

**[J-1-2025]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

**TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.**

|                           |                                       |
|---------------------------|---------------------------------------|
| HAYLEY FREILICH,          | : No. 10 EAP 2024                     |
|                           | :                                     |
| Appellant                 | : Appeal from the Order of the        |
|                           | : Commonwealth Court entered on       |
|                           | : July 6, 2023, at No. 327 C.D. 2022, |
| v.                        | : affirming the Order entered on      |
|                           | : March 29, 2022, in the Court of     |
|                           | : Common Pleas of Philadelphia        |
| SOUTHEASTERN PENNSYLVANIA | : County, Civil Division, at No.      |
| TRANSPORTATION AUTHORITY, | : 180600401.                          |
|                           | :                                     |
| Appellee                  | : ARGUED: March 4, 2025               |

**OPINION**

**CHIEF JUSTICE TODD**

**DECIDED: October 1, 2026**

Through its enactment of certain provisions of the Judicial Code,<sup>1</sup> commonly known as the Sovereign Immunity Act (“Sovereign Immunity Act”), the General Assembly has limited recovery against Commonwealth parties to \$250,000.<sup>2</sup> In this appeal by allowance, we consider whether this damages cap, as applied to the facts of this case, violates the Pennsylvania Constitution’s right to a jury trial<sup>3</sup> or right to a remedy.<sup>4</sup> We also granted allocatur to address whether, if we determine the damages cap to be

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<sup>1</sup> 42 Pa.C.S. §§ 8521-28.

<sup>2</sup> Section 8528(b) of the Sovereign Immunity Act provides that “[d]amages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.” 42 Pa.C.S. § 8528(b).

<sup>3</sup> Pa. Const. art. I, § 6.

<sup>4</sup> Pa. Const. art. I, § 11.

unconstitutional, the cap is severable from the remainder of the Sovereign Immunity Act. For the reasons that follow, we are compelled to find that, as applied to the circumstances *sub judice*, the Sovereign Immunity Act does not violate our Constitution's right to a jury trial or right to a remedy, and, thus, affirm the order of the Commonwealth Court.

Appellant Hayley Freilich was in the crosswalk on Broad Street and Vine Street in downtown Philadelphia, Pennsylvania, when she was struck by a Southeastern Pennsylvania Transportation Authority ("SEPTA") bus. The front axle of the bus ran over her left foot, causing extensive injuries. She underwent a partial left foot amputation, and required numerous additional operations and significant medical care. Indeed, she will require professional curative care for the remainder of her life.

Appellant retained counsel under the terms that the law firm would challenge the constitutionality of Section 8528(b) of the Sovereign Immunity Act limiting SEPTA's liability to \$250,000, and argue that the cap violates the right to a jury trial provided for in Article I, Section 6 and the right to a remedy in Article I, Section 11 of the Pennsylvania Constitution.<sup>5</sup> In 2018, Appellant filed a one-count complaint in the Philadelphia County Court of Common Pleas, alleging that SEPTA was negligent when its bus struck and injured her. SEPTA filed an answer and new matter asserting, *inter alia*, all defenses, immunities, and limitations available to the Commonwealth under the Judicial Code. However, SEPTA made an offer to settle Plaintiff's claims in the amount of the \$250,000 damages cap. Appellant rejected the offer.

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<sup>5</sup> There is no dispute that Section 8528 applies to SEPTA. Section 8501 of the Sovereign Immunity Act defines a "Commonwealth party" as "[a] Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment." 42 Pa.C.S. § 8501. SEPTA, a regional transportation authority created by an act of the General Assembly, as a Commonwealth agency, is a "Commonwealth party," and, therefore, is covered by the sovereign immunity provision. *See Feingold v. Southeastern Pennsylvania Transportation Authority*, 517 A.2d 1270, 1276-77 (Pa. 1986).

SEPTA admitted liability, and, thus, a jury trial was scheduled, limited to a determination of compensatory damages. However, due to complications brought on by the COVID-19 pandemic, as well as the time and expense of a jury trial, on October 29, 2021, the parties entered into a Stipulated Jury Verdict for Plaintiff (“Stipulated Verdict”), awarding \$500,000 for past economic losses; \$500,000 for future economic losses; and \$6,000,000 for past and present non-economic losses. The parties acknowledged that they would file post-trial motions as if this was a jury verdict. Appellant filed a motion for delay damages, seeking damages totaling \$892,979. SEPTA filed a motion to mold the verdict to conform it to the \$250,000 statutory cap, and filed an answer to Appellant’s motion for delay damages, again invoking the application of Section 8528(b), and citing its earlier settlement offer in the amount of that statutory cap.

That same day, Appellant filed an answer and memorandum of law in opposition to SEPTA’s motion to mold the verdict. Appellant relied on the concurring opinion by then-Justice, later Chief Justice, Max Baer in *Zauflik v. Pennsbury School District*, 104 A.3d 1096, 1134 (Pa. 2014) (Baer, J., concurring), in which he asserted that a facial constitutional challenge to the statutory cap for local political subdivisions was without merit, but, with a properly developed record, a plaintiff might establish that the damages cap constituted an impermissible barrier to the jury trial right under Article I, Section 6.

In further support of her position, Appellant obtained the reports of a number of experts to demonstrate Appellant’s injuries; her resulting medical and surgical care and her surgical prognosis; her functional deficits and her rehabilitative prognosis; her mental health following the partial amputation of her foot; a care plan describing her medical and personal care costs over her lifetime; and the inflation-adjusted value of her future personal and medical care costs. Appellant’s counsel advanced \$72,170 for these expert reports; \$1,492 for medical records; \$1,585 for trial technology services; and \$957 for

court filings, service, and messenger fees. In addition, under the contingent fee agreement, counsel would be paid \$83,333 out of the damages cap. Subtracting these litigation expenses and counsel fees from the \$250,000 statutory recovery, Appellant asserted that she would net only \$90,462 in compensatory damages.

In addition, however, Appellant's health insurer, Aetna Health, Inc. ("Aetna"), had paid \$520,668 for health care resulting from the accident, and, under the Certificate of Coverage setting forth Aetna's rights and responsibilities, Aetna retained the right for repayment of the full cost of all benefits that it had paid, and possessed an assignment of the proceeds of any settlement, judgment, or other payment received by her to the extent of the full cost of all benefits provided by Aetna. The Certificate of Coverage also granted Aetna a first-priority lien on any recovery from a third party, and Appellant was required to pay, from any recovery, settlement, or judgment from any responsible third party all amounts due to Aetna as reimbursement for the benefits that Appellant received. Thus, according to Appellant, any such payments to Aetna would further diminish or eliminate her net recovery. Similarly, Appellant received \$7,967 in short-term disability benefits and \$31,383 in long-term disability benefits from The Hartford under a disability insurance policy. Under the policy, The Hartford reserved the right to reimbursement to the fullest extent allowed by statute and customary practice.

On March 4, 2022, the Philadelphia County Court of Common Pleas, per Judge James Crumlish, III, granted SEPTA's motion to mold the verdict, and denied Appellant's motion for delay damages. In a thoughtful opinion in support of its order, the court, while mindful of the inequities of the recovery in light of Appellant's catastrophic injuries, found itself bound by our decision in *Zauflik*, which in the court's view rejected similar challenges to the statutory damages cap, and concluded it could not substitute its judgment for that of the legislature. Appellant filed a praecipe for entry of judgment, and a judgment of

\$250,000 against SEPTA was entered on the trial court's docket. Appellant appealed to the Commonwealth Court.

A three-judge panel of the Commonwealth Court affirmed in an unpublished opinion authored by Judge Michael Wojcik, and joined by Judge Stacy Wallace. The court first rejected Appellant's argument that the damages cap violated her right to a jury trial, as the entire judgment would be consumed by costs, fees, and insurance reimbursement claims. Specifically, as did the trial court, the Commonwealth Court found itself bound by our decision in *Zauflik*, which it read to resolve Appellant's as-applied challenge. Specifically, the Commonwealth Court explained that, assuming the right to a jury trial in a negligence case brought against the Commonwealth was protected under Article I, Section 6, a trial by jury was not impeded by the damages cap; rather, what was impacted was the ultimate recovery, which, according to the *Zauflik* Court, was qualitatively distinct and unconnected to a trial by jury. Thus, the Commonwealth Court determined that, even assuming fees and costs rendered Appellant effectively unable to obtain any financial recovery, she nevertheless could adequately prosecute the matter and such diminution in recovery was not a violation of Appellant's right to a jury trial.

As to Appellant's challenge based on our Constitution's remedies clause in Article I, Section 11, the Commonwealth Court reasoned, again pointing to *Zauflik*, that the General Assembly acted within its constitutional authority when it provided for a limited waiver of governmental immunity, offering that if the legislature could abolish a cause of action — its undisputed right — it could also limit recovery on actions. See *Smith v. City of Philadelphia*, 516 A.2d 306, 309-10 (Pa. 1986). Thus, while acknowledging the harsh result of its decision, the court concluded that it was bound by *Zauflik*, and held that a limitation on damages was not a constitutional violation.

Finally, in rejecting Appellant's constitutional claims, the Commonwealth Court stressed that it was strictly bound by our decisions, even if the members of the Commonwealth Court panel did not agree with such precedent, and it was for this Court to determine if new precepts of law should be enunciated or existing doctrine expanded.

Senior Judge Bonnie Brigrance Leadbetter concurred in the result. While acknowledging that the Commonwealth Court was bound by *Zauflik*, she opined, relying upon Justice Baer's concurring opinion in that decision, that the statutory damages cap violated the right to a remedy and the right to trial by jury under the Pennsylvania Constitution.

Appellant appealed to our Court, and we granted allocatur to address the constitutionality of Section 8528(b) of the Sovereign Immunity Act, as applied to Appellant. In addition, we requested briefing on the issue of whether, if found to be unconstitutional, Section 8528(b) was severable from the rest of the Sovereign Immunity Act.

Before addressing these issues, we set forth a brief background of the history of sovereign immunity in our Commonwealth and the governing standard and scope of our Court's review of these constitutional challenges.

The complex and winding history of sovereign immunity in our Commonwealth has been detailed in prior decisions, *see, e.g., Zauflik*, 104 A.3d at 1110-16; *Mayle v. Department of Highways*, 388 A.2d 709, 716 (Pa. 1978), and in scholarship, *see, e.g.,* James J. Dodd-o & Martin A. Toth, *The Emperor's New Clothes: A Survey of Significant Court Decisions Interpreting Pennsylvania's Sovereign Immunity Act and Its Waivers*, 32 Duq. L. Rev. 1 (1993).

Writ large, the sovereign immunity doctrine holds that the Commonwealth cannot be sued in its own courts except with its consent, and insulates the Commonwealth and

its agencies from liability except in specified circumstances when that consent is granted. The sovereign immunity doctrine originated in English common law and was embodied in the maxim “the King can do no wrong.” *Mayle*, 388 A.2d at 710. Although it is supposed that this maxim may originally have been based on misinterpretation of the law, by the mid-13th century, it was accepted that the Crown could not be sued unless it consented to suit. *Id.* In Pennsylvania, the doctrine of sovereign immunity was originally recognized in *Respublica v. Sparhawk*, 1 Dall. 357, 362 (Pa. 1788), and, in 1851 in *O’Connor v. Pittsburgh*, 18 Pa. 187 (1851), we announced its formal adoption in the Commonwealth. In doing so, the *O’Connor* Court reasoned that sovereign immunity was unaffected by the Pennsylvania Constitution of 1776 or the Pennsylvania Constitution of 1790. Rather, the court deemed the doctrine to be part of the law of the Commonwealth, inherent in the concept of a state body, requiring neither legislative nor constitutional enactment.

While conventional wisdom eschewed general concepts of immunity, sovereign immunity remained, perhaps as a result of decisions establishing its constitutional foundation and the belief that immunity protected the public purse. Nevertheless, our decisions reflect an impatience with the legislature’s failure to address the obvious inequities created by the sovereign’s absolute immunity.

Indeed, in 1978, in *Mayle*, contrary to prior reasoning, we stripped the constitutional foundation for sovereign immunity, concluding that the doctrine was based upon common law principles wholly within the court’s power to alter, and abolished the doctrine entirely.<sup>6</sup> In direct response to our decision, the legislature passed the Sovereign Immunity Act.

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<sup>6</sup> Our Court had already taken a partial step in this direction earlier involving actions against political subdivisions. *See also Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877 (Pa. 1973) (abolishing doctrine of governmental immunity protecting local political subdivisions from suit).

The Sovereign Immunity Act provides for a three-part construct: a presumption of immunity; waiving immunity for certain categories of conduct; and imposing a liability cap on any claim that fits within the enumerated categories for which immunity is waived. See 42 Pa.C.S. §§ 8521, 8522, 8528. While, generally speaking, any damages cap is in some respects unfair to injured parties as it limits the recovery of damages otherwise found to be warranted, the legislative history of the Sovereign Immunity Act indicates that the General Assembly's greatest concerns regarded the economic impact upon the Commonwealth's fisc. Indeed, the statute was enacted with immunity being the rule, and waivers the exception. See *id.* § 8521. The legislature intended to strike a balance between allowing relief from the harsh rule of immunity in certain limited situations while at the same time maintaining the integrity of the Commonwealth's fisc. See *generally* Dodd-o & Toth, 32 Duq. L. Rev. at 106-07.

Additionally, we must emphasize that Appellant brings her constitutional challenges on an "as-applied" basis. An as-applied challenge is distinct from a "facial" constitutional challenge. In *Commonwealth v. Pownall*, 278 A.3d 885, 904-05 (Pa. 2022), we explained: "A statute is facially unconstitutional only where no set of circumstances exist[s] under which the statute would be valid." In determining whether a statute is facially invalid, "courts do not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases." *Germantown Cab Company v. Philadelphia Parking Authority*, 206 A.3d 1030, 1041 (Pa. 2019). In contrast, an as-applied challenge contends that legislation, even though it may generally operate constitutionally, is unconstitutional as applied to an individual's particular circumstances. *Pownall*, 278 A.3d at 906.

Finally, both of the issues on which we granted allocatur raise constitutional challenges, and so are pure questions of law. Thus, our standard of review is *de novo*,

and our scope of review is plenary. *League of Women Voters of Pennsylvania v. DeGraffenreid*, 265 A.3d 207, 228 n.23 (Pa. 2021). Furthermore, we stress that the fairness, sageness, essential nature, benefit, and expediency of legislation are issues for the General Assembly, and not for the judiciary to determine. Thus, “acts passed by the General Assembly are strongly presumed to be constitutional” and our Court will not declare legislation to be unconstitutional “unless it clearly, palpably, and plainly violates the Constitution. If there is any doubt that a challenger has failed to reach this high burden, then that doubt must be resolved in favor of finding the statute constitutional.” *Pennsylvania State Association of Jury Commissioners v. Commonwealth*, 64 A.3d 611, 618 (Pa. 2013) (citation omitted). With these general principles in mind, we turn to the issues before us.

The first issue on which we granted allocatur is whether the damages cap in Section 8528(b) of the Sovereign Immunity Act violates Appellant’s right to a jury trial under Article I, Section 6 of the Pennsylvania Constitution. Section 6 provides that “Trial by jury shall be as heretofore, and the right thereof remain inviolate.” Pa. Const. art. I, § 6.

Initially, Appellant acknowledges that we upheld similar damages caps against a facial challenge in *Zauflik*, but maintains that, notwithstanding that decision, Section 8528’s damages cap is unconstitutional as applied to her. Specifically, Appellant points to Justice Baer’s concurring opinions in *Zauflik*<sup>7</sup> and *Grove v. Port Authority of Allegheny County*, 218 A.3d 877 (Pa. 2019)<sup>8</sup> as foundational support for her position.

Specifically, Appellant highlights that Justice Baer, while joining the majority opinion, offered his view that “through a properly developed record, a victim may be able

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<sup>7</sup> This author and Justice Stevens joined the concurring opinion in *Zauflik*.

<sup>8</sup> Justices Donohue, Dougherty, and Mundy joined the concurrence in *Grove*.

to establish that the statutory damages cap constitutes an onerous procedural barrier to the jury trial right in violation of Article I, Section 6.” *Zauflik*, 104 A.3d at 1134 (Baer, J., concurring). Appellant stresses Justice Baer’s reliance upon *Application of Smith*, 112 A.2d 625 (Pa. 1955), in which a plaintiff challenged a statute and local court rule promulgated pursuant to that statute which required compulsory arbitration of certain claims. A jury trial was permitted only after arbitration, and the party appealing the arbitration award was required to pay the arbitrator’s fee; these requirements were challenged as an unconstitutional restriction upon the right to a jury trial.

As explained by Justice Baer, the Court in *Application of Smith* rejected the argument that the requirement to pay the arbitrator’s fee was an unconstitutional condition, but acknowledged that the right to a trial by jury “must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the [jury trial] right practically unavailable.” *Zauflik*, 104 A.3d at 1134 (Baer, J., concurring). Justice Baer emphasized that our Court in *Application of Smith* explained that “[t]he problem, however, is one of degree rather than of kind.” 112 A.2d at 630. The majority, while concluding that imposing arbitration costs on an appellant did not violate the right to a jury trial, nevertheless found that the local rule levying a set amount of compensation for each arbitration panel member could be problematic and negatively impact an appellant’s right to appeal (for a jury trial) depending upon the value of the matter. We suggested that, where a claim sought a small amount of damages relative to the arbitrator’s fee such that the fee would operate as a strong deterrent to seeking a jury trial, the local court rules should provide for a lower rate of compensation for the arbitrators. *Id.* Accordingly, we upheld the validity of the statute, but opined that, to protect the jury trial right, the local rule of court should be amended to lower the arbitrators’ fee where a comparatively small claim is involved. *Id.* Springboarding upon the

concurrency's reliance on *Application of Smith*, Appellant herein contends that, like the fees in *Application of Smith*, the damages cap renders cost-prohibitive the exercise of her right to a jury trial under Article I, Section 6.

According to Appellant, this impact becomes manifest when one considers the practicalities of litigating a catastrophic injury case against the Commonwealth. Again pointing to Justice Baer's concurrence in *Zauflik*, Appellant emphasizes the expensive and complex features of modern litigation, including well-financed and vigorous defenses asserted by corporations and their counsel, and the need for expert reports, depositions, and high-quality trial presentations, not to mention contingency fees by plaintiffs' counsel. Appellant also underscores Justice Baer's observation that "plaintiffs' counsel cannot responsibly agree to enter an appearance in a case where there will be no or *de minimis* return to the client because of the costs and fees necessary to secure a successful result." *Id.* at 1135. Related thereto, Appellant highlights Justice Baer's analysis of the inflationary impact, given that the statutory cap has not changed since 1978, and his urging of the legislature to raise the cap.

Appellant proffers that, five years after his concurrence in *Zauflik*, in *Grove*, Justice Baer, joined by Justices Donohue, Dougherty, and Mundy, again spoke about the damages cap rendering the jury trial right cost prohibitive and violating Article I, Section 6 of our Constitution. Specifically, although the appeal in *Grove* was resolved on the basis of an erroneous jury instruction, in his concurrence, Justice Baer again emphasized the damages cap was almost 40 years old, and discussed the possibility of a constitutional challenge akin to that which he proffered in *Zauflik*, contending the cap failed to account for the economic realities of catastrophic injury cases, or simple inflation. *Id.* at 892 (Baer, J. concurring). Justice Baer suggested that he would be open to such a challenge where the record established that the damages cap placed an "onerous burden" on a plaintiff's

right to a trial by jury, and warned that the Court might be compelled to find the cap unconstitutional, leaving “local governments exposed to full liability if, and until, new legislation is passed.” *Id.*

In addition, Appellant relies upon our decision in *Mattos v. Thomson*, 421 A.2d 190 (Pa. 1980), in which our Court considered a claim that mandating non-binding arbitration in medical malpractice cases unconstitutionally postponed access to a jury trial. Appellant explains that, in *Mattos*, we considered an arbitration mandate to be onerous, rendering the right to a jury trial practically unavailable. By analogy, Appellant asserts that our Court has the ability to consider the factual circumstances underlying her claim and how the damages cap obstructs her right to a jury trial, rendering such right practically unavailable.

Turning to the factual record in this matter, Appellant emphasizes the costs of litigation – including needing multiple experts to establish her injuries, medical records, and trial technology services; court filing expenses; and counsel fees – as well as insurance subrogation claims against her recovery by her health insurer, Aetna, and by her disability insurer, The Hartford. According to Appellant, the cost of preparing for trial was \$76,205 and her counsel fees were \$83,333, leaving her with \$90,462, little more than 1% of the agreed upon value of her claim (\$7,000,000), and noting that amount did not include deductions by her insurers. As a result, Appellant submits that her recovery would be zero, and maintains that the limited recovery permitted under the damages cap, when compared against these costs, fees, and reimbursements, effectively denies her a right to a jury trial.

Finally, Appellant emphasizes that legislative inaction has exacerbated the cap’s inadequacy. Specifically, Appellant points out that the real value of the cap has shrunk to a fraction of its initial value, and does so each year with inflation. As a result, Appellant contends that, each year, the burden of paying for accidents caused by the

Commonwealth increasingly shifts onto tort victims, as the Commonwealth is less and less responsible for the harm caused by its negligence.

Two *amicus* briefs were filed in support of Appellant. *Amicus* North Central Trial Lawyers Association contends that, under intermediate scrutiny, the damages cap is simply not adequate to compensate for catastrophic injuries; while acknowledging that the legislative process is the preferable forum to address this issue, *amicus* submits the passage of time has diminished an individual's right to a remedy, and, thus, urges it is time for the judiciary to act. *Amici* Pennsylvania Association for Justice and the American Association for Justice adds that the damages cap disincentivizes the state to act to protect its citizens, such as by investing in upgraded structures, and thus submits the cap is unconstitutional.

SEPTA responds by first arguing that Appellant does not have a constitutional right to a jury trial against the Commonwealth. Focusing on the first component of Article I, Section 6 — “[t]rial by jury shall be as heretofore” — SEPTA submits that this language has been construed to protect the right to a jury trial only in matters where the right existed in 1790, at the formation of the Commonwealth. As there was no common law right to a jury trial in proceedings against the Commonwealth in 1790, SEPTA submits that Appellant has no constitutional right to a jury trial against the Commonwealth. This understanding, according to SEPTA, is consistent with federal law, citing *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) (“It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government.”). In further support thereof, SEPTA points out that, under the Procurement Code, the legislature eliminated jury trials in contract claims against the Commonwealth and channeled such actions through the Board of Claims. See 62 Pa.C.S. § 1702(b).

Thus, according to SEPTA, the damages cap cannot infringe on a constitutional right that does not exist.

Even assuming such a right exists, SEPTA maintains that the *Zauflik* Court squarely rejected the idea that a substantive limit on recovery can impair the right to a jury trial given that it found that a statutory cap on damages is not the kind of “onerous burden” that impedes the jury trial right, but, rather, merely imposes a limit on the right to recovery post-verdict. SEPTA rejects the suggestion that an as-applied challenge survives *Zauflik*, and contends that finding a constitutional infirmity will require the abandonment and overruling of that decision in violation of the principle of *stare decisis*. Moreover, SEPTA maintains doing so would make Pennsylvania an outlier, as, according to SEPTA, every other state court of last resort to have reached the issue has rejected arguments similar to those presented by Appellant.

SEPTA posits that, while Justice Baer’s concurrence stresses the inability of a hypothetical plaintiff to obtain counsel due to the cap, to accept such a contention would necessarily require the recognition of a right to counsel in civil cases. SEPTA argues that the implications of doing so would be “staggering.” Appellee’s Brief at 20. First, SEPTA asserts that it would be a sea change in Pennsylvania law, as currently there is no right to counsel in a civil action. Additionally, SEPTA maintains that accepting Appellant’s argument would in effect tie a plaintiff’s constitutional right to a jury trial to the amount counsel can recover. According to SEPTA, no authority links a reasonable recovery with the right to a trial by jury. Related thereto, in SEPTA’s view, not only does Appellant’s theory require the recognition of a right to counsel in civil cases, but it implies a right that counsel be “*well compensated*.” *Id.* at 21 (emphasis original). Furthermore, SEPTA submits that, if the right to a trial by jury depended upon the ability to obtain counsel, there would be no principled basis on which to limit that rule to plaintiffs and would apply equally

to defendants, as defendants also have a right to a jury trial under Article I, Section 6. According to SEPTA, this may be especially true for defendants as there is no monetary incentive for defense counsel, as there would be no contingency fee basis of compensation. Appellant's Brief at 20-22. Related thereto, SEPTA warns that tying the jury trial right to counsel's compensation would be unworkable, as it would require judges to decide whether expenses, fees, and medical costs are sufficient to invalidate the damages cap in a particular case, resulting in inconsistent outcomes. Further, SEPTA stresses that no principled standards exist by which to determine what level of compensation is constitutionally required in a given case to protect a plaintiff's right to a jury trial. Finally, again, even assuming a right to a jury trial against the Commonwealth exists, and that it is implicated by the damages cap, SEPTA avers that Appellant cannot show her right to a jury trial was impeded, as she chose to accept a stipulated verdict rather than present her case to a jury – that is, she voluntarily chose to forgo her right to a jury trial.

Intervenor, the Commonwealth, largely echoes SEPTA's arguments. Like SEPTA, it asserts that, when the Constitution was adopted, there was no common law cause of action "*at all*" against the Commonwealth, and, thus, under the "heretofore" clause in Article I, Section 6, Appellant cannot obtain relief as she has no right to a trial by jury. Commonwealth's Brief at 32 (emphasis original). The Commonwealth also maintains that, logically, if the legislature, per Article I, Section 11, can eliminate a cause of action, and may limit the amount of damages that may be recovered, then the exercise of this power through a damages cap could not unconstitutionally burden the right to a trial by jury. Furthermore, the Commonwealth asserts that the damages cap does not deny a plaintiff the right to a jury trial, but merely sets an outer limit on the damages that may be awarded against a Commonwealth party. Here, according to the Commonwealth,

Appellant gave up her right to have a jury hear her case by agreeing to a stipulated verdict. As well, the Commonwealth stresses that it is for the legislature to decide when and how sovereign immunity is waived, and to make the public policy decisions undergirding that determination.

Finally, the Commonwealth points out that the Commonwealth is self-insured and pays damages with public funds. It attempts to place verdicts such as the \$7 million in Appellant's case in context, stressing the frequency of large monetary awards, including, for example, a \$725 million verdict for a service mechanic who developed leukemia after exposure to benzene in gasoline, and \$2.25 billion verdict for injuries from the weed killer Roundup which was reduced as excessive to \$404 million, noting that \$404 million was almost equivalent to last year's state funding for the entire Judiciary (\$408 million).

In support of SEPTA, numerous *amici* echo similar legal arguments.<sup>9</sup> As well, these *amici* highlight the practical negative impact of granting relief on an as-applied basis. Specifically, *amicus* School District of Philadelphia offers that caps on damages ensure the financial viability of government entities so that they may provide for the common good. It stresses that there is a fundamental right to an education, but that school districts like itself are systematically underfunded, and any decision that reduces its budget would threaten its "ability to deliver constitutionally required education to Philadelphia's children." School District of Philadelphia Brief at 6. *Amicus* contends that even a \$2 million verdict represents the average salary of approximately "24 teachers, 86 student climate staff, or 67 special education assistants." *Id.* at 12. *Amicus* Philadelphia Housing Authority highlights the impact lifting the cap would have on the vulnerable community it serves in combating housing insecurity and poverty, and adds that striking

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<sup>9</sup> These *amici* have provided argument in favor of SEPTA, both with respect to Appellant's challenge to the damages cap as a violation of her right to a trial by jury and to her claim that the cap unconstitutionally burdens her right to a remedy, which we discuss next.

the cap would increase the cost of obtaining liability insurance. *Amicus* seeks prospective application of any decision striking a cap on damages. *Amicus* Housing Authority Risk Retention Group raises similar concerns. *Amici* Port Authority of Allegheny County, the Pennsylvania Turnpike Commission, and the Pennsylvania Public Transportation Association, in a well-written brief, add that the damages cap provides crucial cost certainty to transportation entities, without which such entities would almost certainly be forced to increase fares and tolls, reduce services, and delay projects. *Amici* warn that smaller transportation entities would lose the ability to obtain insurance and may cease operations rather than face a potential judgment that could cripple their municipalities. *Amici* contend that it is for the General Assembly to balance the ramifications of altering the damages cap, and submits *Zauflik* is controlling. *Amicus* Indiana County Transit Authority takes a similar position.

*Amici* Montgomery County, Allegheny County, Bucks County, Chester County, the City of Philadelphia, and the City of Pittsburgh maintain that the damages cap preserves finite funds for delivering essential services, provides much-needed predictability for budgeting and resource allocation, and that, even with the cap, counties and cities face substantial liability exposure. *Amici* add that, if the cap were deemed to be unconstitutional, liability insurance would become either prohibitively expensive or unavailable. Finally, *Amici* 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 suggest that the appeal be dismissed as improvidently granted in light of *Zauflik* and principles of *stare decisis*.

In determining whether Section 8528(b)'s damages cap violates Article I, Section 6 of the Pennsylvania Constitution, we remind that "the polestar of constitutional analysis

. . . must be the plain language of the constitutional provisions at issue. A constitutional provision requires unstrained analysis, ‘a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.’ Stated otherwise, the constitutional language controls and ‘must be interpreted in its popular sense, as understood by the people when they voted on its adoption.’” *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014) (citations omitted).

Thus, we turn to the text of Article I, Section 6. Section 6 provides, in relevant part, that “[t]rial by jury shall be as heretofore, and the right thereof remain inviolate.” Pa. Const. art. I, § 6. Based upon the text, the constitutional right to a trial by jury can be conceptualized as containing two components. First, the constitutional right to a jury trial has a temporal and historic limitation — “as heretofore.” Second, the right to a trial by jury remains “inviolable.” We resolve Appellant’s challenge under the second clause.<sup>10</sup>

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<sup>10</sup> SEPTA and the Commonwealth focus upon Section 6’s temporal and historic limitation, contending that, as there was no right to a jury trial in common law against the Commonwealth, this constitutional provision provides no relief to Appellant. They raise an interesting argument. This section “has been construed as requiring 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.” *Parker v. Children’s Hospital of Philadelphia*, 394 A.2d 932, 938 (Pa. 1978) (citing *Van Swartow v. Commonwealth*, 24 Pa. 131 (1854)); see also *Premier Cereal and Beverage Co. v. Pennsylvania Alcohol Permit Board*, 140 A. 858, 859 (Pa. 1928) (“Such guaranty is that the right shall remain as heretofore; that is, as it was when the Constitution was adopted.”). In *Zauflik*, we explained that, when the Constitution was adopted, “there was no common law right to a jury trial in proceedings against the Commonwealth, as the state was immune from suit.” 104 A.3d at 1130 (citing *Ligat v. Commonwealth*, 19 Pa. 456 (1852) (“A sovereign state is not liable to an action at law against her consent, and the right of trial *by jury* has, therefore, no existence in such a case.” (emphasis original)) and White, *Commentaries on the Constitution of Pennsylvania*, 69-70 (1907) (“White”) (in any case where the state allows itself to be sued, it can fix the mode of trial, since at common law the state could not be sued at all)). Moreover, in *Smith v. City of Philadelphia*, *supra*, our Court offered that, “the Framers would have had no occasion to apply the prohibition against limiting damages to government, for government, at that time, was immune from suit. It was not for more than 100 years after this provision was drafted that this Court in [*Mayle*] (continued...) ”

Broadly speaking, in construing the right to a jury trial, our Court has considered the term “inviolate” to mean “freedom from substantial impairment.” *Commonwealth v. Eckhart*, 242 A.2d 271, 272-73 (Pa. 1970). The cardinal principle is that the essential features of a trial by jury as known at common law shall be preserved. This protects the substance of the right; details of administration which leave the enjoyment of the right unaffected are of no constitutional concern. *Id.* at 273; *see generally* Jessica B. Rhoades, “*Trial by Jury*” as appearing in Ken Gormley, ed., *The Pennsylvania Constitution: A Treatise on Rights and Liberties*, 236 (2004) (“Gormley”). However, Article I, Section 6 “does not require an absolutely unfettered right to trial by jury.” *Parker*, 394 A.2d at 938 (statute requiring that medical malpractice cases first be subject to arbitration before appeal *de novo* with jury trial did not violate Section 6; Section 6’s guarantee of right to jury trial should not be construed so as to exclude any other method for disposing of disputes). What is most important is that the right to a jury trial “must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.” *Application of Smith*, 112 A.2d at 629 (upholding statutory scheme mandating compulsory arbitration for certain minor cases, but allowing jury trial

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abrogated common-law sovereign immunity.” 516 A.2d at 309. The *Zauflik* Court also recognized the “bottom line [] that the right to a jury trial as heretofore is not so clear and simple.” 104 A.3d at 1131; *see generally* *McLinko v. Department of State*, 279 A.3d 539, 593 (Pa. 2022) (Wecht, J., concurring) (“This Court has never passed upon whether our Commonwealth has had one moment of constitutional self-determination or five. We have, however, referred to the projects of 1790, 1838, 1874, and 1968 as culminating in ‘new’ constitutions.”). For that reason, the *Zauflik* Court resolved the Article I, Section 6 challenge based upon the second component of Section 6. *See id.* at 1131 (“Even if it is assumed that the right to a jury trial in negligence cases filed against governmental entities existed in the ‘heretofore’ described in Article I, Section 6, such that it must ‘remain inviolate’ now, the full-blown jury trial appellant demanded and received was not impeded by the damages cap.”). We do likewise. Given our conclusion on the second component of Section 6, we need not reach SEPTA’s argument on the first component.

upon appeal from decision of arbitrators; statute did not create “onerous” burden on right to jury trial).

Appellant’s claim is nuanced. Acknowledging *Zauflik*, but not seeking its overruling, Appellant relies on the reference in *Application of Smith* to “onerous” conditions, and argues that the damages cap places just such a condition and restriction on her right to a jury trial, making the right, as a practical matter, unavailable to her. As set forth above, she argues the damages cap rendered her case untenable to pursue because of the expensive and complex features of modern litigation. Because a gross recovery capped at \$250,000 would produce no or a *de minimis* net financial recovery, in her view, the cap places onerous practical impediments to pressing her case, and so makes a jury trial practically unavailable, rendering the cap constitutionally infirm.

In *Zauflik*, we considered, in the context of catastrophic injuries to a student from a school bus accident, numerous challenges to the constitutionality of the similar \$500,000 cap on damages against municipal agencies under the Political Subdivision Tort Claims Act (“Tort Claims Act”),<sup>11</sup> including a facial constitutional challenge to the cap based upon the jury trial right.<sup>12</sup> Specifically, we rejected a claim based on a diminished recovery, envisioning the right to a jury trial as protecting *a process* rather than *a recovery*. Specifically, we reasoned that the damages cap did not place an onerous condition or restriction on a plaintiff’s right to a trial by jury; “rather, the burden lies in the limited amount of recovery allowed, and that is obviously not the same thing.” 104 A.3d at 1132. We elaborated:

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<sup>11</sup> 42 Pa.C.S. §§ 8501-8564.

<sup>12</sup> While *Zauflik* dealt with a facial challenge to the Tort Claims Act, we have found it instructive in determining the scope of liability resulting from the Sovereign Immunity Act’s waivers. See, e.g., *Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989).

Successful plaintiffs are often limited in their ability to recover the full amount of a jury's award for many different reasons—a defendant may simply be judgment-proof, for example—but this practical reality has nothing to do with the plaintiff's right to seek to have the merits of her cause determined by a jury, rather than some other *process*. This Court has struck down onerous procedural barriers to the exercise of the jury trial right, but that is quite a different matter from a substantive limit on the damages ultimately recovered—following a full-blown jury trial. See, e.g., *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (statutory arbitration scheme first upheld in *Parker* later determined to cause lengthy delays which present onerous conditions and restrictions which impose oppressive burden on that right).

*Zauflik*, 104 A.3d at 1132 (emphasis original). Thus, our Court envisioned the right to a trial by jury as a right to a certain process or form of dispute resolution, and we have not hesitated to uphold that right in the face of *procedural* barriers.

The logic of *Zauflik* applies equally to Appellant's as-applied challenge. As conceptualized in *Zauflik*, the right to a jury trial in Pennsylvania is the right to a process, and Appellant was entitled to that process. While Appellant may receive only a *de minimis* or no recovery in her case, she could have had a full trial by jury. Her claim of inadequate damages goes to her ultimate recovery, post-verdict, as a result of the application of the statutory cap; her minimal recovery was not the result of the denial of, or of a defective, jury trial. The damages cap did not alter the availability, or contours of, a jury trial.<sup>13</sup> Indeed, Section 8528(b) neither prohibits a trial by jury, nor limits a plaintiff's presentation of her case at a jury trial. Nor does the cap prohibit a jury from returning a verdict for any or all damages suffered by a plaintiff. Thus, rather than limiting or burdening the *process* of a jury trial, the statute limits the *amount* that may be recovered from the Commonwealth

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<sup>13</sup> Notably, Appellant did not seek a jury trial. Rather, as discussed, she reached a stipulated verdict in the amount of \$700,000 with SEPTA, avoiding “the expense and time associated with trial.” Appellant's Brief at 7. We assume without deciding that Appellant may raise a jury trial claim in these circumstances.

and its agencies.<sup>14</sup> It curtails the remedy but not the process. Furthermore, as noted above, there is no constitutional right to a complete recovery on a jury's verdict.

Appellant was, in fact, able to fully prosecute the instant matter. Indeed, it appears that Appellant would have proceeded to a trial by jury if not for the COVID-19 pandemic. Curiously, for relief, Appellant does not ask for a jury trial, but, rather, seeks entry of the judgment on the parties' agreed-upon verdict, as modified by the addition of delay damages. Yet, there is no question that Appellant's claims could have been heard by a

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<sup>14</sup> It is for this reason that we find Appellant's reliance upon *Mattos, supra*, to be misplaced. While the *Mattos* Court offered the unobjectionable general principle that a "jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically available," *Mattos*, 421 A.2d at 192, that matter dealt with a facial challenge to a statutory provision mandating arbitration prior to bringing a medical malpractice claim in court. Our Court declared the statute to be unconstitutional due to the delays involved in processing such claims and for failing to achieve its purpose of resolving disputes promptly, resulting in an oppressive delay and thereby impermissibly infringing upon the right to a trial by jury. *Id.* at 196. Thus, that case presented a *procedural* hurdle to a trial by jury, unlike the economic hurdle argued by Appellant. The same is true with respect to *Application of Smith, supra*, which addressed a process, *inter alia*, mandating compulsory arbitration, and subjecting the right to appeal to a trial by jury to the appealing party's payment of all costs. Our Court initially determined that the payment of accrued costs as a condition for the allowance of an appeal did not violate the Constitution. 112 A.2d at 630-31.

We addressed a second issue in *Application of Smith*: whether a county rule setting compensation for arbitrators would operate as a deterrent to appeal in cases of low dollar value, amounting to a practical denial of the right to appeal. *Id.* at 630. Noting that the problem "is one of degree rather than of kind," the Court suggested that the payment as a condition for the right to appeal would "seemingly operate as a strong deterrent, amounting practically to a denial of that right, if the case should involve only, as in the present instance, as little as \$250." *Id.* However, rather than finding a violation of Article I, Section 6, this aspect of the decision consisted of a proposal to the county that they "should" take cognizance of this situation and "should" amend the rule to provide a lower rate of compensation where a comparatively small claim was involved. *Id.* Notably, this aspect of the decision arguably could be viewed as *dicta*, or merely a suggestion, as the plaintiff was not affected by the rule. *Id.* at 631. Ultimately, the payment of arbitrator compensation at issue in *Application of Smith* was an integral part of the appeal *process* that the Court insinuated could burden the right to appeal in certain cases, and, thus, like *Mattos*, distinguishable from the economic burden advanced by Appellant.

jury of her peers. Significantly, Appellant does not challenge our decision in *Zauflik*, and its reasoning applies equally in this as-applied challenge.

Finally, while we are cognizant that Appellant based her as-applied challenge on Justice Baer's concurring opinions in *Zauflik* and *Grove*, upon closer scrutiny, and based upon the above analysis, we conclude her claim cannot survive the logic of *Zauflik*. The concurrences, however, remain as an entreaty to the General Assembly for change.<sup>15</sup>

For these reasons, we conclude that, under Article I, Section 6, the legislature has not unconstitutionally deprived Appellant of her right to trial by jury, as applied to her circumstances, through Section 8528(b)'s \$250,000 cap on damages. The cap did not limit the availability or parameters of a trial by jury. Rather, it was her ultimate recovery that was limited. Thus, we turn to Appellant's second issue: whether Section 8528's statutory limitation on damages violates the Pennsylvania Constitution's remedies clause, Article I, Section 11.

Section 11 provides that "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." Pa. Const. art. I, § 11.

Initially, Appellant emphasizes the constitutional promise of a meaningful remedy, born of Magna Carta, and deeply ingrained in our Commonwealth's tradition. Appellant asserts that Section 11 is violated when a remedy has been so substantially impaired *prospectively* as to become illusory. Appellant proffers *Yanakos v. UPMC*, 218 A.3d 1214

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<sup>15</sup> SEPTA and the Commonwealth contend that granting relief for Appellant would require the recognition of a right to counsel in civil cases, because she contends the expense of litigation against the Commonwealth undermines a plaintiff's ability to find counsel willing to accept a case. As we resolve the jury trial issue against Appellant, we need not address this contention.

(Pa. 2019), in which our Court considered Section 11's remedy guarantee as applied to a seven-year statute of repose and found that the statute prospectively impaired the right to recover in a case involving an allegedly negligent transplant surgery. Our review resulted in a plurality decision regarding the appropriate standard of scrutiny to be applied to such a remedies clause claim, but produced a four-judge consensus that at least intermediate scrutiny applied. According to Appellant, under intermediate scrutiny, a court assesses whether the challenged statute is substantially related to an important governmental interest. Appellant submits that the 44-year-old damages cap is no longer substantially related to the governmental interest of compensating injured persons *and* protecting the public fisc, as in her view, the damages cap now protects only the Commonwealth's purse. Appellant maintains that the liability cap "has lost all connection to the compensation side of the coin." Appellant's Brief at 56. Appellant offers an analysis by the Legislative Budget and Finance Committee regarding governmental and sovereignty immunity laws, which concluded that the cap allowed relief in over 99% of the claims against the Commonwealth, but that, for severe injuries, the cap had devastating health and financial consequences. Appellant submits that the balance struck by Section 8528, compensating victims while also protecting the public purse, at least as applied to her, is "irretrievably broken," violating the remedies clause. Appellant's Brief at 61.

Appellant contends that *Zauflik* is not dispositive of this as-applied constitutional challenge, as she does not contest the General Assembly's power to place general limitations on liability in favor of a government unit. Rather, Appellant submits that her challenge is much narrower, that the cap violates her right to a remedy where it has not been adjusted for over 40 years, and because the fees and costs of litigating her case rendered a trial economically unfeasible and a remedy illusory.

SEPTA counters, pointing to the express terms of our Constitution which recognize that every injured person shall have a “remedy by due course of law,” but highlighting that suits against the Commonwealth may only be brought “in such manner, in such courts and in such cases as the Legislature may by law direct.” Pa. Const. art. I, § 11. SEPTA stresses that these two sentences must be construed together. It traces the origins of the remedies clause, and its adoption as part of the 1790 Constitution, resulting in its current language. In SEPTA’s view, the framers understood that it was the General Assembly that was granted the exclusive power to determine when and how the Commonwealth may be sued. SEPTA offers various decisions by our Court which, in its view, recognize that Section 11 vests unfettered control over remedies in the legislature, and gives the legislature the power to abolish a remedy entirely, or to cap recoveries, citing *Carroll v. York County*, 437 A.2d 394 (Pa. 1981), and *Smith, supra*. Additionally, SEPTA relies heavily upon *Zauflik*, and maintains that the fact that this constitutional challenge is being brought on an as-applied basis makes no difference under that decision.

Moreover, SEPTA suggests that, because the General Assembly has, in its view, complete control over the Commonwealth’s exposure to suit, such control is not subject to judicial review, even under a rational basis analysis. In the alternative, SEPTA offers that, under any level of scrutiny, the Commonwealth has a substantial interest in protecting its policymaking prerogatives and the public fisc, emphasizing its need for financial stability and to provide critical services, and its limited budget for paying personal damages claims. According to SEPTA, this overriding interest in ensuring its ability to provide vital government services outweighs an individual’s interest in a full tort recovery. Related thereto, SEPTA maintains that, even if the General Assembly has not legislated at the pace suggested by Justice Baer in his concurrences in *Zauflik* and *Grove*, Article I, Section 11 is not violated as a result. Rather, SEPTA emphasizes that the decision not

to amend the damages cap is a valid exercise of the Commonwealth's legislative power, and principles of separation of powers dictate that the judiciary respect that choice. Finally, SEPTA stresses that, if our Court grants Appellant relief, the judiciary would have to strike a new balance between compensating an injured person and protecting the public fisc, an effort that would need to be repeated in any case where a damages cap operated to limit a remedy. In SEPTA's view, such an effort would improperly intrude upon policy prerogatives constitutionally vested in the legislature.

In its own brief, the Commonwealth submits that *Yanakos* is distinguishable. It notes that the malpractice action in that case was brought against private entities. Such actions were permissible under the common law prior to the 1790 Constitution, whereas a common law action against the Commonwealth was impermissible. Thus, in the Commonwealth's view, no form of heightened judicial scrutiny is inappropriate, and for our Court to determine whether the damages cap is "wise or should be raised given inflation would override the clear text of our Constitution." Commonwealth's Brief at 28.

Article I, Section 11 provides that, "[a]ll 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." Pa. Const. art. I, § 11.

Akin to Article I, Section 6, our remedies clause contains two primary components. Section 11 expressly provides that every injured person shall have a "remedy by due course of law," but also that suits against the Commonwealth may be brought only "in such manner, in such courts and in such cases as the Legislature may by law direct." Pa. Const. art. I, § 11. The first of these clauses, regarding open courts and a remedy by due course of law, can be traced to Magna Carta, and sets forth the principle that tribunals

should conduct open proceedings and provide redress to those who have suffered legal injury. See, *generally*, White at 159; Donald Marritz, “*Courts to be Open; Suits Against the Commonwealth*” as appearing in Gormley at 456. We have explained that the right to a remedy connotes a “legal injury” as defined by the legislature. *Singer v. Sheppard*, 346 A.2d 897, 903 (Pa. 1975). Consistent with this understanding of legal injury, our Court has explained that there is no “immutable body of negligence law . . . [W]hat today is a trespass, may, by development of law, not be so tomorrow . . . .” *Freezer Storage, Inc. v. Armstrong Cork Company*, 382 A.2d 715, 720 (Pa. 1978) (citations omitted). Indeed, “[n]othing in Article I, Section 11, therefore, prevents the legislature from extinguishing a cause of action.” *Singer*, 346 A.2d at 903.

The second clause, setting forth that suits “may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct,” as noted above, has been at the center of the debate regarding the source of the doctrine of sovereign immunity. In *Mayle*, in declaring that Article I, Section 11 did not preclude our Court from abrogating the doctrine of sovereign immunity, we described Section 11 as “neutral [because] it neither requires nor prohibits sovereign immunity. It merely provides that the presence or absence of sovereign immunity shall be decided in a non-constitutional manner.” 388 A.2d at 716. Thus, while the *Mayle* Court determined that the framers did not intend to bestow constitutional immunity on the Commonwealth under Section 11, we nevertheless found that the framers “intended to allow the Legislature, if it desired, to choose cases in which the Commonwealth should be immune.” *Id.* at 717.

In the years following *Mayle*, we have addressed the interplay between these two provisions, and we have repeatedly determined that, by its terms, Section 11 vests in the General Assembly control over suits against the Commonwealth. Most recently, in

*Zauflik*, our Court expressed the general principle 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.” *Zauflik*, 104 A.3d at 1129. Thus, Section 11 “expressly authorizes the General Assembly to ‘direct’ exactly how the Commonwealth may be subjected to suit.” *Id.* at 1127.

In an early challenge to the validity of the Tort Claims Act, in *Carroll v. York County*, 437 A.2d 394 (1981), we found the second sentence of Article I, Section 11 — “[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” — to be “integral, unequivocal and controlling” and in so finding, upheld the Act. *Id.* at 396. In doing so, we concluded that our function was not “to displace a rationally based legislative judgment.” *Carroll*, 437 A.2d at 397. Thus, we found Section 11 gave the General Assembly authority to choose areas in which the Commonwealth would be immune from suit.

Similarly, five years later, in *Smith v. City of Philadelphia*, *supra*, we forcefully reiterated the ability of the General Assembly to regulate the manner, the courts, and the cases in which suits may be brought against the Commonwealth. However, we also addressed the legislature’s ability to limit the *amount* of damages.

In *Smith*, we reasoned that, “[i]n granting the legislature power to control not only the cases, but also the manner and the courts in which cases against the Commonwealth may be brought, the Framers intended that the legislature have *complete control* over suits brought against the Commonwealth.” *Id.* at 309 (emphasis added). Disagreeing with the plaintiff’s assertion that the legislature had no power to limit the amount of recovery, we explained that, “[i]f the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted. To hold otherwise would

be, in our view, to grant with one hand what we take away with the other. Such a result would be absurd, or at least, unreasonable.” *Id.* (footnote omitted). Thus, the Court upheld the ability of the legislature to limit the amount of liability damages.

We find this reasoning to be controlling here. In sum, Appellant contends that her inability to obtain, at best, *de minimis* financial recovery for her injuries renders Section 11 unconstitutional as applied to her. Yet, a cause of action may be limited by the General Assembly, and if it may abolish a claim entirely, essentially setting the limit on damages at \$0, then it follows that the legislature may waive sovereign immunity in some instances, and may limit damages to \$250,000, even if this amount renders Appellant’s recovery nugatory. Appellant has not presented a persuasive response to this logic. Indeed, to afford Appellant relief on an as-applied basis would be contrary to our holdings for over 40 years regarding the General Assembly’s unfettered authority with respect to recovery against the Commonwealth.<sup>16</sup>

Related thereto, we conclude Appellant’s claim, as it impacts the General Assembly’s constitutional power to abolish a cause of action or limit recovery to a certain

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<sup>16</sup> We find our approach in *Yanakos* to be distinguishable and ultimately, inapplicable. In *Yanakos*, we considered a professional malpractice claim for an allegedly negligently performed liver transplant. Eleven years after the surgery, it was determined that the donor was not suitable. At issue was the seven-year statute of repose in the Medical Care Availability and Reduction of Error Act (“MCARE”). The plaintiffs brought a constitutional challenge under Article 1, Section 11. While the Court was divided on the degree of scrutiny to be applied to determine whether the statute of repose violated Section 11, we concluded that the government interest in controlling the costs of medical malpractice insurance premiums and of medical care was, at least, an important interest, but nevertheless that MCARE’s statute of repose was not substantially or closely related to the achievement of that interest.

Thus, our decision in *Yanakos* involved a challenge to a statute limiting a cause of action against a private entity, and focused entirely on Section 11’s first sentence — the right to a remedy. Section 11’s second sentence, regarding suits against the Commonwealth, and the General Assembly’s right to restrict suits against it, was not implicated.

dollar amount, necessarily implicates the separation of powers doctrine. Her claim, that the existing dollar amount of the statutory cap on damages is insufficient to protect injured parties, is in essence a request that we substitute our judgment regarding what is an adequate amount — what is a sufficient recovery against the Commonwealth — for that of the legislature.

The separation of powers doctrine, at its core, speaks to the division of power; our Constitution divides that power among three co-equal branches.<sup>17</sup> The doctrine is essential to that tripartite governmental framework and is the cornerstone of judicial independence. *Renner v. Court of Common Pleas of Lehigh County*, 234 A.3d 411, 419-20 (Pa. 2020). The doctrine prohibits one branch from exercising, infringing upon, or usurping the powers of the other two branches. This constitutional insulation from encroachment is, in turn, related to our system of checks and balances. *Jefferson County Court Appointed Employees Association v. Pennsylvania Labor Relations Board*, 985 A.2d 697, 706 (Pa. 2009). For checks and balances to properly work, each branch must be prevented from controlling or coercing the other. *Renner*, 234 A.3d at 420.

As noted above, Article I, Section 11, guarantees an important substantive right of access to courts for the redress of wrongs, but is not absolute and does not guarantee a remedy for every claimed wrong. As our case law makes clear, it is for the legislature to provide for remedies, including any limitations on the type or amount of the remedies. The crafting of permissible recoveries necessarily involves balancing the compensation of injuries with the protection of the public purse. With limited public funds, payments of

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<sup>17</sup> The governing structure of our Commonwealth, like the federal government, is divided into three equal branches: the legislative, see Pa. Const. art. II, § 1 (“The legislative power of this Commonwealth shall be vested in a General Assembly . . . .”); the executive, see Pa. Const. art. IV, § 2 (“The supreme executive power shall be vested in the Governor . . . .”); and the judicial, see Pa. Const. art. V, § 1 (“The judicial power of the Commonwealth shall be vested in a unified judicial system . . . .”).

multimillion dollar awards would necessarily impact other areas of government spending; as several *amicus* briefs stress, there are real world consequences of raising the \$250,000 cap. While Appellant maintains that our decision will impact only her, highlighting that her challenge is on an as-applied basis, this simply is not true. Although catastrophic claims against the Commonwealth are uncommon, they nonetheless have the potential to be devastating. Given the similarity of the governing immunity statutes, a decision undermining the damages cap in this case would likely impact core government functions, affecting other government agencies, local political subdivisions, courts and prisons, school districts, and transportation systems.<sup>18</sup> See Commonwealth's Brief at 2. Thus, while we are sympathetic to Appellant's predicament, we are nonetheless cognizant of our role in our tripartite constitutional framework, and believe that Appellant's plea for change in this area is properly made to the legislature.<sup>19</sup>

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<sup>18</sup> While, generally speaking, it is for the legislature to determine available remedies, including any limitations on the type or amount of the remedies, we reject SEPTA's invitation to find the General Assembly's authority in this regard to be insulated from all judicial review, see Appellant's Brief at 33.

<sup>19</sup> Indeed, virtually all states have rejected constitutional challenges to their statutory damages limitations provisions based on the failure to provide adequate compensation to plaintiffs or the constitutional right to a monetary remedy. See, e.g., *VanDam Estate v. Mid-American Sound*, 25 N.E.3d 165, 169-70 (Ind. Ct. App. 2015); *Wright v. Colleton County School District*, 391 S.E.2d 564, 569-70 (S.C. 1990); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788-89 (Minn. 1989); *Stanhope v. Brown County*, 280 N.W.2d 711, 720 (Wis. 1979). Only two states have held a statutory damages limitation to be unconstitutional. The Louisiana high Court found its damages cap to be unconstitutional based upon its unique constitutional provision, La. Const. art. XII, § 10(A), expressly mandating that a state, state agency, or political subdivision shall not be immune from suit and liability in contract or for injury to person or property. *Chamberlain v. State Through Department of Transportation & Development*, 624 So.2d 874, 881-84 (La. 1993). Louisiana subsequently amended its constitution to permit a damages cap. La. Const. art. XII, § 10(C). The Louisiana legislature then reinstated the \$500,000 cap, which has remained in effect since 1995. La. Stat. Ann. § 13:5106(B)(1). At one time, the Montana Supreme Court also found its statutory cap to be unconstitutional, interpreting its remedies clause to grant a fundamental right to full legal redress against the state. *Pfost v. State*, 713 P.2d 495, 500-06 (Mont. 1985). That decision, however, (continued...)

Based upon the above, and cognizant of our standard of review — which reminds that statutes are presumed to be constitutional and will be upheld unless clearly, palpably, and plainly violative of our organic charter — we conclude the damages cap contained in Section 8528(b) does not violate Section 6 or Section 11 of Article I of our Constitution, even on an as-applied basis where the practical effect of that damages cap would leave a plaintiff with no recovery.<sup>20</sup>

Finally, we address the dissenting opinion. Justice Donohue concludes that Section 8528 is *facially* unconstitutional; that the General Assembly is prohibited by our Constitution from placing any liability cap on a plaintiff's recovery; and that this section should be severed from the Sovereign Immunity Act. The dissent's approach is inappropriate and unwise.

First, Appellant is clear that her challenge is brought only on an as-applied basis, limited to the facts of her case. See, e.g., Appellant's Brief at 3, 10, 11, 12, 16-20, 62. Indeed, Appellant expressly is not challenging the viability of the liability cap: "Ms. Freilich does not seek a ruling that the liability cap is categorically unconstitutional," and "does not seek a declaration that the liability cap violates constitutional principles as a general matter." *Id.* at 19-20. Appellant's stance is eminently reasonable given that our Court in *Zauflik*, a mere 12 years ago, rejected a facial challenge to the General Assembly's constitutional authority to adopt legislation establishing sovereign immunity, enumerating

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was overruled four years later, when the Court interpreted the remedies clause to not mandate absolute redress. See *Meech v. Hillhaven West, Inc.*, 776 P.2d 488, 491-93 (Mont. 1989). In 1997, the Montana Legislature enacted a sovereign damages cap that limited damages "in excess of \$750,000 for each claim and \$1.5 million for each occurrence" against "[t]he state, a county, municipality, taxing district, or any other political subdivision of the state." Mont. Code Ann. § 2-9-108.

<sup>20</sup> As we have found Section 8528(b) to survive Appellant's constitutional challenges, we need not address the question of its severability from the remainder of the Sovereign Immunity Act.

exceptions, and limiting liability. *Zauflik* 104 A.3d at 1128-29. In her brief, Appellant references only in passing the *Smith* decision, which serves as the cornerstone of Justice Donohue’s dissent, and in doing so, distinguishes that decision as arising in the context of a facial challenge. Appellant’s Brief at 62 (“The plaintiffs in both *Zauflik* and *Smith* challenged whether the General Assembly had the power to adopt legislation establishing a general limitation on liability in favor of the sovereign or political subdivisions. The cases challenged the legislature’s authority to enact liability caps in the first instance. Here, Ms. Freilich recognizes that damages against the sovereign survive facial challenge under *Zauflik* and *Smith*.”). Again, Appellant is explicit: “She does not seek abrogation of either [*Zauflik* or *Smith*] or argue with the concept that the sovereign has a right to impose liability caps as a general proposition. Ms. Freilich’s challenge runs downstream from those decisions and is substantially narrower.” *Id.* The dissent’s injection of a facial challenge, contrary to Appellant’s considered and express argument, is jurisprudentially imprudent.

Moreover, a facial challenge and an as-applied challenge are legally distinct: “Facial and as-applied constitutional challenges are distinct animals, and their differences often mean that they are subject to different standards and principles.” *McLinko v. Department of State*, 279 A.3d 539, 564 (Pa. 2022) (citing *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 275 (Pa. 2003) (distinguishing between as-applied and facial constitutional challenges when applying exhaustion of administrative remedies doctrine); *Kepple v. Fairman Drilling Co.*, 615 A.2d 1298, 1303 & n.3 (Pa. 1992) (distinguishing between facial and as-applied constitutional challenges for purposes of providing notification to the Attorney General pursuant to Pa.R.A.P. 521(a)). More specifically, a facial challenge tests constitutionality of a statute as written and does not consider the facts of the case, whereas an as-applied challenge tests the law as applied to a particular person under particular circumstances, not on the basis of its text. Rather than

addressing Appellant's forceful as-applied challenge, the dissent *sua sponte* proffers a distinct facial challenge for the first time before our Court. This approach is legally unsound. See Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.").

Admittedly, there are rare occasions in which our Court appropriately reconsidered precedent *sua sponte*. However, this is not one of those cases. The dissent leans heavily on our decision in *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414 (Pa. 2017), going so far as to characterize this matter to be "indistinguishable" from *William Penn*. Dissenting Opinion (Donohue, J.) at 7. We respectfully disagree. First, *William Penn*, in which our Court rejected its prior precedent in *Marrero v. Commonwealth*, 739 A.2d 110 (Pa. 1999), involved a threshold question of whether the General Assembly's provision for the maintenance and support of a thorough and efficient system of public education under Article Article III, Section 14 was a political question reviewable by our Court. The discrete legal issues, as broadly framed by the appellants therein, clearly encompassed the continued viability of the political question doctrine in this context and called for a reexamination of *Marrero*:

A. Education Clause Claims

Where a petition alleges that the legislature's school[-]funding scheme bears no relationship to the actual cost of preparing students to meet state academic standards, *does the political[ ] question doctrine bar the judiciary from considering whether the legislature has complied with its constitutional duty to support a thorough and efficient system of public education?*

B. Equal Protection

Where a petition alleges gross and irrational disparities in school funding between low-wealth and high-wealth school districts, *does the political question doctrine preclude students in low-wealth school districts from asserting an equal protection claim to protect their individual constitutional rights?*

*William Penn School District*, 170 A.3d at 434 (emphasis added). Indeed, we said as much: “deciding the two questions presented in this case requires us to examine our ruling in [*Marrero II*], which itself adopted wholesale the Commonwealth Court's earlier opinion in that case.” *Id.* at 440. By contrast, here, Appellant raises *only* a “narrower” as-applied challenge to Section 8528.

Second, in *William Penn*, our reconsideration of *Marrero* flowed from the parties’ arguments. The *William Penn* appellants engaged in an in-depth analysis of our decision in *Marrero*, contending that the appellants in *Marrero* did not assert an equal protection claim, and that our Court did not address the justiciability of such a claim in its opinion. Moreover, the *William Penn* appellants provided a political question analysis, contending that none of that doctrine’s factors supported judicial abstention. Appellant’s Brief in *William Penn* at 23. Finally, the *William Penn* appellants roundly criticized and refuted the lower court’s reliance upon *Marrero* and its contention that our Court adopted a *per se* rule that education funding challenges are non-justiciable. *Id.* at 28. Thus, our Court’s reconsideration of *Marrero* was well grounded.

In any event, contrary to the dissent’s suggestion, the appellants in *William Penn* specifically asked our Court to overrule *Marrero*:

Alternatively, if *Marrero* is an absolute bar to any education-funding challenge, the Court should overrule that decision. See *Tincher v. Omega Flex*, 104 A.3d 328, 352 (Pa. 2014) (“[F]aithfulness to precedent is not sufficient justification to buttress judicial decisions proven wrong in principle or which are unsuited to modern experience and which no longer adequately serve the interests of justice.”).

Appellant’s Reply Brief at 15 n.10. Thus, far from “indistinguishable,” our decision in *William Penn* provides little support for the dissent’s decision to *sua sponte* reconsider *Smith*.

Finally, it is unfair and ill-advised to consider a facial challenge to Section 8528 without advocacy from Appellant, the Attorney General, and SEPTA. While the dissent sets forth her view of the law in this area, the parties did not have the opportunity to address the litany of related issues the dissent was required to grapple with, including: the *Smith* Court's legal analysis; the interpretation, breadth, and history of Article I, Section 11 and Article III, Section 18 of our Constitution; the extent of legislative power to regulate actions against the Commonwealth; other relevant state court decisions; the linkage of the constitutional references to "cases" to jurisdiction; and the *stare decisis* factors, including the workability of the rule established in *Smith*, the age and lineage of *Smith*, and the reliance on settled jurisprudence. Indeed, in a facial challenge to a statute, it is imperative that all interested parties be heard.

For all these reasons, the order of the Commonwealth Court is hereby affirmed.

Justices Dougherty, Mundy and Brobson join the opinion.

Chief Justice Todd files a special concurring opinion in which Justices Dougherty and Mundy join.

Justice Dougherty files a concurring opinion in which Justice Mundy joins.

Justice Wecht files a concurring opinion.

Justice Donohue files a dissenting opinion in which Justice McCaffery joins.