No. S22A1060

IN THE

SUPREME COURT OF THE STATE OF GEORGIA

JO-ANN TAYLOR, as Executor for TIA MCGEE'S ESTATE,

Appellant-Plaintiff,

v.

THE DEVEREUX FOUNDATION, INC. a Pennsylvania corporation, and GWENDOLYN B. Skinner, an individual,

Appellee-Defendants.

BRIEF OF AMICI CURIAE UNITED STATES CHAMBER OF COMMERCE, GEORGIA CHAMBER OF COMMERCE, INC., AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF APPELLEE-DEFENDANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

CONSTITUTIONAL AND STATUTORY AUTHORITIES

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

Page(s)

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It 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 Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the 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. ("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 American Tort Reform Association ("ATRA," and, collectively with the Chamber and Georgia Chamber, "Amici") is a broad-based coalition of businesses, municipalities, associations, and professional firms that have pooled their resources to promote fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed amicus curiae briefs in cases addressing important issues like the constitutionality of the punitive-damages cap in this case.

Amici represent businesses, insurers, and others with an interest in the fairness and predictability of the civil-justice system in general and punitive damages in particular. Amici take no position on the merits of Plaintiff's claims or whether the specific facts of this case warrant an award of punitive damages. But amici and their members have a substantial interest in the constitutionality of O.C.G.A. § 51-12-5.1, which advances fairness and predictability by providing a reasonable limit on punitive damages. Promoting those values is especially important because, according to a recent survey by the U.S. Chamber's Institute for Legal Reform, Georgia's litigation climate ranks 41st overall—and 44th for damages—in terms of fairness and reasonableness, as perceived by American businesses. U.S. Chamber Institute for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States: A Survey of the Fairness and Reasonableness of State Liability Systems* 1, 16 (Sept. 2019), tinyurl.com/2vnyka57. Nearly 90% of surveyed companies reported that a state's litigation climate influences their business decisions.

Plaintiff invites the Court to disregard the General Assembly's judgment, the Court's prior holdings upholding the statute, and the holdings of the majority of other state high courts to have addressed the constitutionality of such statutes. Doing so would encourage unpredictable awards and excessive settlement demands, to the detriment of the people and economy of Georgia.

INTRODUCTION AND SUMMARY OF ARGUMENT

The people of the State of Georgia, acting through their elected representatives in the General Assembly, have weighed the costs and benefits of awarding punitive damages "not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant." O.C.G.A. § 51-12-5.1(c). Balancing these purposes against the significant practical and constitutional problems that attend unchecked potential liability, the people have concluded that, with certain statutory exceptions, a limit of $250,000 best serves the needs of the State, its people, and its economy. For three reasons, nothing in the Georgia Constitution's guarantee to both plaintiffs and defendants of the right to a jury trial robs the people of Georgia of the authority to make that determination.[1]

[1] This brief focuses on the flaws in Plaintiff's jury-trial-right argument. As Defendant explains, Plaintiff's other constitutional challenges to the General Assembly's cap on punitive damages are likewise meritless. *See* Def.'s Resp. Br. at 23-29. As noted, Amici take no position on Defendant's underlying liability, or whether punitive damages are warranted in this case.

First, properly understood, the jury-trial right is purely procedural in nature. In the late eighteenth century—the critical timeframe for determining the scope of the right under this Court's precedent—sources from William Blackstone to Alexander Hamilton understood that the legislature's authority to alter the substantive content of the law remained unimpaired by the jury-trial right. As in England and elsewhere in the United States, the 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. The General Assembly did not somehow act unconstitutionally in exercising this plenary power.

Second, as this Court has repeatedly held, legislative limits on punitive damages comport with Georgia's Constitution generally and the jury-trial right specifically. Indeed, the Court has already both rejected jury-trial-right challenges to such statutes, *see, e.g.*, *Teasley v. Mathis*, 243 Ga. 561, 563 (1979), and upheld the precise statute plaintiffs challenge in this case, *Bagley v. Shortt*, 261 Ga. 762, 762 (1991). While the Court invalidated a cap on intangible *compensatory* damages in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, it did not overrule these earlier holdings as to punitive damages, explaining that punitive damages are different because they are "not really a 'fact' 'tried' by the jury." 286 Ga. 731, 736 (2010).

Moreover, the Court's holdings that punitive damages fall outside the scope of any substantive component of the jury-trial right are correct, even without taking their precedential force into account. Such damages serve exclusively punitive and deterrent purposes, and those purposes raise moral rather than factual questions: what the proper punishment for a misdeed is, rather than how much harm the plaintiff suffered. Thus, a statutory limit on punitive damages does not intrude upon the fact-finding authority of the jury. To the contrary, the determination of what level of punitive damages to permit involves serious public-policy tradeoffs that are best resolved by the General Assembly.

As legislatures, academics, and courts across the country have recognized, too lax and unpredictable a damages regime can harm a state by discouraging the offering of products, jobs, and services that the state and its people need. And as the U.S. Supreme Court has emphasized, the similarities punitive damages share with criminal punishment—without the procedural protections of criminal prosecutions—can risk due process violations unless awards are adequately constrained. This limiting task, the U.S. Supreme Court has repeatedly made clear, belongs to state legislatures in the first instance. Unsurprisingly, then, more than 25 states cap or prohibit some or all punitive-damages awards, and the significant majority of state high courts to have considered constitutional challenges to these statutes have rejected them. This Court should do the same.

Third, regardless of whether punitive damages are a "fact," the jury-trial right does not encompass them because the "punitive damages" that existed in 1798 were not *solely* non-compensatory like modern punitive damages are. Instead, they existed in large part to fill the remedial gap left by circumscribed views of compensatory damages that did not account for intangible harms. And while the history of *jury-determined*, solely non-compensatory punitive damages by 1798 was uncertain at best, there was already an undisputed history of *legislation* by that time that, like the statute here, limits a jury's discretion in the amount of punishment to impose in civil litigation.

For these reasons, this Court should affirm the trial court's judgment that the General Assembly's punitive damages cap comports with the Georgia Constitution.

ARGUMENT

I. THE PROCEDURAL JURY-TRIAL RIGHT DOES NOT ABROGATE THE LEGISLATIVE PREROGATIVE TO MAKE SUBSTANTIVE LAW

Under long-settled law, the Georgia Constitution's provision that "[t]he right to trial by jury shall remain inviolate," Ga. Const. art. I, § I, para. XI, preserves the jury-trial right only as it existed at common law in 1798. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207-08 (1848) ("The provision in our State Constitution, that trial by jury, as heretofore used, shall remain inviolate, means that it shall not be taken away, as it existed in 1798, when the instrument was adopted, *and not that*

there must be a jury in all cases." (emphasis in original)). As this Court has emphasized, that means that "[n]ew forums may be erected, and new remedies provided, accommodated to the ever shifting state of society." *Id.*

To determine the scope of the jury-trial right in 1798—and thus its continuing 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)). In turn, 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). 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: "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).[2]

Early American understandings of the jury-trial right 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 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,

[2] *Rouse* was a criminal case, and the portion of Blackstone it quotes also concerned a criminal jury. But the same jury-trial provision applies in civil cases, and *Rouse* observed that, if anything, the jury requirement "will hold much stronger in criminal cases." 4 Ga. at 146.

at 615 (Alexander Hamilton) (John C. Hamilton ed., 1864). A constitutionalized jury-trial right would leave these substantive matters to the legislature, affecting only the procedural question of whether the government could collect taxes—as established and in the amounts set by the legislature—in summary proceedings, rather than jury trials (in Hamilton's words, "the mode of collection"). *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 General Assembly's plenary power means that it "may modify or abrogate common law rights of action as well as statutorily created rights." *Teasley v. Mathis*, 243 Ga. 561, 563 (1979) (internal citations omitted). Indeed, "[t]he 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 v. Whirlpool Corp.*, 264 Ga. 701, 705 (1994). 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 the province of the legislature" to eliminate—or, as here, limit—remedies such as punitive damages. *Teasley*, 243 Ga. at 563.

To be sure, there is some tension between the historically procedural character of the common-law jury right and *Nestlehutt*'s conclusion that a legislative cap on non-economic compensatory damages violates Georgia's Constitution. But regardless of any stare decisis force *Nestlehutt* might have as to intangible compensatory damages, it offers no justification for further *extending* an erroneous substantive reading of the jury-trial right to punitive damages. Even if preserved in their particular context, "[e]rroneous precedents need not be extended to their logical end." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 556 (2015) (Thomas, J., dissenting). "Making the same mistake in different areas of the law furthers neither certainty nor judicial economy." *Id.* Instead, "[i]t

furthers error." *Id.*; *see also Neese v. Utah Bd. of Pardons & Parole*, 416 P.3d 663, 707 (Utah 2017) (Lee, A.C.J., dissenting) (even if a "decision may be entitled to deference as a matter of *stare decisis* … that does not mean that [courts] are required to *extend* that decision further"). In any event, even on *Nestlehutt*'s own terms, the statute at issue here does not violate the right to a jury trial. *See infra* Section II.

II. PUNITIVE DAMAGES ARE OUTSIDE ANY SUBSTANTIVE COMPONENT OF THE JURY-TRIAL RIGHT.

Even assuming the existence of a substantive component to the jury-trial right, it would not extend to punitive damages. To begin, this Court has already repeatedly held that plaintiffs have no right to punitive damages. Moreover, the reasoning underlying those decisions—that such damages implicate moral rather than factual questions—is correct. And finally, legislatures have long played a role in cabining the discretion of juries to set punitive awards, including for common-law claims.

A. As This Court Has Repeatedly Held, There Is No Constitutional Right To Punitive Damages, Which Are Not A Fact To Be Tried By A Jury.

1. Repeated Decisions of This Court Make Clear That Plaintiffs Have No Constitutional Right to Punitive Damages.

This Court has held that "eliminating the right to sue for exemplary damages [in certain circumstances] is well within the province of the legislature," and that the General Assembly may enact such a law without "depriving [a plaintiff] of his right to a jury trial." *Teasley*, 243 Ga. at 563; *see also State v. Moseley*, 263 Ga. 680, 681 (1993). Likewise, the Court has held that because "a plaintiff has no vested right to

punitive damages, … the right to such damages may be taken away by a statute." *Kelly v. Hall*, 191 Ga. 470, 472 (1941). Indeed, the General Assembly has the power to statutorily remove an entitlement to punitive damages *even after* the conduct in question occurs, or "*even after* a verdict [awarding punitive damages] but before judgment has been rendered thereon." *Id.* (emphasis added). Scant surprise, then, that this Court held the very punitive damages cap at issue in the present case constitutional in *Bagley v. Shortt*, which explained that because "punitive damages lawfully may be eliminated" altogether, "they may [also] be circumscribed." 261 Ga. at 762; *see also Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 543 (1993) ("We have previously held that the legislature may lawfully circumscribe punitive damages in this circumstance." (citing *Bagley*)); *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226, 230 n.17 (1996) (noting *Bagley*'s holding that the General Assembly's cap is constitutional).

Plaintiff's arguments that all of these repeated statements by this Court are irrelevant cannot withstand scrutiny. For example, Plaintiff asserts that in *some* of these cases, the underlying cause of action did not exist in 1798. *See* Pl. Br. at 20-21 (citing *Teasley*, *Moseley*, and *Mack Trucks*); Pl. Reply at 9-10. That aspect of those cases, however, played no role in the Court's decisions, which rested on the absence of any right to punitive damages, not the nature of the underlying claim. *Teasley*, 243 Ga. at 563; *see Mack Trucks*, 263 Ga. at 541 ("We begin with the

premise that there is no constitutional right to an award of punitive damages." (citing *Teasley*)); *Moseley*, 263 Ga. at 681. In fact, the jury awarded damages in *Mack Trucks* only on an ordinary negligence theory. *See* 263 Ga. at 539 (defendant "liable for 'negligent failure to recall or warn'" but "not liable under a theory of 'strict products liability'"). And *Teasley* expressly rejected the idea that the cause of action mattered to its analysis by noting that the General Assembly's plenary authority extends to "common law rights of action *as well as* statutorily created rights." 243 Ga. at 563 (internal citations omitted) (emphasis added); *see also Moseley*, 263 Ga. at 681 (reiterating that the jury-trial right does not "prohibit[] the General Assembly from abrogating or circumscribing common law or statutory rights of action" (citing *Teasley*)). In any event, this Court has also recognized the General Assembly's plenary authority over punitive damages in a case involving personal-injury claims of the type that did exist in 1798. *Bagley*, 261 Ga. at 762 & n.1 (applying punitive-damage cap to each of two plaintiffs, one of whom survived the car crash at issue).

Conversely, Plaintiff observes that *some* of this Court's cases did not directly confront challenges based on the jury-trial right. Pl. Br. at 21-22 (citing *Mack Trucks* and *Bagley*). But even Plaintiff must concede that the Court rejected jury-trial-right challenges to legislation limiting or adjusting punitive damages in *Teasley* and *Moseley*. *See* Pl. Br. at 20-21. And both *Bagley* and *Mack Trucks* rest on and reaffirm *Teasley*, thus reinforcing the General Assembly's authority to place

reasonable limits on punitive damages, notwithstanding jury-trial or other challenges. *See Bagley*, 261 Ga. at 762 (citing *Teasley*); *Mack Trucks*, 263 Ga. at 541 (citing *Teasley* and *Bagley*).

Nestlehutt, on which Plaintiff so heavily relies, only confirms the constitutionality of the General Assembly's punitive-damages cap. In the course of holding that the jury-trial right prevents a cap on non-economic compensatory damages, the Court distinguished its repeated holdings that the General Assembly may abolish, cap, or otherwise modify non-compensatory punitive damages. *Nestlehutt*, 286 Ga. at 736. As the Court explained, "statutory limits on *punitive* damages" are distinct from caps on various forms of compensatory damages because, "unlike the measure of actual damages suffered," punitive damages "are not really a fact tried by a jury." *Id.* (internal quotation marks and brackets omitted).

Plaintiff is wrong to assert that this statement was dicta because *Nestlehutt* did not directly concern punitive damages. Pl. Br. at 22-23; Pl. Reply at 10. Precedent includes the necessary reasoning supporting a decision. *Cf. Seminole Tr. of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). Here, *Nestlehutt*'s explanation that, unlike compensatory damages, punitive damages "are not really a fact tried by a jury" is the ground on which the Court distinguished its prior holdings that the General Assembly can modify or cap

punitive damages, including in the very statute now at issue. Accordingly, that reasoning was necessary to *Nestlehutt*'s result and further establishes the constitutionality of the cap.

For similar reasons, *Nestlehutt* forecloses Plaintiff's argument that "whether something is a factual question, legal question, or mixed question is irrelevant under the Georgia Constitution." *See* Pl. Br. at 23; Pl. Reply at 10-11. As *Nestlehutt* explained, in reasoning essential to its decision, the non-factual nature of the punitive-damages inquiry takes it outside the scope of the jury-trial right. In any event, Plaintiff's position proves too much, as it runs headlong into longstanding black-letter law that while it is "the right of the jury to pronounce upon the facts," it is "the *duty* of the court, in *every case*, plainly and independently to declare the law." *Anderson v. State*, 2 Ga. 370, 380 (1847).

2. There Is No Constitutional Right to a Jury Determination of the Amount of Punitive Damages, Which Is Not a Fact the Jury Must Decide.

Even setting aside the precedential force of the Court's repeated statements in *Nestlehutt* and prior cases, there is no constitutional right to a jury determination of the amount of punitive damages. The General Assembly has mandated that "[p]unitive damages shall be awarded *not* as compensation to a plaintiff, *but solely* to punish, penalize, or deter a defendant." O.C.G.A. § 51-12-5.1(c) (emphasis added). The amount of punitive damages to be awarded thus does not "present[] a

question of historical or predictive fact." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001). Rather, it presents inescapably moral questions concerning the State's interests in punishment and deterrence—interests that the General Assembly properly weighs in the first instance. Put another way, "[u]nlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy." *Gordon v. State*, 608 So. 2d 800, 801 (Fla. 1992). The moral question of what *should* be done to a defendant is inescapably subjective in a way that the objective factual question of what *has* been done to a plaintiff is not. "Accordingly, … punitive damages [are] subject to the plenary authority of the ultimate policy-maker under our system, the legislature." *Id.*

The irreducibly moral considerations of how to most appropriately "punish" or "penalize" wrongful conduct also unavoidably involve important public-policy tradeoffs. The threat of unbounded liability may well—either directly or through increasing liability-insurance premiums—make doing business in the state more expensive, thereby reducing the willingness of those who provide critical services, jobs, and products to participate in a state's economy. Legislative damages caps in Georgia and other states reflect these competing interests. For example, Alaska's punitive-damages cap was enacted expressly to "provide for reasonable, but not excessive, punitive damage awards against tortfeasors sufficient to deter … while not hampering a positive business environment by allowing excessive penalties" and

to "alleviate the high cost of malpractice insurance premiums that discourages physicians, architects, engineers, attorneys, and other professionals from rendering needed services to the public." 1997 Alaska Sess. Laws, ch. 26, § 1(2), (5); *see* Tex. Gen. Laws, Seventieth Legislature, First Called Session, Ch. 2, § 1.01(2) (explaining in enacted preamble to punitive-damages cap the legislative judgment that "[a] serious liability insurance crisis currently exists in the State of Texas and is having adverse effects on the availability and affordability of various types of liability insurance and the economic development and growth of this state and the well-being of its citizens"). Such "questions of policy formulation … are best left to the legislature." *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053-54 (Alaska 2002).[3]

These concerns are also reflected in scholarly work both inside and outside the legal field. *See, e.g.*, W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 325-26

[3] Although Plaintiff insists that the amount of punitive damages is a factual question, Pl. Br. at 23-25; Pl. Reply at 11, even one of the cases Plaintiff relies on most heavily admits that while "punitive damages derive their meaning from a set of underlying facts as determined by a jury, … what a jury does with those facts is a kind of case-by-case *policymaking* that involves consideration of broader issues, like deterrence and retribution." *Time Warner Ent. Co. v. Six Flags Over Ga., LLC*, 254 Ga. App. 598, 602 n.3 (2002) (internal quotation marks omitted) (emphasis added). And, of course, the final word on policymaking comes from the General Assembly under longstanding law. *See, e.g.*, *Commonwealth Inv. Co. v. Frye*, 219 Ga. 498, 499 (1963) (making "an emphatic statement" that the General Assembly is "empowered by the Constitution to decide public policy, and to implement that policy by enacting laws").

(1998) ("High [punitive] damage levels suppress innovation across the board."); Richard J. Mahoney & Stephen E. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 Science 1395, 1395 (1989) (describing the "uncontrolled imposition of punitive damages" as "the driving force" behind the result that "new, safe products may be kept off the market and the scope of research and development restricted"). They are also borne out by those particularly well-situated to speak to the damaging effects of unpredictably excessive damages. *See, e.g.*, Brief of Amici Curiae Wisconsin Medical Society & American Medical Association Litigation Center at 2, *Mayo v. Wis. Injured Patients & Fams. Comp. Fund*, 914 N.W.2d 678 (Wis. 2018) (No. 2014AP2812), 2018 WL 548064, at *3 ("[A]n uncontrolled medical-liability environment negatively impacts the attraction and retention of high-quality physicians, the control of costs incurred in providing care, and the practice of needed medical services (particularly high-risk services).").

In addition and related to the systemic problems they can present, punitive damages by their nature "pose an acute danger of arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). That is because they "serve the same purposes as criminal penalties," but without "the protections applicable in a criminal proceeding." *Id.*; *see also id.* at 428 ("Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after

the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.").

Striking the right balance between the societal dangers presented by unchecked punitive damages and the statutory purposes of penalty, punishment, and deterrence are first and foremost legislative tasks. As the U.S. Supreme Court has repeatedly emphasized, within the guardrails set out by due process, "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *see also State Farm*, 538 U.S. at 416 ("States possess discretion over the imposition of punitive damages."). "As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Cooper Indus.*, 532 U.S. at 433. Accordingly, "reviewing court[s] engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (internal quotation marks omitted). The upshot is that this Court should defer to the General Assembly's assessment of the appropriate limits on punitive damages—and reject Plaintiff's request to strike that limit down based on an inapplicable constitutional provision.

3. Sister States' Legislative Enactments and Judicial Decisions Support the Constitutionality of the General Assembly's Cap.

The General Assembly is far from alone in exercising its authority to "place limits on the permissible size of punitive damages awards." *Cooper Indus.*, 532 U.S. at 433. By 1996, such guardrails were sufficiently common that at least 16 states, including Georgia, had enacted or were then considering caps on punitive damages in some or all cases. *Gore*, 517 U.S. at 613-17 (Ginsburg, J., dissenting). Five years later, four more states had enacted such caps. *Cooper Indus.*, 532 U.S. at 433 n.6. Today, more than half of the states have legislatively[4] or constitutionally[5] limited or prohibited punitive damages in some or all cases.

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[4] Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. Ann. § 52-240b; Fla. Stat. Ann. § 768.73; O.C.G.A. § 51-12-5.1(g); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702(e)-(f); La. Civ. Code Ann. art. 3546; Me. Rev. Stat. Ann. tit. 18-C § 2-807; Miss. Code Ann. § 11-1-65(3)(a); Mont. Code Ann. § 27-1-220; Nev. Rev. Stat. Ann. § 42.005; N.H. Rev. Stat. Ann. § 507:16; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32-03.2-11(4); Ohio Rev. Code Ann. § 2315.21(D)(2)(a)-(b); Okla. Stat. Ann. tit. 23, § 9.1; S.C. Code Ann. § 15-32-530(A); Tenn. Code Ann. § 29-39-104(a)(5); Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code Ann. § 55-7-29(c); Wis. Stat. Ann. § 895.043; *see Simeone v. Charron*, 762 A.2d 442 (R.I. 2000) (interpreting Rhode Island's wrongful death statute, R.I. Gen. Laws § 10-7-1, to preclude punitive damages in such cases).

[5] Neb. Const. art. VII, § 5; *see Abel v. Conover*, 104 N.W.2d 684, 688 (Neb. 1960) ("It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed[.] … This rule is so well settled that we dispose of it merely by the citation of cases so holding.").

Despite Plaintiff's claim—citing only two Missouri cases—that "persuasive foreign authority" supports the invalidation of the General Assembly's punitive damages cap, *see* Pl. Br. at 22, most state high courts to have considered punitive-damages caps have upheld or applied them. Thus, for example, the Kansas Supreme Court has echoed this Court's reasoning upholding legislative judgments about the proper limitations on punitive damages:

> Because a plaintiff does not have a right to punitive damages, the legislature could, without infringing upon a plaintiff's basic constitutional rights, abolish punitive damages. If the legislature may abolish punitive damages, then it also may, without impinging upon the right to trial by jury, accomplish anything short of that, such as requiring the court to determine the amount of punitive damages or capping the amount of the punitive damages.

Smith v. Printup, 866 P.2d 985, 994 (Kan. 1993); *see also Evans*, 56 P.3d at 1050-51; *Bernier v. Burris*, 497 N.E.2d 763, 776-77 (Ill. 1986) (ban on punitive damages for claims alleging malpractice in the healing arts); *State v. Doe*, 987 N.E.2d 1066, 1070-73 (Ind. 2013); *Peters v. Saft*, 597 A.2d 50, 52-54 (Me. 1991) (punitive damages cap for dram shop liability); *Arnesano v. State ex rel. Dep't of Transp.*, 942 P.2d 139, 142 (Nev. 1997); *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004); *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 485-91 (Ohio 2007); *Garrison v. Target Corp.*, 869 S.E.2d 797, 805-07 (S.C. 2022); *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 155-58 (Tex. 2015); *Etheridge v. Med. Ctr. Hosps.*, 376 S.E.2d 525, 528-29 (Va. 1989); *cf. Kirkland v. Blaine Cnty. Med. Ctr.*, 4 P.3d 1115, 1120 (Idaho

2000) (upholding cap on non-economic damages against right-to-jury-trial challenge); *Murphy v. Edmonds*, 601 A.2d 102, 116-18 (Md. 1992) (same); *Verba v. Ghaphery*, 552 S.E.2d 406, 410 (W. Va. 2001) (same); *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 690-93 & n.6 (Tenn. 2020) (same, and finding "unpersuasive" the reasoning underlying the Sixth Circuit's *Erie* guess that the Tennessee Supreme Court would find Tennessee's similar punitive damages cap violative of the Tennessee Constitution).

* * *

This Court should adhere to its own prior decisions and the weight of authority from across the country. The amount of punitive damages to be awarded is an essentially moral question involving the sorts of public-policy tradeoffs best suited to the General Assembly. The jury-trial right in no way removes the ability to make those difficult, consequential decisions from the people's duly elected representatives.

B. There Was No Requirement In 1798 That Juries Determine The Amount Of Non-Compensatory Punitive Recoveries.

The jury-trial right also does not extend to the determination of the amount of punitive damages for another, independent reason: in 1798, juries were not responsible—and certainly not solely responsible—for determining the amount of any non-compensatory punitive damages. At that time, awards called "punitive damages" typically served compensatory functions, and in fact, legislatures often

pursued punitive ends by enacting statutes altering the amount of plaintiffs' recoveries.

Unlike today, the role of punitive damages in the late eighteenth century was not "*solely* to punish, penalize, or deter a defendant." *See* O.C.G.A. § 51-12-5.1(c) (emphasis added). Although "punitive or 'exemplary' damages have long been a part of Anglo-American law[,] [t]hey have always been controversial." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring in the judgment). Despite Plaintiff's treatment of Sedgwick's treatise as seemingly dispositive, *see* Pl. Reply at 4-7, a heated debate concerning the role and propriety of punitive damages continued well into the 1800s. *See DeMendoza v. Huffman*, 51 P.3d 1232, 1239-42 (Or. 2002) (describing this debate and its resolution with the adoption of the modern, purely punitive approach to punitive damages in the 1850s).

Some contended that what courts referred to as "punitive" or "exemplary" damages were "in reality no more than full compensation" in the context of a system that otherwise limited compensation for intangible, non-economic injuries. *Haslip*, 499 U.S. at 25 (Scalia, J., concurring in the judgment) (citing 2 Simon Greenleaf, Law of Evidence 235 n.2 (13th ed. 1876)); *see* Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518 (1957) ("The doctrine of exemplary damages originated in the English courts in the eighteenth century as a means of justifying awards of damages in excess of the plaintiff's *tangible* harm." (emphasis

added)). Indeed, "punitive damages were initially awarded exclusively in cases that involved insult to the honor and dignity of the victim." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 615 (2003). These, of course, are precisely the kinds of cases in which constrained understandings of compensatory damages might prove less than fully sufficient. It was only "throughout the *nineteenth* century, both in the United States and in England, [that] the concept of actual damages was being broadened to include intangible harm," with the result that "the original compensatory function of exemplary damages came to be filled by actual damages," leaving "courts today … to speak of exemplary damages exclusively in terms of punishment and deterrence." *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. at 520 (footnotes omitted) (emphasis added).

Courts have acknowledged this history. As the U.S. Supreme Court has explained, "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries" because such damages were "not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus.*, 532 U.S. at 437 n.11. Since then, however, "the types of compensatory damages available to plaintiffs have broadened," and "the theory behind punitive damages has shifted toward a more purely punitive (and therefore less factual) understanding." *Id.* Accordingly, in line with the General Assembly's

requirement that punitive damages "be awarded *not* as compensation to a plaintiff," O.C.G.A. § 51-12-5.1(c) (emphasis added), "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded … to achieve punishment or deterrence," *State Farm*, 538 U.S. at 419. This evolution of the purpose of "punitive" or "exemplary damages" means that little can be drawn from general statements that, in some form or another, such damages have a long history. *See* Pl. Br. at 14-16 & n.16; Pl. Reply at 3-9.

To be sure, some of Plaintiff's authority suggests that, by 1798, punitive or exemplary damages served some non-compensatory functions. None, however, suggests that such damages existed in the *solely* non-compensatory form that prevails in Georgia and elsewhere. For example, Plaintiff quotes (Pl. Br. at 15-16) language from the U.S. Supreme Court's 1851 decision in *Day v. Woodforth*, 54 U.S. 363, but that case explains that such damages are justified in part because "[i]n many civil actions, … the wrong done to the plaintiff is incapable of being measured by a money standard." *Id.* at 371. In other words, such damages were justified because of doubts that compensatory damages—as then understood—would provide full redress. Plaintiff's English cases repeat the same concern, recognizing that punitive damages—as then understood—served to compensate the plaintiff for harm suffered. *See Huckle v. Money*, 95 Eng. Rep. 768, 768-69 (K.B. 1763) (noting that the damages for personal injury would be quite small, but would not account for the

outrage caused the plaintiff by the physical invasion and imprisonment, "a most daring public attack made upon the liberty of the subject"); *Tullidge v. Wade*, 95 Eng. Rep. 909, 909 (K.B. 1769) (emphasizing the "insult" that "the plaintiff … received"); *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (K.B. 1763) (damages can serve "*not only* as a satisfaction to the injured person, but *likewise* as a punishment to the guilty" (emphasis added)). Thus, by 1798, there was no practice of jury-dictated, solely non-compensatory punitive damages—and Plaintiff certainly has not demonstrated to the contrary. *See, e.g.*, *S&S Towing & Recovery, Ltd. v. Charnota*, 309 Ga. 117, 119 (2020) ("Because all presumptions are in favor of the constitutionality of a statute, the burden is on the party claiming that the law is unconstitutional to prove it.").[6]

By contrast, there is a clear, longstanding tradition in both England and the United States of legislatively fixing punitive recoveries for common-law causes of action. As far back as 1275, Parliament provided that "[t]respassers against religious persons[] shall yield double damages." Synopsis of Statute of Westminster I, 3

[6] Nor do the pre-*Huckle* cases cited in Plaintiff's reply brief change that result. As Plaintiff apparently acknowledges, *Duke of York v. Pilkington*, 89 Eng. Rep. 918 (K.B. 1693), and *Townsend v. Hughes*, 86 Eng. Rep. 850 (K.B. 1676), did not even purport to award punitive damages, and Plaintiff's suggestion that punitive damages were included rests on nothing more than speculation about the level of damages that would compensate "the King's only brother and heir" for defamatory statements that he "has burned the city" and "is now come to cut our throats." *Duke of York*, 89 Eng. Rep. at 918.

Edw., c. 1 (Eng.), *in* 24 Great Britain Statutes at Large 138 (Pickering Index 1761); *see also, e.g.*, Statute of Westminster I, 3 Edw. I, c. 24 (1275), *in* 1 Statutes of the Realm 33 (reprt. ed. 1963) (requiring double damages for unlawful disseisin when the defendant committed the tort under color of a public office). Indeed, "Parliament enacted at least 65 separate provisions for double, treble and quadruple damages between 1275 and 1753." David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 368 (1994); *see Gore*, 517 U.S. at 580-81 & n.33. Similar statutes have long been prevalent in the United States as well. *See, e.g.*, *Halo Elecs., Inc. v. Pulse Elecs, Inc.*, 579 U.S. 93, 97 (2016) ("The Patent Act of 1793 mandated treble damages in any successful infringement suit."). Georgia is no exception: The General Assembly has long enacted statutes providing for multiple damages. *See, e.g.*, O.C.G.A. § 20-3-514(c) (specifying treble damages for certain breaches of contract); Ga. Code § 1446 (1882) (specifying double damages for harm done by animals that break into properly secured enclosure); *id.* § 1445 (1882) (specifying treble damages for one who kills an animal that was trespassing on his inadequately secured enclosure).

To be clear, these statutes providing for double and treble damages are punitive—and certainly as punitive as exemplary damages were originally considered to be. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to

deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."); *Savannah Elec. Co. v. Bell*, 124 Ga. 663, 668-69 (Ga. 1906) ("It is within the province of the General Assembly to impose double damages, treble damages, and the like upon one who has by his wrongful conduct damaged another. … This is nothing more nor less than a legislative imposition of a penalty upon the person who causes the death of another by negligence, the penalty to go to the person injured.").

It was well understood—indeed, "unquestioned"—that the General Assembly, like other legislatures, had the constitutional power to limit the jury's discretion to select the penalty enforceable through a civil action. *Savannah Elec.*, 124 Ga. at 669. That forecloses Plaintiff's argument that only juries—not Parliament or American legislatures—could determine the amount a plaintiff could recover to punish and deter a defendant. There is no meaningful difference between, on one hand, a legislative power to cap punitive damages (which might be below the level a jury might set in a particular case) and, on the other, a legislative power to impose double or treble damages or even a universally applicable amount of punitive damages (which might be above or below the amount a jury might set in a particular case). *Id.*; *see also Arbino*, 880 N.E.2d at 476 (holding legislative power to set multiple damages demonstrates legislative power to cap damages). Each rests on the legislature's ultimate authority to define the punishment for particular causes of

action. Indeed, a cap allows *more room* for the jury to play a role, because it can determine the amount of punitive damages warranted within the cap.

While *Nestlehutt* found multiple-damages statutes inapposite to caps on non-economic compensatory damages on the ground that such statutes "do not in any way nullify the jury's [compensatory] damages award but rather merely operate upon it [by using it as the basis for multiplication] and thus affirm the integrity of that award," 286 Ga. at 737, that conclusion does not follow in the context of punitive damages, where both the multiplier and the caps go to the same question—what the appropriate level of punishment is. That is, while a multiple-damages statute respects the jury's role in determining an award of damages *for compensation* by taking that award as a given and using it as a basis for multiplication, a multiple-damages statute eliminates or at minimum constrains a jury's ability to determine the amount of damages, if any, appropriate *for punishment*. Because the jury-trial right protects defendants as well as plaintiffs, *see Flint River Steamboat Co.*, 5 Ga. at 195, Plaintiff's position would render invalid statutes awarding double and treble damages at the behest of the next aggrieved defendant (aggrieved by too much punishment imposed by the General Assembly) to the same extent it would invalidate a cap (because the General Assembly limited the punishment). Far better—and far more consistent with the original public meaning of Georgia's constitution—to follow longstanding law recognizing that "[i]t is within the province

of the General Assembly" to determine the appropriate amounts of civil punishment. *Savannah Elec.*, 124 Ga. at 668.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's decision applying the General Assembly's punitive damages cap. A copy of the order setting the deadline to file this brief is attached as Exhibit 1.

Dated: September 7, 2022

Respectfully submitted,

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This 7th day of September, 2022.

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EXHIBIT 1

SUPREME COURT OF GEORGIA
Case Nos. S22A1060; S22X1061;
S22A1161; S22X1097

July18, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JO-ANN TAYLOR, EXECTUOR v. THE DEVEREUX FOUNDATION, INC. et al.
THE DEVEREUX FOUNDATION, INC. et al. v. JO-ANN TAYLOR, EXECUTOR

MICHELLE MCKINNEY, ADMINISTRATOR v. GWINNETT OPERATIONS, LLC et al.
GWINNETT OPERATIONS, LLC et al. v. MICHELLE MCKINNEY, ADMINISTRATOR

In each of these cases, the trial court entered an order reducing the jury's punitive damages award for the plaintiff to a total of $250,000 under OCGA § 51-12-5.1 (g). On appeal, each plaintiff reasserts her argument, which the trial court rejected, that OCGA § 51-12-5.1 (g)'s punitive damages cap violates the Georgia Constitution. Oral argument in each case has been set for the November 2022 calendar. In addition to the briefs of the parties, the Court invites the Solicitor General's Unit of the Office of the Attorney General of Georgia, the Georgia Trial Lawyers Association, and the Georgia Defense Lawyers Association to file briefs of amicus curiae expressing their views on the following questions:

Does the punitive damages cap in OCGA § 51-12-5.1 (g) violate the Georgia Constitution, either facially or as applied?

What relevant causes of action existed and provided for punitive damages before the adoption of the Georgia constitutional right to a trial by jury, and how, if at all, does this answer inform analysis of the constitutionality of OCGA § 51-12-5.1 (g)? See *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 733-737 (691 SE2d 218) (2010).

Any brief of amici curiae filed pursuant to this order shall comply with the page limits set forth in Supreme Court Rule 20 (4).

Any amicus briefs from the amici listed above, and any other amici curiae who wish to express their views on this question—whether in support of an appellant, of an appellee, or of neither party—shall be filed on or before September 7, 2022.

The Court discourages any requests for extension of time to file amicus briefs.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk