

**IN THE SUPREME COURT OF PENNSYLVANIA**

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Docket No. 10 EAP 2024

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HAYLEY FREILICH,  
Plaintiff-Appellant,

V.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,  
Defendant-Appellee.

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**BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL  
JUSTICE REFORM, CHAMBER OF COMMERCE OF THE UNITED  
STATES OF AMERICA, PENNSYLVANIA CHAMBER OF BUSINESS  
AND INDUSTRY, PENNSYLVANIA MANUFACTURERS' ASSOCIATION,  
AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION  
IN SUPPORT OF DEFENDANT-APPELLEE SOUTHEASTERN  
PENNSYLVANIA TRANSPORTATION AUTHORITY**

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On Allowance of Appeal from the Commonwealth Court's Unreported Opinion and Order at No. 327 C.D. 2022 entered on July 6, 2023, affirming the judgment entered by the Philadelphia County Court of Common Pleas at Control Nos. 2111457 and 2111633 on March 28, 2022, in favor of Plaintiff-Appellant Hayley Freilich and against Defendant-Appellee Southeastern Pennsylvania Transportation Authority

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**TABLE OF CONTENTS**

STATEMENT OF INTEREST OF *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT ..... 5

ARGUMENT..... 8

    I. The Court Should Dismiss This Appeal as Having Been Improvidently  
    Granted ..... 8

    II. Alternatively, This Court Should Reaffirm Over 40 Years of Precedent and  
    Hold That Section 8528 of the Sovereign Immunity Act Is Constitutional .....13

        A. This Court and the Pennsylvania Commonwealth Court Repeatedly Have  
        Held That Section 8528 of the Sovereign Immunity Act and Section 8553 of  
        the Tort Claims Act Are Constitutional Amid a Flurry of Constitutional  
        Challenges .....13

        B. Pennsylvania Precedent Is in Accord with the Robust National Consensus  
        on the Subject .....16

        C. Were This Court to Usurp the Legislature’s Policymaking Function, Ignore  
        over Four Decades of Unbroken Precedent, and Depart from the Near-National  
        Consensus on the Topic, It Would Impose a Significant Financial Burden on  
        the Commonwealth and Already Cash-Strapped Local Governments .....20

CONCLUSION .....27

## TABLE OF AUTHORITIES

### Cases

<i>Ayala v. Bd. of Pub. Educ.</i> , 305 A.2d 877 (Pa. 1973) .....	15, 16
<i>Boiter v. Dep’t of Transp.</i> , 712 S.E.2d 401 (S.C. 2011) .....	25
<i>Buford v. United States</i> , 532 U.S. 59 (2001) .....	11
<i>Bugosh v. I.U. N. Am., Inc.</i> , 971 A.2d 1228 (Pa. 2009) .....	9
<i>Cargill’s Estate v. City of Rochester</i> , 406 A.2d 704 (N.H. 1979) .....	24
<i>Carroll v. York County</i> , 437 A.2d 394 (Pa. 1981) .....	20
<i>Cauley v. City of Jacksonville</i> , 403 So.2d 379 (Fl. 1981) .....	20, 24
<i>Chambersburg Borough v. PLRB</i> , 139 A.3d 189 (Pa. 2016) .....	9
<i>Commonwealth v. Thompson</i> , 985 A.2d 928 (Pa. 2009) .....	6
<i>Commonwealth v. Tilghman</i> , 673 A.2d 898 (Pa. 1996) .....	10
<i>Degliomini v. ESM Prods., Inc.</i> , 253 A.3d 226 (Pa. 2021) .....	16
<i>Finn v. City of Philadelphia</i> , 664 A.2d 1342 (Pa. 1995) .....	18
<i>Freach v. Commonwealth</i> , 370 A.2d 1163 (Pa. 1977) .....	15
<i>Gamble v. United States</i> , 587 U.S. 678 (2019) .....	5
<i>Griffin v. SEPTA</i> , 757 A.2d 448 (Pa. Commw. Ct. 2000) .....	14, 19
<i>Hallett v. Town of Wrentham</i> , 499 N.E.2d 1189 (Mass. 1986) .....	24
<i>Heller v. Frankston</i> , 464 A.2d 581 (Pa. Commw. Ct. 1983) .....	32
<i>Howlett By &amp; Through Howlett v. Rose</i> , 496 U.S. 356 (1990) .....	29
<i>Jones v. SEPTA</i> , 772 A.2d 435 (Pa. 2001) .....	17
<i>Kapil v. Ass’n of Pa. State Coll. &amp; Univ. Faculties</i> , 470 A.2d 482 (Pa. 1985) .....	16
<i>Katz v. Westfall Township</i> , Case No. 3:03-CV-02377 (M.D. Pa. 2009) .....	29
<i>Larimore Pub. Sch. Dist. No. 44 v. Aamodt</i> , 908 N.W.2d 442 (N.D. 2018) .....	23
<i>Lyles v. City of Philadelphia</i> , 490 A.2d 936 (Pa. Commw. Ct. 1985) .....	18
<i>Lyles v. PennDOT</i> , 516 A.2d 701 (Pa. 1986) .....	18, 19
<i>Mayle v. Pa. Dep’t of Highways</i> , 388 A.2d 709 (Pa. 1978) .....	16
<i>Meech v. Hillhaven West, Inc.</i> , 776 P.2d 488 (Mont. 1989) .....	25
<i>Michel v. City of Bethlehem</i> , 478 A.2d 164 (Pa. 1984) .....	15
<i>Mitchell v. W.T. Grant Co.</i> , 416 U.S. 600 (1974) .....	6
<i>Mobil Oil Corp. v. Nw. Agency, Inc.</i> , 415 A.2d 36 (Pa. 1980) .....	10
<i>Packard v. Joint Sch. Dist. No. 171</i> , 661 P.2d 770 (Idaho Ct. App. 1983) .....	24
<i>Parker v. Children’s Hosp. of Phila.</i> , 394 A.2d 932 (Pa. 1978) .....	32
<i>PennDOT v. Consol. Rail Corp.</i> , 519 A.2d 1058 (Pa. Commw. Ct. 1986) .....	19
<i>Pfost v. State</i> , 713 P.2d 495 (Mont. 1985) .....	25
<i>Rich v. Acrivos</i> , 815 A.2d 1106 (Pa. Super. Ct. 2003) .....	14

<i>Richardson v. State Highway &amp; Transp. Comm’n</i> , 863 S.W.2d 876 (Mo. 1993).....	21
<i>Shick v. Shirey</i> , 716 A.2d 1231 (Pa. 1998).....	7
<i>Smith v. City of Philadelphia</i> , 516 A.2d 306 (Pa. 1986).....	19
<i>Stanhope v. Brown County</i> , 280 N.W.2d 711 (Wis. 1979).....	24
<i>Stanley v. City of Omaha</i> , 713 N.W.2d 457 (Neb. 2006).....	25
<i>State ex rel. Colo. State Claims Bd. of Div. of Risk Mgmt. v. DeFoor</i> , 824 P.2d 783 (Colo. 1992).....	24
<i>Steltz v. Meyers</i> , 265 A.3d 335 (Pa. 2021).....	11
<i>The Monrosa v. Carbon Black Export, Inc.</i> , 359 U.S. 180 (1959).....	9
<i>Tindley v. Salt Lake City Sch. Dist.</i> , 116 P.3d 295 (Utah 2005).....	22
<i>Trujillo v. City of Albuquerque</i> , 965 P.2d 305 (N.M. 1998).....	25
<i>Wells v. Panola Cnty. Bd. of Educ.</i> , 645 So.2d 883 (Miss. 1994).....	25
<i>Westfall Township</i> , Case No. 5:09-BK-02736 (Bankr. M.D. Pa. 2009).....	30
<i>Wilson v. Gipson</i> , 753 P.2d 1349 (Okla. 1988).....	24
<i>Zauflik v. Pennsbury Sch. Dist.</i> , 104 A.3d 1096 (Pa. 2014).....	<i>passim</i>
<i>Zauflik v. Pennsbury Sch. Dist.</i> , 72 A.3d 773 (Pa. Commw. Ct. 2013).....	13, 19

**Constitutional Provisions**

MONT. CONST. art. II, § 16.....	26
PA. CONST. art. I, § 6.....	21
PA. CONST. art. I, §11.....	6, 19, 20, 21
PA. CONST. art. III, § 18.....	19, 21
PA. CONST. art. III, § 32.....	19, 21
U.S. CONST. amend IV.....	19, 20, 21, 22

**Statutes**

42 Pa.C.S. §§8521–8528.....	14
42 Pa.C.S. §§8541–64.....	14
42 Pa.C.S. §8528.....	<i>passim</i>
42 Pa.C.S. §8553.....	<i>passim</i>
42 U.S.C. §1983.....	24
Act of Oct. 5, 1980, P.L. 693, No. 142.....	14
Mont. Code Ann. § 2-9-108 (1997).....	20

**Rules**

Pa.R.A.P. 121.....	1
Pa.R.A.P. 531.....	4

Pa.R.A.P. 1112–1122.....	8
Pa.R.A.P. 1114 .....	8
Pa.R.A.P. 1115 .....	11
Pa.R.A.P. 2135 .....	1

**Other Authorities**

Aleeza Furman, <i>Philadelphia on Track for Record Year of High-Dollar Verdicts</i> , THE LEGAL INTELLIGENCER (July 16, 2024).....	26
B. Cardozo, <i>The Nature of the Judicial Process</i> (1921) .....	6
Cary Silverman & Christopher E. Appel, <i>Nuclear Verdicts: An Update on Trends, Causes, and Solutions</i> , U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM, May 2024 .....	26
Christina McFarland, <i>Cities Anticipate \$360 Billion Revenue Shortfall</i> , NATIONAL LEAGUE OF CITIES (May 14, 2020).....	22
Commw. Ct. IOP §414.....	9
David Harrison, <i>U.S. News: City’s Belt-Tightening Highlights Pandemic-Induced Budget Woes</i> , THE WALL STREET JOURNAL (Nov. 30, 2020).....	22
David Porter, <i>Facing \$20M Judgment, Pa. Town Seeks Bankruptcy</i> , PITTSBURGH POST-GAZETTE (June 21, 2009) .....	24
Elinor Haider & Jason Hachadorian, <i>How the Pandemic Has Affected Municipal Budgets in Philadelphia and Other Cities</i> , PEW CHARITABLE TRUSTS (Mar. 30, 2021) .....	21
Elizabeth McNichol & Michael Leachman, <i>States Continue to Face Large Shortfalls Due to COVID-19 Effects</i> , CENTER ON BUDGET & POLICY PRIORITIES (July 7, 2020) .....	21
George W. Dougherty, Jr., <i>Assessing the Effects of the COVID-19 Pandemic on Municipal Revenues in Southwestern Pennsylvania</i> , UNIV. PITT. CENTER FOR METROPOLITAN STUDIES.....	22
Irv Randolph, <i>Federal Financial Intervention Needed to Help the Safety of Cities</i> , THE PHILADELPHIA TRIBUNE (June 26, 2020).....	21
James L. Isham, Annotation, <i>Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Damages Recoverable in Tort Action Against Governmental Unit</i> , 43 A.L.R. 4th 19 (1986 & Supp. 1996).....	16, 17
John Finnerty, <i>IFO warns state spending is outpacing revenue and could quickly deplete state surplus</i> ,” Capitolwire.com (July 31, 2024).....	23
PA. DEP’T OF COMM. & ECON. DEV., <i>Act 47 Financial Distress</i> .....	23
Richard Gazarik, <i>City Faces ‘Deep’ Layoffs</i> , TRIBUNE-REVIEW (Feb. 19, 2013)...	24

Stephen Caruso and Kate Huangpu, *Pennsylvania is flush with surplus cash, but it still faces a looming budget problem*, SPOTLIGHT PA (Mar. 14, 2024).....23

U.S. House of Representatives, House Committee on the Budget, STATE AND LOCAL GOVERNMENTS ARE IN DIRE NEED OF FEDERAL RELIEF (Aug. 19, 2020) .....21

*What’s Behind ‘Nuclear’ Verdicts? Skeptical Juries, Attys Say*, LAW360 (May 14, 2024) .....25

## **STATEMENT OF INTEREST OF AMICI CURIAE**

The Pennsylvania Coalition for Civil Justice Reform (“PCCJR”) is a statewide, bipartisan organization representing businesses, healthcare, and other perspectives. PCCJR is dedicated to improving the Commonwealth’s civil justice system by increasing awareness of problems, advocating for legal reform in the legislature, and promoting fairness in the courts. PCCJR often participates as an *amicus* in appeals of statewide importance.

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The U.S. Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation’s business community.

The Pennsylvania Chamber of Business and Industry (the “Pennsylvania Chamber”) is the largest broad-based business association in Pennsylvania. The Pennsylvania Chamber has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth’s private

workforce. Its members range from small companies to mid-size and large business enterprises across all industry sectors in the Commonwealth. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens. The Pennsylvania Chamber works to create a fair, balanced, and common-sense civil litigation system that gives predictability and certainty and achieves greater efficiencies and unbiased justice.

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 540,000 employees on the plant floor, and the millions of additional jobs in supporting industries. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania. PMA has forcefully advocated for civil justice reforms that will bring balance and stability to Pennsylvania's legal system.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. It promotes and protects the viability of private competition for the benefit of consumers and



insurers, with a legacy dating back 150 years. APCIA’s member companies represent 65% of both the nationwide and Pennsylvania property-casualty insurance markets. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus* briefs in significant cases before federal and state courts.

Since 1980, counties, townships, boroughs, and other political subdivisions across the Commonwealth have relied upon the statutory cap imposed by Section 8553 of the Political Subdivision Tort Claims Act, 42 Pa.C.S. §8553 (the “Tort Claims Act”), to protect the public treasury and, in turn, ensure that vital government services are provided to the public. Thus, for nearly half a century, local governments have conducted their affairs and allocated their scarce resources without fearing insolvency on account of an uncapped tort liability scheme and resulting consequences to innocent taxpayers.

But that decades-old statutory regime is now in jeopardy. Plaintiff/Appellant Hayley Freilich (“Plaintiff”) is seeking a declaration that the statutory cap imposed by Section 8528 of the Sovereign Immunity Act, 42 Pa.C.S. §8528—which applies to tort actions brought against the Commonwealth and is substantially similar to the cap set forth in Section 8553 of the Tort Claims Act—is unconstitutional, at least as applied to her. Because the unlimited tort liability regime that Plaintiff invites will

have a ruinous financial impact on the Commonwealth and cash-strapped municipalities, *Amici* have a compelling interest in this appeal.

Pursuant to Pa.R.A.P. 531(b)(2), *Amici* each file this brief in their own right and, where applicable, on behalf of their respective members. *Amici* state that no person, other than their respective members and their respective counsel, paid for or authored this brief, in whole or in part.

## SUMMARY OF ARGUMENT

Ten years ago, this Court reaffirmed the constitutionality of Section 8553 of the Tort Claims Act in a unanimous opinion. *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1124, 1127–30, 1133 (Pa. 2014) [hereinafter “*Zauflik II*”] (Castille, C.J., joined by Saylor, J., Eakin, J., Baer, J., Todd, J., and Stevens, J.); *id.* at 1133 (Baer, J., concurring, joined by Todd, J., and Stevens, J.) (“I join the finely crafted majority opinion in its entirety.”). This marked at least the eighth time in the past 43 years that this Court or the Pennsylvania Commonwealth Court held that a statutory cap on governmental tort liability is constitutional.

Despite this unbroken line of cases, Plaintiff now asks this Court to convert two concurring opinions expressing disagreement over the amount of the statutory caps into a ruling greenlighting an uncapped tort liability scheme for the Commonwealth and its political subdivisions. But to do so would subvert the essential role of *stare decisis*, see, e.g., *Gamble v. United States*, 587 U.S. 678, 691 (2019) (explaining the principles underlying the doctrine), and without *stare decisis*, “we may fairly be said to have no law.” *Commonwealth v. Thompson*, 985 A.2d 928, 953–54 (Pa. 2009) (cleaned up). It will also undermine the integrity of the judicial system because the perception will be that the law changed because the composition of this Court changed—and, without a special justification to overturn precedent (which Plaintiff has not offered), nothing “could do more lasting injury to

this Court and to the system of law which it is our abiding mission to serve.” *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting). *See generally* B. Cardozo, *The Nature of the Judicial Process* 149–150 (1921).

A finding that statutory caps are unconstitutional also flies in the face of the Commonwealth’s Constitution, which plainly states that “[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.” PA. CONST. art. I, §11. The right to limit the Commonwealth’s exposure to damages, regardless of how stringent, necessarily is subsumed within the right to determine the “manner” in which the Commonwealth is sued, lest Article I, Section 11 be rendered meaningless. Moreover, Pennsylvania would become a national outlier if this Court adopts Plaintiff’s recycled arguments: the highest appellate court of every state that has addressed the issue has held that legislatively prescribed limits on governmental tort liability are constitutional.

And the fiscal problems facing the Commonwealth and its municipalities will only be exacerbated if this Court were to usurp the Legislature’s policymaking function, ignore over four decades of unbroken precedent, and foist an uncapped tort liability scheme upon them. In short, no one benefits from invalidating the statutory caps—not this Court, not the Commonwealth, not its political subdivisions, not the nearly 13 million people who reside in Pennsylvania—except for Plaintiff and a small group of already highly compensated members of the plaintiffs’ bar.

*Amici* are not unsympathetic to the injuries Plaintiff sustained. But no amount of empathy or compassion can change the fact that the Legislature is the appropriate forum to address Plaintiff's concerns regarding the statutory cap. *Shick v. Shirey*, 716 A.2d 1231, 1237 (Pa. 1998) ("Where the legislature has spoken . . . , we will not interpret statutory provisions to advance matters of supposed public interest."). Accordingly, if this Court does not dismiss this appeal as having been improvidently granted, it should uphold the constitutionality of Section 8528 of the Sovereign Immunity Act and affirm the Commonwealth Court's Order.

## ARGUMENT

### **I. The Court Should Dismiss This Appeal as Having Been Improvidently Granted**

Review of a final order of the Commonwealth Court generally is not a matter of right. Pa.R.A.P. 1114(a). Rather, such review is obtained through the allowance of appeal process. Pa.R.A.P. 1112–1122. But granting a petition for allowance of appeal does not necessarily mean this Court will decide the appeal. There are any number of circumstances in which, after acting to grant allowance of appeal, “[e]xamination of a case on the merits . . . may bring into proper focus a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident.” *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In such a scenario, the appropriate course is to dismiss the appeal as having been improvidently granted. *See, e.g., Bugosh v. I.U. N. Am., Inc.*, 971 A.2d 1228, 1228 (Pa. 2009) (*per curiam*) (dismissing appeal as improvidently granted); *Chambersburg Borough v. PLRB*, 139 A.3d 189, 189 (Pa. 2016) (*per curiam*) (same); *Mobil Oil Corp. v. Nw. Agency, Inc.*, 415 A.2d 36, 36 (Pa. 1980) (*per curiam*) (same). “[A] dismissal as being improvidently granted has the exact same effect as if this Court had denied the petition for allowance of appeal (allocatur) in the first place. Where [this Court] dismiss[es] an appeal as improvidently granted, the lower tribunal’s opinion and order stand as a decision of that court and this

Court’s order has no precedential value.” *Commonwealth v. Tilghman*, 673 A.2d 898, 904 (Pa. 1996) (emphasis omitted).

This Court granted allocatur in the instant appeal in March. It is now abundantly clear, with the benefit of merits briefing, that this appeal should be dismissed as having been improvidently granted.

Preliminarily, Plaintiff asserts that she “does not seek a ruling that the liability cap is categorically unconstitutional.” (Appellant’s Br. at 19). Plaintiff instead maintains that she has “only framed a challenge to the liability cap based on the *particular circumstances of her case*,” adding “she only seeks reinstatement of the verdict *in her case*; she does not seek a declaration that the liability cap violates constitutional principles as a general matter.” (*Id.* at 19–20 (emphasis added); *accord id.* at 62). Thus, by her own admission, Plaintiff is asking this Court to engage in fact-specific error review. That the decision on appeal is an unpublished opinion of the Commonwealth Court—which, by its very nature, applies to the parties and no one else, Commw. Ct. IOP §414(a)—only reinforces that fact.

But fact-specific error review typically weighs against granting allocatur because it does not “present an opportunity to elucidate broad legal principles or otherwise refine or advance Pennsylvania law.” *Steltz v. Meyers*, 265 A.3d 335, 353 (Pa. 2021) (Wecht, J., dissenting, joined by Baer, C.J., and Donohue, J.). This case proves the point: Plaintiff is raising an as-applied challenge based on the unique

circumstances of her case, and the “fact-bound nature” of her claims “limits the value of appellate court precedent, which may provide only minimal help when other courts consider” factually dissimilar cases. *Cf. Buford v. United States*, 532 U.S. 59, 59–60 (2001).

Plaintiff also does not provide this Court with a test to assess whether the imposition of the statutory cap violates her rights to a jury trial or to a remedy under the Pennsylvania Constitution. Rather, Plaintiff repeatedly urges this Court to look to the “economic realities” (Appellant’s Br. at 11, 43) and “particular circumstances of her case” (*id.* at 19, 59), which, of course, are not legal standards. The closest Plaintiff comes to articulating *some* principle to evaluate her constitutional challenge is at the tail end of her 67-page Brief, where she writes: “a cap in the amount of \$250,000 violates her rights to a jury trial and to a remedy, under conditions where the cap has not been adjusted in more than forty years and where the fees and costs in litigating her case would render trial economically unfeasible and the remedy illusory.” (*Id.* at 62).

But this is nothing more than a standardless standard. Not only does Plaintiff fail to define the phrase “economically unfeasible,” she also never articulates the line of demarcation as to when a trial becomes “economically unfeasible” (whatever that may mean) and the remedy “illusory.” Plaintiff seems to suggest that the dividing line is drawn wherever a plaintiff and her counsel subjectively believe that



the costs and potential fee become “so disproportionate to a potential recovery” (*id.* at 39), further underscoring the nebulous, ad-hoc nature of Plaintiff’s constitutional challenge. Faced with such an unworkable proposal, this Court should refrain from expending any further energy on this appeal. *Cf.* Pa.R.A.P. 1115(d) (“The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.”).

Other considerations weigh heavily in favor of dismissing this appeal as having been improvidently granted, including, but not limited to:

- Plaintiff does not offer any special justification for overturning over 40 years of unbroken precedent.<sup>1</sup> Instead, she tries to sidestep this wealth of caselaw by giving the false impression that she is raising an issue of first impression—repeatedly claiming that *Zauflik* only involved a “facial challenge” or “facial challenges” to the liability cap for local governmental entities. (Br. at 8, 20, 21, 36, 43). But the plaintiff in *Zauflik* (which was represented by Plaintiff’s counsel’s law firm) raised both a facial *and* as-applied challenge to Section 8553 of the Tort Claims Act before the Commonwealth Court. *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773, 777 (Pa. Commw. Ct. 2013) [hereinafter “*Zauflik I*”] (“The question is whether [Section 8553] as applied to Ashley Zauflik . . . is constitutionally permissible.”); *id.* at 780 (“Zauflik argues that the statutory cap also violates . . . equal protection principles *as applied to this case*[.]” (emphasis added));
- While couched as an “as-applied challenge,” Plaintiff effectively is asking this Court to adopt a catastrophic injury exception to the

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<sup>1</sup> For her part, Plaintiff could have argued for some special justification warranting overturning the well-settled precedent that undercuts her arguments. Unsurprisingly, however, she did not. Without a special justification that would permit this Court to revisit that settled precedent, Plaintiff necessarily fails to counter the argument that this appeal was improvidently granted.

statutory cap, a point made clear by the *amici* supporting her. (*See, e.g.,* Br. of *Amicus Curiae* N. Cent. Pa. Trial Lawyers Ass’n at 21 (“As applied to claimants such as Petitioner, who suffered catastrophic injuries, the statute has the effect of eliminating entirely their right to a remedy.”)). But despite enumerating exceptions to sovereign immunity in both the Tort Claims Act and Sovereign Immunity Act, the General Assembly did not provide for any exception to the statutory cap in either statute. Thus, Plaintiff’s constitutional challenge is nothing more than a thinly-veiled attempt to re-write the Sovereign Immunity Act and the Tort Claims Act;

- Plaintiff suggests that the absence of an “inflation-adjustment mechanism” renders the statutory cap unconstitutional. (Br. at 39). Plaintiff’s *amici* imply the same. (Br. of *Amici Curiae* Pa. Ass’n for Justice, *et al.* at 16, 17; Br. of *Amicus Curiae* N. Cent. Pa. Trial Lawyers Ass’n at 4). But as the Commonwealth Court explained nearly a quarter century ago: “[T]he mere passage of time will not render the amount of the cap unconstitutional due to the influence of inflation. Presumably the legislature was aware of the effects of inflation and could have opted for some cap indexed to inflation. That the legislature did not index the cap to inflation but set forth an absolute dollar amount does not render the cap unconstitutional.” *Griffin v. SEPTA*, 757 A.2d 448, 453 (Pa. Commw. Ct. 2000) (*en banc*). Indeed, inaction by the Legislature is itself a policy determination that this Court cannot negate;
- Plaintiff equates “economic impracticality” with a “constitutional violation” (Br. at 36–37), which has no basis in the law. At any rate, if this Court truly is concerned about plaintiffs being adequately compensated for their injuries, it stands to reason that this Court should start by limiting the contingency fee charged by plaintiff’s counsel;
- Plaintiff suggests that this Court should consider whether a situation is “untenable for plaintiffs’ counsel” in assessing the constitutionality of the statutory cap (Br. at 38), laying bare that the apparent motivation behind this appeal, at least in part, is for the plaintiffs’ bar to recoup higher fees for governmental tort cases. But since there is no absolute right to counsel in civil cases, *see, e.g., Rich v. Acrivos*, 815 A.2d 1106, 1108 (Pa. Super. Ct. 2003), it necessarily follows that the adequacy of

the fee paid to plaintiff's counsel cannot give rise to a constitutional violation of any kind; and

- If this Court issues an opinion finding the statutory cap unconstitutional, it is highly unlikely that this Court will be able to cabin its reasoning to the unique facts presented here. Thus, instead of drafting a one-off opinion, this Court will be opening the floodgates to every trial court in this Commonwealth making a case-by-case determination as to whether application of the statutory cap is permissible. Such ad hoc decisionmaking inevitably would create inconsistent decisions among trial courts, leading to a shapeless body of law.

For all these reasons and more, this Court should dismiss this appeal as having been improvidently granted.

**II. Alternatively, This Court Should Reaffirm Over 40 Years of Precedent and Hold That Section 8528 of the Sovereign Immunity Act Is Constitutional**

**A. This Court and the Pennsylvania Commonwealth Court Repeatedly Have Held That Section 8528 of the Sovereign Immunity Act and Section 8553 of the Tort Claims Act Are Constitutional Amid a Flurry of Constitutional Challenges**

Historically, absent legislative authorization, the Commonwealth and its political subdivisions were immune from tort liability. *See, e.g., Ayala v. Bd. of Pub. Educ.*, 305 A.2d 877, 880–81 (Pa. 1973), *superseded by statute on other grounds as recognized in Michel v. City of Bethlehem*, 478 A.2d 164, 165 (Pa. 1984); *Freach v. Commonwealth*, 370 A.2d 1163, 1167 (Pa. 1977). But in 1973, the Pennsylvania Supreme Court abolished the judicially created doctrine of local governmental immunity. *Ayala*, 305 A.2d at 878–79. And five years later, in 1978, the Court

eliminated the judicially created doctrine of sovereign immunity. *Mayle v. Pa. Dep't of Highways*, 388 A.2d 709, 710 (Pa. 1978), *superseded by statute as recognized in Kapil v. Ass'n of Pa. State Coll. & Univ. Faculties*, 470 A.2d 482, 485 (Pa. 1985).

The General Assembly responded swiftly, enacting the Tort Claims Act, Act of Oct. 5, 1980, P.L. 693, No. 142, §221(*l*) (codified at 42 Pa.C.S. §§8541–64), and the Sovereign Immunity Act, Act of Oct. 5, 1980, P.L. 693, No. 142, §221(*l*) (codified at 42 Pa.C.S. §§8521–8528), just two years later and reinstating the general rule of governmental and sovereign immunity from tort liability. *See, e.g., Degliomini v. ESM Prods., Inc.*, 253 A.3d 226, 241 (Pa. 2021). The Tort Claims Act and Sovereign Immunity Act share many similarities. *See, e.g., Jones v. SEPTA*, 772 A.2d 435, 438–39 (Pa. 2001). Both statutes emerged from the same 1980 legislation. Act of Oct. 5, 1980, P.L. 693, No. 142, §221(*l*). Both statutes reinstate a form of immunity subject to certain enumerated exceptions. *Compare* 42 Pa.C.S. §8521, *with id.* §8541. And both statutes include exceptions for vehicle liability, care, custody, or control of personal property, care, custody, or control of animals, and sexual abuse. *Compare id.* §8522(b)(1), (3), (6), (10), *with id.* §8542(b)(1)–(2), (8)–(9).

Of particular importance here, both statutes impose a cap on damages. *Compare id.* §8528, *with id.* §8553. Specifically, the Sovereign Immunity Act limits damages arising from the same cause or transaction or occurrence—or series of

causes of action or transactions or occurrences—to \$250,000 per plaintiff or \$1 million in the aggregate in actions against Commonwealth parties. *Id.* §8528(b). The Tort Claims Act similarly limits damages arising from the same cause or transaction or occurrence—or series of causes of action or transactions or occurrences—to \$500,000 in the aggregate in actions against a local agency or employee thereof. 42 Pa.C.S. §8553(b).

Recognizing the substantial similarities between the two statutes and that there are “no legally significant differences between a statute which limits damages recoverable against agencies of the Commonwealth and a statute which limits damages recoverable against the Commonwealth itself,” *Lyles v. PennDOT*, 516 A.2d 701, 703 (Pa. 1986) [hereinafter “*Lyles II*”], this Court has held that the Sovereign Immunity Act and Tort Claims Act “are to be interpreted consistently, as they deal with indistinguishable subject matter,” *Finn v. City of Philadelphia*, 664 A.2d 1342, 1344 (Pa. 1995) (collecting cases).

Notably, this Court and the Pennsylvania Commonwealth Court have upheld Section 8528 of the Sovereign Immunity Act and Section 8553 of the Tort Claims Act on multiple occasions against a flurry of constitutional challenges. *Lyles v. City of Philadelphia*, 490 A.2d 936, 939–41 (Pa. Commw. Ct. 1985) (holding Section 8553 of the Tort Claims Act constitutional under Article I, Section 11 and Article III, Section 18 and Article III, Section 32 of the Pennsylvania Constitution and the

Fourteenth Amendment to the U.S. Constitution); *Smith v. City of Philadelphia*, 516 A.2d 306, 309–12 (Pa. 1986) (same); *Lyles II*, 516 A.2d at 703 (holding Section 8528 of the Sovereign Immunity Act constitutional under Article III, Section 18 and Article III, Section 32 of the Pennsylvania Constitution and the Fourteenth Amendment); *PennDOT v. Consol. Rail Corp.*, 519 A.2d 1058, 1060 (Pa. Commw. Ct. 1986) (same); *Griffin*, 757 A.2d at 450–51 (same); *Zauflik I*, 72 A.3d at 783–96 (holding Section 8553 of the Tort Claims Act constitutional under various sections of the Pennsylvania Constitution and the Fourteenth Amendment); *Zauflik II*, 104 A.3d at 1124, 1127–30, 1133 (same); *see also Carroll v. York County*, 437 A.2d 394, 396-70 (Pa. 1981) (holding the Tort Claims Act constitutional under Article I, Section 11 of the Pennsylvania Constitution).

**B. Pennsylvania Precedent Is in Accord with the Robust National Consensus on the Subject**

Most states have adopted statutes that, like the Sovereign Immunity Act and Tort Claims Act, limit the damages recoverable against the state or a local government in a tort action. *See, e.g., Cauley v. City of Jacksonville*, 403 So.2d 379, 386 n.14 (Fl. 1981) (collecting statutes); *see also* James L. Isham, Annotation, *Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Damages Recoverable in Tort Action Against Governmental Unit*, 43 A.L.R. 4th 19, § 2[a] (1986 & Supp. 1996). Indeed, the highest appellate court of *every state but one* that has addressed the issue has held that legislatively prescribed limits

on governmental tort liability are constitutional under the Fourteenth Amendment to the U.S. Constitution or state constitutional provisions that are similar, if not identical, to Article I, Section 6 (“right-to-jury” provision), Article I, Section 11 (“open courts” provision), Article III, Section 18 (“anti-cap” provision), and Article III, Section 32 (“special laws” provision) of the Pennsylvania Constitution. *See* Isham, *supra*, §2[a] (“Courts have almost uniformly recognized that legislative bodies have the power to prescribe [limits on the amounts or kinds of damages recoverable against government tortfeasors], and that the limits prescribed are constitutionally valid.”).

For instance, in *Richardson v. State Highway & Transportation Commission*, 863 S.W.2d 876 (Mo. 1993), the Missouri Supreme Court considered the constitutionality of a statute limiting the amount of recovery against a political subdivision to the amount of its liability insurance. In rejecting the plaintiffs’ argument that the statute violated the equal protection, due process, and right to jury trial provisions of the Missouri Constitution, along with the Fourteenth Amendment to the U.S. Constitution, the Missouri Supreme Court wrote:

The General Assembly has a rational basis to fear that full monetary responsibility for tort claims entails the risk of insolvency or intolerable tax burdens. Restricting the amount recoverable—like limited recovery to certain enumerated torts—allows for fiscal planning consonant with orderly stewardship of government funds, while permitting some victims to recover something.

[The appellants] claim that full recovery will not “bankrupt” Missouri governments. This argument is more properly directed to the General Assembly, which can balance the level of compensation of tort victims with the need to protect public funds. [W]ithin constitutional limits, a sovereign may prescribe the terms and conditions under which it may be sued, and the decision to waive immunity, and to what extent it may be waived, lies within the legislature’s purview.

*Richardson*, 863 S.W.2d at 879 (citations omitted; emphasis added; second alteration in original).

In *Tindley v. Salt Lake City School District*, 116 P.3d 295 (Utah 2005), the Utah Supreme Court addressed the constitutionality of a statute that capped the damages recoverable against the state or its political subdivisions to an aggregate amount of \$500,000 for two or more persons in any one occurrence. In rebuffing the contention that the statute violated multiple provisions of the Utah Constitution, the Utah Supreme Court reasoned:

[T]he damage cap was intended to preserve the treasuries of the state and its political subdivisions. By limiting the damages payable by governmental entities, the Act protects an entity’s operating budget from the possibility of substantial damage awards and the financial havoc they may wreak. We find this to be a legitimate governmental purpose. Although we recognize that the aggregate cap may impose significant financial and emotional burdens on those injured by a governmental entity, it is not our province to rule on the wisdom of the Act or to determine whether the Act is the optimal method for achieving the desired result. Rather, our inquiry is limited to the Act’s constitutionality.

*Tindley*, 116 P.3d at 303 (citation omitted; emphasis added).



By way of another example, in *Larimore Public School District No. 44 v. Aamodt*, 908 N.W.2d 442, 446 (N.D. 2018), the North Dakota Supreme Court held that a statute that limited damages to \$250,000 per person and \$500,000 for injury to three or more persons did not violate the open court, remedy, jury trial, equal protection, or special law provisions of the North Dakota Constitution. *Id.* at 446, 450–62. In so ruling, the North Dakota Supreme Court looked to this Court’s reasoning on this very issue and explained:

While we sympathize with those who have suffered a catastrophic injury and loss, we agree with the Pennsylvania Supreme Court’s rationale [in *Zauflik*] that *the competing policy considerations involved with establishing damage caps for political subdivisions are legitimate considerations for the legislative branch*. In our view, the establishment of the aggregate statutory damage cap at issue in this case represents a core legislative function with a sufficiently close correspondence to the legitimate legislative goals of providing affordable liability insurance for political subdivisions within applicable fiscal constraints.

*Aamodt*, 908 N.W.2d at 461 (emphasis added).

Countless other jurisdictions also have upheld the constitutionality of statutory limitations on governmental tort liability, including where the cap fell below the \$250,000 limit at issue in this appeal. *See, e.g., State ex rel. Colo. State Claims Bd. of Div. of Risk Mgmt. v. DeFoor*, 824 P.2d 783, 786–91 (Colo. 1992) (*en banc*) (upholding as constitutional per-incident statutory caps of \$150,000 for one person and \$400,000 for multiple persons); *Cauley*, 403 So.2d at 384–87 (\$50,000 and \$100,000 caps); *see also Stanhope v. Brown County*, 280 N.W.2d 711, 716–20

(Wis. 1979) (\$25,000 cap); *Cargill’s Estate v. City of Rochester*, 406 A.2d 704, 706–09 (N.H. 1979) (\$50,000 cap); *Packard v. Joint Sch. Dist. No. 171*, 661 P.2d 770, 773–75 (Idaho Ct. App. 1983) (\$100,000 cap); *Hallett v. Town of Wrentham*, 499 N.E.2d 1189, 1194 (Mass. 1986) (\$100,000 cap); *Wilson v. Gipson*, 753 P.2d 1349, 1351–56 (Okla. 1988) (\$300,000 cap); *Wells v. Panola Cnty. Bd. of Educ.*, 645 So.2d 883, 889–94 (Miss. 1994) (\$10,000 and \$50,000 caps); *Trujillo v. City of Albuquerque*, 965 P.2d 305, 308, 313–14 (N.M. 1998) (\$300,000 cap); *Stanley v. City of Omaha*, 713 N.W.2d 457, 468–71 (Neb. 2006) (\$1,000,000 cap); *Boiter v. Dep’t of Transp.*, 712 S.E.2d 401, 403–05 (S.C. 2011) (\$300,000, \$600,000, and \$1.2 million caps).<sup>2</sup>

**C. Were This Court to Usurp the Legislature’s Policymaking Function, Ignore over Four Decades of Unbroken Precedent, and Depart from the Near-National Consensus on the Topic, It Would Impose a Significant Financial Burden on the Commonwealth and Already Cash-Strapped Local Governments**

States and local governments across the country have suffered considerable budgetary and revenue shortfalls over the last several years, exacerbated by the COVID-19 pandemic. *See, e.g.*, U.S. House of Representatives, House Committee

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<sup>2</sup> In 1985, Montana’s highest court held that a statutory damages cap on tort actions against the state and political subdivisions violated the right to full legal redress for injury in Article II, § 16 of the Montana Constitution. *Pfost v. State*, 713 P.2d 495, 500–06 (Mont. 1985). But four years later, the court overruled *Pfost* and rejected its prior holding “that Article II, § 16 of the Montana Constitution guarantees a fundamental right to full legal redress.” *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989). The Montana legislature then enacted a statutory cap that has been in effect ever since. Mont. Code Ann. § 2-9-108 (1997).

on the Budget, STATE AND LOCAL GOVERNMENTS ARE IN DIRE NEED OF FEDERAL RELIEF at 3 (Aug. 19, 2020) (“The confluence of plunging tax revenues and increasing demand for services is creating budget gaps for state, local, and tribal governments that may exceed the largest on record.”);<sup>3</sup> *see also* Elizabeth McNichol & Michael Leachman, *States Continue to Face Large Shortfalls Due to COVID-19 Effects*, CENTER ON BUDGET & POLICY PRIORITIES (July 7, 2020) (“The projected shortfall for 2021 fiscal year, which began on July 1 for most states, is much deeper than the shortfalls faced in any year of the Great Recession[.]”).<sup>4</sup>

As a result, states and local governments have needed to increase taxes, cut expenditures, or draw on reserves to overcome their revenue deficits. *See, e.g.*, Elinor Haider & Jason Hachadorian, *How the Pandemic Has Affected Municipal Budgets in Philadelphia and Other Cities*, PEW CHARITABLE TRUSTS (Mar. 30, 2021).<sup>5</sup> Many cities are looking to the federal government for help. *See, e.g.*, Irv Randolph, *Federal Financial Intervention Needed to Help the Safety of Cities*, THE PHILADELPHIA TRIBUNE (June 26, 2020) (“If they are not bailed out, cities will have to massively cut essential services. . . . The health and safety of an entire generation of Americans will be set back, people will die, and our economy will cease to

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<sup>3</sup> Available at: <https://democrats-budget.house.gov/sites/evo-subsites/democrats-budget.house.gov/files/documents/COVID19%20state-local%20paper-FINAL.pdf>.

<sup>4</sup> Available at: <https://www.cbpp.org/research/state-budget-and-tax/states-continue-to-face-large-shortfalls-due-to-covid-19-effects>.

<sup>5</sup> Available at: <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/03/30/how-the-pandemic-has-affected-municipal-budgets-in-philadelphia-and-other-cities>.

function as we know it. And crime will go up.”); *see also* David Harrison, *U.S. News: City’s Belt-Tightening Highlights Pandemic-Induced Budget Woes*, THE WALL STREET JOURNAL at A6 (Nov. 30, 2020) (“Moody’s Analytics estimates state and local governments faced a \$70 billion to \$74 billion shortfall in the 2020 fiscal year. That could balloon to \$268 billion in 2021 and \$312 billion in 2022 absent more federal help. Unlike the U.S. government, almost all state and local governments are required to balance their budgets every year.”).

No state is more representative of this national trend than Pennsylvania. “[R]evenue losses for cities, towns and villages in 2020 is expected to be the most significant in Pennsylvania, with a shortfall representing 40.2% of revenues.” Christina McFarland, *Cities Anticipate \$360 Billion Revenue Shortfall*, NATIONAL LEAGUE OF CITIES (May 14, 2020).<sup>6</sup> A study by the University of Pittsburgh’s Center for Metropolitan Studies estimated that municipalities located in southwestern Pennsylvania were to lose between \$123 million and \$485 million in 2020 alone. George W. Dougherty, Jr., *Assessing the Effects of the COVID-19 Pandemic on Municipal Revenues in Southwestern Pennsylvania*, UNIV. PITT. CENTER FOR METROPOLITAN STUDIES at 4.<sup>7</sup> Moreover, 14 municipal governments were

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<sup>6</sup> Available at: <https://www.nlc.org/article/2020/05/14/cities-anticipate-360-billion-revenue-shortfall/>.

<sup>7</sup> Available at: [https://mcusercontent.com/602e1b4b218bee3a72718f6f1/files/928587e1-936d-4a1c-8db4-4ce0fca0ec33/Assessing\\_the\\_Effects\\_of\\_Covid\\_19\\_on\\_Municipal\\_Revenues\\_in\\_SWPA\\_5\\_19\\_2020.pdf](https://mcusercontent.com/602e1b4b218bee3a72718f6f1/files/928587e1-936d-4a1c-8db4-4ce0fca0ec33/Assessing_the_Effects_of_Covid_19_on_Municipal_Revenues_in_SWPA_5_19_2020.pdf).

designated as financially distressed by the Pennsylvania Department of Economic and Community Development as of December 31, 2022, under the Municipalities Financial Recovery Act (Act 47). *See* PA. DEP’T OF COMM. & ECON. DEV., *Act 47 Financial Distress*, <https://dced.pa.gov/local-government/act-47-financial-distress/>.

Further, the Commonwealth currently is facing a “structural deficit,” whereby “[t]he state’s annual costs, such as paying public servants and providing health care to people who can’t afford it, consistently exceed the state’s annual tax revenue.” Stephen Caruso and Kate Huangpu, *Pennsylvania is flush with surplus cash, but it still faces a looming budget problem*, SPOTLIGHT PA (Mar. 14, 2024).<sup>8</sup> In fact, Pennsylvania “will end next fiscal year with a budget deficit close to \$1.6 billion unless steps are taken to trim spending or boost revenue, the Independent Fiscal Office has warned.” John Finnerty, *IFO warns state spending is outpacing revenue and could quickly deplete state surplus*,” Capitolwire.com (July 31, 2024). To say that the Commonwealth and many local governments across Pennsylvania are in a perilous financial position would be an understatement.

The fiscal problems facing the Commonwealth and its political subdivisions will only be exacerbated if this Court were to usurp the Legislature’s policymaking function, ignore over four decades of unbroken precedent, and impose an uncapped

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<sup>8</sup> Available at: <https://www.spotlightpa.org/news/2024/03/pennsylvania-budget-josh-shapiro-surplus-structural-deficit-explainer/>.

tort liability scheme upon them. “[I]t is not difficult to imagine the adverse budgetary consequences for local agencies of even one multi-plaintiff lawsuit involving severe injuries . . . , or even multiple deaths, if liability were uncapped.” *Zauflik II*, 104 A.3d at 1122.

Indeed, many townships, boroughs, counties, and other local governments could meet the same dire fate as Westfall Township in Pike County, Pennsylvania, if this Court were to sanction such a regime. Located where New Jersey, New York, and Pennsylvania meet at the Delaware River, Westfall Township has a population of approximately 2,500 people. Westfall Township lost a federal lawsuit in 2005 and subsequently had a \$20.8 million judgment entered against it—*an amount over 20 times its annual budget*. See *Katz v. Westfall Township*, Case No. 3:03-CV-02377, Order at 4–6, Dkt. #161 (M.D. Pa. 2009); David Porter, *Facing \$20M Judgment, Pa. Town Seeks Bankruptcy*, PITTSBURGH POST-GAZETTE at A10 (June 21, 2009). After negotiations, the amount was reduced to \$6 million, \$1 million less than the stipulated verdict here. See Richard Gazarik, *City Faces ‘Deep’ Layoffs*, TRIBUNE-REVIEW (Feb. 19, 2013).

Westfall Township’s liability, however, was not subject to a statutory cap.<sup>9</sup> Westfall Township also lacked (or the relevant claim fell outside of) an insurance

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<sup>9</sup> The cap was not applicable because *Katz* involved federal civil rights claims against a municipality (*i.e.*, the Township) pursuant to 42 U.S.C. §1983, which permits such claims

policy to cover the cost of the judgment. Therefore, to satisfy the judgment—which obligated the Township to pay \$75,000 per quarter for 20 years—Westfall Township was required to raise property taxes and dedicate the increase to paying the judgment. *See id.* Westfall Township later filed for bankruptcy. *See In re Westfall Township*, Case No. 5:09-BK-02736, Chapter 9 Voluntary Petition, Dkt. #1 (Bankr. M.D. Pa. 2009). The uncapped judgment had a ruinous financial impact on the residents of Westfall Township, resulting in the imposition of liability on individual taxpayers who themselves were not at fault for any damages.

The plight of Westfall Township illustrates that *Amici*'s concerns are hardly hyperbolic. Such scenarios will become all too common if this Court were to foist upon the Commonwealth and local governments a limitless tort liability scheme. *Tindley*, 116 P.3d at 304 (reasoning that a judgment against a small municipality for damages resulting from a catastrophic event “could have a devastating impact on the municipality’s fiscal health”). This is especially true given the recent trend of nuclear verdicts (\$10 million+) and thermonuclear verdicts (\$100 million+) in Pennsylvania. *See, e.g.*, Spencer Brewer, *What’s Behind ‘Nuclear’ Verdicts? Skeptical Juries, Attys Say*, LAW360 (May 14, 2024) (stating Pennsylvania had \$1.2 billion worth of nuclear verdicts in 2023); *see also* Aleeza Furman, *Philadelphia on Track for Record*

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notwithstanding state sovereign immunity. *See Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 376 (1990).

*Year of High-Dollar Verdicts*, THE LEGAL INTELLIGENCER (July 16, 2024) (“Court data shows that by the halfway mark of 2024, Philadelphia saw nearly as many eight-plus-figure civil jury verdicts as it did in the entirety of 2023. That statistic is especially striking considering 2023 had already marked a high point for awards exceeding \$10 million.”). See generally Cary Silverman & Christopher E. Appel, *Nuclear Verdicts: An Update on Trends, Causes, and Solutions*, U.S. CHAMBER OF COMMERCE, INSTITUTE FOR LEGAL REFORM, May 2024.<sup>10</sup>

Many local governments lack the resources to pay a seven-figure verdict, much less a nuclear or thermonuclear one. While Plaintiff may argue that insurance is the cure-all to this problem, *Amici* are not aware of any local government that has an existing insurance policy to account for the possibility that this Court would overturn nearly a half century of precedent and thrust unlimited tort liability upon political subdivisions. And of course, there is no way of knowing at this point if an insurance market would even develop amid an uncapped tort liability regime, and if so, whether the premiums would even be affordable for most municipalities.

Consequently, when faced with verdicts that far exceed the existing caps, local governments will likely be forced to either raise taxes to exorbitant levels or make deep cuts to essential government services; some may even go the way of Westfall

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<sup>10</sup> Available at <https://instituteforlegalreform.com/wp-content/uploads/2024/05/ILR-2024-Nuclear-Verdicts-Study.pdf>.



Township and be driven into bankruptcy. Every citizen of the Commonwealth and every business, small and large, will ultimately foot the bill for uncapped and potentially boundless jury verdicts imposing a judicially mandated, *de facto* tax increase that also gives a taxpayer-funded windfall to the plaintiff's bar. If such a regime is to come to pass, it should be created by the General Assembly, not this Court. To permit otherwise would undermine "the cornerstone of our democratic form of government"—the principle of separation of powers. *Heller v. Frankston*, 464 A.2d 581, 585 (Pa. Commw. Ct. 1983), *aff'd*, 475 A.2d 1291 (Pa. 1984).

### **CONCLUSION**

Reasonably minded individuals can certainly disagree as to whether the Commonwealth's tort liability should be limited to a predetermined amount. But this policy judgment is reserved to the people's elected legislature, and in reviewing the constitutionality of a statute, this Court may not substitute its judgment for that of the General Assembly in reviewing the constitutionality of a statute. *See, e.g., Parker v. Children's Hosp. of Phila.*, 394 A.2d 932, 937 (Pa. 1978).

In enacting the Sovereign Immunity Act, the General Assembly made the policy choice to limit the Commonwealth's tort liability to \$250,000 per plaintiff or \$1 million in the aggregate, rather than capping liability at a higher figure, indexing the cap to inflation, or even eliminating the cap altogether. Having previously held that Section 8528 is constitutional, it would be improper for this Court to now

second-guess the Legislature’s wisdom in imposing the cap. Indeed, had sufficient political support existed to increase the liability caps or to add an index for inflation, the General Assembly surely would have done so by now. The fact that the Legislature has not is a legislative decision by the policy-making branch of government that must be respected. Thus, as this Court has previously acknowledged, Plaintiff’s argument is one better suited for the General Assembly. *Zauflik II*, 104 A.3d at 1133 (“[T]he conclusion that the General Assembly is in the better position than this Court to address the complicated public policy questions raised by the larger controversy has substantial force.”); *see, e.g., Tindley*, 116 P.3d at 303; *Richardson*, 863 S.W.2d at 879.

Accordingly, if this Court does not dismiss this appeal as having been improvidently granted, it should uphold the constitutionality of Section 8528 of the Sovereign Immunity Act and affirm the Commonwealth Court’s Order. Alternatively, if the Court disagrees, *Amici* ask that this Court deem Section 8528 unconstitutional on a prospective basis only so that the General Assembly is afforded time to amend the Sovereign Immunity Act as necessary—and the Commonwealth and its political subdivisions are provided the opportunity to obtain insurance (to the extent it even exists) to stave off the ruinous financial impact of an uncapped tort liability scheme.

Respectfully submitted,

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Dated: August 2, 2024

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, ET AL. complies with the word-count limit set forth in Pa.R.A.P. 531(b)(3). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required by Pa.R.A.P. 2135(b) and (d)), contain **6,679 words**.

I also certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: August 2, 2024



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Casey Alan Coyle, Esquire

**PROOF OF SERVICE**

I hereby certify that, on this 2<sup>nd</sup> day of August, 2024, I am causing to be served the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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