



# Democracy on Trial: The Role of Pennsylvania's High Courts in 2024 and Beyond

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# Introduction

Over the past decade, the Commonwealth's courts system has acted as a democratic bulwark, dealing with an unprecedented wave of litigation concerning democracy and elections in Pennsylvania. There is no sign that the trend is abating — and that raises the stakes for this year's judicial elections.

As we stand on the precipice of another potentially contested presidential election, already rife with misinformation intentionally designed to create confusion and distrust, the winners of this year's Pennsylvania judicial elections will play a critical role in protecting democratic principles from unchecked political power grabs. This requires the full attention of journalists, policymakers and voters.

The extensive litigation over Act 77, the bipartisan 2019 effort to overhaul Pennsylvania election law, is one example of the important role the courts play in setting the rules under which our democracy operates. The administration of the vote-by-mail component of Act 77, complicated by the COVID-19 pandemic and the intentional dissemination of misinformation by former President Trump and his allies, created both political and legal controversies that persist to this day. Both the Commonwealth and Supreme Courts have issued opinions on specific components of the law — notably counting undated mail-in ballots — as well as the constitutionality of the law itself.

This November, voters will fill one vacancy each on the Supreme Court of Pennsylvania and the Commonwealth Court. Neither race will immediately change the partisan makeup of either

court — the Supreme Court is currently 4-2 in favor of Democrats, the Commonwealth Court 5-3 Republican. However, the new justice and judge will each have a powerful effect on the direction of the Commonwealth's jurisprudence for the next decade. The critical importance of each justice or judge was driven home in late 2021 after the death of Chief Justice Max Baer. His death resulted in a six-member Supreme Court which in 2022 produced a split decision on a vital interpretation of federal law designed to protect voters from disenfranchisement.

In this report, we focus on the courts' role in protecting our democracy on three fronts: ensuring the results of elections are respected, protecting ballot access and voting rights, and upholding checks and balances.

# Powers of the Courts

The Supreme Court of Pennsylvania, founded as a provincial court of the British Crown in 1684, is recognized as the oldest court of its kind in the Western Hemisphere.<sup>1</sup>

The modern court retains a unique vestige of this royal history: the extraordinary power known as the King’s Bench.<sup>2</sup> When exercising the power of the King’s Bench, the Court can short-circuit the regular appellate process by intervening in lower court cases before the lower-court proceedings are complete, exercising supervisory and disciplinary authority over other jurists, overturning executive actions, and otherwise “review[ing] an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.”<sup>3</sup> There is no fixed process or procedure for invocation of King’s Bench powers; rather, the Court “may employ any type of process of procedure necessary for the circumstances.”<sup>4</sup>

This power is of special relevance in elections cases, where a speedy and final resolution may be needed to determine whether ballots were cast properly and should therefore be counted, as the Court did using its King’s Bench powers in 2020.

The Commonwealth Court is another unique feature of Pennsylvania’s court system. The court is one of two statewide appellate-level

courts which hears appeals in matters involving administrative and civil public law, but it also serves as the court of original jurisdiction for matters involving the legislative and executive branches of the Commonwealth government. Importantly, this court serves as the venue for most disagreements over statutes enacted by the General Assembly and the enforcement of those laws by state and local authorities. In recent years, the Commonwealth Court’s nine judges have ruled on landmark cases in voting rights and election administration, public education funding, and executive power in public health emergencies.

Together, these two courts decide critical questions of legislative policy and executive implementation of law in Pennsylvania.

<sup>1</sup> <http://scopareview.com/about/supreme-court-of-pennsylvania/>.

<sup>2</sup> 42 Pa. C.S. § 502.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *In re Bruno*, 627 Pa. 505, 562 (2014).

# Ensuring Election Results are Respected

The Supreme Court of Pennsylvania played a vital role protecting voting rights in the 2020 election, ensuring that over 2.6 million mail-in ballots were counted and certified.

The 2020 presidential race was the most contested national election since the immediate aftermath of the American Civil War. Unwilling to accept defeat and cushioned by an environment of online misinformation about election administration, former President Trump and his allies made multiple attempts to overturn the election results. Among their strategies was weaponizing the justice system to interfere with the lawful canvass of votes, and politicizing those courts when they failed to attain such outcomes.

In the Commonwealth Court, these efforts initially bore fruit on three fronts: ordering closer access to ballot-counting operations by campaign observers in Philadelphia; preventing the counting of mail-in ballots with technical defects in Allegheny County; and staying certification of election results statewide. All three of these decisions were quickly overturned by the Supreme Court of Pennsylvania.

We will almost certainly see more litigation of this kind in 2024. Election conspiracists will continue to seek remedies via the justice system, to redress their false and aggrandized grievances despite a clear lack of evidence for their claims. Ensuring that elections result in the winners — defined in Pennsylvania law as the candidate receiving the most votes<sup>5</sup> — taking office is a bedrock principle of our representative democracy.

<sup>5</sup> PA ST 25 P.S. § 3167.

<sup>6</sup> *In re Canvassing Observation*, 241 A.3d 339 (2020).

The following sections highlight the courts' recent roles in deciding critical election-related cases, including the preservation of Pennsylvania's vote-by-mail law, assuring certification of election results, maintaining the integrity of voting systems, and keeping politics out of election audits.

## Interpreting Election Law

The 2020 election and its aftermath demonstrate the important role courts play in interpreting election law and ensuring consistency in election administration. New procedures adopted under Act 77 — the Commonwealth's 2019 law expanding vote-by-mail — necessitated large central processing operations in counties to process the deluge of ballots. The eyes of the nation turned to Philadelphia in the days following the 2020 presidential election, where election workers labored around the clock to tally the votes. Almost immediately after counting began, however, a lawsuit was filed by a campaign-appointed observer alleging that he was not given meaningful access to observe the counting due to COVID-19 protocols.<sup>6</sup>

On November 5, the Commonwealth Court, reversing a trial court's decision, granted relief and required that observers be allowed within six feet of counting tables. As counting continued under conditions created by a separate but similar federal court order, the Supreme Court vacated the lower court's decision on November 17, noting that the Election Code does not require a minimum distance parameters for canvass observers, and that the Philadelphia Board of Elections' protocols provided ample opportunity for observation of the

canvass.<sup>7</sup>

Observing the canvass of mail-in votes was only one issue presented to the courts in the weeks following the November 3 election. Consolidating several challenges filed by multiple campaigns into *In re Canvass of Absentee and Mail-In Ballots*, the Pennsylvania Supreme Court considered whether mailed ballots in envelopes with missing or incorrect dates and/or address information in the voter declaration should be included in the final vote tally – a question left unresolved in the ambiguous and at times contradictory guidance issued by the Secretary of the Commonwealth.<sup>8</sup>

A closely divided Pennsylvania Supreme Court allowed, in a 4-3 decision issued on November 23, ballots with signed voter declarations on their outer envelopes but missing dates to be counted in the 2020 election, in part relying on a longstanding judicial principle that the Pennsylvania Election Code should be construed broadly so as not to deprive voters of their right to elect a candidate of their choice. The court also cited the likely confusion of voters and election officials stemming from conflicting Department of State guidance. However, four of the seven the justices also decided that incomplete or inaccurate voter declarations violated the Pennsylvania Election Code. This fractured and conditional interpretation of the Election Code’s requirements for mail-in ballots did little to resolve the issue for future elections.

As the final result of Pennsylvania’s 2020 presidential election became clear, a challenge to Act 77 itself was filed by U.S. Representative Mike Kelly, in addition two candidates for public office and four voters in their capacity as private

citizens.<sup>9</sup> The suit, filed on November 21, 2020, asked the Commonwealth Court to invalidate the law in its entirety based on the Pennsylvania Constitution’s absentee voting provisions. Such a decision would prevent certification of the Commonwealth’s election and disenfranchise the 2.6 million Pennsylvanians who voted by mail in the presidential election.

After the Commonwealth Court enjoined the Secretary of the Commonwealth from certifying the election results on November 25, the Supreme Court of Pennsylvania used its King’s Bench power to vacate that order and dismiss the plaintiff’s petition for review. In its November 28 opinion, the Court criticized the timing of the filing as “beyond cavil” – meaning frivolous – noting that the plaintiffs had ample time between the law’s enactment on October 19, 2019 and the commencement of voting for the 2020 general election to present a facial challenge to the law’s constitutionality. The US Supreme Court declined to review the Court’s order.<sup>10</sup>

By reaching down into the Commonwealth Court’s docket to quickly decide this question, the Supreme Court allowed county and state election officials to certify the results of the election and provide finality to voters and candidates alike.

## Ensuring the Certification of Election Results

Certification is the final step in the process of canvassing votes, in which county election officials acknowledge that they have properly counted all valid ballots, including provisional and military absentee ballots, and finalize the outcome of each race. Under Pennsylvania’s Election Code, boards

<sup>7</sup> Id at 6.

<sup>8</sup> *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020).

<sup>9</sup> *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), cert. denied sub nom. *Kelly v. Pennsylvania*, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021).

<sup>10</sup> *Kelly v. Commonwealth*, 240 A.3d 1255 (2020).

of election are required to certify the results of an election no later than the third Monday following election day.<sup>11</sup> Once a routine and unnoticed part of election administration, certification has become a volatile aspect of the election process that could draw increasing court involvement.

In 2020 and 2022, the ministerial process of election certification by county boards of election became a hot button issue throughout the state. Responding to the deluge of misinformation surrounding the 2020 presidential election, members of boards of elections in Allegheny, Montgomery, and Luzerne counties voted against certification of their county results.<sup>12</sup> While these votes were largely symbolic and did not prevent certification, they set a precedent for county officials to object to the results of an election solely on the basis that they disagreed with the outcome or due to spurious claims of voter fraud.

This trend magnified in 2022, when three counties – Berks, Fayette, and Lancaster – refused to certify the results of their May primaries due to ongoing federal litigation over counting undated mail-in ballots<sup>13</sup>. After the Department of State objected and filed suit, the Commonwealth Court issued an order requiring the three counties to certify their vote totals inclusive of undated mail-in ballots – the governing legal standard at the time.

That November, a majority of election board members in another county, Luzerne, voted against certification of its general election results, citing voter suppression due to paper ballot shortages on election day. While the paper ballot issue – the use of an improper stock weight for ballots by a vendor that caused ballot readers to reject

them – did cause delays and confusion, it did not affect the outcome of the election. Public pressure and threatened legal action by the Department of State caused the board to reconsider its vote, certifying the results of the 2022 general election on November 30.

As we look ahead toward 2024, certification continues to be a likely target for election subversionists to prevent election results counter to their wishes. In presidential elections, timely certification is especially critical due to the recently adopted federal Electoral Count Reform and Presidential Transition Improvement Act (known as the ECRA), which requires presidential electors to meet in their respective state legislatures forty-two days following the election (for 2024, the date is Tuesday, December 17). The courts will have to be swift in compelling counties to certify in the event they withhold certification for frivolous or partisan objections.

## **Ensuring the Integrity of Voting Systems**

In an atmosphere of increasing doubt and conspiracism around elections, the Court can play an important role in insulating the election system from conspiracy theories. An ongoing case before the Supreme Court of Pennsylvania involves a county board of elections relying on election misinformation to approve an unauthorized examination of its voting equipment, placing the security of that vital infrastructure in jeopardy.

Shortly following the 2020 election, officials in Fulton County allowed a third-party vendor to examine voting equipment in search of evidence of fraud. In response, the PA Department of State

<sup>11</sup> 25 P.S. § 2642 (k).

<sup>12</sup> <https://www.inquirer.com/politics/election/pennsylvania-certification-election-results-third-circuit-trump-counties-20201123.html>.

<sup>13</sup> <https://www.nbcnews.com/politics/2022-election/pennsylvania-sues-county-election-boards-refusal-certify-primary-resul-rcna37965>.



decertified all of the county’s voting machines as neither they nor county officials could guarantee the integrity of the equipment following the inspection<sup>14</sup>. Fulton County sued the Department over the decertification, requesting a review by the Commonwealth Court of the Secretary’s authority<sup>15</sup>.

In the meantime, the Department learned of an attempt by Fulton County to seek a second third-party review, and asked the Commonwealth Court to enjoin such an action<sup>16</sup>. The Commonwealth Court denied the injunction, but upon appeal by the Department to the Supreme Court a temporary stay was issued pending a full review of the case. Nonetheless, Fulton County commissioners allowed a third company to access the voting equipment in defiance of the Supreme Court order<sup>17</sup>.

In a scathing opinion delivered on April 19, 2023, the justices sanctioned the county and their counsel for “dilatatory, obdurate, and vexatious conduct.”<sup>18</sup> Not only did the court find that the county willfully violated their order and ordered them to immediately comply, they held the county responsible for the Department’s legal bills in this case and recommended the county’s attorneys for disciplinary action.

The Court’s firm pushback on Fulton County’s repeated attempts to allow third-parties to access its voting equipment prevented misinformation from interfering with the nonpartisan administration of elections while securing vital and sensitive infrastructure necessary to conduct those elections.

<sup>14</sup> [https://www.thecentersquare.com/pennsylvania/article\\_c44ad262-fadd-11eb-bc88-bba9baa4ed53.html](https://www.thecentersquare.com/pennsylvania/article_c44ad262-fadd-11eb-bc88-bba9baa4ed53.html).

<sup>15</sup> <https://apnews.com/article/pennsylvania-voting-a2496bab8c3f4264b2fd2c9f5b2da312>.

<sup>16</sup> <https://apnews.com/article/tom-wolf-pennsylvania-state-elections-government-and-politics-1814af70a7d3e624b73b221a6dd69ad7>.

<sup>17</sup> *County of Fulton v. Secretary of Commonwealth*, 292 A.3d 974 (Pa. 2023).

<sup>18</sup> *Id.* at 17.

<sup>19</sup> *Costa v. Ward*, 290 A.3d 335 (Pa. Cmmw. Ct. 2023).

## Avoiding Political Interference of Election Audits

At times, the Court is asked to mediate conflicts related to the powers of other branches, and how those powers interact with election law — especially when questions of partisan interference with administration of election arise.

In fall of 2021, Republicans in the state Legislature continued to question the 2020 election and announced plans to investigate the state’s results. As part of their efforts, a Senate committee issued a subpoena to the Secretary of the Commonwealth’s office demanding large amounts of data, including extensive information on individual voters. The Secretary sued to block the subpoena, but the Commonwealth Court refused to intervene, dismissing the complaint on the grounds that the issue was not yet ripe for judicial review.<sup>19</sup>

The case, *Costa v. Ward*, turned primarily on when a court should step in to oversee a legislative subpoena issued to the executive branch. The majority of the Commonwealth Court’s three-judge panel held it was premature for the court to intervene, as the Legislature has its own processes to enforce compliance which it had not yet followed to completion, and ruled that the legislative subpoena could move forward. However the dissent called this rationale an abdication of judicial responsibility to police the checks and balances between the branches and said the court should have taken a more active role in policing against legislative overreach. As the dissent noted, citing a relevant U.S. Supreme Court opinion, courts must carefully scrutinize interbranch subpoenas

because they “stem from a rival political branch... with incentives to use subpoenas for institutional advantage.”<sup>20</sup>

The case remains on appeal to the Pennsylvania Supreme Court, and the underlying investigation of the 2020 election has since stalled out in the

legislature. But the willingness of lawmakers to interject themselves into nonpartisan election administration practices in order to alter the outcome of an election remains a concerning trend that will necessitate judicial review in the future.

## Protecting Ballot Access and Voting Rights

Over the last two federal election cycles, in 2020 and 2022, the Pennsylvania Supreme Court has played a central role in protecting voting rights in the state. The court has been called upon to decide issues concerning poll watchers and observers; deadlines for receipt of mail-in and absentee ballots; the use of drop boxes; whether voters must be notified of errors on their mail-in ballots and be given the opportunity to cure such ballots; the need for secrecy envelopes for mail-in ballots; dating, address, and signature requirements for ballots; recount petitions; and the constitutionality of Pennsylvania’s mail-in voting law. These issues are still very much alive in the courts, at both the federal and state levels.

### A Second Challenge to Act 77

After surviving an initial challenge to its constitutionality in the immediate weeks following the 2020 election, the state’s no-excuse mail-in ballot law — Act 77 — faced additional scrutiny by the Commonwealth and Supreme Courts.<sup>21</sup> Suits filed by a Bradford County board of elections member and fourteen members of the General

Assembly (eleven of whom had voted in favor of enacting the law) challenged the constitutionality of Act 77 based on their interpretation of Article VII of the Pennsylvania Constitution. They argued that the constitution required voters to cast their vote in person unless they met the narrow exemption requirements for voting by absentee ballot enumerated in the Pennsylvania Constitution.<sup>22</sup>

In *McLinko vs. Department of State*, the Commonwealth Court agreed with petitioners that Act 77 violated the Pennsylvania Constitution’s provisions based on an 1862 ruling interpreting Article VII Section 14’s phrase “offer to vote” as a requirement to appear in person to cast a ballot.<sup>23</sup> The court interpreted the strict requirements for absentee voting<sup>24</sup> under Section 14 as a ceiling, rather than a floor, and for the Legislature to enact voting alternatives to appearing in person, thus requiring constitutional amendment prior to enactment of a statute.<sup>25</sup> The Commonwealth Court’s opinion, delivered on January 28, 2022, struck down Act 77 in its entirety, threatening to not only remove mail-in voting as a popular voting

<sup>20</sup> *Trump v. Mazars, LLC*, 140 S. Ct. 2019 (2020).

<sup>21</sup> *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), cert. denied sub nom. *Kelly v. Pennsylvania*, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021).

<sup>22</sup> *McLinko v. Dep’t of State*, 244 & 293 M.D. 2021, 270 A.3d 1243 (Pa. Commw. 2022); *McLinko v. Dep’t of State*, 244 & 293 M.D. 2021, 270 A.3d 1278 (Pa. Commw. 2022).

<sup>23</sup> *Id.* at 22.

<sup>24</sup> The only permissible reasons to vote absentee under PA Constitution Article VII Section 14 are “because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee.”

<sup>25</sup> *Chase v. Miller*, 41 Pa. 403, 419 (1862).

method, but also throw Pennsylvania’s election administration into confusion as voters and election officials struggled to adapt to a constantly shifting set of election rules.

The Supreme Court of Pennsylvania rejected the lower court’s reasoning, however, finding that the phrase “offer to vote” concerned residency requirements, not in-person voting requirements, and had no precedential value in this case. Further analysis in the Court’s opinion notes that Section I of Pennsylvania’s Constitution, when read as a whole, does not indicate that it established the manner in which a vote must be cast, only the requirements for voter eligibility. Based on this review, and the strong presumption of constitutionality given to acts passed by the General Assembly<sup>26</sup>, the court overturned the opinion of the Commonwealth Court in a 5-2 decision along partisan lines. The majority opinion authored by Justice Donahue found that Act 77 not only conformed with the Pennsylvania Constitution, but also reaffirmed that the “General Assembly is endowed with great legislative power,” permitting them to designate the time, manner and place of voting in the Commonwealth.

Still, Act 77’s universal mail-in voting continues to face threats from within the Legislature, where several proposals to repeal or restrict the provisions have been introduced. Additionally, issues arising from Act 77’s implementation continue to challenge county election administrators, creating a patchwork of election administration that varies greatly from one county to the next. Creating uniformity among these disparate practices, absent a negotiated compromise in the fractured General Assembly, will certainly require additional litigation

and decision from the state’s high courts.

## Counting Mail-In Ballots

The decision by the Supreme Court of Pennsylvania to count ballots with missing handwritten information in the 2020 election proved a tentative one, as new challenges arose in subsequent election cycles.

In 2022, the question of missing dates on mail-in ballots once again came before the courts. In a suit stemming from a close 2021 Court of Common Pleas race, *Ritter v. Lehigh County Board of Elections*, the Commonwealth Court decided that ballots with missing dates should be rejected.<sup>27</sup> In response, Pennsylvania voters filed a federal lawsuit alleging that rejection of the ballots violated the materiality requirement provision of the Civil Rights Act of 1964 (CRA).<sup>28</sup> This critical provision of federal law prohibits the abridgement of a voter’s franchise for irrelevant errors or omissions, as long as those errors do not prevent election officials from determining whether the voter is qualified to cast a ballot.

The Third Circuit Court of Appeals agreed with the voters, finding that missing and incorrect dates had no bearing on a voter’s eligibility, and that rejecting these ballots would be inconsistent with the materiality provision.<sup>29</sup> The United States Supreme Court vacated the Third Circuit’s judgment as moot following the certification of the underlying election at issue.

That did not mark the end of litigation on this question. In pre-election guidance to counties issued by then-Acting Secretary of

<sup>26</sup> *Stilp v. Commonwealth*, Gen. Assembly, 974 A.2d 491, 495 (Pa. 2009).

<sup>27</sup> *Ritter v. Lehigh County Board of Elections*, 272 A.3d 989 (Pa. Commw. Ct.), *appeal denied*, 271 A.3d 1285 (Pa. 2022).

<sup>28</sup> *Migliori v. Elections*, 36 F.4th 153 (3d Cir. 2022), *vacated as moot*, *Ritter v. Migliori*, 143 S.Ct. 297 (Mem.) (2022).

<sup>29</sup> *Id.* at 28.

the Commonwealth Leigh Chapman, election officials were advised to include undated ballots in their vote tally.<sup>30</sup> Five weeks later, the fractured Pennsylvania Supreme Court opinion in *In re Canvass of Absentee and Mail-In Ballots* gave way to a majority decision in *Ball v. Chapman* that the Pennsylvania Election Code requires complete and accurate dates.<sup>31</sup> But, due to a vacancy created by the death of Chief Justice Baer, the justices were evenly split on the question of whether rejecting these ballots resulted in a violation of the Civil

Rights Act's materiality provision. This question is currently pending before a federal trial court.<sup>32</sup>

The current justices on the Pennsylvania Supreme Court have had many occasions to weigh in on the requirements for mail-in and absentee ballots, and they have been closely or evenly divided almost every time. Its consideration of these issues will have a significant impact on the scope of the freedom to vote in Pennsylvania, and on who takes office after those votes are cast.

## Upholding Checks & Balances

Philadelphia is the cradle of American constitutional democracy, where the framers designed a system of government that, if functioning properly, would prevent the concentration of power in one person or institution. This system of checks and balances seeks to ensure that the three co-equal branches of government — legislative, executive and judiciary — work in the best interest of the American people and uphold the rule of law. This careful balance was written into not just the federal constitution, but also Pennsylvania's own governing documents.

The judiciary is not only its own distinct branch, but at times it has the responsibility to police the balance of power between the legislative and executive branches. This duty goes beyond a particular issue or issues and speaks to the most fundamental aspects of democracy within Pennsylvania: that the people's elected officials exercise their powers in a fair and appropriate way.

Pennsylvania's recent history of divided government makes these conflicts more likely. In 2020, Republicans controlled both chambers of the General Assembly, while the executive branch was held by a Democratic Governor. Mirroring those partisan differences, the Commonwealth Court often agreed with arguments presented by the legislature, whereas the Supreme Court often accepted the administration's reasoning. With a narrowly divided House of Representatives now controlled by Democrats, the system may experience even more tension.

### Preserving Limited Executive Authority in Emergencies

One clear example of the Commonwealth judiciary's role in this space is the state Supreme Court's ruling regarding the governor's emergency powers at the height of the COVID-19 pandemic. Responding to the pandemic in March 2020, then-Governor Tom Wolf declared a state of emergency pursuant to state's Emergency Management

<sup>30</sup> <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-DOS-Guidance-Civilian-Absentee-Mail-In-Ballot-Procedures.pdf>.

<sup>31</sup> *Ball v. Chapman*, 289 A.3d 1 (Pa. 2022).

<sup>32</sup> *Pennsylvania State Conference of NAACP v. Schmidt*, No. 1:22-CV-339, 2023 WL 3902954 (W.D. Pa. June 8, 2023).

Services Code.<sup>33</sup> He then used the powers granted him under the emergency designation to order the closure of all non-essential businesses. Several businesses sued, saying the order was an abuse of the state statute and the state constitution. But the Pennsylvania Supreme Court, exercising its King’s Bench jurisdiction to review the matter of public health and safety, sustained the action as lawful in a unanimous decision.<sup>34</sup>

When the governor extended the state of emergency for an additional 90 days, the Legislature moved to block him via a resolution passed by both chambers. The resolution’s supporters said the action should unilaterally end the emergency declaration (and with it the extra powers that the governor could exercise), while opponents and the governor said the resolution was subject to a gubernatorial veto – and potential override – like other legislation.

The issue also went to the state Supreme Court, which again upheld the governor’s actions.<sup>35</sup> In doing so, the court underscored that it was not ruling on the merits of the governor’s policy choices using the emergency powers – only whether the powers were lawful and whether the Legislature could override them. The court determined that the resolution was not binding because it was not presented to the governor and subject to potential veto – a process called “presentment.” To have allowed the resolution to take effect unilaterally would have distorted the regular system of checks and balances between the legislative and executive branches, and allowed the Legislature to overcome the governor’s opposition to the change without mustering the two-thirds majorities needed to override a veto. In essence,

the Supreme Court invalidated the Legislature’s attempted shortcut on the prescribed process and reaffirmed the proper respective powers and interplay of the two coordinate branches.

## **Curbing Politicization of Independent Institutions**

Another key threat to democracy is the politicization of independent institutions, such as the judiciary, the press, or oversight entities within the government. The Supreme Court of Pennsylvania plays a key role in ensuring independent democratic actors – elected prosecutors, quasi-judicial agencies, fiscal watchdogs, civic institutions – are properly guarded from the exercise of raw political power.

The Legislature can overstep its constitutional role through abuse of its investigative and subpoena powers. On November 16, 2022 in a rare lame-duck session (following a general election in which control of the chamber flipped in favor of Democrats for the first time in twelve years), the House of Representatives voted to impeach Philadelphia District Attorney Larry Krasner, despite a lack of credible findings of wrongdoing by a legislative investigative committee. While the Senate officially accepted the articles of impeachment on November 29, the session ended the following day in accordance with the Pennsylvania Constitution, with no action on the matter.

The impeachment centered on alleged “misbehavior in office,” for declining to prosecute low-level offenses (prostitution, drug possession), which allegedly led to an increase in crime in Philadelphia. Krasner filed suit in the

<sup>33</sup> 35 Pa.C.S. § 7301(c), a provision of the Emergency Management Services Code, id. § 7101, et seq.; Act of Nov. 26, 1978, P.L. 1332, No. 323.

<sup>34</sup> *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).

<sup>35</sup> *Wolf v Scarnati*, 233 A.3d 679.

Commonwealth Court to block the impeachment, claiming that the General Assembly lacked the authority it claimed and that he had not “misbehaved in office” under any acceptable statutory interpretation of state law.

While the Commonwealth Court disagreed with Krasner’s assertions about the Legislature’s authority, it found the underlying reasoning for impeachment lacking. “Misbehavior in office,” the court explained, is derived from Pennsylvania’s common law of “misconduct in office” which states that an official can be subject to removal for “the breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive.”<sup>36</sup>

The impeachment articles failed to meet this

threshold.

Further, to the extent that the DA was alleged to violate professional conduct rules or the state’s code of ethics, these are areas where the court exclusively holds the power to make such a determination – not a legislative body. The matter remains in the hands of the Supreme Court of Pennsylvania, on an appeal filed by the House impeachment managers challenging the Commonwealth Court’s characterization of Krasner’s conduct in office. It remains to be seen whether the Justices will intervene as the majority-Republican Senate of Pennsylvania has postponed the trial portion of the impeachment indefinitely.

## Conclusion

As stated at the outset of this report, in November 2023 Pennsylvania voters will decide which candidates will fill critical vacancies on both the Supreme Court and Commonwealth Court. Additionally, in 2025 three Supreme Court justices will be on the ballot for retention, a yes or no vote as to whether each should continue to serve on the court. The outcome of these elections could set the stage for seismic shifts in the outcome of cases involving democratic institutions and processes like those detailed here.

As the nation’s political parties continue to joust over the concepts of freedom, liberty and equality, the role of courts as arbiters of justice will undoubtedly increase in terms of stakes and scope. With a Congress struggling to keep its factionalism in check and the realities of our federal system in which the states are charged with determining

<sup>36</sup> *Krasner v. Ward*, 536 M.D. 2022.

the “time, manner and place” of elections, it is apparent that the responsibility to preserve democracy is now squarely in the hands of state governments. State courts, in turn, will play an outsized role in reviewing those actions.

In Pennsylvania, numerous challenges remain in the pursuit of uniform, effective, and nonpartisan administration of elections. With a divided General Assembly, the courts will remain the key venue for addressing inconsistencies; the precedent the court establishes will allow the executive branch to issue directives and regulations to county election administrators. Issues related to pre-canvassing and counting mail-in ballots, the use of ballot drop boxes and satellite election offices, certifying results, requesting recounts in close races, and auditing vote tallies post-election remain ripe for judicial consideration. New laws may be adopted in

the interim which conflict with current guidance or place further barriers to voting, in which case the courts will be asked to step in once more.

This election cannot be viewed simply through a partisan lens. Rather, voters must be consistently and accurately informed of what's at stake to our democracy — ensuring that election law is upheld while preventing widespread disenfranchisement, preventing misinformation from informing election administration policies, and preserving vital checks and balances. Above all, the Courts can be instrumental in restoring a sense of trust — admiration, even — in our system of democratic governance and those who administer elections.