

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**Docket No. 14 MAP 2022**

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**DOUG McLINKO,  
Appellee,**

**v.**

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT  
OF STATE, et al.,  
Appellants.**

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**BRIEF FOR *AMICUS CURIAE*  
PHILADELPHIA COUNTY BOARD OF ELECTIONS  
IN SUPPORT OF APPELLANTS**

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## INTEREST OF AMICUS CURIAE

This matter is a challenge to Act 77, bipartisan compromise legislation that authorized no-excuse mail-in balloting in Pennsylvania.<sup>1</sup> The Philadelphia County Board of Elections (the “Board” or “Philadelphia”) has a crucial interest in and perspective on this matter because mail-in ballots have become an integral, secure, and effective way for Philadelphians to exercise their right to vote.

Since the enactment of Act 77 in 2019, large numbers of Philadelphia voters have embraced mail-in ballots, with more than one-third of voters, on average, having used mail-in ballots to vote.<sup>2</sup> Many voters now rely on mail-in ballots as a regular method for voting; more than 140,000 Philadelphians have now voted by mail-in ballot in multiple elections and more than 50,000 have used mail-in ballots exclusively to vote since the option first became available. *Id.* at 36:35. Mail-in ballots have also played a critical role in expanding the franchise in

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<sup>1</sup> See Press Release, Governor Tom Wolf (Oct. 31, 2019), *available at* <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

<sup>2</sup> See Meeting of the Phila. Bd. of Elections at 36:20 (Feb. 9, 2022) (statement of Lisa Deeley, Chairwoman) [hereinafter Board Meeting], <https://www.youtube.com/watch?v=VvwsFcsM5mU>; Press Release, City Commissioners Office, (February 9, 2022), *available at* [https://www.philadelphiavotes.com/en/home/item/2083-philadelphia\\_city\\_commissioners\\_fight\\_to\\_keep\\_act-77\\_and\\_mail-in\\_voting\\_legal](https://www.philadelphiavotes.com/en/home/item/2083-philadelphia_city_commissioners_fight_to_keep_act-77_and_mail-in_voting_legal).

Philadelphia, as nearly 60,000 voters have voted for the first-time by mail-in ballot. Id. at 36:53.

Access to mail-in ballots has also been integral in providing options for voters during incredibly challenging circumstances. Despite the COVID-19 pandemic, Philadelphia experienced an increase in voter turnout during the 2020 General, 2021 Primary, and 2021 General Elections. Id. at 37:01. However, without the mail-in ballots that were cast in those elections, total turnout would have decreased. Id. at 37:10. Indeed, voting by mail-in ballot has become such an important option for voting that during the 2020 General Election, many voters waited hours to cast their vote by mail-in ballot prior to election day.<sup>3</sup>

In addition to being the option of choice for many voters, voting by mail-in ballot is also just as secure as in-person voting. Votes cast by mail-in ballots are subject to advance challenges before they are opened and counted, just as traditional absentee ballot envelopes are. See e.g., 25 P.S. §§ 3146.8, 3150.12b(a)(3).<sup>4</sup>

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<sup>3</sup> Phila. City Commissioners Office, *Final Grant Report* at 6 (Apr. 15, 2021), available at [https://files7.philadelphiavotes.com/departments-reports/CTCL\\_Final\\_Grant\\_Response.pdf](https://files7.philadelphiavotes.com/departments-reports/CTCL_Final_Grant_Response.pdf).

<sup>4</sup> See also In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election, No. 31 EAP 2020, 2020 WL 6875017, at \*5 (Pa. 2020) (“The outer envelope has pre-printed on it (1) a voter's declaration, (2) a label containing the voter's name and address, and (3) a unique nine-digit bar code that links the

That so many Philadelphians have chosen to cast their vote using mail-in ballots is the result of much expense and effort. The Board has spent millions of dollars to provide mail-in ballots as a convenient and secure method for voting in Philadelphia. Board Meeting, supra note 2, at 37:20. In addition to securing new equipment needed to timely process mail-in ballots, the Board has had to bear ongoing costs all on its own, including a new multi-million dollar warehouse and an additional \$200,000 annually for a new unit of employees to operate and maintain equipment. Id. at 37:48. The Board also helped to produce a large multi-faceted communications campaign necessary to inform voters of the option and process for voting by mail-in ballot, including radio ads, digital and social media ads, flyers, posters, bus and truck wraps, and newspaper ads.<sup>5</sup>

If the relief requested by Appellees is granted, then tens of thousands of Philadelphians will no longer be able to vote as they have in the past several elections. Reversing course now on no-excuse mail-in ballots would require another massive communications campaign to instruct voters on how they can vote, and would inevitably result in some level of confusion for Philadelphia

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outer envelope to the voter's registration file contained in the Statewide Uniform Registry of Electors ('SURE') system.”).

<sup>5</sup> See Final Grant Report, *supra* note 3, at 3.

voters. Such an outcome will undoubtedly have a chilling effect on the exercise of the franchise in Philadelphia.

## **ARGUMENT**

*Amicus Curiae* the Philadelphia County Board of Elections wholly concurs in the arguments contained in the Appellants' briefing below. The Board writes separately in order to highlight the importance of mail-in balloting to the fundamental right to vote in Philadelphia, particularly during an emergency, and to emphasize an additional basis for why it is constitutional.

As explained below, the Commonwealth Court's decision and those it relied on failed to apply the presumption of constitutionality. The presumption exists because courts recognize that the Legislature is a co-equal branch of government and has a comparative advantage in weighing competing interests to respond to urgent circumstances. Philadelphia's recent experience with managing elections during the pandemic underscores the critical administrative agility provided by mail-in voting and why the failure to properly apply the presumption here is particularly egregious. Because mail-in balloting is vital to the ability of Pennsylvanians to exercise their right to vote, and the Constitution does not clearly bar it, this Court must reverse the Commonwealth Court's decision.



## **I. Mail-in Voting Protects the Fundamental Right to Vote**

The right to vote is “fundamental”: it is the right that is preservative of all others. Banfield v. Cortes, 110 A.3d 155, 176 (Pa. 2015); Bergdoll v. Kane, 731 A.2d 1261, 1269 (Pa. 1999)). This Court has held that our Constitution requires that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018). In enacting mail-in voting, the Legislature presciently strengthened that right and furthered that guarantee by expanding the ways in which people can vote.

As Philadelphia’s experience shows, mail-in voting is now a key part of how voters exercise the franchise. Hundreds of thousands of voters switched from in-person to mail-in voting after the passage of Act 77. See Board Meeting, supra note 2, at 36:35. Tens of thousands have voted by mail multiple times. See id. Tens of thousands cast their first votes by mail. See id at 36:53. It is so popular that some voters wait hours in line to obtain their mail-in ballot from the Board’s offices before Election Day. See Final Grant Report, supra note 3, at 6.

Mail-in balloting has been especially critical during the emergency created by the COVID-19 pandemic. It has sustained increased turnout even amid declines in registration.<sup>6</sup> Beyond increasing turnout, it has allowed hundreds of thousands of Philadelphians to vote without risking their and their family's health, while at the same time enhancing safety for poll workers and those voting in person by absorbing a significant percentage of overall turnout. Without mail-in voting, Philadelphia's pandemic elections would have had to occur almost entirely in person.

## **II. The Presumption of Constitutionality and Institutional Competence**

The Legislature enhanced the franchise with mail-in voting, which warrants consideration of “perhaps the most fundamental principle of statutory construction: the presumption that the legislature has acted constitutionally.” Snider v. Thornburgh, 436 A.2d 593, 596 (Pa. 1981). Despite this, the Commonwealth Court invalidated it.

The presumption exists to prevent courts from overstepping the Judiciary's role and attempting to weigh competing priorities in place of the more agile Legislature. Philadelphia's experience with mail-in balloting demonstrates that it

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<sup>6</sup> Phila. Bd. of Elections, *Historical Registration* at 1, [https://files7.philadelphiavotes.com/departments-reports/Historical\\_Registration\\_1940-2021G.pdf](https://files7.philadelphiavotes.com/departments-reports/Historical_Registration_1940-2021G.pdf) (last visited Feb. 8, 2022).

has indeed strengthened the right to vote. And mail-in balloting's critical role in preserving the franchise during the COVID-19 pandemic further shows why robust application of the presumption when interpreting constitutional language is critical to maintaining the Legislature's power to address public problems in ways that do not infringe individual rights.

The presumption of constitutionality "is asserted by judges of every grade, both in the federal and in the state courts; and by some of them it is expressed with much solemnity of language. A citation of all the authorities which establish it would include nearly every case in which a question of constitutional law has arisen." Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 164 (1853) (citations omitted). It is a "rule this court has steadily adhered to since the foundation of the Commonwealth." Williams v. Samuel, 2 A.2d 834, 838 (Pa. 1938). It may have "the singular advantage of not being opposed even by a dictum." Sharpless, 21 Pa. at 164.

"This presumption 'reflects on the part of the judiciary the respect due to the legislature as a co-equal branch of government.'" Snider, 436 A.2d at 596 (quoting Sch. Dist. of Deer Lakes v. Kane, 345 A.2d 658 (Pa. 1975)). It is not the judiciary's role to "re-assess the wisdom and expediency of alternative methods of solving public problems." Tosto v. Pa. Nursing Home Loan Agency, 331 A.2d 198, 202 (Pa. 1975). "[T]he legislature, which is more responsive to the people

and has more adequate facilities for gathering and assembling the requisite data, is in a better position to evaluate and determine' alternative approaches." Id. (quoting Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 217 (Pa. 1968)).

“[T]he independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.” Com. v. Zettlemyer, 454 A.2d 937, 959–60 (Pa. 1982) (quoting Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment)).

“Accordingly, courts properly defer to the legislature in the exercise of its function and may refuse to enforce a statute only if it ‘clearly, palpably, and plainly violates the constitution.’” Snider, 436 A.2d at 596 (quoting Tosto, 331 A.2d at 205 (quoting Daly v. Hemphill, 191 A.2d 835, 840 (Pa. 1963))). That is, the violation is “in such manner as to leave *no doubt* or hesitation.” Daly, 191 A.2d at 840 (quoting Sharpless, 21 Pa. at 164). As former Chief Justice Tilghman wrote over two centuries ago, “the power[] . . . to declare a law void, when it violates the constitution of this state or of the United States, . . . is a power of high responsibility, and not to be exercised but in cases *free from doubt*.” Farmers’ & Mechanics’ Bank v. Smith, 3 Serg. & Rawle 63, 72–73, 1817 WL 1771, at \*6 (Pa. 1817) (“I will not pretend to say, that the meaning of that part of the constitution on which the question arises is clear. But I may safely say that it is doubtful.

According to the established principles of construction, therefore, in doubtful cases, I am of opinion that the law of the state is valid.”), rev’d on other grounds, 19 U.S. 131 (1821).<sup>7</sup>

While the presumption applies in all cases even absent emergency, the COVID-19 pandemic perfectly illustrates of the type of situation where action by the Legislature calls for scrupulous application of the presumption. Barely two months before the presidential primary election, the Commonwealth was inundated with the novel coronavirus.<sup>8</sup> Although coincidentally passed before the onset of the pandemic, mail-in balloting was critical to allowing roughly forty percent of Philadelphians to exercise their fundamental rights while staying safe and healthy. See Board Meeting, supra note 2, at 36:20. Absent the Legislature’s action, even

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<sup>7</sup> See also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893) (“That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, — not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.”).

<sup>8</sup> E.g., Press Release, *Governor Wolf Announces Closure of Pennsylvania Schools* (Mar. 13, 2020), <https://www.governor.pa.gov/newsroom/governor-wolf-announces-closure-of-pennsylvania-schools/>.

the emergency amendment provisions of our Constitution would not have allowed mail-in voting for the primary. *See* Pa. Const. art. XI, § 1(b).

While the Commonwealth Court and Lancaster recited the presumption, they failed to apply it in their analysis. McLinko v. Dep't of State, No. 244 M.D. 2021, 2022 WL 257659, at \*4, \*13-\*18 (Pa. Cmwlth. 2022) (citing Chase v. Miller, 41 Pa. 403, 418 (1862); In re Contested Election in Fifth Ward of Lancaster City, 126 A. 199, 200-01 (Pa. 1924)). Indeed, they each relied on Chase, which failed to apply the presumption at all. McLinko, 2022 WL 257659, at \*14; Lancaster, 126 A. at 200. There, rather than applying the presumption to the Legislature's military voting bill, the Court did virtually the opposite: where the lower court had relied on the Legislature's implied judgment of constitutionality to sustain a military absentee voting law, the Chase Court dismissed this reasoning on the grounds that the bill was long and approved at the end of the session. Chase, 41 Pa. at 417-18.

Instead, the Court extracted from a list of voter qualifications a requirement that voting *itself* be in-person. The Court focused its attention on the addition of the italicized language to the Constitution in 1838 providing that “every white freeman . . . having resided . . . *in the election district where he offers to vote ten days immediately preceding such election* . . . shall enjoy the rights of an elector.” Id. at 418. Even viewing this language from the Qualifications section in isolation,

any claim that this provision simultaneously required both residency and in-person voting is doubtful at best. Contra id. at 418. Such language could just as easily be read to only require residency in the election district where in-person voting would take place or where a vote would be counted, without affirmatively requiring that the voter vote in-person. Indeed, it is particularly strange to read such a requirement into the Qualifications section when, as the Court acknowledged, a subsequent section specifically addressed the manner of elections and, at that time, required them “to be by ballot.” Id. at 419.

To buttress its holding, the Chase Court turned to concerns about “fraudulent voting” to justify its interpretation. Id. (“The ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage.”). But this consideration of competing priorities and evaluating alternative approaches, particularly over time as technology has improved, was and is the Legislature’s prerogative.<sup>9</sup>

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<sup>9</sup> As Philadelphia’s experience with mail-in balloting shows, the Legislature was able to craft a system that enhanced voter access without sacrificing security. See, e.g., Donald J. Trump for President, Inc. v. Secretary of Pennsylvania, 830 Fed. App’x 377, 382 (3d Cir. 2020).

Turning back to the Commonwealth Court’s decision, the Court also ignored its obligation to read Chase narrowly to effect the presumption of constitutionality. McLinko, 2022 WL 257659, at \*13-\*18. While Chase proscribed voting by mail as unthinkable, the statute at issue provided for *in-person* voting. Chase, 41 Pa. at 416, 418. What’s more, Chase went on to invalidate the statute on several grounds that had nothing to do with the Qualifications provision, including that the statute improperly gave power to military commanders and permitted troops in polling places. Id. at 424 (“It is scarcely possible to conceive of any provision and practice that could, at so many points, offend the cherished policy of Pennsylvania in respect to suffrage.”).

Thus, Chase’s pronouncements on the requirements of the Qualifications section were not just wrong, they are dicta that the Commonwealth Court should have ignored, particularly in light of the presumption. This Court must not make the same mistake.



## CONCLUSION

For all of the reasons set forth above and by the Respondents, the Court should deny the relief requested in Appellee's application for summary relief and grant Appellants' application for summary relief.

Respectfully submitted,

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## CERTIFICATION OF COUNSEL

I hereby certify that this brief contains 2768 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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