No. 20-0923

In the Supreme Court of Texas

JESUS VIRLAR, M.D. AND GMG HEALTH SYSTEMS ASSOCIATES, P.A., A/K/A AND D/B/A GONZABA MEDICAL GROUP,
Petitioners,

v.

JO ANN PUENTE,
Respondent.

On Petition for Review
from the Fourth Court of Appeals, San Antonio

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

JUDD E. STONE II
Solicitor General

LANORA C. PETTIT
Principal Deputy Solicitor General

BILL DAVIS
Deputy Solicitor General

KYLE D. HIGHFUL
Assistant Solicitor General
State Bar No. 24083175
Kyle.Highful@oag.texas.gov

Counsel for the State of Texas

Identity of Parties, Amicus Curiae, and Counsel

The parties have correctly identified themselves and their counsel.

Amicus Curiae:
The State of Texas

Appellate Counsel for Amicus Curiae:
Ken Paxton
Brent Webster
Judd E. Stone II
Lanora C. Pettit
Bill Davis
Kyle D. Highful (lead counsel)
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
Kyle.Highful@oag.texas.gov

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Statement of Interest of Amicus Curiae

The State of Texas has an interest in the proper interpretation of the Texas Constitution and in defending constitutional legislation. This appeal implicates those interests because it requires this Court to interpret Article I, section 13 of the Constitution and evaluate the constitutionality of provisions in chapter 33 of the Texas Civil Practice and Remedies Code. The State takes no position on any other issue presented in this appeal.

No fee has been or will be paid for the preparation of this brief.

To the Honorable Supreme Court of Texas:

The rights that Texans enjoy would mean little if they were not enforceable in court. The second sentence of Article I, section 13 of the Texas Constitution ("Section 13") undisputedly protects Texans by guaranteeing that the State's courts will be open and will follow the law for all litigants. But the extent to which Section 13 also provides substantive protection to particular common-law causes of action and remedies is a separate and perennially vexing question. Even eminent jurists have expressed uncertainty regarding the meaning of Section 13 and analogous provisions in other state constitutions. *E.g.*, Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. Rev. 1309, 1344 (2003) ("As to whether and to what extent the right to a remedy should preserve substantive rights from legislative encroachment, I must confess continued irresolution."); Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 Rutgers L.J. 1005, 1006 (2001) (lamenting the lack of definitive answers in this area of the law).

But courts should not strike down duly enacted legislation based on uncertain constitutional interpretations. The court of appeals below held that two provisions of chapter 33 of the Texas Civil Practice and Remedies Code, sections 33.011(1) and 33.012(c), taken together and as applied to respondent, violate Section 13 because they limit respondent's recovery of damages for medical negligence. Affirming that holding would require expanding what might be called this Court's "substantive-open-courts" jurisprudence—the doctrine that Section 13 "alters the classic separation of powers between the branches of state government by protecting existing

causes of action from encroachment or abolishment." Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 Alb. L. Rev. 1449, 1454 (2019). The Court should decline to expand the doctrine and should instead hold that the challenged provisions do not violate Section 13.

Summary of the Argument

I. This Court has held that Section 13 has a substantive aspect that limits the Legislature's ability to modify or abolish common-law causes of action and remedies. But the text and history of Section 13 and similar provisions in other state constitutions call that substantive aspect into question. Read in the context of the rest of Texas's bill of rights and the historical circumstances surrounding the adoption of the 1876 Constitution, Section 13 provides a critical procedural protection—guaranteeing that courts will be open to all and will follow the law of the land. But neither Section 13's text nor history indicates that the provision was meant to bind the Legislature's hands and permanently freeze the common law.

II. This Court's precedents do not require affirming the court of appeals' judgment. The Court has broadened its interpretation of Section 13 over the past century. But to hold the challenged provisions of chapter 33 unconstitutional, this Court would need to further extend its substantive-open-courts jurisprudence. And because that jurisprudence rests on an uncertain foundation, the Court should avoid adding another layer. It should instead hold that the challenged provisions do not violate Section 13.

ARGUMENT

I. The Text and History of Section 13 Suggest That It Provides Procedural, Rather Than Substantive, Guarantees.

Section 13 provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Most state constitutions include a similar provision. *See* David Schuman, *The Right to A Remedy*, 65 Temp. L. Rev. 1197, 1201 & n.25 (1992). But the U.S. Constitution does not. Phillips, *supra*, at 1309. That leaves States free to function as "laboratories of democracy," with each State providing its own interpretation of this constitutional language. McGinley, *supra*, at 1453. And the results have varied widely. *See* Phillips, *supra*, at 1326–38. Despite more than a century of interpretation by judges and scholars, "there is still no consensus about the historical meaning of the Clause." Hoffman 2001, *supra*, at 1006. That is evident from the different titles applied to these similar constitutional provisions (and portions thereof), which include "the Open Courts Clause," Michael J. DeBoer, *The Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal for Reconsideration*, 6 Faulkner L. Rev. 135, 138 (2014), "the Procedural Open Courts Clause," McGinley, *supra*, at 1454, "the Substantive Open Courts Clause," *id.*, "the Remedy Clause," DeBoer, *supra*, at 138, and "the Administration of Justice Clause," *id.* These varying interpretations "cannot be harmonized by reliance on textual distinctions among the states" because "[t]here is no correlation between the words of a particular guarantee and how expansively the courts of that state have applied it." Phillips, *supra*, at 1314.

Providing a definitive interpretation of Texas's version of this provision is beyond the scope of this brief. Nevertheless, a partial analysis with tentative conclusions may still assist the Court here. The Court would have to go beyond its own precedent, and well beyond the constitutional text, to hold that the challenged law is unconstitutional. The State offers the following textual and historical analysis to provide a starting point if the Court reconsiders whether Section 13 makes substantive guarantees in addition to procedural ones. *See Tex. Dep't of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 678 (Tex. 2022) (Young, J., concurring) (noting the value of "preliminary and non-comprehensive thoughts" about what "words meant to the Texans who agreed in 1876" to include them in the Constitution).

Yet even a preliminary analysis calls into question this Court's prior determinations that Section 13 provides substantive protection of specific common-law causes of action and remedies. *See, e.g.*, *Sax v. Votteler*, 648 S.W.2d 661, 665–66 (Tex. 1983) (holding that Section 13 limits the Legislature's ability to abrogate common-law causes of action). It may be that Section 13 "was written to be an important procedural limitation yet not a freestanding font of substantive rights." *Crown Distrib.*, 647 S.W.3d at 675 (Young, J., concurring) (discussing Article I, section 19). The high courts of some States have interpreted their analogous provisions to guarantee only procedural rights and not to prevent their legislatures from altering the common law.[1] As discussed below in Part II.C, the State's preliminary analysis suggests that

[1] *See, e.g.*, *Gomersall v. St. Luke's Reg'l Med. Ctr., Ltd.*, 483 P.3d 365, 373 (Idaho 2021) (noting that Idaho's analogous provision "does not create any substantive rights," "merely admonishes Idaho courts to dispense justice and to secure citizens the rights

any further expansion of the Court's substantive-open-courts jurisprudence would be unwarranted, if not erroneous.

A. The text of Section 13 suggests that its purpose is to guarantee that courts are available to civil plaintiffs and will follow the law.

"In interpreting any constitutional provision, [the Court] begin[s] with the text of the constitution." *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992). The provision relevant here—the second sentence in Article I, section 13—has remained

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and remedies afforded by the legislature or by the common law," and "does not prohibit the legislature from abolishing a common law right or remedy"); *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 37 (La. 2008) (noting that Louisiana's analogous provision was not intended "to limit the Legislature's ability to restrict causes of action" and that the provision "operates only to provide remedies which are fashioned by the legislature"); *Gourley ex rel. Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 74 (Neb. 2003) (per curiam) (explaining that, "[a]lthough plaintiffs have a right to pursue recognized causes of action in court, they are not assured that a cause of action will remain immune from legislative or judicial limitation or elimination" and that "if a common-law right is taken away, nothing need be given in return"); *McIntosh v. Melroe Co., a Div. of Clark Equip. Co.*, 729 N.E.2d 972, 977–78 (Ind. 2000) (recognizing that Indiana's analogous provision does not prevent its legislature from abolishing common-law rights and remedies); *Ross v. City of Great Falls*, 967 P.2d 1103, 1109 (Mont. 1998) ("We have held, however, that [Montana's analogous provision] does not guarantee a fundamental right to any particular cause of action or remedy and that the Legislature has the power to alter or abrogate previously available causes of action and constrict liability."); *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) ("This Section of our constitution has been interpreted by this Court as a mandate to the judiciary and not as a limitation upon the legislature."); *O'Quinn v. Walt Disney Prods., Inc.*, 493 P.2d 344, 346 (Colo. 1972) ("[I]t is well settled that this portion of the constitution does not prevent the legislature from changing the law which creates a right. Rather, this section simply provides that if a right does accrue under the law, the courts will be available to effectuate such right.").

unchanged since Texas adopted its current constitution. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986). Because "the constitutional language . . . means to-day what it meant . . . when the Constitution was adopted," the relevant question is what Section 13 meant in 1876. *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1012 (Tex. 1934); *see Booth v. Strippleman*, 61 Tex. 378, 380 (1884) (noting that "constitutions, like statutes, must be construed with reference to the subject matter, and with the view of arriving at and enforcing the intention of the convention").

Section 13 includes two clauses. The first is "[a]ll courts shall be open." The second is "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

In the first clause, the word "open" may have one or more of three meanings. *First*, "open" may mean "[f]ree of access; not shut up; not closed." *Open*, Webster's Complete Dictionary of the English Language (1886) ("Webster 1886") (available at https://tinyurl.com/webster1886) (all websites last visited September 26, 2022). That is, Texas cannot close its courts and cease providing judicial process. *See Open Court*, Black's Law Dictionary (1st ed. 1891) ("Black 1891") (available at https://tinyurl.com/black1891) (noting that "open court" may mean "a court which has been formally convened and declared open for the transaction of its proper judicial business"). *Second*, the clause may mean that courts must be "open" in the sense that access to the courts may not be "contingent upon an impossible condition." *Stockton v. Offenbach*, 336 S.W.3d 610, 617–18 (Tex. 2011) (quoting *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997)). *Third*, "open" may mean that court proceedings are subject to public scrutiny rather than being held in secret. *See Open*,

Webster 1886 ("[n]ot concealed or secret"); *see also Open Court*, Black 1891 (noting that "open court" may mean "a court which is freely open to the approach of all decent and orderly persons in the character of spectators"). The framers of Oregon's constitution, for example, apparently adopted this third meaning. *See* Or. Const. art. I, § 10 ("No court shall be secret . . . ."). Each of these interpretations amounts to "a procedural guarantee of judicial availability." *Lucas v. United States*, 757 S.W.2d 687, 715 (Tex. 1988) (Phillips, C.J., dissenting). None of the interpretations provides a substantive right that would prevent the Legislature from altering a common-law remedy.

Section 13's second clause is more complex: "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." "Injury" means "[a]ny wrong or damage done to another, either in his person, rights, reputation, or property." Black 1891. "Remedy" refers to "[t]he legal means to recover a right, or to obtain redress for a wrong," Webster 1886, or "the means by which the violation of a right is prevented, redressed, or compensated," Black 1891. Finally, the phrase "due course of law" is "synonymous with 'due process of law,' or 'the law of the land,' and the general definition thereof is 'law in its regular course of administration through courts of justice' . . . ." Black 1891; *see Middleton v. Tex. Power & Light Co.*, 185 S.W. 556, 559 (Tex. 1916) (equating "due process of the law" with "law in its regular course of administration through courts of justice"); *Dillingham v. Putnam*, 14 S.W. 303, 304 (Tex. 1890) ("'Due course of law,' in a cause tried in a district court, means a trial according to the settled rules of law in that court, and a further hearing in this court . . . .").

Read in isolation, "shall have remedy" could convey an absolute command that *every* injury *must* have a judicial remedy. But such a broad reading would sweep away all limitations on the right to recover, including statutes of repose, *but see Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 292 (Tex. 2010) (holding that a statute of repose did not violate Section 13), and sovereign immunity, *but see Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997) (rejecting the argument that applying sovereign immunity would violate Section 13). In addition, "by due course of law" modifies "shall have remedy." The primary guarantee of the second clause is thus not absolute entitlement to a remedy but rather the opportunity to pursue a remedy through the ordinary course of judicial proceedings.

Moreover, because Section 13's two clauses are parts of a single sentence, it is reasonable to read them together. *See Ex parte Shires*, 508 S.W.3d 856, 860 (Tex. App.—Fort Worth 2016, no pet.) (noting that constitutional text must be read in context). The second clause expands on the first clause's guarantee. That is, in addition to being open and accessible, courts must also provide justice according to the law of the land. The clause does not provide any guarantees about what the law of the land will be, only that courts must follow it.

Article I, section 13 should also be read together with Article I, section 19. Section 19 provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." It is possible to harmonize these two provisions (and avoid surplusage) by understanding Section 19 as a shield and Section 13 as a sword. That is, Section 19 protects Texans from unlawful and arbitrary government action. If the

State is to deprive someone of a protected right or interest, it must do so in accordance with the law. Section 13, on the other hand, guarantees a forum for civil plaintiffs to seek remedies for the harms done to them, including harms perpetrated by private citizens. And Section 13 requires courts to follow the law when adjudicating those disputes. *See* 1 George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 50 (1977); *see also* DeBoer, *supra*, at 185.

In sum, nothing in the text of Section 13 indicates that it provides substantive rights and precludes the Legislature from limiting or abrogating common-law causes of action or remedies. Therefore, a "process-based reading," *Crown Distrib.*, 647 S.W.3d at 665 (Young, J., concurring), is, at a minimum, entitled to serious consideration.

B. The history of Section 13 also suggests that it provides procedural, not substantive, protections.

"[T]he historical context in which it was written" can inform this Court's interpretation of Section 13. *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997). The language found in Section 13 has a long and distinguished history stretching back to medieval England. Commentators agree on the general contours of the concept's provenance: It appeared in Magna Carta, wound its way through Sir Edward Coke and Sir William Blackstone, was adopted into early American state constitutions, and was eventually accepted by the Texas Framers. *See* Phillips, *supra*, at 1319–25; *see also* McGinley, *supra*, at 1455–60; William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 349–68 (1997); Jonathan M.

Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1284–1311 (1995). But while commentators agree on that much, they have derived from that history widely divergent conclusions.

Given enough material, it is usually possible to pick and choose anecdotes to support almost any interpretation. Nevertheless, the history of Section 13 and of similar state constitutional provisions is consistent with the textual analysis offered above.

In the early thirteenth century, the barons were in rebellion against King John because of the king's "accumulation and abuse of royal power." Koch, *supra*, at 349. In exchange for their allegiance, the barons exacted of King John in 1215 an agreement now known as Magna Carta. *Id.* In part, Magna Carta "represent[s] efforts by the barons to restrain King John's abuse of the judicial machinery." *Id.* at 351. At the time, "[a]ccess to the royal courts was tightly controlled by a complicated system of writs," and "[p]ersons seeking to present a claim to the royal courts were required to purchase the appropriate writ." *Id.* at 352. King John "viewed royal writs as a source of revenue and frequently increased the price of the writ in proportion to the value of the claim or the wealth of the person seeking the writ." *Id.* at 353. Thus, "the royal courts, rather than dispensing justice, had become a means of profit for the king." DeBoer, *supra*, at 180. Chapter 29 of the final version of Magna Carta issued by King Henry III in 1225 addressed those abuses by providing:

> No freeman shall be taken or imprisoned or disseised of any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal

> judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.

Id. at 178–79.

That portion of Magna Carta received a gloss in the seventeenth century by Coke, "the unchallenged authority of his time on the laws of England." Koch, *supra*, at 357. Coke was chief justice of the Court of Common Pleas and later chief justice of the King's Bench. Hoffman 1995, *supra*, at 1291. During his "stormy" judicial tenures, there was "constant conflict between Coke and the King" regarding "whether common-law judges, holding office at royal pleasure, were independent or were servants of the Crown who could be influenced or removed at will." *Id.* At stake was the broader issue of whether the king was "the law speaking," *id.*, or was himself subject to the common law, *id.* at 1292. In addition, "[j]udgeships had to be purchased," and "[j]udges had a vested interest in prolonging and multiplying court proceedings because most of their income derived from fees paid by litigants." *Id.* at 1294. Because of his insistence on an independent judiciary, Coke was eventually dismissed from the bench. *Id.* at 1293. Coke's commentaries on Magna Carta were seized by the Crown and published only after his death. *Id.* at 1294.

Commenting on Magna Carta's guarantee that "(t)o no one will we sell, to no one will we deny, or delay right or justice," Coke wrote in his *Second Institute*:

> This is spoken in the person of the king, who in judgement of law, in all his courts of justice is present . . . .
>
> And therefore, every subject of this realme, for injury done to him in bonis, terris, vel persona [goods, lands, or person], by any other subject, be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may

> take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

Koch, *supra*, at 359–60.

When analyzing Coke's comment, "[t]he modifiers are important." Hoffman 1995, *supra*, at 1314. "Coke did not say simply that every subject shall have a remedy for every injury. Rather, he wrote that every subject of the realm, for injury done 'by any other Subject,' regardless of the status of the tortfeasor, may take 'his remedy by the course of the Law.'" *Id.* Thus, Coke "was not concerned merely with guaranteeing a remedy for every injury; rather, he wanted to assure that the remedies legally available were not to be denied because of the status of the parties." *Id.* Like chapter 29 of Magna Carta, Coke envisioned the courts being open to all and dispensing even-handed justice. And his view of Magna Carta is particularly relevant to early American constitutional law because, "[i]n the eighteenth century, Magna Carta was known almost entirely through Lord Coke's interpretations." Koch, *supra*, 361.

"Second only to Lord Coke's Second Institute in its impact on the understanding and significance of Magna Carta are Sir William Blackstone's Commentaries on the Laws of England," first published between 1765 and 1769. *Id.* at 362. Blackstone asserted that the rights of Englishmen "would have little value were it not for Magna Carta's guarantee of the right of access to the courts." *Id.* He quoted Coke and argued that, "[s]ince the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." *Id.* at 362–63. Although Blackstone's

influence on the American colonists was less than Coke's, he was still widely read. *Id.* at 363.

These ideas concerning an independent and fair judiciary resonated with the colonists. William Penn, for example, "believed that English courts dispensed a different brand of justice for dissenters than for Anglicans." Hoffman 1995, *supra*, at 1297. And, "[l]ike Coke, leading colonial lawyers felt that the integrity of their courts was threatened by improper political pressure." *Id.* at 1296–97. Although "[t]he English judiciary's independence was finally recognized by the Act of Settlement in 1701," that act "did not extend to the American colonies, where judges continued to serve at the pleasure of the King or his appointed governors." *Id.* at 1300. "[T]he fear that the Crown threatened to undermine the administration of justice by interfering with the colonial common-law courts persisted from 1760 until the Revolution." *Id.* at 1307.

Thomas McKean was a judge in Delaware "at the time American courts were closed to civil litigation because of the Stamp Act." *Id.* at 1298. McKean "most likely was responsible for inserting the open courts clause into the first bill of rights of any state when he drafted the Delaware Declaration of Rights in 1776." *Id.* McKean's objective "was not to limit the power of the legislature in prescribing remedies," because another provision in Delaware's 1776 Constitution recognized the legislature's ability to alter the common law. *Id.* at 1308. Rather, he was defending an independent judiciary. *See id.* at 1308–11. Indeed, "[a]s of 1776, when the open courts clause first appeared in the Delaware Declaration of Rights, the sole constitutional

basis for an independent judiciary was . . . Magna Carta, as interpreted by Sir Edward Coke's Second Institute." *Id.* at 1311. In sum,

> [t]he historical setting in which Coke added his gloss to Magna Carta, as well as the circumstances under which the colonists revived his teachings, strongly suggest that the language of the open courts clause was intended to promote and protect an independent judiciary, not to guarantee a remedy for every right.

Id.

Unfortunately, the historical record for Texas's adoption of Section 13 is less robust. We do know that Section 13 "has appeared unchanged in every Texas Constitution." *Trinity River Auth. v. URS Consultants, Inc.—Tex.*, 889 S.W.2d 259, 261 (Tex. 1994). But the records of the Texas constitutional conventions are not very illuminating when it comes to Section 13, perhaps because the provision's inclusion did not occasion much debate. *See Hanlon*, 713 S.W.2d at 339–40 (discussing the 1875 Constitutional Convention and concluding that "[a]pparently, the open courts provision was uncontroversial").

At the convention of 1875, which led to the adoption of the State's current constitution, one Mr. Reynolds offered the following resolution: "That the courts of justice shall be open to every person, and a certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." *Journal of the Constitutional Convention of the State of Texas: Begun and Held at the City of Austin Texas* 120 (1875) (available at https://tinyurl.com/convention9-15-1875). The resolution was referred to the Committee on Bill of Rights. *Id.* The proposed language harkens back to Coke and Blackstone.

Although it differed from the language eventually adopted, it may be that the Framers settled on different language not so much because they rejected Mr. Reynolds's resolution as because they were borrowing from earlier Texas constitutions.

Further research may uncover direct evidence of why the Framers included Section 13 in the 1876 Constitution. But in any event, indirect evidence suggests that Section 13 was intended to promote an independent judiciary, not provide a substantive check on the Legislature. The historical circumstances surrounding the 1875 convention, like those surrounding the issuance of Magna Carta and the writing of Coke's commentaries, were marked by concerns about executive control of the courts. In Texas's case, that control was exercised by the Reconstruction military governor.

During Congressional Reconstruction, Texas and Louisiana were placed into a military district under the command of Major General Philip Sheridan. James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986* 79 (2013). Sheridan was "determined to brook no more 'pride in the rebellion' among state officials." *Id.* at 80. In addition to removing Texas's elected governor from office, Sheridan also removed the entire Texas Supreme Court. *Id.* This led to the formation of what became known as the "Military Court." *Id.* The decisions of that court are generally accorded no precedential value because the court operated outside of the Texas Constitution. *Id.* at 81; *Taylor v. Murphy*, 50 Tex. 291, 295 (1878). Reacting against this control of the courts and other offices by gubernatorial fiat, the 1875 convention strove "to prepare a state charter that would not bear the taint of occupation." Haley, *supra*, at 91–92. Accordingly, the new Constitution "placed[d] the judiciary back

in harness to the popular will" by providing that "judges were thenceforward to be elected by the people." *Id.* at 92.

The thirteenth-century barons had confronted courts controlled by a powerful monarch. Lord Coke confronted the same problem and was dismissed from the bench for opposing the Crown. And Texans under Reconstruction similarly faced a military governor who could restructure courts at his pleasure. Having recently witnessed the ousting of this entire Court, the Framers of the 1876 Constitution sought to ensure that such abuses of executive power would never happen again.

Texas's history and the history of the language incorporated into Section 13 suggest that Section 13's purpose is to guarantee accessible courts that will follow the law. That is a critical right, as history has shown time and again. But this history does not suggest that Section 13 was intended as a substantive check on the Legislature's power to alter the common law.

* * *

The text and history of Section 13 point in the same direction: The provision guarantees the critical procedural right to access a court that will follow the law. But it does not provide substantive protection that limits the Legislature's ability to modify particular causes of action and remedies.

Indeed, it would be questionable, based on both constitutional text and precedent, for the Court to conclude that Section 13 locked the common law in place for all time, for three reasons. *First*, the Constitution vests in the Legislature "[t]he Legislative power of this State." Tex. Const. art. III, § 1. And that power includes the ability "to make rules and determine public policy," "to promulgate rules and

regulations to apply the law," and "to ascertain conditions upon which existing laws may operate." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). In other words, whatever the law has been, it is the Legislature's function to "declar[e] what the law shall be." *Middleton*, 185 S.W. at 561. *Second*, and in the same vein, this Court has recognized in other contexts that the Legislature may change the common law. *E.g.*, *Exxon Corp. v. Emerald Oil & Gas Co.*, 331 S.W.3d 419, 425 (Tex. 2010) ("If the Legislature intended to change this common law principle, it could have done so in the statute."); *Middleton*, 185 S.W. at 559 ("[N]o one has a vested interest in the rules, themselves, of the common law; and it is within the power of the Legislature to change them or entirely repeal them."). *Third*, the common law "is not frozen or stagnant, but evolving." *Reagan v. Vaughn*, 804 S.W.2d 463, 465 (Tex. 1990). There is no reason that causes of action and remedies should not evolve too, whether through judicial decisions or legislation.

Or "perhaps all of that is wrong." *Crown Distrib.*, 647 S.W.3d at 678 (Young, J., concurring). Perhaps the Framers did intend Section 13 to curb the Legislature's ability to modify common-law causes of action and remedies. But unless the Court is fully persuaded of that interpretation, it should hesitate to further expand its substantive-open-courts doctrine.

II. The Challenged Provisions of the Civil Practice and Remedies Code, as Applied to the Facts of This Case, Do Not Violate Section 13.

Texas Civil Practice and Remedies Code section 33.012(c) provides that, "if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons," the court shall reduce the amount of damages by "the sum of the

dollar amounts of all settlements" or "a percentage equal to each settling person's percentage of responsibility as found by the trier of fact," as elected by the defendant. And section 33.011(1) provides that the term "[c]laimant" includes "the person who was injured, was harmed, or died or whose property was damaged" and "any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person."

Here, respondent allegedly suffered permanent brain damage caused by thiamine deficiency she experienced while being treated for complications arising from gastric bypass surgery. *Virlar v. Puente*, 613 S.W.3d 652, 663–66 (Tex. App.—San Antonio 2020, pet. granted). As part of the resulting litigation, respondent's daughter sought damages for, among other things, loss of parental consortium. *Id.* at 666. Respondent's daughter received money from the hospital in a confidential settlement before trial. *Id.* at 666, 685. At trial, the jury found that petitioner Dr. Jesus Virlar was 60% responsible for respondent's injuries and awarded respondent more than $13 million. *Id.* at 667.

Dr. Virlar filed a motion asking the trial court to apply the settlement paid to respondent's daughter as a credit against the judgment. *Id.* The trial court denied the motion. *Id.* The court of appeals affirmed, holding that, "as applied to the facts raised in this appeal, application of section 33.012(c) violates the open courts provision of the Texas Constitution." *Id.* at 688.

Although this Court has sometimes embraced an expansive reading of Section 13, *e.g.*, *Lucas*, 757 S.W.2d at 690, its precedents do not require holding the challenged provisions of chapter 33 unconstitutional. The Court has gradually broadened

its understanding of Section 13's substantive component. The text and history of Section 13 counsel against expanding Section 13's reach even further. So does this Court's presumption that statutes are constitutional. *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 754 (Tex. 2020). Accordingly, the Court should uphold the challenged provisions.

A. Holding the challenged provisions unconstitutional would require extending this Court's interpretation of Section 13's substantive protections.

This Court has never addressed the constitutionality of chapter 33's settlement-credit provision and definition of "claimant." *See* Tex. Civ. Prac. & Rem. Code §§ 33.011(1), 33.012(c). In holding the challenged provisions unconstitutional, the court of appeals below relied heavily on *Lucas*, in which this Court held that a cap on medical-malpractice damages violated Section 13. 757 S.W.2d at 692; *see Virlar*, 613 S.W.3d at 692. Unlike the damages cap in *Lucas*, however, the provisions challenged here do not prevent the full recovery of economic damages. Instead, the question is how the money recovered from the defendant will be apportioned among those classified as one "claimant" under section 33.011(1). *See* Pet. Br. xvii, 7–8; Resp. Br. xii, 8–9.

True, this Court has held that a claim for loss of consortium (like that brought by the minor daughter here) "is predicated on separate and equally distinct damages to the emotional interests involved." *Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978); *accord In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009) (orig. proceeding). But the Court has not held that plaintiffs have a well-established

common-law right not to be classified together as a single claimant when a single act of negligence gave rise to the harms to both plaintiffs. *See* Pet. Br. 11–18. And although applying the settlement credit would reduce respondent's recovery, it would not eliminate it. *Cf. Lebohm v. City of Galveston*, 275 S.W.2d 951, 954 (Tex. 1955) (stating that the Legislature may not arbitrarily withdraw "*all* legal remedies from one having a cause of action well established and well defined in the common law" (emphasis added)). Thus, holding the challenged provisions unconstitutional would be an extension of this Court's substantive-open-courts precedent.[2]

B. The Court has already significantly expanded its interpretation of Section 13's substantive protections.

In the past century, this Court has gradually widened Section 13's application. The Court's 1916 decision in *Middleton* reflects a broad view of the Legislature's ability to alter the common law and a narrow view of the substantive rights provided by Section 13. There, the Court considered the constitutionality of a statute "relating to the liability of employers and compensation of workmen for personal injuries." 185 S.W. at 557. Under that law, an employer who subscribed was exempt from most common-law and statutory liability for personal injury to a worker. *Id.* at 558–59. An employer who did not subscribe remained amenable to suit and was "denied the right of making what constitute the common law defenses thereto." *Id.* at 559. And

[2] If the Court disagrees and concludes that *Lucas* requires holding the challenged provisions unconstitutional, it should consider asking the parties to submit supplemental briefs addressing whether *Lucas* should be overruled.

employees of a subscribing employer would receive certain compensation if injured but were "denied all right of action therefor against such employers." *Id.*

The Court noted that an employer who declined to subscribe would face "the denial of the right, existing in common law actions, to interpose the common law defenses of fellow servant, assumed risk, and contributory negligence in suits for the recovery of damages for personal injuries suffered by their employees." *Id.* But the Court concluded that "[t]hose defenses are but doctrines or rules of the common law." *Id.* They were not vested property rights entitled to constitutional protection, because "no one has a vested interest in the rules, themselves, of the common law; and it is within the power of the Legislature to change them or entirely repeal them." *Id.* Similarly, the statute did not deprive employees of vested rights, because the statute did not "profess to deal with rights of action accruing before its passage." *Id.* at 560. Rather, the statute was "nothing more or less than a denial to [an employee] by the Legislature [of] certain rules of the common law for the future determination of the employer's liability." *Id.* The Court noted that the Legislature had substituted one remedy for another. *Id.* But that substitution was not the focus of the Court's analysis. Nor did the Court consider "the wisdom of the change." *Id.*

The Court instead explained that Section 13 does not protect every common-law cause of action. Interpreting Section 13 to provide "the right of redress in the courts of the land in accordance with the law's administration," the Court narrowly construed its substantive protections: "the Legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another." *Id.* For reasons that are not fully articulated, the Court

appears to have considered the right to redress for intentional injury to have some special constitutional status. In contrast, a right to redress for accidental or negligent harm (like that alleged in this case) was "purely the creation of the common law." *Id.* And because those rights to redress were merely a matter of the common law, they could be altered by the Legislature:

> If the Legislature in the performance of its function of declaring what the law shall be, is authorized to change and repeal the rules of the common law upon other subjects, as is undoubted and has been done in numerous and notable instances, wherein is its power to change this common law rule to be denied? . . . If, in a word, it may declare that contributory negligence shall no longer be a defense, may it not also declare, as to purely accidental injuries, that negligence shall no longer be actionable? If it may change defensive common law rules, may it not also change a common law rule of liability? The power of the Legislature cannot exist in the one instance and not in the other. In virtue of its authority to enact laws, and, in doing so, to supersede common law rules where it deems such action wise, it exists in both . . . . We rest the decision of this question upon what seems to us is the evident proposition that no one has any vested or property interest in the rules of the common law, and therefore no one is deprived of a constitutional right by their change through legislative enactment.

Id. at 561; *see Lucas*, 757 S.W.2d at 697 (Gonzalez, J., dissenting) ("[T]he court in *Middleton* viewed the open courts provision as merely proscribing legislative abolition of intentional wrongs. Not only could the legislature modify or abolish the common law rule of contributory negligence, it could entirely abolish negligence altogether . . . ." (citation omitted)). In sum, the Texas Constitution "has not undertaken to preserve inviolate the rules of the common law. That system of rules to the extent that we are governed by it was adopted by the Legislature, and the same authority may alter it." *Middleton*, 185 S.W. at 561.

The Court has gradually expanded its substantive-open-courts jurisprudence since *Middleton*. For example, the Court held unconstitutional a municipal charter abolishing the city's negligence liability in *Lebohm v. City of Galveston*. 275 S.W.2d at 955. There, the Court distinguished *Middleton* by focusing on what the *Middleton* Court mentioned only in passing: the workers' compensation law substituted one remedy for another. *Id.* at 954.

It may be that the emphasis on a substitute remedy originated in federal jurisprudence rather than the text of Section 13. A few years after this Court decided *Middleton*, the U.S. Supreme Court held that Texas's workers' compensation law did not violate the Fourteenth Amendment's guarantee of due process. *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 162–63 (1919). In doing so, the Supreme Court noted that Texas's compensation scheme was "established as a reasonable substitute for the legal measure of duty and responsibility previously existing." *Id.* at 163. And the Court cited *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). *Id.* In *White*, the Supreme Court held that New York's workers' compensation law did not violate the Fourteenth Amendment. 243 U.S. at 209. But the Court expressed doubt about whether a State could abolish a common-law right of action or defense without providing "a reasonably just substitute." *Id.* at 201.

When this Court distinguished its *Middleton* decision in *Lebohm*, it discussed the U.S. Supreme Court's *Middleton* opinion, and it specifically referred to the doubt about a lack of a substitute expressed by the Supreme Court in *White*. *Lebohm*, 275 S.W.2d at 954. Thus, the U.S. Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause may have influenced this Court's interpretation

of Section 13. If it did, disentangling Section 13 from federal precedent would present an opportunity to reevaluate the meaning of Texas's Constitution. *See* DeBoer, *supra*, at 196 (encouraging state supreme courts "to ensure that they are correctly interpreting their constitutional texts and not importing doctrines and principles from federal due-process jurisprudence"). After all, there is no reason for Section 13 to be merely "the junior twin" of the Fourteenth Amendment. *Crown Distrib.*, 647 S.W.3d at 665 (Young, J., concurring).

Whatever the reason for this Court's expansion of Section 13's reach, the trend continued. Perhaps the high-water mark was *Lucas*, where the Court struck down a medical-malpractice damages cap. 757 S.W.2d at 687. In *Lucas*, the Court expressed none of the deference to the Legislature's ability to modify the common law espoused in *Middleton*. The availability of an "adequate substitute," which had played a small role in *Middleton*, had become the Court's "first concern." *Id.* at 690. And even though the damages cap did not completely abrogate a common-law cause of action, the Court characterized it as "unreasonable *and* arbitrary." *Id.*

C. The Court should not further extend its interpretation of Section 13's substantive protections.

Although no party in this appeal has asked the Court to overrule its precedent, and the Court exercises caution before doing so, *see Mitschke v. Borromeo*, 645 S.W.3d 251, 263–66 (Tex. 2022), the Court should avoid further expansion of Section 13. *Cf. Crown Distrib.*, 647 S.W.3d at 666 (Young, J., concurring) ("We cannot keep building—at least, not safely—without checking those foundations."). The risk of adopting too broad an interpretation of Section 13's substantive guarantees is erroneously

shifting "the final say on economic policy decisions" from the Legislature to the judiciary. McGinley, *supra*, at 1493.

As discussed above in Part I, neither the text nor the history of Section 13 justifies further expanding the provision's reach. And without that expansion, the challenged statutory provisions are constitutional. Accordingly, the Court should decline respondent's invitation to undo the Legislature's policy determinations concerning the apportionment of damages recovered for medical negligence.

Prayer

The Court should reverse the court of appeals' judgement to the extent it held that Texas Civil Practice and Remedies Code sections 33.011(1) and 33.012(c), as applied to the facts of this case, violate Article I, section 13 of the Texas Constitution.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Judd E. Stone II
Solicitor General

Lanora C. Pettit
Principal Deputy Solicitor General

Bill Davis
Deputy Solicitor General

/s/ Kyle D. Highful
Kyle D. Highful
Assistant Solicitor General
State Bar No. 24083175
Kyle.Highful@oag.texas.gov

Counsel for the State of Texas

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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Delonda Dean		ddean@yettercoleman.com	9/26/2022 3:22:03 PM	SENT
Yetter Coleman		efile@yettercoleman.com	9/26/2022 3:22:03 PM	SENT
William Chriss	4222100	wjchrisspc@gmail.com	9/26/2022 3:22:03 PM	SENT
Brendan K. McBride	24008900	brendan.mcbride@att.net	9/26/2022 3:22:03 PM	SENT
Elizabeth Brabb		ebrabb@thompsoncoe.com	9/26/2022 3:22:03 PM	SENT
Linda M.Wariner		linda.wariner@cooperscully.com	9/26/2022 3:22:03 PM	SENT
Terry Thomas		tthomas@snapkalaw.com	9/26/2022 3:22:03 PM	SENT
Valeria Alcocer		valeria.alcocer@oag.texas.gov	9/26/2022 3:22:03 PM	SENT
Kyle Highful	24083175	kyle.highful@oag.texas.gov	9/26/2022 3:22:03 PM	SENT

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Associated Case Party: GMG Health Systems Associates, P.A., a/k/a and d/b/a Gonzaba Medical Group

Name	BarNumber	Email	TimestampSubmitted	Status
Reagan Simpson	18404700	rsimpson@yettercoleman.com	9/26/2022 3:22:03 PM	SENT
Thomas R. Phillips	22	tom.phillips@bakerbotts.com	9/26/2022 3:22:03 PM	SENT
R. Brent Cooper	4783250	brent.cooper@cooperscully.com	9/26/2022 3:22:03 PM	SENT
Diana L.Faust		diana.faust@cooperscully.com	9/26/2022 3:22:03 PM	SENT

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Associated Case Party: Jesus Virlar

Name	BarNumber	Email	TimestampSubmitted	Status
R. Brent Cooper	4783250	brent.cooper@cooperscully.com	9/26/2022 3:22:03 PM	SENT