In the
# Supreme Court of Ohio

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

## BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANTS

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## INTRODUCTION

Any decision declaring that the Ohio Constitution overrides validly enacted legislation should account for the Ohio Constitution's original public meaning. The Attorney General files this brief to make four cascading arguments about the Constitution's Article I, Section 16. One, the Ohio Constitution contains no due-process clause that parallels the Fourteenth Amendment's Due Process Clause. Two, Section 16 instead contains a distinct Remedy Clause, which imposes no limits on the General Assembly's substantive lawmaking choices. Three, if the Court continues to treat Ohio's Remedy Clause like the federal Due Process Clause, the Ohio Remedy Clause does not authorize courts to review an economic regulation and enjoin it when it fails—in a court's view—to display a substantial relation to public health, safety, morals, or general welfare. Four, if the Court decides to measure the Medical Non-Economic Damages Cap at issue in this case against the substantial-relation standard, it passes that test.

These arguments begin with a challenge to a century-old assumption: that the Ohio Constitution's Remedy Clause is an analogue to the federal Constitution's Due Process Clause. The text, history, and structure of Ohio's Remedy Clause say otherwise. Yet, the current approach "has become so embedded, so accepted, so fundamental, to everyone's expectations" that a retreat from it would require "readjustments." *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶58. But the Attorney General believes that the original public meaning as reflected in this brief counsels strongly against using the Remedy Clause as the Eighth District did here—to enjoin a statute that

limits non-economic damages in certain tort suits. Enjoining such a statute is plainly inconsistent with the original public meaning of the Clause.

Even without returning the Clause to that original meaning, enjoining the challenged law as the Eighth District did is so far removed from that original meaning that the Court should not indulge the idea that the Clause authorizes the Eighth District's judgment. In other words, while some of the Court's cases have expanded Article I, Section 16 beyond the provision's original meaning, the Court should avoid "taking a further step down this misguided path" even though a better path "would be for this court to do a course correction and return [its] case law to the original meaning." *City of Cleveland v. State*, 2019-Ohio-3820, ¶¶77–78 (DeWine, J., concurring in judgment only).

## STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law officer. R.C. 109.02. To aid the Court in interpreting Ohio's Constitution, he frequently files amicus briefs before this Court in constitutional challenges to Ohio statutes. *See, e.g.*, Br. of Amicus Curiae Dave Yost in *Kennedy v. W. Reserve Senior Care*, No. 2023-372 (Feb. 20, 2024); Br. of Amicus Curiae Dave Yost in *Brandt v. Pompa,* No. 2021-497 (Nov. 23, 2021).

## STATEMENT OF THE CASE AND FACTS

A law added to the Revised Code in 2003 limits non-economic damages in medical-malpractice tort actions to $500,000 for a single plaintiff even when those damages arise from permanent and significant injuries. R.C. 2323.43(A)(3). This brief will refer to that law as the Medical Non-Economic Damages Cap. The Cap became relevant to a medical-malpractice action filed after a cataract surgery led to an

undiagnosed eye infection that eventually cost the patient his eye. *Paganini v. Cataract Eye Ctr. of Cleveland*, 2025-Ohio-275, ¶¶3–9 (8th Dist.). In the resulting trial, the jury awarded nearly $1.5 million in non-economic damages. *Id.* at ¶11. The plaintiff moved the trial judge to include this full amount in the verdict by declaring the Cap unconstitutional under the Ohio Constitution's Article I, Section 16. *Id.* at ¶12. The trial judge granted the motion and entered a verdict for the uncapped amount. *Id.*

On appeal, the Eighth District affirmed. The Eighth District first explained that Article I, Section 16 "is equivalent to the Due Process Clause in the United States Constitution." *Id.* at ¶52. The appeals court then acknowledged that the Cap's constitutionality presented "an issue of first impression." *Id.* at ¶54. The court answered that question, and upheld the trial court's declaration of unconstitutionality, on two grounds. First, the court concluded that "legislative findings" about controlling malpractice-insurance rates did not "demonstrate a real and substantial relationship between the capping of noneconomic damages for catastrophic injuries and malpractice insurance rates." *Id.* at ¶64. Second, the court reasoned that the Cap is "arbitrary and unreasonable" because it imposes the cost of the collective benefit—lower malpractice rates—on the most severely injured. *Id.* at ¶¶65–66.

This Court then accepted review of the medical providers' discretionary appeal.

## ARGUMENT

**Appellants' Proposition of Law:**

> *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, Section 16 of the Ohio Constitution and is, therefore, constitutional.*[1]

This brief makes four interlocking points. First, the Ohio Constitution contains no equivalent to the Fourteenth Amendment's Due Process Clause. Second, the Ohio Constitution instead contains a Remedy Clause aimed at courts, not the legislature. Third, if the Remedy Clause is treated as a Fourteenth Amendment equivalent, it contains no warrant for searching judicial review of the substance of economic legislation. Fourth, if the Clause contains such a substantive limit on legislative policy-making, it contains no substantive prohibition on the General Assembly passing a statute that limits damage remedies. That means the Medical Non-Economic Damages Cap easily survives a constitutional challenge even under the existing framework for Section 16 challenges.

Before stepping back to first principles, one preliminary note. The challenge to the Medical Non-Economic Damages Cap—R.C. 2323.43(A)(3)—in this case involves only Article I, Section 16. The Court need not, and should not, consider whether similar arguments against the statute might be raised under, for example, Article I, Section 1. *Compare, e.g.*, *State v. Williams*, 88 Ohio St. 3d 513, 524 (2000) (Article I, Section 1 not "self-executing"), *with e.g., In re Jones*, 2018-Ohio-4182, ¶¶36–39

[1] This brief reproduces the Appellants' proposition of law. *See* Rules 16.06(A); 16.02(B)(4). The quotation marks preceding the statutory cite are emphasis, not quotations from the cited statute.

(DeWine, J., concurring in judgment only) (suggesting that a court rule runs afoul of Article I, Section 1). For now, because "it is not necessary to decide more, it is necessary not to decide more." *AJZ's Hauling, L.L.C. v. TruNorth Warranty Programs of N. Am.*, 2023-Ohio-3097, ¶22 (quotation omitted).

## I. The Ohio Constitution's Article I, Section 16 contains no due-process clause.

Section 16's remedy language, properly understood, is directed at court processes for resolving private wrongs, not government-initiated deprivations. It is therefore not merely a differently worded Due Process Clause. Text, history, and structure show why.

**Text.** Start with the text. As relevant here, the Clause says: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const. art. I, §16. On its face, this language focuses on the procedures available in courts for existing causes of action—the language does not confer any right to particular substantive law by restraining the General Assembly. The Section preserves equal access and equal treatment in the courts, it "does not provide for remedies without limitation" or "prevent the General Assembly from defining a cause of action." *Ruther v. Kaiser*, 2012-Ohio-5686, ¶12; *see also Antoon v. Cleveland Clinic Found.,* 2016-Ohio-7432, ¶¶27–29.

Compare this court-focused text with the person-focused language of the Fourteenth Amendment's Due Process Clause. The Due Process Clause directs that no state actor shall "deprive any person of life, liberty, or property, without due process

of law." U.S. Const., amend. XIV, §1. In contrast, Section 16 "does not speak to 'due process' at all but, rather, to an individual's right to access the court system and to seek a remedy." *Stolz v. J&B Steel Erectors*, 2018-Ohio-5088, ¶12. Section 16 (minus the 1912 addition not relevant here) includes two "concepts, namely, (1) that the courts shall remain open; [and] (2) that all persons shall have remedy for the redress of grievances." *State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶37. While Section 16 addresses court processes for resolving private wrongs, the Fourteenth Amendment's Due Process Clause addresses the process that must accompany the government dispossessing its citizens of core rights. So, Section 16's text is not merely a synonym for due process.

**History.** What the text suggests, the history reifies. The pre-ratification history of Section 16 starts in the thirteenth century. The Section "derives ultimately" from Magna Carta. David Schuman, *The Right to Remedy*, 65 Temple L. Rev. 1197, 1199 (1992); *see also* Note, Garrett v. Sandusky: *Justice Pfeifer's Fight for Full & Fair Legal Redress: Does Sovereign Immunity Violate Ohio's "Open Court" Provision?*, 27 U. Tol. L. Rev. 729, 740–41 (1996) (tracing Ohio's Clause to Magna Carta). King John of England ran a system of justice for sale. The more a litigant paid, the quicker and more favorable the outcome. Schuman, *Right to Remedy*, 65 Temple L. Rev. at 1199. These and other abuses led feudal barons to force King John to sign Magna Carta in 1215. *See* A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 6–7 (1968). Magna Carta's Clause 40, in language framed as a promise from the King, instructed courts to stop selling writs: "We will not sell, or

deny, or delay right or justice to anyone." The 1215 Magna Carta: Clause 40, *The Magna Carta Project*, trans. H. Summerson et al., https://perma.cc/A9PG-D2Z3.

Interpretations of Clause 40 by two of England's leading legal scholars set up the background for the Clause's trip across the Atlantic. In the seventeenth century, Lord Edward Coke explained the effect of Clause 40 in words reminiscent of Ohio's Section 16: "[E]very subject of this realm, for injury done to him in *bonis*, *terris*, *vel persona* [in person, land, or goods], by any other subject … may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 55 (E. & R. Brooks 1797) (spelling modernized). Eighteenth-century scholar Sir William Blackstone also interpreted Clause 40 as speaking to the processes of courts. Clause 40, he said, protected the "right ... of applying to the courts of justice for redress of injuries." 1 William Blackstone, *Commentaries on the Law of England* 137 (1765) (spelling modernized). According to Blackstone, the guarantee made sure that "courts of justice must at all times be open to the subject, and the law be duly administered therein." *Id.* (spelling modernized). Coke's and Blackstone's interpretations of Clause 40 made their way into several early state constitutions, as both writers' works had "considerable influence" on the founding generation. *Reid v. Covert*, 354 U.S. 1, 26 (1957); *see also Payton v. New York*, 445 U.S. 573, 594 & n.36 (1980); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring); Jonathan M. Hoffman, *By The Course Of The Law: The Origins of Open Courts Clause of State Constitutions*, 74 Or. L. Rev.

1279, 1287 (1995). When Clause 40's language showed up in Ohio's first Constitution, it carried along these interpretations from legal scholars that all early-nineteenth century lawyers would have been familiar with.

Contrast this history with the history of due-process clauses. They too begin in Runnymede. Due-process clauses, though, were inspired by a different part of Magna Carta: Clause 39. That clause stated that no "free man" could be "arrested, or imprisoned, or disseised, or outlawed, or exiled" except "by the law of the land." 1215 Magna Carta: Clause 39, *The Magna Carta Project*. It is that guarantee, that no one would be deprived of liberty or property except by the "law of the land," that precipitated today's due-process clauses. Sir Edward Coke equated the two clauses in his exposition of Magna Carta, when he described the "true sense" of the phrase "law of the land" to mean "due process." 1 *Institutes*, at 50. William Blackstone followed this lead and equated the two phrases. 1 *Commentaries*, at 129–30 (1765); *see also Horton v. Or. Health and Science Univ.*, 359 Ore. 168, 198–99 (2016) (detailing how Coke's writing distinguished law-of-the-land protections from right-to-remedy protections).

From those influential English writers, due-process or law-of-the-land clauses made their way to the federal and state constitutions. *See, e.g.*, *Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 276 (1855); *Haslip*, 499 U.S. at 29 (Scalia, J., concurring); Hans A. Linde, *Without "Due Process,"* 49 Or. L. Rev. 125, 137–38 (1970); Kentucky Const. art. XII, §10 (1792); Tennessee Const. art. XI, §8 (1796); *but see, e.g.*, Max Crema and Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 448, 461–66 (2022) (arguing that

due process, law of the land, and due course of law had distinct meanings in pre-founding law).

**Structure.** The different origins and histories of remedy clauses and due-process clauses show up in the colonial and early-state fundamental charters that precede Ohio's first Constitution.

In light of their different histories and purposes, many States included both a remedy clause and a separate due-process clause when drafting their own constitutions. For example, Kentucky's 1792 Constitution, in Article XII, Section 13 includes language nearly identical to Ohio's later-adopted Article I, Section 16. "That all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered, without sale, denial, or delay." Kentucky Const. art. XII, §13 (1792). But the Kentucky Constitution also included a due-process or law-of-the-land clause for criminal trials. It read, "… nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land." *Id.* art. XII, §10. This same pattern of pairing a remedy clause with a separate law-of-the-land clause also shows up in, for example, Tennessee's 1796 Constitution, Maryland's 1776 Declaration of Rights, North Carolina's 1776 Declaration of Rights, and Pennsylvania's founding documents. *See* Tennessee Const. art. XI, §§8, 17 (1796); Maryland Declaration of Rights, §§17, 21 (1776); North Carolina Declaration of Rights, §§12, 13 (1776); Pennsylvania's Declaration of Rights §IX (1776); Pennsylvania Plan or Frame of Government §26 (1776); *see also An Ordinance for the Government of the Territory*

*of the United States North-West of the River Ohio*, art. 2 (1787) ("[N]o man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land[.]").

The Tennessee Constitution and Northwest Ordinance are especially notable. Tennessee's Constitution served as the model for many Ohio provisions, including 10 of the 28 provisions in the Ohio Bill of Rights (then Article VIII, now Article I). *See* Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 24 (2d ed. 2022); *accord* Julia Perkins Cutler, *The Life and Times of Ephraim Cutler* 69 (Robert Clarke & Co. 1890) (noting Tennessee influence) (Cutler was a delegate to the 1802 convention; this work reproduces his letters and journal). And the Northwest Ordinance is notable because it is the document that governed Ohio pre-statehood. *See Norwood v. Horney,* 2006-Ohio-3799, ¶41 (linking Ohio constitutional guarantee to Northwest Ordinance).

With those documents as backdrop, the 1802 framers' omission of a readymade clause that they "could have" included shows that Ohio's Constitution lacks a due-process clause like the federal and many state constitutions. *See, e.g.*, *McKee v. City of Akron*, 176 Ohio St. 282, 284 (1964), *overruled on other grounds by Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26 (1982); *DeRolph v. State*, 78 Ohio St. 3d 193, 275 (1997) (Moyer, C.J., dissenting).

The choice of Ohio's founders to omit a law-of-the land or due-process clause did not herald a shift in thinking starting in 1802. Many later constitutions—unlike Ohio's—contain both. *See, e.g.*, Montana Const. art. II, §§16, 17; Nebraska Const. art.

I, §§3, 13; Oklahoma Const. art. II, §§6, 7; Texas Const. art. I, §§13, 19; Utah Const. art. I, §§7, 11. In at least two of these states, the highest court has drawn the obvious inference: importing due-process or law-of-the-land principles into a right-to-remedy clause would leave the remedy clause "redundant and mere surplusage," *Laney v. Fairview City*, 2002 UT 79, ¶37 (Utah 2002), because the two clauses "serve different purposes," *LeCroy v. Hanlon*, 713 S.W.2d 335, 340 (Tex. 1986). On the flip side, Oregon, inspired in part by Ohio's 1802 Constitution, contains only a right-to-remedy clause and lacks a due-process clause. *See* Oregon Const., art. I, §10; *see also* Linde, *Without "Due Process,"* 49 Or. L. Rev at 137–38. The Oregon Supreme Court has held that the Oregon Constitution's guarantee of a right to a remedy "is neither in text nor in historical function the equivalent of a due process clause." *Cole v. State*, 294 Ore. 188, 191 (1982) (Linde, J.); *see also Cole v. Driver & Motor Vehicle Servs. Branch*, 336 Ore. 565, 588 (2004) (citing only federal constitution when holding procedure violated due process); *but see Hudgins v. McAtee*, 596 N.E.2d 286, 289 (Ind. Ct. App. 1992) (interpreting the Indiana Constitution's right-to-remedy clause as coextensive with the Fourteenth Amendment's Due Process Clause).

All told, Ohio never included, and does not now have, a clause with text or history that parallels the Fourteenth Amendment's Due Process Clause. Instead, the due-process protections in the Ohio Constitution stem from the detailed protections for criminal trials in Article I, Section 10. As far as original meaning goes, that should end the matter and require reversing a judgment that rests on the idea that Ohio's

Constitution includes a prohibition on legislation that parallels the Fourteenth Amendment.

As the next discussion shows, ruling on that basis is not the only path to reversing here.

## II. Section 16 imposes no substantive check on the General Assembly's policy choices.

The comparative text, history, and structure recounted in part I shows that Ohio's framers did not include a catch-all due-process clause in addition to the specific guarantees in Article I, Section 10. The isolated text, history, and structure of Section 16 itself further show that it imposes no substantive limits on the General Assembly, as the Clause is aimed at courts, not legislatures.

**Text.** Section 16 speaks to process "by due course of law," not substantive policy set in the legislature. Const. art. I, §16. That language addresses "an individual's right to access the court system and to seek a remedy," not some substantive limit on lawmaking. *See Stolz*, 2018-Ohio-5088 at ¶12 *see also Ruther*, 2012-Ohio-5686 at ¶12; *Antoon,* 2016-Ohio-7432 at ¶¶27–29; *Horton*, 359 Ore. at 280 (Landau, J., concurring).

**History.** The Section's history aligns with the language. Recall that this language begins in Clause 40 of the Magna Carta. *Above* at 7. From the thirteenth century onward, that language did not limit Parliament's ability to enact substantive law. Rather, "[t]here is little dispute that Chapter 40 of Magna Carta was intended to restore the integrity of the courts by curtailing the selling of writs." Hoffman, *By the Course of the Law*, 74 Or. L. Rev. at 1286.

Return to the writing of Coke and Blackstone. Both scholars read Clause 40 as directed at process in courts not substance in legislatures. That is no surprise. Courts during the lives of Coke and Blackstone did not possess the power to review Parliament's enactments as substantively contrary to Magna Carta. The idea that Clause 40 bound only the judiciary was therefore inherent in Coke's and Blackstone's interpretations. Their writings bear out that they viewed Magna Carta as a check only on the Crown and its courts—*not* as a check on Parliament. In Coke's view, Parliament's power was "transcendent and absolute" and "[could] not be confined." Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 36 (W. Clarke & Sons 1809). Blackstone likewise "kn[e]w of no power that can control" Parliament, even if it enacts a law that is "unreasonable." *Commentaries*, at 91.

When Clause 40's thirteenth-century language took root in the colonies (and later, the States), it retained the meaning that these widely read English commentators ascribed to it. As mentioned above, Tennessee adopted this language in its first Constitution, and that document heavily influenced Ohio's 1802 Constitution. According to the Tennessee Supreme Court, the remedy language in that State's founding charter serves as "a mandate to the judiciary and not as a limitation upon the legislature." *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978); *Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1920).

Other States have similarly read their similar clauses as placing no brakes on legislative policymaking. The Montana Supreme Court has held that its remedy clause is "aimed at the judiciary, not the legislature." *Meech v. Hillhaven W., Inc.*,

238 Mont. 21, 30, 34–35, 40 (1989). The North Carolina Supreme Court has said that North Carolina's remedy clause, which is nearly identical to Ohio's, does not interfere with legislative "power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 444 (1983). And a concurring Justice of the Oregon Supreme Court, after surveying the historical evidence, concluded "[n]othing in the wording of" the Oregon Constitution's remedy clause "suggests that its purpose is to constrain the otherwise plenary authority of the legislature." *Horton*, 359 Ore. at 262 (Landau, J., concurring).

These courts' conclusions align with what Ohio history reveals about Section 16. Start in 1802. Direct evidence about the 1802 Constitution is almost nonexistent. *See* G. Alan Tarr, The Ohio Constitution of 1802: An Introduction 1 (2000), https://perma.cc/F7SJ-H5W2. Instead, the journal of that convention records only votes and a handful of proposed revisions to the text. *See Journal of the Convention of the Territory of the United States North West of the Ohio* (G. Nashee 1827). Even so, two contemporaneous clues indicate that Section 16 does not restrict legislative power to set substantive policy.

First, the 1802 Constitution reflected "the understanding that state legislative power [was] plenary." Tarr, The Ohio Constitution of 1802, at 2. What is more, and unlike almost all other contemporary state constitutions, Ohio's 1802 founding document gave the governor no veto power. *Id.* at 3. The power of the General Assembly under the 1802 Constitution was thus nearly unlimited and included the power to

appoint Supreme Court justices. Randolph C. Downes, *Ohio's Second Constitution*, 25 NW. Ohio Q. 71, 72 (Spring 1953); *see also* 11 Ohio Constitutional Revision Commission, *Final Report* 483–84 (June 30, 1977), https://perma.cc/MM49-2YZW. Indeed, this "excessive power given to the legislature" in 1802 was a motivating force behind the vote for the constitutional convention in 1850. Downes, *Ohio's Second Constitution*, at 72. As all this shows, the drafters of the 1802 Constitution intended to create a powerful legislature subject to very few checks. If they had wanted to check that broad power, they would have done so clearly—constitutions tend not to "hide elephants in mouseholes." *Cal. Redev. Ass'n. v. Matosantos*, 53 Cal. 4th 231, 260 (2011) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). And, given the just-discussed history, Section 16's language would have been an awfully obscure way of creating a critically important check on the legislature.

Consistent with that insight, the early General Assembly did not understand Section 16 as curtailing its power to limit or abolish causes of action, let alone curtail remedies. In 1805, the Third General Assembly passed a statute providing that "the common law of England" and "all statutes or acts of the British parliament" would form the substantive law of Ohio "*until repealed* by the general assembly of this state." 3 Ohio Laws 248 (Feb. 14, 1805) (emphasis added). Thus, just three years after Ohio adopted the language that is now Section 16, the General Assembly recognized its broad authority to define what injuries Ohio law recognizes—an authority that permitted it to contradict the received common law. An act passed by an early legislature "is contemporaneous and weighty evidence of" a Constitution's "true

meaning." *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (citation omitted); *see also Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014); *Myers v. United States*, 272 U.S. 52, 175 (1926) (collecting cases). So this early statute sheds strong light on the meaning of the remedy language as originally understood.

Later history confirms that Section 16 does not restrict legislative power to cap damages for a cause of action. Consider, for example, evidence from the 1851 constitutional convention. The framers of Ohio's second constitution substantively discussed the clause only twice. Both discussions involved *the judiciary's* inability to administer justice without delay; neither discussion addressed the General Assembly's power to define substantive law. 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850–51 337, 365 (Jan. 16 & 21, 1851) (S. Medary 1851). Certainly nothing in the record of the 1851 convention suggests that the framers understood themselves to be changing the Section's meaning from the historical meaning outlined above. To the contrary, they treated it as an afterthought—the committee assigned to study the bill of rights initially omitted it from its draft. *Id.*

Section 16 received scarcely more attention during the debates over the never-adopted 1874 Constitution. It came up during discussions about a backlog of cases at this Court. During that discussion, a delegate invoked the clause as a promise observed in the breach—he said *courts* (rather than the legislature) were failing to live up to their obligation, imposed by Section 16, to efficiently disburse justice. 1 Official Report of the Proceedings and Debates of the Third Constitutional

Convention of Ohio 756–57 (July 16, 1873) (W.S. Robison & Co. 1873). Another delegate cited the clause during debates about how to divide the common-pleas jurisdictions across the state. *Id*. at 951–52 (July 22, 1873). Again, the reference had nothing to do with limiting legislative power; and again, the delegate treated the clause as bearing on the efficiency of courts.

Ohio's most recent constitutional convention in 1912 likewise contained little discussion about the remedy language. The focus, instead, was on adding a clause to Section 16 that would authorize suits against the State. 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio 1432 (Apr. 29, 1912) (F.J. Heer Printing Co. 1913).

**Structure.** The Ohio's Constitution's structure is further evidence that Section 16 does not limit the General Assembly's power to cap damages. "What history suggests, the structure of the Constitution confirms." *Sessions v. Dimaya*, 584 U.S. 148, 180 (2018) (Gorsuch, J., concurring in part and in the judgment). The Constitution's structure matters because courts must "give a construction to the Constitution as will make it consistent with itself, and will harmonize and give effect to all its various provisions." *Smith v. Leis*, 2005-Ohio-5125 ¶59 (quotation omitted). The structure of Ohio's Constitution belies reading more into the remedy language than a command about court process.

One structural clue comes from a clause specifically about damages available in tort cases. Section 19a in the Bill of Rights prohibits the General Assembly from "limit[ing]" the "amount of damages recoverable" for wrongful death. Const. art. I,

§19a. That language prohibits the General Assembly from reducing the "amount of recovery" available in wrongful-death suits. *Kennedy v. Byers*, 107 Ohio St. 90, 96 (1923). This more-specific guarantee would be unnecessary if the more-general remedy language in Section 16 blocked the General Assembly from adjusting the amount of damages available in any tort action. In other words, reading Section 16 as an all-purpose clause about damage limits makes Section 19a impermissibly superfluous. *Cf. State v. Anderson*, 2016-Ohio-5791, ¶26 (plurality op.).

Another structural clue is found in the broad constitutional arrangement of separated powers in the Constitution. A clause that empowered the judiciary to second guess economic legislation would "alter which branch of government has the final say on economic policy decisions." Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 Albany L. Rev. 1449, 1493 (2019). But this branch is not supposed to have the final say on such matters.

*

At bottom, nothing in the Ohio Constitution's text, history, or structure supports reading Section 16 as a limit on the General Assembly's substantive power to cap damages for a cause of action. That is not to say, though, that Section 16 lacks force. Adhering to the Section's original meaning still gives it effect. Take two examples. This Court cited Section 16 to invalidate a prison regulation that interfered with inmates' access to their lawyers. Such a provision, this Court held, keeps inmates from exercising their right of access to the courts. *Thomas v. Mills*, 117 Ohio St. 114, 120

(1927). And an appeals court held that a trial court violated Section 16 by citing America's war with Germany as an excuse for repeatedly continuing a German citizen's case. *Leiberg v. Vitangeli*, 70 Ohio App. 479, 486 (5th Dist. 1942). That delay violated Section 16 by blocking a litigant from litigating an established cause of action.

## III. Even if Section 16 functions like a Due Process Clause, it does not restrict the General Assembly's substantive policy choices.

If the "due course of law" language in Section 16 functions like a due-process clause at all, it should not be read to impose *substantive* restrictions on the General Assembly's lawmaking rather than limits on the *procedure* that laws may interpose between a person's liberty or property and the government's deprivation of such interests. Normally, the legislative process *is* due process: when the General Assembly "passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process." *In re D.R.*, 2022-Ohio-4493, ¶56 (DeWine, J., dissenting) (quotation omitted). But laws that enact procedures may transgress due-process guarantees if those procedures—not their substance—afford inadequate protections against erroneous loss of liberty or property. *See, e.g.*, *State v. Cowan*, 2004-Ohio-4777, ¶¶11–12, *State v. Hochhausler*, 76 Ohio St. 3d 455, 468 (1996); *Bell v. Burson*, 402 U.S. 535, 542–43 (1971). Even if Ohio's "due course" language is read to mimic due-process protections, it should not be read to impose any restrictions on legislation's *substantive content*.

As detailed above, looking to either the comparative or absolute, text, history, and structure of Section 16 reveals that it is not a due-process clause that imposes

substantive limits on the General Assembly's policy choices. So what is the source of this Court's cases subjecting laws to substantive judicial second guessing? The answer is a long history of reading Section 16 to mimic the Fourteenth Amendment's Due Process Clause. But although this Court has long joined at the hip Ohio Section 16 with the dissimilar Fourteenth Amendment, it should kick the habit. It should do so for two reasons.

**Federal atextualism.** First, this Court should stop linking Ohio's Section 16 to the U.S. Supreme Court's substantive-due-process cases because those cases do not reflect the Fourteenth Amendment's original public meaning. As an original matter, substantive due process "is a legal fiction," *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment), that "lacks any basis in the Constitution." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 331 (2022) (Thomas, J., concurring) (alteration and quotation omitted). Reading a provision "that guarantees only 'process' before a person is deprived of life, liberty, or property" as defining "the substance of those rights strains credulity for even the most casual user of words." *McDonald*, 561 U.S. at 811 (Thomas, J., concurring in part and concurring in judgment). Ultimately, "substantive due process exalts judges at the expense of the People from whom they derive their authority," "distorts other areas of constitutional law," and "is often wielded to disastrous ends" such as justifying slavery. *Dobbs*, 597 U.S. at 333–36 (Thomas, J., concurring) (quotation omitted); Edward C. Corwin, *The Doctrine of Due Process Before the Civil War*, 24 Harv. L. Rev. 366, 370–71 (1911) (offering reasons to doubt that early state due-

process and law-of-the-land clauses imposed "any limitation on legislative power"). Put another way, the Fourteenth Amendment's Due Process Clause is not "a secret repository of substantive guarantees against 'unfairness.'" *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 598–99 (1996) (Scalia, J., dissenting).

At bottom, substantive-due-process holdings have never been a faithful interpretation of the Fourteenth Amendment's text. This Court should cease following the U.S. Supreme Court's non-textual substantive-due-process cases when applying the Ohio Constitution.

**Lockstepping frozen in time.** The Court should also abandon its lockstep approach to substantive due process because it is not faithfully following U.S. Supreme Court precedent anyway. Since at least 1886, this Court has read the "due course of law" phrase in Section 16 as equivalent to the Fourteenth Amendment's Due Process Clause. *See Adler v. Whitbeck*, 44 Ohio St. 539, 568–69 (1886). In that decision, the Court declared that "'[d]ue course' and 'due process of law' is one and the same thing," and did "not feel required to enter upon any extended discussion of this important constitutional guaranty." *Id.* at 569. Much has changed in Fourteenth Amendment doctrine since *Adler*. So much so that what this Court does today when conducting substantive-due-process review of statutes is best described as lockstep-and-forget. To see why, return to the nineteenth century.

After the Fourteenth Amendment's ratification in 1868, that provision "came for the first time before [the Supreme Court] for construction" in what are now called the *Slaughter-House Cases*. *See Butchers' Union Slaughter-House & Live-Stock Landing*

*Co. v. Crescent Slaughter-House Co.*, 111 U.S. 746, 747 (1884). Those cases challenged, on numerous grounds, a Louisiana law that granted a monopoly to a single slaughterhouse company. The Court upheld that law, including under the new Fourteenth Amendment's Due Process Clause. *Slaughter-House Cases*, 83 U.S. 36, 80 (1872). In doing so, however, the Court described what it called the State's "police power" and suggested that it had "limits." *Id.* at 62. Justice Field, in an influential dissent, similarly described the police power as something that could not "encroach upon any of the just rights of the citizen." *Id.* at 87 (Field, J., dissenting).

In later cases, even when the Court upheld state laws, it firmed up the idea that the Due Process Clause placed a substantive check on legislating. For example, while upholding a Kansas law restricting liquor production, the Court commented that not "every statute enacted ostensibly for the promotion of" the public welfare "is to be accepted as a legitimate exertion of the police powers of the state," because the Due Process Clause imposes "limits beyond which legislation cannot rightfully go." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). Similarly, when the Court upheld a Massachusetts law mandating a vaccine, the Court noted that the result would be different "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law" because the Court would instead have a "duty" to "give effect to the Constitution." *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905); *see also Welch v.*

*Swasey*, 214 U.S. 91, 105 (1909) (collecting cases); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 530–31 (1917) (same).

Eventually, of course, the Court used this formulation to enjoin state laws. Perhaps most famously, the Court did so by enjoining a New York law regulating work hours. *See Lochner v. New York*, 198 U.S. 45 (1905). But there are several similar cases in the early twentieth century. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915); *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

For its part, this Court picked up the language and lesson of these cases. *See, e.g.*, *State ex rel. Bowman v. Bd. of Com'rs of Allen Cnty.*, 124 Ohio St. 174, 200–01 (1931) (citing *Jacobson*); *State Bd. of Health v. City of Greenville*, 86 Ohio St. 1, 21–24 (1912) (citing *Jacobson*); *City of Dayton v. S.S. Kresge Co.*, 114 Ohio St. 624, 629 (1926) (citing *Cusak*); *City of Piqua v. Zimmerlin*, 35 Ohio St. 507, 511 (1880). While the earlier Ohio cases, as in the federal experience, tended to uphold laws under these substantive-due-process challenges, in later cases this Court did invalidate laws by wielding the doctrine. *See, e.g.*, *Direct Plumbing Supply Co. v. City of Dayton*, 138 Ohio St. 540, 545, 548 (1941); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 537, 543 (1943).

Famously, the Supreme Court overruled its *Lochner*-era substantive-due-process cases. The doctrinal change was perhaps most succinctly anticipated and captured by Justice Holmes's earlier dissents, including his statement that "[t]he criterion of constitutionality is not whether we believe the law to be for the public good." *Adkins v. Children's Hosp.*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting). Today, the

"freewheeling judicial policymaking that characterized" these decisions has been "discredited" as untethered from the Fourteenth Amendment. *Dobbs*, 597 U.S. at 240; *see W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937); *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (collecting cases). In fact, by one scholar's count, the U.S. Supreme Court has not invalidated a single economic regulation as irrational under the substantive Due Process Clause since the 1930s. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 641 (4th ed. 2011). Today, that era of judicial regency is usually described "deprecatingly." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (plurality op.). And Ohio's neighbor to the north specifically invoked the errors of that era when it upheld a damages cap, explaining that it was "unwilling" to "usher in a new *Lochner* era." *Phillips v. Mirac, Inc.*, 470 Mich. 415, 437–38 (2004) (citation omitted).

Although the U.S. Supreme Court abandoned its police-power inquiry into statutes' public-welfare bona fides almost 90 years ago, this Court has never fully discarded the language from that bygone era where judges acted like boards of review for economic legislation. As recently as 2022, this Court described its substantive-due-process task as deciding whether economic legislation "bears a real and substantial relation to the public health, safety, morals or general welfare of the public and … is not unreasonable or arbitrary." *Brandt v. Pompa*, 2022-Ohio-4525, ¶28; *see also, e.g.*, *Mayer v. Bristow*, 91 Ohio St. 3d 3, 13 (2000); *but see Stolz*, 2018-Ohio-5088, ¶19 (asking only whether statute is "rationally related to a legitimate government interest"); *Ferguson v. State*, 2017-Ohio-7844, ¶31 (same).

The Court should definitively abandon the "substantial relation" test because it installs judges as self-appointed legislatures to engage in policy-based and standard-less review of valid legislation. That approach flatly conflicts with the Constitution assigning the "legislative power," all of it, to the General Assembly. Const. art. II, §1. As this Court has said, over and over, that text gives the General Assembly "plenary power to enact legislation." *Schaad v. Alder*, 2024-Ohio-525, ¶14 (quotation omitted); *City of Toledo v. State*, 2018-Ohio-2358, ¶17; *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶128 (Cupp, J., concurring). "Whatever limitation is placed upon the plenary grant of legislative power must be found in a clear prohibition by the Constitution. … The legislative power is generally deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the Constitution in reference to the subject-matter in question." *Ostrander v. Preece*, 129 Ohio St. 625, 629 (1935) (quotation omitted).

A judicially wielded "police power" veto on legislation cannot be squared with the General Assembly's plenary power. "'Police power' is not a constitutional term. There can be no such thing as a state law 'exceeding the police power.'" Linde, *Without "Due Process,"* 49 Or. L. Rev at 149 (italics deleted). Any police-power limit on state legislation "would not derive from due process." Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 879–81 (2020). The Court should cease using the non-constitutional term "police power" to police the General Assembly's policy choices. It should abandon that approach no matter which of the two rubrics it follows.

Start with path one. Abandoning this police-power review is compelled by an original-public-meaning approach to the Ohio Constitution. As the above discussion shows, nothing in the text, history, or structure of Section 16 justifies a police-power review over valid legislation. The Court should be "reluctant to read substantive-due-process-type concepts into the Ohio Constitution." *State v. Aalim*, 2017-Ohio-2956, ¶48, (DeWine, J., concurring).

Turn to path two. If the Court continues to treat "[d]ecisions of the federal Supreme Court … as giving the true meaning of the guaranties of the Ohio Bill of Rights," *Direct Plumbing*, 138 Ohio St. at 545, it should align this Court's precedent with the Supreme Court's and replace "police power" review with the rational-basis review that Court performs. *See, e.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 492 (2019); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955).

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When this Court locksteps with the U.S. Supreme Court, it ignores "the plain language of our state Constitution and its unique history and tradition and hook[s] our wagon to the United States Supreme Court, come what may." *Bloom*, 2024-Ohio-5029 at ¶21. But when the Court locksteps, and then locks down, doctrine that the U.S. Supreme Court disavows, the Court doubly errs. The Court should use this case to return the Court to first principles, even if it takes only the first step in that direction. What the Court should not do is continue linking its substantive-due-process cases to the discredited *Lochner* line of cases. That is surely "lockstepping at its most ill-considered." *Id.* at ¶23.

## IV. Even if the Due Course of Law Clause requires testing legislation for a "substantial relation" to public welfare, R.C. 2323.43(A)(3) passes that exam.

If the Court declines to take the approaches above, it still must confront whether the Medical Non-Economic Damages Cap is constitutional. The statute is constitutional whether the Court follows the U.S. Supreme Court precisely or continues its current frozen-lockstep approach.

**Directly applying U.S. Supreme Court Precedent.** Following U.S. Supreme Court precedent makes the specific question here quite easy. In several cases, the Supreme Court has indulged "forays into the domain of state tort law under the banner of substantive due process," *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 523 (2008) (Ginsburg, J., concurring in part and dissenting in part), by limiting tort awards, *see, e.g.*, *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408, 418–428 (2003); *BMW,* 517 U.S. at 574–85. If the Due Process Clause contains substantive rights at all, those rights—according to the U.S. Supreme Court—run in favor of *defendants* to limit total tort recovery. If those cases are right, "substantive due process" does not impose goldilocks precision on legislatures such that uncapped tort awards are unconstitutional at the same time that capped tort awards are too. In no way, then, can the "[d]ecisions of the federal Supreme Court," *Direct Plumbing*, 138 Ohio St. at 545, support a due-process right to unlimited tort recovery.

**Lockstep frozen in time.** If the Court instead maintains its commitment to following the left-behind *Lochner*-era U.S. Supreme Court precedent, it should uphold the Medical Non-Economic Damages Cap against a substantive-due-process challenge. This Court's substantive-due-process cases frame the "rational-basis test" as

whether the Statute "[1] bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] … is not unreasonable or arbitrary." *Arbino*, 2007-Ohio-6948 at ¶49 (quotation omitted; brackets in original). That standard ensures that courts' "ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases." *Yajnik v. Akron Dep't of Health, Hous. Div.*, 2004-Ohio-357, ¶16.

Even this standard gives legislatures a long leash. The list of laws that pass this test is nearly endless. It is rational, for example, to impose a tax on income, even when the earner cannot vote on that tax. *Desenco, Inc. v. Akron*, 84 Ohio St. 3d 535, 545 (1999). It is rational to insulate municipalities from tort liability to avoid a drain on municipal resources, even when municipalities cause injury. *Fabrey v. McDonald Vill. Police Dep't*, 70 Ohio St. 3d 351, 354 (1994). It is rational to limit pit-bull ownership because some owners of that breed are irresponsible. *Toledo v. Tellings*, 2007-Ohio-3724, ¶¶25–26, 33. And it is rational to ban pinball machines because they promote gambling and loitering. *Benjamin v. City of Columbus*, 167 Ohio St. 103, 108, 115–16 (1957).

By comparison, the Medical Non-Economic Damages Cap easily survives. This Court has already twice concluded that statutes limiting non-economic damages rationally advance state interests, such as "economic concerns" about large awards dampening business investment and the "inherently subjective" nature of such awards. *Arbino*, 2007-Ohio-6948 at ¶54; *id.* at ¶¶55–62; *Simpkins v. Grace Brethren Church*, 2016-Ohio-8118, ¶38 (lead op.).

These concerns about non-economic damages are well grounded. Courts recognize that non-economic damages are, "[o]f course … notoriously difficult to quantify." *Leininger v. United States*, 499 F. Supp. 3d 973, 997 (D. Kan. 2020). For their part, anthropologists observe that attitudes about suffering range from the view that it is a way in which victims "pass from a worse to a better place" to the view that it should be "wholly eliminated." James Davies, *Positive and Negative Models of Suffering: An Anthropology of Our Shifting Cultural Consciousness of Emotional Discontent*, 22 Anthropology of Consciousness 188–208 (2011).

Research confirms these observations. A classic study of non-economic damages revealed "uncontrolled variability of awards" even after controlling for type of injury. Randall R. Bovbjerg, Frank A. Sloan, and James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 Nw. U. L. Rev. 908, 924 (1989). Even hypothetical studies trying to assign values to pain produce wide variation. One study reported values from $0 to $500 that parents would pay to shield their infants from the pain of vaccines at a doctor's visit. Allen S. Meyerhoff, Bruce G. Weniger & Jake R. Jacobs, *Economic Value to Parents of Reducing the Pain and Emotional Distress of Childhood Vaccine Injections*, 20 Pediatric Infectious Disease J. S57, S59 (Nov. 2001). According to some observers, this variability in non-economic damages arises from litigants and juries seeking to punish defendants despite statutes and U.S. Supreme Court precedent limiting the size of punitive-damage awards. Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47, 48–49 (2002). In light

of these many challenges in matching pain to dollars, the General Assembly could rationally conclude that a cap on some victims' non-economic damages is warranted in the interest of fairness.

The cap also rationally promotes fairness between multiple plaintiffs injured by the same defendant. With no cap on damages, the first plaintiff to judgment might deplete money that would otherwise compensate other plaintiffs. Wrongdoers with multiple victims are common. Two of this Court's notable medical-malpractice decisions involved "many actions" against the same doctor. *Browning v. Burt*, 66 Ohio St. 3d 544, 545 (1993); *see also Wilson v. Durrani*, 2020-Ohio-6827, ¶2. In such cases, caps on non-economic damages can promote horizontal fairness across all victims by preventing the first award from depleting the defendant's ability to pay.

Promoting horizontal fairness is a common feature in other areas of law. For example, victims of toxic torts often file claims against trusts funded by wrongdoers that are "designed to satisfy the claims of all … victims, both present and future" without depleting the funds by payouts to the earliest victims. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640 (2d Cir. 1988). The same rationale animates one of this Court's own rules. Civil Rule 23(B)(1)(b) authorizes class actions when individual actions would "impair" some plaintiffs' ability to secure complete relief. The Supreme Court has described the identical federal rule as authorizing limited-fund class actions, "in which numerous persons make claims against a fund insufficient to satisfy all claims." *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997); *see, e.g.*, *Herrera v. Charlotte Sch. of Law, L.L.C.*, 818 F. App'x 165, 168 (4th Cir. 2020)

(affirming a settlement related to such a class). If this Court may constitutionally write a rule that constrains damages to achieve horizontal equity, surely the General Assembly may do the same.

Another indicia of rationality is the General Assembly's acknowledged power to eliminate or substitute entire causes of action. For example, the Court has upheld the General Assembly's power to eliminate common-law torts. *See, e.g.*, *Strock v. Pressnell*, 38 Ohio St. 3d 207 (1988) (alienation-of-affection torts). It has also upheld statutes that eliminate a cause of action for all potential plaintiffs who do not discover the injury before a statute of limitations or repose forever bars their ability to sue. *See, e.g.*, *Antoon*, 2016-Ohio-7432 (medical malpractice); *Groch v. Gen. Motors Corp.*, 2008-Ohio-546 (products liability); *Flagstar Bank, F.S.B. v. Airline Union's Mortgage Co.*, 2011-Ohio-1961 (appraiser malpractice). The Court has also upheld statutes that replaced a common-law cause of action with a more-limited remedy. *See, e.g.*, *Stolz*, 2018-Ohio-5088 (eliminating tort suit by worker against third-party contractor on same project); *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349 (1912) (eliminating negligence torts for workers against employers).

If these statutes are consonant with Section 16 as this Court has interpreted it, the Medical Non-Economic Damages Cap must be as well. The greater power to eliminate causes of action must include the lesser power to define the remedies for causes of action not eliminated. In other words, the power to alter the common law "necessarily includes the power to modify any associated remedy." *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010-Ohio-1029, ¶60. (quoting *Arbino*, 2007-Ohio-6948 at

¶132 (Cupp, J., concurring)). That is precisely the reasoning this Court used when it upheld a similar damage limit on tort claims against municipalities, explaining that the power to "prohibit[] *all* tort actions against political subdivisions" implies the lesser power to limit recovery in such actions. *Oliver v. Cleveland Indians Baseball Co. P'ship*, 2009-Ohio-5030, ¶15.

One last indicia of rationality is that several sister supreme courts have turned aside the argument that legislative damage caps violate substantive due process. *Phillips*, 470 Mich. at 436; *Maurin v. Hall*, 274 Wis. 2d 28, 77 (2004), *overruled on other grounds by Bartholomew v. Wisc. Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 293 Wis. 2d 38, (2006); *Judd ex rel. Montgomery v. Drezga*, 103 P.3d 135, 143–44 (Utah 2004); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *English v. New England Med. Ctr.*, 405 Mass. 423, 430–31 (1989); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 100 (1989); *Fein v. Permanente Med. Grp.*, 38 Cal. 3d 137, 160 (1985).

To be sure, this Court held in *Morris v. Savoy* that a damage cap for medical-malpractice cases violates Section 16's substantive component. 61 Ohio St. 3d 684, 690–91 (1991). The pages of this brief above detail why that conclusion is wrong as a matter of text, history, and structure. But *Morris* does not control here, even as precedent.

*Morris* rested on three premises. First, that the damage cap had no connection to it stated goal of reducing malpractice insurance because the statute was "not listed among the statutes that the legislature obviously believed would have an impact on

insurance premiums." *Id.* at 690. Second, that no litigant produced "evidence" that the cap had "been a factor" in insurance rate setting. *Id.* And third, that the damage limit imposed a cost on "those most severely injured" as a means to benefit "the general public." *Id.* at 691.

None of these reasons should govern here. *Morris*'s two points about evidence are no longer true. In the bill that became today's Medical Non-Economic Damages Cap, the General Assembly specifically cited a federal report that linked damage caps like Ohio's to "significantly lower increases in average premium rates" compared to States without such caps. 149 Ohio Laws (II) 3791, 3818, 3848–52 (§3(a)(4)(d)) (Jan. 10, 2003). The bill also—opposite the law in *Morris*—linked the damage cap to a commission's duty to study the law's "effects" on insurance rates. *Id.* at 3582 (§4). As for *Morris's* concern about imposing costs on the "most severely injured," that logic would tank all damage caps. Any cap will fall only on those whose damages would otherwise exceed the cap. *Morris*'s "scant justification," *Groch*, 2008-Ohio-546, ¶138, for its holding does not hold water. All in, the "blanket of stare decisis" cast by *Morris* does not stretch to cover this case. *Arbino*, 2007-Ohio-6948 at ¶23, *see also New Riegel Loc. Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.,* 2019-Ohio-2851, ¶22.

The Court has also held unconstitutional a damages cap in non-medical tort cases. *See Brandt*, 2022-Ohio-4525 at ¶36. *Brandt*, like *Morris*, is wrong for all the textual, historical, and structural reasons discussed above. But *Brandt* offers no guidance here, as it sustained only an as-applied constitutional challenge for "child victims who

suffer traumatic, extensive, and chronic psychological injury as a result of intentional criminal acts and who sue their abusers for civil damages." *Id.* *Brandt* self-limited its holding even more, by distinguishing damage caps in negligence cases from damage caps in criminal-sex-abuse cases. *Id.* at ¶36 n.5. More importantly, the reasoning of *Brandt* was insufficiently deferential to the legislature, and this Court should not follow its reasoning but, instead, demonstrate the proper way to conduct rational basis review under Article I, Section 16.

* * *

Lessons from text, history, and structure point to reversing the judgment here. These lessons can be distilled into a single sentiment voiced decades ago by Justice Scalia that, while it may be "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to" cap damages in tort cases, "the power which the Constitution confers" on judges does not crown them with the authority "to deny legal effect to laws that (in [their] view) infringe upon what is (in [their] view) … [an] unenumerated right." *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting). It is hard to improve on that.

## CONCLUSION

For the foregoing reasons, the Court should reverse the Eighth District's judgment.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Dave Yost was served on August 11, 2025, by e-mail on the following:

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