IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. HOLBROOK, et al.	**:**	
	:	
Petitioners	**:**	**No. 184 MD 2020**
v.	**:**	
	:	**Electronically Filed Document**
COMMONWEALTH OF	**:**	
PENNSYLVANIA, et al.,	**:**	
Respondents	**:**	

RESPONDENTS' BRIEF IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS

Respectfully submitted,

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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 this brief in support of their 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").

PRELIMINARY STATEMENT

Petitioners argue that, in 2012, the Legislative Reapportionment Commission (the "Commission") that existed at that time – and that no longer exists – established state legislative districts that violated the Pennsylvania Constitution. 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. Petitioners refer to this counting method as "prison-based gerrymandering." 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. However, the Pennsylvania Constitution provides the process by which the Commission establishes state legislative districts and also the mechanism for aggrieved parties like Petitioners to assert challenges to reapportionment plans submitted by the Commission. Thus, while Respondents agree with Petitioners as a matter of policy, Petitioners have not asserted viable constitutional claims against these Respondents at this time and in this Court.

The process for apportioning state legislative districts is set forth in Article II, § 17 of the Pennsylvania Constitution. Under the express terms of the Constitution it is the Commission – and not Respondents – that determines how incarcerated individuals should be counted for purposes of state legislative reapportionment. In addition, Article II, § 17 provides a precise timeframe in which, and a specific mechanism by which, aggrieved individuals like Petitioners may raise challenges to reapportionment plans in the Pennsylvania Supreme Court. Indeed, the plan submitted by the Commission in 2012 that Petitioners seek to challenge in this case has already been upheld as lawful by the Court in 2013. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211 (Pa. 2013).

Petitioners contend that the requirements in Article II, § 17 are optional and that they can disregard these requirements by asserting claims for declaratory and injunctive relief against these Respondents in this Court seven years after the

operative reapportionment plan has been approved by the Pennsylvania Supreme Court. As support Petitioners cite to *League of Women Voters v. Commonwealth*, No. 261 MD 2017 (Pa. Cmwlth. 2017), in which certain individuals brought a successful challenge to Pennsylvania's federal congressional redistricting plan. *See* Answer at 2. But *League of Women Voters* is inapposite because congressional redistricting and state legislative reapportionment are two very different things. "Pennsylvania's congressional districts are drawn by the state legislature as a regular statute, subject to veto by the Governor." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 742 (Pa. 2018). Thus, individuals may bring claims challenging the constitutionality of Pennsylvania's congressional redistricting plan against state parties in this Court just as they could with respect to any other "regular statute." "By contrast, the state legislative lines are drawn by a five-member commission pursuant to the Pennsylvania Constitution." *Id*. at 742 n.11 (citing Pa. CONST. art. II, § 17) (emphasis added). Thus, Petitioners must follow the constitutionally established adjudicatory framework and may not bring claims challenging Pennsylvania's state legislative reapportionment plan against these Respondents at this time and in this Court.

Accordingly, the Petition should be dismissed because Petitioners have brought this suit against (i) the wrong parties, (ii) at the wrong time, and (iii) in the wrong court.

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

STATEMENT OF JURISDICTION

This Court does not have jurisdiction over this action for the reasons set forth below.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

"In ruling on preliminary objections," the Court should "accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that [it] may draw from the averments." *Highley v. Dep't of Transportation*, 195 A.3d 1078, 1082 (Pa. Cmwlth. 2018). "The Court however is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review." *Id*. The Court should sustain preliminary objections when "the law makes clear that the petitioner[s] cannot succeed on [their] claim[s]." *Id*. at 1083.

STATEMENT OF QUESTIONS INVOLVED

I. Should the Petition be dismissed when (i) none of the Respondents is a proper party to this action; (ii) Petitioners fail to plead facts that state a claim against any of the named Respondents; (iii) Petitioners' claims against Respondents are barred by the doctrine of sovereign immunity; and (iv) the Commission through its members is an indispensable party that has not been named as a respondent by Petitioners?

Suggested answer: yes.

II. Should the Petition be dismissed when (i) Petitioners' claims concerning the 2012 reapportionment plan are untimely and (ii) Petitioners' claims concerning any future reapportionment plan are unripe?

Suggested answer: yes.

III. Should the Petition be dismissed when the Pennsylvania Constitution designates the Pennsylvania Supreme Court as the exclusive forum for challenges concerning the legality of state legislative reapportionment plans?

Suggested answer: yes.

STATEMENT OF THE CASE

On February 27, 2020, Petitioners filed the Petition in this Court's original jurisdiction challenging the legality of the 2012 legislative reapportionment plan. Petitioners also purport to challenge the legality of any future legislative reapportionment 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

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

- 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).

- 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]

- 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).

- Final Apportionment Plan: "Any person aggrieved by the preliminary plan shall have" a "thirty-day period to file exceptions with the commission . . . .

[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*.

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*.

- 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 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).

- 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).

- 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

The Commission filed the operative final reapportionment plan on June 8, 2012. *See Holt*, 67 A.3d at 1214. 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. Under Article II, § 17(e), the 2012 plan remains in effect until a new reapportionment plan is submitted and obtains the force of law pursuant to the processes set forth therein.

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

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." 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 and artificially deflates voting power in urban counties where fewer correctional facilities are located. *See* Petition ¶ 2.

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. "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. 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. 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.

D. Petitioners' Claims

Based on the foregoing allegations, Petitioners 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 reapportionment plan submitted by the Commission that counts incarcerated people in the same manner as the 2012 plan.

SUMMARY OF ARGUMENT

The Petition should be dismissed because Petitioners have brought this suit against (i) the wrong parties, (ii) at the wrong time, and (iii) in the wrong court.

Petitioners have brought suit against the wrong parties. Neither Governor Wolf nor Secretary Boockvar is a proper party in this case because neither plays any role whatsoever in the reapportionment process under Article II, § 17. Nor do they enforce or otherwise oversee that process. The Commonwealth is not a proper party because it 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.

Petitioners have brought suit 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 file an exception with the Commission within 30 days after the Commission submits a preliminary plan and then an appeal in the Pennsylvania Supreme Court within 30 days after the plan becomes final. Petitioners' claims are well outside of this mandatory 30-day window. Moreover, to the extent Petitioners seek to challenge any future reapportionment 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 reapportionment plan that has not yet been submitted by a Commission that has not yet even been formed.

Petitioners have brought suit in the wrong court. Article II, § 17 designates the Pennsylvania Supreme Court as the exclusive forum for challenges concerning the legality of reapportionment 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.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED BECAUSE IT NAMES THE WRONG PARTIES

The Petition should be dismissed because (i) none of the Respondents is a proper party to this action; (ii) Petitioners fail to plead facts that state a claim against any of the named Respondents; (iii) Petitioners' claims against Respondents are barred by the doctrine of sovereign immunity; and (iv) the Commission through its members is an indispensable party that has not been named as a respondent.

A. None Of The Named Respondents Are Proper Parties To This Action

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). None of the Respondents in this case is a proper party and all Respondents should therefore be dismissed under Pennsylvania Rule of Civil Procedure 1028(a)(5).

1. Governor Wolf and Secretary Boockvar are not proper parties to this action.

Neither Governor Wolf nor Secretary Boockvar is a proper party to this action. In declaratory and injunctive relief actions like this one Commonwealth agencies and actors are only proper parties when they "have or claim any interest

which would be affected by the declaration . . . ." *Pennsylvania State Educ. Ass'n v. Commonwealth Dep't Of Educ.*, 516 A.2d 1308, 1310 (Pa. Cmwlth. 1986) (quoting 42 Pa.C.S. § 7540(a)). Petitioners have not alleged that Governor Wolf or Secretary Boockvar has a claim or interest that would be affected by the outcome of this case because neither Governor Wolf nor Secretary Boockvar play any role whatsoever in the reapportionment of Pennsylvania's state legislative districts.

Petitioners assert that reapportionment plans fall in the purview of Governor Wolf because Governor Wolf is "vested with the supreme executive power of the Commonwealth" and is therefore "responsible for faithfully executing the Commonwealth's legislative apportionment plans. . . ." Petition ¶ 75. Similarly, Petitioners assert that Secretary Boockvar is a proper party because she "is the Commonwealth's highest election official and is responsible for the supervision and administration of the Commonwealth's elections and electoral process." *Id*. at ¶ 76. Petitioners' broad and generalized assertions are insufficient. *See 1st Westco Corp. v. School Dist. of Phila.*, 6 F.3d 108, 116 (3d Cir. 1993) ("If we were to allow [joinder of] the Commonwealth Officials in this lawsuit based on their general obligation to enforce the laws of the Commonwealth, we would quickly approach the nadir of the slippery slope; each state's high policy officials would be subject to defend every suit challenging the constitutionality of any state statute, no matter how attenuated his or her connection to it.").

As described above, the Commission and the Pennsylvania Supreme Court are the entities solely responsible for reapportionment under Article II, § 17 of the Pennsylvania Constitution. Accordingly, Governor Wolf and Secretary Boockvar are not proper parties to this action and should be dismissed. *See Scott Porter, a/k/a Chauntey Mo'Nique Porter v. Commonwealth of Pennsylvania*, 2020 WL 4342721, at *4 (Pa. Cmwlth. July 29, 2020) (dismissing Secretary Boockvar from action challenging the constitutionality of Pennsylvania's Name Change Act when "neither the Department of State nor its Secretary play any role in the Act").

2. The Commonwealth of Pennsylvania is not a proper party to this action.

The Commonwealth of Pennsylvania is also not a proper party to this action. Pennsylvania Rule of Civil Procedure 2102(a) provides that, 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. 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* Pa. CONST., art. I, Sec. 11, 1 Pa. C.S. § 2310) (emphasis added). Article I, § 11 of the Pennsylvania Constitution provides that "[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may be law direct." Pa. CONST. art. I, § 11. And 1 Pa. C.S. § 2310 affords absolute immunity to the Commonwealth of Pennsylvania. As

such, "any meaningful declaratory relief that this Court could provide must be directed to the actions of some identifiable Commonwealth party that violated some identifiable constitutional or statutory provision rather than to the Commonwealth generally." *Brouillette v. Wolf*, 213 A.3d 341, 356 n.16 (Pa. Cmwlth. 2019) (emphasis added).

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

B. Petitioners Fail To Plead Facts That State A Claim Against Any Of The Respondents

The Petition should be dismissed under Rule 1028(a)(4) because Petitioners fail to plead facts that state a claim against any of the Respondents. Pennsylvania is a fact-pleading state. *See* Pa. R. Civ. P. 1019(a). 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.

As described above, Petitioners simply cite to the constitutional and statutory provisions that form the basis for their claims and make generalized allegations that Governor Wolf and Secretary Boockvar are responsible for "faithfully executing" and "carrying out" those laws. Petition ¶¶ 75-76. These are general, non-descriptive allegations of purported executive duties and

responsibilities; they are not factual allegations of specific actions taken by either Respondent.

With respect to the Commonwealth, Petitioners again make conclusory allegations that it has "adopted, maintained, and enforced" the 2012 reapportionment plan. *Id*. at ¶ 74. Petitioners are wrong. Under Article II, § 17 of the Pennsylvania Constitution, it is the Commission – not the Commonwealth – that adopts reapportionment plans. In addition, it is the Pennsylvania Supreme Court – not the Commonwealth – that "maintains" reapportionment 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 even could be) "enforced" by the Commonwealth.

Accordingly, Petitioners' allegations are insufficient to state a claim against any of the Respondents and the Petition should be dismissed. *See Porter*, 2020 WL 4342721 at *4 (dismissing constitutional claims against Secretary Boockvar and the Commonwealth "for failure to aver any factual allegations against them").

C. Petitioners' Claims Are Barred By The Doctrine Of Sovereign Immunity

The Petition should also be dismissed because Petitioners' claims are barred by the doctrine of sovereign immunity. As described above, Petitioners fail to allege that any of the Respondents have taken any action or issued any order with

respect to reapportionment. Instead, the crux of Petitioners' allegations appears to be precisely the opposite of official state action – 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* Petition ¶¶ 74-76. 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. Petitioners' claims fail as a matter of law because "sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials . . . ." *Stackhouse v. Commonwealth of Pennsylvania State Police*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006)

Petitioners assert that sovereign immunity does not apply because the injunctive relief they seek is prohibitive as opposed to mandatory. *See* Answer ¶ 63 ("Petitioners seek an injunction to prohibit the Commonwealth from adopting an unconstitutional legislative redistricting plan that employs prison-based gerrymandering."). But "it is the substance of the relief requested and not the form or phrasing of the requests which guides [the Court's] inquiry." *Stackhouse*, 892 A.2d at 61. Here, the only way the requested relief could be provided is an order requiring Respondents to disregard the current reapportionment plan and mandating that any future plans "be stopped unless and until other actions are

taken" by Respondents. *Id*. at 62. Thus, Petitioners "effectively seek[] an order mandating those actions." *Id*.

As a result, the Petition should be dismissed because it is barred by the doctrine of sovereign immunity.

D. The Commission Is An Indispensable Party

The Commission – through its members – is an indispensable party to this action and the Petition should be dismissed under Rule 1028(a)(1) because Petitioners have failed to name the Commission and its members as respondents. 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). 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).

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 reapportionment process under Article II, § 17. 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.

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

II. THE PETITION SHOULD BE DISMISSED BECAUSE PETITIONERS' CLAIMS ARE UNTIMELY AND UNRIPE

A. Petitioners' Claims Concerning The 2012 Plan Are Untimely

To the extent Petitioners seek to challenge the 2012 plan, Petitioners' claims are untimely and must be dismissed. *See* Petition ¶ 166(a)-(c). Article II, § 17 provides a specific timeframe in which challenges to reapportionment plans must be raised. In particular, § 17(c) provides that "[a]ny person aggrieved by [a] preliminary plan shall have" a "thirty-day period to file exceptions" to the plan "with the commission." Pa. CONST. art. II, § 17(c). If the Commission rejects the exception then "the aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof." *Id.* § 17(d). Because these time constraints are expressly set forth in the Pennsylvania Constitution they are a "statute of repose, rather than a statute of limitation. As a statute of repose, [Article II, § 17] 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).

Here, the 2012 plan challenged by Petitioners was first filed by the Commission in April 2012 and was finalized on June 8, 2012. Thus, if Petitioners

wanted to challenge the legality of the plan, Petitioners were required to file an exception with the Commission within 30 days of April 2012 and also an appeal to the Pennsylvania Supreme Court within 30 days from June 8, 2012. Petitioners' commencement of this action almost eight years after the expiration of the statute of repose is fatal to their claims.

Petitioners assert that "[n]othing in Article II § 17 suggests that its once-per-decade adjudication mechanism is the exclusive means of challenging the constitutionality of a reapportionment plan." *See* Answer ¶ 68. Petitioners are wrong. After the adjudication process has ended and a reapportionment plan obtains the force of law, Article II, § 17(e) states expressly that the plan "shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section seventeen." Pa. CONST. art. II, § 17(e) (emphasis added). This language would be completely meaningless if individuals could raise challenges to reapportionment plans at any time. Thus, the time constraints set forth in Article II, § 17 are mandatory under the plain and unambiguous language of the Constitution itself.

Accordingly, to the extent Petitioners seek to challenge the legality of the 2012 plan, Petitioners' claims must be dismissed as untimely.

B. Petitioners' Claims Concerning Any Future Reapportionment Plan Are Unripe

To the extent Petitioners seek to challenge the legality of any future reapportionment plan, Petitioners' claims are unripe and must also be dismissed. *See* Petition ¶ 166(d)-(e). "[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). 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, the relevant factors weigh overwhelmingly in favor of dismissal.

First, there is not and cannot be a ripe controversy regarding the constitutionality of a future reapportionment plan unless or until a plan is submitted by the Commission that counts incarcerated people as residents of their place of incarceration. Here, it is eminently possible that future Commissions will

submit reapportionment plans that count people who are incarcerated as residents of the districts where they resided prior to incarceration. By attempting to challenge a plan that has yet to be submitted by a Commission that has yet to be formed, Petitioners are asking this Court to render a preemptive advisory opinion. Petitioners' challenge fails because "[t]he courts in our Commonwealth do not render decisions in the abstract or offer purely advisory opinions[.]". *Pittsburgh Palisades Park, LLC, v. Commonwealth*, 888 A.2d 655, 659 (2005)

Second, the parties to this action are not sufficiently adverse. It is the Commission that reapportions state legislative districts in the Commonwealth, not Respondents, and Respondents have no say whatsoever in the counting methods used by the Commission.

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

III. THE PETITION SHOULD BE DISMISSED BECAUSE THE COMMONWEALTH COURT DOES NOT HAVE ORIGINAL JURISDICTION

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). Here,

Article II, § 17 states expressly that a party aggrieved by a reapportionment plan must first file an exception with the Commission and then file an appeal in the Pennsylvania Supreme Court. 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).

The Petition should be dismissed for this reason under Rule 1028(a)(1).

CONCLUSION

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

Respectfully submitted,

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By: ***s/ Alexander T. Korn***

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Date: August 3, 2020

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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.

I further certify that this brief complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a).

s/ Alexander T. Korn
ALEXANDER T. KORN

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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CERTIFICATE OF SERVICE

I, Alexander T. Korn, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on August 3, 2020, I caused to be served a true and correct copy of the foregoing document titled Respondents' Brief in Support of their Preliminary Objections to the following:

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