[J-74-2023] [MO: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Petitioner	:	No. 11 MM 2023
v.	:	SUBMITTED: October 11, 2023
MICHAEL NOEL YARD, Respondent	:	

DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: September 26, 2024**

In this appeal, we are asked to decide whether the evidentiary requirement of Article 1, Section 14 of our charter, "when the proof is evident or presumption great," applies to prisoners for whom the maximum penalty is life imprisonment. This case presents a question of constitutional interpretation of an amendment to our charter that was adopted based on a majority vote on a ballot question put to the voters of our Commonwealth during the general election in 1998. Citizens of Pennsylvania cast their votes on constitutional amendments by answering ballot questions drafted by the Secretary of the Commonwealth.[1] The ballot question is designed to "fairly, accurately, and clearly apprise the voter of the question or issue on which the electorate must vote."[2]

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[1] *See* infra pp. 8-9.

[2] *Sprague v. Cortes*, 145 A.3d 1136, 1142 (Pa. 2016) (opinion in support of denying plaintiffs' relief) (Baer, J.); *id.* at 1151-52 (opinion in support of granting plaintiffs' relief) (Todd, J.); *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969).

In the 1998 general election, voters cast their votes in response to the ballot question—**not** the language of the amendment.[3] In deference to this process, it is my view that when we are asked to construe the meaning of an amendment, we must take into account the ballot question put to the voters where it directly and clearly addresses the issue at hand.

Here, the ballot question relevant to the amendment to Section 14 asked only:

> Shall the Pennsylvania Constitution be amended to disallow bail when the proof is evident or presumption great that the accused committed an offense for which the maximum penalty is life imprisonment or that no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community?

By answering this question affirmatively, the voters unequivocally intended that bail will not be allowed when the proof is evident or presumption great that an accused committed an offense for which the maximum penalty is life imprisonment. And yet, the Majority concludes that the intent of the voters was to deny bail, without regard to the proof or presumption. The Majority accomplishes this bait and switch by misemploying rules of constitutional construction and, in so doing, effectively nullifies the vote on the ballot question put to the voters in 1998.

Though prisoners are generally entitled to bail, Article I, Section 14 of the Pennsylvania Constitution ("Section 14") establishes three exceptions to that rule. Section 14, as amended in 1998, provides:

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[3] The language of the amendment itself was not on the ballot but instead, the amendment was published in two newspapers in every county, as pointed out by the Majority. PA. CONST. art. XI, § 1; Majority Op. at 14 (citing 28 Pa. Bull. 33, at 3925 (Aug. 15, 1998)). The Concurring Justice's reference to "the text" that the entire General Assembly and voters "actually chose," is misleading: the voters only had the option of responding to the ballot question; voters did not have the text of the amendment before them when casting their ballots. Concurring Op. at 9 (Wecht, J.).

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion and the public safety may require it.

PA. CONST., art. I, section 14. As noted, this case requires us to determine whether the evidentiary requirement in Section 14, "when the proof is evident or presumption great[,]" applies to prisoners for whom the maximum sentence is life imprisonment. *Id*. If the evidentiary requirement applies, Section 14 requires the Commonwealth to demonstrate that the proof is evident and the presumption great that the defendant committed an offense subject to a life imprisonment sentence before the court may deny bail. Without the evidentiary requirement, once the Commonwealth files a charge subject to life imprisonment, Section 14 would categorically preclude bail. *See* Majority Op. at 15.

My analysis of the constitutional text leads me to the conclusion that, consistent with the language of the ballot question, the evidentiary requirement applies to the life imprisonment exception. When interpreting constitutional language, we are mindful that the language of the Constitution controls and that it must be interpreted "in its popular sense, as understood by the people when they voted on its adoption." *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017). The touchstone of our analysis is the plain language, *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014), and we regard the language of our Constitution "as the embodiment of the will of the voters who adopted it[.]" *Washington v. Dep't of Pub. Welfare*, 188 A.3d 1135, 1144 (Pa. 2018) (citing *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006)).

Certainly, we always begin with a text-driven analysis of constitutional provisions, but we ultimately "look not only to the letter of the words but also the spirit behind them."

Pennsylvania Prison Socy. v. Commonwealth, 776 A.2d 971, 978 (Pa. 2001) (citing *Commonwealth ex rel. Schnader v. Beamish*, 164 A. 615, 616 (Pa. 1932)). In fact, we have said that

> where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them.

Id. (citing *Beamish*, 164 A. at 616). In this effort, we routinely look to the history of constitutional provisions without regard to identifying an ambiguity in the text.

For instance, when interpreting Article III of the Constitution, we explained that, "[s]ince our Court regards the language of our Constitution as the embodiment of the will of the voters who adopted it, *Stilp*, 905 A.2d at 939, it is instructive to begin our consideration … with a brief history of the circumstances which caused the people to include [the constitutional provisions at issue] in our organic charter of governance, as well as the fundamental purposes which the people intended these amendments to serve." *Washington*, 188 A.3d at 1144-45. Similarly, in interpreting Article 5, Section 10(e) of the Constitution of 1968, we rejected a well-made textual argument as "unpersuasive in the context of the legislative history of the Constitution of 1968 and the clear public policy[.]" *In re Determination of Priority of Comm'n Among Certain Judges*, 427 A.2d 153, 156 (Pa. 1981). *See also Scarnati v. Wolf*, 173 A.3d 1110, 1118 (Pa. 2017) (stating that the constitutional language controls and that we consider the circumstances attending the formation of the constitutional provision at issue "'and the construction probably placed upon it by the people'" as well as existing decisional law, policy considerations and extrajurisdictional caselaw) (citing *Commonwealth v. Harmon*, 366

A.2d 895, 897 (Pa. 1976)); *accord Sprague v. Cortes*, 145 A.3d 1142, 1154 (Pa. 2016) (opinion in support of granting plaintiffs' relief) (Wecht, J.) (explaining that in determining the intent of the voters we may consider, inter alia, the text, history, structure, underlying values and interpretations of other states) (citing Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule*, 59 N.Y.U. Annual Survey of Am. L. 283, 290-91 (2003)).

Many of our cases reveal an effort to temper the dogmatic plain language approach adhered to in statutory construction cases when we are faced with questions of constitutional construction. We do so with consideration of the history and context in which the constitutional provision was adopted. For instance, in our interpretation of the Environmental Rights Amendment, we stated that "in addition to our explicatory analysis of the plain language, we may address, as necessary, any relevant decisional law and policy considerations argued by the parties" as well as extrajurisdictional caselaw. *Robinson Twp*. *v. Commonwealth*, 83 A.3d 901, 943-44 (Pa. 2013) (citing Saylor, supra, at 290-91). We considered the legislative history of the amendment and determined that it supported our plain interpretation of the Environmental Rights Amendment. *Id*. at 955.[4] Similarly, in *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018), we determined that the language of the provision under review, Article I, Section 5 of the Pennsylvania Constitution "clearly and unambiguously" mandated "that all voters have equal opportunity to translate their votes into representation[,]" and then we undertook consideration of the history, caselaw and other matters related to the provision and determined that the plain language interpretation was "consistent" with the history of the

[4] In that and other cases, we have stated that the plain language controls, but we have nonetheless undertaken analysis of other factors notwithstanding that we reached a conclusion initially based on the plain language of the provision. *Robinson Twp*., 83 A.3d at 944-45; *League of Women Voters*, 178 A.3d at 802.

provision as well as the meaning ascribed to it through our case law. *Id*. at 804. In other words, we did not blindly adhere to sometimes archaic textual language without consideration of the context within which it was adopted and had been interpreted. Likewise, here, it is imperative to consider the clearest representation of the voters' intent: the ballot question put to the voters. Thus, in the construction of constitutional amendments that have been presented to the voters by way of a ballot question, it is obvious to me that we must look to the actual ballot question to inform our discernment of the intent of the voters.

The history of Section 14 leading to its amendment in 1998 illustrates that the expansion of the evidentiary requirement was foundational to the bail exception. The evidentiary requirement applied to the bail exception for capital offenses, which was the only exception for over 200 years. From the original Pennsylvania Constitution of 1790 until 1998, all Pennsylvania prisoners were entitled to bail except those held for capital offenses when the proof was evident or presumption great that they committed the offense. Pre-amendment, the provision read: "All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it." PA. CONST., art. IX, § XIV (1790 & 1838). In the 1874 Pennsylvania Constitution, the provision was moved to Article I, where it has remained since. PA. CONST., art. I, § XIV (1874); PA. CONST. art. I, section 14 (1968). Thus, Section 14 established the capital offense exception to the right to bail, and it entrenched the requirement that the right to bail for capital offenses may be denied only when the proof is evident or presumption great that the defendant committed the capital offense.

In 1995, members of the General Assembly sought to amend the provision to add two other exceptions to the unqualified right to bail, one for persons charged with offenses subject to a maximum sentence of life imprisonment and another for dangerousness. After a majority of voters voted in the affirmative to the ballot question presented in 1998, Article I, Section 14 was amended to read:

> All prisoners shall be bailable by sufficient sureties, unless for capital offenses **or offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community** when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion and the public safety may require it.

PA. CONST., art. I, section 14 (emphasis added to illustrate added text).

The amendment added text and did not delete any text. The 1998 amendment was clearly designed to add exceptions for life offenses and dangerousness without modifying application of the proof is evident or presumption great qualifier to capital offenses. In the General Assembly debates regarding the provision, legislators stood to express various views.[5] Not one intimated that they were reconsidering application of the "proof is evident or presumption great" language to capital offenses. In the pages of debate, there is no evidence that an additional purpose of this amendment was to alter the capital offense exception so as to remove its evidentiary requirement. There is no support for the Majority's contention that the General Assembly or voters intended the

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[5] While some legislators voiced support for the amendment because it would bring Pennsylvania in line with other jurisdictions, Senate Legis. J. 30 (Feb. 6, 1995) (Senator Fisher), others expressed concern that the addition of the dangerousness exception would undermine the presumption of innocence or that it was poorly drafted. Senate Legis. J. 30-32 (Feb. 6, 1995) (Senator Fumo); *id*. at 32-33 (Senator Williams); House Legis. J. 246 (April 18, 1995) (Mr. Veon); House Legis. J. 1126 (May 4, 1998) (Mr. Armstrong).

evidentiary requirement to be attached to the dangerousness exception but no longer apply to the capital offense exception. Not only do legislative debates support my view of the provision, but so do publicized expressions of the Secretary of the Commonwealth and the Attorney General, contemporaneous to the passage of the language of the amendment by the General Assembly, which demonstrate that they also understood the evidentiary requirement as applying all three exceptions.

Proposed constitutional amendments must be agreed upon by a majority of the members elected to each House, then published three months before the next general election in at least two newspapers in every county, then agreed upon by a majority of the members elected to each House in the next elected General Assembly. PA. CONST. art. XI, § 1. Next, the Secretary of the Commonwealth publishes the amendment again, then it is "submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe;" and, if approved by a majority of voters, the amendment becomes part of the constitution. *Id*. The Election Code, Act of June 3, 1937, P.L. 1333, *as amended* 25 P.S. §§ 2601-3556, designates the Secretary of the Commonwealth with the duty to determine the form of the ballot question. 25 P.S. § 2755 (providing that "proposed constitutional amendments shall be printed on the ballots or ballot labels in brief form to be determined by the Secretary of the Commonwealth with the approval of the Attorney General").

The Secretary is tasked with the duty "[t]o certify to county boards of elections … the form and wording of constitutional amendments or other questions to be submitted to the electors of the State at large." 25 P.S. § 2621(c). The ballot question "shall appear on the ballot labels, in brief form, of not more than seventy-five words, to be determined

by the Secretary of the Commonwealth in the case of constitutional amendments[.]" 25 P.S. § 3010(b).

The General Assembly has also prescribed the following:

> Whenever a proposed constitutional amendment or other Statewide ballot question shall be submitted to the electors of the Commonwealth in referendum, **the Attorney General shall prepare a statement in plain English which indicates the purpose, limitations and effects of the ballot question on the people of the Commonwealth**. The Secretary of the Commonwealth shall include such statement in his publication of a proposed constitutional amendment as required by Article XI of the Constitution of Pennsylvania. The Secretary of the Commonwealth shall certify such statement to the county boards of elections who shall publish such statement as a part of the notice of elections required by section 1201 or any other provision of this act. The county board of elections shall also require that at least three copies of such statement be posted in or about the voting room outside the enclosed space with the specimen ballots and other instructions and notices of penalties. In election questions which affect only one county or portion thereof, the county board of elections shall fulfill these requirements in the place of the Attorney General and the Secretary of the Commonwealth.

Act of February 19, 1986, P.L. 29, No. 11, 25 P.S. § 2621.1 (emphasis added). Section 1201 requires that each county board give published notice of an election in the ten days prior to the election. 25 P.S. § 3041. The notice shall set forth, inter alia, "the text of all constitutional amendments and other questions to be submitted at such election." *Id*. The notice "may include a portion of the form of ballot or diagram of the face of the voting machine in reduced size." *Id*.

Critically, in 1998, the Secretary of the Commonwealth drafted the ballot question that went before the voters as follows:

> **Ballot Question Regarding**
> **Joint Resolution 1998-1**
>
> Shall the Pennsylvania Constitution be amended to disallow bail when the proof is evident or presumption great that the

> accused committed an offense for which the maximum penalty is life imprisonment or that no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community?

Ballot Question Regarding Joint Resolution 1998-1, reprinted in 28 Pa. Bull. 33, at 3925 (Aug. 15, 1998).[6] An affirmative vote thus indicated that the Pennsylvania Constitution would be amended "to disallow bail when the proof is evident or presumption great that the accused committed an offense for which the maximum penalty is life imprisonment[.]" *Id*. It is indisputable that the voters' understanding and intention was that the evidentiary requirement would apply to the newly added exceptions.

Given that our constitutional interpretation aims to understand the language "as the embodiment of the will of the voters who adopted it[,]" my colleagues' willingness to completely disregard the ballot question is disturbing. *Washington*, 188 A.3d at 1144; *see also Commonwealth v. Williams*, 129 A.3d 1199, 1213-14 (Pa. 2015). We have often said that we interpret the Constitution "in its popular sense, as understood by the people when they voted on its adoption." *Robinson Twp.*, 83 A.3d at 943 (citing *Ieropoli v. AC & S Corp.*, 842 A.2d 919, 925 (Pa. 2004)). "Towards this end, we avoid reading the provisions of the Constitution in any 'strained or technical manner.'" *Id*. (citing *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008)). Further, we favor a natural reading of the constitution, "which completely conforms to the intent of the framers and which reflects the views of the ratifying voter." *Id*. at 943-44 (citing *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979)).

Yet today, the Majority and Concurrence engage in a strained and technical exercise to interpret Section 14 in a manner that conflicts directly with the ballot question

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[6] It is notable that the General Assembly, through its leadership, did not attempt to enjoin the use of the ballot question as one might expect if it so blatantly misstated the actual amendment as determined by the Majority.

voters answered in the affirmative. Despite the obviousness of the conflict, the Majority and Concurrence decide that the best course is to disregard the intent of the voters. *See* Concurring Op. at 6, 10 (Wecht, J.) (recognizing that the ballot question told voters that the standard applied to the three exceptions, "a statement that conflicted directly with the plain language of the constitutional amendment" and that "[t]he constitutional provision that the voters ratified is not the same one that they were led to believe they were voting for"). By willfully disregarding the voters' affirmative answer to the ballot question, my colleagues have not only lost sight of our well-established interpretative focus on the intention of the voters but also the meaning of counting votes in a democracy.[7]

Aside from the ballot question, the Attorney General issued a plain English statement at the time of the adoption of the Section 14 which was placed before the voters. In *Commonwealth v. Grimaud*, 865 A.2d 835 (Pa. 2005), this Court reproduced the plain English statement presented to voters:

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[7] We have stated that we do not allow the "supposed intent" of voters to cloud clear and explicit constitutional language. *Com. ex rel. Mac Callum v. Acker*, 162 A. 159, 160 (Pa. 1932); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018); *Robinson Twp*. 83 A.3d at 944. But in this case, we are dealing with neither the **supposed** intent of the voters nor "clear and explicit" constitutional language. We know precisely the **actual** intent of the electorate based on the specific language of the ballot question. This is a unique scenario where we know that every vote represents an affirmative answer to the ballot question that clearly answers the exact question before this Court. It is a fiction to suggest otherwise. *See* Majority Op. at 15 ("there is simply no way to know what materials each of [the voters] had read or what exactly was in their minds when they made their decision").

The archaic language and sentence structure of Section 14 is anything but clear or explicit. A definitive meaning cannot be discerned even if one were to take heed of the Concurring Justice's suggestion for voters to "give careful and scrupulous attention to the specific words, phrases, and punctuations[.]" Concurring Op. at 9. This begs the question—even if a voter located the proposed amendment in the newspaper and engaged in a "careful and scrupulous" interpretation of it, how does she vote when her interpretation of the text of the amendment directly conflicts with the ballot question? If a no vote was cast in response to the ballot question, the result would also not comport with the Majority's interpretation.

> The purpose of the ballot question is to amend the Pennsylvania Constitution to add two additional categories of criminal cases in which a person accused of a crime must be denied bail. Presently, the Constitution allows any person accused of a crime to be released on bail unless the proof is evident or presumption great that the person committed a capital offense. A capital offense is an offense punishable by death. The Pennsylvania Supreme Court has ruled that a person accused of a crime that is not a capital offense may be denied bail only if no amount or condition of bail will assure the accused's presence at trial.
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> The ballot question would amend the Constitution to disallow bail also in cases in which the accused is charged with an offense punishable by life imprisonment or in which no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community. The ballot question would extend to these two new categories of cases in which bail must be denied the same limitation that the Constitution currently applies to capital cases. **It would require that the proof be evident or presumption great that the accused committed the crime or that imprisonment of the accused is necessary to assure the safety of any person and the community.**
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> The proposed amendment would have two effects. First, it would require a court to deny bail when the proof is evident or presumption great that the accused committed a crime punishable by death or life imprisonment. Second, it would require a court deciding whether or not to allow bail in a case in which the accused is charged with a crime not punishable by death or life imprisonment to consider not only the risk that the accused will fail to appear for trial, but also the danger that release of the accused would pose to any person and the community.

Grimaud, 865 A.2d at 842-43 (quoting plain English statement, Joint Resolution 1998-1, reprinted in 28 Pa. Bull. 33, at 3925 (Aug. 15, 1998)) (emphasis added). As Yard points out, in *Grimaud*, this Court rejected a challenge to the adequacy of the plain English statement, and we characterized it as a "sufficient explanation of the purpose, limitations, and effects of the bail amendment[.]" *Id*. at 843-44. Thus, the Attorney General's stated

interpretation, held by this Court to be a sufficient explanation of the amendment's purpose, limitations and effects, mirrored that of the Secretary of the Commonwealth—the evidentiary requirement applied to each of the three exceptions listed. Given the clarity of the ballot question and the plain English statement, it is impossible to conceive that the voters did not intend that the evidentiary qualification would apply to individuals charged with offenses subject to sentences of life imprisonment.

As in *Grimaud*, in *Commonwealth v. Talley*, 265 A.3d 485 (Pa. 2021), we interpreted the evidentiary requirement as applying to the life sentence exception. *See Talley*, 265 A.3d at 513 ("To satisfy one of these exceptions, the Commonwealth must offer 'evident' proof or establish a 'great' presumption that the accused: (1) committed a capital offense, (2) committed an offense that carries a maximum sentence of life imprisonment, or (3) presents a danger to any person and the community, which cannot be abated using any available bail conditions."). These cases prove that thoughtful jurists believed Section 14 applied the evidentiary requirement to each of the exceptions listed. Because those cases were not as pointedly focused on the question before us in this appeal, I do not rest on them alone in reaching my interpretation of Section 14. However, it is notable that all of these sources – the plain English statement, the ballot question, and both of this Court's pronouncements – follow the same current to the same end. The evidentiary requirement always applied to the capital offense exception, and when the General Assembly drafted the amendment, and when the voters voted to approve the amendment guided by the interpretation drafted by the Attorney General, and each time this Court reviewed the provision in the past thirty years, there was a universal understanding that the evidentiary requirement continued to apply to the capital offense limitation and applied to each of the other new exceptions added in 1998 as well. The Majority has identified no source cutting against Yard's interpretation, let alone a source

authorizing the Pennsylvania Constitution to be amended other than as understood by the ratifying voters.

The clear intent of the voters outweighs the mechanical application of obscure rules of grammar, as 'the emphasis in constitutional construction is upon the intent of the ratifying citizenry.'" *Bruno*, 101 A.3d at 660. Ultimately, because the Majority is entrenched in its conclusion that "the text of the amendment unambiguously limits the proof/presumption qualifier to the dangerousness exception[,]" it is blind to the ballot question put to the voters, the plain English statement, *Grimaud*, the history of the amendment and contrary grammatical considerations. Majority Op. at 14-15.

Instead, in its analysis, the Majority engages in a strained grammatical exercise to explain that the language of Section 14 unambiguously provides that the evidentiary requirement only applies to the dangerousness exception. It does so while willfully ignoring that an affirmative vote at the General Election of 1998 indicated the exact opposite. Even if I agreed with the Majority that the plain language of Section 14 limited application of the evidentiary standard to the dangerousness exception only, which I do not, its result is at tension with the integrity of our election process. The vote of the people is binding, and it did not authorize the amendment to Section 14 **as interpreted by the Majority**. Assuming that the interpretation of Section 14 expounded by the Majority and Concurrence is correct, my learned colleagues have all but ensured a future request for a declaration that the 1998 amendment to Section 14 was a nullity given that the ballot question failed to "fairly, accurately, and clearly apprise the voter of the question or issue on which the electorate" was voting. *Sprague*, 145 A.3d at 1142 (opinion in support of denying plaintiffs' relief) (Baer, J.); *id.* at 1151-52 (opinion in support of granting plaintiffs' relief) (Todd, J.); *Stander*, 250 A.2d at 480. In fact, if the Majority's interpretation is

correct, the ballot question was an outright misstatement of the issue on which the electorate was voting.

Most relevant for our purposes, even employing the rules of statutory construction as the Majority does, common sense and case law illustrate that the language of Section 14 is anything but plain. Reasonable arguments can be made for two different interpretations of Section 14, and for that reason, the text is ambiguous. *Warrantech Consumer Products Services, Inc. v. Reliance Ins. Co.*, 96 A.3d 346, 354 (Pa. 2014) ("A statute is ambiguous when there are at least two reasonable interpretations of the text under review."). This Court, the Secretary of the Commonwealth, and the Office of the Attorney General ("OAG") read the evidentiary requirement to apply to all three exceptions. The Majority, on the other hand, announces that it would interpret the evidentiary requirement to apply to the dangerousness exception only. A finding of ambiguity in this provision is unavoidable: the voters approved one interpretation in the ballot question, and the Majority reaches another.

Despite the existence of two reasonable interpretations, the Majority insists that the plain language interpretation requires only a straightforward application of "the ordinary rules of English grammar" to reach its conclusion that the second "'unless' clarifies that the evidentiary limitation at the end … only modifies the immediately preceding phrase." Majority Op. at 10.[8] The Majority's reading is not natural. Its application of the rules of English grammar, explicated in a perplexing footnote detailing subordinating conjunctions and separate dependent clauses, *id*. at 10-11 n. 9, requires a

[8] The Commonwealth also urges that this interpretation is supported by "the rules of grammar," which, according to the Commonwealth, provide that the three uses of the disjunctive "or" in Section 14 create "three separate and distinct clauses." Commonwealth's Brief at 5. The Commonwealth cites the canon of construction "'that courts should generally apply qualifying words or phrases to the words immediately preceding them.'" *Id*. at 6 (citing *Commonwealth v. Packer*, 798 A.2d 192, 197-98 (Pa. 2002)).

proficiency of grammar that is simply not characteristic of the average voter. *See Pa. Env't Def. Found.*, 161 A.3d at 929 (stating that text must be interpreted "in its popular sense, as understood by the people when they voted on its adoption"). Canons such as the "series-qualifier canon" may be "useful tools, but it is important to keep their limitations in mind." *Facebook, Inc. v. Duguid*, 592 U.S. 395, 410 (2021) (Alito, J., concurring). For instance, one could apply the "series-qualifier canon" or the "last antecedent rule," and depending on which rule is employed, reach opposite results. *Id*. at 412 (Alito, J., concurring) (surmising that if the series-qualifier canon were evaluated empirically, "we would find that the series qualifiers sometimes modify all the nouns or verbs in a list and sometimes modify just the last noun or verb").

Unphased by its use of dense grammatical principles to explain "plain language," the Majority suggests that if an alternative reading were intended, it would have been signaled either by omitting the second "unless" or by setting off the text with commas. Majority Op. at 11. In support, it cites to two cases in which federal courts have considered the series-qualifier rule, *Facebook, Inc.*, 592 U.S. at 403-04 (applying series-qualifier rule), and *United States v. Dai*, 99 F. 4th 136, 139 (2d Cir. 2024) (distinguishing *Facebook, Inc.*, and refusing to apply series-qualifier rule). In *Dai*, the Second Circuit read the phrase "a crime of violence, a violation of section 1591,[9] or an offense listed in section 2332b(g)(5)(B)[10] for which a maximum term of imprisonment of [ten] years or more is prescribed[,]" and determined that the maximum-sentence limitation applied only to the last element of the list. *Dai*, 99 F.4th at 139 (citing 18 U.S.C. § 3142(f)(1)(A)). Focusing on one of the reasons given by the Second Circuit panel in *Dai*, the Majority emphasizes that the series-qualifier canon did not apply there because no comma

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[9] 18 U.S.C. § 1591.

[10] 18 U.S.C. § 2332b(g)(5)(B).

separated the maximum-sentence phrase from the last item in the list. Majority Op. at 12 (citing *Dai*, 99 F. 4th at 139). Likewise, here, the Majority points out, no comma separates the qualifier from the last item in the list. The Majority thus maintains that Section 14 is plain.

However, *Dai* supports my conclusion that Section 14 requires us to resort to the rules of constitutional construction which includes consideration of the history of the provision to ascertain the intention of the voters. The Second Circuit panel in fact gave three reasons why it read the qualifier in the list to modify only the final item in the list. First, it explained that applying the maximum-sentence limitation to Section 1591 (i.e., the second item in the list) would be surplusage given that a violation of Section 1591 is always punishable by imprisonment of ten years or more. *Dai*, 99 F.4th at 139. Second, it found that the government's reading made grammatical sense because "[n]o comma separates the phrase from the third category of offenses, which suggests that the two are directly connected." *Id*. Most relevantly, the *Dai* Court considered legislative history, which showed that the original statute included the first of its three categories (crime of violence) without the qualifier, then was amended to include additional categories with the qualifier. *Id*. at 140 (indicating that the "statutory history show[ed] that Congress added one category of offenses in 2004 and another in 2008, but did not on either occasion alter the scope of the original category of offenses—crimes of violence[]"). In other words, faced with a list including a qualifier at the end (that the Majority compared to the list in the present provision), the *Dai* court looked beyond the plain language of the statute and considered its history.

Facebook, Inc. also illustrates the ambiguity of Section 14. As identified by the United States Supreme Court in that case, the "series-qualifier canon" provides that "'[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in

a series,' a modifier at the end of the list 'normally applies to the entire series.'" *Facebook, Inc.*, 592 U.S. at 402-03 (citing A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)). If this rule applied here, it could justify a plain reading of the statute. However, Section 14 is not a model of a straightforward list using parallel construction. The first two objective items are of a different type than the third subjective item, which makes a parallel construction all but impossible. The application of the series-qualifier canon thus immediately reveals ambiguity in the text.

Before today, there was no doubt that Article 1, Section 14, as amended by a majority vote of the electorate in 1998, established that bail will not be allowed when the proof is evident and the presumption great that an accused committed an offense for which the maximum penalty is life imprisonment. This Court said so (twice), as did the Secretary of State and the Attorney General. The Majority espouses a different interpretation today by resorting to rules of grammatical construction that are open to contrary application. If an ambiguity in the text is necessary to look beyond the language itself to interpret the amendment, we have it here in spades. But the stilted constitutional interpretation principles employed by the Majority allow it to ignore the elephant in the room—the intent of the voters who approved the amendment is crystal clear and contrary to its interpretation. This case may present an anomaly—the ballot question answered by the electorate set forth the exact question this Court is asked to answer in this appeal. I, for one, cannot explain or justify reaching a conclusion different from the answer given by the voters in 1998. The Majority disregards the **clear** expressed intent of the voters. The amendment, as interpreted by the Majority, is not the amendment ratified by the voters by their affirmative vote on the ballot question. Our democracy cannot tolerate this type of bait and switch.

I dissent.

Chief Justice Todd joins this dissenting opinion.