts or reasoning because of nonseverability, either.

B. Section 51-13-1(b) Is Constitutional As Applied To Wrongful-Death Claims And Damages, Under *Nestlehutt*'s Framework.

Nestlehutt does not control, and the answer under its framework is clear for two independently sufficient reasons: Juries in 1798 did not hear wrongful-death claims, nor did they award wrongful death damages, so the jury-trial right does not

interfere with application of § 51-13-1(b) to wrongful-death claims under the *Nestlehutt* framework.

1. This Court has already recognized that "[t]here is no common law right to file a claim for wrongful death; the claim is entirely a statutory creation." *Auld v. Forbes*, 309 Ga. 893, 895 (2020) (quoting *Tolbert v. Maner*, 271 Ga. 207, 208 (1999)). To the contrary, at common law, "the death of a human being could not be complained of as an injury." *Georgia R.R. & Banking Co. v. Wynn*, 42 Ga. 331, 334 (1871) (quoting *Baker v. Bolton*, 170 Eng. Rep. 1033 (1808)). England did not change the rule until 1846. *See* Charles A. Haskell, *Actions for Death by Wrongful Act*, 4 Notre Dame L. Rev. 116, 116-17 (1928). Georgia followed soon after. Robert E. Cleary, Jr., *Eldrige's Georgia Wrongful Death Actions* § 1:4 (Westlaw Jan. 2024 update).

2. Nor could the conclusion be any different even if (*contra Taylor*) the Court were to consider only the sort of damages at issue here, divorced from the claim. The measure of damages for wrongful death is "the full value of the life of the deceased." *Western & A. R. Co. v. Michael*, 175 Ga. 1, 10 (1932); OCGA § 51-4-1(1). That means "the value of the decedent's life *to him*." Cleary, *Eldrige's Georgia Wrongful Death Actions* § 6:1 (emphasis added).

The sources already cited make clear that a pre-1798 jury could not award damages for the value of the life of the deceased to him or her. This Court could not

find "a single case" at common law in which a husband "recover[ed] damages for the homicide of his wife"—despite "the most diligent research." *Wynn*, 42 Ga. at 334. And in *Baker*, when a husband sued to recover for the death of his wife in a stagecoach accident, Lord Ellenborough announced and applied the common-law rule that "the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account," but her death "could not be complained of as an injury" because "the damages, as to the plaintiff's wife, must stop with the period of her existence." 170 Eng. Rep. at 1033.

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The bottom line is that application of § 51-13-1 to noneconomic damages based on a wrongful-death claim satisfies neither element of *Nestlehutt*'s test—much less both elements in combination (linking the claim to the damages) as required by *Taylor*. The Court of Appeals thus erred in holding § 51-13-1 unconstitutional as applied to the $7.2 million wrongful-death award in this case.

II. This Court Should Reconsider and Overrule *Nestlehutt*.

Although it can easily reverse the Court of Appeals by applying precedent, the Court can and should avoid the issues raised in Section I by addressing a more fundamental problem: *Nestlehutt* was wrongly decided and should be overruled. *See* R. 40(b). *Nestlehutt* was mistaken in concluding that the procedural right to a

jury trial imposes substantive limits on the General Assembly's authority to define remedies, and *stare decisis* does not compel the Court to retain *Nestlehutt*'s error.

In evaluating whether to overrule an earlier decision, the Court considers "factors such as the age of the precedent, the reliance interests at stake, the workability of the decision, and most importantly, the soundness of its reasoning." *State v. Jackson*, 287 Ga. 646, 658 (2010). *Stare decisis* "applies with the least force to constitutional precedents," and "[t]he more wrong a prior precedent got the Constitution, the less room there is for the other factors to preserve it." *Gilliam v. State*, 312 Ga. 60, 62-63 (2021) (citation and punctuation omitted). No factor favors retaining *Nestlehutt*.

A. Starting with the "most important[]" factor, *Jackson*, 287 Ga. at 658, *Nestlehutt*'s reasoning was unsound. It misunderstood the nature of the jury-trial right, drawing erroneous conclusions about the historical contours of the jury-trial *right* from the historical *practice* of jury trials.

1. Founding-era jurists from William Blackstone to Alexander Hamilton understood that the jury-trial right did not impair the legislature's authority to alter the substantive content of the law. As in England and elsewhere in the United States, the Georgia General Assembly's plenary legislative power includes full authority to create, abolish, or modify both statutory and common-law causes of action. It also includes full authority to create, abolish, or modify remedies.

To determine the scope of the jury-trial right in 1798—and thus its scope today—this Court has long treated Blackstone as "authoritative." *Nestlehutt*, 286 Ga. at 733 (citing *Rouse v. State*, 4 Ga. 136, 145-47 (1848)). Blackstone described the jury-trial right entirely in procedural terms, focusing on the benefits of those procedures. Thus, he explained that while leaving factual inquiries to a single judge risked "partiality and injustice," a jury "chosen by lot from among those of the middle rank[] will be found the best investigators of truth." 3 William Blackstone, Commentaries on the Laws of England 380 (1st ed. 1768). The point, in other words, was that channeling legally relevant factual issues—those material under the substantive law—through the jury would result in more accurate outcomes.

At the same time, Blackstone recognized the legislature's authority to change the law's substantive content. While Blackstone subscribed to the then-dominant view that the common law was "permanent, fixed, and unchangeable," he added a critical caveat: "unless by authority of parliament." 1 William Blackstone, Commentaries on the Laws of England 137 (1st ed. 1768); *cf., e.g.*, *Dion v. Y.S.G. Enters.*, 296 Ga. 185, 187-88 (2014); *Love v. Whirlpool Corp.*, 264 Ga. 701, 705 (1994). In combination with his procedural focus in discussing the jury-trial right itself, Blackstone's recognition of parliamentary authority confirms the common-sense conclusion that the jury-trial right made "inviolate" in 1798 is the procedural right to have a jury determine certain questions, not the substantive right to have the

law itself remain unchanged. Thus, "Blackstone did not suggest that the right to a civil jury imposed a substantive limit on the ability of either the common-law courts or parliament to define the legal principles that create and limit a person's liability." *Horton v. Or. Health & Sci. Univ.*, 376 P.3d 998, 1037 (Or. 2016). Rather, as this Court crystallized Blackstone's understanding of the right in the criminal context: "What is the sum and substance of this trial by jury? It is 'that the truth of every accusation shall be confirmed by the unanimous suffrage of twelve of the prisoner's equals and neighbors … indifferently chosen and superior to all suspicion.'" *Rouse*, 4 Ga. at 147 (quoting, with minor alterations, 4 William Blackstone, Commentaries on the Laws of England *350).

Early American understandings of the jury-trial right, and its relationship to legislative authority to create or modify substantive law, confirm its procedural character. Alexander Hamilton, for example, observed that a federal right to a jury trial would not serve as an effective "safeguard against an oppressive exercise of the power of taxation" because it would "have no influence upon the legislature, in regard to the amount of the taxes to be laid, to the objects upon which they are to be imposed, or to the rule by which they are to be apportioned." The Federalist No. 83, at 615 (Alexander Hamilton) (John C. Hamilton ed., 1864). The jury-trial right would leave these substantive matters to the legislature, potentially affecting at most the procedural question of the type of proceedings (in Hamilton's words, "the mode

of collection") that the government could use to collect the taxes set by the legislature. *Id.*

This division of roles—the legislature makes law, while the jury finds facts that are material under the law set by the legislature—tracks the ordinary understanding of the separation of powers. Like the federal government and other States, Georgia assigns the legislature the "exclusive power of making laws." *Park v. Candler*, 114 Ga. 466, 501 (1902); *see* Ga. Const. art III, § I, para. I ("The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives."). Thus, "the lawmaking power of the General Assembly is 'plenary,'" and "when this Court is asked to consider the constitutionality of an act of the General Assembly, [it] must indulge a strong presumption that [it] is a proper exercise of the legislative power." *McInerney v. McInerney*, 313 Ga. 462, 467 (2022).

"The power of the legislature to create, modify, or abolish rights to sue has been clearly and repeatedly recognized both by the U.S. Supreme Court and by this Court." *Love*, 264 Ga. at 705. Moreover, the General Assembly's "plenary" power over substantive law extends to remedies as well: "The power of providing forms for administering justice by specific remedies is inherent in the General Assembly, and legislative control over forms of remedies is unlimited as long as there is no deprivation of due process of law." *Harrell v. Cane Growers' Co-Op. Ass'n*, 160

Ga. 30, 44 (1925) (Russell, C.J., concurring specially). Because the General Assembly can abolish rights of action or remedies altogether, it is also well within its power to eliminate—or, as here, limit—remedies such as noneconomic damages.

2. *Nestlehutt*'s mistake also stemmed from confusing early jury *practice* with the scope of the *right* to a jury trial. An observation that juries historically determined the *amount of the specific plaintiff's* compensatory damages recoverable under applicable law does not, on its own, mean that a statute generally defining or limiting recoverable damages would have been understood to violate the *right* to a jury trial in 1798. *See Nestlehutt*, 286 Ga. at 735. In other words, *Nestlehutt* failed to identify any reason to conclude that a substantive entitlement to an unlimited amount of compensatory damages was an irreducible component of a jury trial. It instead simply pointed out that jury calculation of the amount of legally recoverable compensatory damages formed part of pre-1798 practice. *Id.* ("Noneconomic damages have long been recognized as an element of total damages in tort cases.").

That threadbare reasoning and absence of evidence stands in sharp contrast to the use of history in other cases about jury trial rights. For example, to determine whether the federal constitutional right to jury trials required jury unanimity, the Supreme Court looked specifically for evidence that a jury's unanimity was an irreducible *requirement*, not just a *practice*—even a common practice. *Ramos v. Louisiana*, 590 U.S. 83, 90-93 (2020) (citing, among other sources, state

constitutions requiring unanimity and early commentators' observation that "unanimity in the verdict of the jury is indispensable"). That is not just a difference in strength of evidence; it is a difference in kind. Without evidence that a particular practice is an essential one, the only thing being preserved is the *practice* of jury trials in 1798—not the 1798 *constitutional right* to jury trials. *Nestlehutt*'s failure to require evidence about the contours of the right means that it represents an unwarranted incursion on the legislature's prerogative to create, abolish, or modify causes of action and remedies.

B. As for workability, the *Nestlehutt* framework is unworkable because there is no principled way to define the level of generality needed in applying the framework. To see why, compare *Nestlehutt* and *Taylor*: *Nestlehutt* defined the key questions broadly, with few details, inquiring into the history of "medical negligence" actions generally and "noneconomic damages" writ large. *See* 286 Ga. at 733-35. That high-level framing allowed the Court to conclude that there was substantial evidence that juries had awarded compensatory damages in the historical antecedents of the modern medical-malpractice action. *Id.* By contrast, *Taylor* defined the key questions narrowly, with granular details. That demanding framing allowed the Court to conclude that there was no evidence showing that juries had historically awarded punitive damages precisely for a defendant's "entire want of care." 316 Ga. at 65.

As *Nestlehutt* and *Taylor* show, the level of generality is often the dispositive question in constitutional analysis. *See* Frank. H. Easterbrook, *Abstraction and Authority*, 39 U. Chi. L. Rev. 349, 350-55 (1992) (identifying examples). But neither *Nestlehutt* nor *Taylor* justified the level of generality it chose for its analysis of the jury-trial right—despite silently disagreeing on the right answer to that key question. Much less did either case suggest any principled method for determining the proper level of generality. *Cf. Dubois v. Brantley*, 297 Ga. 575, 582-84 (2015) (rejecting an interpretation of Rule 702 that failed to justify the level of generality it presumed). That fundamental flaw in the *Nestlehutt* framework leaves it unprincipled, vulnerable to manipulation, and ultimately unworkable.

C. Neither *Nestlehutt*'s age nor any reliance interests cut in the opposite direction. *See Jackson*, 287 Ga. at 658. *Nestlehutt* is a recent decision, far younger than precedents the Court has recently overruled. *See, e.g.*, *Ammons v. State*, 315 Ga. 149, 157 (2022) (overruling a 29-year-old decision, and collecting similar decisions). And *Nestlehutt* does not affect "reliance interests of the type normally given weight in stare decisis analysis, namely those relating to property or contractual rights." *Id.*; *see Jackson*, 287 Ga. at 658-59.

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Ultimately, *Nestlehutt*'s mistaken transmutation of a procedural right into a substantive limit on the General Assembly's authority to alter causes of action and

remedies improperly intrudes on the General Assembly's legitimate power to enact its own sense of good policy. The Court should cabin or end *Nestlehutt*'s misguided judicial activism now.

III. This Issue Deserves the Court's Review.

Unless this Court corrects the Court of Appeals' decision, § 51-13-1(b) will remain a dead letter in all applications even though this Court has considered just one such application. That is an unwarranted invalidation of a policy carefully crafted by the General Assembly. And because *Nestlehutt*'s rule is constitutional, it hamstrings the General Assembly's efforts to stem the loss of healthcare access and to appropriately cabin the costs of the tort system going forward. Only this Court can fix this problem.

Nestlehutt's implications, especially as applied by the Court of Appeals here, are serious and wide-reaching, stretching far beyond the already serious issue of caps on noneconomic damages in actions involving claims for medical malpractice. Taken to its logical conclusion, *Nestlehutt*'s understanding of the jury-trial right could invalidate innumerable modifications to common-law causes of action and remedies, as doing so would arguably alter the jury's role as it stood in 1798. Under this view, the General Assembly could lack the power to alter the elements of a cause of action available at common law, create evidentiary presumptions or new defenses in common-law actions, alter the rules of evidence from those in 1798, or forbid a

finding of liability absent certain forms of evidence, such as an expert witness's affidavit for professional malpractice cases. *See* OCGA § 9-11-0.1(a). And this extension of *Nestlehutt* could even forbid the General Assembly from eliminating common-law causes of action, contravening the General Assembly's role in deciding whether to create or maintain private rights of action. *See Taylor*, 316 Ga. at 62 (acknowledging that its holding may "limit … the legislature's ability to modify causes of action"); *id.* at 81 n.48 (referring to "remed[ies]" "of constitutional origin"); *Nestlehutt*, 286 Ga. at 736 (acknowledging that its holding bars the legislature from "abrogat[ing] *constitutional rights* that may inhere in common law causes of action"); *but see, e.g.*, *Love*, 264 Ga. at 705.

But this issue's importance is apparent even if one looks only to the immediate issue of tort liability for medical professionals and businesses. As *Nestlehutt* acknowledged, § 51-13-1(b) was "intended to help address what the General Assembly determined to be a 'crisis affecting the provision and quality of health care services in this state.'" 286 Ga. at 732. That crisis stems largely from uncapped verdicts, which led to increasing liability insurance costs, "reduc[tion] [of] Georgia citizens' access to health care services," and ultimately "degrad[ation] [of] their health and well-being." *Id.* That crisis has continued unabated. Last year, Georgia

ranked last in the nation for healthcare, with ballooning healthcare costs.[2] More than 15% of Georgia residents chose not to see a doctor over the course of a year due to cost.[3] And 141 of Georgia's counties are medically underserved areas, according to the State Office of Rural Health.[4]

The problem is only getting worse. As of January 2024, nine of Georgia's rural hospitals had closed since 2010—one of the highest closure rates in the country.[5] Another 18 of Georgia's 30 rural hospitals are at risk of closing due to financial problems.[6] Georgia hospitals operating in the red are reducing crucial but costly services to try to stay afloat, with 23 rural Georgia hospitals ending chemotherapy treatment between 2014 and 2022.[7] Lawmakers warn that Georgia

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[2] Les Masterson, *The Worst (And Best) States For Healthcare, Ranked*, Forbes (Oct. 13, 2023), https://www.forbes.com/advisor/health-insurance/best-worst-states-for-healthcare.

[3] *Id.*

[4] *See* State Office of Rural Health, Maps of Georgia, Medically Underserved Areas/Populations, https://dch.georgia.gov/divisionsoffices/state-office-rural-health/sorh-maps-georgia

[5] Deidra Dukes, *Georgia's rural healthcare crisis: Lawmakers struggle to maintain hospital access* (Jan. 14, 2024), https://www.fox5atlanta.com/news/georgias-rural-healthcare-crisis-lawmakers-struggle-to-maintain-hospital-access

[6] NPR, *Rural U.S. health care is in a crisis* (June 4, 2024), https://www.npr.org/2024/06/04/nx-s1-4964724/rural-u-s-health-care-crisis-georgia.

[7] Chartis, Unrelenting Pressure Pushes Rural Safety Net Crisis into Uncharted Territory at 11 (Feb. 2024), https://www.chartis.com/sites/default/files/documents/chartis_rural_study_pressure_pushes_rural_safety_net_crisis_into_uncharted_territory_feb_15_2024_fnl.pdf.

"has consistently been in the top ten states for critical staffing shortages" and is facing a "crisis" in healthcare access.[8] But *Nestlehutt* and the decision below interfere with the General Assembly's ability to respond by reforming the tort system to reduce healthcare costs for patients and providers.

Georgia's sharp downward trend in healthcare access coincides with a sharp upward trend in "nuclear verdicts"—verdicts of more than $10 million—in the State.[9] These verdicts have increased "in both amount awarded and frequency," with all four of Georgia's largest jury verdicts against corporations handed down since 2018, making the State a nationwide leader in massive jury verdicts.[10] One study identified $60.3 million in nuclear verdicts related to healthcare services between 2009 and 2022.[11] But two subsequent jury verdicts have already surpassed that *13-*

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[8] *See* Letter to Hon. Chiquita Brooks-LaSure (Aug. 8, 2022), https://www.ossoff.senate.gov/wp-content/uploads/2022/08/22.08.08_Georgia-Strong-Delegation-Letter-Signed.pdf

[9] *See, e.g.*, Katheryn Hayes Tucker, *How a Columbus, Ga., Jury Returned a $280M Verdict in 45 Minutes*, Law.com (Aug. 24, 2019) (reporting on a verdict that awarded $30 million for pain and suffering and $150 million in wrongful death damages); Meredith Hobbs, *Are Megamillion Georgia Verdicts 'Nuclear' or Sign of the Times?*, Law.com (Oct. 8, 2019) (reporting "a string of Georgia jury awards in the tens and even hundreds of millions in catastrophic injury and death trials," with "the number and size of these multimillion-dollar verdicts … sharply increas[ing] in Georgia").

[10] Marathon Strategies, *Corporate Verdicts Go Thermonuclear* 12, 40 (2022), available at https://marathonstrategies.com/wp-content/uploads/2023/03/Corporate-Verdicts-Go-Thermonuclear-0313.pdf.

[11] *Id.* at 42.

year total. In 2023, a Bibb County jury awarded $40 million against two hospitals (including $5 million for pain and suffering and $35 million for wrongful death) based on problems associated with a blood transfusion.[12] And earlier this year, a DeKalb County jury awarded $38.6 million ($6 million for pain and suffering and $30 million for wrongful death) against Emory based on problems associated with a heart transplant.[13]

Georgia's spike in massive jury awards carries consequences. For example, insurance "premiums for healthcare professionals in areas known for nuclear verdicts, such as Georgia … , are rising."[14] Indeed, Georgia is one of just six States that have "had large increases" in medical liability insurance premiums in each of the three most recent years surveyed by the American Medical Association.[15] These

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[12] *See* Cedra Mayfield, *Bibb County Jury Returns $40M Verdict Against Two Hospitals*, Law.com (June 29, 2023); Chance Forlines Carter King, *A Tragic Loss: Seeking Justice in a Landmark $40 Million Medical Malpractice Verdict in Georgia* (June 23, 2023), https://www.cfcklaw.com/blog/a-tragic-loss-seeking-justice-in-a-landmark-40-million-medical-malpractice-verdict

[13] See Cedra Mayfield, *DeKalb Jury Returns $38.6M Verdict Against Emory After Teen's Death*, Law.com (Nov. 14, 2023).

[14] U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions* 6 (May 2024), https://instituteforlegalreform.com/wp-content/uploads/2024/05/ILR-May-2024-Nuclear-Verdicts-Study.pdf.

[15]American Medical Association, Jose R. Guardado, *Prevalence of Medical Liability Premium Increases Unseen Since 2000s Continues for Fourth Year in a Row* 3 (2023) https://www.ama-assn.org/system/files/prp-mlm-premiums-2022.pdf.

"skyrocketing medical liability insurance premiums are pushing physicians out of practice,"[16] further straining Georgia's healthcare system. Small businesses are feeling the same pinch when it comes to obtaining liability insurance.[17] Excessive tort suits in Georgia impose enormous economic costs. An in-depth study found that excessive tort litigation cost Georgia 137,658 jobs and reduced per capita output by $1,373—effectively a "tort tax"—in 2022.[18] Another found that Georgia's tort costs mounted to $4,157 per household, the seventh highest in the country, and 2.56% of the State's GDP, the country's ninth highest rate.[19]

Ultimately, "[e]very dollar spent on the broken medical liability system is a dollar that cannot be used to improve patient care."[20] And those tort payouts are not improving patient care indirectly: Studies consistently find that "greater tort liability"

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[16] American Academy of Family Physicians, *Understanding the Physician Liability Insurance Crisis* (2002), https://www.aafp.org/pubs/fpm/issues/2002/1000/p47.html.

[17] *See* Rosie Manins, *Kemp's Push for litigation limits supported by small business leaders*, Atlanta Journal-Constitution (Aug. 23, 2024).

[18] The Perryman Group, *Economic Benefits of Tort Reform* 29, 44 (Oct. 2023), https://cala.com/wp-content/uploads/2024/01/Perryman-Impact-of-Tort-Reform-10-27-2023.pdf.

[19] *Tort Costs*, *supra* n.1, at 20.

[20] American Medical Association, *AMA studies show continued cost burden of medical liability system* (Jan. 24, 2018), https://www.ama-assn.org/press-center/press-releases/ama-studies-show-continued-cost-burden-medical-liability-system.

is "not associated with improved quality of care."[21] In other words, the risk of liability raises healthcare costs and decreases healthcare availability without resulting in better patient care. *Nestlehutt* ties the General Assembly's hands in responding to Georgia's healthcare crisis and in creating a more business-friendly State, and the Court of Appeals' decision doubles down on—and in fact expands—*Nestlehutt*'s mistake. The Court's review of these important issues is badly needed.

CONCLUSION

The Court should grant certiorari and reverse.

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted, this 20th day of September, 2024.

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[21] Michelle M. Mello *et al.*, *Malpractice Liability and Health Care Quality: A Review*, JAMA 323(4):352–366 (2020), https://jamanetwork.com/journals/jama/article-abstract/2759478.

CERTIFICATE OF SERVICE

I hereby certify that on this day I e-filed a true and correct copy of the foregoing in the Supreme Court of Georgia. I further certify that there is a prior agreement with the parties to allow documents in a PDF format sent via email to suffice for service under Supreme Court Rule 14. Pursuant to that agreement, on this day I emailed a PDF copy of the foregoing to the following counsel:

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