

Respectfully submitted,

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By: s/ Alexander T. Korn

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. HOLBROOK,	:	
ABD'ALLAH LATEEF, TERRANCE	:	
LEWIS, MARGARET ROBERTSON,	:	No. 184 MD 2020
NATIONAL ASSOCIATION FOR THE	:	
ADVANCEMENT OF COLORED	:	
PEOPLE, NAACP PENNSYLVANIA	:	
STATE CONFERENCE,	:	
PHILADELPHIA BRANCH OF	:	
THE NAACP, UNIVERSITY OF	:	
PENNSYLVANIA CHAPTER OF THE	:	
NAACP, PROGRESSIVE NAACP, AND	:	
UNIVERSITY OF PENNSYLVANIA	:	
CHAPTER OF BEYOND ARREST:	:	
RETHINKING SYSTEMATIC-	:	
OPPRESSION,	:	
Petitioners	:	Electronically Filed Document
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, THOMAS W.	:	
WOLF, IN HIS OFFICIAL CAPACITY	:	
AS GOVERNOR OF PENNSYLVANIA;	:	
AND KATHY BOOCKVAR, IN HER	:	
OFFICIAL CAPACITY AS	:	
SECRETARY OF THE	:	
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Respondents	:	

RESPONDENTS' PRELIMINARY OBJECTIONS

The Commonwealth of Pennsylvania, Thomas W. Wolf, in his official capacity as Governor of Pennsylvania (“Governor Wolf”) and Kathy Boockvar, in her official capacity as Secretary of the Commonwealth (“Secretary Boockvar”)

(collectively, “Respondents”), hereby submit these Preliminary Objections to the February 27, 2020 Petition for Review (the “Petition”) of Robert L. Holbrook, Abd’allah Lateef, Terrance Lewis, Margaret Robertson, National Association for the Advancement of Colored People, NAACP Pennsylvania State Conference, Philadelphia Branch of the NAACP, University of Pennsylvania Chapter of the NAACP, Progressive NAACP, and University of Pennsylvania Chapter of Beyond Arrest: Rethinking Systematic-Oppression (collectively, “Petitioners”). In support of these Preliminary Objections, Respondents state the following:

INTRODUCTION

1. Petitioners argue that, in 2012, the Legislative Reapportionment Commission (the “Commission”) that existed at that time – and that no longer exists – unconstitutionally established state legislative districts. Petitioners base their claims of unconstitutionality on the fact that the Commission counted incarcerated individuals as residing in their place of incarceration, rather than their place of residence pre-incarceration. From a policy perspective, Respondents agree that those incarcerated should be counted, for purposes of establishing state legislative districts, as residing in their pre-incarceration place of residence.

2. Nevertheless, the Petition should be dismissed, as a matter of law, because Petitioners have sued (i) the wrong parties, (ii) at the wrong time, and (iii) in the wrong court.

SUMMARY OF ARGUMENT

3. Petitioners seek to challenge the legality of the apportionment plan for Pennsylvania's state legislative districts that the Commission submitted in 2012 and that the Pennsylvania Supreme Court upheld as lawful in 2013. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211 (Pa. 2013).

4. Petitioners allege that the 2012 plan counted people who were incarcerated as residents of the districts in which they were incarcerated instead of the districts in which they resided prior to incarceration. Petitioners refer to this counting method as "prison-based gerrymandering" and assert claims for declaratory and injunctive relief based on contentions that the 2012 plan violates (i) the Free and Equal Elections Clause in Article I, § 5 of the Pennsylvania Constitution, (ii) the Equal Population Mandate in Article II, § 16 of the Pennsylvania Constitution, and (iii) 25 Pa.C.S. § 1302(a). Petitioners also seek to permanently enjoin Respondents from enforcing any future apportionment plan submitted by the Commission that counts incarcerated people in the same manner as the 2012 plan.

5. The Petition should be dismissed as a matter of law because Petitioners have sued (i) the wrong parties, (ii) at the wrong time, and (iii) in the wrong court. Each of these procedural and jurisdictional defects is dispositive and provides a separate and independent basis for dismissal.

6. The process for apportioning state legislative districts is set forth in Article II, § 17 of the Pennsylvania Constitution. Neither Governor Wolf nor Secretary Boockvar is a proper party in this case because neither plays any role whatsoever in the apportionment process under Article II, § 17. Nor do they enforce or otherwise oversee that process. The Commonwealth is not a proper party for these same reasons. In addition, the Commonwealth has absolute immunity and may only be joined as a party if there is an express right of action authorized by statute. Here there is no express right of action.

7. Petitioners have also brought this action at the wrong time. To the extent Petitioners seek to challenge the plan submitted by the Commission in 2012, Petitioners' claims are untimely. Article II, § 17 requires any person "aggrieved" by a reapportionment plan to challenge the plan in the Pennsylvania Supreme Court within 30 days after the Commission files the plan. Petitioners' claims are well outside of this mandatory 30-day window. Moreover, to the extent Petitioners seek to challenge any future apportionment plan, Petitioners' claims are unripe. The Commission is constituted under Article II, § 17 every ten years following the release of federal census data and must submit a preliminary plan within 90 days, and then a final plan thereafter. Petitioners do not have standing to challenge a hypothetical future apportionment plan that has not yet been submitted by a Commission that has not yet been formed.

8. Lastly, Petitioners have brought this action in the wrong court. Article II, § 17 designates the Pennsylvania Supreme Court as the exclusive forum for challenges concerning the legality of apportionment plans. The Commonwealth Court does not have original jurisdiction over an action when a statute or constitutional provision provides that the action should be brought in a different court.

9. For these reasons, as set forth more fully below, this Court should sustain these Preliminary Objections and dismiss the Petition.

FACTUAL BACKGROUND

10. On February 27, 2020, Petitioners filed the Petition in this Court's original jurisdiction challenging the legality of the 2012 legislative apportionment plan.

11. Petitioners also purport to challenge the legality of any future legislative apportionment plan – which, by definition, does not yet exist – that counts people who are incarcerated in the same manner as the 2012 plan.

A. The Apportionment Process Under Article II, § 17 Of The Pennsylvania Constitution

12. The process for apportioning state legislative districts for the General Assembly is set forth in Article II, § 17 of the Pennsylvania Constitution.

13. Formation: The Constitution mandates that a Commission be formed “each year following the year of the Federal decennial census. . . .” Pa. Const. Art. II, § 17(a).

14. Membership: “The commission shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a chairman selected” by the initial four members. *Id.* at §17(b).¹

15. Preliminary Apportionment Plan: “[T]he commission shall file a preliminary reapportionment plan” within 90 days after the Commission is certified or after the federal census data is available, “whichever is later. . . .” *Id.* at § 17(c).

16. Final Apportionment Plan: “Any person aggrieved by the preliminary plan shall have” a “thirty-day period to file exceptions with the commission If no exceptions are filed within thirty days, or if filed and acted upon, the commission’s plan shall be final and have the force of law.” *Id.*

17. Appeals From The Final Plan: “Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the

¹ “If the four members fail to select the fifth member within the time prescribed, a majority of the entire membership of the Supreme Court within 30 days thereafter shall appoint the chairman as aforesaid and certify his appointment to such elections officer.” *Id.*

filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.” *Id.* at § 17(d).

18. The Final Plan Obtains The Force Of Law: “When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section seventeen.” *Id.* at § 17(e).

19. The Pennsylvania Supreme Court: “If a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth.” *Id.* at § 17(h).

B. The Current Apportionment Plan

20. The Commission filed the operative final apportionment plan on June 8, 2012. *See Holt*, 67 A.3d at 1214.

21. On May 18, 2013, the Pennsylvania Supreme Court held that the 2012 plan was not contrary to law and shall “have the force of law, beginning with the 2014 election cycle.” *Id.* at 1243.

22. Under Article II, § 17, the 2012 plan remains in effect until a new apportionment plan is submitted and obtains the force of law pursuant to the processes set forth therein.

23. The 2012 plan that was upheld by the Supreme Court in 2013 is the current plan that Petitioners seek to challenge in this case.

C. Petitioners’ Allegations

24. Petitioners allege that the 2012 plan counted people who were incarcerated as residents of the districts in which they were incarcerated instead of the districts in which they resided prior to incarceration. Petitioners refer to this counting method as “prison-based gerrymandering.”

25. Petitioners assert that prison-based gerrymandering artificially inflates the voting power of rural voters who live in the counties in which most correctional facilities are located. Petitioners also assert that the counting method artificially deflates voting power in urban counties where fewer correctional facilities are located. *See* Pet. ¶ 2.

26. Petitioners allege that the “ideal” population size for each Pennsylvania House of Representative district based on 2010 census data “would

contain 62,573 residents, and the ideal Senate district would contain 254,048 residents.” *Id.* at ¶ 128.

27. “The largest current Pennsylvania House district [“HD”] 71, was drawn with a population of 65,036. The largest current Pennsylvania Senate District (“SD”), SD 33, was drawn with a population of 264,160.” *Id.* at ¶ 129.

28. Petitioners allege that if the incarcerated population is subtracted from the overall populations of HD 88 and HD 123, the districts will be 10.27 and 11.19 percent smaller, respectively, “than the largest state House district.” *Id.* at ¶¶ 136-137.

29. Petitioners also allege that if the incarcerated population is subtracted from the overall population of SD 34, the “district is 10.67 percent smaller than the largest state Senate district.” *Id.* at ¶ 139.

PRELIMINARY OBJECTION I
Pa. R. Civ. P. 1028(a)(5) – MISJOINDER OF PARTIES

30. Respondents incorporate the foregoing paragraphs as if set forth at length.

31. Misjoinder objections are based on grounds that an improper party was joined in the action. *See Bell v. Beneficial Consumer Disc. Co.*, 360 A.2d 681, 687 (Pa. Super. Ct. 1976); *see also Haber v. Monroe Cty. Vocational-Tech. Sch.*, 442 A.2d 292, 294 (Pa. Super. Ct. 1982).

32. None of the Respondents in this case is a proper party and all Respondents should therefore be dismissed.

A. Governor Wolf And Secretary Boockvar Are Not Proper Parties To This Action

33. Neither Governor Wolf nor Secretary Boockvar is a proper party to this action.

34. In a declaratory and injunctive relief action like this one, a petitioner may only bring a claim against “some identifiable Commonwealth party that violated some identifiable constitutional or statutory provision.” *Brouillette v. Wolf*, 213 A.3d 341, 356 n.16 (Pa. Cmwlth. 2019).

35. Here, Petitioners do not (and cannot) allege any facts showing that Governor Wolf or Secretary Boockvar have taken any action that violated an identifiable constitutional or statutory provision relating to apportionment. That is because neither Governor Wolf nor Secretary Boockvar administer, oversee, enforce, or play any other role whatsoever in the apportionment process set forth in Article II, § 17 of the Pennsylvania Constitution.

36. Rather, the Commission and the Pennsylvania Supreme Court are the only entities responsible for apportionment.

37. Accordingly, Governor Wolf and Secretary Boockvar are not proper parties to this action and should be dismissed.

B. The Commonwealth Of Pennsylvania Is Not A Proper Party To This Action

38. The Commonwealth of Pennsylvania is also not a proper party for these same reasons.

39. In addition, “the Commonwealth of Pennsylvania, itself, which is clearly not a Commonwealth agency, . . . enjoys absolute immunity pursuant to 1 Pa.C.S. § 2310.” *Bonsavage v. Borough of Warrior Run*, 676 A.2d 1330, 1331 (Pa. Cmwlth. 1996).

40. Thus, while “[a]n action by the Commonwealth” may be brought in the name of “the Commonwealth of Pennsylvania,” an action against the Commonwealth generally may not. Pa. R. Civ. P. 2102(a).

41. There is “only” one exception – where an express “right of action” against the Commonwealth of Pennsylvania “has been authorized by statute.” Pa. R. Civ. P. 2102(a)(2), *Note (citing* CONSTITUTION of 1968, Art. I, Sec. 11, 1 Pa. C.S. § 2310) (emphasis added).

42. Here, the statutes and constitutional provisions cited by Petitioners do not expressly authorize a right of action against the Commonwealth.

43. Moreover, this is not a case in which Petitioners are challenging the constitutionality of a statute. Instead, Petitioners appear to assert that the Commonwealth should be ordered to refrain from “adopt[ing], maintain[ing], and enforce[ing]” apportionment plans that use “prison-based gerrymandering.” Pet. ¶

74. “A request that the Commonwealth be ordered to do something begs the question which of the many actors comprising state government is to be held accountable.” *Finn v. Rendell*, 990 A.2d 100, 106 (Pa. Cmwlth. 2010). “[T]he nature of the Commonwealth as an entity separate from its agencies and officers makes [Petitioners’] action a practical impossibility.” *Id.* at 105.

44. As a result, the Commonwealth of Pennsylvania is also not a proper party to this action and should likewise be dismissed.

PRELIMINARY OBJECTION II
Pa. R. Civ. P. 1028(a)(1) – LACK OF SUBJECT MATTER JURISDICTION

45. Respondents incorporate the foregoing paragraphs as if set forth at length.

46. The Commission – through its members – is an indispensable party to this action and the failure of Petitioners to name the Commission and its members as respondents deprives this Court of subject matter jurisdiction.

47. In an action for declaratory judgment, “all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

48. This requirement “is mandatory” and the failure to join an “indispensable party to a lawsuit deprives the court of subject matter jurisdiction.” *HYK Const. Co. Inc. v. Smithfield Twp.*, 8 A.3d 1009, 1015 (Pa. Cmwlth. 2010).

49. Here, the Commission and its members clearly have an interest that would be affected by a declaration regarding how the incarcerated population should be counted for purposes of apportionment. Indeed, they may be the only parties that have any such interest at all, since the Pennsylvania Supreme Court is the only other entity aside from the Commission that plays a role in the apportionment process under Article II, § 17.

50. Accordingly, the Commission and its members are indispensable parties and the Court “c[an] not properly entertain [Petitioners’] equity claims in their absence.” *HYK*, 8 A.3d at 1016.

51. The Petition should therefore be dismissed for lack of subject matter jurisdiction.

PRELIMINARY OBJECTION III
Pa. R. Civ. P. 1028(a)(4) – DEMURRER

52. Respondents incorporate the foregoing paragraphs as if set forth at length.

53. The Petition fails to plead facts that state a claim against any of the Respondents.

54. Pennsylvania is a fact-pleading state. *See* Pa. R. Civ. P. 1019(a).

55. As such, to assert a claim for declaratory or injunctive relief against Respondents “Petitioners must plead facts” showing that Petitioners were “harmed by [a] challenged action or order” by Respondents. *Bowen v. Mount Joy Twp.*, 644

A.2d 818, 821 (Pa. Cmwlth. 1994). Petitioners have not done so.

56. With respect to Governor Wolf and Secretary Boockvar, Petitioners simply cite to the constitutional and statutory provisions that form the basis for their claims and make conclusory allegations that Governor Wolf and Secretary Boockvar are responsible for “faithfully executing” and “carrying out” those laws. Pet. ¶¶ 75-76. These are general, non-descriptive allegations of purported executive duties and responsibilities; they are not allegations of state action.

57. With respect to the Commonwealth, Petitioners make conclusory allegations that it has “adopted, maintained, and enforced” the 2012 apportionment plan. *Id.* at ¶ 74. Petitioners are wrong. Under Article II, § 17 of the Pennsylvania Constitution, it is the Commission – not the Commonwealth – that adopts apportionment plans. In addition, it is the Pennsylvania Supreme Court – not the Commonwealth – that “maintains” apportionment plans by determining whether a plan “shall have the force of law” until the next reapportionment cycle. Pa. Const. Art. II, § 17(e). Nor do Petitioners allege any facts showing that an apportionment plan ever was (or could be) “enforced” by the Commonwealth.

58. Accordingly, Petitioners’ allegations are insufficient to state a claim against any of the Respondents and the Petition should be dismissed.

PRELIMINARY OBJECTION IV
Pa. R. Civ. P. 1028(a)(4) – DEMURRER

59. Respondents incorporate the foregoing paragraphs as if set forth at length.

60. Petitioners' claims are barred by the doctrine of sovereign immunity.

61. As described above, Petitioners fail to allege that any of the Respondents have taken any action or issued any order with respect to apportionment.

62. Instead, the crux of Petitioners' allegations appears to be the opposite of state action, i.e., that respondents have failed to act to "enforce" or "carry out" the constitutional and statutory provisions in the manner that Petitioners believe they should be enforced. *See* Pet. ¶¶ 74-76.

63. Thus, in terms of the relief requested, Petitioners are asking this Court to enter a permanent, mandatory injunction requiring that Respondents ensure that all legislative districts are reapportioned using Petitioners' preferred counting method for people who are incarcerated. *See Stackhouse v. Commonwealth of Pennsylvania State Police*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006) ("it is the substance of the relief requested and not the form or phrasing of the requests which guides our inquiry").

64. Petitioners' claims fail as a matter of law because "sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action

by Commonwealth officials” *Id.*

65. As a result, the Petition should be dismissed.

PRELIMINARY OBJECTION V
Pa. R. Civ. P. 1028(a)(4) – DEMURRER

66. Respondents incorporate the foregoing paragraphs as if set forth at length.

67. To the extent Petitioners seek to challenge the 2012 plan, Petitioners’ claims are untimely. *See* Pet. ¶ 166(a)-(c).

68. Article II, § 17(d) states expressly that an aggrieved person must file an appeal “to the Supreme Court within thirty days after the filing” of the final apportionment plan by the Commission in order to challenge the legality of the plan.

69. Article II, § 17(d) “is a statute of repose, rather than a statute of limitation. As a statute of repose, [Article II, § 17(d)] does not merely bar a party’s right to a remedy as a statute of limitations does, but it completely abolishes and eliminates the cause of action.” *Noll by Noll v. Harrisburg Area YMCA*, 643 A.2d 81, 84 (Pa. 1994).

70. Here, the 2012 plan challenged by Petitioners was filed by the Commission on June 8, 2012.

71. Thus, if Petitioners wanted to challenge the legality of the plan, Petitioners were required to file an appeal to the Pennsylvania Supreme Court within 30 days from June 8, 2012.

72. Petitioners' commencement of this action almost eight years after the expiration of the statute of repose in Article II, § 17(d) is fatal to their claims.

73. Thus, to the extent Petitioners seek to challenge the legality of the 2012 plan, Petitioners' claims must be dismissed.

PRELIMINARY OBJECTION VI
Pa. R. Civ. P. 1028(a)(5) – LACK OF CAPACITY TO SUE

74. Respondents incorporate the foregoing paragraphs as if set forth at length.

75. To the extent Petitioners seek to challenge the legality of any future apportionment plan, Petitioners' claims are unripe and must also be dismissed because Petitioners lack standing. *See* Pet. ¶ 166(d)-(e).

76. “[T]he doctrine of ripeness concerns the timing of a courts intervention in litigation. The basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Philadelphia Ent. and Dev. Partners, L.P. v. City of Philadelphia*, 937 A.2d 385, 392 (Pa. 2007) (internal citation omitted).

77. Factors courts consider in determining whether a claim is ripe include: “whether the claim involves uncertain and contingent events that may not occur as

anticipated or at all; the amount of fact finding required to resolve the issue; and whether the parties to the action are sufficiently adverse.” *Philips Bros. Elec. Contractors, Inc. v. Pa. Turnpike Comm’n*, 960 A.2d 941, 946-47 (Pa. Cmwlth. 2008) (quoting *Twp. of Derry v. Pa. Dep’t of Labor & Indus.*, 932 A.2d 56, 57–58 (2007)). Here, all factors weigh overwhelmingly in favor of dismissal.

78. First, Petitioners’ purported challenge of any future apportionment plan – which has yet to be submitted by a Commission that has yet to be formed – is based entirely on uncertain, contingent and speculative events that may not occur at all. Indeed, it is eminently possible that future Commissions will submit apportionment plans that count people who are incarcerated as residents of the districts where they resided prior to incarceration. This would render Petitioners’ claims moot in all respects and deprives Petitioners of standing.

79. Second, this Court would have to engage in significant fact finding to resolve the claims asserted by Petitioners. The manner in which people should be counted for purposes of the apportionment of legislative districts in general, and the counting of incarcerated populations in particular – both of which are in a constant state of flux – present a host of extraordinarily complex factual issues that are not well suited to a declaratory judgment and injunctive relief action.

80. Third, the parties to this action are not sufficiently adverse. It is the Commission that apportions state legislative districts in the Commonwealth, not

Respondents, and Respondents have no say whatsoever in the counting methods used by the Commission.

81. For these reasons, Petitioners' claims regarding any future apportionment plan are unripe and should be dismissed.

PRELIMINARY OBJECTION VII
Pa. R. Civ. P. 1028(a)(1) – LACK OF SUBJECT MATTER JURISDICTION

82. Respondents incorporate the foregoing paragraphs as if set forth at length.

83. The Commonwealth Court does not have original jurisdiction over an action when a statute or constitutional provision states that the action should be brought in a different forum. *See, e.g., Nason v. Commonwealth*, 533 A.2d 435, 436 (Pa. 1987) (original jurisdiction in Commonwealth Court was improper where the statutes at issue provided for action to be heard in Court of Common Pleas).

84. Here, Article II, § 17 states expressly that a party aggrieved by an apportionment plan must file an appeal in the Pennsylvania Supreme Court.

85. Consequently, “this Court lacks jurisdiction” because “exclusive jurisdiction lies in the Supreme Court of Pennsylvania.” *Snyder v. Judicial Inquiry and Review Bd.*, 471 A.2d 1287, 1289 (Pa. Cmwlth. 1984).

86. The Petition should be dismissed for this reason as well.

CONCLUSION

For the forgoing reasons, these Preliminary Objections should be sustained and the Petition should be dismissed.

Respectfully submitted,

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Date: May 11, 2020

Counsel for Respondents

CERTIFICATE OF COMPLIANCE

I, Alexander T. Korn, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

s/ Alexander T. Korn
ALEXANDER T. KORN

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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OFFICIAL CAPACITY AS SECRETARY :
OF THE COMMONWEALTH OF :
PENNSYLVANIA, :
Respondents :

CERTIFICATE OF SERVICE

I, Alexander T. Korn, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on May 11, 2020, I

caused to be served a true and correct copy of the foregoing document titled

Respondents' Preliminary Objections to the following:

VIA PACFILE

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s/ Alexander T. Korn
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Pennsylvania and Kathy Boockvar, in her official capacity as Secretary of the Commonwealth (the “Preliminary Objections”), the Petitioners’ response thereto, oral argument, if any, and for good cause shown, it is hereby ORDERED that the Preliminary Objections are SUSTAINED. The Petition is hereby DISMISSED.

J.