IN THE SUPREME COURT, STATE OF WYOMING

CLIFFORD C. BAIN, Petitioner, v. CITY OF CHEYENNE, a municipality; and EDWARD BROOKMAN, an individual, Respondents	)	No. S-24-0225

BRIEF OF WYOMING ATTORNEY GENERAL BRIDGET HILL IN HER OFFICIAL CAPACITY

Bridget Hill #6-3616
Wyoming Attorney General

Mark A. Klaassen #6-4511
Deputy Attorney General

Prentice B. Olive #8-6691
Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
(307) 777-3608

FOR THE ATTORNEY GENERAL

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STATEMENT OF JURISDICTION

On January 19, 2024, Plaintiff-Appellant, Clifford C. Bain, filed a Complaint in the district court for the First Judicial District, Laramie County, State of Wyoming, against Defendant City of Cheyenne and its employee, Defendant Edward Brookman, under the Wyoming Government Claims Act (the Act). (R. at 1). The district court denied Bain's motion for partial summary judgment, and subsequently entered a written order on August 13, 2024. (R. at 285-287). Bain filed a timely petition for a writ of review on August 26, 2024, within fifteen days of the district court's order in accordance with Rule 13.07 of the Wyoming Rules of Appellate Procedure. (*See* Petition for Writ of Review). On September 24, 2024, this Court granted the petition. (R. at 292). This Court therefore has jurisdiction to consider the interlocutory order denying summary judgment.

STATEMENT OF THE ISSUE

I. Does Wyo. Stat. Ann. § 1-39-118(a) violate article 10, section 4, of the Wyoming Constitution?[1]

[1] In his Petition for Writ of Review Bain presented two issues. In his brief, Bain withdraws the second issue. (Appellant's Br. at 2, n. 1).

STATEMENT OF THE CASE

This case arises from a traffic accident involving a bus owned and operated by the City of Cheyenne and driven by Brookman, and a motorcycle operated by Bain. (R. at 2-3). On January 19, 2024, Bain filed a complaint seeking recovery for injuries he sustained in the accident pursuant to the Act. (R. at 1). The Defendants answered and admitted liability, sought to interplead other claimants, and deposited $250,000 with the clerk of court to reflect the maximum potential liability for the single occurrence under the Act, as provided under § 1-39-118(a)(i). (R. at 19-24). On April 12, 2024, Bain filed Plaintiff's Motion for and Brief in Support of Partial Summary Judgment, arguing that Defendants' affirmative defense and request for declaratory relief should be summarily denied because § 1-39-118(a)(i) is an unconstitutional limitation on damages that violates article 10, section 4 of the Wyoming Constitution. (R. at 85-119).

Having been served with a copy of the motion as required by Wyo. Stat. Ann. § 1-37-113 and Wyo. R. Civ. P. 5.1, the Attorney General subsequently filed a notice of intent to appear and be heard. (R. at 144-147). The district court granted this motion. (R. at 157-158). The Defendants and the Attorney General then filed responses to Bain's motion for summary judgment. (R at 159-171, 178-206).

After the motion was fully briefed, the district court set a hearing for July 18, 2024. (R. at 281). The court denied the motion for partial summary judgment at the close of the hearing, and later entered a written order holding that "§ 1-39-118(a) is not a limitation on damages prohibited under Wyo. Const. Art. 10, § 4," and "Art. 10, § 4 was not intended by

the framers to apply to governmental entities, which at the time the Wyoming Constitution was adopted, enjoyed immunity from suit." (R. at 285-287).

STANDARD OF REVIEW

This case involves a writ of review for consideration of the interlocutory order denying Bain's motion for partial summary judgment. (R. at 292). This court reviews "the district court's summary judgment order de novo." *Leonhardt v. Big Horn Cnty. Sheriff's Off.*, 2024 WY 128, ¶ 16, 559 P.3d 1053, 1058 (Wyo. 2024). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting W.R.C.P. 56(a)). When considering such a ruling, courts must review the record "from the vantage point most favorable to the non-moving party, … [along with] the benefit of all favorable inferences that may be fairly drawn from the record." *Loepp v. Ford*, 2024 WY 63, ¶ 24, 550 P.3d 96, 104 (Wyo. 2024).

The summary judgment order resolved a challenge to the constitutionality of a statute. "The question of whether a statute is constitutional is a question of law[.]" *Hardison v. State*, 2022 WY 45, ¶ 5, 507 P.3d 36, 39 (Wyo. 2022) (quoting *Vaughn v. State*, 2017 WY 29, ¶ 7, 391 P.3d 1086, 1091 (Wyo. 2017). The Court can decide such legal issues on a motion for summary judgment. *Laramie Cnty. Sch. Dist. No. One v. Cheyenne Newspapers, Inc.*, 2011 WY 55, ¶ 2, 250 P.3d 522, 523 (Wyo. 2011).

Review of the constitutionality of statutes is necessarily deferential to the State. "Statutes are presumed to be constitutional, and [the courts] will resolve any doubt in favor of constitutionality." *Hardison*, ¶ 5, 507 P.3d at 39 (internal citations and quotation marks omitted). The party challenging the statute bears the heavy burden to "clearly and exactly show the unconstitutionality beyond any reasonable doubt." *Id.* Where, as here, the plaintiff

brings a facial challenge to a statutory provision, he "must establish that no set of circumstances exists under which the Act would be valid." *Dir. of Off. of State Lands & Invs. v. Merbanco, Inc.*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (Wyo. 2003) (internal citations and quotation marks omitted).

SUMMARY OF THE ARGUMENT

Section 1-39-118(a) of the Act is not unconstitutional because article 10, section 4 of the Wyoming Constitution is not applicable to governmental entities. The prohibition on limitation of damages is situated in an article entitled "Corporations" and among other sections pertaining only to that subject. It must therefore be understood in that context. Further review of the history of adoption of article 10, section 4, together with the framers' awareness of broad common law governmental immunity that existed at that time, demonstrate that it does not, and was never intended to apply to governmental entities.

Further, § 1-39-118 is not a limitation on damages that could violate article 10, section 4 but rather must be understood with other provisions to the Act as defining the right to recovery. The Act establishes general immunity from suit for governmental entities with limited waivers of immunity for certain categories of claims. Section 1-39-118(a) specifies that the liability of governmental entities for such claims shall not exceed certain dollar amounts. This provision is therefore not a limitation on damages as alleged, but rather defines the maximum extent of the Legislature's waiver of immunity.

Defining the scope of any waiver of immunity, as part of creating a right of recovery against governmental entities, is a valid exercise of legislative authority that violates no other constitutional provisions or laws. The Legislature has broad authority to regulate access to its courts for suits against governmental entities under of article 1, section 8, of the Wyoming Constitution, and as a part of its general plenary legislative authority.

ARGUMENT

Bain challenges § 1-39-118(a) of the Act, arguing that it violates Wyoming Constitution article 10, section 4 as an impermissible limitation on damages. (Appellant's Br. at 9, 12-16). Variations on this argument seeking to circumvent or expand the limited waiver of governmental immunity under the Act have been made before and failed.

A. Background

Understanding the issues in this case requires an overview of this Court's treatment of sovereign and governmental immunity leading to the enactment of the Act, and the adoption of article 10, section 4.

1. Immunity for governmental entities.

Wyoming courts have treated governmental/municipal immunity and sovereign immunity as distinct doctrines. *Worthington v. State*, 598 P.2d 796, 800 (Wyo. 1979). Governmental/municipal immunity applies to counties and other subdivisions of government. *Oroz v. Bd. of Cnty. Comm'rs of Carbon Cnty.*, 575 P.2d 1155, 1157 (Wyo. 1978) (superseded by statute). Sovereign immunity applies to the State of Wyoming or arms of the state. *Worthington*, 598 P.2d at 800.

Both doctrines have common law origins. Governmental/municipal immunity traces back to the 1788 English case of *Russell v. Men of Devon*. *Oroz*, 575 P.2d at 1157. Sovereign immunity also existed as a common law doctrine long before Wyoming became a state. *Worthington*, 598 P.2d at 800. In the late 1970's, both doctrines faced possible abrogation by the Wyoming Supreme Court. Sovereign immunity survived while governmental/municipal immunity did not.

In the seminal case of *Oroz*, this Court determined that governmental/municipal immunity was "a creature of the courts" and not a "legislative rule." *Oroz*, 575 P.2d at 1157. It held "that the immunity from tort liability heretofore judicially conferred upon counties (municipal corporations, school districts, and other subdivisions of government) is abrogated," and that "the rule is liability the exception is immunity[.]" *Oroz*, 575 P.2d at 1158. As a result of this ruling, counties and other subdivisions of government in Wyoming were left to face "the same rules as private persons or corporations if a duty has been violated and a tort has been committed." *Oroz*, 575 P.2d at 1158.

The *Oroz* Court did not address whether the State would continue to enjoy sovereign immunity from tort liability, a question that would be resolved the following year in *Worthington v. State*, 598 P.2d 796, 800 (Wyo. 1979). The *Worthington* Court determined that it lacked authority to abrogate the State's sovereign immunity because article 1, section 8 of the Wyoming Constitution recognizes the common law doctrine of sovereign immunity and vests the Wyoming Legislature with the exclusive authority to determine whether to waive sovereign immunity and consent to a suit for damages. *Worthington*, 598 P.2d at 802-04. It characterized article 1, section 8 as "a delegation to the legislature of the power to regulate the entire field and not an invitation to the courts to invade that domain." *Worthington*, 598 P.2d at 804.

2. The Wyoming Governmental Claims Act

The Wyoming Legislature responded to abrogation of governmental immunity under *Oroz* by enacting the Act, which took effect just prior to issuance of the *Worthington* decision. *Archer v. State ex. rel. Wyo. Dep't of Transp.*, 2018 WY 28, ¶ 7, 413 P.3d 142,

145 (Wyo. 2018). Through the Act, the Wyoming Legislature defined the scope of immunity that had previously been a common law defense, preserving both sovereign immunity and governmental/municipal immunity in Wyoming. As explained in more detail below, the Act established blanket governmental immunity for any tort, but created a right to recovery for specified categories of claims up to certain monetary thresholds.

Section 1-39-102(a) provides a statement of purpose for the Act, noting the tension between strict application of governmental immunity that would unfairly deny claims of those injured by government actions and the need to protect taxpayer revenues. The section states as follows:

> The Wyoming legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of governmental immunity and is cognizant of the Wyoming Supreme Court decision of Oroz v. Board of County Commissioners 575 P.2d 1155 (1978). It is further recognized that the state and its political subdivisions as trustees of public revenues are constituted to serve the inhabitants of the state of Wyoming and furnish certain services not available through private parties and, in the case of the state, state revenues may only be expended upon legislative appropriation. **This act is adopted by the legislature to balance the respective equities between persons injured by governmental actions and the taxpayers of the state of Wyoming whose revenues are utilized by governmental entities on behalf of those taxpayers.** This act is intended to retain any common law defenses which a defendant may have by virtue of decisions from this or other jurisdictions.

Wyo. Stat. Ann. § 1-39-102(a) (emphasis added).

To achieve the desired balance, § 1-39-104(a) reflects a general rule of immunity from tort liability for governmental entities, subject to enumerated exceptions. It provides, in pertinent part:

> A governmental entity and its public employees while acting within the scope of duties **are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112[**.]

Wyo. Stat. Ann. § 1-39-104(a) (emphasis added). The Act defines "governmental entity" to include the state and any local government. Wyo. Stat. Ann. § 1-39-103(a)(i). The term "local government" broadly includes counties, municipalities, and other government subdivisions. Wyo. Stat. Ann. § 1-39-103(a)(ii). Thus, the Act jointly addresses the concepts of governmental/municipal immunity for political subdivisions and sovereign immunity for the State.

Sections 1-39-105 through -112 of the Act waive the immunity of governmental entities for seven specific categories of tortious conduct of public employees while acting within the scope of their duties. For example, Wyo. Stat. Ann. § 1-39-105, which is pertinent to the claims in this case, provides as follows:

> A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any motor vehicle, aircraft or watercraft.

Wyo. Stat. Ann. § 1-39-105. Sections 1-39-105 through -112 each have the same type of waiver language. *See* Wyo. Stat. Ann. §§ 1-39-106, -107(a), -108(a), -109, -110(a), -112. All of the exceptions to immunity in §§ 105 through 112 are subject to certain exclusions. *See,* Wyo. Stat. Ann. § 1-39-120.

Having provided waivers of immunity for only certain types of claims, and subject to certain exclusions, §§ 1-39-110(b) and -118(a) of the Act were then included to define

the maximum potential liability of governmental entities for such claims. Section 1-39-118(a) provides:

> (a) Except as provided in subsection (b) of this section, in any action under this act, **the liability of the governmental entity**, including a public employee while acting within the scope of his duties, **shall not exceed**:
>
> > (i) The sum of two hundred fifty thousand dollars ($250,000.00) to any claimant for any number of claims arising out of a single transaction or occurrence; or
> >
> > (ii) The sum of five hundred thousand dollars ($500,000.00) for all claims of all claimants arising out of a single transaction or occurrence.

Wyo. Stat. Ann. § 1-39-118(a) (emphasis added).

Read together, these provisions create a right of recovery that waives immunity to allow certain categories of claims against governmental entities, but only up to the amounts defined by the Act.

3. Article 10, Section 4(a)

Bain challenges the constitutionality of § 1-39-118(a) as a limitation on damages. He insists this provision of the Act conflicts with article 10, section 4(a) of the Wyoming Constitution, which provides: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." Wyo. Const. art. 10, § 4(a). This sentence was adopted in the 1890 version of the Wyoming Constitution and has remained unchanged since then. (*Compare* Wyo. Const. art. 10, § 4(a) (2018) *with Journal and Debates of the Constitutional Convention of the State of Wyoming*, Const. at 38 (1893)).

In the 1890 version of the Wyoming Constitution, article 10 had two subparts – Corporations and Railroads. (*Journal/Debates*, Const. at 37, 38). During the Convention, the Corporations subpart began as file numbers 11, 38, 42 and 72, which were assigned to the Standing Committee on Corporations. (*Journal/Debates* at 33, 36, 40, 54). The Corporations Committee replaced the four files with a general substitute file entitled "Incorporations" and recommended that these substitute files be adopted. (*Journal/Debates* at 71; *see* R. at 209-248). The language that has become article 10, section 4(a) appeared in proposed section 5 in the substitute file, which originally provided:

> The liability of no person corporation or association of persons shall ever be limited nor shall any law be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any agreement or contract with any employe[e] waiving any right to recover damages for causing the death or injury of any employe[e].

(R. at 209-210, 225) (bracketed letters added).

The delegates considered a substitute file in the Committee of the Whole during the morning session on the 20th day of the Convention (Tuesday, September 24, 1889). (*Journal/Debates* at 614-16). After the reading of the proposed section 5, the following debate ensued regarding the first sentence:

> (Reading of Sec. 5.)
>
> * * *
>
> Mr. FOX. I am opposed to this section. It is not reasonable. Most of the corporations or companies throughout the United States now are limited. Any association of two or three persons engaged in a mercantile business, you will find are limited, throughout the states. The object in having them limited is this, as I understand it: A person is interested in a corporation, and holds a certain amount of stock, two or three shares at one hundred each. If

organized "limited," and that concern goes into bankruptcy, the man is liable only for the amount of stock he holds. If not limited he is liable for all he has got, and I think that it is proper if persons desire to go into a corporation limited, they should do so. That is a plain statement of the facts as I understand them, and I am opposed to this section.

Mr. CAMPBELL. I think you mistake the reading of the section.

Mr. BROWN. The criticism might be made whether the reading of this does not make it mean more than is intended.

Mr. FOX. I move the whole section be stricken out.

Mr. CHAPLIN. There is a great argument in favor of adopting Sec. 5 of this bill in Wyoming. On several occasions men have been killed in this territory, and their families were prohibited from recovering more than two or three thousand dollars, while if he should break his leg he might recover ten or fifteen times that. That is the reason for putting that in here and it ought to stand.

Mr. HOYT. In order to get at the evident purpose of this section. I move to strike out all of the section down to the word "law" in the second line, and insert the word "no," so it will read "no law shall be, etc."

Mr. CHAIRMAN. I already have one amendment to this, an amendment to the extent of striking out the whole section, and I doubt if that can be amended to the extent of striking out only a portion of it.

Mr. RINER. I want to ask whether or not under this section the question whether a corporation is guilty of negligence or not, would be considered? Would it deprive a corporation of any defense they might have? I think it so far as a piece of legislation, the most vicious thing in this bill. I believe the legislature ought to fix the maximum in every case. They fix it under the law as it now stands in every case of death, and many times the question of negligence is not considered, and they settle on a basis of five thousand dollars, and the parties get that. That, is the maximum under the statute now, and if you leave the matter open, while I admit it is a good thing for the railroads. I don't believe it is a good thing for the parties interested in the final result. I believe it ought to be left to legislative control.

Mr. BROWN. Why have a maximum?

> Mr. RINER. In order that settlement may be made upon a basis fixed by the legislature without litigation. It has that effect.
>
> Mr. SUTHERLAND. I would like to ask Mr. Riner how many five thousand dollars have been paid for the boys who have had their brains knocked out on these snow sheds, or to their heirs? I would like to ask how many have been paid for at the rate of five thousand dollars?
>
> Mr. RINER. We have settled on that basis.
>
> Mr. MORGAN. I don't see why any maximum should be fixed for damages to persons injured or killed. You might as well fix by law the maximum at which I shall sell my house. I think a man ought to have the right to settle on the very best grounds he can get. It is an interference with human rights it seems to me. It can't injure any one to leave it just as it is in this provision.
>
> Mr. CHAIRMAN. The question is on the amendment to the amendment. If you accept this amendment it will read: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." Are you ready for the question? All in favor of the amendment will say aye; contrary no. The ayes have it; the motion is carried.

(*Journal/Debates* at 614-16).

In the Committee of the Whole, the delegates approved one amendment to the first sentence of the proposed section 5. (*Journal/Debates* at 86). As a result of this amendment, the adopted version of the first sentence was changed as follows:

> ~~The liability of no person corporation or association of persons shall ever be limited nor shall any law~~ No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. …

(*See* R. at 209) (underscore and strike though added). The delegates also struck out the proposed section 4 in its entirety (*Journal/Debates* at 86), so proposed section 5 became section 4 in the version of article 10 ultimately adopted by the delegates. (*See*

Journal/Debates, Const. at 38). The Constitutional Convention voted to approve the entirety of article 10. (*See Journal/Debates* at 856).

B. Article 10, section 4(a) does not apply to governmental entities.

Bain rests his entire argument on the assumption that article 10, section 4(a) is plain on its face, and unambiguously applies to any law that would limit damages recoverable against any person, including governmental entities under § 1-39-118(a). (See Appellant's Br. at 12). However, as Bain admits, while the text of article 10, section 4 may seem clear when read out of context, it cannot be construed in a vacuum. Reading the provision *in pari materia* is vital and leads to either: (1) an understanding that its application is limited to the subject matter of the title of article 10 and surrounding provisions that in no way pertain to governmental entities; or (2) an alternative reasonable interpretation about its meaning that must be reconciled through review of the history of article 10, section 4(a) showing the framers never intended for that provision to apply in this context.

When interpreting constitutional language, the goal "is to ascertain the intent of the framers." *In re Neely*, 2017 WY 25, ¶ 41, 390 P.3d 728, 742 (Wyo. 2017) (internal citations and quotation marks omitted). Further, "[e]very statement in the constitution must be interpreted in light of the entire document, with all portions thereof read in *pari materia*." *Id.*, ¶ 47, 390 P.3d at 744 (internal citations and quotation marks omitted) (alteration in original). When interpreting the constitution, "no part will be inoperative or superfluous." *Id.*, ¶ 49, 390 P.3d at 744 (internal citations and quotation marks omitted). Bain asserts that article 10, section 4 is not ambiguous and should therefore be given its plain meaning without recourse to any extrinsic aids. (Appellant's Br. at 15). However, his interpretation

ignores important context, including the title and content of other related provisions of article 10.

In the 1890 version of the Wyoming Constitution, the framers placed the sentence that now is section 4(a) in article 10, under a sub-header entitled "Corporations." (*See Journal/Debates*, Const. at 37). The title "Corporations" is not to be ignored. It is important for understanding the scope and subject matter of the sections under that heading. This Court has previously considered the title of an article in determining the meaning of the sections contained within an article. *See Rasmussen v. Baker*, 50 P. 819, 822-24 (1897) (referencing the title of an article of the Wyoming Constitution, as the subject matter of that article, before engaging in a plain meaning interpretation of a section of that article). Considering a plain meaning interpretation of article 10, section 4 in context, using the article heading to constrain the breadth of its application, is not improper and leads to a conclusion that this provision does not apply broadly to governmental entities – or at least requires further analysis to understand its scope in the face of competing reasonable interpretations.

Insisting on a blinkered approach, Bain ignores further aspects of an *in pari materia* reading of article 10, section 4 that plainly indicate the limits of its application. In addition to the sub-heading title, it is clear that other provisions of article 10 are limited entirely to corporations. For example, section 1 provides authority for the Legislature to pass laws relating to corporations. Wyo. Const. art. 10, section 1. Likewise, section 2 places corporations under the control of the State. Wyo. Const. art. 10, section 2. Sections five through ten specify what corporations can and cannot do and how the State should regulate them. Wyo. Const. art. 10, sections 5-10. When enacted, article 10 had nine other sections,

each of which addressed matters related to corporations. (*Journal/Debates*, Const. at 37-38). At a minimum, given this context, it would be strained construction to read article 10, section 4 as a random outlier that applies beyond corporations to encompass governmental entities. Interpreting article 10, section 4 as a law of general applicability places it completely outside of the subject matter of article 10 as reflected by the title and surrounding sections.

Reading article 10, section 4 in context suggests, at minimum, some latent ambiguity and the need for further inquiry into its meaning, opening the door to consideration of the history of its adoption and the framers' intent. Examining the procedural history of article 10, section 4(a) from the Constitutional Convention further supports a more limited interpretation of its scope.

Such a review of this history is not precluded as Bain argues. Even if the provision is unambiguous on its face, which is disputed, the Court "can look to legislative history 'to confirm the legislative intent reflected in the … plain language.'" *Skoric v. Park Cnty. Cir. Ct., Fifth Jud. Dist.*, 2023 WY 59A, ¶ 13, 532 P.3d 667, 671 (Wyo. 2023) (quoting *In re Gifford*, 2013 WY 54, ¶ 12, 300 P.3d 852, 856 (Wyo. 2013)). This Court has frequently referred to the Journal and Debates as an aid to understanding the meaning of constitutional provisions. *See e.g.*, *Meyer v. Kendig*, 641 P.2d 1235, 1239 (Wyo. 1982). Additionally, this Court has noted that how a provision became a part of the constitution can be a valuable aid in interpreting its scope and meaning. *Dworkin v. L.F.P., Inc.*, 839 P.2d 903, 910 (Wyo. 1992).

As originally conceived, the language that became article 10, section 4(a) was the second half of a compound sentence that provided, "[t]he liability of no person corporation or association of persons shall ever be limited nor shall any law be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." (Ex. 1 at 1-2; Ex. 2 at 5). Use of the conjunction "nor" caused the phrase "to be recovered" to relate back to three objects – "person," "corporation," and "association of persons." *See, XIV The Century Dictionary of the English Language*, 4016(1889) (noting that "nor" was "generally used correlatively after a negative"). This proposed version would have prohibited the Wyoming Legislature from enacting a law to limit damages recoverable from a "person," "corporation," or "association of persons." In 1889, none of these terms included governmental entities.

During the debate in the Committee of the Whole, the delegates amended the compound sentence in the proposed section 5 to read as it currently does. (*Journal/Debates* at 614-16). They deleted the first part of the sentence and, in the second part, replaced the phrase "nor shall any" with the word "no." (*See* Ex. 1 at 1). The sponsor of the amendment offered the change "to get at the evident purpose of this section[.]" (*Journal/Debates* at 615). The amendment appears to have been offered in response to some confusion over the meaning of the first half of the compound sentence. (*Id.*) The discussion focused on whether the first half of the compound sentence made individual owners of limited corporations personally liable, rather than only liable to the extent of their ownership in the corporation. (*Id.* at 614-15). Nothing in the context of the debate suggests that the framers intended to

create a universally applicable rule, or to make article 10, section 4(a) broadly applicable to governmental entities.

After the amendment was proposed, the ensuing debate focused on the policy question of whether the delegates should leave it to a future legislature to determine if damages should be limited. (*Journal/Debates* at 615-16). The delegates' discussion focused on damages caused by corporations, particularly railroads – saying nothing about extending the reach of the provision to include governmental entities. (*Id.*) Thus, the debate reveals that, at most, the delegates intended to prohibit a future legislature from enacting a law to limit the amount of damages to be recovered from private actors. Nothing in the procedural history of the adoption of article 10, section 4(a) suggests that the framers intended for the provision to prohibit a future legislature from enacting a law to limit damages recoverable from governmental entities.

The possibility of extending article 10, section 4(a) to governmental entities would not even have been within the contemplation of the framers. They would not have been concerned about laws limiting the recovery of damages from governmental entities because, at that time, states and local governments had enjoyed common law immunity for a century or more. *See Oroz*, 575 P.2d at 1157; *Worthington*, 598 P.2d at 800. Nothing in the constitutional history of article 10, section 4(a) suggests that the delegates intended to abrogate this long-standing common law immunity when they adopted the language that became article 10, section 4(a).

The Wyoming federal district court considered the meaning and scope of article 10, section 4(a), reaching the same conclusion about its limited application. *See Millward v. Bd.*

of Cnty. Commissioners of Cnty. of Teton, Wyoming, No. 17-CV-117-SWS, 2018 WL 9371676 at *3 (D. Wyo. Aug. 21, 2018). The court relied heavily on *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986), a Pennsylvania case analyzing similar statutory and constitutional provisions. *Millward*, 2018 WL 9371676 at *3.

As *Millward* recognized, Pennsylvania law is instructive because its constitution contains provisions similar to article 1, section 8 and article 10, section 4 of the Wyoming Constitution. Article III, section 18 of the Pennsylvania Constitution "provides that, except for workers' compensation matters, 'in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property….'" *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1115 (2014) (quoting PA. Const. Art. III, § 18) (ellipses in original). Further, article I, section 11 of the Pennsylvania Constitution provides that "[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct [.]" *Zauflik*, 104 A.3d at 1110 (quoting PA. Const. Art. I, § 11).

Like Wyoming, the Tort Claims Act in Pennsylvania defined the maximum potential liability for damages for claims brought against the state. *Zauflik*, 104 A.3d at 1100-01. Plaintiffs in Pennsylvania brought challenges against this cap based on article III, section 18 of Pennsylvania Constitution prohibiting laws limiting damages. *See Zauflik*, 104 A.3d at 1104; *Smith*, 516 A.2d at 308. The Supreme Court of Pennsylvania explained that, "the specific evil aimed at by now-Section 18 was the inappropriate influence on legislation exercised by common carriers, *i.e.*, railroad companies, and in the broader sense, powerful private corporations with an incentive to seek to limit the damages recoverable through

lawsuits arising from accidents." *Zauflik*, 104 A.3d at 1125 (italics in original). The court also pointed out the background of sovereign immunity that existed at the time section 18 was drafted. *Id.* at 1126. Accordingly, it concluded the prohibition against limiting damages did not apply to the government. *Id.*; *Smith*, 516 A.2d at 309.

In reaching its conclusion about the meaning of the Wyoming provisions, *Millward* quoted from *Smith*, stating in relevant part:

> We conclude, therefore, both because the intended scope of this section was to prevent private parties from securing an unfair limitation of liability through influence in the General Assembly, and because the Framers would have had no reason to concern themselves with governmental liability in tort, that **Article III, Section 18 does not operate to restrict the General Assembly from providing for less than full recovery for injuries to persons or property where the defendant is a governmental entity**.

Millward, 2018 WL 9371676 at *3-4 (quoting *Smith*, 516 A.2d at 309-10) (emphasis added). The federal court applied this same rationale in evaluating article 10, section 4(a), determining, as the court had in *Smith*, that when the Wyoming Constitution was enacted, common law immunity reigned, and "the framers never intended it to apply to cases involving governmental defendants." *Millward*, 2018 WL 9371676 at *4. Accordingly, the court held, "[b]ecause the framers aimed Article 10, § 4(a) at private parties and were not concerned with governmental liability in tort, it would be unreasonable to conclude that Article 10, § 4(a) prevents the Wyoming Legislature from capping a governmental entity's liability in the Act." *Id.*

Given the similarities in Wyoming and Pennsylvania law, this Court should adopt the analysis of *Millward* in following the well-reasoned decision of the Pennsylvania

court. Article 10, § 4 should not be construed as applying to governmental entities or otherwise invalidating § 1-39-118(a) of the Act.

C. Section 1-39-118(a) does not violate article 10, section 4(a).

Even if article 10, section 4 was interpreted to apply to government entities, it would not invalidate 1-39-118(a). Bain argues that § 1-39-118(a) of the Act and article 10, section 4 of the Wyoming Constitution conflict with each other because § 1-39-118(a) is a limitation on damages. (Appellant's Br. at 12, 16). However, his argument presumes too much and misses a logical first step. Before applying article 10, section 4, the Court must first determine whether § 1-39-118(a) is actually a limitation on damages. The unambiguous language in § 1-39-118(a), read *in pari materia* with related parts of the Act, confirms that it is not a limitation on damages but rather defines the right to recover and the limited scope of the waiver of immunity embodied in the Act.

This Court considers "'all statutes relating to the same subject or having some general purpose' in pari materia." *Wyoming Guardianship Corp. v. Wyoming State Hosp.*, 2018 WY 114, ¶ 12, 428 P.3d 424, 431 (Wyo. 2018) (quoting *Redco Constr. v. Profile Prop., LLC*, 2012 WY 24, ¶ 26, 271 P.3d 408, 415-16 (Wyo. 2012)). It must "construe the statutes of the Act together… 'giv[ing] effect to every word, clause, and sentence.'" *Wyoming Guardianship Corp.*, ¶ 12, 428 P.3d at 431 (citation omitted). This approach reveals that the various provisions of the Act work together to achieve a legislative purpose – avoid the unfair results of strict application of governmental immunity by establishing a right of recovery through limited waivers of immunity for certain categories of claims with liability

not to exceed specified amounts. Wyo. Stat. Ann. §§ 1-39-102(a), -104(a),-105 through -112, -118(a).

1. Section 1-39-118(a) is not a law limiting damages, but defines the extent of the waiver of governmental immunity.

In enacting the Act, the Wyoming Legislature plainly stated that it was striking a balance, seeking "to retain the common law principle that a governmental entity is generally immune from lawsuits, while acknowledging that fairness requires authorizing lawsuits against a governmental entity in certain statutorily defined situations." *Campbell Cnty. Mem. Hosp. v. Pfeifle*, 2014 WY 3, ¶¶ 18–19, 317 P.3d 573, 578 (Wyo. 2014). To resolve the tension between the unfairness of blanket immunity and the risk of liability to public coffers, the Legislature fashioned the Act as a "closed-ended" statutory scheme, "with governmental liability specifically delimited by the mandates of the Act." *Hall v. Park Cnty.*, 2010 WY 124 ¶ 13, 238 P.3d 580, 585 n.4 (Wyo. 2010).

The Act "unambiguously expresses the intention to grant immunity in all but very limited circumstances." *Diamond Surface, Inc. v. Cleveland*, 963 P.2d 996, 1000-01 (Wyo. 1998). This approach begins with the general rule, "that the government is immune from liability, and, unless a claim falls within one of the statutory exceptions to governmental immunity, it will be barred." *SH v. Campbell Cnty. Sch. Dist.*, 2018 WY 11, ¶ 5, 409 P.3d 1231, 1233 (Wyo. 2018). The Act then waives immunity "in those certain specified instances which are contemplated by the Act and only to the extent contemplated." *Hamlin v. Transcon Lines*, 697 P.2d 606, 613 (Wyo. 1985) .

To operate as intended, the Act needed more than just waivers of immunity, but provisions defining how far those waivers would extend to achieve the desired balance and define the right to recover. This construction of the Act as not only waiving immunity, but defining the scope of its waiver of immunity is confirmed by an *in pari materia* reading of the pertinent sections of the Act. Section 1-39-104(a) provides that "[a] governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112." Wyo. Stat. Ann. § 1-39-104(a). The subject matter-specific "exceptions" referenced in § 1-39-104(a) each contain the following operative language: "A governmental entity is liable for damages resulting from …." Wyo. Stat. Ann. §§ 1-39-105, -106, -107(a), -108(a), -109, -110(a), -112. These exceptions reflect a legislative intent to waive immunity for the specified types of negligent or tortious conduct. *Harbel v. Wintermute*, 883 P.2d 359, 364 (Wyo. 1994).

When read in isolation, §§ 1-39-105 through -112 would appear to serve as blanket waivers of immunity allowing unlimited liability for those categories of claims. However, they do not stand alone. They must be understood in conjunction with §§ 1-39-110(b) and -118(a), which provide that, "in any action under" the Act, "the liability of the governmental entity … shall not exceed" the specified dollar amounts. Wyo. Stat. Ann. §§ 1-39-110(b), -118(a)(i)-(ii). When read in that context, it is apparent that § 1-39-118(a) relates to and defines the extent of the waiver of immunity provided under §§ 1-39-105, 106, 107(a), 108(a), 109 and 112.

Since § 1-39-118(a) is an integral part of the broader statutory scheme and waivers of immunity in the Act, it cannot be interpreted in isolation and extracted as an unlawful limitation on damages. By its own terms, it does not limit damages but defines the right to recovery or scope of the intended waiver, stating "the liability of the governmental entity … shall not exceed" the specified amount. Wyo. Stat. Ann. § 1-39-118(a). Section 1-39-118(a) defines the extent to which a right of recovery exists under that statute, as opposed to limiting an otherwise existing right of recovery.

The application of the Act itself further reveals how § 1-39-118(a) operates to establish the right to recovery and define the scope of waiver of immunity, not as a limitation on damages. At the close of trial for a claim under the Act, a jury is not instructed about any limit on damages it may award against a governmental entity. *See Daley v. Wenzel*, 2001 WY 80, ¶ 17, 30 P.3d 547, 552 (Wyo. 2001) (describing the process of awarding damages in a case involving the Act). The jury may enter a verdict for whatever damages it finds appropriate based on the plaintiff's right to assert claims under the Act. *See id.* It is only after entry of such a verdict that the court must then step in to ensure, as a matter of law, that the amount imposed does not exceed the statutorily defined right to recover. *See id.* (describing how the district court reduced the award of plaintiff, in compliance with § 1-39-118(a), rather than limiting the total amount of damages the jury could award).

The Act creates a window of waived immunity to recover where a tort claim would otherwise be barred. After a plaintiff has recovered the maximum amount for which the government has waived immunity, as provided under § 1-39-118(a), immunity once again

becomes the rule as reflected in the Act. Any amount in excess of the maximum liability under § 1-39-118(a) is considered liability for which the governmental entity has not waived but retains immunity.

2. The federal court in Wyoming has addressed this issue and upheld the Act as a constitutional expression of the scope of the statutory waiver of immunity, not a limitation of damages.

When presented with this same argument in an earlier case, the United States District Court for the District of Wyoming concluded that § 1-39-118(a) was not an improper limitation on damages. *See Millward,* 2018 WL 9371676, at *5. The federal district court held, "[t]he liability caps are not limitations on recovery, but rather are the specified limits on the state legislature's waiver of immunity. Sections 110(b) and 118(a) help define the extent to which governmental immunity has been waived." *Millward*, 2018 WL 9371676 at *5. The court stated, that "when read together, the clear and unambiguous language of the Act demonstrates that the legislature intended to waive governmental immunity only as to a few specific instances and only up to a limited dollar amount." *Id.* Consequently, the court held § 1-39-118(a) did not violate article 10, section 4(a). *Id.*

Further, the federal district court reasoned that if the Legislature has authority to limit the waiver of immunity only to specific instances or categories of claims, "then it is illogical and destroys the balance sought by the Act to hold that the state legislature cannot also limit its waiver of governmental immunity to reasonable dollar amounts." *Id.* at *6. The court explained that the plaintiff's proposed interpretation of § 1-39-118(a) as an improper limitation on damages "would effectively require any waiver of governmental

immunity to expose the governmental entity to unchecked liability, potentially starving the public coffers." *Id.*

3. This Court has upheld statutes granting immunity against constitutional challenges alleging a violation of article 10, section 4.

The federal court's interpretation of § 1-39-118(a) in *Millward* is consistent with Wyoming Supreme Court precedent addressing the application of article 10, section 4(a) to other immunity provisions enacted by the Legislature. In *Meyer v. Kendig*, the Court held that a workers' compensation statute granting co-employees immunity except for one type of tort cause of action, did not violate article 10, section 4(a). *Meyer*, 641 P.2d at 1239. This Court reasoned that the statute addressed a "right to recover" damages against co-employees and therefore did not unlawfully impose a limit on damages. *Id.*

The *Meyer* decision relied solely on the language in the original version of article 10, section 4 to support this holding. *Id.* The Court explained that "[t]he fact that the first sentence of Art. 10, [§] 4 relates only to the amount of damages is exemplified by the second sentence which pertains to the 'right to recover.'" *Id.* The Court referred to the Journal and Debates of the Constitutional Convention of the State of Wyoming, and noted that the framers regarded a "a limitation in amount" and a "right to recover" as separate issues and treated them separately. *Id.* A pure limitation on damages may run afoul of article 10, section 4, but a statute defining a right to recover, including the scope of liability allowed, does not offend that provision.

The same rationale applies here. As noted above, the Act, taken as a whole and understood *in pari materia*, defines the contours of a right to recover against governmental

entities. The Act establishes that right only for certain categories of activity and up to a defined amount. The right to recovery includes both the subject matter waiver of immunity (categories) and the extent of that waiver (amount). The Act waives liability and gives a limited right to recover up to the maximum waiver of liability, after which the plaintiff has no right to recover. All of this was accomplished through the Act without imposing an unlawful limit on damages.

Treating the categorical waivers and defined scope of liability as two different concepts, the first being an acceptable exercise of legislative authority and the latter a forbidden limitation on damages, makes no sense. They operate together to define the right to recover. If the Legislature has authority to bar certain categories of claims entirely, effectively establishing a $0 limit of liability, then it must also have the authority to allow claims while establishing a maximum limit of liability without offending article 10, section 4. *See Millward*, 2018 WL 9371676 at *6. Through the Act, the Legislature established a cause of action that encompasses both the nature of the claims and the scope of possible recovery.

In *Troyer v. Dep't of Health & Soc. Servs*, 722 P.2d 158, 163 (Wyo. 1986), the Court addressed a similar argument that reinforces the need to consider the limits of liability, not as an improper limitation on damages, but as defining the right to recover. . The appellant argued that by making the state immune to certain causes of action, the Act eliminated an avenue for relief that was effectively a limitation on damages "because, if there is no cause

of action, no damages will be recoverable."[2] *Id.*. Finding no constitutional infirmity, this Court held that article 10, section 4(a) "does not prevent limitations on the types of actions which may be brought against the State." *Id.* The *Troyer* Court relied on the analysis from *Meyer* to support this holding. *Id.* (citing *Meyer*, 641 P.2d at 1239). In that regard, the court construed the Act not as a limit on damages, but as defining the right to recovery, which includes limitations on the types of action that may be brought against the State. *Id.*

Later, in *White v. State*, another plaintiff made the same argument, insisting that a statute giving the state immunity from suit violated article 10, section 4(a). *White v. State*, 784 P.2d 1313, 1318 (Wyo. 1989). The Wyoming Supreme Court again applied its previous holdings in *Meyer* and *Troyer*, and rejected this argument. *Id.*

These cases firmly establish that article 10, section 4(a) does not prevent the Wyoming Legislature from defining and circumscribing the right to recover under the Act, including the limit of liability, or from barring certain types of actions altogether. *Meyer*, 641 P.2d at 1239; *Troyer*, 722 P.2d at 163. By providing waivers of immunity in §§ 1-39-105 through -112 and defining the scope of the waiver under §§ 1-39-110(b) and -118(a),

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[2] Bain states, "appellant argued that Wyo. Stat. Ann. § 1-39-110 (LexisNexis 2023) provided a cause of action against the agency, as opposed to the individual health providers and to hold otherwise would violate Article 1, § 8 and Article 10, § 4(a)." (Appellant's Br. at 21). This characterization is incorrect. The appellant in Troyer argued the State was liable as a health care provider, and in the alternative, the Act was unconstitutional. *Troyer*, 722 P.2d at 160.

the Wyoming Legislature has created a limited right of recovery for specific types of tort actions that otherwise would be barred by § 1-39-104(a). Accordingly, § 1-39-118(a) is to be understood merely as further outlining the contours of the right to recovery, not as a limitation on damages that runs afoul of article 10, section 4(a).

Bain attempts to distinguish *Meyer*, *Troyer*, and *White* by characterizing them as cases in which plaintiffs sought "to establish a 'cause of action' by arguing its absence was a limitation on damages." (Appellant's Br. at 22). Bain's argument is a distinction that makes no difference. In all such cases, the initial question is whether a waiver has been enacted to allow suit against a governmental entity. Once the cause of action is established, all cases would then ultimately be subject to other provisions of the Act defining how far that waiver extends in defining the right to recovery.

In the earlier cases, the issue was not merely about an absence of a cause of action, but was based on the fact that each defendant was entitled to immunity as defined under the Act. *See Meyer*, 641 P.2d at 1239; *Troyer*, 722 P.2d at 163; *White*, 784 P.2d at 1318. Bain seeks to separate the waiver allowing a cause of action from the further definition outlining the extent of that waiver, as if interpreting those related provisions together would be improper. (Appellant's Br. at 22). As noted above, these provisions must be harmonized and read together as collectively defining the right to recover, both in terms of subject matter of the claim allowed and the maximum extent of liability.

The definition of the waiver of immunity as set forth in the Act prohibits the right to recover damages beyond the subject matters specified and the monetary extent to which the Legislature waived immunity. *See Meyer*, 641 P.2d at 1239; *Troyer*, 722 P.2d at 163.

Together those provisions define the right of action available to claimants, which is within the authority of the Legislature and not considered an improper limitation on damages.

4. Other related provisions of the Act have been interpreted as extending liability, not increasing a damages limit.

The construction of § 1-39-118(a) as merely defining the right to recover and the extent of the Legislature's waiver of immunity is also consistent with this Court's interpretation of Wyo. Stat. Ann. § 1-39-118(b), which states as follows:

> (b) A governmental entity is authorized to purchase liability insurance coverage covering any acts or risks including all or any portion of the risks provided under this act. Purchase of liability insurance coverage shall extend the governmental entity's liability as follows:
>
> > (i) If a governmental entity has insurance coverage either exceeding the limits of liability as stated in this section or covering liability which is not authorized by this act, the governmental entity's liability is extended to the coverage[.]

Wyo. Stat. Ann. § 1-39-118(b). When interpreting this provision, this Court has emphasized "that a government entity's purchase of liability insurance is not an absolute or complete waiver of immunity. The purchase of insurance **extends liability** only to the extent of the insurance coverage." *Mem'l Hosp. of Sweetwater Cnty. v. Menapace*, 2017 WY 131, ¶ 26, 404 P.3d 1179, 1185 (Wyo. 2017) (emphasis added). Even though the provision does not make the governmental entity liable beyond the insurance coverage, the Court does not describe this as an improper limitation upon damages but merely as extending a defined waiver of liability. *See id.*

The description of how insurance will be applied in § 1-39-118(b) as a waiver up to the limits of the policy, beyond which the governmental entity still retains immunity, is

similar to the limited waiver of liability up to the amount stated in § 1-39-118(a), beyond which the governmental entity retains immunity. *See* Wyo. Stat. Ann. § 1-39-118. This Court should therefore construe § 1-39-118(a) in a manner consistent with § 1-39-118(b), as further defining the extent of the waiver of immunity, not as a limitation on damages.

5. Other jurisdictions have interpreted their governmental claims acts as defining the limits of the waiver of immunity, not as a limitation on damages.

Other state courts have distinguished between provisions providing a limited right to recover under a governmental claims act and laws limiting damages, finding the differences more than just semantic. In *Proctor v. Washington Metro. Area Transit Auth*., 990 A.2d 1048 (2010), the Maryland Court of Appeals analyzed whether the Maryland Tort Claims Act (MTCA) applied to an interstate compact. The MTCA generally waived sovereign immunity, but provided that, "[t]he liability of the State and its units may not exceed $200,000 to a single claimant for injuries arising from a single incident or occurrence. *Id.* at 1060 (quoting Md. Code Ann., State Gov't § 12-104 (1973, 2006 Repl.Vol.). In discussing the MTCA the court stated, "[a]lthough the MTCA's $200,000 damages limit is similar functionally to a cap on damages, it is more accurately described as a limit on the State's waiver of sovereign immunity." *Proctor*, 990 A.2d at 1066.

The Texas Supreme Court reached a similar holding in determining whether a settlement should be offset before or after applying the damage cap under the Texas Tort Claims Act. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997). Like Wyoming's Act, the Texas Tort Claims Act "provides a limited waiver of sovereign immunity, allowing suits to be brought against governmental units only in certain, narrowly

defined circumstances." *Texas Dep't of Crim. Just. v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). The *Trevino* court discussed the nature of the damage claim and stated that the damage cap "does not circumscribe a plaintiff's total recovery for a given injury. Instead, it delineates the extent of the government's waiver of immunity from liability for that injury." *Trevino*, 941 S.W.2d at 81.

In Massachusetts, the court examined similar issues in a case brought for violations under the Jones Act, 46 U.S.C.App. § 688 (1982 & supp. III 1985), general admiralty law, and state law. *Morris v. Massachusetts Mar. Acad.*, 565 N.E.2d 422, 424 (1991). After determining that federal law did not abrogate state sovereign immunity and that the state had waived immunity under the Massachusetts Tort Claims Act, the court analyzed a section that plaintiffs contended limited damages to $100,000. *Id.* at 424-28. The court reasoned that because the state would be entitled to complete immunity, it followed that the state could partially waive its immunity without unfairly limiting damages. *Id.* at 428. The court stated:

> The liability limitation constitutes such a partial waiver. It is incorrect, therefore, to begin with a presumption of unlimited liability and argue that the $100,000 cap impermissibly reduces the plaintiffs' recovery. Rather, our determination is that the Commonwealth is entitled to complete immunity but has consented to be subjected to potential liability up to $100,000.

Id.

These cases show that the concept of a limited waiver of immunity under the Act is not novel, nor is it a contorted reading of statute or a meaningless distinction to interpret such provisions as the scope of a government entity's consent to liability rather than an improper limitation on damages. These jurisdictions have clearly recognized that if the

state may preserve or waive immunity, it also has authority to define the scope or extent of that waiver without the provision being challenged as an unlawful cap or limit on damages. The same rationale applies here.

6. Invalidating § 1-39-118(a) as a limitation on damages would undermine the balance embodied in the Act and cannot be mitigated through insurance.

Bain assures this Court that holding § 1-39-118(a) unconstitutional and extracting it would not upset the balance of immunity and liability under the Act. (Appellant's Br. at 26). His argument ignores practical reality. The balance embodied in the Act would most assuredly suffer from such a ruling, as governmental entities would immediately face potentially unlimited liability for tort claims. Such an outcome would force the Legislature into an all or nothing proposition; either continue to waive immunity under the Act in the face of unlimited liability for the specified categories of claims, or mitigate risk by making governmental entities completely immune and denying all right of recovery to claimants. As a valid exercise of its authority embodied in the Act, the Legislature should not have to make such a trade-off. It has authority to waive immunity, and in doing so, to define how far the waiver of immunity will extend. It makes no sense to say lawmakers control the question of waiver of immunity but may not strike their preferred balance by defining the extent of that waiver.

Plaintiffs also claim that governmental entities could manage their risk simply by obtaining liability insurance under § 1-39-118(b). (Appellant's Br. at 26). Such argument is inconsistent with the plain language of § 1-39-118(b) and further demonstrates the need for an *in pari materia* review to ensure all provisions of the Act are harmonized. If § 1-39-

118(a) is invalidated and stricken from the Act, the purchase of insurance under § 1-39-118(b) would make no sense. Obtaining additional coverage could no longer be described as a waiver of liability that extends liability "to the coverage," because there would be no underlying limit on the waiver of liability under § 1-39-118(a) from which to extend. *Menapace*, ¶ 26, 404 P.3d at 1185; Wyo. Stat. Ann. § 1-39-118(b). Under Bain's suggested approach, purchasing very costly insurance, to the extent it is even available, would become a governmental entities' only protection against the risk of unlimited damages. The idea of mitigating the risk of liability by purchasing insurance as provided under § 1-39-118(b) is contrary to the meaning of that provision and its intended purpose.

Section 1-39-118(a) does not function as an unconstitutional limit on damages. Instead, it is a valid exercise of legislative authority that, when read in conjunction with other provisions of the Act, defines the right to recover against governmental entities to include the extent of the waiver of immunity. Case law in Wyoming supports this interpretation, as does the law of several other jurisdictions. Bain's arguments to the contrary are unavailing.

D. The Legislature properly exercised its authority to create a limited waiver of governmental and sovereign immunity under the Act.

The Legislature is well within its constitutional and plenary authority to enact the limited waiver of immunity and right to recover embodied in the Act. This authority includes the categories of claims it would allow and the monetary extent to which government entities are exposed to liability for such claims.

1. Article 1, section 8 is not limited to procedural directives.

Article 1, section 8 of the Wyoming Constitution states, "[s]uits may be brought against the state in such manner and in such courts as the legislature may by law direct." This provision establishes the foundation for sovereign immunity. *Pfeifle*, ¶¶ 17-19, 317 P.3d at 578. Bain seeks to limit the meaning of this language, arguing that § 1-39-118(a) is not a valid exercise of this authority because it limits damages and therefore does not pertain to a "manner" or "court" for the conduct of suits against the state. (R. at 164; Appellant's Br. at 19). He asserts the authority to control the "manner" of suits speaks only to "procedural aspects of litigation rather than the end result of awarding damages." (Appellant's Br. at 19). His arguments are unavailing.

When interpreting constitutional provisions, this Court should use the same principles set forth above to "ascertain[] the intent of the framers," and interpret provisions *in pari materia* so that related parts are understood together and "no part will be inoperative or superfluous." *In re Neely*, ¶¶ 41, 47, 49, 390 P.3d at 742 (internal citations and quotation marks omitted) (alteration in original). An *in pari materia* interpretation reveals that the Legislature intended the scope of article 1, section 8, to extend beyond just the procedural aspects of litigation.

The use of the word "manner" in article 1, section 8, does not, as Bain suggests, limit the scope of legislation only to complete waivers of immunity as a means of controlling access to "courts," or merely to procedural limits as to the "manner" of bringing actions. As defined during the time period the constitution was enacted, the word "manner" was defined to include: (1) "[t]he way in which an action is performed; method of doing

anything"; (2) "[h]abitual practice; customary method of acting or proceeding with respect to anything"; and (5) "the way in which anything is made or constituted[.]" *XIII The Century Dictionary Of The English Language*, 3614 (The Century Co. New York, 1889). These ordinary definitions are broad enough to include legislation defining all aspects of a right of action, including both the substance or category of claims allowed, the procedure for bringing such claims, as well as the extent of potential liability that could be awarded as a result.

The plaintiff in *Troyer* made a similar argument that article 1, section 8 guaranteed the right to sue the State and could be subject only to procedural limitations. *Troyer*, 722 P.2d at 162. The *Troyer* court noted that in *Worthington*, Justice Rose suggested a similar interpretation in his dissent. *Id.* (citing *Worthington*, 598 P.2d at 809-12). However, in the majority opinion, this Court stated that "[t]he constitutional provision here considered can hardly be construed as anything but a delegation to the legislature of the power to **regulate the entire field** and not an invitation to the courts to invade that domain." *Troyer*, 722 P.2d at 162–63 (quoting *Worthington*, 598 P.2d at 804) (emphasis added).

The Wyoming Supreme Court has never embraced the limited reading of article 1 section 8 suggested here, consistently holding that the Legislature has authority to determine the extent of any waiver of immunity and liability under the Act for both the State and its political subdivisions. *See White*, 784 P.2d at 1317 (holding in regard to article 1 section 8 "[w]e have long held that the second sentence of that section grants the legislature the power to determine the extent to which the State and its subdivisions are

subject to suit."). Section 118(a) is a valid exercise of the broad authority granted to the Legislature under article 1, section 8 to regulate the manner of suits against the State.

2. The Legislature has the authority to grant governmental/municipal immunity.

In the summary of his argument, Bain makes a passing assertion that the present action is not one against "the State." (Appellant's Br. at 9). In making this distinction, he suggests that article 1, section 8 does not authorize the Legislature to regulate or limit suits against other governmental entities (political subdivisions) as contained in the Act. (*Id*.). This argument is unavailing.

This court has already stated that statutes granting immunity to both private individuals and state entities are within the Legislature's authority. *See Meyer*, 641 P.2d at 1239; *Troyer*, 722 P.2d at 163; *White*, 784 P.2d at 1318. In *Weston Cnty. Hosp. Joint Powers Bd. v. Westates Const. Co.*, 841 P.2d 841, 847 (Wyo. 1992), this Court expressed the authority of the Legislature under article 1, section 8 in broad terms, stating, "[t]he Constitution of the State of Wyoming provides that no suit may be maintained against either the state or its various governmental components, including any and all 'governmental entities,' without the consent and direction of the legislature." Likewise, the *White* court stated, "the authority to immunize governmental entities from suit is not forbidden. To the contrary, it is, by the constitution, expressly granted to the legislature." *White*, 784 P.2d at 1315.

Even if the authority under article 1, section 8 was limited, as Bain suggests, solely to immunity for claims against the State, it is not the only source of legislative authority.

This Court has stated that "a constitution is not a grant but a limitation upon legislative power." *Cathcart v. Meyer*, 2004 WY 49, ¶ 45, 88 P.3d 1050, 1067 (Wyo. 2004). As a result, "the legislature may enact any law not expressly or inferentially prohibited by the constitution." *Id.* Additionally, "[t]his plenary power of the legislature is the rule for all purposes of civil government, and a prohibition to exercise a particular power is an exception." *Id.*

It is clear therefore that the Legislature may enact immunity for persons in any number of areas that are well beyond the scope of article 1, section 8. *See Meyer* (holding that a worker's compensation statute providing partial immunity for co-employees, not enabled by the workers compensation constitutional provision, did not violate article 10, section 4). This plenary authority extends to preserving or modifying common law concepts such as governmental/municipal immunity. The Legislature adopted the common law in Wyo. Stat. Ann. § 8-1-101, and may abrogate the common law where it "clearly indicates such an intent." *Sorensen v. State Farm Auto*. Ins. Co., 2010 WY 101, ¶ 18, 234 P.3d 1233, 1239 (Wyo. 2010) (quoting *Merrill v. Jansma*, 2004 WY 26, ¶ 33, 86 P.3d 270, 285 (Wyo.2004)).

The Court in *Oroz* recognized the authority of the Legislature in this regard, providing an opportunity for the Legislature to respond to the abrogation of common law governmental/municipal immunity by extending the effective date of its ruling. *Oroz*, 575 P.2d at 1159. It follows that if the Legislature may abrogate the common law, it may exercise its plenary power and reinstate the common law once abrogated. Whether article 1, section 8 applies or not, the Legislature had general plenary authority to reinstate the

common law of governmental/municipal immunity when it passed the Act. *See* Wyo. Stat. Ann. § 1-39-102(a).

Such broad authority to provide immunity beyond the State itself and include governmental entities (political subdivisions), does not create any danger of similar grants of immunity to corporations or private individuals. Additional grants of immunity to other persons would still have to pass constitutional muster under provisions such as equal protection and due process that would serve as limitations on the unfettered exercise of such authority.

CONCLUSION

For these reasons, this Court should affirm the decision of the district court and hold that Wyo. Stat. Ann § 1-39-118 is constitutional.

DATED this 16th day of January, 2025.

/s/Bridget Hill
Bridget Hill #6-3616
Wyoming Attorney General

/s/Mark A. Klaassen
Mark A. Klaassen #6-4511
Deputy Attorney General

/s/Prentice B. Olive
Prentice B. Olive #8-6691
Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
Telephone: (307) 777-3608

CERTIFICATE REGARDING ELECTRONIC FILING

I, Prentice Olive, hereby certify that the foregoing BRIEF OF WYOMING ATTORNEY GENERAL BRIDGET HILL IN HER OFFICIAL CAPACITY was served this 16th day of January, 2025, electronically via the Wyoming Supreme Court C-Track Electronic Filing System to the following:

Colin M. Simpson
Larry B. Jones
BURG SIMPSON ELDREDGE HERSH & JARDINE, P.C.
1135 14th Street
Cody, WY 82414
csimpson@burgsimpson.com
ljones@burgsimpson.com

Attorneys for Petitioner

J. Mark Stewart
422 West 26th Street
Cheyenne, WY 82001
mark@davisandcannon.com

Attorney for Respondents City of Cheyenne, Wyoming and Edward Brookman

The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

/s/Prentice B. Olive
Prentice B. Olive #8-6691
Assistant Attorney General