No. S25G0132

Supreme Court of Georgia

THE MEDICAL CENTER OF CENTRAL GEORGIA, INC., *et al.*,

Appellants,

v.

NORKESIA TURNER,

Appellee.

On Writ of Certiorari to the Georgia Court of Appeals

BRIEF OF AMICI CURIAE GEORGIA TRIAL LAWYERS ASSOCIATION & AMERICAN ASSOCIATION FOR JUSTICE

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IDENTITY AND INTEREST OF AMICI CURIAE

The Georgia Trial Lawyers Association is a voluntary organization of about 2,000 trial lawyers throughout Georgia who represent people injured by the wrongdoing of others. GTLA's mission is to protect the constitutional promise of justice for all by guaranteeing the right to trial by jury, preserving an independent judiciary, and providing Georgians access to the courts.

The American Association for Justice is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiffs trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Georgia. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

INTRODUCTION

GTLA and AAJ concur with Appellee Norkesia Turner: the noneconomic-damages caps in O.C.G.A. § 51-13-1 are unconstitutional—as this Court held in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733-37 (2010). That holding bound the Court of Appeals below and should remain unmolested by this Court.

All parties in a tort action have a constitutional right for a jury to decide questions about noneconomic damages, including those for wrongful death. Protecting the jury-trial

right isn't pro-plaintiff or anti-defendant. Here, GTLA and AAJ support Turner because selectively applying the noneconomic-damages caps in § 51-13-1 to medical-malpractice actions where the patient's harm is death violates the constitutional jury-trial right.

MCCG[1] and their amici disagree. That disagreement rests on posture not principle.[2] Turner's lawsuit sought damages against MCCG and thus put MCCG's "property" at risk—even though some of Turner's claims were for wrongful-death damages. MCCG thus has a constitutional right to a jury's determination of the damages amount. Do MCCG and their amici believe that they can be deprived of their property without a jury trial because the relief sought is wrongful-death damages? Do MCCG and their amici believe that the General Assembly could pass a law requiring damages of at least $10 million in medical-malpractice cases where the harm is death—even if the jury returned a smaller verdict? Doubtful. But if so, they're wrong.

In Georgia, having a jury determine noneconomic damages, including those for wrongful death, is not a matter of legislative grace. It is a constitutional right that predates the State's formation.[3]

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[1] For simplicity, Appellants are referred to collectively as MCCG.

[2] The jury-trial right is symmetrical. If it applies to plaintiffs in cases like these, then it applies to defendants. If it doesn't apply to plaintiffs (as MCCG and their amici claim), then it doesn't apply to defendants.

[3] "The right, then, of the people of this province was, that their lives, liberty, and property should not be forfeited, but by the judgment of their peers, that is, by a trial by jury." *Tift v. Griffin*, 5 Ga. 185, 189 (1848).

ARGUMENT

I. The Court should affirm the judgment below.

A. The Court of Appeals properly applied *Nestlehutt*.

In granting MCCG's petition for certiorari, the Court set out to decide a narrow question:

> In the decision below, did the Court of Appeals properly apply our precedent as set out in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010)? *See Taylor v. The Devereux Foundation, Inc.*, 316 Ga. 44 (2023).[4]

The answer is yes.

The Court of Appeals was correct: MCCG's claim that the "noneconomic damages" caps in O.C.G.A. § 51-13-1 apply to the wrongful-death damages awarded in medical-malpractice actions "is foreclosed by binding Supreme Court of Georgia precedent."[5] That precedent is *Nestlehutt*. There, this Court held in the opening paragraph that "the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the constitutional right to trial by jury."[6] Then after analyzing "the trial court's holding that the noneconomic damages cap violates our state Constitution's guarantee of the right to trial by jury," the Court reiterated its holding that "the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the right to a

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[4] Jan. 14, 2025 Order at 1 (cites modified). The Court also instructed the parties that "[b]riefs should be submitted only on this point," citing Supreme Court Rule 45. *Id.*

[5] *Med. Ctr. of Cent. Ga., Inc. v. Turner*, 372 Ga. App. 644, 652 (2024).

[6] 286 Ga. at 731.

jury trial as guaranteed under the Georgia Constitution."[7]

Two more important details about *Nestlehutt*. *One*. The first footnote, appended to the opening paragraph, explains that the Court "express[es] no opinion as to subsection (f) of O.C.G.A. § 51-13-1."[8] *Two*. The Court emphasized that the statutory caps for noneconomic damages applied not only "in a medical malpractice action" against "health care providers" (a defined term[9])—the type of action the Nestlehutts brought—but also "in a medical malpractice action" against "a single medical facility," "more than one medical facility," and "multiple health care providers and medical facilities."[10]

Together, these details reveal *Nestlehutt*'s breadth. Had the Nestlehutts brought an "as applied" challenge, the Court would have had no reason to discuss the caps in subsections (c), (d), and (e), for the Nestlehutts' action fell solely within subsection (b). The Court discussed the caps in subsections (c)–(e) because it intended its holding that "the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the right to a jury trial" to apply to all statutory caps.[11] Because subsection (f) isn't about caps, the Court added footnote 1 to clarify that its holding didn't reach that subsection.[12]

Nestlehutt's "two unqualified statements that *all* of the

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[7] *Id.* at 732, 738.

[8] *Id.* at 731 n.1.

[9] § 51-13-1 (a)(2).

[10] *Nestlehutt*, 286 Ga. at 732 (describing § 51-13-1(c), (d) & (e)).

[11] *See id.* at 738.

[12] Subsection (a) contains definitions for that Code section only. Subsection (f) contains no defined terms. So while not unconstitutional, subsection (a) is immaterial.

caps on damages in O.C.G.A. § 51-13-1 are unconstitutional" did not escape the Court of Appeals.[13] Nor did the holding's import for "Turner's wrongful-death claim" that "unquestionably involves medical malpractice": "the statutory cap on damages as to that claim violates her *inviolate* right to a jury trial under the Georgia Constitution."[14] Because the Court of Appeals faithfully applied *Nestlehutt*, its judgment should be affirmed.[15]

B. Severability cannot save § 51-13-1.

Turner ably explains why severability cannot save § 51-13-1.[16] GTLA and AAJ join those arguments. Here, we offer another reason severability cannot save MCCG from *Nestlehutt*'s holding—even under their impoverished view of that holding.[17]

When construing legislation, this Court "presume[s] the General Assembly meant what it said and said what it meant."[18] The 2005 Act creating § 51-13-1 contains a severability section:

> In the event any section, subsection, sentence,

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[13] *Turner*, 372 Ga. App. at 655 n.47.

[14] *Id.* at 655.

[15] Should the Court conclude that statements in the Court of Appeals' *opinion* are inaccurate, that conclusion does not prevent the Court from affirming the Court of Appeals' *judgment*. *See WWW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 683 (2012) ("[W]hile we disagree with the rationale of the majority opinion below, it reached the right result, and we therefore affirm the Court of Appeals' judgment.").

[16] Turner Br. at 18-23.

[17] *See* MCCG's Br. at 26-32.

[18] *Deal v. Coleman*, 294 Ga. 170, 172 (2013) (citation omitted).

> clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect ***the other*** sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof.[19]

Applying the severance section's plain meaning to Section 13 of the Act (while assuming the Nestlehutts brought only an as-applied challenge to § 51-13-1(b)), the remaining subsection language would be nonsensical, comprising only the clause "including an action for wrongful death."

> (b) ~~In any verdict returned or judgment entered in a medical malpractice action,~~ including an action for wrongful death, ~~against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based~~.

After all, MCCG claims that wrongful death is a distinct cause of action.[20] By that logic, "medical malpractice action" cannot refer to cases involving wrongful death. In any event, the "sentence" or "clause" *Nestlehutt* declared unconstitutional was all of § 51-13-1(b) except for the "clause or phrase" "including an action for wrongful death." For while the severance section purports to save "***the other***" parts of the

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[19] 2005 Ga. Laws 1, 17, § 14 (emphasis added).

[20] MCCG's Br. at 32-35.

Act,[21] its plain language preserves none of the unconstitutional part. This is another reason any severance proposal cannot save the caps in § 51-13-1.

* * *

GTLA and AAJ champion a robust right to trial by jury. Affirming the Court of Appeals' judgment, which faithfully applies *Nestlehutt*, will neither enlarge nor shrink the right to trial by jury in the Georgia Constitution. Affirming preserves the status quo and leaves for another day thorny questions of constitutional construction and stare decisis. Affirming is an exercise of judicial restraint.

Even so, MCCG and their amici encourage this Court to consider a wholesale revision of Georgia law on the right to trial by jury, including overruling *Nestlehutt*. Doing so here—where neither the Court of Appeals nor the trial court decided these issues—is unnecessary.

But should the Court consider taking up MCCG and their amici's revision request, GTLA and AAJ offer this overview of both history and precedent to help guide the Court's analysis.

II. The right of trial by jury in Georgia.

The current Georgia Constitution provides that "[t]he right to trial by jury shall remain inviolate."[22] In *Nestlehutt*, this Court held that this provision "guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the

[21] 2005 Ga. Laws at 17, § 14 (emphasis added).

[22] Ga. Const. of 1983, art. I, § 1, ¶ XI.

time of the adoption of the Georgia Constitution in 1798."[23] More recently, in *Taylor*, the Court said that "the Georgia constitutional provision on jury trials 'froze' the scope of the inviolate right to a jury trial as it existed in 1798."[24]

Should the Court decide to reconsider these decisions, then the Court must grapple with the scope of jury trials *in Georgia* not only before 1798 (the date given in *Nestlehutt* and other cases) but also after the Civil War and into the 20th century. This record shows, contrary to what *Taylor* and other cases say, that the right of trial by jury was never intended to be "frozen" to a specific date.

A. The right of trial by jury at common law.

The *Magna Carta* guaranteed the right of trial by jury in 1215.[25] In the last eight centuries, no section of the *Magna Carta* "has been cited more often as a guarantee of the liberties of the citizen."[26] Judgment by one's peers—the *Magna Carta*'s phrasing of trial by jury—is "one of the oldest principles of English law."[27]

William Blackstone was the most accepted authority on

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[23] *Nestlehutt*, 286 Ga. at 733 (quoting *Benton v. Ga. Marble Co*, 258 Ga. 58, 66 (1988)).

[24] *Taylor*, 316 Ga. at 58. *Taylor* didn't hold that 1798 was *the* "key date," 316 Ga. 57 n.19, but *Taylor* did emphasize the supposed "almost 175 years" of Court decisions linking the scope of the jury-trial right to before 1798, *id.* at 56.

[25] Magna Carta § 39 (1215), *reprinted in* Sources of Our Liberties 1, 17 (Richard L. Perry & John C. Cooper eds., 2d impression 1960).

[26] Richard L. Perry, Sources of Our Liberties, *supra* note 25, at 5.

[27] *Id.* at 7.

English common law in Colonial America.[28] His *Commentaries*, this Court has said, "constituted the law of this State, before and since the Revolution."[29] Blackstone revered the English jury system. He declared the ancient right of "trial by jury" the "glory of the English law" and "the most transcendental privilege which any subject can enjoy" because no subject can "be affected in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals."[30] Blackstone hailed jury trials as the "principal bulwark of our liberties" and exclaimed that trial by jury "was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it."[31]

While the jury-trial right sprang from the *Magna Carta*, this right expanded over the common-law period to embrace new causes of action—both criminal and civil.[32] Trial by jury was so important to Colonial Americans that they not only claimed it as their right but also cited its circumvention as a

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[28] *See Schick v. United States*, 195 U.S. 65, 69 (1904).

[29] *Rouse v. State*, 4 Ga. 136, 145 (1848); *see also Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 203 (1951) ("This [C]ourt regards Blackstone as an authority on the common law.").

[30] 3 William Blackstone, *Commentaries* *379.

[31] *Id.* *350.

[32] *See* Theodore F.T. Plucknett, A Concise History of the Common Law 130-31 (Liberty Fund ed. 2010) [1956] ("[J]ury trial almost immediately became normal in trespass, both for the trial of misdemeanours and of torts. In the end, trespass and its derivatives supplanted the old real actions (and also the old personal actions of debt, detinue, etc.) with the result that all the civil trial juries now in use descend directly from the jury in trespass, as likewise the juries for the trial of misdemeanours.").

reason to sever ties with England.[33]

Georgia also specifically cited England's attempt to deprive Georgians of the right to trial by jury as a reason for austere trade regulations.[34] The point cannot be oversold: Georgia, like her sister colonies, took offense to England's attempt to place enforcement of a *new statute* of the *type* traditionally enforced in courts requiring juries in another court where juries were not used. In other words, Georgians expected the jury-trial right to apply to new statutory claims.

B. The constitutional right of trial by jury in Georgia.

Georgia enacted its first constitution in 1777.[35] That Constitution established one court in each county called the "superior court,"[36] also called the "supreme court,"[37] which sat twice a year (in March and October).[38] "All causes, *of what*

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[33] Declaration of Independence ¶ 20 (1776). The Declaration of Independence referred to the 1765 Stamp Act. The Stamp Act not only taxed all sorts of documents needed for colonial life but also granted admiralty courts—where there was no right of trial by jury—jurisdiction to enforce the Act. That jurisdictional rejiggering was intentional, for "the British assumed juries would be sympathetic to the American plight" caused by the Stamp Act. Robert S. Peck, *Violating the Inviolate: Caps on Damages and the Right to Trial by Jury*, 31 U. Dayton L. Rev. 307, 316 (2005). In response, the American colonies convened the Stamp Act Congress to "protest" the removal of the "trial by jury," which they described as "the inherent and invaluable right of every British subject in these colonies." Resolutions of the Stamp Act Congress ¶ 7 (1765), *reprinted in* Sources of Our Liberties, *supra* note 25, at 261, 270.

[34] *See* 1 Revolutionary Records of Georgia 235, 239 (July 6, 1775).

[35] 2 Federal and State Constitutions 777 n.a.

[36] Ga. Const. of 1777, art. XXXVI.

[37] *Id.* art. XL.

[38] *Id.* art. XXXVI.

nature soever, shall be tried in the supreme court," other than those "hereafter mentioned."[39] There were two exceptions. The first was for "[c]aptures, both by sea and land," and "maritime causes."[40] The second was for "the court of conscience," which had been established by an 1760 act,[41] which would continue "as heretofore practiced" with one caveat: its jurisdiction increased to try cases "not amounting to more than ten pounds."[42] The 1777 Constitution provided that "trial by jury" was to "remain inviolate forever."[43]

Twelve years later, Georgia enacted its second constitution in 1789, extending the prior constitution's guarantee that "trial by jury shall remain inviolate."[44]

Georgia's third constitution, the Constitution of 1798, guarantees that "trial by jury, *as heretofore used in this State*, shall remain inviolate."[45] Nothing like the emphasized language appears in any other Constitution. Like the Constitutions of 1777 and 1789, the 1798 Constitution was not enacted by the people of Georgia but by convention.[46]

Since 1798, Georgia has had seven constitutions. The turbulent period of 1861 to 1877 saw four. The first two, the Constitutions of 1861 and 1865, do not enshrine the inviolate

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[39] *Id.* art. XL (emphasis added) .

[40] *Id.* art. XLIV.

[41] *See infra* n.64.

[42] Ga. Const. of 1777, art. XLVI.

[43] *Id.* art. LXI.

[44] Ga. Const. of 1789, art. IV, § 3.

[45] Ga. Const. of 1798, art. IV, § 5 (emphasis added).

[46] 2 Federal and State Constitutions 791 n.a.

right of trial by jury.[47] This Court has never explained that omission.

Yet the 1861 Constitution's text suggests that this omission was intentional. The first three Georgia Constitutions have *one* jury-trial provision for criminal and civil cases. The 1861 Constitution has zero *civil*-jury provisions but two *criminal*-jury provisions: one appended to the due process clause, and one for public and speedy trial by an impartial jury.[48] Curiously, the only individual right in the 1798 Constitution omitted from the 1861 Constitution is the civil-jury right. The 1865 Constitution includes one *criminal*-jury provision for public and speedy trial by an impartial jury.[49] But at least one decision of this Court suggests that the 1865 Constitution never went into "practical effect."[50]

The Constitutions of 1868 and 1877 return the explicit guarantee that the right of trial by jury "shall remain inviolate," but both invoke an important caveat: "except where it is otherwise provided in this Constitution."[51] This pattern of

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[47] *Taylor*, 316 Ga. at 56 n.18.

[48] *See* Ga. Const. of 1861, art. I, § 4 ("No citizen shall be deprived of life, liberty, or property except by due process of law; *and of life or liberty only by the judgment of his peers*." (emphasis added)); *id.* art. I, § 11 ("Every person charged with an office against the laws of the State . . .shall have a public and speedy trial by an impartial jury.").

[49] Ga. Const. of 1865, art. I, § 8.

[50] *White v. Clements*, 39 Ga. 232, 248 (1869).

[51] Ga. Const. of 1868, art. V, § 13, ¶ 1 ("The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate."); Ga. Const. of 1877, art. VI, § 18 ("The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less

explicitly noting that the "inviolate" right of trial by jury "shall remain" except where otherwise provided in the Constitution continued in Constitutions of 1945, 1977, and 1983.[52] Today, trial by jury remains an "inviolate" right in Georgia—except as modified by the Constitution.[53]

1. Trial by jury in Georgia before the Revolution.

Georgia, the last of the thirteen colonies, formally began with the Charter of 1732.[54] The Charter gave certain men, the trustees, control over Georgia for 21 years.[55] The Charter empowered the trustees to establish courts "for the hearing and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes and things whatsoever, arising or happening within the said province of Georgia, or between persons of Georgia."[56] And they did before

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than five, to constitute a trial or traverse jury in Courts other than the Superior and City Courts.").

[52] Ga. Const. of 1945, art. VI, § XVI, ¶ I ("The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."); Ga. Const. of 1977, art. VI, § XV, ¶ 1 (same as 1945); Ga. Const. of 1983, art. I, § I, ¶ XI(a) ("The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party.").

[53] *See Nestlehutt*, 286 Ga. at 736 (Legislature has authority to modify or abrogate the common law but may not abrogate "*constitutional* rights that may inhere in common law causes of action.").

[54] Charter of 1732, *reprinted in* 2 Federal and State Constitutions 765.

[55] Albert B. Saye, A Constitutional History of Georgia 1732–1968, at 12-18 (rev. ed. 1970) [1948].

[56] Charter of 1732, *supra* n.54, at 774.

sailing from England.[57]

The first Georgia court was sworn in on July 7, 1733, in Savannah. Although there was a court, there were no lawyers—either by express law (now lost to history) or practice.[58] All appearing in court had to plead their own case. And there were plenty of cases—both civil and criminal.[59]

The charter period ended in 1752, and Georgia became a royal colony.[60] Georgia had many courts during the royal-colony period.[61] But most cases were heard in the "Inferior Courts, or Courts of Conscience, held by justices of the peace."[62] These courts had jurisdiction over petty crimes and minor civil disputes. They heard civil disputes valued at fewer than £8 and not involving "Titles of Land."[63] The original 1760 act empowering justices of the peace to hear these cases also required a jury.[64] That same year, the legislature

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[57] Joseph R. Lamar, The Bench and Bar of Georgia During the Eighteenth Century 5 (1913). Born in Ruckersville, Georgia, Joseph Lamar served as an associate justice on both the Georgia Supreme Court (1901–1905) and then the U.S. Supreme Court (1911–1915).

[58] *See id.* at 7.

[59] *Id.* at 7.

[60] *See* Saye, *supra* note 55, at 45-49.

[61] *See* Saye, *supra* note 55, at 65 (listing "The General Court, The Court of Sessions of Oyer and Terminer and General Gaol Delivery, The Court of Appeals, The Court of Admiralty, and the Court of Ordinary").

[62] *Id.*

[63] *Id.*

[64] An Act for the More Easy and Speedy Recovery of Small Debts and Damages (1760), *reprinted in* 18 The Colonial Records of the State of Georgia: Statutes Enacted by the Royal Legislature of Georgia from Its First Session in 1754 to 1768, at 372, 372-73 (Allen D. Candler ed.,

created a special court to decide disputes between merchants and shippers with a "special jury."[65]

Examining Georgia's pre-Revolution history, this Court "found no court in existence prior to the Constitution of 1777, which had common-law jurisdiction in civil cases, in which trial by jury was not provided for."[66] Nor have GTLA and AAJ.

2. Jury trials from 1777 to 1798.

Because some decisions by this Court treat 1798 as a key date, this section discusses jury trials in Georgia between 1777 and 1798.

The Judiciary Act of 1778 established a "superior court" in each county where "all causes of what nature or kind soever are to be tried," except as otherwise provided in the Constitution of 1777.[67] Superior courts had jurisdiction over all actions "for any debt or damages, or any sum of money above ten pounds," and those courts had "to give judgment according to the verdict of the jury."[68] And superior courts had jurisdiction over actions at law and in equity.[69]

After the Constitution of 1789, the General Assembly

1910) [hereinafter Colonial Records].

[65] An Act for Holding Special or Extraordinary Courts of Common Pleas for the Tryal of Causes Arising Between Merchants Strangers & Mariners (1760), *reprinted in* 18 Colonial Records 362.

[66] *DeLamar v. Dollar*, 128 Ga. 57, 60-61 (1907).

[67] Judiciary Act of 1778, *reprinted in* Digest of the Laws of the State of Georgia 219 (Robert & George Watkins ed. 1800) [hereinafter Watkins' Digest].

[68] *Id.* at 220.

[69] *Id.*

gave superior courts the "full power and authority to exercise jurisdiction in and to hear and determine, ***by a jury of twelve men***, all pleas, civil and criminal; and all causes of what nature or kind soever, according to the usage and custom of courts of law and equity (except such as are hereby referred to inferior jurisdictions)."[70] Superior courts were authorized "to proceed with a jury on a petition or bill" in civil disputes "for any debt or damages, or any sum of money above ten pounds."[71] The General Assembly also created "inferior county courts," staffed by justices of the peace, that had jurisdiction "to hear and determine causes at common law, within their respective counties," except for cases about "the right of title of lands or tenements."[72] Inferior county courts could decide actions for "small debts" ("any debt or liquidated demand due by judgment, specialty, or account" under "five pounds steering") "without the solemnity of a jury"; but any unhappy party could appeal to superior court "for final hearing and determination by jury."[73]

In 1790, the General Assembly set out rules for how superior courts were to decide "all cases respecting the discovering transactions between co-partners or co-executors, compelling distribution of intestate estates or payments of legacies, or in any other case whatsoever."[74] While customarily

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[70] Judiciary Act of 1789, *reprinted in* Watkins' Digest 389, 391 (emphasis added).

[71] *Id.* at 391.

[72] *Id.* at 396, 397.

[73] *Id.* at 401.

[74] Act Amending Judiciary Act of 1789, *reprinted in* Watkins' Digest 422, 422.

heard in equity, Georgia superior courts had to submit such suit's merits and supporting evidence "to a special jury."[75]

In 1791, the General Assembly gave superior courts concurrent jurisdiction with inferior county courts in all cases.[76] That act requires "[t]hat the trial of all cases of what nature or kind they may be, shall be by jury in the customary and established mode."[77]

In 1792, the General Assembly did not change the established use of jury trials, including use of a 12-person jury to decide all cases.[78] The General Assembly vested superior courts with all the powers of a court of equity, including the power to compel testimony, but required all proof "be submitted to a special jury, whose verdict shall be final."[79]

In 1797, the General Assembly overhauled the Georgia judiciary's structure yet made no changes to the use of juries. Superior courts continued to have jurisdiction to decide all cases, civil and criminal, "by a jury of twelve men."[80] Superior courts retained original jurisdiction over civil disputes for any debt or damages, or any sum of money," though the threshold was raised to "thirty dollars."[81] Superior courts continued to exercise equitable powers and had to try equity

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[75] *Id.*

[76] Act Amending Judiciary Act of 1789, *reprinted in* Watkins' Digest 439, 440.

[77] *Id.* at 440.

[78] Judiciary Act of 1792, *reprinted in* Watkins' Digest 480, 481.

[79] *Id.* at 482.

[80] Judiciary Act of 1797, *reprinted in* Watkins' Digest 619, 621.

[81] *Id.* at 621.

cases to a "special jury."[82] Justices of the peace could decide "small debts" cases without a jury; but the unhappy party could appeal and try the case to a five-person jury and before a justice of the peace.[83]

* * *

This history shows how Georgia used trial by jury before 1798. Both before and after the Revolution, Georgia required jury trials for all civil actions in courts of general jurisdiction—whether the case arose at law or in equity. Before the Revolution, jury trials were required in all "inferior" and "special" courts. After the Revolution, starting in 1789, actions for "small debts" could be decided by justices of the peace without a jury—but either party could appeal that decision and receive a trial by jury.

C. Supreme Court precedent on the right of trial by jury.

1. The meaning of "as heretofore used in this State" in the 1798 Constitution.

In *Taylor*, the Court said that "no reported case expressly focuses on the meaning of this language"—referring to the phrase "as heretofore used in the State" in the 1798 Constitution.[84] That's incorrect. Several cases do.

Take *Nell v. Snowden*. There, the Court considered whether superior courts could order new trials in equity cases. Getting to yes, the Court noted that the Judiciary Acts of 1792 and 1797 required superior courts to submit equity cases to special juries. The Court held that "the trial by jury

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[82] *Id.*

[83] *Id.* at 638-39.

[84] 316 Ga. at 57 n.19.

was *used* in Equity causes in this State before and at the time of the adoption of the Constitution."[85] So it was irrelevant that the Judiciary Act of 1799 didn't mention submitting equity cases to special juries because that right "is derived from the Constitution."[86] Because the 1798 Constitution empowered superior courts to grant new trials and the Judiciary Act of 1799 permitted new trials for cases tried to special juries, the Court held that superior courts could order new trials in equity cases.[87]

Then there's *Hargraves v. Lewis* (a fractured, bear of an opinion). Again, the Court held that "the Judge had no right to pass the order perpetually enjoining the execution . . . without the intervention of a Jury."[88] That holding rested on the Judiciary Acts of 1792 and 1797, which required "the trial of the merits upon the testimony was to be had by a Jury. And this was the trial by Jury, *heretofore used* in Equity causes, which was adopted by the" 1798 Constitution.[89] Even the dissent agreed with this point: "Before, and at the time of the adoption of the Constitution of 1798, trial by Jury in Equity causes was *used in this State*," and thus it was constitutionally guaranteed.[90]

Nell and *Hargraves* establish that the 1798 Constitution preserved Georgia's unique jury practices—not those of

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[85] 5 Ga. 1, 4 (1848).

[86] *Id.*

[87] *See id.*

[88] 7 Ga. 110, 125 (1849).

[89] *Id.* at 126.

[90] *Id.* at 134 (Warner, J., dissenting).

England—"inviolate." They are not alone. In *Mounce v. Byars*, the Court reiterated that the Georgia-specific jury practices predating 1798 were constitutionally guaranteed. Thus, "[a]ny law . . . passed subsequent to the Constitution, which repealed those Acts, and defeated the usage of trial by Jury, which they prescribed, is void."[91]

Reading *Nell*, *Hargraves*, and *Mounce* together, it may appear that the phrase "as heretofore used in this State" in the 1798 Constitution enhanced the "inviolate" jury-trial right. But the Court has twice cast doubt on that conclusion. In *Costly v. State*, the Court emphasized that "nothing more is meant" by this language than what prior Constitutions said: "that 'trial by *Jury*,' (as contradistinguished from any other *mode*) 'shall remain inviolate forever.'"[92]

Fifty-one years later, in *DeLamar v. Dollar*, the Court again downplayed the phrase's significance:

> The [C]onstitution of 1798 contains the words, "as heretofore used in this State," which do not appear in the other instruments; but this really would not affect the interpretation to be placed upon the declaration that trial by jury shall remain inviolate, ***for each declaration would mean that it must be preserved in the future in all cases in which it was allowed under valid laws existing at the time that the***

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[91] 11 Ga. 180, 185-88 (1852); *see also Brown v. Burke*, 22 Ga. 574, 581 (1857) ("In this State, all Equity causes are tried by a special jury, under the direction of the Court as to the law. The Judge here cannot decide a fact, and cannot now give his opinion to the jury as to the preponderance of the evidence.").

[92] 19 Ga. 614, 629 (1856).

[C]onstitution was adopted.[93]

Notably, *DeLamar* evaluated the jury-trial right under the then-current 1877 Constitution,[94] thereby demonstrating that each new Constitution refreshes the jury-trial right.[95]

2. Upholding legislation against constitutional challenge.

During the 19th century, the Court upheld legislation restricting trial by jury. One line of cases originates during Reconstruction and concerns the jury-trial right in equity. Recall *Nell*, *Hargraves*, and *Mounce* recognized Georgians' constitutional jury-trial rights in equity under the 1798 Constitution.[96] And the Court continued to do so until 1871.[97] But the Court inexplicably changed course in the 1880s.

In an 1885 Act, the General Assembly defined "the duties of masters in chancery and auditors" at law or in equity.[98] Basically, this Act allowed parties to present their case to a third party (master or auditor) who received evidence and decided the issues. Aggrieved parties could file exceptions. The judge could dismiss meritless expectations and direct a verdict on the report's findings. But the judge had to submit disputed issues to the jury after finding meritorious

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[93] 128 Ga. 57, 59 (1907) (emphasis added).

[94] *See id.* at 65.

[95] *See id.* at 59-64.

[96] *See supra* nn.85-93 and accompanying text.

[97] *Hunt v. Formby's Guardian*, 43 Ga. 79, 84 (1871) (noting that "equity jurisdiction in this State is vested in the Superior Court, and a jury, under our chancery practice, is a part of our equity system").

[98] Practice in Reference to Masters and Auditors, 1885 Ga. Laws 98.

exceptions, discovering new evidence suggesting error, or identifying improperly received testimony.[99]

The Act's first constitutional challenge was in 1886. After the master of chancery issued a report, the exceptions were overruled, and judgment was entered, the losing party challenged the Act for violating the constitutional jury-trial right. Rejecting the challenge, the Court said—citing no authority—that "[t]he interposition of juries in the trial of chancery cases is purely a matter of legislative regulation," wrongly claiming that such trials originated in the Judiciary Act of 1799.[100] The Court also stated its "***opinion*** that the right of trial by jury, as guaranteed by our [C]onstitution, has reference to the right as embodied in *Magna Charta*."[101] The Court noted that the right to trial by jury in chancery cases has never "existed in England, either before or after *Magna Charta*, and that it never has and does not now exist in many of our sister states having the same constitutional provision as ours."[102] The Court gave no reason for the sudden reversal of *Nell*, *Hargraves*, and *Mounce*.

Two years later, another constitutional challenge arose. This case differed from the first in that it was "a case at law" and an auditor, not a master, issued the report.[103] These turned out to be crucial differences. Unlike in equity cases,[104]

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[99] *See id.*

[100] *Mahan v. Cavender*, 77 Ga. 118, 121 (1886).

[101] *Id.* (emphasis added).

[102] *Id.*

[103] *Poullian v. Brown*, 80 Ga. 27, 30 (1888).

[104] *See id.* at 31 (stating without citing any authority that "the right of

the Court held that "in a case at law it is the constitutional right of every citizen to have a trial by jury in a proper case made."[105] The Court also held that "exceptions of fact are questions for the jury, and have always been in England and in this country; and the legislature has no power to provide otherwise until the [C]onstitution be altered."[106]

After these cases, the Court never again recognized the constitutional right to jury trials in equity guaranteed by the 1798 Constitution. Instead, the Court repeatedly reiterated that there is no jury-trial right in equity[107]—and often inaccurately claimed that jury trials in equity began with the Judiciary Act of 1799, including as recently as *Taylor*.[108]

A second line of 19th century cases concerns "proceedings" that were unknown or tried without a jury in 1798. *Williams v. City Council of Augusta* is an example of nonjury proceedings before 1798. That case arose when the city council fined a gun-powder retailer for keeping too much gun powder. The gun-powder retailer argued that the fine violated his constitutional jury-trial rights. The Court disagreed. Because the right of municipal corporations to create

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trial by jury in equity cases is given by statute, and in such cases is not a constitutional right").

[105] *Id.*

[106] *Id.*

[107] *E.g., Hearn v. Laird*, 103 Ga. 271, 276 (1898); *Bemis v. Armour Packing Co.*, 105 Ga. 293, 294 (1898); *Lamar v. Allen*, 108 Ga. 158, 162 (1899); *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 298 (1925); *Cawthon v. Douglas County*, 248 Ga. 760, 761-62 (1982).

[108] *Williams v. Overstreet*, 230 Ga. 112, 115 (1973) (quoting *Mahan*, 77 Ga. at 121), *quoted in Taylor*, 316 Ga. at 58.

"by-laws" and enforce them "by *pecuniary penalties, in a summary manner*" existed both in England and in Georgia before the 1798 Constitution, the gun-retailer had no jury-trial right.[109]

Another example is *Davis v. Harper*, which involved a claim of settlement against an administrator in a court of ordinary (probate court).[110] While these cases had been heard "for a long while" in a court of equity, the Court confessed that it was "not clear" that a probate court could not have heard these cases (even if no one on the Court could remember it doing so).[111] Regardless, the 1798 Constitution conferred on "the inferior court the powers of a court o[f] ordinary, or register of probates, and it is unquestionable that at common law this officer had the power now in question."[112] Ultimately, the Court concluded that "[i]t does not appear . . . that in 17[98] the right of trial by jury existed in these cases."[113]

Sometimes the constitutional challenge raised a procedural issue outside the jury-trial right. In *Rafe v. State*, for example, a convicted murderer challenged the method of summoning and empaneling jurors. Those procedures, the Court held, were not part of the jury-trial right before the

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[109] 4 Ga. 509, 516 (1848); *see also Floyd v. Comm'rs of Town of Eatonton*, 14 Ga. 354 (1853) (same conclusion following *Williams*).

[110] 54 Ga. 180, 180-81 (1875).

[111] *Id.* at 183.

[112] *Id.*

[113] *Id.* The Court also noted that aggrieved parties in the court of ordinary have the right of appeal to superior court where they can get a trial by jury. *See id.*

1798 Constitution.[114] Rather, they were legislative creations—both before and after the 1798 Constitution.[115]

Sometimes the cases concerned "special proceedings not then known or subsequently created or provided by statute," such as "contested election cases, proceedings against road defaulters, partition proceedings, condemnation proceedings, [and] proceedings to validate bonds."[116]

Yet GTLA and AAJ's research has revealed no *civil* case involving an action at law for damages in which the Court held that the jury-trial right did not apply. Nor has our research revealed any *criminal* case in which the Court held that a defendant did not have the right to trial by jury for a new crime created after 1798. That's significant. Because until the treasonous 1861 Constitution, Georgia had no separate jury-trial provision for criminal cases.

The Court's Antebellum and Reconstruction cases make clear that the relevant question was whether the "case" or "proceeding" was tried to a jury before 1798. Later cases like *DeLamar* show that the Court considered this question under the most recent Constitution, not the 1798 Constitution. But in either case, the inquiry was about the whole case—not whether specific damages for certain claims were available. The undeniable fact is that all actions at law for damages were tried to a jury in Georgia before 1798 and after—at least until the 1877 Constitution as shown by *DeLamar v.*

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[114] 20 Ga. 60, 66 (1856).

[115] *Id.*

[116] *Crowell v. Akin*, 152 Ga. 126, 135 (1921) (citations omitted).

Dollar.[117]

D. Trial by jury deserves staunch protection.

Trial by jury is a fundamental, preexisting right. It appears in the first Georgia Constitution. That's more than can be said for other venerated rights, such as the right to keep and bear arms (1861);[118] right against unreasonable searches and seizures (1861);[119] and freedom of speech (1861).[120] Trial by jury deserves broad protection—similar to that given by the U.S. Supreme Court to the Seventh Amendment.[121]

Yet by treating the jury-trial right as "frozen" in 1798 as some cases do, this Court has relegated trial by jury to a second-class right.[122] And the Court has done so largely without

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[117] 128 Ga. 88-89 (holding County Court Act of 1879 unconstitutional for depriving parties of jury-trial right in cases of no more than $50).

[118] Ga. Const. of 1861, art. I, § 6.

[119] Ga. Const. of 1861, art. I, § 23.

[120] Ga. Const. of 1861, art. I, § 8.

[121] *See SEC v. Jarkesy*, 603 U.S. 109, 121-26 (2024). While the Seventh Amendment remains unincorporated against the States, the U.S. Supreme Court's most recent incorporation cases leave little doubt that it should be. "A Bill of Rights protection is incorporated . . . if it is 'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 586 U.S. 146, 150 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010) (cleaned up)).

[122] Imagine if other venerated rights had to pass through the same kind of "framework" as trial by jury. Consider one: freedom of the press. That right appears in the 1777 Constitution (and 1789 and 1798 Constitutions) in the same provision as the jury-trial right. Does the freedom of the press extend to only those persons considered members of the press in 1777 (or 1789 or 1798)? Does it extend to only those types of publications that existed back then? Of course not.

giving the history of this right *in Georgia* due consideration. Before this Court takes up MCCG and their amici's request to revisit *Nestlehutt* and other precedents, a thorough understanding of the relevant history is needed. This case is a poor vehicle for that project given the narrowness of the Court of Appeals' decision. We thus encourage the Court to decide this case on the narrow grounds required by the question presented. Should the Court decide to take this question up, GTLA and AAJ ask the Court to hold that the jury-trial right applies to all legal actions for damages and that "[t]he very existence of [damages] caps, in any amount, is violative of the right to trial by jury."[123]

CONCLUSION

GTLA and AAJ ask that the Court affirm the Court of Appeals' judgment.

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

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