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184 MD 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert L. Holbrook, *et al.*, *Petitioners*, v. Commonwealth of Pennsylvania, *et al*., *Respondents*.	No. 184 MD 2020

[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of the Preliminary Objections to the Petition for Review submitted by Respondents the 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, and the Answer of Petitioners thereto, it is hereby ORDERED that the Preliminary Objections are OVERRULED.

BY THE COURT:

_____

J.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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: RE-THINKING SYSTEMATIC-OPPRESSION, *Petitioners*, 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*.	Docket No. 184 MD 2020

PETITIONERS' ANSWER TO THE PRELIMINARY OBJECTIONS OF RESPONDENTS

Petitioners respectfully submit this Answer to the Preliminary Objections of Respondents the Commonwealth of Pennsylvania ("the Commonwealth"), 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"). The Preliminary Objections should be overruled for the reasons set forth below.

Respondents readily concede that incarcerated persons "should be counted, for the purposes of establishing state legislative districts, as residing in their pre-incarceration place of residence." Respondents' Preliminary Objections ("Obj.") ¶ 1. Nonetheless, Respondents argue that their objections should be sustained on procedural grounds. These objections are without merit, unsupported by any authority, and contradicted by the Congressional redistricting litigation recently before this Court. *See generally League of Women Voters v. Commonwealth,* No. 261 MD 2017 (Pa. Commw. Ct. 2017). To be clear, Plaintiffs have sued proper parties, their claims remain ripe and timely, and this Court has jurisdiction over Plaintiffs' claims.

First, Governor Wolf, Secretary Boockvar, and the Commonwealth of Pennsylvania are each proper parties to this action. Pursuant to the Pennsylvania

Constitution, "supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed . . . ." Pa. Const. art. IV, § 2. Governor Wolf, as the chief executive officer of the Commonwealth, is responsible for the faithful execution of the laws of the Commonwealth, including those governing the apportionment and redistricting process that, to date, unconstitutionally implements the challenged practice of prison-based gerrymandering. Secretary Boockvar, for her part, is the Commonwealth's chief elections officer, and is explicitly part of the Article II § 17 reapportionment process. [1] The Commonwealth is also a proper party in a challenge to the constitutionality of a state law or practice, particularly a matter concerning the constitutionality of a redistricting plan. *See*, *e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018); *see generally Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002). Where Petitioners are seeking declaratory relief and to enjoin Respondents from enacting future legislative redistricting plans that violate state law, as is the case when those plans practice prison-based gerrymandering, sovereign immunity does not bar claims against the Commonwealth.

[1] *Banfield v. Cortes*, 110 A.3d 155, 174 (Pa. 2015) (describing the Secretary of the Commonwealth as "Pennsylvania's chief election official"); Pa. Const. art. II, §§17(b)-(c), (h) (setting forth duties of "the elections officer of the Commonwealth who under law shall have supervision over elections" in the Article II § 17 legislative reapportionment process).

Second, Article II § 17 does not preclude this action as time-barred or lacking in subject-matter jurisdiction. Petitioners challenge the Commonwealth's current legislative plan and the redistricting practice of prison-based gerrymandering. Petitioners do not seek to avail themselves of the Article II § 17(d) process for direct appeal from a final reapportionment plan; instead they seek declaratory and injunctive relief as to a violation of the Commonwealth's constitutional and statutory law. While Article II, § 17 imposes a minimum floor requiring the Commonwealth to perform reapportionment at least once per decade and provides a mechanism by which to do so, it does not bar courts from hearing challenges at other times and does not bar litigants from bringing reapportionment challenges in this Court through the course of constitutional litigation. Nor do Article II § 17's text or ratification history reveal any intent to make § 17 an exclusive remedy. The completion of the Article II § 17(d) appeal process does not close the courts, as Respondents suggest. Nor does it immunize legislative apportionment plans from subsequent constitutional challenge.

Indeed, Respondents' claims to the contrary are especially inapt in this case, where several present Petitioners were legally incapable of participating in the Article II § 17 appeal process in 2011-13, because they were not authorized to vote at that time, and would have no remedy for their ongoing and imminent constitutional harms if Respondents' interpretation were adopted. Respondents'

construction of Article II § 17 would drastically abrogate the scope of the "free and equal" clause of the state's constitution, rendering its text an empty promise for all but 30 days of each decade. It would also infringe on Petitioners' rights to "remedy by due course of law, and right and justice administered without . . . denial or delay." Pa. Const. art. I, § 11. Further, Respondents admit that no other court presently has jurisdiction over this lawsuit. Thus, original jurisdiction lies with this Court under Pennsylvania law.

Third, this case is fully ripe for adjudication. The issues are adequately developed, and Petitioners would suffer hardship if judicial review is delayed. By contrast, obtaining declaratory and injunctive relief through the present litigation would redress Petitioners' ongoing and imminent harms more completely and significantly sooner than if Petitioners were forced to wait years without a remedy, suffering further constitutional injuries, before bringing their claims through the post-2020 Article II § 17 process. Thus, judicial review here is also consistent with the Declaratory Judgments Act's purpose because it would "settle and . . . afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . ." between Petitioners and Respondents under the Commonwealth's constitution and statutory law. *See* 42 Pa. Cons. Stat. § 7541(a).

Paragraphs numbered 1-9 of the Preliminary Objections filed by Respondents set out averments of law that Petitioners are not required to address in their

responsive pleading pursuant to 231 Pa. Code § 1029. Petitioners address these statements of law briefly herein and set out specific responses admitting or denying Respondents' statements of fact beginning at the paragraph numbered 10.

FACTUAL BACKGROUND

10. Admitted in part and denied in part. Petitioners admit that the Petition for Review in this Court's original jurisdiction was filed on February 27, 2020. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

11. Denied. The averments in this paragraph purport to characterize the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

12. Admitted.

13. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

14. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

15. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

16. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

17. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

18. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

19. This paragraph consists of legal conclusions and quotations to which no responsive pleading is required.

20. Admitted.

21. Admitted in part and denied in part. Petitioners admit that the text quoted in this paragraph appears in the Supreme Court's decision in *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211 (Pa. 2013). However, to the extent Respondents suggest that the current apportionment plan is immunized from review in the present case because the plan has "the force of law," *see infra* ¶¶ 82-85, that is denied. The phrase "force of law" is a legal term of art denoting a governmental action that creates legal rights, relationships, and duties, in contrast to advisory or communicatory pronouncements. *See*, *e.g.*, *Shapp v. Butera*, 348 A.2d 910, 913 (Pa. Commw. Ct. 1975) (clarifying that executive orders have "the force of law" because the government "could obtain a court order and the sanctions of noncompliance with a court order to enforce [them]"). Having "the force of law" does not bar judicial review or for courts "to declare, when appropriate, certain acts unconstitutional." *League of Women Voters*, 178 A.3d at 822.

22. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners incorporate ¶ 21 above regarding the construction of the phrase, "force of law." The phrase's function in Article II § 17(e) is simply to make an approved reapportionment plan self-executing, in that it goes into effect without implementing legislation. Petitioners also submit that redistricting plans do not necessarily "remain[] in effect" for the rest of the decade after acquiring the force of law—for example, a plan may be struck down as unconstitutional before the end of the decennial period in which it was enacted. *See id.* at 801-02 (enjoining further use of a congressional redistricting plan because it "clearly, plainly and palpably violate[d]" the Pennsylvania Constitution).

23. Denied. The averments in this paragraph purport to characterize the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

24. Denied. The averments in this paragraph purport to summarize facts alleged in the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

25. Denied. The averments in this paragraph purport to summarize facts alleged in the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

26. Denied. The averments in this paragraph purport to summarize facts alleged in the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

27. Denied. The averments in this paragraph purport to summarize facts alleged in the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

28. Denied. The averments in this paragraph purport to summarize facts alleged in the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

29. Denied. The averments in this paragraph purport to summarize facts alleged in the Petition for Review, which speaks for itself. Petitioners refer to the Petition for its full and complete contents and deny anything inconsistent therewith.

PRELIMINARY OBJECTION I

30. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

31. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

32. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

33. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Governor Wolf and Secretary Boockvar are sued in their official capacities and are proper parties to this action.

34. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

35. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Respondent Wolf is the Governor of the Commonwealth and is being sued in his official capacity. As the head of the executive branch, he is responsible for the faithful execution of the laws governing the Commonwealth. Pa. Const. Art. IV, § 2. Governor Wolf's responsibilities include ensuring the execution of laws governing the redistricting process, as well as execution of the census in the Commonwealth; accordingly, Governor Wolf is inherently involved in the violation alleged by Petitioners and any remedy they seek. Respondent Boockvar is the Secretary of the Commonwealth and is being sued in

her official capacity. As the Commonwealth's chief election officer, Secretary Boockvar is expressly involved in the process of reapportioning the Commonwealth pursuant to Pa. Const. Art. II § 17. By way of further response, both Governor Wolf and Secretary Boockvar have ordered and conducted elections under the present unconstitutional map that relies on the infirm practice of prison-based gerrymandering. Moreover, both bear responsibility for overseeing efforts to ensure the accuracy and completeness of the 2020 Census in the Commonwealth, which will determine where incarcerated persons are counted. 25 Pa. Stat. and Cons. Stat. Ann. § 2628.

36. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

37. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

38. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. The Commonwealth of Pennsylvania is a proper party.

39. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this

paragraph is denied. By way of further response, "sovereign immunity . . . is not applicable to declaratory judgment actions . . ."; nor does it bar actions for prohibitory injunctive relief "where the plaintiff seeks to restrain [the performance of] an affirmative act." *Legal Capital, LLC. v. Med. Prof'l Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000) (citation omitted); see also *Wilkinsburg Police Officers Ass'n By & Through Harder v. Commonwealth,* 636 A.2d 134, 137 (Pa. 1993) (holding that "sovereign immunity poses no bar" when Petitioners seek a declaration of unconstitutionality); *Fawber v. Cohen*, 532 A.2d 429, 434 (Pa. 1987) ("Although declaratory relief does affirmatively affect the functioning of state officials administering our statutory law, it does not directly compel an affirmative act[,]" and therefore sovereign immunity does not apply). Here, Petitioners seek declaratory relief and to enjoin Respondents from adopting another legislative plan that violates the state constitution through the use of prison-based gerrymandering. This Court has made clear that sovereign immunity does not bar claims that seek prohibitory injunctions to restrain state action. *Pennsylvania Federation of Dog Clubs v. Commonwealth*, 105 A.3d 51 (Pa. Commw. Ct. 2014), *aff'd*, 115 A.3d 309 (Pa. 2015). In addition, sovereign immunity does not bar an action for declaratory judgment, as this case seeks. *Fawber v. Cohen,* 532 A.2d 429, 434 (1987) ("Although declaratory relief does affirmatively affect the functioning of

state officials administering our statutory law, it does not directly compel an affirmative act.")

40. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. Indeed, Pennsylvania Rule of Civil Procedure 422(a) states "[s]ervice of original process upon the Commonwealth or an officer of the Commonwealth, or a department, board, commission or instrumentality of the Commonwealth, or a member thereof, shall be made at the office of the defendant and the office of the attorney general by handing a copy to the person in charge thereof[;]" thus, this Rule expressly contemplates that the Commonwealth can be a respondent.

41. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. The Commonwealth has been a party in challenges to the constitutionality of a state law or practice, and, specifically, in challenges concerning the constitutionality of a reapportionment plan enacted by the Commonwealth. *See*, *e.g.*, *League of Women Voters*, 178 A.3d at 821; *Erfer*, 794 A.2d at 325.

42. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

43. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

44. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

PRELIMINARY OBJECTION II

45. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

46. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, in contrast to the Governor, the Secretary of the Commonwealth, and Commonwealth, the LRC is not a necessary or indispensable party to this action. As Respondents acknowledged in their preliminary objections, the LRC no longer exists. The 2011-12 LRC completed its work in 2013 and has been disbanded.[2] A party is generally considered indispensable "when his or her rights are so connected with the claims of the litigants that no decree

[2] *See* Pennsylvania Legislative Redistricting website, http://www.redistricting.state.pa.us/index.cfm (last visited June 10, 2020).

can be made without impairing those rights." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 581 (2003) (quoting *Sprague v. Casey,* 550 A.2d 184, 189 (1988)). Because the LRC is not presently constituted in any form, it has no enforceable interests.

47. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, "the LRC has a constitutional duty to formulate a [redistricting] plan that complies with law." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 738 (Pa. 2012). The LRC's participation in appeals does not create interests in the present case, which does not arise from the § 17 process. Insofar as the LRC, which is currently a non-existent legislative entity, has any interests or rights connected to the claims here, these interests, if any, are adequately represented by the existing Respondents, including the Commonwealth itself.

48. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

49. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

50. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

51. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

PRELIMINARY OBJECTION III

52. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

53. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

54. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is admitted.

55. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

56. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. As discussed *supra* at ¶ 35, the Governor has an inherent duty to ensure that the Commonwealth's legislative plan and elections held pursuant to the challenged reapportionment map are not held in an unconstitutional manner. *Butera*, 348 A.2d at 913 (1975) ("the Governor has that power which has been delegated to him by the Constitution and statutory provisions, or which may be implied properly from the nature of the duties imposed upon the Governor"). The Governor has violated this duty each time that he has ordered and conducted elections under the present unconstitutional map that employs prison-based gerrymandering. Moreover, Pennsylvania law specifically requires that an individual who is confined to a penal institution is considered a resident of where the individual was last registered before confinement or the individual's last known address, and not the location of the prison. 25 Pa. Cons. Stat. § 1302(a)(3). The Governor, as the head of the executive branch—which includes the Department of Corrections, which keeps records on persons incarcerated in state prisons, including their last known residence—is inherently responsible for the process of apportioning prisoners where they are incarcerated, which is unconstitutional and in violation of state law.

The duties of Secretary Boockvar, as the chief elections officer of the Commonwealth, are also clearly sufficiently set forth in the Petition. As discussed *supra* at ¶ 35, under the Pennsylvania Constitution, Secretary Boockvar is responsible for publishing the reapportionment plan and supervising elections following the reapportionment process, which as currently conducted have unconstitutionally employed prison-based gerrymandering. *See* Pa. Const. Art. II § 17 (b) & (i). Thus, both the Governor and the Secretary are responsible, in part, for Petitioners' harms and are necessary to any remedy.

57. Denied. The relief sought in this case cannot be fully granted without the Commonwealth ending its practice of using a redistricting plan that relies on prison-based gerrymandering in compliance with the declaration and prohibitory, prospective injunction sought by Petitioners. *See supra* at ¶ 41; *infra* at ¶ 63. The Commonwealth is thus a proper and necessary party. *See generally York-Adams Cty. Constables Ass'n v. Court of Common Pleas of York County*, 474 A.2d 79, 81 (Pa. Commw. 1984) ("Necessary parties are those whose presence . . . is essential if the Court is to completely resolve the controversy before it and render complete relief" (citation omitted)).

58. Denied. The Petition for Review alleges state action sufficient to state a claim.

WHEREFORE, this preliminary objection should be overruled.

PRELIMINARY OBJECTION IV

59. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

60. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

61. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

62. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

63. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners seek an injunction to prohibit the Commonwealth from adopting an unconstitutional legislative redistricting plan that employs prison-based gerrymandering. Such prohibitory injunctions are not subject to sovereign immunity. *See*, *e.g.*, *Wilkinsburg Police Officers Ass'n By and Through Harder v. Commonwealth*, 535 Pa. 425, 636 A.2d 134, 137 (1993) ("suits which simply seek to restrain state officials from

performing affirmative acts are not within the rule of immunity"). Nor is the injunctive and declaratory relief Plaintiffs seek to ensure compliance with Article I § 5 and Article II § 16 of the Pennsylvania Constitution and 25 Pa. Cons. Stat. § 1302(a)(3) subject to sovereign immunity. *See Milestone Materials, Inc. v. Dep't of Conservation & Nat. Res*., 730 A.2d 1034, 1039 (Pa. Commw. Ct. 1999) ("[T]he doctrine of sovereign immunity does not bar suits that seek to compel state officials to carry out their duties only in a lawful manner."); *supra* at ¶ 39.

64. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

65. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

PRELIMINARY OBJECTION V

66. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

67. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. Petitioners submit that their claims arise under Article I § 5 and

Article II § 16 of the Pennsylvania Constitution, as well as 25 Pa. Cons. Stat. § 1302(a)(3), and are committed to this Court's exclusive original jurisdiction by 42 Pa. Cons. Stat. §§ 7531-7541 and 42 Pa. Cons. Stat. § 761(a). *See* Pet. for Review at ¶¶ 77-78, 145-166. None of the statutes or constitutional provisions relevant to this case are subject to any statute of limitations or statute of repose. By way of further response, Petitioners incorporate ¶¶ 82-86, *infra*, as if set forth at length herein.

68. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. Respondents misperceive both the words of Article II § 17(d) and their import. In fact, Article II § 17(d) states that an aggrieved person seeking to challenge an unconstitutional legislative apportionment plan "may" obtain judicial review through that provision's appeal mechanism, not—as Respondents assert—that an aggrieved person "must" do so. *Compare* Pa. Const. art. II, § 17(d) *with* Obj. ¶ 68. Nothing in Article II § 17 suggests that its once-per-decade adjudication mechanism is the *exclusive* means of challenging the constitutionality of a reapportionment plan. By way of further response, Petitioners do not bring their claims pursuant to the process set forth in Article II §17(d). Instead, with respect to the current reapportionment plan, Petitioners bring claims under the Declaratory Judgments Act, 42 Pa. Cons. Stat. §§ 7531-7541, and 42 Pa. Cons. Stat. § 761(a), seeking a declaration that the plan's use of prison-based gerrymandering violates

Article I § 5 and Article II § 16 of the Pennsylvania Constitution and 25 Pa. Cons. Stat. § 1302(a)(3). Notably, the Declaratory Judgments Act explicitly provides that declaratory relief is "additional and cumulative to all other available remedies," with three narrow exceptions not relevant here. *See* 42 Pa. Cons. Stat. § 7541(b)-(c); *see also id*. § 7537 ("[T]he existence of an alternative remedy shall not be a ground for the refusal to proceed under this subchapter."). Thus, declaratory relief is available in the present case—and is "additional and cumulative" to whatever remedies may or may not be available through the Article II § 17(d) appeal process. *See* Pet. for Review at ¶¶ 77-78, 145-66. By way of further response, Petitioners incorporate ¶¶ 82-86, *infra*, as if set forth at length herein.

69. Admitted in part and denied in part. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, Petitioners admit that Article II § 17(d) contains a statute of repose, but deny that it has any bearing on their claims. As discussed *supra* at ¶ 68, Article II § 17's timing provisions apply only within the narrow scope to which they are directed—that is, only to "an appeal from the final plan directly to the Supreme Court" brought through the procedures set forth therein. *See* Pa. const. art II, § 17(d). In an action not arising under Article II § 17(d), that subsection's timing provisions cannot be construed to close the courts and dispossess voters of their constitutional rights under Article I § 5 and Article II § 16. Thus, Petitioners deny that Article II §

17's timelines are relevant to the present litigation. By way of further response, Petitioners incorporate ¶¶ 82-86, *infra*, as if set forth at length herein.

70. Admitted.

71. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners do not seek to avail themselves of the Article II § 17(d) appeal process. Instead, Petitioners bring claims under 42 Pa. Cons. Stat. §§ 7531-7541, and 42 Pa. Cons. Stat. § 761(a) seeking a declaration that the Commonwealth's use of the practice of prison-based gerrymandering violates Article I § 5 and Article II § 16 and 25 Pa. Cons. Stat. § 1302(a)(3). *See* Pet. for Review at ¶¶ 77-78, 145-66. None of these statutes or constitutional provisions are subject to any statute of limitations or statute of repose. Article II § 17's timing provisions have no effect on the availability of judicial review in cases, like this one, brought under different constitutional provisions and on different jurisdictional grounds. The completion of the Article II § 17(d) appeal process does not close the courts to all litigants for the remainder of the decade, nor does it immunize legislative apportionment plans from subsequent constitutional challenge. As set forth below at ¶ 85, Respondents' interpretation of Article II § 17 is contrary to the reapportionment provisions' text and ratification history unsupported by any authority, and would unjustifiably abrogate Petitioners'

enumerated rights to "free and equal" elections under Article I § 5 and to "remedy by due course of law" and "justice administered without . . . denial or delay" under Article I § 11. By way of further response, Petitioners incorporate ¶¶ 82-86, *infra*, as if set forth at length herein.

72. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. Petitioners do not seek to avail themselves of the Article II § 17(d) appeal process. Instead, Petitioners bring their claims under the Declaratory Judgments Act, 42 Pa. Cons. Stat. §§ 7531-7541, and 42 Pa. Cons. Stat. § 761(a), and seek a declaration that the Commonwealth's use of the practice of prison-based gerrymandering violates Article I § 5 and Article II § 16 of the Pennsylvania Constitution and 25 Pa. Cons. Stat. § 1302(a)(3). *See* Pet. for Review at ¶¶ 77-78, 145-66. None of the statutes or constitutional provisions relevant here is subject to any statute of limitations or statute of repose. Respondents misperceive this case in claiming that it is governed by the timing provisions of Article II § 17(d). By way of further response, Plaintiffs incorporate ¶¶ 82-86, *infra*, as if set forth at length herein.

73. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Plaintiffs incorporate ¶¶ 82-86, *infra*, as if set forth at length herein.

WHEREFORE, this preliminary objection should be overruled.

PRELIMINARY OBJECTION VI

74. The foregoing paragraphs are incorporated by reference as if set forth fully herein.

75. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners' claims are fully ripe for adjudication. Petitioners seek both declaratory and injunctive relief as to a reapportionment practice that is currently in force and which renders the current reapportionment plan unconstitutional. *See*, *e.g.*, *Phantom Fireworks Showrooms, LLC v. Wolf,* 198 A.3d 1205, 1218 (Pa. Commw. Ct. 2018) (finding matter ripe for adjudication where law was already in force). By way of further response, the declaratory relief Petitioners seek would eliminate uncertainty about the correct interpretations of Article I § 5, Article II § 16, and 25 Pa. Cons. Stat. § 1302 and make a "lengthy, costly, and inefficient" Article II § 17(d) appeal on these questions unnecessary. *See Bayada Nurses, Inc. v. Commonwealth Dep't of Labor & Indus.*, 8 A.3d 866, 876 (Pa. 2010) (finding these considerations relevant to the ripeness inquiry). Further, a declaratory judgment from this Court that prison-based gerrymandering is unconstitutional would provide a clear mandate for Respondents to take certain actions *now*, before the Article II § 17 process begins, to facilitate a

constitutionally valid post-2020 legislative reapportionment and redress Petitioners' injuries sooner and more fully than would otherwise be possible. Specifically, the declaratory judgment Petitioners seek here would clarify that Respondents have a mandate to (1) request the optional data product the Census Bureau provides, on request, to assist states in reallocating their incarcerated populations, and submit the required data file in the Census Bureau's specified format;[3] (2) ensure that the Commonwealth's records on the pre-incarceration homes or voter-registration addresses of incarcerated people are as complete and accurate as possible; and (3) appropriately adjust population data from the 2020 Census as soon as it is reported pursuant to 13 U.S.C. § 141, before the post-2020 LRC starts its work. Thus, the relief sought by Petitioners would cause their constitutional injuries to be redressed much sooner and more completely than if they were forced to wait for judicial review until the next time the § 17(d) process is available—which will likely several years from now, after the 2020, 2022, and perhaps 2024 elections. *See* Pa. Const. art. II, §

[3] *See* Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5528 (Feb. 8, 2018) ("The Census Bureau works closely with the states and recognizes that some states have decided, or may decide in the future, to 'move' their prisoner population back to the prisoners' pre-incarceration addresses for redistricting and other purposes. Therefore, following the 2020 Census, the Census Bureau plans to offer a product that states can request, in order to assist them in their goals of reallocating their own prisoner population counts. Any state that requests this product will be required to submit a data file (indicating where each prisoner was incarcerated on Census Day, as well as their pre-incarceration address) in a specified format. The Census Bureau will review the submitted file and, if it includes the necessary data, provide a product that contains supplemental information the state can use to construct alternative within-state tabulations for its own purposes.").

2.[4] If judicial review is delayed, Petitioners will suffer hardship by being deprived of any remedy during those years. Such a delay is unjustified here because the relevant issues—including the constitutional rights and injuries at stake—are already fully developed. These considerations point to the conclusions that Petitioners' claims are ripe and that standing is satisfied. *See Bayada Nurses*, 8 A.3d at 874 ("When determining whether a matter is ripe for judicial review, courts 'generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed.'").[5]

76. Denied. The averments in this paragraph purport to summarize a legal opinion, which speaks for itself. Petitioners refer to the opinion for its full and complete contents and deny anything inconsistent therewith.

77. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners incorporate ¶ 75, *supra*, as if set forth at length herein.

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[4] As a result of the COVID-19 pandemic, the Census Bureau currently projects that it will report population data to the states four months later than in past decades—which will further delay the availability of any remedy through the Article II § 17(d) appeal process. *See* U.S. Census Bureau, *2020 Census Operational Adjustments Due to COVID-19* at 3 (May 7, 2020), https://2020census.gov/content/dam/2020census/materials/news/2020-census%20operational-adjustments-long%20version.pdf.

[5] Granting declaratory relief in the present action is thus consistent with the Declaratory Judgements Act's stated purpose: "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations" between Petitioners and Respondents under the Commonwealth's constitution and statutory law. *See* 42 Pa. Cons. Stat. § 7541(a).

78. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners seek declaratory relief from the prison-based gerrymandering practice that is currently in place and has been employed in each state legislative election since its enactment in 2012. Moreover, Respondents' arguments about a hypothetical set of facts that could render this case moot are speculative and without merit. Respondents overlook the exceptions to the mootness doctrine that apply, as here, "when the case involves questions of great public importance," or "when a party to the controversy will suffer some detriment without the court's decision." *Saucon Valley Sch. Dist. v. Robert O.*, 785 A.2d 1069, 1073 (Pa. Commw. Ct. 2001). Here, the dilution of Petitioners' and other Pennsylvanians' voting and representational rights are clearly "questions of great public importance . . . ." *Id.* And Petitioners would suffer further injury without a decision by this Court, because they would be denied any remedy for their ongoing and imminent constitutional harms until the termination of the post-2020 Article II § 17 appeal process, which would not produce a constitutional map until, at best, several years into the decade—likely after elections for the General Assembly have taken place in 2020, 2022, and 2024. *See* Pet. for Review at ¶¶ 16-73 (detailing harms suffered by Petitioners); Obj. at ¶ 3 (noting that the post-2010 Article II § 17 appeals process continued into mid-2013); *supra* ¶ 75 & n.4 (noting operational delays to

the 2020 Census that will impact redistricting timelines). Such a denial or delay would subject Petitioners to further and irreparable violations of their voting and representational rights. *See infra* ¶ 85(d); Pet. for Review at ¶¶ 16-73. In addition, it would infringe on Petitioners' rights to "remedy by due course of law, and right and justice administered without . . . denial or delay." Pa. Const. art. I, § 11; *see Yanakos v. UPMC*, 218 A.3d 1214, 1222 (Pa. 2019) (describing the right to remedy as "an important right" given its historical significance and enumeration in the Constitution); *DeGrossi v. Commonwealth Dep't of Transp.,* 174 A.3d 1187, 1192-93 (Pa. Commw. Ct. 2017) (holding that it is appropriate under Article I § 11 to consider harms caused by delays in the administration of justice).

79. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. By way of further response, this Court need not decide "[t]he manner in which people should be counted for purposes of the apportionment of legislative districts in general [or] the counting of incarcerated populations in particular." Obj. at ¶ 79. Petitioners respectfully submit that 25 Pa. Cons. Stat. § 1302(a)(3) *already* dictates "[t]he manner in which people should be counted" by requiring that incarcerated people be deemed residents of their pre-incarceration home or voter-registration addresses for electoral purposes, including redistricting. On that basis, and because prison-based gerrymandering dilutes the voting and representational rights of Petitioners and other Pennsylvanians,

Petitioners request that this Court declare the Commonwealth's current system of prison-based gerrymandering a violation of Pennsylvania's constitution and statutory law. By way of further response, this Court routinely engages in substantial fact-finding for matters seeking declaratory and injunctive relief and is fully capable of undertaking such an exercise in this case. Factual or legal complexity "is not a ground upon which a court may or should abridge rights explicitly guaranteed in the Declaration of Rights." *Robinson Township v. Commonwealth*, 83 A.3d 901, 949 (Pa. 2013)

80. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Petitioners and Respondents are sufficiently adverse: Petitioners seek relief from Pennsylvania's prison-based gerrymandering practice, while Respondents are substantially responsible for the execution of that scheme and the administration of elections pursuant thereto. By way of further response, Petitioners incorporate ¶¶ 30-44 as if fully set forth herein.

81. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

PRELIMINARY OBJECTION VII

82. Petitioners incorporate the foregoing paragraphs as if fully set forth herein.

83. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, *Nason v. Commonwealth*, 533 A.2d 435, 436 (Pa. 1987), concerns "an appeal by a trust beneficiary and its trustees seeking public funds for interim care," *id.*, and has no relevance here. No case, statute, or constitutional provision states that the present action should be brought in a different forum. This case is committed to the exclusive original jurisdiction of the Commonwealth Court under 42 Pa. Cons. Stat. § 761(a), because it is a civil action against the Commonwealth government and officers of the Commonwealth government acting in their official capacities, and under the Declaratory Judgments Act, 42 Pa. Cons. Stat. §§ 7531-7541; and because it challenges the legality of prison-based gerrymandering pursuant to Article I § 5 and Article II §16 of the Pennsylvania Constitution and to 25 Pa. Cons. Stat § 1302(a)(3).[6] *See* Pet. for Review at ¶¶ 77-78.

[6] 42 Pa. Cons. Stat. § 725(1) provides that "[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of . . . [the] Legislative Reapportionment Commission," but this case is *not* an appeal from a final order of the Legislative Reapportionment Commission. Instead, it is a civil action under 42 Pa. Cons. Stat. § 761(a) against the Commonwealth government and officers of the Commonwealth government acting in their official capacities, and a petition for

84. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, Respondents misread the text and effect of Article II § 17. The provision in fact states that an aggrieved person seeking to challenge a legislative apportionment plan "may" obtain judicial review through its procedures, not—as Respondents assert—that an aggrieved person "must" do so as the exclusive means of challenging such a plan. *Compare* Pa. const. art. II, § 17(d) *with* Obj. ¶ 84; *see also supra* at ¶ 68. Further, as Respondents admit, Article II § 17(d)'s 30-day period has elapsed for the post-2010 redistricting cycle, meaning that it is now jurisdictionally impossible to file a § 17(d) challenge with the Pennsylvania Supreme Court. Thus, the Supreme Court does not presently have any form of original jurisdiction—let alone *exclusive* original jurisdiction—over challenges to legislative reapportionment plans. Instead, exclusive original jurisdiction lies with this Court. *See* Pet. for Review at ¶¶ 77-78.

85. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied. By way of further response, *Snyder v. Judicial Inquiry & Review Bd.*, 471 A.2d 1287, 1288 (Pa. Commw. 1984), concerns an attempt by a

review in the nature of declaratory relief under the Declaratory Judgments Act. Pet. for Review at ¶¶ 77-78.

sitting judge to enjoin an ethics investigation into his conduct, *id*., and has no relevance here. Petitioners' claims are committed to this Court's exclusive original jurisdiction under 42 Pa. Cons. Stat. § 761(a) and 42 Pa. Cons. Stat. §§ 7531-7541. *See* Pet. for Review ¶¶ 77-78; *supra* at ¶ 83. Although Article II § 17 provides an alternative means of obtaining judicial review of a legislative reapportionment plan at the beginning of the redistricting cycle, before such a plan goes into effect, it does not deprive this Court of jurisdiction over constitutional challenges to apportionment plans brought on other grounds outside of § 17's timelines.[7] Particularly where, as here, Petitioners were legally incapable of participating in the § 17(d) appeals process in 2011-13, such a result would be a radical abrogation of Article I § 5's scope and would undermine the constitutional right to remedy. *See infra* at ¶ 85(c)-(d). Respondents ask this Court to find in Article II § 17 a jurisdiction-stripping clause that closes the courts to an entire category of constitutional litigation outside of a 30-day window once per decade. No such clause exists. As set forth in ¶¶ 85(a)-(d), nothing in the provision's text, ratification history, relevant case law, or the Pennsylvania Supreme Court's rules of construction supports Respondents' "cramped construction of the Pennsylvania constitution."[8]

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[7] Declaratory relief, which Petitioners seek here, is explicitly "additional and cumulative to all other available remedies . . ." 42 Pa. Cons. Stat. § 7541(b); *see also id*. § 7537 ("[T]he existence of an alternative remedy shall not be a ground for the refusal to proceed under this subchapter.").

[8] *See Stilp v. Commonwealth Gen. Assemb.*, 974 A.2d 491, 498 (Pa. 2009).

(a) Respondents' arguments fail, first, on textual grounds. Article II § 17 says *nothing* about cases based on other jurisdictional grounds than § 17(d), or cases filed at other times than § 17(d)'s 30-day period. Yet Respondents construe its silence on those questions as a sweeping abrogation of the judicial power. Respondents are wrong. If Article II § 17 was intended to abrogate this Court's jurisdiction over cases arising outside of the § 17(d) process, or to grant exclusive jurisdiction over such cases to the Supreme Court, its text would express that intent in "clear and unequivocal language." *Delaware River Port Auth. v. Pa. Pub. Util. Comm'n*, 145 A.2d 172, 175 (Pa. 1958). But Article II § 17 expresses no intent to limit jurisdiction in cases like this one. To argue otherwise, Respondents read words and requirements into Article II § 17 that are not there—which Pennsylvania courts may not do. *See JP Morgan Chase Bank N.A. v. Taggart*, 203 A.3d 187, 198 (Pa. 2019) (an interpretation that relies on adding absent words is not reasonable); *Johnson v. Lansdale Borough*, 146 A.3d 696, 711 (Pa. 2016) (Although courts "must listen attentively to what [a provision] says," they must also listen "to what it does not say."). Here, Article II § 17 should be given effect without adding words or assuming a jurisdiction-stripping intent expressed nowhere in its text. A plain reading of § 17 simply establishes a constitutional mechanism to reapportion the Commonwealth and provides a non-exclusive opportunity for

judicial review before a reapportionment plan goes into effect. Whatever limits it may impose on appeals brought under § 17(d) apply only within that narrow context.

(b) Second, the ratification history of Article II § 17 reveals no intent to restrict jurisdiction over cases arising outside of the § 17(d) process. When analyzing the intent behind a constitutional provision, Pennsylvania courts focus on "the intent of voters who ratified the constitution." *Robinson Township v. Commonwealth*, 623 Pa. 564, 635 (Pa. 2013). A court's goal is to interpret the text "insofar as possible in terms of its spirit and intention." *Stilp v. Commonwealth Gen. Assemb.*, 974 A.2d 491, 495 (Pa. 2009) (citation omitted). Given the importance of respecting the citizens' understanding of an amendment they adopt, courts interpret provisions consistent with the meaning of the constitution "in its popular sense, as understood by the people when they voted on its adoption." *Ieropoli v. AC & S Corp*., 842 A.2d 919, 925 (Pa. 2004) (citation omitted). To determine intent, Pennsylvania courts look to "the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history." *League of Women Voters*, 178 A.3d at 802-803 (Pa. 2018) (citations omitted). None of these sources support Respondents' argument that Article II § 17 was intended to limit subject-matter jurisdiction in

reapportionment cases by closing the courts to any such cases raised outside of the § 17(d) process. Indeed, there is no evidence that the voters or delegates even considered the possibility that a later interpreter would claim Article II § 17 stripped the courts of jurisdiction over reapportionment cases outside of § 17(d)'s narrow frame. To the contrary, the record suggests that voters adopted the provision to *increase* the power of the judiciary in order to combat the "mischief" of continued legislative inaction and ensure that all legislative elections were conducted from constitutional maps.[9] The impetus for Article II § 17's adoption was the General Assembly's refusal to perform its constitutionally mandated duty to reapportion the Commonwealth. As the chair of the 1968 Constitutional Convention's task force on legislative reapportionment recounted in introductory remarks at the convention, Pennsylvania's legislature had evinced "wholesale disregard . . . for the requirements of the state constitutions for periodic redistricting after each

[9] Contemporaneous newspaper accounts suggest that voters understood themselves as combatting legislative dereliction, not limiting judicial oversight. Newspapers described the reapportionment amendments put to the voters as seeking to "prevent the redistricting partisanship which riddled the Legislature in 1963," *Five Amendments to the Pennsylvania Constitution*, DELAWARE COUNTY (PA.) DAILY TIMES (Apr. 19, 1968), and a "necessary change" in light of recent Supreme Court rulings. *League of Women Voters Backs Five Questions on Primary Ballot*, STANDARD-SPEAKER (Apr. 17, 1968). None of these sources stated any awareness of or support for a possible interpretation of the future Article II § 17 that would shield state legislative maps from constitutional challenge for all but 30 days of the decade.

decennial census and for fair apportionment of legislative seats."[10] At the time of the U.S. Supreme Court's foundational redistricting decisions, such as *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), districts in Pennsylvania's Senate had not been redrawn since 1921.[11] After *Sims*, the Pennsylvania Supreme Court held "one-person, one-vote" principles justiciable under the Commonwealth's constitution, but allowed lawmakers an opportunity to enact new maps to remedy the constitutional deficiency. *Butcher v. Bloom*, 415 Pa. 438, 446-47 (Pa. 1964) ("*Butcher I*"). When the General Assembly failed to act, the Supreme Court stepped in, "pursuant to [its] retained jurisdiction," to fashion "a constitutionally valid legislative apportionment . . ." *Butcher v. Bloom*, 420 Pa. 305, 309 (Pa. 1966) ("*Butcher II*"). It was against this backdrop that voters authorized a limited constitutional convention in 1968.[12] These historical circumstances suggest that the ratifying voters intended first and foremost to ensure that Pennsylvania's legislative maps comported with constitutional requirements,

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[10] Statement of Delegate David Stahl, in *Debates of the Pennsylvania Constitution Convention of 1967-68*: Volume I, at 29 (1968). Delegate Stahl explicitly linked the convention to the U.S. Supreme Court's reapportionment decisions, which "ha[d] given impetus to the move for constitutional reform in many states, including Pennsylvania." *Id.* at 30.

[11] *See* Mark Turzai, Rodney A. Corey & James G. Mann, *The Protection Is in the Process: he Legislative Reapportionment Commission, Communities of Interest, and Why Our Modern Founding Fathers Got It Right*, 4 U. Pa. J. L. & Pub. Aff. 353, 359 (2019).

[12] *See* Pa. Bar Assoc., Constitutional Review Comm'n, *Pennsylvania's Constitution: A Brief History*, http://www.pabar.org/crc/history.asp (last visited June 9, 2020).

including emerging rules such as "one person, one vote." They reveal no intent to erect the Article II § 17 process as an exclusive remedy that would bar any other form of constitutional reapportionment challenge. Indeed, as the *Butcher* cases show, new constitutional doctrines on reapportionment may emerge mid-decade, and courts should be prepared to respond. Thus, it would be inconsistent with the voters' intent to interpret § 17 as abolishing jurisdiction for apportionment cases raised later in the decade, outside of the § 17(d) process.

(c) Third, Respondents' interpretation of Article II § 17 would abrogate Petitioners' rights under other constitutional provisions and undermine the judiciary's role in Pennsylvania's constitutional structure. A Pennsylvania court "must strive in its interpretation to give concomitant effect to all constitutional provisions." *In re Bruno*, 101 A.3d 635, 660 (Pa. 2014). And, in interpreting constitutional provisions, Pennsylvania courts take special care to avoid abrogating enumerated rights. *See*, *e.g.*, *Robinson Township,* 83 A.3d at 949. Accordingly, a court should identify the scope of an enumerated right and step in to enforce it as "a limitation on the state's power to act contrary to this right." *Id*. at 951. Protecting enumerated rights, indeed, is one of the Pennsylvania judiciary's core functions, a responsibility it uniquely assumes. *See*, *e.g.*, *Bruno*, 101 A.3d at 660. Thus, Article II § 17

cannot be interpreted to abrogate the scope of Pennsylvanians' rights under Article I § 5, the Free and Equal Elections Clause. This clause provides an enumerated right that is both explicit and expansive in its reach, "mandat[ing] clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be 'free and equal.'" *League of Women Voters*, 178 A.3d at 804. (emphasis in original). The Supreme Court has held that the Free and Equal Elections Clause "should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so." *Id.* at 814. Respondents' construction of Article II § 17 would drastically abrogate the scope of Article I § 5, rendering its text an empty promise for all but 30 days of each decade. And by closing the courts to such claims, Respondents' arguments would also impermissibly abrogate Article I § 11's enumerated guarantee that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Pa. Const. art. I, § 11. Thus, Respondents' jurisdictional arguments should be rejected.

(d) Fourth, Respondents' construction of Article II § 17 should be rejected because it would lead to an absurd or unreasonable result. *See* 1 Pa. Cons. Stat. § 1922(1) (instructing courts to presume "[t]hat the General Assembly does not intend a result that is absurd . . . or unreasonable."); *League of Women Voters*, 178 A.3d at 802 (approving the use of 1 Pa. Cons. Stat. § 1922 to review a constitutional provision). According to Respondents, Article II § 17 gives this Commonwealth's people only *one month per decade* to seek judicial review of legislative apportionment plans. For the remaining 119 months, Respondents claim, neither this Court *nor any other court* may hear cases about reapportionment plans, even when those cases raise constitutional claims. This result is absurd and unreasonable. It contradicts two centuries of precedent affirming the right and duty of Pennsylvania courts to declare when a law—or an apportionment plan with the force of law—is "repugnant to the constitution." *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 469 (Pa. 1948); *see League of Women Voters*, 178 A.3d at 822; *see also Respublica v. Duquet*, 2 Yeates 493, 501 (Pa. 1799). The absurdity is further demonstrated by the fact that several of the present Petitioners were legally incapable of participating in the Article II § 17(d) appeals process in 2011-13 and would effectively have no remedy for their constitutional harms if Respondents' interpretation were adopted. For example, Petitioners Robert L. Holbrook,

Abd'allah Lateef, and Terrance Lewis were incarcerated—and thus ineligible to vote—during the entirety of the post-2010 redistricting process, when § 17(d)'s 30-day window was last open. Pet. for Review ¶¶ 18-20, 28-32; 37-40. Lacking the right to vote, they also lacked standing to participate in the Article II § 17(d) process under the Supreme Court's holding in *Albert v. 2001 Legislative Reapportionment Comm'n*, which limits standing in such challenges to authorized voters. 790 A.2d 989, 995 (Pa. 2002). In 2018, 2017, and 2019, respectively, Petitioners Holbrook, Lateef, and Lewis were released from incarceration. Pet. for Review ¶¶ 21, 30, 40. They subsequently registered to vote. *Id*. ¶¶ 23, 32, 43. But Article II § 17(d)'s 30-day window was already closed by the time they became eligible voters. Similarly, during the post-2010 redistricting process, members of Petitioner organizations the University of Pennsylvania Chapter of the NAACP ("UPenn NAACP"), the Progressive NAACP,[13] and University of Pennsylvania Chapter of Beyond Arrest: Rethinking Systematic-Oppression ("UPenn Bars") were too young to be eligible to register to vote or have standing to appeal the redistricting plans pursuant to Article II § 17(d). *Id.* ¶¶ 63, 67, 72. Yet all Petitioners are suffering

[13] All members of Petitioner organizations the UPenn NAACP and the Progressive NAACP are also members of Petitioner organizations the National Association for the Advancement of Colored People ("NAACP") and the NAACP Pennsylvania State Conference ("Pennsylvania NAACP"). *See* Pet. for Review at ¶ 61 & n.7; ¶ 65 & n.8.

ongoing and imminent future harms to their voting and representational rights under Article I § 5 and Article II § 16. *Id.* ¶¶ 16-73. Petitioners' only available recourse is the present action. Respondents' interpretation of Article II § 17, by foreclosing this recourse, would deny or significantly delay any remedy, thus infringing Petitioners' rights to "remedy by due course of law, and right and justice administered without . . . denial or delay." Pa. Const. art. I, § 11. Thus, Respondents' interpretation should be rejected as absurd or unreasonable.

86. Denied. The averments in this paragraph are conclusions of law to which no responsive pleading is required. To the extent a response is required, this paragraph is denied.

WHEREFORE, this preliminary objection should be overruled.

Dated: June 10, 2020

Respectfully submitted,

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VERIFICATION

I, Robert L. Holbrook, hereby state:

1. I am a petitioner in this action;
2. I verify that the statements made in the foregoing Answer to Preliminary Objections are true and correct to the best of my knowledge, information, and belief; and
3. I understand that the statements in said Answer to Preliminary Objections are subject to the penalties of 18 Pa. Cons. Stat. § 4904 relating to unsworn falsification to authorities.

Signed: Robert L. Holbrook

Dated: June 10, 2020

VERIFICATION

I, Anson Asaka, on behalf of National Association for the Advancement of Colored People, hereby state:

1. I am a petitioner in this action;
2. I verify that the statements made in the foregoing Answer to Preliminary Objections are true and correct to the best of my knowledge, information, and belief; and
3. I understand that the statements in said Answer to Preliminary Objections are subject to the penalties of 18 Pa. Cons. Stat. § 4904 relating to unsworn falsification to authorities.

Signed: 

Dated: June 10, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020 a true and correct copy of the foregoing Answer to Preliminary Objections was served on the following persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121 and 1514(c):

Service via by first-class mail addressed as follows**:**

Commonwealth of Pennsylvania
Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

Governor Thomas W. Wolf
Office of the Governor
508 Main Capitol Building
Harrisburg, PA 17120

Secretary Kathy Boockvar
Pennsylvania Department of State
Office of the Secretary
302 North Office Building
Harrisburg, PA 17120

/s/ Kahlil C. Williams
Kahlil C. Williams
Pa. Bar ID 325468

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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: RE-THINKING SYSTEMATIC-OPPRESSION, *Petitioners*, 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*.	No. 184 MD 2020

CERTIFICATE OF COMPLIANCE

I 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 of confidential information and documents differently than non-confidential information and documents.

Dated: June 10, 2020

/s/ Kahlil C. Williams
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