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' REPLY BRIEF IN FURTHER SUPPORT OF THEIR PRELIMINARY OBJECTIONS

Respectfully submitted,

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Respondents hereby submit this reply brief in further support of their Preliminary Objections.[1] As described in Respondents' opening brief and further below, the Petition should be dismissed because it (i) names the wrong Parties; (ii) Petitioners' claims are untimely and unripe; and (iii) the Commonwealth Court does not have original jurisdiction over this action.

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

A. None Of The Respondents Is A Proper Party In This Action

1. Governor Wolf is not a proper party.

As made clear in Respondents' opening brief, Governor Wolf is not a proper party in this case because the Governor plays no role whatsoever in the state legislative reapportionment process established by the Pennsylvania Constitution. *See* Resp. Br. at 14-16. To the contrary, it is the Commission that is responsible for reapportionment, including the determination of how incarcerated people should be counted for purposes of representation. *See id*. Nonetheless, Petitioners assert that Governor Wolf is a proper party because Governor Wolf "bears responsibilities related to census data used for legislative reapportionment" under

[1] Capitalized terms used herein and not otherwise defined are as defined in Respondents' Brief in Support of their Preliminary Objections dated August 3, 2020 (cited to herein as "Resp. Br."); citations to "Pet. Opp." refer to Petitioners' Brief in Opposition to Respondents' Preliminary Objections dated October 16, 2020.

13 U.S.C. § 141. Pet. Opp. at 9. There are a host of problems with that assertion.

First, § 141 does not impose any responsibilities on state parties at all or with respect to census data in particular. Rather, § 141 imposes obligations on the federal Commerce Secretary to "take a decennial census of population" every ten years "in such form and content as he may determine . . . ." 13 U.S.C. § 141(a). The statute is inapposite for this reason alone.

Second, § 141 does not relate in any way to the counting of people who are incarcerated at either the federal or state level. "[S]ince the first U.S. census in 1790, the federal government has included incarcerated people in the population counts of where they're imprisoned" as a matter of federal policy.[2] Section 141 has absolutely nothing to do with that policy nor does it impose any contrary obligation on the states. The statute is inapposite for this separate reason as well.

Third, Petitioners rely on a selective quotation from § 141(c) that is taken out of context. Petitioners quote the words "the Governor of the state" but omit all of the other language in that subsection. Pet. Opp. at 9. Section 141(c) provides in relevant part:

> Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having

[2] https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts.

> responsibility for legislative apportionment or districting of such State. . . .

13 U.S.C. § 141(c). That population tabulations for specific geographic areas may be reported to state governors and other state officials pursuant to a federally approved state plan is totally irrelevant. Irrespective of whether the Pennsylvania Governor receives particularized census data for certain geographic areas, it is the Commission that is responsible for drawing state legislative lines and determining how incarcerated people should be counted, not Governor Wolf.

In sum, Governor Wolf is not a proper party and should be dismissed from this case.

2. Secretary Boockvar is not a proper party.

Secretary Boockvar is not a proper party because the Secretary also plays no role in the reapportionment process. *See* Resp. Br. at 14-16. Petitioners assert that Secretary Boockvar is a proper party because the Secretary "bears responsibility for overseeing efforts to ensure the accuracy and completeness of the 2020 Census in the Commonwealth" under 25 P.S. § 2628. Pet. Opp. at 10. Petitioners' assertion misses the mark. The accuracy of the federal census and the counting of people who are incarcerated for purposes of state legislative reapportionment are two very different things. It is the Commission that determines how incarcerated people should be counted for reapportionment, not Secretary Boockvar. There is nothing in § 2628 that gives the Secretary any responsibility, authority or

discretion to dictate to the Commission how state legislative lines should be drawn or how incarcerated people should be counted. Secretary Boockvar should also be dismissed.

3. The Commonwealth of Pennsylvania is not a proper party.

Petitioners assert that the Commonwealth is "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." Pet. Opp. at 10. Petitioners are mistaken for the following reasons.

First, the authorities cited by Petitioners are inapposite. Petitioners cite to *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) and *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002). But the petitioners in those cases challenged the constitutionality of congressional redistricting plans, "which are drawn by the state legislature as a regular statute. . . ." *League of Women Voters*, 178 A.3d at 742. Petitioners here are not challenging congressional redistricting plans. Instead, Petitioners are challenging state legislative reapportionment plans "drawn by a five-member commission pursuant to the Pennsylvania Constitution." *Id*. at 742 n.11. As such, Petitioners must follow the constitutionally established adjudicatory framework and may not bring claims against the Commonwealth in this Court. Moreover, unlike this case, none of the cases cited by Petitioners "involved the consideration or disposition of a preliminary objection alleging the

misjoinder of the Commonwealth generally as a party, its absolute immunity, or the application of Article 1, Section 11 of the Pennsylvania Constitution, 1 Pa. C.S. § 2310, or Pa. R.C.P. No. 2102." *Brouillette v. Wolf*, 213 A.3d 341, 356 n.16 (Pa. Cmwlth. 2019).[3]

Second, there is no authority that supports Petitioners' extremely broad and expansive notion that that the Commonwealth may be named as a respondent any time a petitioner purports to challenge a state "practice." To the contrary, controlling precedent from this Court makes clear that Petitioners must name "some identifiable Commonwealth party that violated some identifiable constitutional or statutory provision rather than to the Commonwealth generally." *Id*. Petitioners have not done so and the Commonwealth should be dismissed.

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

1. Petitioners fail to state a claim against Governor Wolf and Secretary Boockvar.

Petitioners assert that they have "adequately stated a claim" against Governor Wolf and Secretary Boockvar because these officials "have a duty to correct th[e] unlawful practice" by the Commission of counting people who are incarcerated in their places of incarceration. Pet. Opp. at 13-15. Petitioners are

[3] Petitioners also cite to Pennsylvania Rule of Civil Procedure 422(a), which governs service of process on the Commonwealth when the Commonwealth is a proper party in an action. Rule 422(a) is inapplicable in this case because the Commonwealth is not a proper party in this action.

wrong because neither Governor Wolf nor Secretary Boockvar have any such duty. Under Article II, § 17 of the Pennsylvania Constitution, it is the Commission – not Governor Wolf and Secretary Boockvar – that determines how incarcerated people are counted for purposes of state legislative reapportionment. Governor Wolf and Secretary Boockvar do not have any statutory or constitutional authority to participate in – let alone override – the determinations made by the Commission. Petitioners do not point to any relevant factual allegations in the Petition against Governor Wolf and Secretary Boockvar and the claims against them should be dismissed. *See* Resp. Br. at 17-18.

2. Petitioners fail to state a claim against the Commonwealth.

Petitioners also fail to state a claim against the Commonwealth. *See id*. at 18. Petitioners assert that they have stated a claim because "[t]he relief sought in this case cannot be fully granted without the Commonwealth." Pet. Opp. at 15. That is incorrect. The next Commission will be formed in 2021 and Petitioners may challenge any reapportionment plan at that time pursuant to the process established in Article II, § 17 of the Pennsylvania Constitution. As part of the challenge process Petitioners may also "file an appeal from the final plan" submitted by the Commission "directly to the Supreme Court within thirty days after the filing thereof." Pa. CONST. art. II, § 17(d). If the Pennsylvania Supreme Court determines that the Pennsylvania Constitution requires the Commission to

count people who are incarcerated in their places of residence prior to incarceration, then the Commission in existence at that time and all subsequent Commissions will have to abide by that ruling. Petitioners will have obtained complete relief without the Commonwealth.

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

Petitioners concede that injunctions seeking to compel state officials to perform mandatory, "affirmative actions" are barred by the doctrine of sovereign immunity. Pet. Opp. at 17. Nonetheless, Petitioners assert that sovereign immunity does not apply in this case because the injunctive relief they seek is prohibitive as opposed to mandatory. *See id*.; Answer ¶ 63. That is false. Just two pages earlier Petitioners state that they are asking this Court to order Respondents to "correct th[e] unlawful practice" by the Commission of counting people who are incarcerated in their places of incarceration. Pet. Opp. at 15. Thus, Petitioners "effectively seek[] an order mandating those actions" by Respondents. *Stackhouse v. Commonwealth of Pa. State Police*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006). "[I]t is the substance of the relief requested and not the form or phrasing of the requests which guides [the Court's] inquiry" with respect to sovereign immunity. *Id*. Accordingly, the doctrine applies in this case and the Petition should be dismissed.

D. The Commission Is An Indispensable Party

Although the Commission is the only entity responsible for determining how incarcerated people should be counted for purposes of reapportionment, Petitioners assert that the Commission is not an indispensable party because the Commission "has been disbanded." Pet. Opp. at 12. But the disbanding of the Commission is not relevant to the issue of indispensability. The fact that the Commission has been disbanded means that Petitioners must wait until the next Commission is formed in 2021 before challenging a state legislative reapportionment plan pursuant to the process set forth in the Pennsylvania Constitution. It does not mean that Petitioners may assert claims against nominal Respondents in this Court in the absence of the Commission.

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

A. Petitioners' Claims Concerning The 2012 Plan Are Untimely

Petitioners concede that the timeframe for challenges and appeals to legislative reapportionment plans set forth in Article II, § 17 of the Pennsylvania Constitution is a "statute of repose" and that they have not brought their challenge within the applicable timeframe. Pet. Opp. at 19.[4] Nonetheless, Petitioners

[4] As described in Respondents' opening brief, state legislative reapportionment and congressional redistricting 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*, 178

contend that their claims are timely because they are asserting a claim for declaratory relief that is "additional and cumulative to all other available remedies" under the Declaratory Judgment Act. *Id*. (quoting 42 Pa.C.S § 7541(b)). But the statutory language cited by Petitioners is not applicable in this case because the Pennsylvania Constitution forecloses the remedies sought by Petitioners. The Pennsylvania Constitution states expressly that after the period for challenges and appeals in Article II, § 17 has been exhausted the resulting reapportionment 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); *see* Resp. Br. at 22. This language would be completely meaningless if Petitioners could bring a separate action challenging the legality of reapportionment plans at any time in this Court under the Declaratory Judgment Act. Indeed, if this Court were to grant the relief sought by Petitioners then the 2012 final reapportionment plan would not be used "thereafter in elections to the General Assembly until the next reapportionment" in direct contravention of the language in Article II, § 17. The Declaratory Judgment Act does not and cannot

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A.3d at 742. 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). Accordingly, Petitioners must adhere to the timelines and adjudicatory framework for challenges and appeals in Article II, § 17.

afford Petitioners with remedies that are precluded by the explicit language of the Pennsylvania Constitution.

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

Petitioners also attempt to challenge future reapportionment plans that have not yet been submitted by future Commissions that have not yet been formed. *See* Resp. Br. at 23-24. Petitioners assert that their claims challenging these future reapportionment plans are ripe because "the current state legislative maps will have effectively been abandoned in lieu of the maps the [Commission] will need to draw for the upcoming 2022 state House and Senate elections." Pet. Opp. at 21. Petitioners have it backwards. That future Commissions have not yet submitted future reapportionment plans means that any attempt to challenge such plans at this time is purely hypothetical and speculative. As a result, Petitioners' claims with respect to any future reapportionment plans are unripe.

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

Petitioners assert that this Court has jurisdiction because the constitutionally established adjudicatory framework for challenges to reapportionment plans set forth in Article II, § 17 "does not expressly foreclose the Commonwealth Court's jurisdiction." Pet. Opp. at 23. Petitioners are wrong. As described above, the Pennsylvania Constitution states expressly that after the period for challenges and

appeals in the Pennsylvania Supreme Court has been exhausted the resulting reapportionment 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). This language would be completely meaningless if petitioners could bypass the process in Article II, § 17 by raising challenges to reapportionment plans at any time in this Court. Accordingly, the Constitution does, in fact, foreclose this Court's jurisdiction.

CONCLUSION

For the forgoing reasons, and for the reasons set forth in Respondents' opening brief, these Preliminary Objections should be sustained and the Petition should be dismissed.

Respectfully submitted,

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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.

s/ Alexander T. Korn
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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 October 30, 2020, I caused to be served a true and correct copy of the foregoing document titled Respondents' Reply Brief in Further Support of their Preliminary Objections to the following:

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