

**[J-1-2025] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

HAYLEY FREILICH,	: No. 10 EAP 2024
	:
Appellant	: Appeal from the Order of the
	: Commonwealth Court entered on
	: July 6, 2023, at No. 327 CD 2022,
v.	: affirming the Order of the Court of
	: Common Pleas of Philadelphia
	: County, Civil Division, entered on
SOUTHEASTERN PENNSYLVANIA	: March 28, 2022, at No. 180600401.
TRANSPORTATION AUTHORITY,	:
	: ARGUED: March 4, 2025
Appellee	:

CONCURRING OPINION

JUSTICE WECHT

DECIDED: October 1, 2026

Hayley Freilich sued the Southeastern Pennsylvania Transportation Authority after sustaining catastrophic injuries caused by SEPTA’s negligence. As a Commonwealth agency, SEPTA’s liability is limited by statute to \$250,000 per plaintiff (or \$1,000,000 in the aggregate).¹ Freilich challenged this damages cap as violating her right to a jury trial and her right to a remedy, rights guaranteed by Article I, Sections 6 and 11, of Pennsylvania’s Constitution.² Because the statutory damages cap does not violate these constitutional provisions, I join the Majority’s decision to reject Freilich’s challenge, and I concur in today’s result. My analysis of Sections 6 and 11 differs in some respects from that of the Majority, as I discuss below.

¹ 42 Pa.C.S. § 8528(b).

² PA. CONST. art. I, §§ 6, 11.

I. Article I, Section 6

Article I, Section 6 of the Pennsylvania Constitution states: “Trial by jury shall be as heretofore, and the right thereof remain inviolate.”³ This provision has been part of the Pennsylvania Constitution since 1790, and has remained unchanged throughout.⁴ It guarantees both that the right to a trial by jury “shall be as heretofore” and that “the right thereof [shall] remain inviolate.” As a textual matter, the presence of the “as heretofore” term places a temporal qualification upon the “inviolable” term. To interpret the right to a trial by jury without reference to this temporal qualification is illusory.

The Majority nevertheless cleaves Section 6 in two, decoupling the “heretofore” requirement from the “inviolable” requirement.⁵ Having isolated these terms from each other, the Majority proceeds to resolve Freilich’s Article I, Section 6 challenge solely under the “inviolable” guarantee. The Majority declines to consider SEPTA’s invocation of the “as heretofore” qualification, dismissing it as “an interesting argument” that need not be reached.⁶

I cannot agree that the terms of Section 6 can be isolated from one another, or that the question before us turns on the “inviolable” language alone. The “as heretofore” provision does not merely surface an “interesting argument.” Rather, it forms an essential part of this case’s analysis as well. “Inviolable” is tied to “heretofore.” The words are not two independent components. The one cannot meaningfully be considered without reference to the other. “Heretofore” establishes, defines, and modifies that which must

³ PA. CONST. art. I, § 6.

⁴ The text of Article I, Section 6 originally appeared in Article 9, Section 6. See Jessica B. Rhoades, *Trial By Jury*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, § 9.2 at 235 (Gormley, ed., 2004).

⁵ Maj. Op. at 18.

⁶ *Id.* at 18-19, n.10.

remain “inviolate.” The two terms speak to distinct aspects of the right to a jury trial, and they work in tandem. The meaning of each exists within the context of the other. The only way to know whether access to a jury is a right that cannot be violated is to look to the right as it existed “heretofore;” and the only way to know whether the right to a jury trial as it existed heretofore is preserved is to examine whether the same right presently is being violated. By cleaving this constitutional provision in two, the Majority distorts it.

As noted, the Majority dispenses with the matter in cursory fashion, footnoting it as an “interesting argument.”⁷ That is unfortunate. Proper analysis of this constitutional case requires us to confront the argument that the jury trial right, while inviolate in its domain, was not available against the Commonwealth for many types of claims in 1790 (*i.e.*, “as heretofore”). Section 6 guarantees as “inviolate” the right to a jury trial, but only to the extent that “the right thereof” existed “as heretofore” when the provision was adopted as part of the Constitution of 1790.⁸ The protections of Article I, Section 6 extend “to all causes of action that existed at the time the Constitution was adopted,” but no further.⁹ We have explained that the purpose of this constitutional provision is to protect as constitutionally inviolate “the right of trial by jury in its accustomed form. . . . But beyond this point there is no limitation upon legislative power in constructing modes of redress

⁷ *Id.* at 18-19, n.10.

⁸ *Parker v. Children’s Hosp. of Philadelphia*, 394 A.2d 932, 938 (Pa. 1978) (holding that this provision guarantees “the right to trial by jury in all matters in which the right to a jury trial has been recognized at the time of the adoption of the Constitution of 1790”); *Byers v. Commonwealth*, 42 Pa. 89, 94-95 (Pa. 1862) (holding that Article I, Section 6 preserves the right to a jury trial as that right existed at the formation of the Commonwealth, and does not extend it).

⁹ *Mishoe v. Erie Ins. Co.*, 824 A.2d 1153, 1160 (Pa. 2003) (collecting cases).

for civil wrongs. . . .”¹⁰ Similarly, the legislature is free to forgo trial by jury for causes of action that did not exist in 1790, but which have since been created or defined by statute.¹¹

Preserving as inviolate the right to trial by jury as it was “heretofore” ties the guarantee to the right as it existed in 1790. “Notably, at that time—that is, ‘heretofore’—there was no common law right to a jury trial in proceedings against the Commonwealth, because the state was immune from suit.”¹² There was no right of action against the Commonwealth at all,¹³ as the sovereign could be sued only when it consented to be sued. The jury-trial right that existed “heretofore” as of 1790, and that would accordingly “remain inviolate,” did not encompass actions against the Commonwealth.

“The purpose of the Constitution undoubtedly was to preserve the jury trial wherever the common law gave it.”¹⁴ The “right thereof” is to remain “inviolat,” subject to the temporal limitation on that right as tethered by “heretofore.” When the plaintiff’s ability to exercise her right to a jury trial as it existed in 1790 is not violated, “the right thereof” remains as “[t]heretofore” and “inviolat.” Freilich offers no authority to suggest that she would have enjoyed a right to a jury trial for this type of action against the Commonwealth in 1790. There is no such authority. Hence, as a matter of historical reality, the right to a jury trial does in fact “remain inviolat” notwithstanding any cap that a post-1790 legislature chooses to place on damages. It remains “inviolat” because, in 1790, there was no such right against the sovereign “[t]heretofore.” Under Article I,

¹⁰ *Mishoe*, 824 A.2d at 1160 (quoting *Haines v. Levin*, 51 Pa. 412, 414 (Pa. 1866)).

¹¹ *Commonwealth v. Dietz*, 132 A. 572 (Pa. 1926) (holding that a new, statutory cause of action did not require trial by jury).

¹² *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1130 (Pa. 2014).

¹³ *See id.*

¹⁴ *Van Swartow v. Commonwealth*, 24 Pa. 131, 134 (1854).

Section 6, Freilich has no right to a jury trial when she sues the Commonwealth. Section 8528 cannot infringe upon a nonexistent right.

Moreover, as the Majority correctly observes, a cap on damages does not violate a plaintiff's right (via post-1790 statute) to have a jury hear her case against the Commonwealth.¹⁵ Rather, the damages cap burdens the amount available for recovery. The damages cap is implicated only after the jury has assessed damages; the cap does not violate the right to access a jury in the first instance.

An additional point pertaining to Article I, Section 6 bears mention. Freilich's argument that her Article I, Section 6 right to a jury trial has been violated by the damages cap is defeated by the second sentence of Article I, Section 11. That sentence permits the legislature to authorize suits against the Commonwealth "in such manner, in such courts and in such cases as the Legislature may by law direct."¹⁶ It follows that, in suits against the sovereign, the right to a jury trial articulated in Section 6 is subject to the limiting authority of the legislature, as set forth in Section 11, to which I now turn.

II. Article I, Section 11

Article I, Section 11 provides:

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.¹⁷

¹⁵ Maj. Op. at 21-22; *see also Zauflik*, 104 A.3d at 1132 ("The damages cap does not present a condition or restriction on appellant's right to have a jury hear her case; rather, the burden lies in the limited amount of recovery allowed, and that is obviously not the same thing.").

¹⁶ PA. CONST. art. 1, § 11.

¹⁷ *Id.*

Like Section 6, Section 11 “first entered the Pennsylvania Constitution in 1790, and was adopted verbatim in the Constitutions of 1838 and 1873, all three times as part of the Declaration of Rights.”¹⁸ Section 11 does two things. First, it guarantees a “remedy by due course of law.” Second, it authorizes suits against the Commonwealth, albeit only “in such manner, in such courts and in such cases as the Legislature may by law direct.”

At the 1789-90 Constitutional Convention, initially, only the first sentence of what would become Section 11 was proposed.¹⁹ Later, at the suggestion of one of the Constitution’s drafters, the provision that would become Section 11 was modified to allow suits against the Commonwealth.²⁰ The delegates ultimately adopted the language that has prevailed until today, permitting suits against the Commonwealth “in such cases as the Legislature may, by law, direct.” While the adoption of this section in the Constitution of 1790 did not itself waive the constitutional immunity of the Commonwealth, that adoption authorized the Legislature, if it chooses, to prescribe circumstances in which the Commonwealth may be sued.²¹

Freilich focuses upon the first sentence of Section 11, while obscuring the second. That second sentence of Section 11 gives the General Assembly control over suits brought against the Commonwealth. It authorizes the legislature “to enact laws that direct the way in which a plaintiff might pursue her right to a judicial remedy against the

¹⁸ See *Mayle v. Pennsylvania Dep’t. of Highways*, 388 A.2d 709, 716 (Pa. 1978); PA. CONST., art. 9, § 11 (1790); PA. CONST., art. 9, § 11 (1838); PA. CONST., art. 1, § 11 (1873).

¹⁹ See *Yanakos v. UPMC*, 218 A.3d 1214, 1220-21 (Pa. 2019).

²⁰ *Id.* See Donald Marritz, *Courts to Be Open; Suits Against the Commonwealth*, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, § 14:3[c] at 469 (Gormley, ed., 2004).

²¹ See, e.g., *Mayle*, 388 A.2d at 717.

Commonwealth.”²² Pursuant to this constitutional authority, the General Assembly has created a statutory presumption of immunity, has waived that immunity in certain circumstances, and has imposed a cap on damages in cases where the waiver applies.²³ Applying the second sentence of Section 11, this Court has upheld these exceptions to generalized governmental immunity.²⁴

The Constitution assigns to the legislature the responsibility for striking the balance between public and private interests. The General Assembly has answered this call by enacting the Sovereign Immunity Act. The governmental interest advanced by the Act is expressed as a balance between protecting the public fisc and compensating individuals injured by the Commonwealth. Under Section 11, it is the legislature, not the judiciary, that has the authority to resolve the policy tensions inherent in balancing the public and private interests implicated by suits against the Commonwealth.

In *Smith v. City of Philadelphia*, this Court upheld the damages cap included in the Subdivision Tort Claims Act, reaffirming that Section 11 authorizes the General Assembly “to regulate the manner, the courts and the cases in which suits may be brought against the Commonwealth,” and that “the Framers intended that the legislature have complete control over suits brought against the Commonwealth.”²⁵ We held that “Article I, Section 11 should not be read to prohibit the Legislature from enacting a limit on [] tort liability.”²⁶

²² *Zauflik*, 104 A.3d at 1128.

²³ See 42 Pa.C.S. §§ 8521, 8522, 8528.

²⁴ See *Zauflik*, 104 A.3d at 1127; *Carroll v. York Cnty.*, 437 A.2d 394, 396 (Pa. 1981); see also 1 Pa.C.S. § 2310 (pursuant to Section 11, it is the General Assembly’s intent that the Commonwealth, its officials and employees shall remain immune to suit except where immunity is specifically waived).

²⁵ 516 A.2d 306, 309 (Pa. 1986).

²⁶ *Id.*

The General Assembly has exercised this constitutional authority to immunize the Commonwealth from liability for a wide range of claims, to channel contract-based claims against the Commonwealth through administrative agencies that deprive plaintiffs of any opportunity for a jury trial, and, under 42 Pa.C.S. § 8528, to limit damages for certain claims for which it has waived sovereign immunity. The legislature's prerogative to choose categories of cases in which the Commonwealth will waive immunity from suit encompasses an authority to designate monetary limits applicable to recovery in such cases. What was true forty years ago in *Smith* remains true today: "[i]f the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted."²⁷

As the Majority ultimately recognizes, this Court already has rejected the arguments that Freilich advances in this case.²⁸ In *Zauflik*, we held that "the General Assembly has the authority under Article I, Section 11 to define the manner in which governmental entities may be sued in tort, and it has determined that such lawsuits may proceed in limited circumstances, subject to a uniform limitation on damages."²⁹ Consequently, "the General Assembly also properly acted within its Section 11 authority when it adopted the damages cap in actions against local governments in Section 8553 of the Act."³⁰ *Zauflik*, in turn, rested upon decades of precedent construing Section 11 as empowering the legislature to balance competing public and private policy interests implicated by suits against the Commonwealth. In *Carroll*, for example, the Court held that the Political Subdivision Tort Claims Act "is a valid exercise of legislative authority

²⁷ *Id.*

²⁸ See Maj. Op. at 27-29.

²⁹ 104 A.3d at 1129.

³⁰ *Id.* at 1128 (citing 42 Pa.C.S. § 8553(b)).

specifically granted by our Constitution.”³¹ We rejected the argument that prohibiting a plaintiff from suing a political subdivision of the Commonwealth effectively closed the courts to potential plaintiffs by denying them a “remedy by due course of law” under the first sentence of Section 11, because this argument was refuted by the second sentence of Section 11.³² Section 11 authorizes the General Assembly “to enact laws that direct the way in which a plaintiff might pursue her right to a judicial remedy” against the Commonwealth or its political subdivisions.³³ If the General Assembly may bar recovery against the Commonwealth outright, it follows that the General Assembly also may limit the amount of any recovery that may be had in circumstances where it chooses to modify that bar.

Freilich’s reading of Section 11 is atextual. She frames her argument around the first sentence while disregarding the second. Even on an as-applied basis, acceptance of Freilich’s position would require the Court to disregard half of Section 11. What the first sentence of Section 11 gives, the second sentence qualifies. An individual’s right to a remedy as described at the outset of Section 11 is limited in cases against the Commonwealth, as the legislature sees fit. The General Assembly has the constitutional authority to strike the appropriate balance between the public and private interests that are in play. Absent any other constitutional infirmities, no Court may displace these policy choices.

Even without the second sentence of Section 11, it is not apparent that Freilich would have a persuasive argument against the damages cap under the first sentence. That first sentence ties the guarantee of a remedy to “due course of law.” The historical

³¹ 437 A.2d at 398.

³² *Id.* at 396.

³³ *Zauflik*, 104 A.3d at 1128.

record does not reveal what the drafters intended when they guaranteed a “remedy by due course of law.” Nor do we know what interpretation the ratifying voters likely gave to that phrase.³⁴ It is possible that the framers intended “by due course of law” to mean “by the law of the land,” such that Section 11 guarantees a right to “whatever remedy the law allows.”³⁵ Early decisions from this Court spoke of “due course of law” in terms of invalidating legislation that attempted to interfere with the judicial process.³⁶ This line of cases suggests that “due course of law” may have been understood to involve access to such process. Indeed, “due course of law” speaks to us of process regularity, of a rule-based paradigm that affords notice, a right to be heard, and other hallmarks of predictable, equal procedural justice.

It is not apparent from the text of Section 11 or the historical record whether “by due course of law” instantiates legislative authority to decide the “course of law” that is, in any given set of circumstances, “due.” Regardless, to demonstrate that she was deprived of a remedy by due course of law under the first sentence of Section 11, Freilich would have to establish that the legislature is not empowered to make laws that limit the

³⁴ See *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 765 (Pa. 1979) (“Constitutional provisions . . . must be given the ordinary, natural interpretation the ratifying voter would give them.”).

³⁵ See *Yanakos*, 218 A.3d at 1239 (Wecht, J., dissenting); see also *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 492 (Mont. 1989); *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (“The constitutional guaranty [*sic*] providing for open courts and insuring a remedy for injuries does not guaranty [*sic*] a remedy for every species of injury, but applies only to such injuries as constitute violations of established law of which the courts can properly take cognizance.”).

³⁶ See, e.g., *Bagg’s Appeal*, 43 Pa. 512, 517 (Pa. 1862) (holding that a statute that extended the statute of limitations in a case that had already been resolved in the courts was contrary to “due course of law” because “legislation cannot be just that gives opposite rules for distinct cases in the same class. . . . This is nothing like ‘the due course of law’”); *Menges v. Dentler*, 33 Pa. 495, 498 (Pa. 1859) (holding that “justice [*is*] denied, and the due course of law violated” when the legislature changes the law that applies to a case).

amount of money available as the remedy due under her circumstances or any other. Freilich has not made any such showing.

Freilich leans upon this Court's decision in *Yanakos* as support for her Section 11 argument. Focusing exclusively upon the first sentence of Section 11, Freilich argues that Section 11 is violated when a remedy has been so substantially impaired that it has become illusory. The medical malpractice plaintiffs in *Yanakos* brought a constitutional challenge under Section 11 to a statute of repose that barred certain claims filed beyond seven years of the alleged tort or breach of contract.³⁷ A plurality of this Court struck down the statute as violating Section 11. I declined to join that plurality, which failed "to afford the legislature sufficient latitude to modify" traditional common law remedies, in accord with the "due course of law."³⁸ The *Yanakos* plurality did not confront Section 11's "due course of law" language. Instead, it focused upon the guarantee of a remedy, ignoring that guarantee's textual tether to "due course of law."

Invoking the plurality opinion in *Yanakos*, Freilich argues that, like the statute of repose at bar there, the statutory liability cap here vitiates the constitutional right to a remedy. Freilich's argument advances without any regard for what "due course of law" means or what it may provide in any given circumstance. As the Majority recognizes, *Yanakos* involved a private cause of action, rather than a suit against the Commonwealth. The second sentence of Section 11, therefore, was not implicated in *Yanakos*, as it is here. Nevertheless, Freilich may be forgiven for thinking that *Yanakos* licensed boundless challenges under the remedies clause and subjected all such challenges to

³⁷ 218 A.3d at 1216.

³⁸ *Id.* at 1243 (Wecht, J., dissenting).

intermediate scrutiny.³⁹ Freilich maintains that *Yanakos* “reasonably can be read” to require the application of intermediate scrutiny to challenges brought under the Remedies Clause.⁴⁰ Under such a view, a legislative enactment would be constitutional only if it is “substantially related to achieving an important government interest.”⁴¹

That is not a view that comports with Section 11. While Section 11 anticipates that the judiciary will administer remedies by “due course of law,” the General Assembly is the locus where such “due course” begins, *i.e.*, with the lawmaking enterprise itself. The Constitution mandates a remedy by due course of law, not by some vision of cosmic justice. The General Assembly maintains its policy-making authority to abrogate or modify common law causes of action in response to clear social or economic needs, provided that it acts in a rational and non-arbitrary manner.⁴² Freilich has not demonstrated that, under the first sentence of Section 11, the promise of a “remedy by

³⁹ One justice favored construing the right to a remedy guaranteed in Article I, Section 11, as fundamental, a construction that would have mandated application of strict scrutiny to any allegedly infringing statute. See *Yanakos*, 218 A.2d at 1227 (Donohue, J., concurring and dissenting).

⁴⁰ Appellant’s Br. at 52.

⁴¹ *Yanakos*, 218 A.3d at 1222.

⁴² See *id.* at 1243 (Wecht, J., dissenting) (“Rather than embrace a test that is manifestly incompatible with our existing Remedies Clause jurisprudence, I would follow the lead of the many courts which have held that the legislature may abrogate or modify a common law cause of action in response to a clear social or economic need, so long as the challenged legislation bears a rational and non-arbitrary connection to that need.”); see also *Silver v. Silver*, 280 U.S. 117, 122 (1929) (“[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.”); see also Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK MAGAZINE (Oct. 4, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10> (“A lot of stuff that’s stupid is not unconstitutional. I gave a talk once where I said they ought to pass out to all federal judges a stamp, and the stamp says—Whack! [Pounds his fist.]—STUPID BUT CONSTITUTIONAL. Whack! [Pounds again.] STUPID BUT CONSTITUTIONAL! Whack! STUPID BUT CONSTITUTIONAL. [Laughs.] And then somebody sent me one.”) (capitalized in original).

due course of law” precludes the legislature from defining the substance and scope of any such remedy.

Mindful of this Court’s *Zauflik* precedent, Freilich chose to raise her Article I, Section 6 and Article I, Section 11 claims as as-applied constitutional challenges, rather than facial challenges. This distinction holds no meaningful difference in the context of the damages cap. If we were to agree with Freilich that the statutory cap is invalid as applied to her, such holding would lead to unlimited government liability and/or a lengthy (and presumably open-ended) series of cases litigated in a quixotic effort to determine somehow which plaintiffs’ injuries are subject to the damages cap and which are not.⁴³

A facial challenge tests a law’s constitutionality on the law’s text alone. A statute is unconstitutional on that basis where “no circumstances [exist] under which the statute would be valid.”⁴⁴ By contrast, an as-applied challenge requires the court to consider whether a statute is unconstitutional when applied to the particular plaintiff under particular circumstances.⁴⁵ Freilich has built an appeal premised upon the particular circumstances of her case, focusing upon the catastrophic nature of her injuries compared to the inadequate amount of the available damages, the diminution in monetary value that the passage of time has had on the statutorily available damages cap, and her concomitant challenges in finding competent counsel willing to pursue her case. Freilich seeks only reinstatement of the stipulated verdict in her case, rather than a declaration that the liability cap is unconstitutional as a general matter.

⁴³ Maj. Op. at 32.

⁴⁴ *Germantown Cab Co. v. Philadelphia Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

⁴⁵ *Martin v. Donegal Twp.*, 325 A.3d 502, 509 (Pa. 2024) (“An as-applied constitutional challenge does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.”) (internal citations omitted).

As Judge Leadbetter observed below, Freilich would not be entitled to relief on an as-applied basis because she “did, in fact, obtain highly competent and effective counsel.”⁴⁶ Notwithstanding the adversity that law and circumstance has imposed upon her, Freilich has not, apparently, suffered a deprivation of counsel. Freilich cannot show that the cost of litigating her claim precluded counsel from accepting her case.

Also problematic for an as-applied challenge is Freilich’s decision not to try her case before a jury. She chose, instead, to stipulate to a jury verdict.⁴⁷ Freilich opted not to exercise her right to a jury trial as provided in Article I, Section 6, notwithstanding the opportunity to do so. Waiver of her right to have a jury assess damages does not establish that her “inviolable” right to a jury trial “as heretofore” was violated.

Although Freilich frames her claim in the language of as-applied challenges, it is indisputable that success on that claim necessarily would mean that similarly situated plaintiffs with catastrophic injuries who are restrained by the damages cap could bring the same challenge. An as-applied finding of unconstitutionality here would impact each plaintiff whose damages award is similarly limited. It also would require every trial court in each such case to determine whether the amount of recovery or potential recovery is sufficient for that plaintiff to have secured a lawyer who is both able and willing to vindicate the plaintiff’s right to a jury trial and right to pursue an adequate remedy. This would require both expert and judicial assessments of the legal expenses and medical costs associated with each case, along with a determination of the lowest possible recovery sufficient for each plaintiff in view of the particular circumstances of the case. Would a ten percent contingency fee suffice to secure legal counsel? Would a thirty-three percent

⁴⁶ *Freilich v. Southeastern Pennsylvania Transportation Auth.*, 327 C.D. 2022, 2023 WL 4370703, at *12 n.3 (Pa. Cmwlth. July 6, 2023) (Leadbetter, J., concurring).

⁴⁷ To be sure, Freilich’s decision in this regard was reasonable, given the difficulties associated with trial during the coronavirus pandemic.

fee be sufficient, or excessive? Would an award above the damages cap but below full recovery be sufficient? Does it matter to this calculation whether the defendant offers to settle, or contests liability, thereby driving up legal costs? Trial judges would be forced to adjudicate battles of experts in order to analyze and weigh the competing public and private interests in each such case. This is not our governing paradigm. Instead, our Constitution vests in the legislature the responsibility to strike the balance that the people's representatives deem appropriate. That balancing having been done, our work is at an end.

Freilich resists this conclusion. Her approach would impose a fact-intensive inquiry requiring trial courts in each individual case to balance the private interest in full recovery with the public interest in protecting and conserving the public fisc. Line drawing of the sort Freilich contemplates would result in inconsistent outcomes shaped by parties' litigation postures and individual trial judges' necessarily idiosyncratic views regarding the adequacy of recovery in particular cases. This is a judgment that Article I, Section 11 leaves to the lawmakers. To grant relief in this appeal would be to force the judiciary to wade into the line-drawing and balancing that the Constitution entrusts to the legislature.

Under Freilich's rubric, courts would have to slice and dice the private right to a remedy in individual circumstances and then, by some unknown and unknowable yardstick, weigh that right against the "government policymaking prerogatives and the public fisc" that the second sentence of Section 11 seeks to protect.⁴⁸ Proper analysis would require consideration of an admixture of attorneys' fees, costs, medical expenses, and third party insurance claims. We have no constitutional metric by which to measure these factors and then discern from such measuring what might be a constitutionally

⁴⁸ *Brooks v. Ewing Cole, Inc.*, 259 A.3d 359, 371 (Pa. 2021) (internal citations omitted).

permissible award. Slapping the “as-applied” label on Freilich’s claim cannot obscure the fact that this exercise would need to be repeated in each and every case where the damages cap applies.

Take this case as an example. Freilich argues that, were the Court to agree with her that the liability cap is unconstitutional as applied to her, the remedy would be to reinstate the stipulated jury verdict, rather than to determine a new liability cap or remand for the trial court to do so. Let us set aside the fact that this argument fails to account for the need to assess severability of the liability cap in the event that this Court were inclined to hold the cap unconstitutional. The proposed remedy would confer an unwarranted benefit on Freilich by disregarding one half of the balancing act—protection of the public fisc. Although Freilich disclaims a request for uncapped damages, that is precisely the principle that ensues from vindication of her position.⁴⁹ Freilich posits that the result of invalidating the damages cap would be the award of the stipulated jury verdict. The result in her case, under this advocacy, should be whatever the jury awards. And the necessary result in future cases—notwithstanding Freilich’s characterization of her claim as an as-applied challenge—is whatever the jury determines.

Striking the appropriate balance among competing interests involves policy decisions that “are not particularly amenable to resolution by an appellate court with a limited, fact-specific record.”⁵⁰ This is a matter constitutionally reserved to the legislature and beyond the scope of judicial resolution.⁵¹ As we have observed, “the power of judicial

⁴⁹ See Appellant’s Reply Br. at 26.

⁵⁰ *Zauflik*, 104 A.3d at 1121.

⁵¹ See *id.* at 1120-21 (whether a statutory damages cap strikes the appropriate balance “is a question of policy addressed to the General Assembly itself, which has the greater capacity for broad analysis of such complex questions as the implications of self-insurance or risk-sharing pools, or the actual budgetary ability of school districts and other agencies to carry insurance under various scenarios of uncapped liability”).

review must not be used as a means by which the courts might substitute [their] judgment as to public policy for that of the legislature.”⁵² Under Article I, Section 11, the legislature has the exclusive constitutional authority to determine what manner of suits may be brought against the Commonwealth. The General Assembly has chosen to enact, and not to revisit, the existing damages cap. Policy arguments challenging the wisdom or adequacy of the statutory limits are arguments for the legislature, not the courts. As Justice Felix Frankfurter wrote over seventy-five years ago:

Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defect should be demonstrated and removed than that the law should be aborted by judicial fiat.⁵³

With the passage of the Sovereign Immunity Act, the General Assembly has acted pursuant to Section 11, directing the manner in which plaintiffs may sue the Commonwealth. Neither Article I, Section 6 nor the remedies clause of Article I, Section 11 poses a constitutional impediment to this legislative authority.

⁵² *Parker*, 394 A.2d at 937.

⁵³ *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring).