IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID WINNETT; SUSAN JACOBSON BAILEY; LOLITA SCOTT, JEREMY SCOTT, ASHLEY COMBS, AS NEXT FRIEND OF LXXX SXXXX, A MINOR; JUAN SILVA; SHARON VORHEIER; VERONICA CASTRO AND ALEJANDRO PASTRANO, INDIVIDUALLY AND AS NEXT FRIEND OF H.P., A MINOR; CANDACE KEEN AND GEORGE R. KEEN III AS NEXT FRIEND OF E.K., A MINOR; ERNEST MOLINA; JACLYN ANDRADA AND JASON ANDRADA, INDIVIDUALLY AND AS NEXT FRIENDS OF R. A., A MINOR; MELISSA MIKULEC; CANDACE HORTON, INDIVIDUALLY AND AS NEXT FRIEND OF PAMELA STEEL; JESSICA WILMORE, INDIVIDUALLY AND AS NEXT FRIEND OF J.W.; TEXAS WATCH; AND NATIONAL MEDICAL MALPRACTICE ADVOCACY ASSOCIATION,	§	**CIVIL ACTION NO.:**
	§	
	§	**1:20-CV-01155-LY**
Plaintiffs,	§	
v.	§	
BINH PHAM, M.D.; AUSTIN GASTROENTEROLOGY, P.A. D/B/A AUSTIN GASTROENTEROLOGY BAILEY SQUARE; ELIZABETH MOOREHEAD, M.D.; AUSTIN RADIOLOGICAL ASSOCIATION D/B/A ARA DIAGNOSTIC IMAGING; MANGESH BHATTA, M.D.; DONALD KREAG MURPHEY, M.D.; AUSTIN RADIOLOGICAL ASSOCIATION; ARA DIAGNOSTIC IMAGING; DAVID J. SHAW, M.D.; RONALD BAKER KING, JR., M.D.; JOHN RUSSELL BRENNER, D.O.; STAR ANESTHESIA P.A.; STAR ANESTHESIA, PLLC; STAR ANESTHESIA ASSOCIATES, P.L.L.C.; CHRISTUS SANTA ROSA	§	

HEALTH CARE CORPORATION D/B/A CHRISTUS SANTA ROSA HOSPITAL—WESTOVER HILLS; ANGELA AKONYE, M.D.; WOMEN'S CENTER OF WESTOVER HILLS, PLLC; AMY GONZALEZ, M.D.; RENE PEREZ, M.D.; ALAMO WOMEN'S OBSTETRICS AND GYNECOLOGY, PLLC; MARK E. THOMPSON, M.D.; NORTHEAST OB/GYN ASSOCIATES, PLLC; HERIBERTO TEJADA, M.D.; YVONNE MANALO, M.D.; CHRISTUS SANTA ROSA HEALTH CARE CORPORATION D/B/A CHRISTUS SANTA ROSA HOSPITAL-NEW BRAUNFELS; MARY E. GELDERNICK, M.D.; CHI ST. LUKE'S HEALTH MEMORIAL MEDICAL CENTER – LUFKIN; TYLER REGIONAL HOSPITAL, LLC, D/B/A UT HEALTH TYLER; HON. DARLENE BYNRE, JUDGE, 126TH JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS; HON. AMY CLARK MEACHUM, JUDGE, 201ST JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS; HON. DUSTIN M. HOWELL, JUDGE, 200TH JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS; AND HON. JAN SOIFER, JUDGE, 345TH JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS,	§
Defendants.	§
and,	§
TEXAS HOSPITAL ASSOCIATION; AND KEN PAXTON, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF TEXAS,	§
Defendants-Intervenors.	

DEFENDANTS' RESPONSE TO PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR REQUEST FOR DECLARATORY RELIEF AND PERMANENT INJUNCTION

Respectfully submitted,

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TO THE HONORABLE LEE YEAKEL:

Pursuant to this Court's September 8, 2021 Order, Defendants[1] file this Response Brief to Plaintiffs' Opening Brief ("Defendants' Response"), in support of Defendants' defense and opposition to Plaintiffs' request for declaratory and injunctive relief to be addressed at the upcoming January 7, 2022 bench trial. Defendants respectfully state as follows:

I. ARGUMENT AND AUTHORITIES IN REPLY

A. Precedent Dictates the Seventh Amendment is Not Incorporated to the States

Stare decisis is the bedrock principle of common law. As such, no precedent permits incorporation of the Seventh Amendment to the states. Regardless of the theory or method of incorporation being utilized, it has not and is not incorporated to the states. Plaintiffs' case law fails to support the proposition that the Seventh Amendment should be incorporated to the states.

1. *Heller Does Not Demand Incorporation of Every Amendment*

Plaintiffs' flawed constitutional logic is that because other amendments have been recently incorporated, the Seventh Amendment must also be incorporated. Dkt. 65, pp. 7-8. Plaintiffs ask this Court to pervert the holding in *Heller* to incorporate the Seventh Amendment to the states when *Heller* does not mention the Seventh Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 625-26 (2008). Nor should the Court read any broader meaning into *Heller* because at every turn, the Supreme Court has held that the Seventh Amendment does not apply to the states. In *Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 418 (1996), the Court held that the Seventh Amendment "governs proceedings in federal court, but not in state court…." In *Tull v. United States*, 481 U.S. 412, 417-18 (1987), the Supreme Court held that the Seventh Amendment applies only to federal court proceedings. In *Dohaney v. Rogers*, 281 U.S.

[1] For purposes of this brief, "Defendants" retains the same meaning as used in Defendants' Opening Brief. Dkt. 71, p 1.

362, 369 (1930), the Supreme Court determined that the due process clause does not guarantee any particular form or method of state court procedures. And in *McDonald v. City of Chicago, Ill*., 561 U.S. 742, 763 (2010), the Supreme Court did not accept a total incorporation theory of the Fourteenth Amendment."

Further, in *Heller*, Justice Scalia wrote that most of the rights contained within the Bill of Rights are limited. *Heller*, 554 U.S. at 626. For example, the right to bear arms does not mean the right for felons to bear arms, or an unrestricted right to sell arms. *Id*. at 626-27. The First Amendment protects free speech unless that speech is directed to inciting or producing imminent lawless action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The right against self-incrimination under the Fifth Amendment is limited in that it only applies to acts that are communicative, rather than any noncommunicative evidence. *Schmerber v. California*, 384 U.S. 757, 779 n.5 (1966). The Seventh Amendment is also limited: it is limited to the federal court system. *See Gasperini*, 518 U.S. at 418. Thus, *Heller* does not dictate the future of the incorporation doctrine nor does it specifically incorporate the Seventh Amendment to the states.

2. *Incorporation of the Sixth Amendment Under Ramos v. Louisiana is Inapplicable to Incorporation of the Seventh Amendment*

Ramos is inapplicable to arguments for incorporating the Seventh Amendment. *Ramos* emphasizes the differences between the two amendments, justifying how the Seventh Amendment should be treated differently from other amendments and treated consistently with precedent. The Supreme Court in *Ramos* justified the incorporation of the Sixth Amendment right to a unanimous verdict by analyzing prior precedent. *Ramos v. Louisiana*, 140 S.Ct. 1390, 1396-97 (2020). The Court acknowledged that the unanimity requirement has been persistent within case law and legal treatises since at least the nineteenth century. *Id*. The Court also emphasized that 48 of 50 states require unanimity for criminal convictions, save Louisiana and

Oregon, and that the absence of the requirement in those two states was historically racially driven. *Id*. at 1394. The Court acknowledged that racial motivation behind the absence of a unanimity requirement in Louisiana and Oregon made incorporation necessary to "preserve and protect" liberty. *Id*. at 1401-02.

This same necessity—to reinforce the prohibition against racial discrimination—is not present when one considers the Seventh Amendment. Forty-seven states guarantee a right to civil jury trial in their state constitutions, with the remaining three states (Colorado, Wyoming, and Louisiana) ensuring the right via statute. Hamilton, Eric J., *Federalism and the State Civil Jury Rights*, 65 Stan. L. Rev. 851, 855-56 (2013); *see also* COLO. R. CIV. P. 38; WYO. R. CIV. P. 38; LA. C.C.P. art. 1731-32. This is in stark contrast to the criminal unanimity requirement missing from both the Louisiana and Oregon constitutions and their respective statutes. Unlike the right to a unanimous criminal conviction, which was not universally guaranteed by the states, the states have each guaranteed their respective citizens the right to a civil jury trial. Additionally, incorporating the Sixth Amendment only affected two states (Louisiana and Oregon). Incorporating the Seventh Amendment to the states would wreak havoc on dual sovereignty across the nation. Hessick, F. Andrew and Fisher, Elizabeth, *Structured Rights and Incorporations*, 71 Ala. L. Rev. 163, 166 (2019) ("Because the incorporation of each provision of the Bill of Rights limits the states' ability to act, the intrusion on state interests should inform determinations about which rights are incorporated against the states."). Though the Fourteenth Amendment imposed new restrictions on the states, it did not abrogate state sovereignty. *Id*.

Were the Seventh Amendment incorporated, each state would be forced to modify its own rules of civil procedure to comport with federal precedent, which would assuredly mean that certain state citizens will ***lose*** certain protections that the federal rules of procedure do not

guarantee. *Id*. at 167. This is because our system of dual sovereignty is only limited by the Framers' requirement that the states have republican forms of government; otherwise, the people are free to decide how to arrange and allocate power in a way that best reflects their values and views. *Id*. at 167-68. The Framers deliberately left the states "vast discretion in structuring their republican governments." *Id*. at 168. Such unjustified upheaval would be catastrophic to the United States' system of government as it would undermine the dual system of government principles under which this Country was founded. *See* Elazar, Daniel J., *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States*, 297 (1962); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.").

3. *The Framers Intended the Seventh Amendment's Right to a Civil Jury Trial to Apply Only to Federal Courts*

At the time of its framing, the Seventh Amendment was written to apply only to the federal courts. The dilemma back in 1787 was as follows: Federalists feared jury nullification of the laws of contract, prompting them to not include a right to a civil jury trial, whereas Anti-Federalists strongly protested the lack of a right to civil jury trial as juries could protect litigants from bad laws passed by the legislature, tyrannical actions by the executive, and corrupt or

biased judges.[2] As a compromise and out of fear that a second constitutional convention might be called if a right to civil jury trial were not included in a federal Bill of Rights, James Madison drafted what became the Seventh Amendment. *Id*.; *see also Siebert v. Okun*, 2021-NMSC-016, ¶ 48, 485 P.3d 1265, 1277 (N.M. 2021) (discussing the history of civil jury trials while holding that damage caps did not violate the civil jury trial right). Note that, at the time, each state had already put in place some form of jury trial right. *See* J. Miron, *Constitutionality of a Complexity Amendment to the Seventh Amendment*, 73 Chi. Kent L. Rev. 865, 869 (1998) ("Before all thirteen colonies ratified the Constitution, they all had … instituted some form of jury trial right."). Thus, when the Bill of Rights was ratified, the existing states had their own procedures for civil jury trials. *Colgrove v. Battin*, 413 U.S. 149, 153 (1973) (citing 2 M. Farrand, Records of the Federal Convention 587 (1911)).

The importance of this historical context is that Anti-Federalists wanted the civil jury right to protect against tyrannical federal laws, as the Thirteen Colonies had already protected their respective civil jury trial rights in their own state constitutions. Given this, the Seventh Amendment was intended for federal courts only. And the author of the Seventh Amendment, Federalist James Madison, did not support unfettered civil juries nullifying democratically created laws, which led him to intentionally create a limited civil jury right.

The Supreme Court has ***generally*** held that "the trial by jury is a fundamental guarant[ee] of the rights and liberties of the people." *Hodges v. Easton*, 106 U.S. 408, 412 (1882). However, the fifty states have already agreed that such a right is fundamental, ***as each state contains a right to civil jury trial***, provided through constitution or statute. What has never been

[2] R. Lettow Lerner and S. A. Thomas, "Seventh Amendment," *Common Interpretation* (retrieved on Dec. 1, 2021) at https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125.

considered fundamental, whether by the Framers or the individual states, is the right to a civil jury trial in the states according to federal procedures, a phenomenon that would only exist if the Seventh Amendment is incorporated to the states. It, therefore, cannot be said that the federal right to a civil jury trial is one that is fundamental to the scheme of ordered liberty that is preserved in the states—if it was, the Framers would have surely imposed federal procedures upon the states.[3] They did not do so, and this Court should not do what the Framers never intended.

Furthermore, the determination of whether a federal right should be incorporated to the states through the Fourteenth Amendment depends on this Country's history and tradition, not that of England, even if the United States has adopted a great deal of that country's judicial system. *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997) (basing evaluation of criminality of suicide on the tradition as it existed at the time of the American Colonies onward). At the time of America's founding, each of the Thirteen Colonies were free to determine their own civil jury trial procedures, which resulted in thirteen distinct approaches to the concept of a civil jury trial. Henderson, Edith G., *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 299 (1966). While the concept of a national civil jury trial right was discussed by the Framers, there was no consensus reached as to the extent of such power, particularly because of the great diversity of practice amongst the states. *Id*. Because there has never been a universal approach to conducting a civil jury trial found within this Country, it cannot be said that the right as it exists in the federal system is deeply rooted in America's history and tradition. *Id*.; *see also*

[3] Ironically, although the Seventh Amendment was drafted for the Constitution as an anti-federalist shield against potential federal tyranny, Plaintiffs now use that Amendment as a sword against state autonomy. The implications of such an argument are discussed further below, but the conceptual disparity between the intent of the drafters of the Seventh Amendment and the residual effects of Plaintiffs' arguments is striking. *See Sowers v. R.J. Reynolds Tobacco Co.*, 975 F.3d 1112, 1128 (11th Cir. 2020) (discussing history of Seventh Amendment).

Hamilton, *supra* (discussing the differences in the right to civil jury trial amongst the states). As such, the Seventh Amendment does not meet the test for incorporation.

B. Even If Incorporated, Plaintiffs Fail to Establish any Violation of the Seventh Amendment

Sections 74.301 & 74.302, which provide limitations on civil liability for noneconomic damages, do not violate the Seventh Amendment. Plaintiffs expressly concede that the Reexamination Clause of the Seventh Amendment is not at issue here, and solely focus on the Preservation Clause of the Seventh Amendment. *See* Dkt. 65, p. 8 n. 4. In reality, Plaintiffs turn what is really a Reexamination Clause issue into a Preservation Clause issue because of the conclusive nature of case law in deciding that statutory caps or limitations of liability do not violate the Reexamination Clause of the Seventh Amendment. Regardless, Plaintiffs' Preservation Clause argument fails to establish any violation of the Seventh Amendment, as Sections 74.301 & 74.302 allow for the substance of the right to a jury trial to be preserved, thus not violating the Seventh Amendment.

1. *Feltner Does Not Lead to Sections 74.301 & 74.302 Violating the Seventh Amendment*

Plaintiffs' argument centers around the Supreme Court's decision in *Feltner*. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *see also* Dkt. 71, pp. 18-21. Plaintiffs argue that *Feltner* supports "the preservation of the civil-jury guarantee in the Seventh Amendment" to "plainly include[] the assessment of compensatory damages." Dkt. 65, p. 19. Plaintiffs argue that, because noneconomic damages were historically a part of compensatory damages, the Supreme Court's conclusions in *Feltner* that "jurors are the 'judges of the damages'" and that "a jury must determine the actual amount of damages" support a finding that there is a violation of the Seventh Amendment. Dkt. 65, p. 22 (quoting *Feltner*, 523 U.S. at 353-

55). From this inconsonant reference point, Plaintiffs incorrectly reason that Sections 74.301 & 74.302 "improperly take[] that constitutionally consecrated authority away, substituting a legislative one-size-fits-all determination divorced from the record established in the case and the jury's binding determination – all in the service of legislative purposes unrelated to the dispute before a court." Dkt. 65, p. 22. However, *Feltner* should not be interpreted to create quasi-omnipotent jury power and province or to restrict judicial power to apply a legal remedy.

Sections 74.301 & 74.302 do not have a minimum threshold and do not expressly limit or reduce a litigant's access to a jury trial. A medical malpractice litigant may have a jury determine issues of fact regarding liability, causation, and the amount of damages (including noneconomic damages), regardless of amount sought. In light of this, Plaintiffs' qualm is that Sections 74.301 & 74.302's limitations on liability infringe on "the Seventh Amendment right to trial by jury by changing the jury's factual determination of compensatory damages and [requiring] its reduction to another amount regardless of the magnitude of the injury." Dkt. 65, p. 29. Assuming Plaintiffs' argument is correct, this Court cannot overlook that Sections 74.301 & 74.302 do not violate the Preservation Clause of the Seventh Amendment where a jury awards a putative claimant an amount of noneconomic damages less than the corresponding limitations of liability for noneconomic damages under Sections 74.301 & 74.302. Thus, not all noneconomic damages awards could possibly infringe on the jury's ability to find facts. Indeed, to realize any alleged "violation" of the Preservation Clause of the Seventh Amendment, a medical malpractice litigant must go through a jury trial, obtain a jury award in excess of the limitations on liability for noneconomic damages, and have a judge apply the limitations to the jury award in the remedy phase of the proceeding.

This reality is important for three reasons. First, it highlights that Plaintiffs are trying to create a Preservation Clause issue over what is really a Reexamination Clause issue (already conceded by Plaintiffs), as the "violation" would only occur when the jury's award is reduced during the remedy phase. Second, it confirms that the Texas Legislature is ***not*** "substituting a legislative one-size-fits-all determination divorced from the record established in the case and the jury's binding determination" through implementing Sections 74.301 & 74.302, otherwise, all medical malpractice cases that go to a jury trial would be impacted by Sections 74.301 & 74.302. Third, it shows a fundamental difference between the facts in *Feltner* and Sections 74.301 & 74.302: the statute at issue in *Feltner* allowed for a ***judge*** to find the amount of damages to be awarded ***completely without a jury trial***. *See Feltner*, 523 U.S. at 343-46.

Feltner's conclusions were logical in that there were no jury deliberations or findings ***whatsoever*** on the damages to be awarded to copyright plaintiffs seeking statutory damages in lieu of actual damages under 17 U.S.C. § 504(c).[4] When this reality was compared to the functions of juries in common law copyright actions back in 1791, the Court found a Seventh Amendment violation as judges had effectively subverted the juries' function of setting the amount of damages. *Feltner*, 523 U.S. at 355. Sections 74.301 & 74.302 do not create any such subversion; rather, they merely function as a limit on liability for a subset of damages applied after jury trial and verdict in the proper case. There is no substitution of the jury's findings with that of a judge's findings, as the jury still performs its fact finding function as to both liability and the extent of damages.

After *Feltner*, 17 U.S.C. § 504(c) was updated by Congress but ***still*** contained minimum and maximum statutory damages. Taking Plaintiffs' argument as true, this action by Congress

[4] 17 U.S.C. § 504 addresses "remedies for infringement, damages and profits," and provides the statutory methods to assess an infringer's liability, including through section 504(c).

should be impermissible and unconstitutional, but this conclusion has been widely rejected by numerous circuit courts analyzing *Feltner*.[5] This calls into question Plaintiffs' premise that *Feltner* supports that limitations on liability or damages caps are unconstitutional under the Seventh Amendment. Because the statute addressed in *Feltner* had, and still has, statutory minimums and maximums, how could other limitations on liability be invalid? *Feltner* does not support limitations on liability for damages being rendered unconstitutional under the Seventh Amendment. That limitations of liability do not violate *Feltner* or the Seventh Amendment is supported by the fact that, historically, in copyright matters, legislatures utilized a "floor and cap" and/or "fixed amount per infringed page" model in which juries must operate when determining damages. *Feltner*, 523 U.S. at 351 (describing historical "floor and caps" in Massachusetts, New Hampshire, and Rhode Island). Justice Thomas cited *Hudson v. Patten*, 1 Root 133, 134 Conn. Super. Ct. (1789), for the proposition that pre-1791 American copyright statutes specified that infringement actions would be tried at "law" before a jury—notwithstanding statutory damage provisions. *Feltner*, 523 U.S. 351. In *Hudson*, a jury awarded copyright owners £100 under the Connecticut copyright statute, which provided for in an amount double the value of the infringed copyright. *Hudson*, 1 Root at 134. Under the Copyright Act of 1831, juries assessed the amount of damages, ***despite the fact that the statute fixed damages at a***

[5] *See Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 496–97 (1st Cir. 2011) ("Our sister circuits have likewise concluded that *Feltner* did not render § 504(c) unconstitutional.") (citing *BMG Music v. Gonzalez,* 430 F.3d 888, 892–93 (7th Cir.2005) (upholding statutory damages award under § 504(c) despite claim that *Feltner* rendered such an award unconstitutional)); *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.,* 259 F.3d 1186, 1192 (9th Cir.2001) (rejecting argument that *Feltner* rendered "statutory damages provision of the Copyright Act ... unconstitutional in its entirety" and concluding *Feltner* "in no way implies that copyright plaintiffs are no longer able to seek statutory damages under the Copyright Act")); *see also Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009) ("We have subsequently interpreted *Feltner* to uphold the constitutionality of the statutory damages provision, provided that at the plaintiff's election of a jury trial, we replace the term 'court' in § 504(c) with 'jury.'") (citations omitted).

set amount per infringing sheet.[6] Thus, the Copyright Act illustrates that the Seventh Amendment and statutory limitations of liability can co-exist.

Additionally, *Feltner* does not support or suggest that all litigants under 17 U.S.C. § 504(c) are entitled to a jury trial. Various courts within the Fifth Circuit have expressly interpreted *Feltner* to only provide a right to a jury trial under 17 U.S.C. § 504(c) in cases that involve the plaintiff seeking ***greater than the statutory minimum of $750.00***.[7] As litigants suing under 17 U.S.C. § 504(c) have no right to a jury trial under *Feltner* unless they seek greater than that statute's minimum amount, *Feltner* is not as far-reaching as Plaintiffs urge or there would remain a right to a jury trial to determine damages regardless of amount sought.

Consistent with *Feltner*, Sections 74.301 & 74.302 do not inhibit a jury's ability to find liability and the extent of damages before any legal adjustment to damages awards are made in the remedy phase of trial. Importantly, prior to *Feltner*, a plaintiff suing under 17 U.S.C. § 504(c) would elect to be awarded statutory damages and would have a judge determine the amount within the statutory minimum and maximum. After *Feltner*, that same plaintiff is entitled to have a jury decide the award of statutory damages, but is still subject to minimum and

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[6] *See Backus v. Gould*, 7 How. 798, 800, 12 L.Ed. 919 (1849) (jury awarded damages of $2,069.75 calculated according to statutory requirement of fifty cents per infringed sheet); *Reed v. Carusi*, 20 F. Cas. 431, 432, No. 11,642 (D.Md.1845) (same, but $200 award); *Dwight v. Appleton*, 8 F.Cas. 183, 185 (No. 4,215) (C.D.N.Y.1843) (same, but $2,000 award); *Millett v. Snowden*, 17 F. Cas. 374, 375 (No. 9,600) (S.D.N.Y.1844) (same, but $625 award).

[7] *See, e.g.*, *EMI April Music Inc. v. Jet Rumeurs, Inc.*, 632 F. Supp. 2d 619, 625 (N.D. Tex. 2008) ("Where a plaintiff seeks statutory damages in excess of the $750 minimum, the infringer has a Seventh Amendment right to a jury determination of the amount of statutory damages.") (citations omitted); *Van Stry v. McCrea*, 2:19-CV-00104-WCB, 2020 WL 1911391, at *2 (E.D. Tex. Apr. 20, 2020); *Atl. Recording Corp. v. Anderson*, CIVA H-06-3578, 2008 WL 2316551, at *9 n. 5 (S.D. Tex. Mar. 12, 2008); *Cynthia Hunt Productions, Ltd. v. Evolution of Fitness Houston Inc.*, CIV.A. H-07-0170, 2007 WL 2363148, at *6 (S.D. Tex. Aug. 16, 2007); *EMI April Music Inc. v. Know Group, LLC*, 3:05-CV-1870-M, 2006 WL 3203276, at *5 (N.D. Tex. Nov. 6, 2006); *see also GoPets Ltd. v. Hise*, 657 F.3d 1024, 1034 (9th Cir. 2011) ("[W]e hold that there is no right to a jury trial when a judge awards the minimum statutory damages.") (citing *Gonzalez,* 430 F.3d at 892–93).

maximum statutory damages. The same is true under Section 74.301 & 74.302. For example, consider a medical malpractice claim in which the jury awards various elements of damages, part of which includes noneconomic damages in the amount of $900,000 against a health care provider. After verdict, within the remedy phase, the judge issues a judgment applying the statutory maximum limitation of liability to that element of damage, in an amount of $250,000—depending on any credits or other legal adjustments to be applied to the jury's verdict.

This example is analogous to the situation encountered by post-*Feltner* litigants, as post-*Feltner* litigants suing under 17 U.S.C. § 504(c) and litigants suing in health care liability claim lawsuits both have entitlement to jury trials and both are subject to limitations of liability on the amount of damages. These limitations do not violate the "substance of the common-law right of trial by jury" as, at minimum, the "substance" of a trial by jury—who will determine liability and the amount of damages—is undisturbed. *Feltner*, 523 U.S. at 355. Limitations on liability applied in the remedy phase do not conflict with that "substance," as the jury decides liability and then whether that maximum amount of noneconomic damages is reached, or whether a lesser amount is more appropriate. *See Tull*, 481 U.S. at 426 n.9 ("[n]othing in the [Seventh] Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial .... We have been presented with no evidence that the Framers meant to extend the right to a jury to the remedy phase of a civil trial."'). Indeed, the Framers fashioned the Seventh Amendment amidst a controversy that the civil jury itself would be abolished. *Id.* However, this ***does not*** mean that plaintiffs were entitled to a full recovery in tort in common law. *See Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 96, 376 S.E.2d 525, 529 (1989) (citing *Phipps v. Sutherland*, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959); *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 88–89 n. 32 (1978)).

In *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249, 255 (5th Cir. 2013), the Fifth Circuit considered a statutory challenge to Mississippi's general noneconomic damages cap for reasons other than the Seventh Amendment. In analyzing Mississippi common law, the court incorporated Supreme Court precedent in determining the role of juries as to Mississippi common law. *Id.* at 259 (citing *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("under the common law jury guarantee, the jury alone makes a factual finding of 'compensatory damages'—the amount of money that will compensate the plaintiff for a loss or injury.")). The court found that the statute did not invade the jury's fact-finding process and that the law was consistent with the judge's role of applying the law to the jury's factual findings—i.e., converting the jury's award into the award of the law in the remedy phase. *Id.* at 260 (citations omitted).

While not mandatory authority, *Learmonth* illuminates that Sections 74.301 & 74.302 do not violate the Seventh Amendment. Sections 74.301 & 74.302 are framed in terms of applying a limitation on liability for damages to a judgment, not an award or verdict (unlike the Mississippi statute at issue in *Learmonth*). A judgment, as opposed to a jury verdict/award, is a function of the judge applying Texas law to the facts decided by the jury to determine the legal consequences of those factual findings—in the remedy phase. *See Davis v. Omitowoju*, 883 F.2d 1155, 1162 (3d Cir. 1989). Such an application does not violate the jury's ability to find liability for, and the amount of, any damages. Therefore, there is no violation of the Preservation Clause, and, unsurprisingly, there is no violation of the Reexamination Clause either. As Sections 74.301 & 74.302 are consistent with both clauses, there is no Seventh Amendment violation.

2. *Revisiting Watson v. Hortman*

Plaintiffs also challenge the findings and rationale of *Watson v. Hortman*, which properly held that the limitations on liability imposed by House Bill 4 ("H.B. 4") do not violate the

Seventh Amendment, as the court followed over 100 years of precedent to declare that the Seventh Amendment is not incorporated to the states. *Watson v. Hortman*, No. 2:08-CV-81, 2009 WL 10676569, *6 (E.D. Tex. Mar. 12, 2009). In doing so, the court held that H.B. 4 would not violate the Seventh Amendment because imposing the limitations on liability would not cause the court to reexamine the jury's verdict or impose its own factual determination of what the damages award should be. *Id*. The court pointed toward the circuit courts holding similar views regarding damages caps and the Reexamination Clause. *Id*. (citing *Hemmings v. Tidyman's Inc*., 285 F.3d 1174, 1202 (9th Cir. 2002); *Davis*, 883 F.2d at 1159–65; *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989)). As recognized by numerous circuit courts, statutory damages caps do not require a court to reexamine the factual findings that are the basis for the plaintiff's damages and therefore do not violate the Seventh Amendment. *See, e.g., Schmidt v. Ramsey*, 860 F.3d 1038, 1045 (8th Cir. 2017) , *cert. denied,* 138 S. Ct. 506 (2017); *Hemmings*, 285 F.3d at 1201; *Smith v. Botsford*, 419 F.3d 513, 519 (6th Cir. 2005); *Boyd*, 877 F.2d at 1196; *see also Tudor v. Se. Oklahoma State Univ*., 13 F.4th 1019, 1045 (10th Cir. 2021) (finding district court's application of the Title VII damages cap to not violate Seventh Amendment).

Plaintiffs argue *Watson* is undermined because it relied on *Palko v. Connecticut,* 302 U.S. 319 (1937), which Plaintiffs label as a "thoroughly repudiated case" and "not good law." Dkt. 65, p. 3. But *Watson* cited *Palko* merely for the proposition that "the Seventh Amendment has not been incorporated by the Fourteenth Amendment to apply to state court proceedings," a concept expressly adopted by the Supreme Court in *McDonald* the following year. *See Watson*, 2009 WL 10676569, *6; *McDonald*, 561 U.S. at 765, n.13. Moreover, Defendants do not rely on *Palko* to support their arguments against incorporation of the Seventh Amendment. Regardless,

Watson still addressed the merits of whether there was a violation of the Seventh Amendment. *Watson*, 2009 WL 10676569, *6 ("In addition, even assuming that the Seventh Amendment did apply to this case…").[8] While not addressed by Plaintiffs, the Preservation and Reexamination Clauses are linked, especially here, considering that challenges to Sections 74.301 & 74.302 have been made under each clause. *See Sowers*, 975 F.3d at 1127 ("Although the Seventh Amendment issue in this case involves only the Reexamination Clause, the two clauses are inseparably linked and have been since the beginning."). As thoroughly discussed within Defendants' Opening Brief, there is no violation of the Reexamination Clause by applying Sections 74.301 & 74.302 in the remedy phase. Dkt. 71, pp. 21-27.

3. *Plaintiffs' State Court Decisions Do Not Support a Seventh Amendment Violation*

Plaintiffs cite to a number of state court decisions in arguing that Sections 74.301 & 74.302 do not alter the cause of action for medical malpractice, rather the jury's authority with respect to that cause of action. Dkt. 65, p. 22. However, *Hilburn*, *Nestlehutt*, *Watts*, *Sofie*, *Moore*, and *Smith* all involved state court challenges under state constitutional rights to a trial by jury that were "inviolate." *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1135, 442 P.3d 509, 515 (2019); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 221 (2010); *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 637 (Mo. 2012); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 638, 771 P.2d 711, 712 (1989), amended, 780 P.2d 260 (Wash. 1989); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 159 (Ala. 1991); *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1083 (Fla. 1987). The core consideration here is whether Sections 74.301 & 74.302 violate the

[8] Plaintiffs do not address that the *Watson* court denied the plaintiffs' motion for reconsideration based on *McDonald*. No. 2:08-CV-81 (Dkt. 158) ("the Supreme Court in *McDonald* made clear that the Seventh Amendment right to trial by jury in civil cases was not incorporated to the states"). A copy of this order is included in the Appendix to Texas Hospital Association's Opening Brief. Dkt. 72-1, at pp. 245-46.

"substance of the common-law right of trial by jury." *Feltner*, 523 U.S. at 355. Simply put, that "substance" is not infringed by Sections 74.301 & 74.302 as the jury is allowed to assess liability and to set the amount of all damages, without restriction by Sections 74.301 & 74.302. Additionally, many of these cases undermine Plaintiffs' arguments regarding the Seventh Amendment's incorporation, or differentiate the Amendment from the specific state's constitutional language. *See, e.g.*, *Hilburn*, 309 Kan. 1127 at 1148 (stating that Supreme Court jurisprudence on the Seventh Amendment's scope in civil trials is not binding on states); *Watts*, 376 S.W.3d at 650 (distinguishing Missouri's constitutional language from Seventh Amendment); *Moore*, 592 So. 2d at 164 (Ala. 1991) ("provisions of the Seventh Amendment are not binding upon state courts.") (citations omitted); *Sofie*, 112 Wash. 2d at 644 (same).

C. Plaintiffs' Requested Relief Destabilizes State Autonomy and Sovereignty

Assuming, for the sake of argument, that this Court agrees with Plaintiffs' argument that the post facto application of legislatively established non-economic damage limitation of liability to a jury verdict is unconstitutional, the implications of Plaintiffs' requested relief would wreak havoc on this Country's dual sovereignty system. If Sections 74.301 & 74.302 violate the Preservation Clause of the Seventh Amendment then, as a logical extension, all state and federal limitations on common law causes of action should/would also be unconstitutional.

A conclusion that statutory limitations on liability are unconstitutional threatens the constitutionality of statutory defenses. Statutory defenses are legislatively created limits on recovery. For example, comparative negligence takes a plaintiff's actual damages and reduces them based on the portion of the plaintiff's culpability.[9] By Plaintiffs' reasoning, if a statutory

[9] *See Cruz v. Home Depot U.S.A., Inc.*, No. CV 4:15-1566, 2016 WL 2926369, at *2 n.1 (S.D. Tex. May 19, 2016) ("Texas is a comparative negligence jurisdiction in which a claimant may

limitation on liability violates the Seventh Amendment, so too should a statutory requirement to reduce damages according to relative fault found by the jury.[10] Certainly, total statutory defenses such as TEX. CIV. PRAC. & REM. CODE § 95.003, which shields a property owner from all liability related to the death or injury of an independent contractor, would then be unconstitutional as they "eliminate" a jury's ability to make a "damages" assessment. Statutory total defenses to products liability for government compliance would also be subject to constitutional limitations. *See*, Mich. Comp. Laws § 600.2946(5) (setting out statutory defenses for drug manufacturers based on FDA compliance); *see also* TEX. CIV. PRAC. & REM. CODE §§ 82.007-08.

Under Plaintiffs' reasoning, statutory defenses would not be constitutional, as a legislature cannot constitutionally abolish a common law cause of action or category of damages while unconstitutionally limiting recoverable damages. Plaintiffs' logic and reasoning would also impact statutes of repose or limitations, as legislatively imposed timelines to seek redress would serve as "temporal" restraints on recovery. Because failure to abide by the legislatively mandated repose or limitations provisions serves as a total bar to recovery, such statutes would frustrate the rights of an injured individual to have the facts in a common law cause of action determined by a jury. *See*, *e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 74.251(a), (b). If the lesser power to limit recovery does not exist, nor should the greater powers to abolish a cause of action, bar recovery by statutes of repose or limitation, or provide for a total statutory defense. *See Boyd*, 877 F.2d at 1196.

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not recover damages if his percentage of responsibility is greater than 50 percent.") (internal citations omitted).

[10] Currently, 13 states have pure comparative negligence statutes, while 33 states have modified comparative negligence statutes. *See* Sydney Goldstein, *Comparative and Contributory Negligence Laws by State*, Law Info (Nov. 3, 2020), https://www.lawinfo.com/resources/personal-injury/comparative-and-contributory-negligence-laws-by-state.html.

The en masse dismantling of all legislative limitations on causes of action meeting the *Markman* criteria will open the floodgates to an unprecedented quantity of litigation and neuter the states' abilities to determine how a state addresses a given common law cause of action. *See Markman*, 517 U.S. at 376; *see also* Dkt. 71, pp. 16-17. This would create a tremendous strain on the judicial system while also spiking the costs of personal and commercial insurance available in a given state. Legislatures on both the state and federal levels have historically exercised their constitutional power to make law to impose damage caps or limitations on liability as a mechanism to address crises.[11] A determination that legislatively imposed limitations on liability are unconstitutional would signal to legislatures that they lack the authority to create any sort of limitation for a common law cause of action. Separation of powers issues are triggered, as the judiciary would effectively restrict the role of legislatures to exercise constitutionally delegated powers. *See Learmonth,* 710 F.3d at 266 ("To accept that the constitutional separation of powers prohibits the legislature from limiting a legal remedy would be to prohibit the legislature from enacting practically any change to substantive law."). Plaintiffs' argument, if accepted, would limit the power of judges to faithfully apply the law. *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (judicial power includes court's power to "interpret and apply the law"). If judges cannot limit liability for damages found by a jury in accordance with a statute imposing such limitations without frustrating the Preservation Clause of the

[11] Over the last few decades, many states—including Texas—have adopted comprehensive legal reforms. For example, Mississippi's 2004 tort reform package included stricter limits on establishing venue, caps on noneconomic damages, liability protection for "innocent sellers" of products, and lowered caps on punitive damages. Similar legal reform occurred on the federal level, despite the presence of the Seventh Amendment. In 1986, prompted by decreased availability of vaccines due to increased litigation and skyrocketing liability insurance, Congress passed the National Childhood Vaccine Injury Act, eliminating the financial liability of vaccine makers. *See History of Tort Reform*, Institute for Legal Reform, https://instituteforlegalreform.com/history-of-tort-reform (last visited Nov. 29, 2021).

Seventh Amendment, they would also not be able to apply statutorily-mandated double or treble damages without also encroaching on the jury's province as sole factfinder. Ultimately, this conclusion is paradoxical as "[a]wards of double or treble damages authorized by statute date back to the 13th century ... and the doctrine was expressly recognized in cases as early as 1763," predating the Seventh Amendment. *Hemmings*, 285 F.3d at 1202 (quoting *Browning–Ferris Ind. of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 274 (1989)).

Plaintiffs' interpretation of the Seventh Amendment leads to a draconian result which would usurp any procedural innovations developed since 1791. This thematic concept has specifically been rejected by the Supreme Court. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979) ("The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment.") (citing *Galloway v. United States*, 319 U.S. 372, 388–93 (1943) (directed verdict does not violate Seventh Amendment); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497–98 (1931) (retrial limited to question of damages does not violate Seventh Amendment even though there was no practice at common law for setting aside verdict in part); *Fid. & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 319–21 (1902) (summary judgment does not violate Seventh Amendment)) (footnote omitted); *see also Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460, (1977) ("The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases."). To find otherwise would go against the civil jury's historical domain, violate the dominion of state legislatures, and effectively call into question all procedural innovations developed since 1791. Such a result goes against common

sense, public policy, and legal precedent. Therefore, Plaintiffs' requested relief should be denied.

II. CONCLUSION

Plaintiffs' arguments (which do not address their request for permanent injunctive relief) subvert limitations on liability by attempting to juxtapose them against the Seventh Amendment, even though that Amendment has not been, and should not be, incorporated to the states, nor is the amendment (if incorporated) violated by Sections 74.301 & 74.302. Plaintiffs' intended result, if manifested, would cut against the dual sovereignty system of government established by the Constitution, and lead to catastrophic effects on state autonomy. Such a result was never intended by the Framers of the Constitution, so this Court should refrain from using the Framers' own decree against their intentions. This Court should so declare and should decline to issue any requested injunctive relief.[12]

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request that this Court deny Plaintiffs' Request for Declaratory Judgment in all respects, that judgment be granted in Defendants' favor, that this Court issue a declaration that the Seventh Amendment has not been incorporated to the states, but even if it has, that Sections 74.301 and 74.302 of the Texas Civil Practice and Remedies Code do not violate the Seventh Amendment of the United States Constitution, that no permanent injunctive relief be granted, that Defendants be granted recovery of their costs, including attorneys' fees and court costs, and that this Court award them any and other relief to which they may be entitled.

[12] Plaintiffs do not address or substantiate their request for injunctive relief in their opening brief.

Dated: December 3, 2021.

Respectfully submitted,

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