IN THE SUPREME COURT OF OHIO

JOHN PAGANINI Plaintiff-Appellee. v. THE CATARACT EYE CENTER OF CLEVELAND, et al. Defendants-Appellants.	Case No. 2025-0386 On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case Nos. CA-24-113867 CA-24-114019

BRIEF OF *AMICI CURIAE* THE OHIO ASSOCIATION FOR JUSTICE AND THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Ohio state courts. Throughout its 79-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The Ohio Association for Justice ("OAJ") is the only statewide, non-profit association of attorneys whose mission is to preserve the constitutional right and protect access to the civil justice system for all Ohioans as provided for in the Seventh Amendment to the United States Constitution, and Ohio's Open Courts clause, Ohio Const. art. 1, § 16. Founded in 1954, OAJ currently consists of more than 1,500 lawyers dedicated to a constitutional guarantee stated in plain English: the right to trial by jury "shall be inviolate." Inviolate does not mean "occasionally abridged," "tempered by policy," or "subject to legislative tinkering." It means untouched. OAJ's mission is to see that deserving individuals—especially those who have suffered catastrophic, life-altering injuries—can put wrongdoers to the test before a jury of their peers and thereby sustain public confidence in the civil courts.

OAJ and AAJ have substantial interests in the outcome of this appeal because statutory caps on noneconomic damages go to the core of that guarantee. As applied

to plaintiffs with catastrophic injuries, these caps do not merely channel procedure; they displace the jury's traditional factfinding role on the measure of damages—an assignment the Constitution leaves to the people in the jury box.

This case, which has been cast by the Ohio Association of Civil Trial Attorneys ("OACTA") and the Attorney General as a broader constitutional attack, poses the question: May the General Assembly preordain, in the abstract, limitations on Article I, Section 16's right to a remedy by due process of law, when that right is protected by the promise of the 'inviolate right to a jury trial' under Article I, Section 5? That is not a technical squabble. It bears directly on access to the courts, the right to a full, complete remedy, the jury right itself, and whether Ohioans—most of all, the grievously injured—receive the full measure of the Constitution's guarantee.

STATEMENT OF THE CASE AND FACTS

OAJ and AAJ accepts the Statement of the Case and Facts from the Appellant.

ARGUMENT

The sole proposition of law under review by this Court is whether "the "hard limit" on recoverable noneconomic loss in R.C. 2323.43(A)(3) that applies to serious or "catastrophic injuries" does not violate the "due course of law" provision in Article I, §16 of the Ohio Constitution and is, therefore, constitutional." Despite the limited scope of this appeal, and the clear waiver of the Appellant, the Attorney General, and OACTA, press to convert this as-applied challenge into a facial one. This is a false dichotomy. Regardless of whether this Court frames Mr. Paganini's case as an as-applied or facial challenge, the plain text and original meaning of Article I, § 16

necessitate a finding that the caps at issue are *per se* invalid under the state of Ohio's constitutional guarantees.

I. IF THIS COURT TREATS PAGANINI'S CLAIM AS A FACIAL CHALLENGE, THE PLAIN TEXT AND ORIGINAL MEANING OF ARTICLE I, SECTION 16 COMPELS INVALIDATION OF ALL DAMAGE CAPS.

The plain text and original meaning of the "right to remedy by due course of law" provide no exception or uncertainty: when the legislature imposes a cap on damages, constitutional guarantees are violated. This Court must no longer continue down the path of policymaking from the bench, but compel adherence to the correct interpretation of the Constitution. When the legislative, artificial cap on damages is invoked against a constitutional right to remedy and inviolate right to jury, there are two constitutional rights hit with the legislative stone. This Court cannot allow the continued violations of Ohioans' Constitutional rights to stand. *State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029*,* ¶ 27 ("A supreme court not only has the right, but is entrusted with the duty to examine its former decision and, when reconciliation is impossible, to discard its former errors."), *quoting Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶43.

Recently, the Ohio Supreme Court has returned to its textualist and originalist roots by refusing to adhere to its previous decision that "Ohio's open courts provision means nothing more than textually and historically dissimilar provisions in the federal Constitution." *State ex rel. Cincinnati Enquirer*, 2024-Ohio-5029, ¶ 26. This Court should similarly part ways with its previous decisions here, which wrongly equated the rights in Article 1, § 16 for Ohioans under the Ohio Constitution with

those in the federal constitution. *See Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 48, *citing Sorrell v. Thevenir*, 69 Ohio St. 3d 415, 426 (1994); *see also Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544 (1941). Not only does the wording of each document differ significantly, but the Fifth and Fourteenth Amendments to the United States Constitution do not provide for an explicit "right to remedy by due course of law" as the Ohio Constitution does. *Compare* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; *with* Ohio Const., art. I, § 16. "Different words, of course, signal a different meaning." *See Adams v. DeWine*, 2022-Ohio-89, ¶ 205 (Kennedy, Fischer, Dewine, JJ. dissenting), *citing Obetz v. McClain*, 2021-Ohio-1706, ¶ 21.

In Ohio, constitutional interpretation is guided by original public meaning at the time of adoption. *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 43-44 (1993) Therefore, the right to remedy by due course of law articulated in Section 16 must be interpreted in 1802 terms. *See* Ohio Const., art. I, § 16; Hon. R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 Ohio State L.J. (forthcoming 2025) (manuscript at 4), available at https://ssrn.com/abstract=4986929.

Because the federal Fifth Amendment existed before its Ohio counterpart, the more natural reading is that the state's founders included the phrase "right of remedy by due course of law" to enhance rights conveyed the Ohio Constitution. "Not only may state constitutions confer rights with no federal corollary (for instance, the right to a remedy for injuries done to a person's land, goods, person, or reputation) but state supreme courts may also construe similar constitutional protections . . . as having a

substantive difference." Benjamin White, *Prodigal Reasoning: State Constitutional Law and the Need for a Return to Analysis*, 86 U.Cin.L.Rev. 1099 (2018).

The framers further departed from the federal model by guaranteeing an Ohioans right to remedy "by due course of law," not merely "due process of law." Under standard canons, including *expressio unius* and the presumption that different words carry different meanings, "course" must be understood to sweep more broadly than "process." *See* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Texts*, at 107 (discussing the operation of the "negative-implication canon"); *Id.* at 170-171 (different words, different meanings). The "course" of law encompasses the entire arc of the legal proceeding, from injury to final judgment, and includes the substantive adequacy of the outcome. *See* Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va.L.Rev. 447, 452, 501-502 (2017) (comparing due course of law "to refer to legal procedure more broadly" with due process of law which "means legal process in the technical sense. . . ."); Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L.Rev. 1309, 1321-23, 1341 (2003) *citing* Edward Coke, *Second Part of the Institutes of the Laws of England* 55 (1642) and 1 William Blackstone, *Commentaries on the Laws of England* *130 (1769) https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp (cleaned up) (accessed Oct. 1, 2025) ("This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restrain, unless by due course of

law."). Mere procedural regularity will not satisfy a constitutional command to provide a meaningful "remedy by due course of law." *See* Ohio Const., art. I, § 16; Phillips, *supra*, 1321-23. The careful choice of words reflects historical concerns; in 1802, the term "remedy" conveyed not a hollow procedural formality but an assertion of the intrinsic right to be made whole following an injury. *Marbury v. Madison*, 5 U.S. 137, 163 (1803), *quoting* 3 William Blackstone, *Commentaries* at 23, *109 ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded, . . . for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress.").

In 1851, the Ohio Constitution continued to recognize the fundamental rights reserved to the people as in 1802, including and expanding its Bill of Rights to guarantee many individual liberties. *See* Ohio Const., art. I, §§ 1–20; *see also* Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 32-36 (2004) (summarizing the expanded Bill of Rights in the 1851 Constitution). These "retained rights" included the right to alter, reform, or abolish government; freedom of assembly; the right to bear arms for defense and security; the inviolate right to trial by jury; freedom from slavery and involuntary servitude; religious liberty and rights of conscience; habeas corpus; bail protections; due process; freedom of speech and press; protection against quartering troops, unreasonable searches, and imprisonment for debt; redress for injury; protections for property rights; and the explicit reservation of all powers not delegated to the government. *See* Ohio Const.,

art. I, §§ 2–12, 14, 16, 19, 20. The "retained rights" language in Section 20, added in the 1851 Constitution, closely tracks the Ninth Amendment and reaffirms the principle that fundamental liberties exist beyond those specifically enumerated—serving as a structural barrier to government overreach and securing individual rights not spelled out in the text. Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War*, 68 MercerL.Rev. 389, 421-422 (2017) ("The drafters of the 1851 version added a Baby Ninth to the front of the old Baby Tenth . . . But the resulting text is not ambiguous like the 1802 version. It simply says that if powers aren't delegated—whatever they are—then they remain with the people.")

A. This Court's Own Precedents Lay the Groundwork for Abandoning the Prevailing, Yet Incorrect, Reading of Article I, §16.

The post-1851 decisions of *Byers v. Meridian Printing Company*, *Derby Turnpike Company v. Parks*, *Cincinnati House of Refuge v. Ryan*, *Weil v. State*, and *Toledo v. Preston*, support a textualist and original meaning interpretation that the legislature cannot limit an Ohioan's right to a full and complete remedy even if that enactment "favors public policy." That includes caps on damages.

In 1881, this Court upheld a statute governing the proceedings and commitments of homeless children, concluding that it ran afoul of no provision in Section 16—because, after all, "as the law affords "full and complete remedy" by way of *habeas corpus* for any alleged trespass upon parental rights. *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197 (1881), paragraph two of the syllabus. Then, in 1889, this Court sustained a criminal regulation fixing the rates and sales of personal

property, holding that no deprivation of the right to remedy by due course of law had occurred, since—"if a jury find[s] that the defendant had the right of possession at the commencement of the suit, they shall assess him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant." *Weil v. State*, 46 Ohio St. 450, 455 (1889). Both decisions reflect the understanding of the era: that damages must be full and complete, and that it is the jury—not the legislature—that has the authority to fix the amount, free from arbitrary fiat.

In 1893, this Court considered whether postponing relief until the injury was fully consummated ran afoul of Section 16. *Toledo v. Preston*, 50 Ohio St. 361, 366-367 (1983). Even then, the Court permitted a delay in suing, reasoning that such postponement served the sound purpose of ensuring the *full extent* of damages could be properly ascertained.

> The statute under consideration . . . only contemplates a delay until the injury shall be fully accomplished; for, until the improvement has been completed, it is, perhaps, always impracticable to ascertain with certainty the extent of the injury, the fill or excavation, as the case may be, will cause; in fact the injury has not been completed until then . . . .

Id. at 367.

Then, in 1893, the Court held that both Section 5's inviolate right to a jury trial and Section 16's guarantee of remedy by due course of law had indeed been infringed:

> It is very obvious that every thing which takes the form of an enactment is not therefore deemed the law of the land, or due course or process of law. If this were so, then decrees and forfeitures in all possible forms, and acts confiscating

> the property of one person or class of persons . . . upon some view of public policy, where it could not be said to be taken for a public use, would be the law of the land.

Tpk. Co. v. Parks, 50 Ohio St. 568, 579 (1893).

Even in 1893, this Court had concerns about "public policy" skewing constitutional protections. What was obvious to the Ohio Supreme Court in 1893 seems to have been lost today as Ohioans' constitutional right to "remedy by due course of law" from their "inviolate" right to a jury, has been capped in favor of "public policy." What the Court once dismissed as inconceivable has been ushered in as settled fact. Said another way, Ohioans' constitutional rights are not the playthings of shifting priorities and public policy.

This Court has not been blind to the legislature's temptation to cut back rights granted expressly by the Constitution—nor has it hesitated to voice its doubts when legislative power brushes up against guarantees reserved to the people themselves:

> If the legislature is vested with the power, under the constitution, to authorize a probate court to destroy valuable property rights of a turnpike company, because its road has been out of repair for the period of six months, it may be inquired, why may not the legislature authorize that court to do the same thing, although the road has not been out of repair longer than one day, for, it is not the abatement of a nuisance that is the subject of inquiry, but the taking and destruction of private property without a trial by jury.

Id.

The Justices of 1893, it turns out, were right to be wary. Today, in deference to the legislature's so-called "public policy considerations," Ohioans' constitutional guarantees of trial by jury and right to remedy have been whittled away. When a

jury's verdict is shrunk by an artificially set cap, it violates the Ohio constitution's guarantees of a right to remedy by due course of law and *inviolate* right to a jury.

Less than twenty years later, this Court drew a bright line—defining, with unmistakable clarity. The due process rights long held by Ohioans:

> Due process of law has also been defined to be, 'Law in its regular form of administration through courts of justice.' It is obvious that it does not mean that anything which the legislature may declare, without regard to constitutional limitations, is due process of law; for that would abrogate all guaranties of the constitution. By settled principles of the common law, the publication of defamatory matter, which is false in fact and not privileged, is presumed to be malicious, that is, the plaintiff may recover without proving malice and the burden is upon the defendant to disprove it. This is the substantive law and not mere matter of procedure. By the common law, also, one who is injured by such a publication may, by natural right, demand an apology or retraction, but unless it were accepted as a satisfaction it would not be a complete defense and would only be considered in mitigation of damages. This again is substantive law and not a matter of formal procedure. These rules have always been regarded as primary and essential in the law of libel for protection of reputation not only for injury which may be measured by money values, but for that 'intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction.' And therefore they are to be regarded as part of the 'remedy by due course of law' of which the constitution declares that no person shall be deprived. These rights the legislature did not give to the libeled person and the legislature can not take them away.

Byers v. Meridian Printing Co., 84 Ohio St. 408, 421-422 (1911) (internal citations omitted).

In fact, the only portion of Section 16 where the people of Ohio delegated power to the legislature was on the suits against the state provision. "Suits may be brought

against the state, in such courts and in such manner, *as may be provided by law*." (Emphasis Added) Ohio Const. art. I, § 16. The Constitution speaks both by inclusion and by omission. The first paragraph of Section 16 pointedly omits the phrase "as may be provided by law." That is no typo; it is a choice Ohioans made to give the legislature the power to determine which courts and in which manner cases specifically against the State are brought but *not* to similarly limit the open courts provision. Scalia & Garner, *supra*, at 107, 170-171 (2012) (Section "10. Negative-Implication Canon" and Section "25. "Presumption of Consistent Usage"). And that choice binds this, Court.

Faithful to the original understanding of the term "remedy," this Court, in adopting the *Park v. Free Press Company* opinion, reaffirmed that guarantee in no uncertain terms.

> [I]t is not competent for the legislature to give one class of citizens legal exemption for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial, to do wrong to others without answering *fully* for the wrong.

Byers, 84 Ohio St. at 423, *citing Park v. Free Press Co.*, 75 Mich. 560 (1888).

When a legislative cap on damages curtails an Ohioan's ability to obtain full redress for a wrongful act, it authorizes a person "to do wrong to others without answering *fully* for the wrong." *Id.* The Constitution brooks no such limitation—therefore the restriction must fall.

This Court has made it unmistakably clear: An Ohioan cannot—consistent with our Constitution "be compelled to be waive his [constitutional] right, or that [the

citizen] can be arbitrarily subjected to an option to stand upon one right under penalty of losing another." *Id.* In deciding that Ohioans' rights ought to be protected an Ohioan cannot be "given the choice of resorting to the courts without the right of demanding retraction, or of demanding a retraction, and, if given, *being limited in his right of recovery;* and if he chooses either course he must do it at his own peril and without any recompense whatsoever." *Id.* at 422-23 (emphasis added). Here, Paganini stands before this Court faced with an unconstitutional choice: either accept no remedy, by not bringing a lawsuit at all because of the costs of litigation, or settle for a diminished one artificially set by the legislature. A legislature's purported authority to impose an arbitrary limit of $500,000 on recoveries includes the power to limit damages to one thousand dollars, or even one dollar. The Ohio Constitution guarantees more. An Ohioan's right to full recovery cannot be reduced—the Constitution dictates that he should not be forced to choose at all.

When a legislative enactment caps damages at an amount that does not provide a full, complete remedy, it replaces the constitutionally promised "right to remedy" with an illusory token. *See Morris v. Savoy*, 61 Ohio St.3d 684 (1991). That violates Coke's, Blackstone's, and Section 16's original meaning.

B. Historical Interpretations of the Magna Carta Confirm the Right to a Full Remedy.

First, it was the reading of Coke and Blackstone—not the bare text of Magna Carta—that Ohio's founders drew upon in drafting their Constitution. When Ohio adopted its constitutional guarantee that every person "shall have remedy by due course of law," it followed Lord Coke and Lord Blackstone's influential interpretation

of Magna Carta, which expanded its scope to embrace a broad, substantive right to redress. *See* 3 William Blackstone, *Commentaries on the Laws of England* *130 (1769) https://avalon.law.yale.edu/18th_century/blackstone_bk3ch1.asp (cleaned up) (accessed Oct. 1, 2025) ("The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the week from the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited."); Edward Coke, *Second Institutes* 55 (1797); Dewine, *Ohio Constitutional Interpretation*, 86 OhioSt.L.J. at 4 (forthcoming 2025) ("[T]he appropriate methodology in interpreting the Ohio Constitution is to apply the original public meaning of a provision at the time of its adoption."). OACTA's claim that Magna Carta was wrongly interpreted by Lord Coke, although likely correct, is irrelevant. When interpreting the text of the Constitution, one cannot look at whether the understanding was right or wrong as it does not influence the original meaning of Ohio's Constitution as the *founders* knew in 1802. The accuracy of the beliefs the founders reflected is irrelevant; the interpretative task is to find the meaning then. Scalia & Garner, *supra*, 78 ("Words must be given the meaning they had when the text was adopted."). The founders drew heavily from influential common law commentators instead of the text of Magna Carta and that is the interpretation that guides today.

Legal historians confirm that the American "remedy" provisions in state constitutions—including Ohio's—are traced not to Magna Carta's original text, but to Coke's and Blackstone's expansion and commentary in the seventeenth century.

Phillips, *supra*, 1319-21. This adoption of Coke's broad definition as he wrote it—rather than a narrow, originalist reading of Magna Carta—forms the backbone of any rational textualist approach to remedies in state constitutions.

Edward Coke was "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England.'" *Payton v. New York*, 445 U.S. 573, 594 (1980). The remedy clauses that appear in the state constitutions "traces to Edward Coke's commentary." *Smothers v. Gresham Transfer Inc.*, 23 P.3d 333, 340 (Or. 2001), *overruled on other grounds, Horton v. Oregon Health & Sci. Univ.*, 359 Or. 168 (Or. 2016). The U.S. Constitution's Fifth Amendment guarantee of due process is itself an "affirmation of Magna Charta according to Coke. . . ." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring). And Blackstone's works "constituted the preeminent authority on English law for the founding generation. . . ." *Alden v. Maine*, 527 U.S. 706, 715 (1999).

It is no surprise, then, that Chief Justice Marshall quoted Blackstone in *Marbury*. *See* 5 U.S. at 163, *quoting* Blackstone, *Commentaries* at *23, *109. On that "general and indisputable rule," Marshall pronounced:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Id.

Lord Coke, in his explanation of the Magna Carta, asserted, "every subject of his realm, for injury done to him in goods, lands, or person . . . *may take his remedy* by the course of law, and have justice, and right for the injury done to him, freely

without sale, fully without any denial, and speedily without delay." *See* Phillips, *supra*, 1320-1321, *citing* Coke, *Second Institutes* 45. To read Lord Coke's interpretation as "may take *certain* remedy" would be, again, to add words to the text that do not exist. Phillips, *supra,* 1320-1321 *citing* Comment, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202, 1203-04 (1964) ("[R]ecords of the constitutional conventions which adopted certain-remedy clauses are virtually devoid of any clues as to the intentions of the framers . . . ."). Lord Coke's "remedy" that fails to restore the injured party is fundamentally inadequate.

Then, Sir William Blackstone "described the right to a remedy as one of the critical means through which civilized society served its principal aim – the preservation of an individual's absolute rights to life, liberty and property." Phillips, *supra*, 1321 *citing* 1 William Blackstone, *Commentaries* *124. In fact, Blackstone goes even further in describing what a "remedy" means:

> [T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws it to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration.

Id. at 1321, fn. 42.

This right to a remedy was not just a "certain" or "partial" remedy but "'Once a person was injured, the right to an 'adequate remedy' immediately attached, through

judicial process . . . . For it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." *Id.* And, this "right to a remedy was one of the five subordinate rights through which people vindicated their absolute rights." *Id.* Blackstone references three absolute rights in his commentaries: (1) Personal Security; (2) Personal Liberty; and (3) Private Property. *Id.* at 1311 *citing* 1 William Blackstone, *Commentaries* *125, *129. "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." *Id.* at *125. "A man's limbs . . . are also the gift of the wise Creator; to enable him to protect himself from external injuries in a state of nature . . . and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty." 1 Blackstone, *Commentaries* *126 https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp (cleaned up) (accessed Oct. 1, 2025). Basically, the foundation of the policy of Tort Law and the underpinning to an Ohioan's Constitutional Right to Remedy. *See, e.g.*, *Floor Craft Floor Covering v. Parma Cmty. Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 7 (1990) ("The controlling policy consideration underlying tort law it the safety of persons and property – the protection of persons and property from losses resulting in injury.").

Blackstone agrees that "no suitable atonement can be made for the loss of life or limb." 1 Blackstone, *Commentaries* *127 https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp (cleaned up) (accessed Oct. 1, 2025). Concluding Blackstone's belief in civil justice and the right to

remedy, there is nothing stronger than his description of the laws obstructing the right to an adequate remedy:

> At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and that, whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity; and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law.

Id. at *129, https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp (cleaned up) (accessed Oct. 1, 2025).

The original public meaning of "remedy" in Section 16 must be assessed considering how the term was used in foundational Anglo-American legal sources, but the evidence reveals a broader substantive import than simply procedural access. Phillips, *supra*, at 1317-1319. Prominent founding-era treatises affirmed the concept that "where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded," reinforcing that the right to remedy encompasses both access and substantive adequacy. *Marbury*, 5 U.S. at 163.

Thus, if Ohio is going to restrict the damages of a person whose "life or limb" has been taken, it better not be "for light and trivial causes" otherwise, Blackstone would find that a tyrannical government was restricting the absolute rights of its citizens.

C. OACTA's Interpretation Cannot Be Squared with the Text and Original Meaning of Section 16.

Ohio Association of Civil Trial Attorneys would have this Court ignore the original meaning of "remedy" in 1802. The Ohio Supreme Court cannot abide by such departure from the constitutional text.

OACTA would reduce Section 16 to unlocked doors and a token payout—any relief, however paltry, would do. *See* OACTA Br. 11. Not so. The text promises more; a right to remedy by due course of law—a meaningful remedy, not a fig leaf—and that is how Coke and Blackstone understood "right to remedy" at common law. Ohio Const., art. I, § 16; *see* 3 William Blackstone, *Commentaries*, at 3; *see also* Phillip, *supra*, at 1311-1326. As posited by Chief Justice Phillips, "if the framers really intended to place a constitutional shield around the common law, that notion should appear in opinions applying the guarante (sic)." *Id.* at 1324. In Ohio, those opinions exist. *See Byers*, 84 Ohio St. 408; *Parks*, 50 Ohio St. 568; *Cincinnati House of* 37 Ohio St. 197 at syllabus 2; *Weil*, 46 Ohio St. 450; *Preston*, 50 Ohio St. 361.

Section 16 is framed as an individual rights provision: "every person . . . shall have remedy . . . and shall have justice administered without denial or delay." The focus is the injured person's entitlement, not a mere directive to court administrators. The mandatory verb "shall" imposes an enforceable duty. *State ex rel. Mun. Constr. Equip. Operators' Lab. Council v. City of Cleveland*, 2020-Ohio-3197, ¶60 (2020). And "justice administered without denial" inherently speaks to substantive justice, not the mere mechanical operation of a procedural system, so it must be given its fair interpretation. Phillips, *supra*, at 1332. Blackstone and Coke knew what the Attorney

General and OACTA seemingly forget, or deliberately misinterpret, "shall have right to remedy by due course of law" in 1802 did not need the qualifier of "full" because "remedy" already meant "full remedy." *Cincinnati House of Refuge*, 37 Ohio St. 197, syllabus 2. This reinforces that the clause is a rights-bearing guarantee securing meaningful redress—a guarantee the judiciary is bound to enforce against encroachment by the political branches.

Early state constitutions adopted similar language, universally treating "remedy" as entitling injured parties to meaningful redress rather than hollow or token relief. Michael DeBoer, *Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal For Reconsideration*, 6 Faulkner L. Rev. 135, 183 (2014) *citing* Coke, *Second Institutes,* 55. ("First, justice ought to be unbought, because nothing is more hateful than venal justice. Second, it ought to be full, for it ought not to halt. Third, justice ought to be quick, for delay is a kind of denial.") Thus, both textual analysis and historical context confirm that "every right when withheld must have a remedy, and every injury its proper redress" was understood as granting substantive, not merely formal, legal redress. Phillips, *supra,* at 1322, *citing* 3 Blackstone, *Commentaries*, *116.

By 1912, two distinct approaches emerge. In one set of states, the phrase "shall have remedy," echoing Lord Coke, secures a full remedy. In the other, only a "certain remedy." Phillips, *supra*, at 1320-1321 *citing* Comment, 49 Iowa L. Rev. 1202, 1203-04. The word "certain" is key—it operates as a limiter on the type or scope of remedy

available. But if "remedy" meant anything less than "full," then "certain" would be redundant. After all, the phrase "a certain partial remedy" is nonsensical.

The Court cannot lean on aphorisms that "no one has a vested right in rules of the common law" or that broad constitutional text must bend to contemporary "necessity" and "wise policy." *Fassig v. State,* 95 Ohio St. 232, 249-250 (1917) (rationalizing policy over original meaning), syllabus paragraph 5 overruled by *Griffin v. Hydra-Matic Div., Gen. Motors Corp.*, 39 Ohio St.3d 79 (1988). Especially when those common law guarantees have been written in stone in the constitution. The Ohio Constitution must be interpreted as the people understood it in 1803.

Justice Clint Bolick of the Arizona Supreme Court agrees:

> Indeed, textualist judges provide the greatest possible guarantee that the judiciary will safeguard the Constitution and rule of law. Textualism is easy to define yet often difficult to effectuate. It is grounded in the belief that the role of judges is to enforce the Constitution and laws that conform to the Constitution . . . And in the end, when a constitution is ratified or a law enacted, the agreement is to the words rather than the intent, so that when the words and the intent seem to conflict, judges enforce the words.

Clint Bolick, *The Case for Legal Textualism*, Hoover Inst. (Feb. 26, 2018), https://www.hoover.org/research/case-legal-textualism (accessed Sept. 8, 2025).

When interpreting federal or state constitutional law, common law transforms into a constitutional guarantee, it is no longer "mere common law." Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 551. (Discussing the U.S. Constitution and its binding authority

"unless it is changed through the procedures set out in Article V."). Again, this Court made clear: rights that do not owe their existence to the legislature—constitutional guarantees—*cannot be stripped away by the legislature*. *Byers*, 84 Ohio St. 408, 421-422. If Ohioans want a different rule, the remedy is amendment by the people—not revision by the General Assembly or this Court.

Ultimately, any legislative action imposing caps directly conflicts with Ohio's constitutional mandate. "The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited" *See* 3 William Blackstone, *Commentaries* at 2 https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp (cleaned up) (accessed Sept. 10, 2025). Especially when an Ohioan has exercised their *inviolate* right to a jury, another Ohio Constitutional right, and that jury had determined that the Ohioan's full, complete remedy is a dollar amount above the artificial cap set by the legislature. While this Court has used rational basis in interpreting the applicability to a constitutional provision, OAJ and AAJ contends that standard is too light. If a legislative provision impedes a constitutional right guaranteed to Ohioans, it must meet the higher standard of strict scrutiny. This artificial cap cannot, has never, and will never justify, under strict scrutiny, the depriving of multiple Constitutional rights to a full and complete remedy from the citizen's inviolate right to a jury trial.

D. The Attorney General's Reading Improperly Excises Words from Section 16.

Even worse than OATCA's interpretation, the Attorney General *deletes* words from Section 16 by claiming that Ohioans have no additional rights than its federal counterparts. The Attorney General's attempt to erase express language from the constitutional text cannot be squared with the obligation to enforce what the people of Ohio wrote and adopted. DeWine, *supra*, at 4 ("A citizen who voted for a constitutional amendment would likely have been aware of the evil that the constitutional provision was intended to remedy.").

Then, the Attorney General reads Section 19a as surplusage rather than as a logical continuation of Section 16. *See City of Athens v. McClain*, 2020-Ohio-5146, ¶36 *citing In re BankVest Capital Corp.*, 360 F.3d 291, 301 (1st Cir. 2004) (holding that overlapping provisions is not the same as surplusage). Constitutional provisions must be read harmoniously, and "unless . . . manifestly required" not in a way that renders portions surplusage or superfluous. *State ex rel. Myers v. Board of Education*, 95 Ohio St. 367, 373 (1917). The Attorney General makes no attempt to read Section 19a as a logical extension of Section 16.

In 1912, the people of Ohio amended Article I to add Section 19a, prohibiting caps on damages in wrongful death actions. Ohioans knew, what the Attorney General seemingly forgets, in 1802 neither the common law, nor the newly enacted constitutional protection of "right to remedy by due course of law," recognized a legal remedy for wrongful death. As Lord Ellenborough famously declared: "In a civil court, the death of a human being could not be complained of as an injury." *Baker v. Bolton*,

1 Camp. 493, 170 Eng. Rep. 1033 (1808). Thus, Ohio's Section 19a is a logical extension of Section 16 protections to wrongful death.

The Attorney General would read this as surplusage, but by its plain text and the framers' deliberate adoption of unqualified, rights-bearing language, the provision reflects the historic conception of remedy found in Blackstone: "in taking cognizance of all wrongs, or unlawful acts, the law has a double view . . . not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent . . .." (cleaned up) 4 Blackstone, Commentaries on the Laws of England *7 (https://avalon.law.yale.edu/18th_century/blackstone_bk4ch1.asp). The language in Section 19a establishes a specific, additional protection in wrongful death cases—prohibiting statutory caps—while Section 16, is common law guaranteed by the Ohio Constitution, sets the general principle that remedies must be meaningful and complete.

Read harmoniously, Section 19(a) is a constitutional floor for wrongful death damages, ensuring that no cap is ever imposed in those cases, while Section 16 assures an unqualified right to a full and adequate remedy in all other tort cases—consistent with Coke and Blackstone's conception of substantial redress. This interpretation honors both provisions, the understanding of the term "injury" in 1803, and the text-driven intent of the framers by refusing to dilute Section 16's command or read Section 19(a) as an implied limitation. *See* Ohio Const., art. I, §§ 16, 19a; 4 Blackstone, *Commentaries*, at *7; DeWine, *supra*, at 7-8; *Arnold*, 616 N.E.2d at 166.

Finally, the Attorney General states that "right to remedy by due course of law" has no meaning since the Ohio Constitution and its federal counterparts have the same meaning—notwithstanding their different wording. *See State ex rel. Cincinnati*, 2024-Ohio-5029, ¶¶ 25–27. (disapproving unreasoned holdings that treat Ohio constitutional provisions as identical to federal counterparts, and emphasizing distinct text and history). Even though this Court, again, recognized that Section 16 contains "'*many* important constitutional principles— "open courts," "*right to remedy*," and "due course of law."'" (Emphasis Added) *Id*. at ¶ 35, *citing Ruther v. Kaiser*, 2012-Ohio-5686, ¶ 10. Should the Court adopt the Attorney General's reasoning, all hope for a Court to read the text as written from the understanding at the time the citizens passed the Constitutional provision will be, and should be, lost.

E. The Correct Interpretation of the Text and Historical Context of Section 16 Forbids the Erosion of the Guarantee of "Remedy by Due Course of Law" Advanced by Defendants.

Fidelity to the Ohio Constitution's text, its structure, and its founding-era meaning requires giving "remedy by due course of law" the full substantive force those words carried in 1802. *See Byers*, 84 Ohio St. 408 (1911); *Parks*, 50 Ohio St. 568 (1893). That means forbidding legislative caps that transform the constitutional guarantee into an empty formality for the most grievously injured.

> The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrong prohibited. This remedy is therefore principally to be fought by application to these courts of justice; this is, by civil suit or action.

1 Blackstone, *Commentaries*, *2-3, available at https://avalon.law.yale.edu/18th_century/blackstone_bk3ch1.asp (accessed Oct. 1, 2025) (cleaned up).

A court committed to textualism cannot read Section 16 as a hollow vessel without doing violence to the very interpretive principles it professes to apply. Scalia & Garner, *supra*, at 174 ("If possible, every word and every provision is to be given effect. . . . None should needlessly be given an interpretation that causes it to duplicate or to have no consequence."). The greater power to abolish a common-law cause of action, that has been written in stone into the Ohio Constitution, altogether does not imply the lesser power to retain it in name while stripping it of its substance.

In determining that former R.C. 2745.01 was unconstitutional, the Court reasoned that it "created a cause of action that is simply illusory" and that the requirements "are so unreasonable and excessive that the chance of recovery of damages by employees for intentional torts committed by employers in the workplace is virtually zero." *Johnson*, 85 Ohio St.3d 298, 306-07. To accept the reasoning that the remedy does not have to be full or meaningful would be to license the legislature to drain enumerated, absolute, and constitutional rights of effect—something neither textualism, separation of powers, nor would Lords Blackstone and Coke tolerate.

This Court held true to these textualist interpretations even recently. "Denial of a remedy and denial of a meaningful remedy lead to the same result: an injured plaintiff without legal recourse." *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 60 (1987). Nor is this novel: the Court has already invalidated, as applied to minors,

a portion of R.C. 2305.11(B) because "it is unrealistic to expect that children would seek redress against their parents" under the due course of law guarantee. *Mominee v. Scherbarth*, 28 Ohio St.3d 270, 276 (1986).

If this Court is to return to its textualist and originalist roots, it cannot nibble at the edges—it must do so without reservation. And when this Court returns to those roots, it will have only but one option: a return to the full remedy guarantees of Blackstone and Coke. Scalia & Garner, *supra*, at xxv ("Faithful adherence to [textualist] interpretative conventions will narrow the range of acceptable judicial decision-making and acceptable argumentation-will curb- even reverse-the tendency of judges to imbue authoritative texts with their own policy preferences."). The right to remedy by due course of law and the inviolate right to a jury have been at risk for years. Today, this Court could right the ship. If the Court does not, as textualist scholar Eugene Volokh wondered:

> [W]hy, the critics ask, would accepting (for instance) a restriction on "ideas we hate" "sooner or later" lead to restrictions on "ideas we cherish"? If the legal system is willing to protect the ideas we cherish today, why won't it still protect them tomorrow, even if we ban some other ideas in the meantime?

Eugene Volokh, *The Mechanism of the Slippery Slope*, 116 Harv.L.Rev. 1026, 1028 (2003).

One specific claim that Eugene Volokh makes, which relates to this case and textualism, is the assertion that "by changes in people's moral or empirical attitudes." *Id.* at 1033. Blackstone agreed. "Every subject knows; or may know if he pleases: for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and

unchangeable, unless by the authority of parliament." 1 Blackstone, *Commentaries*, *137. Here, Ohioans chose the language in 1802 and the arbitrary will of the judge, or congress, cannot change except by Constitutional amendment by the people.

i. *The text and original meaning of Article I, Section 16 preclude artificial limits on remedies awarded by juries.*

The Ohio Constitution guarantees rights that extend beyond the protections offered by the U.S. Due Process Clause. *See Arnold*,67 Ohio St.3d 35, syllabus ¶1. The Constitutional guarantee can be read directly from the text. And even if there is a question about what those words meant, there is no question that they derive from Blackstone and Coke. There is no need for a Judge or Justice to ask themselves "what should the text mean" because the text is clear. As Justice Scalia wrote:

> When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean . . . .

Antonin Scalia, *A Matter of Interpretation*, at 17-18 (Amy Gutmann ed., 1997).

This Court's revision back to Section 16 textualist and original meaning, the Blackstone and Coke fix, means the Constitutional encroachment can finally end.

While the U.S. Due Process Clause emphasizes procedural safeguards, and Section 16 has that same guarantee, Section 16 goes one step further by guaranteeing that a citizen "shall have remedy by due course of law." Ohio Const., art. I, § 16. A remedy that fails to restore a plaintiff to their pre-injury condition is fundamentally

at odds with Lord Coke and Lord Blackstone whose influence on Section 16 is clear, even in 1802.

Textualists interpret words according to their ordinary legal meaning at the time they were adopted. *See* Scalia & Garner, *supra*, 78. In the founding-era legal lexicon—as reflected in Blackstone, Coke, and early American practice—"remedy" presupposed substantive adequacy. Phillips, *supra*, 1345**.** Even then there was concern that "a legislature, perhaps buckling to inordinate pressure from a well-organized and highly vocal special-interest group, sought to deny all recovery for a well-organized action that did implicate absolute rights, the remedy guarantee would come into play." *Id.* And by abolishing all medical claims that includes a limitation so unreasonable as to deny meaningful access and a meaningful remedy. *Id.* To read it any other way would be to deny meaningful access but allow a meaningful remedy or meaningful access but no meaningful remedy. Both are constitutionally invalid.

If Ohio's constitutional framers had intended only to secure court access, then Section 16 would say what other clauses say: "courts shall be open" or "the right to sue shall not be denied." They did not. They chose instead the stronger, rights-bearing formulation: "shall have remedy by due course of law" guarantee from Blackstone and Coke. Giving Section 16, anything less than its full historical meaning, dilutes the command and rewrites the Constitution under the guise of interpreting it. *See* Ohio Const., art. I, § 16; Scalia & Garner, *supra* at xxv ("The judge's principal function is to give those texts their fair meaning . . . such distortion of texts that have been adopted by [the people] is undemocratic.").

Here, according to the original meaning set Lord Blackstone and Lord Coke, the remedy in Section 16 is a full and complete remedy. The legislature has no right to impede an Ohioan's right to a full and complete remedy. *Byers,* 84 Ohio St. 408, 422. Again, if the text and original meaning matters, then the understanding of remedy in 1802 of a full remedy must be reinstated. To find otherwise would be to deny the textualist underpinnings of "right to remedy by due course of law."

ii. The argument that Article I, Section 16 does not limit legislative power is flawed.

For the sake of argument, let us presume that Section 16, does not itself afford the "right to remedy by due course of law" or that the phrasing adds no additional rights than the federal constitution. It does not follow, however, that the government—including the General Assembly—is thereby vested with authority to trample such a right. Indeed, the framers of the Ohio Constitution anticipated that future governments might claim power to encroach upon rights not expressly listed.

It is precisely for this reason that Section 20 was adopted: "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." Ohio Const., art. I, § 20. Since the framers ratified Section 20 after Section 16, it must be presumed that the framers ratified it with Section 16 in mind. *See* Scalia & Garner, *supra*, at 167-168, 585-54; Ohio Const., art. I, §§ 16, 20. By plain reading, the power to impair the right to a full remedy at law resides with the people, not the legislature.

> If a state were to adopt a provision in its constitution with an open-ended commitment to unenumerated rights, it would be adopted with two things in mind. First, that constitutional provisions, including provisions in

> declaration of rights, are judicially enforceable and the constitutionality of legislation and other governmental action can be attacked in court. Second, that even when a law is not explicitly in tension with a constitutional provision, the law nevertheless can be declared unconstitutional.

Anthony B. Sanders, *Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why it Matters* 34 (2023).

In fact, Ohio, at the time, had one of the strongest unenumerated rights clauses in the county. *Id.* at 48-49. And this is by no means an understatement. Compare the original "To guard against the transgressions of the high powers, which we have delegated, we declare, that all powers, not hereby delegated, remain with the people" with the one that stands today. *Id.*; Ohio Const., art. I, § 20. Rights are much stronger than powers, but Ohioans had, and still have, both. In fact, the enumeration of powers typically meant the ability to tax, regulate commerce, declare war, etc. David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 Iowa L.Rev. 971, 975 (2024) ("[A] third principle holds that Congress's enumerated powers must not be construed, individually or collectively, as the equivalent of a general police power to legislate on all subjects."). Ohioans' choice to protect the retained rights meant that the government could not infringe on *unenumerated rights*. Sanders, *Baby Ninth Amendments*, at 116. ("Whatever additional rights are given up (if any), however, it seems clear that Locke meant them in a limited context to protect the public, but beyond simple crime fighting and punishment."). So, when reviewing the word "retained" it is clear that Ohioans chose to retain all available rights rather than giving them up. *Id.* at 115. The choice in words, again, matters. Ohioans could have

chosen softer language or, in fact, decided to enumerate on the rights and powers the people wanted and leave the rest up to the government. Except, Ohioans did not do so and kept the rights and powers to themselves.

Ohioans are fortunate enough to have both: rights not spelled out in the text, and powers not afforded government. If the Constitution does not enumerate a full right of remedy by due process of law for Ohioans, that does not mean the State may snatch it away. Quite the opposite. The right remains with the people, and the power to curtail it lies only with them—not with judges, not with legislators, not with bureaucrats.

Chief Justice Moyer articulated the point with clarity:

> I simply cannot accept the notion that the delegates to the 1912 Constitutional Convention intended to, in effect, discard all other provisions of the Ohio Constitution, giving the General Assembly carte blanche to legislate changes in our Constitution without the bothersome process of submitting these matters to a vote of the people. I think it is worthwhile to take a look at just a few of the rights that most citizens take for granted but must now take a back seat to the 'general welfare' clause noted above.

City of Rocky River v. State Emp. Rels. Bd., 43 Ohio St.3d 1, 23 (1989) (Moyer, C.J., dissenting).

Chief Justice Moyer proceeded to recount numerous rights secured by the Ohio Constitution—including, notably, Sections 16 and 20 of Article I. Yet the position advanced by the Attorney General and supporting *amici* would invert that safeguard, granting the legislature carte blanche to alter constitutional guarantees without recourse to the people, thereby rendering Section 20 a nullity and mere surplusage.

This Court further instructs that every constitutional word must be given operative effect and that narrowing "retained rights" to a nullity would violate the surplusage canon and the people's intent. *State ex rel. Myers*, 95 Ohio St. at 373. The interpretation of the text must show "fidelity to the text as it is written," ensuring that "retained rights" are not made subject to legislative override, but preserved as a continuing reservation against government power. DeWine, *supra*, at 4 ("A constitutional provision has the meaning that would have been accessible to a member of the public at the time of its adoption."). Thus, Section 20 operates as a barrier: it prevents both judicial and legislative erosion of the fundamental rights the people kept for themselves at the founding, rights not limited to those listed in the text but secured by the very structure of the Ohio Bill of Rights. *See* Ohio Const., art. I, § 20; *Arnold*, 67 Ohio St.3d 35.

But here is where the real difficulty for a textualist and originalist arises. Faced with these so-called 'baby Ninth Amendments,' judges too often abandoned the text altogether—substituting, not the people's words, but their own musings, their own sentiments, about what their state's Ninth Amendment ought to mean. Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutional Law Before the Civil War*, 68 Mercer L. Rev. 393, 440-441 (2017) ("If early state declarations of rights were not meant to be judicially enforceable, then that would be true for all of a state's bill of rights, not just its Baby Ninth or Lockean Natural Rights Guarantee"). A judge substituting their own individual rationale claiming that ruling the way of the text "would have given judges too much power

and undermine[] popular sovereignty" is, quite literally, the opposite of being a textualist and originalist judge. *Id.* Either apply the text as written—or do not proclaim that the decision will be a textualist one. Fidelity to the words is the very heart of textualism; anything less is, quite simply, not textualism at all.

If the Court is inclined to convert Paganini's as-applied challenge into a facial challenge, then it must find that the caps on damages under Article I, Section 16 is unconstitutional.

II. Paganini Prevails Even on an As-Applied Challenge.

Should the Court keep Paganini's as-applied challenge the same, the question is simple: Does R.C. 2323.43 violate Section 16's Right to Remedy? Likewise, the answer is simple: Yes. When a statute creates "two classifications of tort victims: medical malpractice tort victims and all other tort victims," it unconstitutionally "treats similarly situated people differently based upon an illogical and arbitrary basis." *Sorrell*, 69 Ohio St. 3d at 424-425. While the Appellants may assert that their caps are justified as controlling healthcare costs, as clarified in *Johnson v. BP Chemicals*, the constitutionality of such measures rests not upon their justification but on whether they uphold the rights afforded to injured individuals under the Equal Protection Clause of the Ohio Constitution. *Johnson v. BP Chems., Inc.* 85 Ohio St.3d 298, 303 (1999).

A. The Applicable Constitutional Standard Is Rational-Basis Review.

When reviewing a statute under the "due course of law" provision this Court applies a rational-basis test unless a fundamental right is restricted. *Arbino*, 2007-Ohio-6948, ¶ 49. Under this test, a statute must bear a "real and substantial relation

to the public health, safety, morals, or general welfare," and it must not be "unreasonable or arbitrary." *Brandt v. Pompa*, 2022-Ohio-4525, ¶ 28. As applied to Paganini's case, R.C. 2323.43(A)(3) fails this test.

In *Brandt*, the Ohio Supreme Court elaborated that caps on damages, particularly for catastrophic injuries, must not be arbitrary: "The imposition of statutorily mandated limits on damages fails to adequately address the severity of the injuries sustained, thereby undermining the fundamental right to a remedy as prescribed under Article I, Section 16 of the Ohio Constitution." This principle supports the proposition that R.C. 2323.43(A)(3) inherently violates the constitutional guarantees afforded to grievously injured parties. The *Brandt* decision highlights the deficiencies in applying uniform limits to all damages, regardless of their context. *Id.*

There is a critical distinction between a facial challenge and an as-applied challenge. As this Court has clarified, an "as-applied" challenge alleges that a statute is unconstitutional when applied to a plaintiff under a specific set of circumstances. *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 2016-Ohio-8118, ¶ 20. Paganini's argument is precisely that: the statutory cap, when rigorously applied to his horrific, documented catastrophic injuries—the loss of a bodily organ system and substantial physical deformity—results in an arbitrary and unreasonable outcome, violating his fundamental right to a remedy under the "due course of law" provision of Article I, Section 16 of the Ohio Constitution.

The text of R.C. 2323.43(A)(3) provides a cap of $500,000 for each plaintiff or $1,000,000 for each occurrence if the noneconomic losses are for a "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system" or "permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities." R.C. 2323.43(H)(3) defines "noneconomic loss" broadly, encompassing "pain and suffering, loss of society, consortium, companionship ... disfigurement, mental anguish, and any other intangible loss." The jury found that Paganini suffered a loss of a bodily organ system and a substantial physical deformity. The issue here is not whether Paganini's injuries are catastrophic; the jury said they are. The issue is whether the imposition of any cap, even a higher one, on such injuries within the medical malpractice context can pass constitutional muster as applied to this specific case.

This Court's decisions regarding damages caps provide a clear, bright line. In *Morris v. Savoy*, this Court declared a $200,000 cap on general damages in medical malpractice cases unconstitutional, finding it "irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice." *Morris*, 61 Ohio St.3d at 691. This foundational principle stands: the most grievously injured should not be singled out to bear the burden of a supposed public benefit.

Later, in *Arbino*, this Court upheld the facial constitutionality of R.C. 2315.18, a broader tort reform statute that also caps noneconomic damages. *Arbino*, 2007-

Ohio-6948, ¶ 49. Appellants no doubt cling to *Arbino* as their shield. But *Arbino* is no such defense here; it is the very sword wielded against them. The *Arbino* Court explicitly distinguished the caps it found constitutional from prior, unconstitutional caps by highlighting R.C. 2315.18's exception for catastrophic injuries. The Court reasoned that R.C. 2315.18 "alleviate[d] this concern by allowing for limitless noneconomic damages for those suffering from catastrophic injuries." *Id.* ¶ 60. The very rationale for upholding the general tort cap in *Arbino* was its lack of a cap for catastrophic injuries.

Here, in medical malpractice, R.C. 2323.43(A)(3) does precisely what *Arbino* said was alleviated in R.C. 2315.18—it imposes a "hard limit" even on catastrophic injuries. The trial court, as affirmed by the Court of Appeals, seized upon this distinction with the precision of a surgeon:

"The trial court found that R.C. 2323.43(A)(3) is unreasonable and arbitrary because, as in *Morris*, it imposes "the cost of lowering medical malpractice insurance rates on a small group of individuals with catastrophic physical injuries stemming from medical malpractice . . . ." (Tr. 28, ¶ 59). Indeed, this sound, text-based argument has persuaded the court of appeals for the Tenth District as well as a significant number of courts of common pleas that the cap imposed by R.C. 2323.43(A)(3) violates due process and/or equal protection. *See Lyon v. Riverside Methodist Hosp.*, 2025-Ohio-2991, ¶ 33 & ¶ 43 (collecting cases).

This is not judicial activism; it is textual fidelity. The legislative rationale for tort reform is to stabilize health care costs and lower malpractice insurance rates

(R.C. 2323.43, Editor's Notes). But the application of a cap to those, like Paganini, who suffer loss of a bodily organ and permanent physical deformity, contradicts the legislative compromise celebrated in *Arbino*. The legislative findings themselves fail to show a "real and substantial relationship between the capping of noneconomic damages for catastrophic injuries and malpractice insurance rates." (Tr. 30). Indeed, the Ohio Department of Insurance's own 2019 report, as noted by the Court of Appeals, does not demonstrate how capping catastrophic injuries will impact insurance rates, especially given the rarity of such cases. (Tr. 29-30). This is not just a policy disagreement; it is a factual lacuna that undermines the rational basis for the statute "as applied."

B. Legislative Intent Does Not Substitute for Evidence.

In *Arbino,* this Court determined that the *Morris* Court "found no evidence in the record of that case demonstrating a connection between awards in excess of the statutory limits and rising malpractice-insurance rates." *Arbino*, 2008 Ohio at 434, *citing Morris*, 61 Ohio St.3d at 690 ("We are unable to find, either in the amici briefs or elsewhere, any evidence to buttress the proposition that there is a rational connection.")." The findings illustrated in this case elucidate that legislative aims must align with demonstrated needs as discerned from context and empirical evidence. As it stands, the Appellants' reliance on claimed insurance benefits from R.C. 2323.43(A)(3) collapses under scrutiny, where no evidence demonstrates that capping catastrophic injury damages correlates to an improved malpractice insurance landscape. The Appellants, and their *amici*, argue for a legal regime so deferential to

legislative whim that it would render our state constitution's guarantees a mere illusion.

Here, OAJ and AAJ provide the evidence to "buttress the proposition that there is a rational connection." In 2022, The IZA Institute of Labor Economics ran a study and titled their paper "How Do Insurers Price Medical Malpractice Insurance." Bernard Black, Jeffrey Traczynski & Victoria Udalova, How Do Insurers Price Medical Malpractice Insurance?, IZA Discussion Paper No. 15392 (June 2022) available at (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4151271). The paper "puzzles with regard to the operation of the market for medical malpractice insurance, but does not find convincing answers for them." *Id.* at 1. And as for the legislative rationale—it fares no better.

The fatal defect is in what the researchers delicately call a "puzzle." Once legislatures-imposed damage caps, insurers paid less to victims—no quarrel there, the payouts plummeted. But the miracle of "tort reform" stopped right there. The insurers never passed a dime of those savings on to doctors. Premiums did not go down. The companies simply pocketed the difference. *Id.* at 2. ("Insurers in new-cap states have been able to charge apparently supra-competitive prices for a sustained period, even in markets with a reasonable number of competitors.")

And this wasn't a blip. The study found the same story, across states, across markets: when the caps took hold in the early 2000s, insurer profits shot up—by nearly 50%—and they stayed fat for more than a decade. *Id.* at 24 ("We thus find strong evidence that insurers, through their collective pricing decision, are able to

earn large excess profits in states that adopt damage caps"). The authors expected that in a competitive market, lower costs would mean lower prices. Instead, they found what economists, with characteristic understatement, call "supra-competitive prices"—translation: insurers charging more than any genuine market could justify, and getting away with it year after year. *Id.* at 2

So much for the legislative rationale. It is not merely unproven; it is disproven. Doctors got no relief in premiums. Patients got no relief in healthcare costs. The only relief came for insurers' balance sheets. And the victims? They were doubly punished: stripped of full compensation by artificial caps, while the supposed economic benefits went to line the pockets of the very industry lobbying for "reform." The stated purpose collapses under the weight of its own evidence.

This Court's decision in *Brandt* reinforces this textualist analysis. In Brandt this Court found R.C. 2315.18 unconstitutional as applied to child victims of intentional criminal conduct suffering permanent and severe psychological injuries, precisely because it "fails to include an exception to its compensatory-damages caps for noneconomic loss for plaintiffs who have suffered permanent and severe psychological injuries." *Brandt*, 2022-Ohio-4525, ¶ 46. The Court reasoned that "the rational basis for the statute is eliminated when it excludes those suffering catastrophic psychological injury from the exceptions to the caps." *Id*. The principle is identical here: the rational basis for R.C. 2323.43(A)(3) is eliminated when it imposes any cap on those, like Paganini, who suffer catastrophic physical injuries.

The Appellants' argument is, at its heart, an appeal to policy, divorced from the text of the Constitution as interpreted by this Court. They invite this Court to ignore the very "hard limit" within R.C. 2323.43(A)(3) that differentiates it from the statute upheld in *Arbino*, and from the constitutional standard articulated in *Morris* and *Brandt*. To do so would be to rewrite the very words of the statute and judicial precedent, something a textualist court steadfastly refuses to do. The cap on Paganini's catastrophic damages is not merely a policy choice; it is an arbitrary imposition of costs on the most severely injured, lacking a real and substantial relationship to the asserted public welfare.

The trial court, affirmed by the Court of Appeals, understood this distinction. It saw the text of R.C. 2323.43(A)(3) and accurately determined that, as applied to the extraordinary and catastrophic injuries suffered by Paganini, it runs headlong into the guarantees of Section 16 of the Ohio Constitution.

For these reasons, the trial court's finding that R.C. 2323.43(A)(3) is unconstitutional as applied to Appellee John Paganini should be affirmed.

CONCLUSION

For the foregoing reasons, *amici curiae* the Ohio Association for Justice and the American Association for Justice respectfully request this Honorable Court to affirm the judgment of the Court of Appeals, Eighth Judicial District, in its entirety, upholding the trial court's denial of Appellants' motion for judgment notwithstanding the verdict and alternative motion for a new trial, and affirming the trial court's correct finding that R.C. 2323.43(A)(3) is unconstitutional as applied to Appellee John Paganini.

In the alternative, should the Court convert Appellee John Paganini's as-applied challenge into a facial challenge, *amici* respectfully request this Honorable strike down R.C. 2323.43(A)(3) as violating a plaintiff's "right to remedy by Due Course of Law" and "inviolate right to a trial by jury."

Respectfully submitted,

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Certificate of Service

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