IN THE
COURT OF APPEALS OF MARYLAND

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No. 35
SEPTEMBER TERM, 2014

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ESTELA ESPINA, *et al.*,

Petitioners,

v.

STEVEN JACKSON, *et al.*,

Respondents.

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ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

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# BRIEF OF AMICI CURIAE LOCAL GOVERNMENT INSURANCE TRUST HARFORD COUNTY, MARYLAND MONTGOMERY COUNTY, MARYLAND

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David M. Funk
Karen J. Kruger

Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201
(410) 659-7700
dfunk@fblaw.com
kkruger@fblaw.com

Attorneys for Amici Curiae

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Local Government Insurance Trust (the "Trust"), Harford County, Maryland, and Montgomery County, Maryland (collectively, "Amici Curiae"), pursuant to Maryland Rule 8-511(a)(1), file this Brief of Amici Curiae in support of the position of the Respondents.[1]

## INTRODUCTION

Petitioners raise a significant issue of constitutional interpretation: Are the damages that flow from a jury finding that a local government or a local government official or employee violated a plaintiff's rights under the Maryland Constitution subject to the limitation on damages enacted by the Maryland General Assembly in the Local Government Tort Claims Act, Md. Code Ann., Cts. & Jud. Proc. §§ 5-301 – 5-304 (the "Act")?[2] Petitioners argue that the limitation on damages in the Act does not apply to state constitutional torts, but if the limitation does apply, Petitioners urge this Court to

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[1] The Trust is organized pursuant to Md. Code Ann., Ins. § 19-602, which authorizes public entities to pool together to purchase casualty insurance, property insurance, or health insurance, or to self-insure against casualty, property, or health risks. Pursuant to this authority, the Trust operates a self-insured liability pool for its members, which include 141 municipalities and 17 counties. Harford County, Maryland and Montgomery County, Maryland are political subdivisions of the State of Maryland and are self-insured for primary liability. Amici Curiae obtained the written consent of the parties to this appeal to file this Brief in support of the position of the Respondents. *See* Md. Rule 8-511(a)(1).

[2] The Act was passed by the General Assembly and signed by Governor Schaefer as Chapter 594 of the Laws of Maryland of 1987. *See* Act of July 1, 1987, ch. 594, 1987 Md. Laws 2710. Chapter 594 took effect July 1, 1987. *Id.* at 2716. The limitation on damages is codified at Md. Code Ann., Cts. & Jud. Proc. § 5-303(a), which reads in pertinent part that "the liability of a local government may not exceed $200,000 per an individual claim, and $500,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions…."

find that the limitation violates Article 19 of the Maryland Declaration of Rights. The ruling sought by Petitioners would undermine the intent of the Act and have a direct and severe impact on the potential liability for damages of local governments in Maryland. Because Petitioners' argument finds no support in Maryland law, Amici Curiae respectfully request that this Court affirm the decision of the Court of Special Appeals.

## STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case of the Respondents.

## QUESTIONS PRESENTED

1. Did the General Assembly intend to exclude state constitutional torts from the limitation on damages in the Act?
2. Does the limitation on damages in the Act violate Article 19 of the Maryland Declaration of Rights?
3. Does the General Assembly have the constitutional power to limit damages for a state constitutional tort?

## STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts of the Respondents.

## ARGUMENT

### I. The General Assembly Intended the Limitation on Damages in the Local Government Tort Claims Act to Apply to State Constitutional Torts

The question of whether the General Assembly intended to include state constitutional torts within the ambit of the damages cap in the Act is not difficult to answer in the affirmative. First, there is nothing either in the language or the legislative

history of the Act to suggest that its scope is in any way limited. Indeed, the opposite is true. Second, Maryland courts have long assumed in numerous cases that the Act applies to all tort claims against local governments, including claims based on allegations of state constitutional violations. This is illustrated most clearly in the cases involving the required pre-suit notice provision in the Act. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-304. Third, the General Assembly, in amending the Act in direct response to this Court's ruling in *Housing Authority of Baltimore City v. Bennett*, 359 Md. 356 (2000), expressly announced its broad intent that (i) the *total* liability of a local government, directly or otherwise, in an action arising from tortious acts or omissions may not exceed the limits on liability stated in the Act, and (ii) the Act applies to *any* claim for tort damages against a local government or a local government employee. *See* Act of April 20, 2001, ch. 286, §§ 2 -3, 2001 Md. Laws 1935, 1936-37 (emphasis added) ("Chapter 286"). These uncodified provisions of Chapter 286 send a direct and unambiguous message that the General Assembly intends all torts – common law, statutory, and constitutional – to come within the ambit of the Act's damages cap.

Petitioners can cite nothing in the Act's language or legislative history, or in any case construing the Act, that supports their contention that the Act does not apply to state constitutional torts. Petitioners can only resort to lofty and exalted terms in an effort to characterize state constitutional provisions as worthy of unlimited damages. This is nothing more than colorful rhetoric that is properly ignored by this Court.

### A. The Plain Language of the Local Government Tort Claims Act Makes No Exception for State Constitutional Torts

This Court's decision in *Widgeon v. Eastern Shore Hospital Center*, 300 Md. 520 (1984), established that an individual may bring a common law action for damages for the deprivation of the individual's liberty or property interests in violation of Articles 24 and 26 of the Maryland Declaration of Rights. Subsequently, this Court expanded the scope of constitutional causes of action to include Articles 19, 21, 25 and 40 of the Maryland Declaration of Rights. Md. Dec. of R., arts. 19, 21, 25, and 40; *see DiPino v. Davis*, 354 Md. 18, 50 n. 7 (1999); *Ashton v. Brown*, 339 Md. 70, 106-08 (1995).[3] These constitutional causes of action are generally referred to as "constitutional torts." *See DiPino*, 354 Md. at 50 ("Indeed, we have characterized civil violations of State Constitutional protections as 'constitutional torts.'"); *see also Ashton*, 339 Md. at 104.[4]

This Court has held generally that the Act encompasses state constitutional torts:

> [T]here is no exception in the Local Government Tort Claims Act for constitutional torts. In fact, there is no exception in the statutory language for any category of torts. As long as the local government employee is acting in the scope of his

[3] *But see Dehn Motor Sales v. Schulz,* 439 Md. 460, 486 n. 27 (2014) ("Article 19 of the Maryland Declaration of Rights does not necessarily support a private cause of action and monetary remedies. Article 19, rather, guarantees a citizen the opportunity to seek judicial redress of a wrong.").

[4] Black's Law Dictionary defines a "tort" as a "civil wrong" having three elements: (i) existence of a legal duty from defendant to plaintiff, (ii) breach of duty, and (iii) damage as a proximate result. *Black's Law Dictionary*, 1335 (5th ed. 1979). Certain provisions of the Maryland Constitution create a legal duty owed by the government to its citizens. Under *Widgeon*, a plaintiff may recover tort damages for the breach of a duty arising out of these constitutional provisions. *Widgeon*, 300 Md. at 537-38. Accordingly, a breach of a constitutional duty is a tort.

> employment and without malice, the local government is required to pay the judgment against the employee to the extent it represents compensatory damages, up to certain statutory limits.

*Ashton*, 339 Md. at 107-08 n. 19. Indeed, there is nothing in the language or legislative history of the Act to indicate or imply an intent to restrict the limitation on local government liability to non-constitutional torts.

The Act has two primary purposes: first, to insulate local government employees from financial liability as long as they act within the scope of their employment and without actual malice, *see, e.g.*, Md. Code Ann., Cts. & Jud. Proc. §§ 5-302(b), 5-303(b), and second, to protect the local government fisc by placing a ceiling on the amount of damages that may be awarded an individual injured by the local government or an employee of the local government as a result of a tortious act or omission. *See, e.g., id.* § 5-303(a).

In examining the language of the Act, the Court of Special Appeals noted that the cap applies "for damages resulting from tortious acts or omissions." *De Espina v. Prince George's Cnty.*, 215 Md. App. 611, 631 (2013). The court correctly recognized that the Act "provides no exceptions for intentional torts or constitutional violations" and that it would not "recognize an exception in a statute when there is no express basis for the exception in the statutory language." *Id.* at 632; *see also Lee v. Cline*, 384 Md. 245, 256 (2004) ("This Court has been most reluctant to recognize exceptions in a statute when there is no basis for the exceptions in the statutory language.") (citations omitted).

The Court of Special Appeals properly observed "the cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature." *De Espina*, 215 Md. App. at 630 (citation omitted). "To ascertain the intent of the General Assembly, we begin with the normal, plain meaning of the language of the statute." *Id.* (quoting *Lockshin v. Semsker*, 412 Md. 257, 276 (2010)).

> We, however, do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute.

*Id.* (quoting *Lockshin*, 412 Md. at 276).

If this Court were to find an exception to the damages cap for state constitutional torts, it would necessarily – and improperly – be removing a significant element from the plain and simple language of the statute and undermining the whole statutory scheme. *See Lockshin*, 412 Md. at 275 ("We neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute, and we do not construe a statute with 'forced or subtle interpretations' that limit or extend its application." (citation omitted).

There is no language in the Act indicating that it excludes from its coverage state constitutional torts. The sections relating to notice, Md. Code Ann., Cts. & Jud. Proc. § 5-304(b)), legal representation, Md. Code Ann., Cts. & Jud. Proc. § 5-302(a)), and preservation of defenses, Md. Code Ann., Cts. & Jud. Proc. § 5-303(d) and (e)), all broadly describe the applicability to "actions for unliquidated damages" and any "tortious

acts or omissions committed by any employee." Petitioners do not argue that any of these provisions in the Act exclude state constitutional torts. Rather, they arbitrarily limit their attack to the Act's damages cap, Md. Code Ann., Cts. & Jud. Proc. § 5-303(a)).

In deciding whether the Act's notice requirement would bar a plaintiff's claims, Maryland appellate courts have discussed whether the notice requirement applies to state constitutional torts and have found that it does. *See, e.g., Rounds v. Md. Nat'l Capital Park & Planning Comm'n*, 214 Md. App. 90 (2012); *Prince George's Cnty. v. Longtin*, 419 Md. 450 (2011); *Wilbon v. Hunsicker*, 172 Md. App. 181 (2006), *cert. denied* 398 Md. 316 (2007); *White v. Prince Georges Cnty.*, 163 Md. App. 129 (2005), *cert. denied* 389 Md. 401 (2005); *Chapelle v. McCarter*, 162 Md. App. 163 (2005). As a consequence, Maryland courts have refused to permit tort claims based on state constitutional violations to proceed when a plaintiff has not complied with the notice requirements of the Act. *See Dehn Motor Sales*, 439 Md. at 487; *Ransom v. Leopold*, 183 Md. App. 570 (2008); *see also Butler v. Windsor*, 2014 U. S. Dist. Lexis 77862 *22 ("The LGTCA applies to state constitutional torts, as well as common law torts."); *Ross v. Prince George's Cnty.*, 2012 U.S. Dist. Lexis 50526 (D. Md., Apr. 10, 2012) (finding that expansive terms of the Act indicate its applicability to state constitutional torts.).

In a different but similar context, this Court held that the statutory cap on noneconomic damages in a personal injury action, Md. Code Ann. Cts. & Jud. Proc., § 11-108, applies to a claim for damages arising out of a statutory violation. *Green v. N.B.S., Inc.*, 409 Md. 528, 544 (2009). In a passage that is particularly relevant to this case, the *Green* Court observed:

> [N]othing in the legislative history suggests that the General Assembly even thought of the difference between actions claiming personal injury due to common law torts as opposed to causes of action claiming personal injury arising out of statutory or constitutional torts. And, when interpreting a statute, a court must presume that the legislature did not intend to make any alteration other than what is specified and plainly pronounced. Also, in light of the reasons for the original cap statute, and its amendment, it is impossible to believe that the legislature intended to narrow the statute in the way appellant suggests so that insurers would now have to cover non-economic damages awards that exceeded the cap so long as the personal injury action arose out of a violation of a statute or constitutional provision.

*Green*, 409 Md. at 544 (citations omitted). Similarly, it is impossible to believe that the General Assembly intended to exclude state constitutional torts from the Act's damages cap so that local governments would have to cover damages awards in excess of the cap if the action arose out of a violation of the Maryland Constitution.

It is of signal importance that the General Assembly has never sought to exclude state constitutional torts from the ambit of any legislation dealing with tort actions. Indeed, the only respect in which state constitutional torts have been treated differently from other torts is in the area of common law public official immunity (discussed *infra* in Part III of this Argument). *See Clea v. Mayor and City Council of Baltimore*, 312 Md. 662, 684 (1988); *Ashton*, 339 Md. at 102.

### B. The Legislative History of the Local Government Tort Claims Act Reveals No Intent to Exclude State Constitutional Torts From Its Application

After considering the plain language of the Act, the Court of Special Appeals examined its legislative history and concluded that "nothing in the legislative history

suggests the General Assembly intended to limit the application of the cap to non-constitutional claims." *De Espina*, 215 Md. App. at 635.

In 2001, the General Assembly, in overruling this Court's decision in *Housing Authority of Baltimore City v. Bennett*, 359 Md. 356 (2000), reaffirmed its intention that the Act be broadly applied.[5] In the uncodified sections of Chapter 286, the General Assembly expressed its intent that the *total* liability of a local government in an action arising from tortious acts or omissions may not exceed the damages cap and the damages cap applies to *any* claim for damages under the Act. *See* Act of April 20, 2001, ch. 286, §§ 2 -3, 2001 Md. Laws 1935, 1936-37 (emphasis added). The Court of Special Appeals found that "the uncodified sections [of Chapter 286] indicate that the legislature intended to limit the total liability of a local government in a broad range of cases, with no exceptions for constitutional violations." *De Espina* 215 Md. App. at 637 (footnote omitted).

The enactment of the Act represented a matter of state-wide importance. One of its primary aims "was to bring stability to what was perceived as an escalating liability picture for local governments by containing their exposure while guaranteeing payment to tort victims of judgments against [local government] employees[.]" *Balt. Police Dept. v. Cherkes*, 140 Md. App. 282, 324 (2001). The Act provides an incentive for citizens to

[5] In *Bennett*, this Court held, as a matter of statutory construction, that the monetary caps in the Act did not apply to "tort actions directly against local governments when the bases for such actions are enactments of the General Assembly, state common law, the state constitution, or federal law." *Id.* at 373-74. The General Assembly acted quickly at its next Regular Session to enact emergency legislation to correct this mistaken view of legislative intent.

serve as public employees, and encourages them "to perform to the best of their abilities." *Pavelka v. Carter*, 996 F.2d 645, 649 (4th Cir. 1993). This Court has previously recognized that when legislation seeks to protect significant interests with respect to the general public welfare, that intent must be respected. *See Lockshin*, 412 Md. at 276.

Petitioners urge this Court to treat state constitutional violations differently from other civil wrongs that may be committed by local government employees. Private citizens cannot be held liable for violations of state constitutional provisions – only local government actors can be held so liable. *See DiPino*, 354 Md. at 50-51. The intent of the Act is to require the local government to indemnify its employees against tort damages. It would be incongruous indeed if these constitutional wrongs were held not to be within the ambit of the Act, thus depriving local government employees the protections intended by the Act.

Without any support in Maryland cases, Petitioners resort to out-of-state cases that describe state constitutional rights in lofty and exalted terms in an effort to characterize those provisions as worthy of unlimited damages. This is nothing more than colorful rhetoric because none of the cases cited actually holds that a cap on damages for state constitutional torts is unconstitutional. The tort claims to which the Act applies are those based on legal duties created at common law, or by statutes or constitutional provisions. There is simply no argument Petitioners may advance to establish that the Act is

inapplicable to state constitutional torts.[6]

## II. The Limitation on Damages in the Local Government Tort Claims Act is Reasonable and Does Not Violate Article 19 of the Maryland Declaration of Rights

Petitioners' argument that the Act's limitation on damages violates Article 19 of the Maryland Declaration of Rights must fail under this Court's decision in *Murphy v. Edmonds*, 325 Md. 342 (1992). *Murphy* held, conclusively, that a reasonable statutory restriction on damages is constitutional under the principles of Article 19. *Id.* at 365-67.

Article 19 of the Maryland Declaration of Rights protects two interrelated rights: (1) a right to seek redress for an injury to one's person or property and (2) a right of access to the courts.[7] Like all constitutional rights, the rights protected by Article 19 are not unlimited. This Court has consistently recognized that Article 19 is a directive to the

[6] Petitioners cite many out-of-state cases that discuss constitutional provisions generally. None holds that damages caps are unconstitutional under state law, and, except for *Clarke v. Oregon Health Sciences University*, 175 P.3d 418 (Or. 2007), none involves torts. *See, e.g.*, Petition for Certiorari at 8-10 (*citing Wolff v. Sec'y of S.D. Games, Fish & Parks Dept.*, 544 N.W. 2d 531 (S.D. 1996) (inverse condemnation); *Greenway Dev. Co. v. Borough of Paramus*, 750 A. 2d 764 (N.J. 2000) (same); *Krauss v. City of Cleveland*, 96 N.E. 2d 314 (Ohio Ct. App. 1950) (gambling regulation); *In re Appeal of Inter-Faith Villa, L.P.*, 185 P.3d 295 (Kan. Ct. App. 2008) (tax exemption)). Petitioners also cite a number of criminal cases that are irrelevant to the issues in this case. In *Clarke*, the Oregon Supreme Court held that the damages cap in the Oregon Tort Claims Act is constitutional. *Clarke*, 175 P3d at 434. Similarly, Petitioners cite *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994), an election case, to support their premise that "self-executing" constitutional rights may not be limited by the legislature, whereas the case actually holds that such provisions may be altered by statute as long as the restrictions are reasonable. *Loonan*, 882 P.2d at 1388 n. 6.

[7] Article 19 provides "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land." Md. Dec. of R. art. 19.

courts to insure access, and "the Legislature, pursuant to its authority to change the common law or statutory provisions, may enact reasonable restrictions upon traditional remedies or access to the courts." *Jackson v. Dackman*, 442 Md. 357, 378 (2011).

In *Murphy v. Edmonds*, this Court held that the limitation on noneconomic damages in Md. Code Ann., Cts. & Jud. Proc. § 11-108 does not violate Article 19. *Murphy*, 325 Md. at 365. The reasoning in *Murphy* is dispositive here:

> Article 19 does guarantee access to the courts, but that access is subject to reasonable regulation. A statutory restriction upon access to the courts violates Article 19 only if the restriction is unreasonable.

*Id.*

Judge Eldridge, writing for the Court, continued:

> In our view, the limitation upon recoverable noneconomic tort damages under § 11-108 of the Courts and Judicial Proceedings Article does not amount to a restriction upon access to the courts. There is a distinction between restricting access to the courts and modifying the substantive law to be applied by the courts. The plaintiffs' cause of action based on negligence was not abolished by § 11-108. Instead, § 11-108 simply modifies the law of damages to be applied in tort cases. While the right to recover noneconomic damages exceeding $350,000 was abrogated, this change in the substantive law is not a restriction upon access to the courts.

*Id.* at 366.

While the Court acknowledged that a statutory abrogation of access to the courts that leaves the plaintiff "totally remediless" would be unreasonable and a violation of Article 19, *id.*, the limitation on noneconomic damages in Md. Code Ann., Cts. & Jud. Proc. § 11-108 is an "entirely reasonable" restriction upon access to the courts and does

not violate Article 19. *Id.* at 367. As with the limitation on noneconomic damages, the limitation on recoverable damages for the wrongful act of a local government or a local government employee is entirely reasonable because it seeks a legitimate legislative objective. *See Franklin v. Mazda Motor Corp.,* 704 F. Supp. 1325, 1333 (D. Md. 1989) ("The Maryland cap on noneconomic damages represents a policy judgment by the legislature that pain and suffering will be compensable in a range between zero and $350,000. This type of policy judgment is not foreign to the legislature.").

The limitation upon recoverable tort damages under in Md. Code Ann., Cts. & Jud. Proc. § 5-303(a) mirrors the limitation on noneconomic damages in Md. Code Ann., Cts. & Jud. Proc. §11-108. A plaintiff's cause of action under the Maryland Constitution is not abolished by the Act. Instead, the Act simply modifies the law of damages to be applied in tort cases against a local government or local government employee. While the Act limits the right to recover damages exceeding a certain amount, this change in the substantive law of damages is not a restriction upon access to the courts. *Longtin,* 419 Md. at 488 ("To be sure, applying a damage cap does not vitiate a person's remedy altogether.")

In determining that the statutory cap on noneconomic damages is constitutional, the Court of Appeals in *Murphy* relied heavily on two task force reports: *Report of the Joint Executive/Legislative Task Force on Medical Malpractice Insurance* (Dec. 12, 1985) and *Report of the Governor's Task Force to Study Liability Insurance* (Dec. 20,

1985).[8] The Court observed that the statutory cap on noneconomic damages "was enacted in response to a legislatively perceived crisis concerning the availability and cost of liability insurance in this State." *Murphy*, 325 Md. at 368.

> This crisis resulted in the unavailability of liability insurance for some individuals and entities, especially those engaged in hazardous activities such as asbestos removal, and increasing difficulty in obtaining reinsurance. *See Report of the Governor's Task Force to Study Liability Insurance*, 3-4 (Dec. 1985). The crisis also affected the medical profession, resulting in excessive insurance premiums for doctors and declining services for patients, especially in high risk specialties such as obstetrics. *See Report of the Joint Executive/Legislative Task Force of Medical Malpractice Insurance*, 5 (Dec. 1985).
>
> In considering whether to enact the cap on tort damages, the General Assembly had before it the above-cited task force reports, both of which advocated a $250,000 cap on noneconomic damage awards. *See Report of the Governor's Task Force to Study Liability Insurance*, *supra*, at 10-13; *Report of the Joint Executive/Legislative Task Force of Medical Malpractice Insurance*, *supra*, at 28-29. Neither task force believed that the cap should be extended to economic damages. *Ibid*. The *Report of the Governor's Task Force to Study Liability Insurance* stated that the cap would lead to greater predictability of damage awards, thus making the insurance market more stable and attractive to underwriters. The Report also noted that noneconomic damages are "impossible to ascertain with precision and are subject to emotional appeals to a jury," so that a $250,000 cap would

[8] The 28-member Task Force on Medical Malpractice Insurance, appointed by Governor Hughes on July 31, 1985 and chaired by Judge James Macgill, was asked to undertake a comprehensive review of the issues associated with the availability and accessibility of medical malpractice insurance. The 23-member Task Force to Study Liability Insurance, appointed by Governor Hughes on August 28, 1985 and chaired by Lt. Governor J. Joseph Curran, Jr., was asked to develop administrative or legislative recommendations to help ensure the availability of adequate liability insurance coverage at an affordable cost.

> permit a more realistic recovery in this area. *See Report of the Governor's Task Force to Study Liability Insurance*, *supra*, at 11.

*Id.* at 368-69 (footnote omitted).

Despite the recommended cap of $250,000, the General Assembly set the cap on noneconomic damages at $350,000. *See* Act of July 1, 1986, ch. 639, 1986 Md. Laws 2348, 2350. "Since, the General Assembly had before it several studies which concluded that $250,000 would cover most noneconomic damage claims, the Legislature did not act arbitrarily in enacting the cap at $350,000." *Murphy*, 325 Md. at 370.

Not coincidentally, the Governor's Task Force to Study Liability Insurance also recommended that a "Local Government Tort Claims Act," similar to the Maryland Tort Claims Act, be enacted to limit the amount of damages that may be assessed against a local government entity or its employees. *See Report of the Governor's Task Force to Study Liability Insurance* at 13. As with the statutory cap on noneconomic damages upheld by the Court in *Murphy v. Edmonds*, the statutory cap on damages against a local government was a response to a perceived crisis concerning the availability and cost of liability insurance for counties, cities and towns in Maryland. The Task Force explained the rationale for its recommendation as follows:

> The Local Government Tort Claims Act clarifies the unsettled status of claims against employees of local governments, and, with its caps on damage awards and attorneys fees, will result in more predictable exposure by local governments. The Task Force heard testimony from several Maryland cities and counties which have experienced premium increases for liability insurance from 150 percent to 750 percent or have had their coverage cancelled altogether. This testimony was consistent with national trends indicating that local

> government liability insurance premiums have increased an average of 150 percent in the past year, with many policies being cancelled. (See Appendix D). The broad nature of local government's services and exposures creates an uncertain potential that insurers are either unwilling to underwrite or will do so only reluctantly and at excessive rates.
>
> Approximately 28 states have implemented some form of tort claim statute and 24 states have some form of local government tort claims act. (see Appendix E). Caps on limitations of awards and attorneys' fees restrict the rights of individual claimants to recover a full measure of damages, and such an act can be challenged for restricting the rights of injured citizens. On the other hand, local governments and their employees are providing a service for the entire public and for the general welfare and, to some degree, the injured citizen is seeking relief from his fellow citizens and from himself in bringing a claim. Cities, towns, and county governments are not the same as profit-making corporations and should have protections against the large verdicts and claims which are presently available under the existing tort system.
>
> The Task Force believes that the Local Government Tort Claims Act will have a pronounced effect on making liability insurance more affordable and available and as such should alleviate to some extent the insurance crisis now faced by local governments and will be in the best interest of the state and its citizens.

*Report of the Governor's Task Force to Study Liability Insurance* at 15-16.

The Task Force recommended a statutory damages cap of $100,000 to make it consistent with statutory caps on suits against local school districts and charitable hospitals. As enacted, the statutory cap on tort damages was set at $200,000 per an individual claim, and $500,000 per total claims that arise from the same occurrence. *See* Act of July 1, 1987, ch. 594, 1987 Laws Md. 2710, 2713. In that the General Assembly

had before it a task force study that recommended a statutory damages cap of $100,000, the General Assembly did not act arbitrarily in enacting the cap at $200,000/$500,000.

Since *Murphy*, this Court has held that legislation constitutes an unreasonable restriction on a plaintiff's Article 19 rights when the right to access to the courts is abrogated or rendered completely meaningless. *See, e.g., Dackman*, 422 Md. at 382 (holding that the statute was excessively restrictive and created a bar to meaningful recovery because the plaintiff was left with "almost no compensation."); *Piselli v. 75th St. Med., P.A.*, 371 Md. 188 (2002) (holding that a statute which cut off minor's right to bring action before the minor reached age of majority is unreasonable under Article 19).

But this Court has ruled that all other statutes attacked on this basis to be constitutional. *See, e.g., Dixon v. Ford Motor Co.*, 433 Md. 137 (2013) (holding legislative cap on noneconomic damages is reasonable under Article 19); *Rios v. Montgomery County*, 386 Md. 104 (2005) (holding the pre-suit notice requirement in the Act does not violate Article 19); *Lee*, 384 Md. at 266 (holding the Maryland Tort Claims Act's "substitution of governmental liability in place of the liability of government-employed tortfeasors" provides reasonable access to the courts); *Robinson v. Bunch*, 367 Md. 432 (2002) (holding an exclusive statutory remedy to resolve employment issues in an administrative court is reasonable under Article 19). To find in favor of Petitioners here would constitute an abrupt departure from Maryland precedent.[9]

[9] Once again, Petitioners resort to cases from other states in which constitutional provisions similar to Article 19 are described as creating a limitation on state legislatures. *See, e.g.*, Brief of Appellants at 38-47; *Shell v. Jefferson Cnty.*, 454 So. 2d. 1331 (Ala.

Under Article 5 of the Maryland Declaration of Rights, the General Assembly has the constitutional authority to revise, amend or even repeal provisions of the common law. *Murphy,* 325 Md. at 362; *Att'y Gen. v. Johnson*, 282 Md. 274, 282 (1978), *appeal dismissed,* 439 U.S. 805 (1978) ("The common law … [is] subject to the control and modification of the Legislature, and may be abrogated or changed as the General Assembly may think most conducive to the general welfare…."). In the case of available damages from a local government, the General Assembly exercised that power and reasonably determined that the damages remedy available to such plaintiffs should not be unlimited.

In reviewing the constitutionality of House Bill 942 (2001), which would become Chapter 286, the Attorney General stated:

> House Bill 942 would affect plaintiffs in pending tort suits filed directly against local governments by limiting their potential recovery to the amounts set by statute. It does not eliminate an existing cause of action, but merely limits the amount of recovery.

J. Joseph Curran, Jr., *Bill Review Letter to the Honorable Parris N. Glendening RE: HB942*, 3 (April 23, 2001).

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1984) (sewer rates); *In re Appeal of Inter-Faith Villa, L.P.*, 185 P.3d 295 (Kan. Ct. App. 2008 (tax-exemption); *Kitchens v. City of Paragould*, 88 S.W.2d 843 (Ark. 1935) (municipal bonds); *Baker v. Bosworth*, 222 P.2d 416 (Colo. 1950) (constitutional amendment); *see also Ieropoli v. AC&S Corp.*, 842 A.2d 919 (Pa. 2004) (history of the remedies clause); *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001) (same). None of these cases arises from a tort action or addresses a statutory cap on tort damages. They simply add to the colorful rhetoric of Petitioners' brief.

In analyzing statutory provisions, as opposed to interpreting the common law, this Court must afford deference to the directives of the General Assembly. This case is about interpreting a statute and effectuating the intent of the legislature. *See e.g., Comptroller v. John C. Louis Co.,* 285 Md. 527, 543 (1979) (legislative enactments are entitled to "great weight").

The Act modifies the law of damages, not the common law right to bring an action against a governmental official. The opinion of the Court of Special Appeals properly interpreted the constitutionality of the Act by identifying the key element: that the Act did not and was never intended to eliminate any cause of action, the elimination of which might limit access to recovery through the courts. *De Espina,* 215 Md. App. at 645. The damages limitation in the Act is reasonably related to the legislative objective to protect the local government fisc and does not amount to a restriction upon access to the courts.

A claimant has a right to seek "a remedy to redress the wrong" and the cap on damages is the General Assembly's effort to make that remedy possible, without paralyzing local governments under the weight of unlimited verdicts. Article 19 does not vitiate the General Assembly's right to exercise its constitutional power to make legislative determinations that benefit local governments and the citizens of Maryland. There is no constitutional impediment to the General Assembly's limiting damages as it has done in the Act.

## III. The General Assembly is Fully Empowered to Determine as a Matter of Public Policy that State Constitutional Torts are Subject to the Limitation on Damages in the Local Government Tort Claims Act

At common law, non-constitutional torts are subject to "governmental immunity" and "public official's immunity." Under the common law doctrine of "governmental immunity," if the alleged tort is non-constitutional, a local government is immune from liability for governmental activities. At common law, a local government is not immune from liability for proprietary activities. *Ashton*, 339 Md. at 101; *Clea*, 312 Md. at 667. Under the common law doctrine of "public official's immunity," if the alleged tort is non-constitutional, a local government official is immune from tort liability while acting in a discretionary capacity within the scope of the official's authority and without actual malice. *Clea*, 312 Md. at 672-73; *James v. Prince George's Cnty.*, 288 Md. 315, 323-24 (1980). As a matter of common law, state constitutional torts are not subject to either "governmental immunity" or "public official's immunity." *Ashton*, 339 Md. at 101, 104; *Clea*, 312 Md. at 667, 679.

Through the Act, the General Assembly has created a statutory overlay that allocates responsibility between the local government and the local government employee. *See* Md. Code Ann., Cts. & Jud. Proc. Art §§ 5-302 and 5-303. Under these provisions of the Act, a local government must provide a legal defense to its employee in any action that alleges damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government. *Id.* § 5-302(a). The local government is liable for any judgment against its employee for damages

resulting from tortious acts or omissions committed by the local government employee within the scope of employment with the local government. *Id.* § 5-303(b)(1). A local government is not liable for punitive damages, but may indemnify an employee for a judgment for punitive damages entered against the employee. *Id.* § 5-302(c). A local government may not assert governmental immunity to avoid the duty to defend or indemnify a local government employee. *Id.* § 5-303(b)(2).

A person may not execute against a local government employee on a judgment rendered for tortious acts or omissions committed by the local government employee within the scope of employment with the local government and without actual malice. *Id.* § 5-302(b)(1). The local government employee is fully liable for all damages awarded in an action in which it is found that the employee acted with actual malice. Md. Code Ann., Cts. & Jud. Proc. § 5-302(b)(2)(i). If the local government employee acted with actual malice, the local government may seek indemnification from the employee for any sums the local government paid as damages on the employee's behalf. *Id.* § 5-302(b)(2)(ii).

Any common law or statutory defense or immunity possessed by a local government employee remains in effect if the defense or immunity was in existence on the effective date of the Act. *Id.* § 5-303(d). A local government may assert the defense or immunity on its own behalf if the claim against the local government is premised on the tortious act or omission of the employee who possesses the defense or immunity, and a local government may only be held liable to the extent that a judgment could have been rendered against the local government employee under the Act. *Id.* § 5-303(e).

The liability of a local government may not exceed $200,000 per an individual claim, and $500,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions, or liability arising from a judgment against an employee and indemnification for punitive damages entered against the employee. *Id.* § 5-303(a). The total liability of a local government, directly or otherwise, in an action arising from tortious acts or omissions, may not exceed the limits on liability set forth in the Act. Act of April 20, 2001, ch. 286, § 2, 2001 Md. Laws 1935, 1936.

One of the key purposes of the Act is to create a scheme by which "the local government is merely the insurer and the local government employee the insured." *Hansen v. City of Laurel,* 420 Md. 670, 680 n. 5 (2011). Nevertheless, Petitioners suggest that because there is no immunity for either the individual actor or the local government as employer in the face of allegations of state constitutional torts, there should likewise be no limitation on what damages are recoverable. But to effectuate the intent of the General Assembly, just the opposite must be true. With no common law immunity protection, the only protection available to the local government is the statutory limitation on damages in the Act. Surely the General Assembly, aware of this Court's decision not to provide common law immunity to local governments for state constitutional violations, intended the protection of the Act's damages cap to apply to state constitutional torts.

This Court has decided as a matter of common law that neither the local government nor the local government employee is immune from liability for state constitutional torts, and the General Assembly has decided by statute that the total tort

liability of a local government shall not exceed the damages cap in the Act. As Judge Harrell observed in his dissenting opinion in *Prince George's County v. Longtin*, the damages cap is an integral part of a legislative scheme to allocate responsibility between the local government and the local government employee for tortious conduct. *Longtin*, 419 Md. at 520. "The $200,000/$500,000 damages cap was a reasonable, rational, and constitutional balancing. Indeed, it may well have been a necessary prerequisite to the passage of the LGTCA." *Id.*

In support of their argument that the statutory damages cap in the Act should not apply to state constitutional violations, the Petitioners rely heavily on the distinction drawn by this Court in *Clea v. Mayor and City Council of Baltimore* between ordinary torts and constitutional torts:

> [W]ith regard to clothing a public official with a degree of governmental immunity, there are sound reasons to distinguish actions to remedy constitutional violations from ordinary tort suits. The purpose of a negligence or other ordinary tort action is not specifically to protect individuals against government officials or to restrain government officials. The purpose of these actions is to protect one individual against another individual, to give one person a remedy when he is wrongfully injured by another person. Issues of governmental immunity in this context concern whether, and to what extent, as a policy matter, a government official or entity is to be treated like an ordinary private party.
>
> On the other hand, constitutional provisions like Articles 24 or 26 of the Maryland Declaration of Rights, or Article III, § 40 of the Maryland Constitution, are specifically designed to protect citizens against certain types of unlawful acts by government officials. To accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions.

> It would also, as frankly recognized by counsel for Officer Leonard in this Court, largely render nugatory the cause of action for violation of constitutional rights recognized in *Widgeon*, *Mason*, *Heinze*, *Weyler*, and other cases.

*Clea*, 312 Md. at 684-85 (citation omitted).

Petitioners' reliance is misplaced. First, the Court in this passage was explaining the reason underlying its decision, as a matter of common law, not to grant public official immunity for state constitutional courts. The General Assembly chose not to adopt this reasoning in enacting the Act. Second, if the Court were to grant public official immunity and governmental immunity, the victim of the constitutional violation would be remediless. By contrast, the General Assembly has not left the victim of a constitutional violation remediless. The Act expressly provides that a local government may not assert governmental immunity to avoid liability for a judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-303(b). In disallowing the local government to claim governmental immunity to avoid liability, while capping damages at a reasonable and rational level to limit liability, the General Assembly has achieved a balance that is well within its constitutional power to set public policy.

In this case, the Court of Special Appeals has correctly held, in reliance on this Court's decision in *Murphy v. Edmonds*, that the damages cap in the Act does not abridge a plaintiff's rights under Article 19 of the Maryland Declaration of Rights. Once it is determined that the damages cap in the Act is constitutional, it is for the General

Assembly to decide the torts to which the cap will apply. The General Assembly is constitutionally empowered to decide if state constitutional torts should be subject to the cap. In this case, the Court of Special Appeals has correctly held that the plain language of the statute, the legislative history, and the case law all indicate a clear legislative intent to apply the damages cap in the Act to state constitutional torts. This legislative intent should be honored, and the decision below affirmed.

## CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that this Court affirm the judgment of the Court of Special Appeals.

Respectfully submitted,

David M. Funk
Karen J. Kruger

Funk & Bolton, P.A.
Twelfth Floor
36 South Charles Street
Baltimore, Maryland 21201
(410) 659-7700
dfunk@fblaw.com
kkruger@fblaw.com

Attorneys for Amici Curiae
Local Government Insurance Trust, Harford County, Maryland, & Montgomery County, Maryland

Dated: October 24, 2014

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

### Maryland Constitution Declaration of Rights

Article 19.

That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

### Annotated Code of Maryland

Courts and Judicial Proceedings Article

§5-303.

(a)(1) Subject to paragraph (2) of this subsection, the liability of a local government may not exceed $200,000 per an individual claim, and $500,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions, or liability arising under subsection (b) of this section and indemnification under subsection (c) of this section.

### Chapter 286 of the Laws of Maryland of 2001

SECTION 2. AND BE IT FURTHER ENACTED, That it is the intent of the General Assembly that the total liability of a local government, directly or otherwise, in an action arising from tortious acts or omissions, may not exceed the limits on liability stated in § 5-303(a) of the Courts and Judicial Proceedings Article.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall apply to any claim for damages under § 5-303 of the Courts and Judicial Proceedings Article in a case pending on the effective date of this Act and arising from events occurring on or after July 1, 1987.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 2014, two copies of the foregoing Brief of Amici Curiae were sent via first class mail, postage prepaid to:

Thomas C. Mooney, Esquire
Law Offices of Thomas C. Mooney
14750 Main Street, Suite #2
Upper Marlboro, Maryland 20772

Timothy F. Maloney, Esquire
Joseph, Greenwald & Laake, P.A.
6404 Ivy Lane, Suite #400
Greenbelt, Maryland 20770

Attorneys for Petitioners

Daniel Karp, Esquire
Karpinski, Colaresi & Karp
120 East Baltimore Street, Suite 1850
Baltimore, Maryland 21202

Attorneys for Respondents

_____
Karen J. Kruger

STATEMENT PURSUANT TO MARYLAND RULE 8-504(a)(9)

This brief is prepared with proportionally spaced type. The font used is Times New Roman. The type size is 13 point.