No. S25G0132

In the Supreme Court of Georgia

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

Appellants,

vs.

Norkesia Turner, et al.,

Appellees.

On Writ of Certiorari from the
Court of Appeals of Georgia
(No. A24A0378)

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

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IDENTITY AND INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("U.S. 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 U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the federal and state courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

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

The Chambers represent businesses, large and small, with an interest in the fairness and predictability of the civil-justice system in general and damages awards in tort cases in particular. The Chambers take no position on the merits of Appellees' claims. But the Chambers and their members have a substantial interest in the constitutionality and proper judicial interpretation of O.C.G.A. § 51-13-1, which advances fairness and predictability by providing a reasonable limit on noneconomic damages in wrongful-death cases.

Promoting those values is especially important because Georgia's tort costs as a percentage of state GDP and tort costs per household are among the highest in America. *See* U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 20-21 (Nov. 2024), https://tinyurl.com/yarkp78f. In addition, according to a recent survey, Georgia's litigation climate ranks 41st overall—and 44th for damages—in terms of fairness and reasonableness, as perceived by American businesses. *See* 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), https://tinyurl.com/2vnyka57. Nearly 90% of surveyed companies reported that a state's litigation climate influences their business decisions. *Id.* at 3.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1798, there was no cause of action for wrongful death in Georgia. Nor could a survivor recover damages for a loved one's wrongful death. In 1850, the General Assembly enacted Georgia's first wrongful-death statute, which created a cause of action and established liability for wrongful death where none existed before. And only in 1878 did the legislature establish the measure of damages that is used today for wrongful-death claims. In 2005, concerned that increasingly large and unpredictable verdicts were affecting the availability of health care services in Georgia, the General Assembly passed a statute capping wrongful-death damages in the medical-malpractice context. *See* O.C.G.A. § 51-13-1.

In that same statute, the General Assembly also sought to impose caps on *other types of damages* available in *other types of medical-malpractice actions*—including noneconomic damages to compensate injured plaintiffs for things like pain and suffering in common-law medical-negligence cases. In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010), this Court invalidated the $350,000 damages cap in O.C.G.A. § 51-13-1(b) as applied to noneconomic compensatory damages in common-law medical-malpractice actions. *See* 286 Ga. at 733-35. After conducting a historical analysis of those specific claims and damages, the Court concluded that juries in and before 1798 awarded those kinds of damages for those kinds

of claims and, therefore, the attempt to cap those damages by statute violated the Georgia Constitution's guarantee of the right to trial by jury. *Id.* at 732-38.

But that was as far as *Nestlehutt* went. *Nestlehutt* did not hold that statutory caps on *all* types of damages in *all* types of medical-malpractice actions are unconstitutional. In particular, and in keeping with principles of restraint in judicial review, *Nestlehutt* did not analyze or offer any ruling about wrongful-death claims or wrongful-death damages—because neither was at issue in the *Nestlehutt* case.

This case therefore presents a question of first impression for Georgia's appellate courts: whether O.C.G.A. § 51-13-1(b)'s cap on wrongful-death damages violates the constitutional right to a jury trial. The Court of Appeals should have recognized that *Nestlehutt* rendered no holding on that question. Indeed, if *Nestlehutt*'s claim- and damages-specific historical test is applied to that question, it takes little effort to determine that wrongful-death claims and damages did not exist at common-law or otherwise in Georgia in 1798, and therefore that statutory caps on wrongful-death damages do not offend the Georgia Constitution.

But the Court of Appeals erroneously believed that *Nestlehutt*—a case in which nobody died—had somehow already invalidated O.C.G.A. § 51-13-1's cap on wrongful-death damages. The Court of Appeals made several fundamental errors in its reading of *Nestlehutt*. First, the court erred by overreading some broad statements in *Nestlehutt*, disregarding the axiomatic rule that a case's holding is limited

to its factual context and the issues that context necessarily raises. Second, the court misunderstood *Nestlehutt*'s *two*-step historical test. Third, the court erred by concluding that *Nestlehutt* invalidated the statutory damages caps in O.C.G.A. § 51-13-1 *in every possible application*—implying that this Court either conducted an unexpressed and shoddy facial invalidation analysis, or struck down the entire statute without providing a reasoned decision on severability. Finally, the Court of Appeals suggested that *Nestlehutt* rendered an improper advisory opinion on wrongful-death claims and damages.

The General Assembly capped wrongful-death damages in the medical-malpractice context in order to curb enormous verdicts that threaten Georgians' access to health care. This Court must safeguard against legislative encroachments on constitutional rights. But where the Constitution poses no barrier, the legislature has authority to modify claims and remedies as it sees fit. Wrongful-death claims and wrongful-death damages were not part of the ancient common law; they exist in Georgia law only by legislative dispensation. The People's elected representatives, balancing the interests of survivors against the "crisis affecting the provision and quality of health care services in this state," Ga. Laws 2005, Act 1, § 1, decided on the appropriate ceilings for wrongful-death damages in the medical-malpractice context. The Court of Appeals badly misunderstood *Nestlehutt* and, in doing so, failed

to respect that valid legislative decision. This Court should reverse the decision below.

ARGUMENT

I. *Nestlehutt* held only that O.C.G.A. § 51-13-1(b), as applied to noneconomic compensatory damages in a common-law medical-malpractice action, violates the right to a jury trial—while holding nothing about wrongful-death damages in a wrongful-death action.

Nestlehutt was a common-law medical-negligence case, and its jury-trial holding was limited to that context. The case did not involve or decide anything about wrongful-death claims or damages. How do we know that?

Start with *Nestlehutt*'s facts. Mrs. and Mr. Nestlehutt sued a plastic surgeon for medical malpractice after Mrs. Nestlehutt was disfigured by surgery. 286 Ga. at 731. At trial, the jury awarded medical expenses plus $900,000 for her pain and suffering and $250,000 for Mr. Nestlehutt's loss of consortium, for total noneconomic damages of $1,150,000—which O.C.G.A. § 51-13-1(b)'s statutory cap would have reduced to $350,000. *Id.* No one had died, so there was no wrongful-death claim, and the jury awarded no wrongful-death damages.

Next consider the arguments in *Nestlehutt*. The plaintiffs contended that O.C.G.A. § 51-13-1(b) violated the Georgia Constitution's right to jury trial because "[m]edical malpractice is a traditional common law claim" and "Georgia has always measured noneconomic damages like pain and suffering exclusively by the enlightened conscience of impartial jurors." Appellees' Br. in *Nestlehutt*, 2009 WL

2954779, at *4-*5 (cleaned up). They cited examples from early Georgia cases of juries awarding pain and suffering damages in common-law medical-malpractice cases. *Id.* In short, the Nestlehutts were focused on the unconstitutionality of O.C.G.A. § 51-13-1 as applied to pain and suffering damages in common-law medical-negligence cases—the kind of damages in the kind of case they had litigated. They said nary a word about a jury-trial right regarding wrongful-death claims or damages, because those matters were not involved in their case.

Now consider the Court's reasoning in *Nestlehutt*. The Court applied a historical test, explaining that Article I, Section I, Paragraph XI(a) of the 1983 Georgia Constitution "'guarantees the right to a jury trial only with respect to cases as to which there existed a right to jury trial at common law or by statute at the time of the adoption of the Georgia Constitution in 1798.'" 286 Ga. at 733 (quoting *Benton v. Georgia Marble Co*., 258 Ga. 58, 66 (1988)). *Benton* had explained that there is "no state constitutional right to a jury trial with respect to proceedings of statutory origin unknown at the time the Georgia Constitution was adopted." 258 Ga. at 66.

Applying that historical principle, the *Nestlehutt* Court first examined whether medical-negligence claims of the sort the Nestlehutts brought existed and were decided by juries as of 1798, and, citing scholarly sources and cases, concluded that they were. 286 Ga. at 733-34. The Court then examined whether, as of 1798, juries

also determined the amount of noneconomic damages to award for such claims, and—again citing scholarly sources and cases on that question—concluded that juries did make that decision. *Id.* at 734-35. With both those elements of its historical test met,[1] the Court held that O.C.G.A. § 51-13-1(b) infringed on the plaintiffs' jury-trial right by requiring the trial court to reduce the noneconomic damages the jury had awarded them to $350,000. *Id.* at 735. The Court did not discuss or announce a holding about wrongful-death claims or damages, because those matters were not involved in the case.

While some statements in the *Nestlehutt* opinion were worded broadly (something not uncommon in judicial opinions, as discussed further below), the fact that the Court's holding was limited to the type of claim and damages presented was clear. Indeed, the three Justices who specially concurred stated squarely that the Court's unanimous holding in Division 2 regarding the jury-trial issue pertained to "noneconomic compensatory damages, as found by juries *in common-law medical malpractice cases*." *Id.* at 740 (Nahmias, J., concurring specially, joined by Carley,

[1] In *Taylor v. Devereux Foundation, Inc.*, 316 Ga. 44 (2023), this Court confirmed that a plaintiff must satisfy both parts of this historical test to establish a violation of the jury-trial right—that is, both the cause of action and the kind of damages at issue must have existed and been decided by juries before 1798. *Id.* at 60, 71 (holding that the plaintiff's jury-trial right was not violated where, although her premises-liability claim existed and was decided by juries at common law before 1798, the kind of damages she sought—punitive damages based on "entire want of care"—did not exist at that time).

P.J., and Hines, J.) (emphasis added).[2] No Justice expressed disagreement with this understanding of the Court's jury-trial holding.

Final confirmation of the scope of the Court's holding in *Nestlehutt* comes from the fact that, had the Court considered wrongful-death claims or damages, it quite obviously would have distinguished them from the common-law medical-malpractice claim and associated damages the Court actually addressed. Looking first to the provenance of wrongful-death *claims*, this Court has repeatedly recognized that the "right to file a claim for wrongful death did not exist at common law; it is entirely a legislative creation." *Carringer v. Rodgers*, 276 Ga. 359, 362 (2003). The General Assembly enacted Georgia's first wrongful-death statute a half-century after 1798, in 1850—four years after the British Parliament established by statute a wrongful-death cause of action because the common law did not provide one. *See Bibbs v. Toyota Motor Corp*., 304 Ga. 68, 70 (2018); *see also Tolbert v. Maner*, 271 Ga. 207, 208 (1999) (explaining that "wrongful death claims are only permitted under the auspices of the Wrongful Death Act" and are "in derogation of common law"). Georgia's 1850 statute and ones that followed created "a new cause of action" and established "liability for wrongful death where none existed before."

[2] The specially concurring Justices did not join Division 3 of Chief Justice Hunstein's opinion, which addressed the retroactive application of the Court's unanimous jury-trial-right holding. Justice Melton also declined to join Division 3, *see* 286 Ga. at 740, so that division was not precedential.

W. & Atl. R. Co. v. Michael, 175 Ga. 1, 13 (1932); *see also Bibb*, 304 Ga. at 72 n.6 ("'[A] survivor's statutory claim for a decedent's wrongful death and an estate's common-law claim for the same decedent's pain and suffering are distinct causes of action.'" (citation omitted)). Juries did not decide wrongful-death claims before 1798, because no such claims existed at that time.

And wrongful-death *damages* of the sort the plaintiffs in this case recovered developed even later. While the 1850 statute authorized survivors to seek damages in an action for wrongful death, damages for "the full value of the life of the deceased" were first authorized by statute in 1878. *Bibbs*, 304 Ga. at 72. Juries before 1798 could not and did not determine or award that type of damages—or any damages for wrongful death.

The *Nestlehutt* Court did not address any of that history, because it did not offer any holding about wrongful-death claims or damages. Had it done so, the holding would have been the *opposite* of the holding it issued as to the common-law medical-malpractice claim and associated compensatory damages with which the Court was presented. The Court would have held—as the Court can and should hold in this case, now that the issue is presented—that the Georgia Constitution's right to jury trial does not attach to wrongful-death claims and damages, neither of which existed before 1798.

II. The Court of Appeals misunderstood *Nestlehutt*'s holding, in part because the court assumed that this Court had disregarded several basic principles of judicial review.

The Court of Appeals misread *Nestlehutt*'s holding as applying to wrongful-death claims and damages, reflecting both a misunderstanding of language in *Nestlehutt* and misplaced assumptions that this Court had disregarded several fundamental principles of restraint in judicial review. *See Med. Ctr. of Cent. Georgia, Inc. v. Turner*, 372 Ga. App. 644, 654 (2024).

1. Most fundamentally, the Court of Appeals disregarded a point this Court has repeatedly explained is "axiomatic" to understanding the import of precedent: "a decision's holding is limited to the factual context of the case being decided and the issues that context necessarily raises," so "[l]anguage that sounds like a holding—but actually exceeds the scope of the case's factual context—is not a holding no matter how much it sounds like one." *Schoicket v. State*, 312 Ga. 825, 832 (2021) (quoting *Ga. Interlocal Risk Mgmt. Agency v. City of Sandy Springs*, 337 Ga. App. 340, 340 n.1 (2016)); *accord*, *e.g.*, *Gonzalez v. State*, 315 Ga. 661, 665 (2023); *Bibb*, 304 Ga. at 78 ("Like any precedential decision, *Spradlin* must be read in light of the facts presented in that case."). Legal scholars have long observed that "'judges, however cautious they may be by training and disposition, sometimes state rules in terms wider than needed for the disposal of the matter at hand.'" Bryan A. Garner, et al., The Law of Judicial Precedent 58 n.70 (2016) (quoting Dennis Lloyd, *Introduction*

to Jurisprudence 374 (rev. ed. 1965)). "No judge can write opinions with mathematical precision," so a court's generalized statements "must be read in context, with due regard for the difficulty—the impossibility, really—of the court's anticipating every circumstance in which the language could be applied." *Id.* Or in the words of Chief Justice Marshall, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). "If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Id.*

As courts do, particularly courts as busy as this one, the Court in *Nestlehutt* included a number of broadly worded statements that can be overread if the directive of cases like *Schoicket* is not understood and applied. For example, *Nestlehutt* said that, "[a]s with all torts, the determination of damages rests peculiarly within the province of the jury." 286 Ga. at 734 (citation and quotation marks omitted). Taken at face value—divorced from the factual context of the *Nestlehutt* case—that statement would make unnecessary the detailed analysis the Court engaged in regarding the history of the *specific* tort claim and *specific* damages at issue (common-law medical-malpractice cases and pain and suffering damages). This Court has already recognized that *Nestlehutt*'s holding did not reach so broadly; if it did, the Court's detailed analysis of the specific tort claim and type of punitive damages in *Taylor*

would have been unnecessary, and indeed the result of that case would have been different.

The Court of Appeals misrelied on similarly broad statements in *Nestlehutt* about the "common law right to a jury trial [applying to] claims *involving the negligence of a health care provider.*" 372 Ga. App. at 654 n.43 (quoting 286 Ga. at 735). After all, the Court of Appeals said, "the wrongful death claim in *this* case *involves* the negligence of a health care provider." *Id.* But that statement in *Nestlehutt* was not made in the factual context of a wrongful-death claim, nor was any such claim argued to or analyzed by the Court—and if the Court had examined such a claim using its historical test, the result would have been the opposite of the result reached in its examination of the common-law medical-negligence claim that was presented.

2. The Court of Appeals also misunderstood how *Nestlehutt* applied both steps of its historical test. With respect to the *claim* analysis, the Court of Appeals seemed to believe that there can be only one type of claim arising from medical malpractice, which is incorrect. And the only claim *Nestlehutt* analyzed was an action for common-law medical malpractice. *Cf. Clark v. Singer*, 250 Ga. 470, 472 (1983) (holding a statute of limitation unconstitutional as applied to a "medical malpractice wrongful death action").

On top of that error, the Court of Appeals simply ignored the second half of the *Nestlehutt* test. As *Nestlehutt* indicates and *Taylor* emphasizes, in evaluating

whether a statutory cap on *damages* violates the right to a jury trial, it is not enough to show that the type of *claim* at issue was decided by juries before 1798; the plaintiff must also show that juries determined the type of *damages* at issue before 1798. *Nestlehutt*, 286 Ga. at 735; *Taylor*, 316 Ga. at 64. *Nestlehutt* made no mention of wrongful-death damages, because wrongful-death damages were not at issue in *Nestlehutt* and indeed did not exist at common law or by statute until 1878. *Bibbs*, 304 Ga. at 72. And the Court of Appeals just blew by this issue.

3. The Court of Appeals also read *Nestlehutt* as holding that "*all* of the caps on damages in O.C.G.A. § 51-13-1 are unconstitutional," pointing to *Nestlehutt*'s "unqualified" statements that "'the noneconomic damages caps in O.C.G.A. § 51-13-1 violate the constitutional right to trial by jury.'" 372 Ga. App. at 655 n.47 (quoting 286 Ga. at 731); *see also* 372 Ga. App. at 653 n.40. That reading improperly presumes one of two things: either *Nestlehutt* silently and haphazardly decided a facial challenge to O.C.G.A. § 51-13-1, or *Nestlehutt* decided an as-applied challenge and then struck down the whole statute without engaging in the required severability analysis. There is no support for either view.

As for the first possibility, before a court can hold that a statute is facially unconstitutional, the plaintiff must show, and the court must determine, that "the law is unconstitutional in all of its applications, or at least that the statute lacks a plainly legitimate sweep." *Olevik v. State*, 302 Ga. 228, 247 (2017) (citation omitted); *see*

also Georgia Dep't of Hum. Servs. v. Steiner, 303 Ga. 890, 899 (2018) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))).

As discussed above, the Nestlehutts' argument was that the application of O.C.G.A. § 51-13-1(b) to reduce their award of pain-and-suffering and loss-of-consortium damages in a traditional medical-malpractice case violated their right to a jury trial. They did not assert that the statute was facially unconstitutional, or that it was unconstitutional as applied to any other type of claims or damages, such as wrongful-death claims and damages. And the *Nestlehutt* Court did not examine any type of claim or damages other than the ones presented by the Nestlehutts' case, as the Court would have had to do before facially invalidating the statute. And if the Court *had* done so with regard to wrongful-death claims and damages, it would have easily decided that O.C.G.A. § 51-13-1 is *not* unconstitutional in all of its applications.

It is a basic principle of restraint in judicial review that a court should not unnecessarily or haphazardly decide that the entirety of a legislative act is unconstitutional. *Cf. Steiner*, 303 Ga. at 899 (holding that a party to whom a statute may be constitutionally applied lacks standing to pursue a facial challenge, which requires

review of the application of the statute to others). The Court of Appeals erred to the extent it presumed that in deciding *Nestlehutt*, this Court bulldozed away all of O.C.G.A. § 51-13-1(b) without mentioning, much less adequately analyzing, more than the one application of the statute that the parties in that case presented. This error is particularly evident because three of the Justices who joined the part of the opinion including the statements the Court of Appeals highlighted explained, without disagreement, that the Court's jury-trial holding related to "noneconomic compensatory damages, as found by juries in *common-law* medical malpractice cases." 286 Ga. at 740 (Nahmias, J., concurring specially) (emphasis added).

If instead the Court of Appeals believed that *Nestlehutt* addressed an as-applied challenge to O.C.G.A. § 51-13-1 and nevertheless decided to invalidate the statute in its entirety, that would again be unsupported, because it presumes that the *Nestlehutt* Court ignored the judicial presumption of severability and two explicit severability provisions enacted by the General Assembly. This Court properly uses a scalpel, not a sledgehammer, to cure unconstitutional legislation. The "judiciary will not, and indeed can not, void an enactment of the General Assembly merely because it is defective in part." *Fortson v. Weeks*, 232 Ga. 472, 473 (1974). "Constitutional principles dictate that such defective parts be excised and the remainder sustained provided the legislative scheme can be preserved." *Id.* The United States Supreme Court has prescribed the same approach. "Generally speaking, when

confronting a constitutional flaw in a statute, [courts should] try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation and quotation marks omitted). The "normal rule" is "that partial, rather than facial, invalidation is the required course." *Id.*

And as Justice Kavanaugh has explained, when a statute contains an *express* severability clause, "the judicial inquiry is straightforward." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020). Absent "extraordinary circumstances," courts "should adhere to the text" of the severability clause. *Id.* That is because a severability clause "leaves no doubt about what the enacting [legislature] wanted if one provision of the law were later declared unconstitutional." *Id.* At times in the past, courts would sometimes "override the text" of a severability clause on the ground that the text did not reflect the legislature's "actual intent" as to severability. *Id.* But while that kind of argument "may have carried some force back when courts paid less attention to statutory text as the definitive expression of [legislative] will," "courts today zero in on the precise statutory text" and, as a result, "hew closely to the text" of severability clauses. *Id.* Courts also occasionally defy severability clauses on the ground that the remainder of the statute cannot operate on its own. But there should be little latitude in that exception to the rule, because "it is fairly unusual for the remainder of a law not to be operative." *Id.* at 628.

With regard to O.C.G.A. § 51-13-1, there are *two* express provisions about severability. The first is the overarching severability rule the General Assembly has enacted for all of its statutes. *See* O.C.G.A. § 1-1-3. That provision says that unless "otherwise specifically provided," in the "the event any title, chapter, article, part, subpart, Code section, subsection, paragraph, subparagraph, item, sentence, clause, phrase, or word of this Code or of any Act or resolution of the General Assembly is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this Code." *Id.* Further, the "General Assembly declares that it would have enacted the remaining parts of this Code if it had known" that any portion "would be declared or adjudged invalid or unconstitutional." *Id.*

And to make sure this background rule wasn't overlooked, the General Assembly included a specific severability clause in the 2005 Tort Reform Act that included what was codified as O.C.G.A. § 51-13-1. *See Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 277 (2008). This provision says that in the event that "any section, subsection, sentence, clause, or phrase of this Act" is declared "unconstitutional," "such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act." Ga. Laws 2005, Act 1, § 14. And it reiterates the General Assembly's declaration "that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or

adjudged invalid or unconstitutional." *Id.*

In its opinion, the *Nestlehutt* Court identified a discrete constitutional flaw in O.C.G.A. § 51-13-1, which was the only jury-trial issue argued to the Court: that the statute's cap on noneconomic compensatory damages in common-law medical-malpractice cases violates the Georgia Constitution's right to a jury trial. The remainder of the statute does not inevitably suffer from that same constitutional flaw. The statutory cap on wrongful-death damages, for instance, does not violate the right to a jury trial, because wrongful-death claims and wrongful-death damages did not exist until more than a half-century after 1798. There is no good reason to believe that, having concluded that O.C.G.A. § 51-13-1 was unconstitutional in one application, the Court would have held the statute unconstitutional across the board, without any mention of severability.[3] When this Court chooses to override a severability clause, it says so. *See, e.g.*, *Daimler Chrysler Corp. v. Ferrante*, 281 Ga. 273, 275 (2006) (explaining at length why the Court could not "effectively sever the unconstitutional

[3] Severability is straightforward in this situation. To effectuate *Nestlehutt*'s holding while preserving the remainder of the statute, the Court could just sever the following words from O.C.G.A. § 51-13-1(b): "In any verdict returned or judgment entered in a medical malpractice ~~action, including an~~ action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based." The Court could take a similarly surgical approach to the other subsections of § 51-13-1.

provisions" from an asbestos statute, and why the "presence of a severability clause within the Act does not require a different result"). The correct understanding of *Nestlehutt* is that it did not hold that O.C.G.A. § 51-13-1 was entirely invalid, only that the statute cannot not be constitutionally applied to reduce "noneconomic compensatory damages, as found by juries in common-law medical malpractice cases." 286 Ga. at 740 (Nahmias, J., concurring specially).

4. Finally, the Court of Appeals also implied that *Nestlehutt* rendered an improper advisory opinion on the constitutionality of O.C.G.A. § 51-13-1(b)'s cap on wrongful-death damages. The court acknowledged that "*Nestlehutt* did not involve a claim specifically characterized as one for wrongful death." 372 Ga. App. at 654. Yet the court believed that because *Nestlehutt* "did not exclude wrongful-death claims" from its analysis, it should be presumed to have "included" them. *Id.* But that isn't how precedent—or the judicial power—works. A Georgia court has no authority to issue precedential rulings on issues that are not presented in a case: a court "may not properly render advisory opinions." *Fulton Cnty. v. City of Atlanta*, 299 Ga. 676, 677 (2016). This Court did not render an improper advisory opinion on statutory caps for wrongful-death damages in *Nestlehutt*, and the Court of Appeals was wrong to read the opinion as if it did. *See Georgia Dep't of Hum. Servs. v. Addison*, 304 Ga. 425, 434 n.9 (2018) ("A decision of this Court obviously is not precedent for a point it does not actually address and resolve.").

* * *

For all of these reasons, the Court of Appeals erred in concluding that *Nestlehutt*'s jury-trial holding extended to wrongful-death claims and damages. But if the Court of Appeals was right—if *Nestlehutt*'s holding *does* control the wrongful-death issues presented by this case—then that holding can and should be easily overruled. A purported holding in *Nestlehutt* that the jury-trial right in Georgia extends to wrongful-death claims and damages would have been devoid of specific analysis of that cause of action and the type of damages associated with it—analysis that would inexorably lead to the opposite conclusion—and would have been issued in violation of fundamental restraints on judicial review. Precedents "that are not just wrong but 'unreasoned,' or which 'disregard[ ] the basic legal principles that courts use to do law,' are ripe for overruling"—particularly when they interpret a constitutional provision, are inconsistent with other precedent on the same subject, and have not been deeply entrenched in Georgia law. *Wasserman v. Franklin Cnty.*, No. S23G1029, 2025 WL 309390, at *12-13 (Ga. Jan. 28, 2025). All of that would be true of *Nestlehutt*'s holding as it was described by the Court of Appeals.

As for *Nestlehutt*'s actual holding—that statutory damages caps violate the jury-trial right as applied to reduce noneconomic compensatory damages in common-law medical-malpractice cases—the Court need not revisit it to correctly decide this case. But if the Court does not reconsider that holding now, then it should do so

in an appropriate case, for the reasons stated in the Chambers' amici curiae brief in support of the petition for certiorari in this case.

III. O.C.G.A. § 51-13-1 is a valid exercise of legislative power as applied to wrongful-death cases and addresses a serious threat to health care in Georgia.

Because the Georgia Constitution poses no barrier to imposing O.C.G.A. § 51-13-1's caps on wrongful-death damages, it would be judicial overreach for the Court to impede that application of this important statute. The General Assembly enacted statutory caps on damages in wrongful-death actions, along with other measures, to combat the "crisis affecting the provision and quality of health care services in this state." Ga. L. 2005, Act 1, § 1. That crisis stems in part from enormous and unpredictable damages verdicts, which lead to increasing liability insurance costs, "reduc[tion] [of] Georgia citizens' access to health care services," and ultimately "degrad[ation] [of] their health and well-being." *Nestlehutt*, 286 Ga. at 732.

That crisis has not abated over the past 20 years. In 2023, Georgia ranked dead last in the nation for healthcare costs.[4] More than 15% of Georgia residents chose not to see a doctor over the course of a year due to cost.[5] And the problem is only

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

[5] *Id.*

getting worse. As of January 2024, nine of Georgia's rural hospitals had closed since 2010—one of the highest closure rates in the country.[6] Another 18 of Georgia's 30 rural hospitals are at risk of closing due to financial problems.[7] Georgia hospitals operating in the red are reducing crucial but costly services to try to stay afloat, with 23 rural Georgia hospitals ending chemotherapy treatment between 2014 and 2022.[8] The Court of Appeals' decision in this case interferes with the General Assembly's ability to respond by reforming wrongful-death litigation—which, again, exists only by legislative dispensation—to reduce healthcare costs for patients and providers.

Georgia's sharp downward trend in healthcare access coincides with a sharp upward trend in "nuclear verdicts"—verdicts of more than $10 million—in the healthcare arena. One study identified $60.3 million in nuclear verdicts related to healthcare services between 2009 and 2022.[9] Wrongful-death verdicts are a major

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

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

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

[9] Marathon Strategies, *Corporate Verdicts Go Thermonuclear* 42 (2022), https://marathonstrategies.com/wp-content/uploads/2023/03/Corporate-Verdicts-Go-Thermonuclear-0313.pdf.

share of the problem. In 2023, a Bibb County jury awarded $40 million against two hospitals (including $5 million for pain and suffering and $35 million for wrongful death) based on problems associated with a blood transfusion.[10] In 2024, a DeKalb County jury awarded $38.6 million ($6 million for pain and suffering and $30 million for wrongful death) against Emory based on problems associated with a heart transplant.[11] The biggest medical-malpractice verdict in Georgia history was a wrongful-death case resulting in $77 million in damages.[12]

Georgia's spike in massive wrongful-death awards carries consequences. For example, insurance "premiums for healthcare professionals in areas known for nuclear verdicts, such as Georgia . . . , are rising."[13] These "skyrocketing medical

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[10] *See* Cedra Mayfield, *Bibb County Jury Returns $40M Verdict Against Two Hospitals*, Law.com (June 29, 2023), https://www.law.com/dailyreportonline/2023/06/28/bibb-county-jury-returns-40m-verdict-against-hospitals-after-deaf-womans-death/; Chance, Forlines, Carter, and King, PC, *A Tragic Loss: Seeking Justice in a Landmark $40 Million Medical Malpractice Verdict in Georgia* (June 23, 2023), https://www.cfcklaw.com/blog/a-tragic-loss-seeking-justice-in-a-landmark-40-million-medical-malpractice-verdict.

[11] *See* Cedra Mayfield, *DeKalb Jury Returns $38.6M Verdict Against Emory After Teen's Death*, Law.com (Nov. 14, 2023), https://www.law.com/dailyreportonline/2023/11/14/dekalb-jury-returns-38-6m-verdict-against-emory-after-teens-death/.

[12] *See* Katheryn Tucker, *DeKalb Jury's $77M Med-Mal Verdict Appears to Set New Georgia Record* (Sep. 2, 2022), Law.com, https://www.law.com/dailyreportonline/2022/09/02/dekalb-jurys-77m-med-mal-verdict-appears-to-set-new-georgia-record/.

[13] U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions*, p. 6 (May 2024), https://tinyurl.com/4mnxr4ad.

liability insurance premiums are pushing physicians out of practice,"[14] further straining Georgia's healthcare system. More broadly, an in-depth study found that excessive tort litigation cost Georgia 137,658 jobs and reduced per capita output by $1,373—effectively a "tort tax"—in 2022.[15] Another found that Georgia's tort costs amounted to $5,050 per household, the eighth highest in the country, and 2.6% of the State's GDP, the country's fifth highest rate.[16]

Ultimately, "[e]very dollar spent on the broken medical liability system is a dollar that cannot be used to improve patient care."[17] And those tort payouts are not improving patient care indirectly: Studies consistently find that "greater tort liability" is "not associated with improved quality of care."[18] In other words, the risk of liability raises healthcare costs and decreases healthcare availability without resulting in

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

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

[16] U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 20-21 (Nov. 2024), https://tinyurl.com/yarkp78f.

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

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

better patient care. The Court of Appeals' decision, if not corrected by this Court, will inappropriately tie the General Assembly's hands in responding to Georgia's healthcare crisis.

CONCLUSION

The Court should reverse the decision below.

This submission does not exceed the word-count limit imposed by this Court's Rule 20.

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CERTIFICATE OF SERVICE

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

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