

**IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT**

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No. 10 EAP 2024

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**HAYLEY FREILICH,**

APPELLANT,

v.

**SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY**

APPELLEE.

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**BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA ASSOCIATION FOR  
JUSTICE AND THE AMERICAN ASSOCIATION FOR JUSTICE IN  
SUPPORT OF APPELLANT TO REVERSE THE JUDGMENT OF THE  
COMMONWEALTH COURT**

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On appeal from an order of the Commonwealth Court in 327 CD 2022,  
entered on July 6, 2023, affirming the judgment of the Philadelphia County  
Court of Common Pleas in June Term 2018, No. 401, entered on March 28,  
2022.

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## **INTEREST OF AMICI CURIAE**

The Pennsylvania Association for Justice (“PAJ”), formerly Pennsylvania Trial Lawyers Association, is a non-profit organization comprised of 2,000 members of the trial bar of the Commonwealth of Pennsylvania. For over 40 years, PAJ has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special privileges for any individual, group, or entity. Through its *Amicus Curiae* Committee, PAJ strives to maintain a high profile in the state and federal courts of the Commonwealth by promoting, through advocacy, the rights of individuals and the goals of its membership.

The American Association for Justice (“AAJ”) is a national voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world’s largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions across the nation, including Pennsylvania. Throughout its 77-year history, AAJ has served as

a leading advocate of the right to access the courts for legal redress for wrongful conduct. This case is of acute interest to AAJ.

All parties have consented to the filing of this brief. No person or entity other than the *amici curiae*, its members, and its counsel authored this brief in whole or in part. No person or entity other than *amici curiae*, their members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

## **QUESTIONS PRESENTED**

1. Does 42 Pa.C.S. § 8528(b) violate Hayley Freilich's right to a remedy in Article I, Section 11 of the Pennsylvania Constitution under the facts of this case, where Freilich's recovery will be consumed by costs, fees, and insurance reimbursement claims?

2. Does 42 Pa.C.S. § 8528(b) violate Hayley Freilich's right to a jury trial in Article I, Section 6 of the Pennsylvania Constitution under the facts of this case, where Freilich's recovery will be consumed by costs, fees, and insurance reimbursement claims?

3. If the Court concludes that the limitation of damages set forth in 42 Pa.C.S. § 8528 is unconstitutional, is Section 8528 severable from the limited waiver of sovereign immunity set forth in 42 Pa.C.S. § 8522(a)?

## **SUMMARY OF ARGUMENT**

This *Amici Curiae* brief is respectfully submitted to the Court to address the patent unfairness raised by the Appellant, a victim of negligent and harmful conduct, regarding the limitation on damages against government defendants contained in 42 Pa.C.S. § 8528. With the passage of time, this arbitrary and artificial limitation on damages has created fundamental injustice. The cap subverts the goals of tort law, leaves victims of government actors with little to no recovery for their life-changing injuries (or even death), and violates the Pennsylvania Constitution.

This Court has previously recognized the increasing inequity of this issue for more than a decade, but pleas to the General Assembly have produced no change. Appellant's case presents the opportunity to correct over 40 years of oversight which has led to ever-growing injustice, and a less safe society. This Court should reverse the Commonwealth Court's holding by finding that the cap violates the Pennsylvania Constitution on its face, or at least more acutely when considered in the light of the facts of Appellant's case and strike 42 Pa.C.S. § 8528(b) down.

## ARGUMENT

### A. THIS CASE HIGHLIGHTS THE ONGOING FAILURE OF THE LEGISLATURE TO ADDRESS THE LIMITATIONS ON DAMAGES IN CLAIMS AGAINST THE COMMONWEALTH

Nearly five decades ago, this Court recognized the prohibition on suing government entities in the Commonwealth had failed to keep up with modern society and concepts, declaring “[w]hatever justification ever existed for the doctrine that the Commonwealth is immune from liability for tortious conduct...the doctrine’s day has long since passed.”<sup>1</sup> “[T]he doctrine is unfair and unsuited to the times, and this Court has the power to abolish the doctrine.”<sup>2</sup> Today, it is as readily apparent that whatever justification existed for the Legislature to enact the arbitrary caps on damages in these cases, that time has similarly passed, and this Court must again exercise its role in restoring justice, equity, and fairness.

In the current financial reality that all Americans face today—especially considering the rampant inflation of the last four years alone—it is almost unfathomable that a financial limitation, decided upon more than 40 years ago, has never been reevaluated, reconsidered, or amended. By comparison, the federal government, through the Federal Reserve’s Federal

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<sup>1</sup> *Mayle v. Pa. Dep’t. of Highways*, 388 A.2d 709, 710 (Pa. 1978).

<sup>2</sup> *Id.*

Open Market Committee, assesses the economic realities of the cost of living and national inflation at least eight times each year in meetings, reports its findings, and adjusts monetary policy accordingly.<sup>3</sup> That the federal government is so diligent in its observation of inflation to adapt to a changing economic climate while our Commonwealth turns a blind eye to such change by leaving an arbitrary cap on damages in place is inexcusable.

The General Assembly's inaction has failed the citizens of this Commonwealth, especially in light of repeated pleas from former Chief Justice Max Baer.<sup>4</sup> Having just passed the tenth anniversary of his concurrence in *Zauflik v. Pennsbury School District*, wherein he cautioned that a failure to increase these caps could soon violate an injured citizen's Constitutional rights, Justice Baer poignantly observed the effects of inflation:

It is obvious that money in 2014 does not spend as it did in 1978. Notably, that year the Governor of Pennsylvania earned somewhere around \$70,000. Today, his salary exceeds \$180,000. In 1978, a member of the General Assembly, which passed the cap under scrutiny herein, earned \$25,000 a year. Today a legislator earns approximately \$84,000. Notwithstanding this clear evidence of inflation, the cap remains the same.<sup>5</sup>

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<sup>3</sup> *Federal Open Market Committee*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Last updated May 22, 2024) <https://www.federalreserve.gov/monetarypolicy/fomc.htm>.

<sup>4</sup> See *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1134 (Pa. 2014) (Baer, J. concurring); *Grove v. Port Auth. of Allegheny Cnty.*, 218 A.3d 877, 890-892 (Pa. 2019) (Baer, J. Concurring).

<sup>5</sup> 104 A.3d at 1135.

With that simple illustration of the effects of inflation, Chief Justice Baer implored the Legislature to revisit the caps:

I hope the Legislature renders [a Constitutional challenge] and any future litigation moot. I would like to think that the failure to raise the cap has been inadvertent on its part. In its wisdom, it decided to create these causes of action against government [defendants] to protect our citizenry against the tyranny of injury without compensation...It is my hope that the Legislature will become cognizant of its oversight through this case, raise the cap to a level that is constitutional, and thereby protect the people that it serves...<sup>6</sup>

Despite this “hope” that in the years following the Legislature would take notice and act, it failed to do so.

Five years later, Chief Justice Baer reiterated this sentiment in his concurrence in *Grove v. Port Authority of Allegheny County*, noting that “[a]s each year passes, stagnant statutory caps fail to compensate victims of negligence adequately and grow ever more restricting....”<sup>7</sup> While still optimistic that the Legislature would address this inequity, Chief Justice Baer recognized “it is the role of this Court to protect our citizens’ constitutional rights...In the event that the Legislature does not so act, this Court may be faced with a developed challenge to the statutory caps as violative of the

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<sup>6</sup> *Id.* at 1136.

<sup>7</sup> 218 A.3d at 890 (Pa. 2019) (Baer, J. Concurring).



constitutionally guaranteed right to a jury trial.”<sup>8</sup> Unfortunately, no such change occurred during his tenure on this Court. More tragically, he did not witness such a change in his lifetime.

In response to the *Zauflik* and *Grove* decisions, the only movement from the Legislature on the issue of government caps was to request the Legislative Budget and Finance Committee issue a report analyzing the limitations on plaintiffs in cases involving government defendants.<sup>9</sup> That report confirmed exactly what Chief Justice Baer opined and first illustrated in *Zauflik*: that basic cost-of-living adjustment (“COLA”) increases require the original \$250,000 to be raised to \$1.04 million.<sup>10</sup> The report also highlighted that for those “who have been severely injured by governmental entities subject to the caps, the limitations on liability have devastating health and financial consequences.”<sup>11</sup>

The only recent amendment to Sovereign Immunity occurred in 2019, when an exception to immunity was created for instances of sexual abuse.<sup>12</sup>

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<sup>8</sup> *Id.* at 892.

<sup>9</sup> Legislative Budget and Finance Committee, *A Report on the Limitations on Liability Under Pennsylvania’s Sovereign and Governmental Immunity Laws, Conducted Pursuant to Senate Resolution 2021-146* (June 2022)

<http://lbfc.legis.state.pa.us/Resources/Documents/Reports/720.pdf>.

<sup>10</sup> *Id.* at p. 86.

<sup>11</sup> *Id.* at p. 47.

<sup>12</sup> 42 Pa.C.S. §8522(b)(10).

Notably, there are no limitations on damages for these injuries.<sup>13</sup> This demonstrates two issues: (1) the Legislature was aware of the insufficiency of damages in modern times, and (2) it is unwilling to otherwise amend or increase the cap. By failing to act in any meaningful way to amend the limitations for other injured victims, the legislature has essentially opined that individuals who sustain life-altering injuries, or who are killed, should be compensated differently than those who suffer the life-altering sequelae of sexual abuse.

As Ms. Freilich has demonstrated throughout this litigation and appeal, costs of living have increased, as have costs of representation.<sup>14</sup> Likewise, compensation for those injured or killed by Commonwealth actors must increase as well. To build on Chief Justice Baer's example, the salaries of elected officials have continued to increase, with the Governor now making \$237,679<sup>15</sup> and legislators making more than \$106,000 (one of the highest

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<sup>13</sup> 42 Pa.C.S. §8528(d).

<sup>14</sup> The firm paid \$72,170.83 for expert reports; \$1,492.27 for medical records; \$1,585.00 for trial technology services; \$957.14 for court filings, service, and messenger fees. The health insurer paid \$520,668.42 for health care resulting from the accident. The firm will be paid \$83,333.33. *Freilich v. SEPTA*, 302 A.3d 1261, 1264 (Pa. 2023).

<sup>15</sup> *Salaries for Elected and Appointed Officials Receiving Salaries Contained in Act 1995-51*, (Nov. 15, 2023) <https://www.budget.pa.gov/Services/ForAgencies/Payroll/Documents/statutory-salaries.pdf>.

in the nation).<sup>16</sup> Since the late 1970's, Pennsylvania legislators' salaries have increased four-fold, but no such change has occurred for the most seriously harmed individuals who are injured by the Commonwealth. This is even more ironic when considering that, since 1995, state law has given all 253 legislators—plus the governor, lieutenant governor, cabinet heads, the row officers, and all judges—annual COLA increase based on the rate of inflation in the greater Philadelphia region.<sup>17</sup> However, there has been no such change for citizens suffering severe injury or death at the hands of the Commonwealth.

The cap has remained bound by the chains of time and stagnant for so long that the cap now functions only to harm Pennsylvanians who find themselves as victims of negligence at the hands of the Commonwealth, while also decreasing the burden on those who can avoid causing devastating injuries such as those suffered by Ashley Zauflik, Joan Grove, and now Hayley Freilich. It cannot be said that there was not ample warning of this outcome, but the Legislature has failed to take any meaningful steps

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<sup>16</sup> Jan Murphy, *With Generous Benefits, Pa. Lawmakers Could be Second Best Compensated in Nation*, THE BRADFORD ERA (last updated Nov. 30, 2023), [https://www.bradfordera.com/news/with-generous-benefits-pa-lawmakers-could-be-second-best-compensated-in-nation/article\\_947c6684-8fca-11ee-b4ba-6bc832abfdc2.html](https://www.bradfordera.com/news/with-generous-benefits-pa-lawmakers-could-be-second-best-compensated-in-nation/article_947c6684-8fca-11ee-b4ba-6bc832abfdc2.html).

<sup>17</sup> See 65 P.S. §366.4(d) and (d.1); 65 P.S. § 366.3(e); and 65 P.S. §366.2(a)(i).

to address this inequity. As a result, it is now up to this Court to act as it did in *Mayle*, and as Chief Justice Baer first predicted more than ten years ago.

**B. THE LIMITATIONS ON DAMAGES IN CASES INVOLVING GOVERNMENT DEFENDANTS VIOLATE PENNSYLVANIAN’S CONSTITUTIONAL RIGHTS**

The limitation on damages contained in 42 Pa.C.S. § 8528(b) violates Article I, Section 6; Article I, Section 11; and Article III, Section 18 of the Pennsylvania Constitution. In reviewing the constitutionality of a provision, there are two types of challenges: facial and as applied.<sup>18</sup> The standard for facial challenge requires the petitioner to demonstrate a “clear, plain, palpable” violation of the Constitution<sup>19</sup> and that no circumstances exist where the statute would be valid.<sup>20</sup> For an as-applied challenge to succeed, petitioner must show that they have been impacted by an alleged discriminatory or improper exercise of discretion in applying the questioned statute.<sup>21</sup> In the present case, both challenges are applicable, and Freilich succeeds on both counts.

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<sup>18</sup> *Peake v. Commonwealth*, 132 A.3d 506, 516-517 (Pa. Commw. Ct. 2015).

<sup>19</sup> *Pa. Env'tl. Def. Found. v. Commonwealth*, 279 A.3d 1194, 1202 (Pa. 2022).

<sup>20</sup> *Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d, 1030, 1041 (Pa. 2019).

<sup>21</sup> *Commonwealth v. McCabe*, 265 A.3d 1279, 1290 (Pa. 2021).

**B.1 THE CAP UNCONSTITUTIONALLY BURDENS THE ARTICLE I, SECTION 6 RIGHT TO A JURY TRIAL BY RENDERING IT COST-PROHIBITIVE**

The cap violates the right to a jury trial in Article I, Section 6 of the Pennsylvania Constitution by placing an onerous burden on the right to a jury trial. Section 6 reads:

“[t]rial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case.”<sup>22</sup>

On its face, the framers directed what the General Assembly may do with this right, which does not include imposing statutes that make a jury trial impractical. In cases involving serious injuries caused by Commonwealth defendants, it is economically infeasible both for plaintiffs to seek counsel and for counsel to present their case. Today, most health insurance carriers require repayment of past medical bills out of settlement proceeds, and often require complete payment irrespective of any legal fees or litigation expenses. These costs are constantly increasing, and as a result of these costs, a plaintiff who is forced to proceed to a jury trial is essentially unable to make any recovery after repayment, as Ms. Freilich would in this case.

In *Application of Smith*, this Court noted that the ability to present an issue to a jury “must not be burdened by the imposition of onerous

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<sup>22</sup> Pa. Const. Art. I Sec. 6.

conditions, restrictions, or regulations which would make the [jury trial] right practically unavailable,”<sup>23</sup> and this sentiment was emphasized by Chief Justice Baer *in Zauflik*.<sup>24</sup> Appellant’s record is exactly what he envisioned as presenting an onerous procedural burden to the right to a jury trial due to the impracticality created by the cap.<sup>25</sup> It “renders cost-prohibitive the exercise of the jury trial right,” and is therefore unconstitutional, at the very least, as applied to cases such as this one.<sup>26</sup>

## **B.2 THE CAP UNCONSTITUTIONALLY RENDERS THE ARTICLE I, SECTION 11 RIGHT TO OPEN COURTS AND FULL REMEDIES ILLUSORY**

The cap makes the right to open courts and full remedies of Article I, Section 11 illusory, producing *de minimis* recovery for plaintiffs who are victims of catastrophic injury. Article I Section 11 says:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.<sup>27</sup>

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<sup>23</sup> 112 A.2d 625 (Pa. 1955).

<sup>24</sup> 104 A.3d at 1134 (Baer, C.J. concurring) (citing *Application of Smith*, 112 A.2d 625 (Pa. 1955)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Pa. Const. Art. 1 Sec. 11.

As a result of the refusal to increase these amounts since 1980, the cause of action the General Assembly initially created has essentially become eviscerated. The cap usurps the jury's role in the determination of damages and renders the endeavor pointless. In the present case alone, Ms. Freilich's verdict has been cut to a mere 0.04% of an agreed-upon amount that would make her whole.<sup>28</sup> It is even less after the costs of litigation and may be nothing at all after repayment of her healthcare insurance's medical lien. Such a result is unconscionable.

Further frustrating the purposes of tort law, government defendants can exploit the fact that they cannot be liable for more than the cap, contravening the process of good-faith litigation or negotiation. Even in the most severe cases, there is little disincentive to prevent defendants from negotiating down from the capped amount in an attempt to force injured individuals to take even less than \$250,000 to avoid the additional costs of proceeding to trial. If there is a dispute regarding liability and claims of comparative negligence, there is even more of an incentive for defendants to force severely injured plaintiffs to spend money and take their chances at trial.<sup>29</sup> Absent the threat of punitive damages, the only downside for

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<sup>28</sup> *Freilich*, 302 A.3d 1261.

<sup>29</sup> *See Grove*, 218 A.3d 877.

defendants is that they may have to pay delay damages, which are now only calculated on the cap<sup>30</sup>, not the verdict awarded<sup>31</sup>, as it was prior to 2001. The existence of the cap here—as with all caps on damages—does not serve the interest of justice, equity, or fairness as it frustrates negotiations, protracts litigation, and forces injured individuals to proceed to trial while limiting the exposure of defendants. It is precisely because of this conduct and reality that caps, in all forms, should be prohibited or eliminated.

### **B.3 THE PENNSYLVANIA CONSTITUTION CLEARLY PROHIBITS LIMITATIONS ON DAMAGES IN ARTICLE III, SECTION 18**

Recognizing the inequity of limitations on damages, the Pennsylvania Constitution explicitly prohibits caps in Article III, Section 18 of the Pennsylvania Constitution:

...in no other cases [than worker's compensation] shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property....<sup>32</sup>

The Court need not look beyond this plain language, as Section 8528(b) facially violates this provision by capping recovery for victims of injury or death. Nothing, whether explicit or implied, permits violation of a

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<sup>30</sup> *Allen v. Mellinger*, 784 A.2d 762, 768-769 (Pa. 2001).

<sup>31</sup> *See Woods v. Commonwealth Dep't of Transp.*, 612 A.2d 970 (Pa. 1992).

<sup>32</sup> Pa. Const. Art. III, Sec. 18.



constitutional provision, regardless of a tortfeasor's identity. The text of this section plainly requires the conclusion that any act which limits a plaintiff's recovery is facially unconstitutional. While an exception for worker's compensation was purposefully carved out, no other exceptions were created to this clear rule. Sovereign immunity may have existed at the time the provision was enacted, but absent amendment, the cap violates Article III, Section 18 as it exists today.

**B.4 THE UNCONSTITUTIONAL PROVISION CAN BE SEVERED AND THE  
REST OF § 8528 CAN REMAIN INTACT**

Absent a non-severability clause, which § 8528 does not contain, severability of statutory provisions is generally presumed.<sup>33</sup> This Court has held that where a statutory provision is unconstitutional, the part that is unconstitutional can be severed and the rest of the act can remain intact.<sup>34</sup> Such a declaration is well within the province of this Court, as § 8528(b) does not pass constitutional muster, and can be eliminated while leaving the rest of the provisions of Sovereign Immunity undisturbed.

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<sup>33</sup> 1 Pa.C.S. § 1925.

<sup>34</sup> *Yanakos v. UPMC*, 218 A.3d 1214, 1227-1228 (Pa. 2019). (Statute of repose within MCARE Act held unconstitutional under Pa. Const. Art. I, Sec 11, but the Act remained otherwise intact.).

**C. OTHER JURISDICTIONS PROVIDE MORE ADEQUATE COMPENSATION THROUGH HIGHER CAPS, NO CAPS, OR CLAUSES THAT ALLOW THE CAP TO ADAPT**

Though caps and immunity are frequently cited as a necessary evil to avoid rampant verdicts and awards, the truth is that relatively few cases or claims even approach the current cap, let alone exceed it.<sup>35</sup> As the Budget and Finance Committee Report determined, “[t]he statutory caps play no significant role for the vast majority of plaintiffs [(less than one percent)].”<sup>36</sup> Equity and fairness require elimination of these amounts when weighing the “devastating health and financial consequences” of severely injured individuals compared to the relatively minor increase of exposure to government defendants.<sup>37</sup> Furthermore, looking to other jurisdictions, neither higher caps nor the absence of caps have led to bankruptcies or failures of other states.

Across the country, 15 states have no caps on damages against government entities at all.<sup>38</sup> Of the states that do have caps, 21 are higher

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<sup>35</sup> Legislative Budget and Finance Committee, *supra* note 9 at p. 47.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Alabama (ALA. CODE §§ 11-93-1 through 11-93-3), Arizona (ARIZ. CONST. Art. II, § 31. N.), California, Connecticut, Delaware (10 Del. Laws c. § 4013), District of Columbia, Iowa, Michigan (M.C.L. § 691.1407), Nebraska (NEB. REV. STAT. § 13-926), New Jersey (N.J. REV. STAT. ANN. § 59:9-2), New York, Ohio (OHIO REV. CODE § 2744.05), South Dakota, Washington (R.C.W.A. § 4.92.090 and §§ 4.96.010 to 50 (1967)), West Virginia (W. VA. CODE § 29-12A-76).

than Pennsylvania.<sup>39</sup> A number of jurisdictions have included insurance waivers that permit plaintiffs to recover up to the limits of available insurance.<sup>40</sup> Recognizing the harshness of a bright-line rule limiting

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<sup>39</sup> Colorado (COLO. REV. STAT. § 24-10-114) (\$424,000 per person), Indiana (IND. CODE § 34-13-3-4) (\$700,000 per person), Missouri (MO. ANN. STAT. § 537.610) (\$300,000 per person), South Carolina (S.C. CODE ANN. §15-78-120) (\$300,000 per person), Tennessee (TENN. CODE ANN. §9-8-307 (state) and TENN. CODE ANN. § 29-20-311 (local)) (\$300,000 per person), Hawaii (HAW. REV. STAT. § 663-8.7) (\$375,000 (state) or \$350,000 (local)), Alaska (ALASKA STAT. § 09.17.010) (\$400,000 per person or life expectancy in years multiplied by \$8,000, whichever is greater), Maine (ME. REV. STAT. ANN. tit. 14, § 8104D-8105) (\$400,000 per person), Maryland (MD. STATE GOV'T CODE ANN. § 12-104 (state) and § 5-303 (local) (\$400,000 per person), New Hampshire (N.H. REV. STAT. ANN. § 541- B:14 (state) and N.H. REV. STAT. § 507-B:4 (local)) (\$475,000 per person (state) or \$275,000 per person (local), Idaho (IDAHO CODE §6-926) (\$500,000 per person), Kansas (KAN. STAT. ANN. § 75-6105) (\$500,000 per person), Louisiana (LA. REV. STAT. ANN. § 13:5106) (\$500,000 per person), Minnesota (MINN. STAT. ANN. § 3.736 (state), 466.04 and 466.06 (local)) (\$500,000 per person), Mississippi (MISS. CODE ANN. § 11-46- 15) (\$500,000 per person), Vermont (VT. STAT. ANN. tit. 12, § 5601 VT. STAT. ANN. tit. 19, § 985. VT. STAT. ANN. 29, § 1403) (\$500,000 per person (state), \$75,000 or limits of liability insurance, whichever is greater), Utah (UTAH CODE. ANN. § 63G-7- 604(1)c; § 63G-7-604(1)(a), and § 63G-7-604(1)(d)) (\$583,900 per person), Montana (MONT. CODE. ANN. § 2-9- 108) (\$300,000 per person), Georgia (GA. CODE § 50-21-29 and 36-92-2) (Motor vehicle: \$500,000 one person, \$700,000 aggregate, \$50,000 property. Local government may adopt a higher waiver, or if insurance coverage is in excess of waiver, or \$1 million per person state cap limit); North Carolina (N.C. GEN. STAT. § 143-299.2 (state), § 163A-435 (counties), § 160A-485 (cities), §115C-42 (school boards), and §160A-485.5 (cities with population over 500,000) (immunity waived by purchase of insurance, up to the amount purchased); Oregon (OR. REV. STAT. § 30.271 through OR. REV. STAT. § 30.273) (\$2,347,700 per person (state) or \$782,600 per person (local).

<sup>40</sup> Arkansas (AR CONST. Art 5 § 20), Delaware (10 Del. Laws c. § 4013), Florida (FLA. STAT. ANN. §768.28), Idaho (IDAHO CODE §6-926), New Hampshire (N.H. REV. STAT. ANN. § 541-B:14 (state) and N.H. REV. STAT. §507-B:4 (local)), Maine (ME. REV. STAT. ANN. tit. 14, § 8104D-8105), Minnesota (MINN. STAT. ANN. §3.736 (state), 466.04 and 466.06 (local)), Mississippi (MISS. CODE ANN. § 11-46- 15), Montana (MONT. CODE. ANN. §2-9- 108), Oklahoma (OKLA. STAT. tit. 51, §154), South Dakota, Virginia (VA. CODE §8.01-195.3 (state) and VA. CODE § 15.2-1405), Wyoming (WYO. STAT. §1-39-118(a) and WYO. STAT. § 1-39-118(f)).

recoveries, some states have included automatic increases of the cap,<sup>41</sup> or even the ability to repay awards over the course of several years.<sup>42</sup>

Faced with a similar dilemma, the Oregon Supreme Court declared a tort claims act limit unconstitutional in 2007.<sup>43</sup> In that case, the court held that the statute's incorporation of individual government hospital employees within the state's limited liability violated the patient's right to court access. The court reasoned that eliminating individual liability failed to provide an adequate remedy at law and overstepped the legislature's authority by having "completely eliminated an injured person's preexisting right to obtain a full recovery from the individual tortfeasor's who negligently caused the injuries."<sup>44</sup>

Following that decision, the Oregon legislature adopted new limitations on damages that raised the limits annually from 2009 to 2015,<sup>45</sup> and "[b]eginning in 2015, and every year thereafter," the amount will be adjusted based on changes of the Consumer Price Index, not to exceed three percent for any year.<sup>46</sup>

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<sup>41</sup> IND. CODE § 34-13-3-4, OR. REV. STAT. § 30.271 through OR. REV. STAT. § 30.273 adjusted annually as required by OR. REV. STAT. §§ 30.271(4), 30.272(4), and 30.273(3).

<sup>42</sup> HAW. REV. STAT. § 657-24.

<sup>43</sup> *Clarke v. Oregon Health Services University*, 175 P.3d 418 (Or. 2007).

<sup>44</sup> *Id.* at 434.

<sup>45</sup> OR. REV. STAT. §§ 30.271 (1)(a)-(g) and §§ 30.272(1)(a)-(g) and (3)(a)-(g).

<sup>46</sup> OR. REV. STAT. § 30.271(4) and § 30.272(4).

In looking at Oregon and the experience of other jurisdictions, it is apparent that there is no appreciable risk of rampant bankruptcies should this Court invalidate and overturn the cap. To the contrary, there is ample guidance available to the Legislature on solutions that would pass constitutional muster, including 50 years of empirical evidence and data on damages in claims involving government defendants in Pennsylvania. Furthermore, there are existing protections for all defendants, Commonwealth or otherwise, from excessive or unjust verdicts, such as remittitur.

**D. LIMITATIONS AND CAPS ON DAMAGES DO NOT ENCOURAGE A SAFER SOCIETY**

The purpose of tort law is two-fold: (1) to compensate injured individuals; and (2) to deter potential tortfeasors from disregarding due care.<sup>47</sup> As discussed above, it is clear that the cap, as it exists now, clearly fails the first prong; but it also fails the second. The relatively paltry amount of the cap fails to incentivize government defendants to exercise proper care and protect the citizens of the Commonwealth. When faced with the ever-growing expenses of large capital projects, it is imaginable that a government may want to postpone repairs or replacement of degrading structures.

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<sup>47</sup> See *Flagiello v. Pennsylvania Hospital*, 208 A.2d 193, 200-201 (Pa. 1965) and *Scampono v. Highland Park Care Center, LLC.*, 57 A.3d 582, 598 (Pa. 2012).

According to PennDOT, the expected cost to replace the I-83 John Harris Memorial Bridge in Harrisburg is \$679,000,000.<sup>48</sup> When compared to the total amount available for any single incident, the disproportion of that amount is staggering; and even more shocking when considering that expense is 2,716 times the value of a single life under the current cap. Considering those numbers, it is conceivable that there is at least some incentive for some entities to delay a recommended project for another year, when the worst potential exposure for liability for failing to do so is \$1,000,000. Without increasing these limitations, there is far less financial incentive for defendants to act with due care and safety for all citizens.

## **CONCLUSION**

Our laws should not tempt public officials to exchange the safety of innocent Pennsylvanian lives for monetary considerations. They should instead be encouraged by our laws to take protective measures. The General Assembly, despite pleading for action from the late Chief Justice Baer, has been immobile on this issue. It is well within the province and duty

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<sup>48</sup> Road & Bridge Project Construction, *Project Report*, PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (May 31, 2024) <https://gis.penndot.gov/paprojects/Reports/ProjectReport.aspx?ProjectID=113754&ReportType=Anticipated>.

of this Court to determine the fairness and constitutionality of these statutory caps on damages that leave victims of Commonwealth negligence without more than a fraction of a fraction the money it will take to provide care for the rest of their lives. To determine that one's loss of liberty, bodily integrity, or life is worth, at most, \$250,000 shocks the conscience. We respectfully submit this brief to the Court and ask that the change which Appellant, Hayley Freilich, seeks is realized to prevent further injustice within our Commonwealth, particularly when it comes to some of our most vulnerable citizens – those who have suffered catastrophic injury or death due to the negligence of the Commonwealth that is duty-bound to protect them.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

1. The undersigned, Joseph R. Froetschel, is licensed to practice law in the Commonwealth of Pennsylvania, and is good standing.
2. This brief complies with the typeface requirement of Appellate Rule 124(a) as it has been properly formatted and uses 14-point Arial font.
3. This brief complies with type-volume limitations of Appellate Rule 531 and does not exceed 7,000 words, as it contains 5,960 words based upon the word count of Microsoft Word, the word processing system used to prepare this brief.
4. I 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.

Dated: June 3, 2024

By: *s/ Joseph R. Froetschel*  
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*Attorney for Amici Curiae*

## **PROOF OF SERVICE**

I, Joseph R. Froetschel, hereby certify that on this 3<sup>rd</sup> day of June 2024, I have served the foregoing document to all counsel of record via PACFile and in accordance with the Rules of Appellate Procedure, which satisfies the requirements of Pa.R.A.P. 121.

Dated: June 3, 2024

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