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120 MAP 2016

IN THE SUPREME COURT OF PENNSYLVANIA

No. 120 MAP 2016

John Doe 1, John Doe 2, John Doe 3 and Jane Doe 1, Appellees

v.

Franklin County, Franklin County Sheriff's Office, Franklin County Sheriff Dane Anthony and Employee John/Jane Does, Appellants

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Reply Brief of Appellants Franklin County, Franklin County Sheriff's Office, and Sheriff Dane Anthony

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Appeal from the Order by the Commonwealth Court of Pennsylvania, 1634 CD 2015, dated 5-20-16
Reversing in part and affirming in part the Order of the Franklin County Court of Common Pleas, Docket No. 4623-2014 dated 8-13-15

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I. Argument:

A. The reasonableness of Sheriff Anthony's actions and damages exposure are extremely relevant to whether this Court should limit high official immunity.

Plaintiffs criticize the fact that our opening brief defends the reasonableness of Sheriff Anthony's use of postcards and highlights the fact that Plaintiffs want to certify a class for an aggregate $12 million in damages. These facts are relevant to the question of whether this Court should limit absolute immunity in this context. The purpose of absolute immunity is to protect high officials from the burdens of having to prove their good faith in litigation and to a jury, and because fear of litigation and damages could "deter all but the most courageous or the most judgment-proof public officials from performing their official duties." *Matson v. Margiotti*, 371 Pa. 188, 203 (1952). *See also Montgomery v. City of Phila.*, 392 Pa. 178, 183 & n.7 (1958). The massive exposure in this case for a good faith decision highlights the need for immunity.

B. High official immunity is not limited to defamation actions.

Plaintiffs claim that high official immunity only applies to defamation. High official immunity would offer little protection if it only applied to defamation. For this reason, "the doctrine of high public official immunity is applicable to **actions** by public officials, not just defamatory

statements." *Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560, 567 (Pa. Commw. 2005), appeal denied, 587 Pa. 697 (2006) (emphasis by Court). Plaintiffs' argument otherwise is foreclosed by *Matson*, *Jonnet*, and *Durham.* In *Matson*, although a defamation case, this Court recognized that the doctrine had already been found to cover "slander, or libel, or malicious prosecution suits." *Matson v. Margiotti*, 371 Pa. 188, 203 (1952). This Court held that the privilege covers "defamatory statements and even from statements or **actions** motivated by malice…" *Id.* at 193-94 (emphasis added).

As persuasive authority, this Court in *Matson* relied upon numerous cases that applied the doctrine to bar torts other than defamation. *Id.* at 194 (citing *Standard Nut Margarine v. Mellon*, 72 F.2d 557, 560 (D.C. Cir. 1934) (erroneous assessment of taxes and malicious interference with business), *Yaselli v. Goff,* 12 F.2d 396, 407 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927) (per curiam) (malicious prosecution); *Springfield v. Carter*, 175 F.2d 914, 918 (8th Cir. 1949) (malicious prosecution), *Gibson v. Reynolds*, 172 F.2d 95, 97 (8th Cir. 1949) (failure to properly classify plaintiff as minister exempt from draft, malicious prosecution for desertion, and due process violations), *Adams v. Home*

Owners' Loan, 107 F.2d 139, 141 (8th Cir. 1939) (malicious prosecution), *Phelps v. Dawson*, 97 F.2d 339, 341 (8th Cir. 1938) (malicious prosecution), *Laughlin v. Rosenman*, 163 F.2d 838, 842 (D.C. Cir. 1947) (malicious prosecution), and *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (malicious prosecution)).

This Court quoted *Spalding v. Vilas*, 161 U.S. 483 (1896), as "the leading case":

> The interests of the people require that due protection be accorded to them in respect of their official **acts**. As in the case of a judicial officer, we recognize a distinction between **action** taken by the head of a department in reference to matters which are manifestly are palpably beyond his authority, and **action** having [a legitimate or proper] connection with the general matters committed by law to his control or supervision. … In exercising the **functions** of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official **conduct** may at any time become the subject of inquiry in a civil suit for damages. … B ut if he **acts**, having authority, his conduct cannot be made the foundation of a suit against him personally for damages

Matson, 371 Pa. at 195, 198 (quoting *Spalding*, 161 U.S. 637) (emphasis added). This Court noted that "this absolute privilege has gradually been extended to the official statements and **acts,**" *id.* at 196, and "statements

or **acts** of high public officials which are made in the course of and within the scope of their official powers or duties give them complete immunity from legal redress." *Id.* at 203 (emphasis added).

This Court's next high official immunity case, *Montgomery v. City of Philadelphia*, 392 Pa. 178 (1958), was also a defamation case. This Court quoted *Matson*'s language that the immunity is for "statements or actions." *Id.* at 183. This Court added, "[A]bsolute immunity is designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public **actions** before a jury." *Id.* (quoting Note, 20 U. of Chi.L.Rev. 677, 679 (1953)) (emphasis added).

This Court quoted Chief Judge Learned Hand's reasoning from a malicious prosecution case:

> Again and again the public interest calls for **action** which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith.

Montgomery, 392 Pa. at n.7 (quoting *Gregoire*, 177 F.2d at 581.

Although *Matson* and *Montgomery* were defamation cases, Plaintiffs gives the high official immunity doctrine "too narrow a reading

in attempting to limit its holding to suits for defamation." *Jonnet v. Bodick*, 431 Pa. 59, 62 (1968). This Court in *Jonnet* and *Durham* made clear that the doctrine applies to all torts. *Durham v. McElynn*, 565 Pa. 163, 166 (2001) (malicious prosecution); *Jonnet*, 431 Pa. at 62 ($47,350 in expenses in reliance of assurances that permit would be granted before Supervisors changed mind and $1 million lost profits). The Commonwealth Court has routinely done so as well.[1]

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[1] *See e.g., McCoy v. Com.*, 9 Pa. Cmwlth. 107, 110 (1973), affirmed without opinion, 457 Pa. 513 (1974) (wrongful death);*Feldman v. Hoffman*, 107 A.3d 821, 829 (Pa. Commw. 2014) (en banc), appeal denied, 632 Pa. 695 (2015) (conversion and intentional infliction of emotional distress); *Osiris Enterprises*, 877 A.2d at 567 (conspiracy to ruin contract bid); *Holt v. Nw. Pennsylvania Training P'ship Consortium*, 694 A.2d 1134, 1140 (Pa. Commw. 1997) (en banc) (employment discrimination and intentional infliction of emotional distress); *Bass v. Cuyler*, 36 Pa. Cmwlth. 74, 76 (1978) (negligence); *Witt v. Com., Dep't of Banking*, 36 Pa. Cmwlth. 298, 302 (1978) (en banc) (misfeasance); *Wallace v. DPW*, 32 Pa. Cmwlth. 615, 618 (1977) (negligence); *Staley v. Com.*, 33 Pa. Cmwlth. 22, 25 (1977) (slip and fall); *Sharp v. Com.*, 29 Pa. Cmwlth. 607, 609 (1977) (physical injuries); *Harris v. Rundle*, 27 Pa. Cmwlth. 445, 455 n.5 (1976) (negligence); *Fischer v. Kassab*, 25 Pa. Cmwlth. 593, 596 (1976) (wrongful death); *Wicks v. Milzoco Builders*, 25 Pa. Cmwlth. 340, 346 (1976) (en banc), aff'd, 481 Pa. 554 (1978) (flooding); *Reiff v. Com.*, 23 Pa. Cmwlth. 537, 539 (1976) ("defendants, knowing of the serious criminal records of the alleged robbers, …allowed the robbers to be released on parole, failed to properly supervise them while on parole, and failed to apprehend them for criminal activity until after Donna was shot."); *Zanca v. Atty. Gen.*, 23 Pa. Cmwlth. 288, 289 (1976) (en banc) (wrongful withholding of driver's license); *Lehnig v. Felton*, 235 Pa. Super. 100, 103 (1975) (en banc) ("Absolute personal immunity from injuries or damage caused by their actions is granted to 'high governmental officers'…"); *Schuman's Vill. Square Drugs v. Stern*, 14 Pa. Cmwlth. 559, 560 (1974) (en banc) (maliciously deny permit); *Kovach v. Toensmeier Adjustment Serv.*, 14 Pa. Cmwlth. 214, 219 (1974) (en banc) (refuse to identify driver that caused injury).

C. High official immunity applies to Section 6111(i).

Plaintiffs do not dispute that Sheriff Anthony is a high official. This Court should not deny him high official immunity. If this Court denies immunity under Act 5 of 1997, high officials in other areas will fear litigation and damages for their good faith actions. Once this Court says absolute immunity is not absolute, high officials will wonder what statutory cause of action is next on the list of exceptions.

It is significant that Plaintiffs ignore *Lindner v. Mollan*, 544 Pa. 487 (1996), where this Court rejected the argument that the Political Subdivision Tort Claims Act abrogated high official immunity by implication. If the PSTCA, which explicitly defines the scope of immunity for government employees, did not abrogate high official immunity, then certainly Act 5 of 1997 did not either as Act 5 doesn't even mention immunity at all. Plaintiffs likewise ignore the legislative history of Act 5, in which no legislator event mentions the lawsuit provision. *See* Senate Journal, pages 317-329, attached as exhibit 5 to our opening brief; House Journal, pages 726-734, attached as exhibit 6 to our opening brief. Plaintiffs cannot show any legislative intent to abrogate high official immunity.

Nevertheless, Plaintiffs claim that high official immunity is against the public interest because they allege that Sheriff Anthony violated the law. Appellee Br. p. 7. Plaintiffs' argument would apply to every single immunity case and end high official immunity in our Commonwealth if accepted. Moreover, Plaintiffs make no allegations of malice or actual harm, making immunity much more equitable for this case than torts like malicious prosecution. *See Durham*, 565 Pa. at 166.

Plaintiffs claim that high official immunity would "eviscerate" Section 6111(i)'s protection of information. Appellee Br. p. 11. To the contrary, Act 5 of 1997 permits suit against "any person, licensed dealer, State or local governmental agency or department" who violates the provision. The "any person" language obviously does not apply to only sheriffs and police chiefs as the statute applies to low- and mid-ranking officials and private persons, such as employees and agents of a "licensed dealer." Because most persons within its reach cannot claim high official immunity, this Court need not share Plaintiffs' fear.

This broad language does not, as Plaintiffs claim, create "an explicit right to sue a sheriff or chief of police" personally because the application of high official immunity would not bar claims against other defendants.

See Appellee Br. p. 5. However, the fact that this tort could be brought against a high official makes this case no different than every other application of high official immunity.

Plaintiffs further argue that there is no benefit to immunity because of their claim for injunctive relief. However, injunctive relief claims are not brought in every case and, even if brought, do not justify denying immunity to damages as the plaintiff could fail to prove a need for prospective relief, changes during the litigation can moot equitable claims, juries are unnecessary in equity cases, and jury verdicts in equity cases are merely advisory. *See* Pa.R.C.P. 1038.3.

Moreover, it's not just the burdens of litigation that justify high official immunity, but also the fear that denying immunity could "deter all but the most courageous or the most judgment-proof public officials from performing their official duties." *Matson*, 371 Pa. at 203. This Court was clearly concerned that damages exposure would weigh heavily on the minds of high officials and burden their decision-making. In this context, a sheriff has statutory duties to find out whether an applicant is of sound mind, a drug addict, a drunk, or otherwise dangerous. 18 Pa.C.S. §6109(e)(i), (v), (vi), (vii). Abolition of high official immunity would force

sheriffs to fear litigation over each conversation. This Court should protect their ability to function without apprehension.

D. This Court should not consider issues raised by Plaintiffs beyond the issue allowed for appeal.

Plaintiffs argue various matters outside the issue allowed for appeal. "Only the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event an appeal is allowed." Pa.R.A.P. 1115(a)(3). This Court should decline to consider Plaintiffs' broader question about whether this Court should completely abolish high official immunity.

If this Court is inclined to entertain that issue, then we respectfully request that this Court issue a new order granting allowance of appeal on the question so that the Governor, Office of Attorney General, agency and department heads, district attorneys, mayors, police chiefs, wardens, and other high officials would know of this Court's plan to review the question and have the opportunity to file amici briefs as Plaintiffs' position would eliminate immunities that they have enjoy. Moreover, if this Court lacks any authority to create or expand common law immunities or defenses as Plaintiffs appear to maintain, then judicial immunity is out the window as well. To put it simply, Plaintiffs' push to abrogate the common law has

a much bigger reach than simply whether the Uniform Firearms Act creates an exception to absolute immunity for sheriffs.

E. This Court has never questioned high official immunity.

Plaintiffs argue that this Court abolished all common law immunities in the 1970s, citing *Ayala v. Phila. Bd. of Pub. Educ.*, 453 Pa. 584 (1973) (abolishing local government immunity), *Mayle v. Pa. Dep't of Highways*, 479 Pa. 384 (1978) (abolishing sovereign immunity), and *Carroll v. York Cty.*, 496 Pa. 363 (1981) (upholding Political Subdivision Tort Claims Act). Plaintiffs claim that these cases separately and collectively stand for the propositions that immunities are inequitable, and this Court cannot create or expand common law immunities or defenses. Plaintiffs' argument has an obvious flaw: this Court's unwavering application of high official immunity since *Ayala, Mayle,* and *Carroll*.

Two weeks after *Ayala*, in *McCoy v. Com.*, 9 Pa. Cmwlth. 107, 110 (1973), the Commonwealth Court held that Liquor Control Board members were high public officials and absolutely immune. This Court affirmed without opinion the following year. *McCoy v. Com.*, 457 Pa. 513 (1974).

A year after *Mayle*, this Court declared the doctrine still valid. *Reese v. Danforth*, 486 Pa. 479 (1979). In *Reese*, this Court determined that a public defender was not a high official. This Court reaffirmed the holding in *Montgomery* that "[w]hether a particular individual claiming official status is accorded immunity depends upon 'the nature of his duties, the importance of his office, and particularly whether or not he has policy-making functions.'" *Id.* at 487 (quoting *Montgomery*, 392 Pa. at 186). *See Lindner*, 544 Pa. at 495 (noting that *Reese* adopted *Montgomery* standard).

This Court held that public defenders "do not serve as public administrators with policy-making functions and the duty to act according to directives handed down to them by other public officials." *Reese*, 486 Pa. at 487-88. This Court distinguished defenders from elected and appointed officials accountable to the public at large: "The scope of authority devolved upon them by statute is coextensive with that of a trained professional representing a client in a particular case, not that of an elected or appointed public official accountable to the community at large. *Cf. Yealy v. Fink*, 43 Pa. 212 (1862); *Jonnet v. Bodick*, 431 Pa. 59 (1968)." *Id.* at 488. This Court in *Reese* did not hold that *Ayala* or *Mayle*

abolished high official immunity, much less all judicially-created immunities or defenses as Plaintiffs claim.

Then, fifteen years after *Carroll*, this Court granted allowance of appeal to answer the question "whether the doctrine of absolute privilege afforded high public officials remains the law in Pennsylvania." *Lindner*, 544 Pa. at 490. This Court again reaffirmed the rationale and need for high official immunity:

> The doctrine of absolute privilege "rests upon the * * * idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Montgomery v. City of Philadelphia*, 392 Pa. 178, 181 (1958). This sweeping immunity is "not for the benefit of high public officials, but for the benefit of the public." *Barto v. Felix*, 250 Pa.Super. 262, 272 (1977) (Spaeth, J., dissenting), appeal denied, 487 Pa. 455 (1980). Absolute privilege is
>
> designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public actions before the jury. And yet, beyond this lies a deeper purpose, the protection of society's interest in the unfettered discussion of public business and in full public knowledge of the facts and conduct of such business.
>
> *Montgomery*, 392 Pa. at 183.

> As such, absolute immunity for high public officials from civil liability is the only legitimate "means of removing any inhibition which might deprive the public of the best service of its officers and agencies." *Id.*

Id. at 490-91.

Citing a half dozen cases, this Court stated, "This Court has never called into question, much less overruled, the common law doctrine of absolute privilege for high public officials. Moreover, our lower courts have consistently relied upon the doctrine." *Id.* at 492 (citing *Mosley v. Observer Publishing*, 422 Pa.Super. 255, 261, appeal denied, 535 Pa. 622 (1993), *Yakowicz v. McDermott*, 120 Pa.Cmwlth. 479, 484 (1988), appeal denied, 523 Pa. 644 (1989), *Rok v. Flaherty*, 106 Pa.Cmwlth. 570, 572 (1987), appeal denied, 517 Pa. 628 (1988), *DeSantis v. Swigart*, 296 Pa.Super. 283, 286–87 (1982), *Barto*, 250 Pa.Super. at 267, and *McCormick v. Specter*, 220 Pa.Super. 19, 21 (1971)). Notably, five of these cases were decided after *Ayala*, and four after *Mayle* and *Carroll*.[2]

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[2] Numerous other cases support this conclusion. *See e.g. Feldman v. Hoffman*, 107 A.3d 821, 829 (Pa. Commw. 2014) (en banc), appeal denied, 632 Pa. 695 (2015); *Reed v. Pray*, 53 A.3d 134, 142 (Pa. Commw. 2012), appeal denied, 619 Pa. 718 (2013); *Azar v. Ferrari*, 898 A.2d 55, 62 (Pa. Commw. 2006); *Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560, 566 (Pa. Commw. 2005) appeal denied, 587 Pa. 697 (2006); *Appel v. Twp. of Warwick*, 828 A.2d 469, 474 (Pa. Commw.) (en banc), appeal denied, 576 Pa. 725 (2003); *Hall v. Kiger*, 795 A.2d 497, 499 (Pa. Commw.) (en banc), appeal denied, 572 Pa. 713 (2002); *Matta v. Burton*, 721 A.2d 1164, 1167 (Pa. Commw. 1998);

This Court cited a trio of cases to show that high official immunity survived the legislative enactment of the Political Subdivision Tort Claims Act. *Id.* (citing *Suppan v. Kratzer*, 660 A.2d 226 (Pa.Cmwlth.1995), *Petula v. Mellody*, 158 Pa.Cmwlth. 212, 220 (1993), *Factor v. Goode*, 149 Pa.Cmwlth. 81, 87 (1992) (en banc), appeal denied, 533 Pa. 654 (1993)). Naturally, all of these cases were decided after *Ayala, Mayle,* and *Carroll. See also Azar v. Ferrari*, 898 A.2d 55, 59 n.4 (Pa. Commw. 2006); *Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560, 566 (Pa. Commw. 2005) appeal denied, 587 Pa. 697 (2006). Like the Commonwealth Court, this Court too held that "the PSTCA does not abrogate the common law doctrine of absolute privilege afforded high public officials." *Lindner*, 544 Pa. at 495.

McKibben v. Schmotzer, 700 A.2d 484, 490 (Pa. Super. 1997); *Holt v. Nw. Pennsylvania Training P'ship Consortium*, 694 A.2d 1134, 1140 (Pa. Commw. 1997) (en banc); *Pickering v. Sacavage*, 164 Pa. Cmwlth. 117, 126 (1994), appeal denied, 539 Pa. 671 (1995); *Bensalem Twp. v. Press*, 93 Pa. Cmwlth. 235, 243–44 (1985); *Bass v. Cuyler*, 36 Pa. Cmwlth. 74, 76 (1978); *Concerned Taxpayers of Allegheny Cty. v. Com.*, 33 Pa. Cmwlth. 518, 519 n.1 (1978) (en banc); *Lucy v. Muchnok*, 36 Pa. Cmwlth. 272, 278 (1978); *Wallace v. DPW*, 32 Pa. Cmwlth. 615, 618 (1977); *Witt v. Com., Dep't of Banking*, 36 Pa. Cmwlth. 298, 302 (1978) (en banc); *Staley v. Com.*, 33 Pa. Cmwlth. 22, 25 (1977); *Sharp v. Com.*, 29 Pa. Cmwlth. 607, 609 (1977); *Harris v. Rundle*, 27 Pa. Cmwlth. 445, 455 n.5 (1976); *Fischer v. Kassab*, 25 Pa. Cmwlth. 593, 596 (1976); *Wicks v. Milzoco Builders*, 25 Pa. Cmwlth. 340, 346 (1976) (en banc); *Kulik v. Stotelmyer*, 23 Pa. Cmwlth. 583, 584 (1976) (en banc); *Reiff v. Com.*, 23 Pa. Cmwlth. 537, 539 (1976); *Zanca v. Atty. Gen.*, 23 Pa. Cmwlth. 288, 289 (1976) (en banc); *Schuman's Vill. Square Drugs v. Stern*, 14 Pa. Cmwlth. 559, 560 (1974) (en banc); *Kovach v. Toensmeier Adjustment Serv.*, 14 Pa. Cmwlth. 214, 219 (1974) (en banc); *Jaffurs v. O'Neill*, 10 Pa. Cmwlth. 346, 346 (1973) (en banc).

This Court specifically rejected the argument that *DuBree v. Com.*, 481 Pa. 540 (1978), which modified the standard of conditional immunity for low officials, abrogated absolute immunity for high officials:

> *DuBree* did not involve the question of absolute privilege for high public officials and, as such, *DuBree* did not discuss any of our earlier cases on absolute privilege. In fact, we made clear in *DuBree* that the issue of whether the seven named members of the Pennsylvania Department of Transportation were high public officials for purposes of absolute privilege was not before the Court since the Commonwealth Court had disposed of the case below without deciding the status of the officials in question. *See DuBree*, 481 Pa. at 540 n. 4. Rather, *DuBree* articulated a standard to determine which officials qualified for official immunity where those officials were not considered high public officials entitled to absolute privilege under the common law. Thus, in *DuBree*, for those officials who were not high public officials entitled to absolute privilege, we held that immunity was not absolute but qualified and its availability depended on the circumstances of each case.

Lindner, 544 Pa. at 496. This analysis is significant as *DuBree* shares a common author with *Ayala, Mayle, ,* and *Carroll*: Justice Roberts. *DuBree* was also decided months after *Mayle*, and *DuBree* recognized high official immunity was alive and well in a post-*Mayle* Commonwealth.

Five years after *Lindner*, this Court unanimously reaffirmed its holding in a malicious prosecution case:

> It has long been held that high public officials are immune from suits seeking damages for actions taken or statements made in the course of their official duties. This common law doctrine of tort immunity existed before enactment of the Political Subdivision Tort Claims Act, 42 P.S. § 8541 et seq., and was not abrogated by it.

Durham, 565 Pa. at 165.

This Court quoted *Matson* for the rationale behind absolute immunity for high officials:

> Even though the innocent may sometimes suffer irreparable damage, it has been found to be in the public interest and therefore sounder and wiser public policy to "immunize" public officials, for to permit slander, or libel, or malicious prosecution suits, where the official's charges turn out to be false, would be to deter all but the most courageous or the most judgment-proof public officials from performing their official duties and would thus often hinder or obstruct justice and allow many criminals to go unpunished.

Id. at 166 (quoting 371 Pa. at 203).

This Court held that granting high official immunity to prosecutors protects the public:

> The public interest requires that district attorneys be able to carry out their duties without

> being hampered by civil suits claiming damages for actions taken in their official capacities. The public would indeed suffer if the prosecution of criminals were impeded, as would be the case if district attorneys were not accorded absolute immunity. … To subject assistant district attorneys acting on behalf of the district attorney to liability would deter all but the most courageous and most judgment-proof from vigorously performing their prosecutorial functions, and would inevitably result in criminals going unpunished.

Id. at 166–67. As is clear from *Reese*, *Lindner,* and *Durham* , this Court has consistently applied high official immunity since *Ayala, Mayle,* and *Carroll*. Plaintiffs' argument otherwise is frivolous.

F. This Court did not hold in *Ayala*, *Mayle*, or *Carroll* that Article 1, Section 11 bars all common law immunities and defenses.

Contrary to Plaintiffs' position, "*Ayala* did not involve the issue of immunity granted a public official." *Bensalem Tp. v. Press*, 93 Pa. Cmwlth. 235, 243–44 (1985). The doctrine of local government immunity (abolished by *Ayala*) and doctrine of absolute immunity for high officials "follow different, though perhaps parallel, historical paths through Pennsylvania and federal law (absolute immunity) and into the English common law." *Wicks v. Milzoco Builders*, 25 Pa. Cmwlth. 340, 346 (1976) (en banc). For these reasons, "the Supreme Court's abolition of

governmental immunity in *Ayala* did not and was not intended to effect an abolition of the doctrine of absolute immunity of high public officials." *Id. See also Bensalem Tp.*, 93 Pa. Cmwlth. at 243–44.

This Court did not hold in *Ayala* or any case since that it lacks the constitutional authority to grant immunity. Before *Ayala*, this Court had "suggested that the Legislature should undertake the abrogation of governmental immunity." *Ayala*, 453 Pa. at 602. Before *Mayle*, this Court held that "this Commonwealth's immunity is constitutionally, not judicially, mandated…" *Brown v. Com.*, 453 Pa. 566, 571 (1973). That was based upon this Court's interpretation at the time of the language in Article 1, Section 11 that "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." This Court urged the General Assembly to limit immunity. *Brown*, 453 Pa. at 579 n.6.

This Court broke from legislative deference and held in *Ayala* that "the doctrine of governmental immunity—judicially imposed —may be judicially terminated." 453 Pa. at 600. This Court found that "there is no requirement for legislative action to abolish—as we do here—the immunity of municipal corporations and quasi-corporations." *Id.* at 601 n.

8. *See also Zauflik v. Pennsbury Sch. Dist.*, 629 Pa. 1, 27-32 (2014) (summarizing history behind and rationale for *Ayala* and *Mayle*). This Court did not hold in *Ayala* that common law immunities are unconstitutional.

In *Mayle*, this Court rejected its previous view that Section 11 requires sovereign immunity unless and until legislation:

> The Constitution is . . . neutral it neither requires nor prohibits sovereign immunity. It merely provides that the presence or absence of sovereign immunity shall be decided in a non-constitutional manner. . . . The (Commonwealth's argument) mistakenly concludes that since the framers recognized the need for resolution of these issues they thereby mandated the doctrine itself. . . . (I)t is an unwarranted conclusion to assume from the grant of the power of consent (to suit) to the legislative branch that this was implicitly an abrogation of the court's traditional powers to abolish common law principles when they no longer meet the needs of the time."

479 Pa. at 400 (quoting *Biello v. Liquor Control Board*, 454 Pa. 179, 189 (1973) (Nix, J., joined by Roberts, J., dissenting). This Court found instead that "the Framers of 1790 intended to allow the Legislature, if it desired, to choose cases in which the Commonwealth should be immune." *Id.* at 400. Accordingly, this Court held "that article I, section 11 of the Pennsylvania Constitution does not preclude this Court from abrogating

the doctrine of sovereign immunity." *Id.* at 406. This Court did not hold, as Plaintiffs contend, that Section 11 required the abolition of sovereign immunity.

In *Carroll*, this Court upheld the Political Subdivision Tort Claims Act because "the conferring of tort immunity upon political subdivisions is within the scope of the Legislature's authority pursuant to Article I, Section 11." 496 Pa. at 367. This Court did not hold that *Ayala* and *Mayle* abrogated all common law immunities and defenses.

Plaintiffs rely on this Court's recent description of *Carroll* in *Dorsey v. Redman*, 626 Pa. 195 (2014), where this Court stated:

> Our Constitution neither prohibits nor grants immunity to the Commonwealth, but vests authority in the General Assembly to determine the matters in which the government shall be immune. Pa. Const. art. I, § 11 ("Suits may be brought against the Commonwealth in such manner, ... and in such cases as the Legislature may by law direct"). Accordingly, our Court has recognized that the legislature is the exclusive body with authority to confer immunity upon political subdivisions. *City of Phila. v. Gray*, 633 A.2d 1090, 1093 (Pa. 1993) (determining General Assembly has exclusive authority to confer governmental immunity); *Carroll v. Cnty. of York*, 437 A.2d 394, 396 (Pa. 1981) (finding municipalities to be agents of state whose powers are determined by legislature). Thus, the breadth of immunity enjoyed by local agencies is

> ultimately for legislative, rather than judicial, determination.

626 Pa. at 209. This Court should not read this language in *Dorsey* so broadly as this Court was not considering whether *Carroll* abolished all common law immunities as Plaintiffs claim; rather, this Court in *Dorsey* addressed whether a statutory cause of action sat outside of the immunities of the Political Subdivision Tort Claims Act and applied the statutory good faith immunity defense to the case.

This Court has cautioned against reading its precedent too broadly, even when that precedent is couched in sweeping language:

> [T]he fact that some decisions of the Court apply loose language cannot mean that the Court must always do so going forward, as this would institutionalize an untenable slippage in the law. Indeed, various principles governing judicial review protect against such slippage, including the axiom that the holding of a judicial decision is to be read against its facts.

Oliver v. Pitt., 11 A.3d 960, 966 (Pa. 2011) (citations omitted). In this case, this Court should not read *Dorsey*'s language as ruling upon an issue not before it: whether all common law immunities and defenses are unconstitutional.

Nor did the cases cited by this Court in *Dorsey* hold that this Court lacks power to expand or limit common law immunities and defenses. *Dorsey* cited *Carroll*, which as explained above did not address whether and to what extent this Court can define common law immunities or defenses. Likewise, in *Gray*, this Court simply held that Philadelphia could not waive statutory immunity. *City of Phila. v. Gray*, 633 A.2d 1090, 1093 (Pa. 1993). Moreover, since *Gray*, this Court has twice reaffirmed high official immunity in *Lindner* and *Durham*. This Court has never held that all judicially created immunities and defenses are abolished as Plaintiffs claim.

G. High official immunity does not violate Article 1, Section 20.

Plaintiffs reference briefly Article 1, Section 20, which allows citizens to petition the government for redress of grievances. They cite no case law and do not develop the argument. *DePaul v. Com.*, 600 Pa. 573, 581 n. 8 (2009) (declining to separately address undeveloped constitutional issue). Further, Plaintiffs do not explain how high official immunity prevents them from "apply[ing] to those invested with the powers of government for redress of grievances or other proper purposes,

by petition, address or remonstrance." This Court should consider the issue waived or, in the alternative, frivolous.

H. Plaintiffs' position creates an absurd result.

Plaintiffs contend that this Court lacks any authority to create or expand common law immunities and defenses. Plaintiffs position would not only derail high official immunity, but call into question all longstanding common law defenses and immunities like judicial immunity. *See Petition of Dwyer*, 486 Pa. 585, 590 (1979) (immunity for judicial and quasi-judicial officials); *Post v. Mendel*, 510 Pa. 213, 220 (1986) (privilege for statements made in judicial proceedings); *Feingold v. SEPTA*, 339 Pa. Super. 15, 31 (1985), aff'd, 512 Pa. 567, n.8 (1986) (holding that common law prohibition on punitive damages against government entities survived *Ayala* and *Mayle*). This Court need not create such turmoil.

Plaintiffs' position also creates an absurd result in that this Court can create new common law torts and expand the scope of existing common law torts, but lacks the ability to limit the scope of tort common law torts or expand the scope of defenses in Plaintiffs' view. This Court

found such a similar limitation absurd when discussing the legislature's power:

> If the legislature may abolish a cause of action, surely it may also limit the recovery on the actions which are permitted. To hold otherwise would be, in our view, to grant with one hand what we take away with the other. Such a result would be absurd, or at least, unreasonable.

Smith v. City of Phila., 512 Pa. 129, 134 (1986). Plaintiffs' view would reach the same result where this Court could create new torts or expand existing ones, but would be powerless to create defenses and immunities to the inequitable applications of common law causes of action. This Court should reject such an unreasonable view of this Court's power.

I. Plaintiffs' position goes against the clear legislative intent to preserve high official immunity.

The General Assembly clearly intended to preserve high official immunity when, in reaction to *Ayala* and *Mayle*, it restored local government and sovereign immunities in 1978. "Importantly, the Act's provisions were based on a report and recommendations prepared in 1978 by the General Assembly's Joint State Government Commission, after a detailed study by a task force consisting of judges, attorneys and citizens…" *Zauflik*, 629 Pa. at 43. Notably, the Joint State Government

Commission specifically mentions absolute immunity for high officials as retained and the Commission cited and quoted *Matson*. Joint Report p. 17, attached as exhibit 7 for this Court's benefit.

The General Assembly sought to expand immunity, not shrink it. "It is clear that the [Political Subdivision Tort Claims] Act is intended to 'insulate political subdivisions from tort liability.'" *Zauflik*, 629 Pa. at 32–33 (quoting *Mascaro v. Youth Study Center*, 523 A.2d 1118, 1123 (Pa. 1987)). The Joint Report makes clear that the General Assembly did not think it needed to codify all common law immunities and specifically that absolute immunity survived *Ayala* and *Mayle*. This Court should not expand the *Mayle* reasoning nearly forty years later to pull the rug out from under the General Assembly and say that there are no common law immunities after all.

J. The rationales of *Ayala* and *Mayle* do not justify abandoning high official immunity.

The reasoning in *Ayala* and *Mayle* do not justify abandoning high official immunity. In those cases, this Court determined that "the government-bankruptcy and flood-of-litigation arguments" could no longer justify such broad, sweeping immunity. *Mayle*, 479 Pa. at 395 (citing *Ayala*, 453 Pa. at 595). "By contrast, a single reason has been

repeatedly offered by all courts which have considered the absolute immunity of high public officials, namely, the preservation of independence in the decision-making processes of high judicial and executive officials." *Wicks*, 25 Pa. Cmwlth. at 346. This Court in *Mayle* and *Ayala* never mentioned high official immunity or criticized its basis.

This Court protects high officials from "the expense, publicity, and danger" of having to prove their good faith in litigation and to a jury. *Montgomery*, 392 Pa. at 183 (quoting Note, 20 U. of Chi.L.Rev. 677, 679 (1953). *See also id.* at n.7 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Chief Judge Learned Hand)). This Court recognizes that high officials "should not be under an apprehension that the motives that control his official conduct may at any time become the subject of inquiry in a civil suit for damages." *Matson*, 371 Pa. at 195 (quoting *Spalding*, 161 U.S. 637). This Court has held that any lesser immunity would force innocent high officials to have to prove their good faith through litigation and jury trials, a result that could "deter all but the most courageous or the most judgment-proof public officials from performing their official duties." *Id.* at 203.

This Court struck a balance between the need to compensate injuries from wrongdoing and the effective operation of government. Litigation may burden low officials, but most low officials do not hold administrative responsibilities and are unlikely get pulled into several lawsuits at once. On the other hand, high officials must oversee governmental entities and would risk being named personally in numerous lawsuits filed against the government entity they supervise. This risk is substantial for the Governor, Attorney General, agency and department heads, wardens, mayors, council members, police chiefs, district attorneys, sheriffs, commissioners, and school superintendents.

For example, if every well-pled allegation of malicious prosecution could go forward against the Attorney General, for example, the AG could be drowned in civil litigation in order to prove their good faith in each case. The same can be said for the Secretary of Revenue for each Commonwealth tax assessment. The depositions in these cumulative cases could be seemingly endless. This Court's rationale for high official immunity has not dwindled with time; if anything, the rationale has grown just as the Commonwealth and its municipalities have grown in

population over the years. This Court should decline Plaintiffs' invitation to abandon this essential immunity.

K. Stare decisis does not require this Court to abolish all common law immunities.

Plaintiffs have an odd view of stare decisis, which would command this Court to follow their broad interpretation of *Ayala* (1973), *Mayle* (1978), and *Carroll* (1981) instead of the clear holdings of this Court's decisions before those cases in *Matson* (1952), *Montgomery* (1958), *Jonnet* (1968), and this Court's more recent decisions in *Reese* (1979), *Lindner* (1996) and *Durham* (2001). This Court has consistently applied high official immunity, and stare decisis requires that this Court continue to do so.

Even if this Court reads the language in *Ayala-Mayle-Carroll* as broadly as Plaintiffs do, this Court should not expand their holdings because, as explained above, the rationale for protecting high officials from litigation supports immunity. "Stare decisis is not an iron mold into which every utterance by a Court, regardless of circumstances, parties, economic barometer and sociological climate, must be poured, and, where, like wet concrete, it must acquire an unyielding rigidity which nothing later can change." *Ayala*, 453 Pa. at 605 (1973) (quoting *Flagiello v. Pa.*

Hosp., 417 Pa. 486, 511 (1965)). Rather, stare decisis is "a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish." *Id.* at 606. Plaintiffs do not justify rejection of the balance this Court struck by giving absolute immunity to only high officials. Stare decisis does not justify abandoning high official immunity simply because this Court abandoned common law immunity for entities.

II. Conclusion:

For these reasons, this Court should reverse the Commonwealth Court's holding that the Sheriff lacks immunity from this suit.

Respectfully submitted,

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Certificate of Word Count

I certify that this brief does not exceed 7,000 words, exclusive of the cover, pages containing the table of contents, table of citations, proof of service, signature block and anything appended to the petition as required by the rules of procedure. This certificate is based on the word count of the word processing system used to prepare the petition.

s/ Josh Autry

Dated: February 16, 2017

Certificate of Service

I certify that on this date, I served this filing by this Court's electronic filing system and by United States, First Class Mail, to:

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