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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

STANLEY CRAWFORD, TRACEY ANDERSON, DELIA CHATTERFIELD, AISHAH GEORGE, RITA GONSALVES, MARIA GONSALVES-PERKINS, WYNONA HARPER, TAMIKA MORALES, CHERYL PEDRO, ROSALIND PICHARDO, CEASEFIRE PENNSYLVANIA EDUCATION FUND, and THE CITY OF PHILADELPHIA,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; BRYAN CUTLER, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; and JOSEPH P. SCARNATI III, IN HIS OFFICIAL CAPACITY AS PENNSYLVANIA PRESIDENT PRO TEMPORE,

Respondents.

No. 562 M.D. 2020

PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS

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INTRODUCTION

The Legislature's power to pass laws, including preemption laws, is "subject to restrictions enumerated" in the Pennsylvania Constitution, including the "express exception of certain fundamental rights reserved to the people in Article I." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018).

By enacting and repeatedly expanding 18 Pa.C.S. § 6120 ("Section 6120") and 53 Pa.C.S. § 2962(g) ("Section 2962(g)") (together, the "Firearm Preemption Laws"), Respondents have exceeded these limits, infringing on Petitioners' constitutional rights to life and liberty, leading inevitably to unconscionable numbers of deaths and injuries. Now, while Pennsylvania's children continue to suffer and die at alarming rates, Respondents want to distract from these horrors with baseless justiciability and preclusion arguments, even suggesting that the loss of children and loved ones is not harm enough for Petitioners to have their day in court. This gamesmanship cannot continue with lives at stake.

Respondents' preemption of virtually all local gun violence prevention regulations—while refusing to pass statewide legislation that undoubtedly would save lives—has exacerbated the epidemic of gun violence that plagues Philadelphia and other communities. In Philadelphia alone, 1,838 people were injured and 400 people were killed by guns in 2020; so far this year 355 people were injured and 87 people were killed. Children already account for at least 10%

of homicide victims in Philadelphia this year.[1] The effects of this epidemic are felt unequally: Black Pennsylvanians are *19 times* more likely to die by gun homicide than White Pennsylvanians; in Philadelphia, *86%* of the victims of gun violence are Black.[2] The disproportionate effect is similar in Pittsburgh. Pet. ¶ 39.

Respondents know these realities. Yet they have time and again decided to throw gasoline on this fire. The Legislature has been informed repeatedly about the enormous and increasing toll gun violence exacts in the Commonwealth's communities of color and about how local gun-safety measures would make a difference. But Respondents have not only declined to enact such measures themselves; they have also handcuffed local governments from doing so. Prohibiting proven gun-safety regulations like "permit-to-purchase" or "one-gun-per-month" ordinances inexorably increases the flow of guns into Petitioners' communities, leads to guns falling into the wrong hands, and adds to the senseless loss of young lives in low-income Black and Hispanic communities.

Petitioners know that loss too well to be kept powerless to address this scourge that is wreaking havoc and sowing tragedy. Respondents' actions deprive

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[1] *See* Mensah M. Dean, *Philly's violent year continues. The latest victims include a 2-year-old girl and 16-year-old boy.*, Phila. Inquirer (Mar. 12, 2021), https://www.inquirer.com/news/gun-violence-philadelphia-youth-mayor-kenney-homicide-overbrook-park-tacony-crisis-20210312.html

[2] *See* The City of Philadelphia – Office of the Controller, *Mapping Philadelphia's Gun Violence Crisis*, https://controller.phila.gov/philadelphia-audits/mapping-gun-violence (last accessed Apr. 2, 2021).

Petitioners and their communities of any legislative recourse; while Respondents argue that local governments must yield to some inherent power of the General Assembly in the area of firearm regulation, Respondents have actively prevented efforts to address gun violence in either forum. Our Constitution does not permit that result. This Court, and our Supreme Court, have struck down preemption provisions when they run afoul of Article I. *See Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012) ("*Robinson Township I*"), and *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) ("*Robinson Township II*"). The Court should do so in this case too.

For now, however, the Court need consider only whether the Petition for Review *adequately alleges* that the Firearm Preemption Laws violate Article I, Section 1, and thwart the City of Philadelphia from fulfilling its responsibility to "prevent or remove conditions which constitute a menace to public health," like gun violence, 16 P.S. § 12010(c). These violations are sufficiently pleaded to survive Respondents' preliminary objections. Respondents spend most of their four briefs raising multiple justiciability challenges (standing, ripeness, political question, separation of powers, and even *res judicata* based on prior decisions involving different issues) to avoid addressing the serious allegations in the Petition. None of these arguments has merit. As explained below, every one of

Respondents' preliminary objections should be overruled. The Petitioners should have their day in court.

STANDARD OF REVIEW

In ruling on preliminary objections, this Court "accept[s] as true all well-pleaded material allegations in the petition for review, as well as all inferences reasonably deduced therefrom." *Pa. Virtual Charter Sch. v. Dep't of Educ.*, 244 A.3d 885, 889 (Pa. Commw. Ct. 2020) (citing *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010)). "In order to sustain preliminary objections, *it must appear with certainty that the law will not permit recovery*, and any doubt should be resolved by a refusal to sustain them." *Id.*

STATEMENT OF QUESTIONS INVOLVED

1. Whether Respondents state valid justiciability objections on grounds of standing, ripeness, political question, or separation of powers?

Suggested Answer: No.

2. Whether Philadelphia's claims are precluded by the decisions in *Schneck*, *Ortiz*, or *Clarke*, none of which involved the claims presented here?

Suggested Answer: No.

3. Whether Petitioners have sufficiently alleged that Respondents' actions in enacting, expanding, and enforcing the Firearm Preemption Laws have

increased the risk of gun violence and therefore impose a state-created danger in violation Article I, Section 1 of the Pennsylvania Constitution?

Suggested Answer: Yes.

4. Whether Petitioners have sufficiently alleged that Respondents violated Article I, Section 1 by preventing Pennsylvanians from protecting their right to "enjoy[] and defend[] life and liberty" with local firearm ordinances?

Suggested Answer: Yes.

5. Whether Philadelphia has sufficiently alleged that Respondents have violated their constitutional responsibility to preserve people's safety and welfare by (i) delegating to Philadelphia the duty to address "menace[s] to public health" like gun violence, and (ii) preventing Philadelphia from fulfilling that duty by enacting the Firearm Preemption Laws?

Suggested Answer: Yes.

6. Whether Respondent Corman has sufficiently supported the assertion that any of Petitioner's allegations constitute "scandalous and impertinent matter?"

Suggested Answer: No.

STATEMENT OF THE CASE

The Firearm Preemption Laws are relatively new compared to the long history of local firearm regulation in Pennsylvania. Philadelphia's regulation of firearms is as old as the Nation. In 1790, for instance, Mayor Samuel Powel signed

into law an ordinance providing that "no person or persons whatsoever shall fire or discharge any cannon, or other piece of artillery of ordnance . . . without the permission of the Mayor."[3] In 1864, Philadelphia passed an ordinance that provided, as amended in 1921, that "[n]o person shall fire or discharge recklessly and without reasonable cause any rifle, gun, pistol, or other firearm."[4] Over the years, Philadelphia also regulated, *inter alia*, the use and transfer of firearms,[5] prohibited the discharge of firearms in hunting,[6] regulated the carrying of a firearm in public spaces,[7] prohibited firearms in educational institutions,[8] regulated the storage and sale of firearms,[9] and regulated the storage and sale of ammunition.[10]

That all changed in 1974. Respondents sought to pass a preemption bill dismantling these ordinances and blocking others, while taking no steps at the state level that would address the gun violence plaguing Philadelphia. Pet. ¶¶ 54, 63, 66.

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[3] The Constitution and Ordinances of the City of Philadelphia, Ch. VI, p. 46 (1790) (excerpt attached hereto as Addendum).
[4] Phila. Code § 10-810(1) & n. 237. All citations to the Philadelphia Code and history are available at https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-184124.
[5] Phila. Code § 10-814 & n. 251 (enacted 1965).
[6] Phila. Code § 10-815 & n. 260 (enacted 1967).
[7] Phila. Code § 10-818 & n. 267 (enacted 1967).
[8] Phila. Code § 10-822 & n. 274 (enacted 1969).
[9] Phila. Code § 9-607 & nn. 842-846 (enacted 1956, *amended* 1957, 1967, 1973, 2010).
[10] Phila. Code § 9-606 & nn. 837-841 (enacted 1956, *amended* 1957, 1967, 1973, 2010).

In passing this bill, now codified at 18 Pa.C.S. § 6120, Respondents disregarded a slew of impassioned pleas to preserve Philadelphia's authority to take life-saving measures within its own borders. *Id*. ¶ 65. Legislators who knew the problems facing Philadelphia informed their colleagues that "the only kind of control that the city has [to address gang killings] is to require registration of handguns and the issuance of permits. This is a problem that is particularly indigenous to the city of Philadelphia." *Id*. ¶ 65(a). They discussed Philadelphia's firearm permit ordinance, noting that 96.4% of applicants were approved, while those denied permits had been convicted of criminal homicide, firearms violations, and other crimes. *Id*. ¶ 65(a, e). And they noted that while some neighborhoods in Philadelphia escaped the plague of gun violence, for others, poverty and gun violence were strongly linked. *See id.* ¶ 65(d) ("Mr. Gleeson does not have this problem. He comes from an affluent area of the city of Philadelphia. It is like our suburbs and it is not an area where they have killings and things like that as we have in our area."). Respondents ignored these pleas. *Id*. ¶ 66.

In the decades since, Respondents have failed to protect Pennsylvanians from gun violence, choosing instead to further handcuff local governments from taking their own initiatives. Respondents preempted all local regulations of ammunition. *Id*. ¶ 68. They expanded the class of firearms included in Section 6120's definition, despite "recent statistics from the Centers for Disease Control

[that] will show that we have lost some 65,000 people due to death by violent crime through guns, more than most wars that we have had in this country." *Id*. ¶¶ 73, 76. Legislators have noted that Respondents' priority was not to find an alternative method to address gun violence, but to wholly abandon any attempt to do so. *Id*. ¶ 77. And fellow legislators warned precisely where Respondents' actions would lead, noting that "[t]hese 203 members, from the highest on high to the lowest freshman rank-and-file member, will be responsible for some tragic incident that will have occurred." *Id*. ¶ 74.

Respondents have disregarded empirical evidence, too. Respondents were warned that "in 2013 the city of Philadelphia witnessed 247 murders. When a murder occurred in the context of domestic violence, a gun was the most frequently used weapon, about 41 percent of the time." *Id*. ¶ 84. They were informed that:

> [g]un violence represents a particularly tragic epidemic in poorer communities in cities like Philadelphia. Of the 247 murders Philadelphia witnessed in 2013, 201 of them, (81.4%) were by gunshot. And among [these] murders, 191 of the 247 victims were black, 224 were male, and 160 were under age 34.

Id. ¶ 85. And they were informed that a comparative study, comparing two cities (Seattle, Washington and Vancouver, British Columbia) which were otherwise similar (including in income, population, unemployment, and non-firearm homicides), but "the rate of murders with guns was five times greater" in the city

with fewer gun regulations. *Id*. ¶ 72. Thus, neither empirical evidence nor impassioned warnings have halted Respondents from thwarting local regulations.

The consequences of their actions play out every day in cities like Philadelphia and Pittsburgh.[11] *Id.* ¶¶ 37-39. Those very consequences have devastated the lives of the Individual Petitioners:

- Stanley Crawford is a Black man who lives in Northeast Philadelphia. Pet. ¶ 9(a). His son, a young Black man named William Aboaje Crawford, was killed with a handgun in broad daylight. *Id*. ¶ 9(b).
- Tracey Anderson is a Black woman who lives in South Philadelphia. *Id*. ¶ 10(a). She was the guardian of her grandson, Tyrese Mikal Johnson, a young student shot and killed in front of Anderson's home. *Id*. ¶ 10(b-d).
- Dalia Chatterfield is a Black woman living in Pittsburgh's Homewood neighborhood. *Id*. ¶ 11(a). Diron Hopwood, her 24-year-old grandson, was shot and killed in her neighborhood. *Id*. ¶ 11(b).

[11] *See* Chris Palmer, *Philly's Violent Year: Nearly 500 People were killed and more than 2,200 shot in 2020*, Phila. Inquirer (Jan. 4, 2021), https://www.inquirer.com/news/philadelphia-gun-violence-homicides-shootings-pandemic-2020-20210101.html (showing an average of 6 people shot each day in Philadelphia); Bryant Reed, *Pittsburgh-Area Leaders Concerned As Shootings And Homicides Rise in 2021*, (Mar. 30, 2021), https://pittsburgh.cbslocal.com/2021/03/30/pittsburgh-area-leaders-concerned-as-shootings-and-homicides-rise-in-2021/ (reporting shootings and homicides rising in Pittsburgh).

- Aishah George is a Black woman living in Philadelphia's Point Breeze neighborhood. *Id*. ¶ 12(a). Her 16-year-old son, Caleer Miller, was killed in South Philadelphia's Lower Moyamensing neighborhood. *Id*. ¶ 12(b).
- Rita Gonsalves is a Black woman who lives in Philadelphia's Germantown neighborhood. *Id*. ¶ 13(a). Her 19-year-old granddaughter, Destiny Gonsalves-Charles, was shot just blocks from Gonsalves's home; she died five days later. *Id*. ¶ 13(b-c).
- Maria Gonsalves-Perkins, granddaughter to Rita Gonsalves and sister to Destiny Gonsalves-Charles, continues to suffer from the trauma of Destiny Gonsalves-Charles's death. *Id*. ¶ 14(b).
- Wynona Harper is a Black woman living in Penn Hills. *Id*. ¶ 15(a). Her 31-year-old son, Jamar Hawkins, was shot and killed in Penn Hills. *Id*. ¶ 15(b). Her 20-year-old nephew had been shot and killed one year earlier, in the Larimer neighborhood of Pittsburgh. *Id*. ¶ 15(e).
- Tamika Morales is a Black and Hispanic woman living in the Eastwick neighborhood of South Philadelphia. Ms. Morales lost her son Ahmad Morales over Labor Day weekend in 2020; 29 other lives were taken by a gun that same weekend. *Id*. ¶ 16(a-c).

- Cheryl Pedro is a Black woman living in the Strawberry Mansion neighborhood of Philadelphia. She lost her 34-year-old son to gun violence. *Id*. ¶ 17(a-b).
- Rosalind Pichardo, a Hispanic-American, resides in Philadelphia's Kensington neighborhood. *Id*. ¶ 18(a). She was threatened with a firearm, lost both her boyfriend and her brother to firearm homicide, and lost her sister to firearm suicide. *Id*. ¶¶ 18(b-d).

Each of the Individual Petitioners is Black, Hispanic, or both. All of them live in neighborhoods with significant poverty rates. *See id.* ¶¶ 9-18. And the evidence demonstrates that their tragic losses are not purely random; they are instead tragically predictable. Young Black men and teenagers—a group that includes nine of the decedents described above—bear the worst brunt of this violence. Their risk of firearm homicide is *35 times* higher than the risk for young non-Hispanic White men. *Id*. ¶ 30. Similarly, from 2015-2019 Latinos were more than five times as likely as White Pennsylvanians to die from firearm homicide.[12] And gun violence plagues those neighborhoods—like Petitioners'—with high concentrations of poverty. *Id*. ¶ 34.

[12] *See Gun Violence in Pennsylvania, Everytown for Gun Safety Support Fund*, https://everystat.org/wp-content/uploads/2021/02/Gun-Violence-in-Pennsylvania-2.9.2021.pdf (last updated Jan. 2021).

As Petitioners continue to see their families and neighborhoods suffer, Respondents continue to prevent local leaders, non-profits, and citizens from effecting the types of local, legislative changes necessary to stem this horrible tide. Petitioners therefore filed this Petition for Review on October 7, 2020. On November 30, 2020, Respondents filed preliminary objections, which Petitioners answered on January 29, 2021.

SUMMARY OF ARGUMENT

I. Respondents leave no stone unturned seeking to escape adjudication on the merits. They search in vain. Neither standing, ripeness, nor Respondents' misguided "political question" objections stand in the way of this Court's review.

A. First, each Petitioner has standing. The Individual Petitioners have lost loved ones to the gun violence exacerbated by the Firearm Preemption Laws and are themselves at a high risk of death or serious injury due to gun violence. The Individual Petitioners have accordingly alleged "some discernible adverse effect" beyond an "abstract interest" in ensuring the Firearm Preemption Laws do not violate the Pennsylvania Constitution. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). The Individual Petitioners have also alleged a "direct and immediate" causal connection between the Firearm Preemption Laws and their injuries, as those laws have increased the risks of gun violence in their communities by preventing local governments from enacting

measures that would reduce the supply of illegal guns and otherwise reduce gun violence.

CeaseFire Pennsylvania Education Fund ("CeaseFirePA") has standing as a Pennsylvania nonprofit whose mission is to reduce gun violence by supporting legislation towards that end. The Firearm Preemption Laws force CeaseFirePA to divert resources from proactively supporting local gun laws to counteracting the effects of preemption, including helping local governments navigate the ever-expanding Firearm Preemption Laws. This "perceptibl[e] impair[ment]" of CeaseFirePA's mission is a legally cognizable injury. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *accord Applewhite v. Commonwealth*, No. 330 MD 2012, 2014 WL 184988 at *7-8 (Pa. Commw. Ct. Jan. 17, 2014).

Philadelphia has standing. Beyond the loss of hundreds of its residents every year, gun violence inflicts a severe economic burden on the City. The Firearm Preemption Laws also interfere with Philadelphia's functions as a governing entity, so Philadelphia has standing to challenge that interference. *See City of Phila. v. Commonwealth*, 838 A.2d 566, 579 (Pa. 2003).

B. Petitioners' request for a ruling under the Declaratory Judgment Act is ripe. The Act "provides a relatively lenient standard for ripeness," *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1217-18 (Pa. Commw. Ct. 2018), and the issues are adequately developed for adjudication. Petitioners have

adequately alleged that the Firearm Preemption Laws are the only impediments to the Cities of Philadelphia and Pittsburgh (among other localities) passing certain barred ordinances, as they have done in the past. They offer specific examples in the Petition for Review, alongside facts establishing that those ordinances would significantly reduce gun violence if enacted. This dispute is no "abstract disagreement[]." *Commonwealth v. Koehler*, 229 A.3d 915, 941 (Pa. 2020).

C. The question before this Court is whether the Legislature exceeded its powers in enacting the Firearm Preemption Laws. That is squarely within this Court's competence, and Respondents fail to articulate a valid "political question" or separation-of-powers objection. Preemption laws, like other laws, are "subject to restrictions enumerated in the [Pennsylvania] Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth." *League of Women Voters*, 178 A.3d at 803. That includes "the express exception of certain fundamental rights reserved to the people in Article I of our Constitution." *Id.* This Court and our Supreme Court have accordingly struck down preemption laws that violate Article I.

II. Philadelphia's claims are not subject to claim or issue preclusion. Respondents base their preclusion arguments on *Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996), *Clarke v. House of Representatives of Commonwealth*, 957 A.2d 361, 362 (Pa. Commw. Ct. 2008), and *Schneck v. City of Phila.*, 383 A.2d 227 (Pa.

Commw. Ct. 1978). None of these cases involved an Article I, Section 1 challenge, or a challenge to the Firearm Preemption Laws' interference with Philadelphia's ability to fulfill its delegated responsibilities under the Local Health Administration Law ("LHAL"), 16 P.S. § 12001, *et seq.*, and the Disease Prevention and Control Law ("DPCL"). 35 P.S. § 521.1, *et seq*. On top of that, the City was not a party to *Ortiz* or *Clarke*, which were brought by individual members of City Council, who—contrary to Respondents' arguments—are not in privity with the City.

III. On the merits, Petitioners have adequately alleged three reasons the Firearm Preemption Laws violate the Pennsylvania Constitution. Respondents cannot show "with certainty that the law will not permit recovery," and their preliminary objections should be overruled. *Pa. Virtual Charter Sch.*, 244 A.3d at 889 (citation omitted).

A. Count I adequately alleges a violation of Article I, Section 1 under the state-created danger doctrine, which provides that the state violates substantive due process rights where it "acts to create or enhance a danger" to the plaintiff. *Morrow v. Balaski*, 719 F.3d 160, 167 (3d Cir. 2013) (en banc).

Petitioners adequately allege every element of a state-created danger claim. Respondents enhanced the danger of gun violence facing Petitioners through affirmative actions, including passing the Firearm Preemption Laws and repeatedly

amending them to make them more restrictive. Petitioners have also alleged that the harm to them was foreseeable and direct, and that Respondents acted with deliberate indifference; each time the Legislature acted to preempt local firearm legislation by imposing or expanding the Firearm Preemption Laws, the Legislature was warned that doing so would increase gun deaths and injuries in Black, Hispanic, and impoverished neighborhoods. Petitioners have also alleged they are members of a discrete class of persons subjected to the potential harm brought about by the Firearm Preemption Laws.

Legislation is not, as Respondents contend, categorically immune to state-created danger challenge; preemption legislation is no exception. This doctrine protects substantive due process rights, and legislation is subject to substantive-due-process challenge. *Johnston v. Twp. of Plumcreek*, 859 A.2d 7, 13 (Pa. Commw. Ct. 2004), does not foreclose Petitioners' claim; the plaintiff there could not establish the elements of a state-created danger claim.

B. Count II adequately alleges another violation of Article I, Section 1: a substantive due process violation. The Firearm Preemption Laws eliminate individuals' ability to protect themselves from gun violence by collectively enacting local public safety measures. This Court's decision in *Robinson Township I* demonstrates that preemption statutes can violate Article I, Section 1 by barring local regulations like zoning laws that protect individual rights under Article I,

Section 1. The same is true of measures like permit-to-purchase requirements that protect individuals' rights "to enjoy[] and defend[] life and liberty." And Petitioners sufficiently allege that the Firearm Preemption Laws cannot withstand any level of constitutional scrutiny.

C. Count III adequately alleges that the Firearm Preemption Laws prevent Philadelphia from fulfilling its delegated responsibilities under the LHAL and DPCL. Among other responsibilities, the Legislature charged Philadelphia with "prevent[ing] or remov[ing] conditions which constitute a menace to public health" under the LHAL. 16 P.S. § 12010(c). Gun violence is a "menace to public health," but one that the Firearm Preemption Laws have stripped Philadelphia of its ability to address. This in turn betrays the Commonwealth's own "obligation to maintain order and to preserve the safety and welfare of all citizens." *Allegheny Cnty. v. Commonwealth*, 490 A.2d 402, 410 (Pa. 1985). Respondents' objections misread the LHAL and DPCL, as well as the Petition for Review.

IV. Finally, Respondent Corman's "scandalous and impertinent matter" objection is baseless. Each allegation in the Petition for Review is material to Petitioners' claims, including to describe the harmful effects of the Firearm Preemption Laws, and to establish that Respondents acted with deliberate indifference in passing, amending, expanding, and enforcing the Firearm Preemption Laws.

ARGUMENT

I. PETITIONERS' CLAIMS ARE JUSTICIABLE.

A. Petitioners Have Standing to Pursue this Action.

1. Individual Petitioners Have Standing.

Standing is established when a petitioner is "aggrieved" by the matter he seeks to challenge. *Fumo v. City of Phila.*, 972 A.2d 487, 496 (Pa. 2009). "An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation." *Id.* The interest is "substantial" if it "surpasses that of all citizens in procuring obedience to the law." *Id.* (internal quotation marks and citation omitted). The interest is "direct" when there is a "causal connection between the asserted violation and the harm complained of," and it is "immediate" so long as that connection is "not remote or speculative." *Id.* Individual Petitioners meet all these requirements.

a. Individual Petitioners' interests are substantial.

Respondent Cutler argues that Individual Petitioners' interests are not "substantial" because Petitioners' "self-defense rights, or rights to be free from harm, do not surpass the common interests of all citizens in such rights." Cutler Br. 10. He posits that Individual Petitioners lack standing because, perversely, the impact of the gun violence epidemic reaches so far and wide: "*Countless* citizens

of this Commonwealth can be said to be similarly affected by gun violence[,]" and the constitutional interest Petitioners invoke "undoubtedly includes all citizens of the Commonwealth." *Id*. at 10-11 (emphasis added). That is not the test for standing. The fundamental thrust of the "substantial interest" inquiry is whether the Firearm Preemption Laws have had "some discernible adverse effect" on *Individual Petitioners'* Article I, Section 1 rights beyond an "abstract interest" in ensuring that the Firearm Preemption Laws do not violate the Pennsylvania Constitution. *Wm. Penn Parking Garage*, 346 A.2d at 282; *see also Fumo*, 972 A.2d at 496 (framing the inquiry into standing as whether a person has been "adversely affected . . . by the matter he seeks to challenge"). Whatever the interests of other victims of gun violence might be, Individual Petitioners here allege concrete, identifiable interests that distinguish them from the public at large.

Here, Individual Petitioners' interests in defending their rights against the Firearm Preemption Laws are anything but "abstract." Each Individual Petitioner has personally suffered and had his or her life permanently scarred because of specific instances of gun violence. *See* Pet. ¶¶ 9-18, 40. Each Individual Petitioner has explained that he or she lives in fear that, because their local governments are helpless to implement gun-safety ordinances, it is only a matter of time before they are confronted with gun violence again. *Id.* And each Individual Petitioner is a member of a particular group or sub-group that faces a higher risk of gun violence

than the general citizen. The public health evidence is overwhelming: Gun violence exacts an enormous and escalating toll on particular groups of Pennsylvanians, namely Black and Hispanic individuals. *See* Pet. ¶¶ 9-18, 28-31, 126-30.

The fact that every Pennsylvanian has a right to be free from harm under Article I, Section 1, and that "[c]ountless" other Pennsylvanians' constitutional rights have been violated does not negate Petitioners' personal, distinct interest in vindicating their rights. Nor does it reduce the violation of Petitioners' individual rights to a "generalized grievance." *Cf. Fumo*, 972 A.2d at 344.

b. Individual Petitioners' interests are direct and immediate.

Individual Petitioners' interests are both "direct and immediate," that is, there is a close causal relationship between Respondents' actions and the constitutional injury suffered by Individual Petitioners. *See* Pet. ¶¶ 54-60, 88-92. Specifically, Individual Petitioners allege that Respondents have prevented municipalities from enacting and enforcing local laws that would protect Individual Petitioners from gun violence, while refusing to act to curb that violence through statewide legislation. *Id.* ¶¶ 54-60. The Individual Petitioners further allege that for decades, Respondents have enforced and expanded the Firearm Preemption Laws despite clear evidence that preemption exacerbates the gun-violence epidemic. *Id.* ¶¶ 61-89. Finally, Petitioners have pleaded in detail how

Respondents' actions have exposed Individual Petitioners to the direct risk of gun violence. *Id.* ¶¶ 126-30.

Nevertheless, Respondent Corman argues that Individual Petitioners lack standing because they "allege[] no direct harm to any Petitioner from gun violence." Corman Br. 16-17. Yet, Respondent Corman also concedes that they allege, in great detail, the gun violence they have experienced and the grief and fear that are now their constant companions. *Id.* at 16. Moreover, notwithstanding Respondent Corman's glib remark that allegations of murdered loved ones "read[] like a complaint for intentional infliction of mental distress[,]" Individual Petitioners' injuries are legally cognizable under Article I, Section 1. *See infra* pp. 62-71. Petitioners also allege that Respondents' actions have created the conditions that gave rise to Petitioners' suffering, such that there is a close, concrete link between the Firearm Preemption Laws and Petitioners' injuries. *See* Pet. ¶¶ 126-30.

At base, Respondent Corman's quarrel is not that Petitioners have failed to assert a "direct and immediate" connection between their constitutional injuries and Respondents' actions, but that he disputes the truth of that assertion. *See* Corman Br. 16-17 (arguing that the Firearm Preemption Laws "do not . . . cause gun violence."). This is no basis for a standing objection: Whether or not Respondents' actions are sufficient to establish causation is an issue of fact for

trial. *See, e.g.*, *Powell v. Drumheller*, 653 A.2d 619, 623-24 (Pa. 1995) (questions regarding causation were for the jury); *Allen v. Cnty. of Wayne ex rel. Wayne Cnty. Corr. Facility*, 88 A.3d 1035, 1041 (Pa. Commw. Ct. 2013) (same).

c. Individual Petitioners have standing to assert a constitutional challenge to laws regulating municipalities.

Respondent Corman also argues, without legal support, that Individual Petitioners are not "proper parties" because the Firearm Preemption Laws "impact only the interests and functions of municipalities and do not regulate "the conduct of private actors[.]" Corman Br. 14-16. This argument assumes, incorrectly, that Individual Petitioners cannot be injured by the Laws, *id.*, and appears to misconstrue the "zone of interest" doctrine.

Courts can use this doctrine to assess standing when the "party's immediate interest is not apparent." *Houston v. SEPTA*, 19 A.3d 6, 10 (Pa. Commw. Ct. 2011) (citing *Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010)). In such cases, courts consider whether the party is within the "zone of interest" protected by the statute or constitutional protections raised. *Id.* Applying a zone-of-interest analysis to Petitioners' case, the appropriate inquiry is whether Individual Petitioners' right to challenge the Firearm Preemption Laws is within the zone of interest protected by Article I, Section 1 of the Pennsylvania Constitution, not whether Petitioners are within the zone of interest regulated by the Firearm Preemption Laws. *See, e.g.*, *S.*

Whitehall Twp. Police Serv. v. S. Whitehall Twp., 555 A.2d 793, 797 (Pa. 1989) (in challenge claiming that a policy violated Act 114, the appropriate inquiry was whether petitioners were "within the zone of interests to be protected by Act 114"); *Franklin Twp. v. Commonwealth, Dep't of Env't Res.*, 452 A.2d 718, 723 (Pa. 1982) (in challenge under the Solid Waste Management Act against a toxic waste permit, the question was whether the challengers were "within the zone of interests sought to be protected or regulated by the Solid Waste Management Act"); *accord City of Phila.*, 838 A.2d at 577 ("Here, the 'law' in question consists of the state constitutional provisions under which Petitioners have brought their challenge."); *accord* Cutler Br.11 (framing the zone of interest inquiry as whether Individual Petitioners are within the zone of interests protected by Article I, Section 1).

Individual Petitioners are surely within the zone of interests protected by Article I, Section 1: Their right to "enjoy[] and defend[] life and liberty" is among the "inherent and indefeasible rights" accorded to them by the Pennsylvania Constitution, and those rights have been infringed by the Firearm Preemption Laws. *See infra* pp. 61-72.

Respondent Corman's argument ignores a vast array of cases holding that a party *does* have standing to challenge a statute, even if that statute does not directly regulate—or even contemplate regulating—that party's conduct. *See, e.g., Wm. Penn Parking Garage*, 346 A.2d at 289 (holding that a tax on public parking

imposed on parking patrons was causally linked to harm to parking garage operators' businesses, giving them standing to challenge the tax); *Washington v. Dep't of Pub. Welfare*, 71 A.3d 1070, 1084-85 (Pa. Commw. Ct. 2013), *rev'd on other grounds*, 188 A.3d 1135 (Pa. 2018) (holding that mental health service providers and their clients had standing to challenge legislation that allowed county governments to divert funding for mental health services to other programs); *Fischer v. Com., Dep't of Pub. Welfare*, 444 A.2d 774, 781-82 (Pa. Commw. Ct. 1982) (finding that a doctor had standing to challenge a statute limiting the use of government funds for abortions).

The cases Respondent Corman cites do not support his reasoning at all. *City of Philadelphia v. Commonwealth* did not consider whether anyone other than the City had standing to challenge the legislation at issue, let alone foreclose that possibility. 838 A.2d at 579 n.8 ("Because of our conclusion that the City has standing, we need not consider whether Mayor Street also has standing."). This case does not stand for the inverse, *see* Corman Br. 15, that "private actors are not the proper parties to challenge a statute" regulating municipalities.

Respondent Corman's reliance on *Pittsburgh Palisades Park, LLC v. Commonwealth,* Corman Br. 15-16, is similarly misplaced. In that case, the Court concluded merely that petitioners, an LLC and an individual, lacked standing to challenge a statute governing gaming licensing fees because petitioners had not

even applied for gaming licenses yet, let alone demonstrated how the statute would injure them if they obtained licenses. 888 A.2d 655, 660 (Pa. 2005). The case does not stand for the proposition that private actors cannot challenge a statute that regulates government conduct. Moreover, the portion of the opinion quoted by Respondent Corman, Corman Br. 16, concerned *taxpayer* standing, which is not at issue here. *Id.* Nothing in Pennsylvania or federal jurisprudence limits standing in the way proposed by Respondent Corman.

2. CeaseFirePA Has Standing.

An organization can seek judicial relief from "injury *to itself* and to vindicate whatever rights and immunities the [organization] itself may enjoy." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 305 (3d Cir. 2014) (emphasis added) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).[13] Accordingly, an organization suffers a legally cognizable injury from actions that "perceptibly impair" the organization's ability to pursue its mission and force it to divert its

[13] In Pennsylvania, standing is prudential in nature, and state courts are not bound by the requirements of federal Article III standing. However, Pennsylvania courts "have found federal decisions on standing helpful." *See Fumo v. City of Phila.* 972 A.2d at 500 n.5; *see also Hous. Auth. of Cnty. of Chester v. Pa. State Civil Serv. Comm'n*, 730 A.2d 935, 939 & n.10 (Pa. 1999) (citing examples).

resources in order to address the complained-of conduct. *Havens Realty*, 455 U.S. at 378-79; *accord Applewhite*, 2014 WL 184988, at *7-8.

CeaseFirePA is a nonprofit whose mission is to reduce gun violence through, *inter alia*, legislative advocacy. Pet. ¶¶ 19-20, 41-42. One of the principal ways CeaseFirePA pursues this mission is by working with communities hit hardest by gun violence to propose, support, and advocate for measures to make their residents safer. *Id.* ¶¶ 43-44. But because of Respondents' actions to block a broad range of effective, evidence-based local gun regulations, CeaseFirePA has had to divert resources away from this advocacy and public education to combat the consequences of the Firearm Preemption Laws. *Id.* ¶¶ 45-48.

Respondents ignore these clear allegations of injury in order to insist that CeaseFirePA is asserting standing based on a "general setback to its abstract social interests." *See* Cutler Br. 4; Corman Br. 17. But CeaseFirePA has more than adequately pleaded facts establishing that its mission has not merely been implicated, but fundamentally and substantially frustrated, by the Firearm Preemption Laws, such that it has "had to alter its operations and reroute its resources in response to allegedly unlawful conduct in a way it otherwise would not have." *Disability Rights Pa. v. Pa. Dep't of Hum. Servs.*, No. 1:19-CV-737, 2020 WL 1491186, at *5 (M.D. Pa. Mar. 27, 2020).

Specifically, CeaseFirePA has alleged that Respondents' actions have forced it to turn attention from its "critical" "local legislative efforts" to help focus on helping municipalities navigate the Firearm Preemption Laws' restrictions; educate community members and policy makers about how preemption forecloses effective gun laws; and counteract attempts to use the Firearm Preemption Laws in inappropriate or unconstitutional ways that undermine and chill local efforts to reduce gun violence. *See* Pet. ¶¶ 44, 47. Like the organization in *Havens*, CeaseFirePA has had to divert significant resources to "identify and counteract" Respondents' actions to stymie local regulation—resources that would have otherwise been available to support their work helping localities "develop gun violence prevention measures that are responsive to their particular needs, and to implement new strategies that could ultimately inform state or national policy." *Id.* ¶ 44; *see Havens*, 455 U.S. at 379 (holding that a housing access organization that employed testers to identify violations of the Fair Housing Act was injured by the discriminatory steering practices it uncovered, because respondents' illegal acts diverted resources from the organization's counseling and referral services). CeaseFirePA's allegations of injury are more than sufficient to establish organizational standing.

3. The City of Philadelphia Has Standing.

The City of Philadelphia has standing to challenge Section 6120[14] because it suffers a significant economic burden as a result of this statute and has a legitimate interest in enacting firearms regulations. *See Robinson Twp. v. Commonwealth*, 52 A.3d 463, 471 (Pa. Commw. Ct. 2012), *aff'd in part, rev'd in part*, 83 A.3d 901 (Pa. 2013). As this Court has explained, a municipality's interest in the outcome of a suit is:

> (1) substantial when aspects of the state law have particular application to local government functions (as opposed to general application to all citizens); (2) direct when the state law causes the alleged constitutional harm; and (3) sufficiently immediate when the municipality asserts factually supported interest that are not speculative or remote.

Id. at 474 (citing *City of Phila.*, 838 A.2d at 578-79); *see also Franklin Twp.*,452 A.2d at 719.

Here, Philadelphia has standing because (1) it has endured, and continues to endure, significant economic burdens resulting from gun violence in the City and (2) Section 6120 unconstitutionally interferes with Philadelphia's interests and

[14] Only Respondent Cutler challenges Philadelphia's standing to bring an action challenging Section 6120. *See* Cutler Br. 15-17. Respondent Corman challenges only Philadelphia's standing as it pertains to Section 2962(g), *see* Corman Br. 18-19, which Petitioners acknowledge does not apply to Philadelphia, *see* Answer to Corman PO ¶ 4.

functions as a governing entity, including its responsibility to protect the health, safety, and quality of life of its citizens.

First, in significant part because of Section 6120, Philadelphia bears a serious economic burden associated with gun violence within its city limits. *See* Pet. ¶ 51. That alone confers standing. *Wm. Penn Parking* 346 A.2d at 280-82. Moreover, a municipality has a direct and substantial interest in a claim based on even the possibility of immediate harm to the quality of the life of its citizens. Our Supreme Court held in *Franklin Township* that a township had standing to challenge the Department of Environmental Resources' permit for a landfill given the "responsibilit[y] of local government" for "the protection and enhancement of the quality of life of its citizens." 452 A.3d at 721-23. To say the least, protecting residents from gun violence is essential to "the protection and enhancement of the quality of life" of Philadelphia residents.

Even more so than in *Franklin Township*, here the impact of the laws on the City are significant. Philadelphia has conducted extensive research to quantify the economic impact of gun violence on its citizens' quality of life. According to the City's Department of Health, firearm homicides are associated with an estimated average cost of $1.42 million in medical expenses, lost earnings/productivity, property damage, and criminal justice costs, while non-fatal firearm-related injuries cost Philadelphia taxpayers $45,632 on average in medical expenses and

lost productivity.[15] These substantial economic burdens meet the required showing in that it is distinct from a general "interest in full compliance with the law." *Wm. Penn Parking*, 346 A.2d at 289. And to the extent Respondents dispute whether such burdens are in fact traceable to Respondents' conduct, or whether the ability to pass commonsense ordinances of the type described in the Petition[16] would in fact reduce the burdens caused by gun violence, such factual disputes are for trial. Petitioners have surely satisfied their threshold pleading requirement to establish standing. *City of Phila.*, 838 A.2d at 577.

Second, as Respondents appear to concede, Philadelphia has an interest as a governing entity. *See* Cutler PO ¶ 19. Under the Pennsylvania Constitution, the City of Philadelphia's home rule powers entitle it to "exercise any power or perform any function not denied by [the Pennsylvania] Constitution, by its home rule charter or by the General Assembly at any time." Pa. Const. art. IX, § 2. In *City of Philadelphia v. Commonwealth*, the Pennsylvania Supreme Court found that Philadelphia had standing to challenge the effects of allegedly unconstitutional legislation as it interfered with its interests and functions as a governing entity. 838

[15] Dep't of Pub. Health of the City of Phila., *The Cost of Gun Violence*, https://www.phila.gov/media/20180927125053/Cost-of-Gun-Violence.pdf.

[16] *See* Pet. ¶¶ 90-125 (alleging that Philadelphia and other municipalities would adopt or enforce firearm ordinances intended to reduce gun violence including permit-to-purchase requirements, one-gun-per-month limits, and extreme risk protection orders).

A.3d at 579. As explained below, this interference includes Philadelphia's right and duty to protect the health, safety, and quality of life of its citizens. *Infra* pp. 71-83.

Respondent Cutler's heavy reliance on this Court's prior decisions in *Ortiz*, 681 A.2d 152, and *Clarke*, 957 A.2d 361, is misplaced. Both cases involved completely different challenges than are raised here, *see infra* pp. 41-48, and neither bears on standing. *See Am. Standard*, 8 A.3d at 333 ("When the standards for substantiality, directness, and immediacy are readily met, the inquiry into aggrievability, and therefore standing, ends."). Respondents' objections regarding standing should be overruled.

B. Petitioners' Claims Are Ripe for Adjudication.

As a petition for declaratory relief this case is governed by the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541. The purpose of the Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." *Phantom Fireworks*, 198 A.3d at 1218 (quoting 42 Pa.C.S. § 7541(a)) (internal quotations omitted).

Consistent with these principles, the Act "provides a relatively lenient standard for ripeness," such that the action is ripe for adjudication so long as it presents "the ripening seeds of a controversy." *Id.* (quoting *Wecht v. Roddey*, 815

A.2d 1146, 1150 (Pa. Commw. Ct. 2002)) (internal quotations omitted). In other words, "the subject matter of the dispute giving rise to a request for declaratory relief need not have erupted into a full-fledged battle . . ." *Berwick Twp. v. O'Brien*, 148 A.3d 872, 881 (Pa. Commw. Ct. 2016) (citation omitted). It is sufficient that "the claims of the several parties in interest, while not having reached the active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable . . . ." *Id.* (citing *Lakeland Joint Sch. Dist. Auth. v. Scott Twp. Sch. Dist.*, 200 A.2d 748, 751 (Pa. 1964)); *see also Wecht*, 815 A.2d. at 1150 (citing *Silo v. Ridge*, 728 A.2d 394 (Pa. Commw. Ct. 1999)).

That is precisely the case here. Philadelphia and other municipalities have repeatedly passed laws and ordinances to reduce gun violence, which have been repeatedly ruled preempted by the Firearm Preemption Laws. *See* Pet. ¶¶ 92, 103-05, 114-15, 123. Philadelphia and other municipalities wish to enforce those gun violence prevention regulations and to enact others. *Id.* ¶¶ 93-125.[17] However,

[17] The Philadelphia Code, for instance, includes numerous provisions addressing gun safety, including provisions requiring licenses for acquisition or transfer of firearms (Philadelphia Code § 10-814a); restricting firearms in public spaces and educational institutions (§§ 10-818 & 10-822); reducing straw and multiple handgun purchases (§ 10-831a); and restricting possession of firearms by persons subject to Protection from Abuse orders (§ 10-835a). All of these provisions were added to the Philadelphia Code after ordinances were passed by Philadelphia's City Council and signed by the Mayor, and would be effective and enforced but for

Respondents continue to prevent them from passing or enforcing these lifesaving ordinances, and Petitioners continue to suffer. *Id.* ¶ 89.

"[I]n 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." *Twp. of Derry v. Pa. Dep't of Lab. & Indus.*, 932 A.2d 56, 60 (Pa. 2007). The "rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Koehler*, 229 A.3d at 941 (citation and quotation marks omitted).

There is nothing abstract about the facts set forth by Petitioners here. The Firearm Preemption Laws remain in full force and effect, and their devastating impact on Petitioners' lives and their ability to pass gun violence prevention regulations—past, present, and future—is well documented. And Petitioners' injuries are already manifest. The Court does not need to speculate about how and

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the Firearm Preemption Laws. In 2014, the Commonwealth amended Section 6120 to "g[ive] persons adversely affected by local gun-control laws standing to bring an action against the municipality." *Leach v. Commonwealth*, 141 A.3d 426, 428 (Pa. 2016). Because this amendment (later declared unconstitutional) meant Philadelphia could be sued for ordinances that were enacted but not yet enforced, Philadelphia added language to many of its gun safety Code provisions, clarifying that the *effective date* of the provisions would be *suspended* until authorized under state law. *See* PCC Bill No. 140904 (Feb. 18, 2015), *available at* https://phila.legistar.com/LegislationDetail.aspx?ID=2016353&GUID=C7581858-5F69-49B6-B980-57FB9148299E.

whether the Firearm Preemption Laws will affect Petitioners to determine their constitutionality. The matter is thus ripe for review. *See, e.g., id.* (question of whether a post-conviction court could reinstate a defendant's right to appeal was ripe for review, even though defendant had not yet established the underlying merits of his claim, because "[t]he disagreement in the present case is far from abstract. It centers on the discrete legal ground that resulted in [defendant's] petition being thrown out of court."); *Phantom Fireworks,* 198 A.3d at 1218 (finding a request for declaratory relief ripe for review where the petitioner alleged it was already suffering losses as a result of the challenged law); *see also Parker v. Commonwealth, Dep't of Lab. & Indus.*, 540 A.2d 313, 322 (Pa. Commw. Ct. 1988) (finding an actual controversy pursuant to the Declaratory Judgment Act where "Petitioners here have pled that they have been denied benefits by the Department at one time or another by the Department pursuant to [a] statute [that] is still in effect").

Respondents nevertheless insist that Petitioners' claims are too "hypothetical" and "speculative" to constitute an actual controversy because they plead facts related to legislation that has either already been invalidated under the Firearm Preemption Laws, or which "[has] not been (and may never be) enacted." Cutler Br. 20-21; *accord* Corman Br. 27-30; GA Br. 45-46. Respondents' arguments lack merit.

First, Respondents cannot dismiss Petitioners' allegations about the gun-violence prevention measures that the City would pass as "vague references to ordinances" (GA Br. 46) and "contingent on possible future actions" (Cutler Br.20) that "might never" happen (Corman Br. 31). Petitioners have alleged, with specificity, precisely those ordinances that Philadelphia *would pass* should the Firearm Preemption Laws be declared unconstitutional. Pet. ¶¶ 91, 99, 103-05, 113-15, 123. In other words, Petitioners have sufficiently pled that only the unconstitutional Firearm Preemption Laws stand in the way of the specified firearm ordinances. Respondents' insistence that the City's allegations about its own intent are still "hypothetical" strains credulity.

Second, Respondents compare Petitioners' challenge to the Firearm Preemption Laws with a series of cases challenging proposed or unenforced legislation. *See Mt. Lebanon v. Cnty. Bd. of Elections*, 368 A.2d 648 (Pa. 1977) (proposed legislation); *S. Whitehall Twp. v. Pa. Dep't of Transp.*, 475 A.2d 166 (Pa. Commw. Ct. 1984) (regulation that had never been triggered); *City Council of Phila. v. Commonwealth*, 806 A.2d 975, 978-79 (Pa. Commw. Ct. 2002), *vacated and remanded*, 847 A.2d 55 (Pa. 2004) (statute that had not yet gone into effect); *Boron v. Pulaski Twp. Bd. of Supervisors*, 960 A.2d 880, 885 (Pa. Commw. Ct. 2008) (citing cases dismissing challenges to unapplied ordinances).

The cases Respondents cite are inapposite. Petitioners are not challenging proposed legislation or unenforced ordinances. They are challenging the Firearm Preemption Laws, which are very much in effect, and which continue to be applied to Petitioners' detriment. *See Phantom Fireworks*, 198 A.3d at 1218 (distinguishing a challenge to "a zoning ordinance that had not been enforced or applied" with a challenge to "a taxing statute" whose "provisions are in force").

Ultimately, Respondents cannot dispute that it would be futile for Philadelphia to continue to pass preempted ordinances. *See, e.g.*, GA Br. 46 ("There is no doubt that there have been ordinances in the past that have been preempted by Section 6120. Indeed . . . there has been much litigation with respect to such ordinances."); Corman Br. 30 ("Philadelphia and other municipalities have enacted some of these types of ordinances, [and] the Preemption Provisions preempted those enactments . . . ."). The City need not pass yet another ordinance for Petitioners to establish that their claims are well-developed, and that they will suffer devastating consequences if review of their Constitutional claims is delayed any further. *See Twp. of Derry*, 932 A.2d at 60.

Respondent Cutler argues that "any relief granted to Petitioners . . . could only be prospective (not retroactive)." Cutler Br. 21-22. If that characterization is accurate, it does not show that Petitioners' claims are unripe; courts routinely grant solely prospective relief under the Declaratory Judgments Act, especially where

providing such relief is the only way to ensure past harm does not continue. *See, e.g.*, *Phantom Fireworks*, 198 A.3d at 1218 ("Phantom Fireworks has no legal recourse to recover its business losses from them. It can only hope to address such losses going forward by means of this lawsuit. Phantom Fireworks' challenge to Act 43 is therefore ripe for adjudication."); *Common Cause v. Commonwealth*, 668 A.2d 190, 195 (Pa. Commw. Ct. 1995) (after finding that the legislature failed to follow constitutional procedures in enacting legislation, determining that a prospective declaratory judgment was the appropriate remedy for ensuring that "the unconstitutional acts" would not "continue unabated"). That is because the Declaratory Judgment Act is "remedial legislation and is to be liberally construed and administered." *Parker v. Commonwealth, Dep't of Lab. & Indus.*, 540 A.2d 313, 322 (Pa. Commw. 1988).

Respondent Cutler's assertion that the Court cannot "resurrect those ordinances" held preempted in *Ortiz*, *Clarke*, and *Schneck* (Cutler Br. 21), is a straw man, and has nothing to do with ripeness. If the Firearm Preemption Laws are ruled unconstitutional, Philadelphia will be free to enact measures addressing gun violence, including measures like those struck down in *Ortiz*, *Clarke*, and *Schneck*. That would save lives, reduce the risks of gun violence facing Petitioners, and otherwise redress Petitioners' injuries. The constitutionality of the Firearm Preemption Laws is therefore ripe for resolution.

C. The Court Has the Power to Declare a Statute Unconstitutional.

Respondents devote considerable attention to refuting a theory that Petitioners never asserted. Petitioners are not asking the Court "to enact laws" (GA Br. 42), "to substitute its policy judgment for the General Assembly's policy judgment" (Corman Br. 32), "to adopt a political position, not a legal one" (Commonwealth Br. 16), or to convert "the judiciary into a super-legislature" (Cutler Br. 1). Rather, Petitioners ask the Court to hold that the Firearm Preemption Laws violate the Pennsylvania Constitution, via routine application of bedrock principles of judicial review.

"Our Constitution vests legislative power in the General Assembly," but "[o]rdinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers." *Robinson Twp. II.*, 83 A.3d at 927-28 (alteration in original) (internal quotation marks and citation omitted); *see also id.* at 927 ("This is not a radical proposition in American law." (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803)). The gravamen of Petitioners' constitutional claims is that the Firearm Preemption Laws violate Article I, Section I of the Pennsylvania Constitution. This is an ordinary judicial-review theory that falls fully within this Court's competence and jurisdiction. The decisions cited by Respondents show just that. *See, e.g.*, *Luzerne Cnty. v. Morgan*, 107 A. 17, 17 (Pa. 1919) ("[t]he legislature may do

whatever it is not forbidden to do by the federal or state Constitution."); *see also Mercurio v. Allegheny Cnty. Redevelopment Auth*., 839 A.2d 1196, 1203 (Pa Commw. Ct. 2003) ("[t]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made *in areas that neither affect fundamental rights nor proceed along suspect lines*") (quotation marks and citation omitted) (emphasis added).

Respondents call for judicial abstention under the political question doctrine and separation-of-powers principles on the grounds that the text of the Pennsylvania Constitution entrusts legislative power exclusively to the General Assembly. *See* Commonwealth Br. 14-15 & n.2; GA Br. 44-45; Corman Br. 33; Cutler Br.1.[18] But the political question doctrine and separation-of-powers principles are not shields protecting legislation from judicial scrutiny. Rather,

[18] Respondents cite strings of cases allegedly supporting their claims of non-justiciability, yet they do not cite a single case in which the court actually found claims non-justiciable. *See e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962) (legislative redistricting is justiciable); *Sweeny v. Tucker*, 375 A.2d 698 (Pa. 1977) (legislature's expulsion of a member is subject to judicial review); *Zemprelli v. Daniels*, 463 A.2d 1165 (Pa. 1981) (meaning of a constitutional provision, even a provision that impacts the internal operations of the legislature, is justiciable); *Council 13, AFSCME v. Commonwealth*, 986 A.2d 63 (Pa. 2009) (employees' claim that the Pennsylvania Constitution did not require the Governor's furlough plan did not present a nonjusticiable political question); *Robinson Twp. II*, 83 A.3d 901 (amendment of the Pennsylvania Oil and Gas Act was subject to the judicial review under the Environmental Rights Amendment); *William Penn Sch. Dist. v. Pa. Dep't of Educ*., 170 A.3d 414 (Pa. 2017) (legislature's education funding decisions are subject to judicial review under the Pennsylvania Constitution's equal protection and education clauses).

"[t]he question is whether our Constitution, explicitly or impliedly, can be read as reflecting the clear intent to entrust the legislature with the sole prerogative to assess the adequacy of its own effort to satisfy [a] constitutional mandate." *William Penn Sch. Dist.*, 170 A.3d at 439.

The constitutional merits questions in this case ask whether the Firearm Preemption Laws violate Article I, Section 1. These are not political questions entrusted solely to the legislature. Whether a statute violates Article I, Section 1 or any other constitutional provision is the judiciary's prerogative to adjudicate. *See, e.g.*, *In re J.B.*, 107 A.3d 1, 16 n.26, 20 (Pa. 2014) (holding that a statute's lifetime registration provision as applied to juveniles is unconstitutional under Article I, Sections 1 & 11); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (invalidating a provision of the Protective Services Act under Article I, Section 1).

Similarly, the Commonwealth's and General Assembly's lengthy arguments about the preemptive effect of Section 6120 are tautological. *See* Commonwealth Br. 8-12; GA Br. 13-18. They object that the preemption laws cannot be challenged because they are preemption laws, ignoring that these laws can be invalidated on constitutional grounds. Of course, the legislature preempted such local measures by passing the Firearm Preemption Laws—that is the entire point of this litigation. Indeed, Petitioners' constitutional challenge is ripe precisely because of the preemptive scope of the Firearm Preemption Laws. Respondents cannot

argue in one breath that Petitioners' concerns with preemption are speculative, and that the current effect of preemption renders their challenge non-reviewable in the next.

Respondents suggest, however, that preemption laws are uniquely off-limits to constitutional review. *See, e.g.*, GA Br. 40; *see also* Corman Br. 34-35. They are not. The General Assembly's power "is subject to restrictions enumerated in the [Pennsylvania] Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth." *League of Women Voters*, 178 A.3d, at 803. Under the Pennsylvania Constitution, the people have delegated general power to the General Assembly, "with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution." *Id.* As such, the General Assembly's power to preempt is "not absolute," and our Supreme Court has struck down preemption laws that violate our Constitution. *Robinson Twp. II*, 83 A.3d at 946. The U.S. Supreme Court has done the same. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996). This Court has the authority to do so here.

II. PHILADELPHIA'S CLAIMS ARE NOT PRECLUDED.

Respondents' final attempt to avoid the merits is their contention that three decades-old decisions—*Schneck*, *Ortiz*, and *Clarke*—preclude the City of Philadelphia's claims. They do not.

A. Philadelphia's Claims Are Not Barred by *Res Judicata*.

"Res judicata, or claim preclusion, applies only when there exists a 'coalescence of four factors: (1) identity of the thing sued upon or for; (2) identity of the causes of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued.'" *Robinson v. Fye*, 192 A.3d 1225, 1231 (Pa. Commw. Ct. 2018) (quoting *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995)). In addition to claims that were actually litigated, "res judicata also precludes those 'claims which could have been litigated during the first proceeding *if they were part of the same cause of action*.'" *Id.* (emphasis added). The purpose of the doctrine of *res judicata* is "to protect the judiciary from the corresponding inefficiency and confusion that re-litigation of a claim would breed." *In re Coatesville Area Sch. Dist.*, 244 A.3d 373, 378 (Pa. 2021) (internal quotations omitted).

Contrary to Respondents' assertions, the "causes of action" in this case are different from those in *Schneck*, *Ortiz*, and *Clarke*. "Identity of the causes of action under the second element of res judicata exists 'when the subject matter *and* the ultimate issues are the same in both the old and new proceedings.'" *Robinson*, 192 A.3d at 1232 (emphasis added). There is no overlap between the ultimate issues in this case and the ultimate issues in *Schneck*, *Ortiz*, and *Clarke*.

Schneck involved a class action against the City of Philadelphia seeking to enjoin enforcement of an ordinance that predated enactment of Section 6120. 383 A.2d 227, 228 (Pa. Commw. Ct. 1978). The question to the Commonwealth Court in *Schneck* was whether Philadelphia's gun licensing ordinance was preempted by Section 6120; the Court held that it was. *Id.* In *Ortiz*, the ultimate issue was whether principles of home rule dictate that municipalities have the power to enact certain firearms legislation despite Pennsylvania's firearms preemption laws. 681 A.2d at 154. In *Clarke*, the ultimate issue was a statutory interpretation question, namely, whether certain Philadelphia ordinances fell outside the scope of Pennsylvania's firearms preemption laws, and whether changed circumstances justified reconsideration of the Court's holding in *Ortiz*. 957 A.2d at 363-64. In contrast, the ultimate issues here are whether Pennsylvania's firearms preemption laws violate the state-created danger doctrine and substantive due process guarantees under Article I, Section I of the Pennsylvania Constitution, and the Commonwealth's obligation to maintain order and to preserve the safety and welfare of all citizens. *See* Pet. ¶¶ 131-52. No court has yet considered these claims.

As such, barring Philadelphia's claims in this case would not prevent inconsistent decisions or encourage reliance on adjudication. Here, if Petitioners were to prevail on the merits, there would be nothing inconsistent between the

decision in this case and the decisions in *Ortiz*, *Clarke* and *Schenk*, because the issues to be decided by the Court in this case are entirely different from the issues decided in those cases. *See Balent v. City of Wilkes-Barre*, 669 A.2d 309, 315 (Pa. 1995) (the purpose of res judicata "is to relieve the parties of the cost and vexation of multiple lawsuits, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudications"). A decision on the merits in this case would address the state-created danger doctrine, Article I, Section I of the Pennsylvania Constitution, and interference with delegation. *Ortiz* and *Clarke* do not address the limits of the General Assembly's power to preempt political subdivisions of the Commonwealth, under Article I Section I or otherwise.

Respondents cannot satisfy the second prong of the res judicata test because the claims or causes of action in this case differ completely from the claims or causes of action in *Schneck*, *Ortiz*, and *Clarke*.

With respect to *Ortiz* and *Clarke*, Respondents also cannot satisfy the third prong—identity of the parties. The City was not a party in *Ortiz* or *Clarke*. Respondents argue instead that the City is in privity with the individual members of Philadelphia City Council who were parties in those cases.[19] Not so.

[19] Respondents have not asserted a preliminary objection that the other parties in this case are in privity with the parties in *Ortiz* or *Clarke*; therefore the issue of whether preclusion applies to the other parties in this case is not before the Court.

"Privity for purposes of res judicata is not established by the mere fact that persons may be interested in the same question or in proving the same facts." *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1317 (Pa. 1983). Privity lies "when there exists mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." *Robinson*, 192 A.3d at 1234. The Commonwealth cites *Commonwealth v. Bellis*, 399 A.2d 397, 400 (Pa. 1979), in support of its argument that the City of Philadelphia is in privity with City Council members. *See* Commonwealth Br. 19-21. But *Bellis* does not support this conclusion; rather, it merely stands for the proposition merely that a city councilman may be considered an "agent" of the City under Pennsylvania's government bribery statute. *Bellis,* 399 A.2d at 400.

Precedent counsels against applying such a general rule to cities and their elected officials. Pennsylvania courts have held that a department of the Commonwealth is not in privity with the Commonwealth itself or with the District Attorney. *Commonwealth, Dep't of Transp. v. Crawford*, 550 A.2d 1053, 1055 (Pa. Commw. 1988); *Commonwealth v. Pullano,* 625 A.2d 1226, 1228 (Pa. Super. 1993). Indeed, in this very litigation, the Commonwealth, the General Assembly, the Speaker of the House, and the President Pro Tempore of the Senate all mount different defenses through different counsel. Likewise, an officer of a corporation

is not in privity with the corporation for purposes of res judicata. *See Amalgamated Cotton Garment & Allied Indus. Fund v. Campolong*, 463 A.2d 1129, 1131 (Pa. Super. 1983). Consistent with these principles, the City of Philadelphia is not in privity with its individual elected officials.

Ortiz and *Clarke*—lawsuits brought by individual city council members rather than the City, through private outside counsel rather than the Law Department—reflect that Philadelphia City Council has certain functions that are independent of the rest of city government. The Philadelphia Home Rule Charter affords City Council the right to take independent legal action, under certain circumstances. *See* Phila. Home Rule Charter § 2-105 ("In the event the Law Department declines to advise or render legal services to the Council in any matter . . . the Council may employ and fix the compensation of counsel of its own selection to handle such matter . . ."); *see also id.* at Annotation ("[P]rovision is made for Council obtaining its own counsel in the event the Law Department declines to act . . . Under such circumstances Council is assured independence from the executive branch in order to enable it to function properly."). In *Ortiz* and *Clarke*, the individual City Council members who were parties in those cases were acting independently from the City, in accordance with their unique rights to do so under the Charter. The parties in *Ortiz* and *Clarke* did not represent the same "legal right" that Philadelphia represents in this case. *See Robinson,* 192 A.3d at 1234

(privity exists where there is "such an identification of interest of one person with another as to represent the same legal right").

Because there is no identity in the causes of action or parties, res judicata does not bar the City of Philadelphia from asserting the claims in this case.

B. Philadelphia's Claims Are Not Barred by Collateral Estoppel.

Issue preclusion, or collateral estoppel, does not apply either. That doctrine "forecloses re-litigation in a later action[] of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *City of Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (Pa. 1989). "Collateral estoppel will only apply where: the issue is the same as in the prior litigation; the prior action resulted in a final judgment on the merits; the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action." *In re Coatesville*, 244 A.3d 379. Issue preclusion (collateral estoppel) "is premised on practical considerations that overlap substantially with those of res judicata. These include avoiding the cost and vexation of repetitive litigation, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication." *Id.* (internal quotations omitted).

Respondents' preliminary objection based on collateral estoppel fails for essentially the same reasons that their preliminary objection based on res judicata fails. First, the issues in this case differ significantly from the issues in *Ortiz* and *Clarke*. The issues in this case are whether Sections 6120 and 2962(g) violate Article I, Section 1 of the Pennsylvania Constitution and whether Section 6120 unlawfully interferes with Philadelphia's delegated duties. In contrast, the issues in *Ortiz* and *Clarke* were whether Section 6120 unlawfully interfered with the powers of Pennsylvania home rule municipalities. The issue in *Schenk* was whether Section 6120 preempted Philadelphia's gun licensing ordinance. No previous litigation has challenged the constitutionality of Section 6120 and 2962(g) under Article I, Section I, nor has any previous litigation included a claim that Section 6120 unlawfully interferes with duties delegated to political subdivisions by the Commonwealth. Respondents simply cannot satisfy the first prong of the collateral estoppel test because the issues in this case are different from the issues presented in the prior cases cited by Respondents. Also, as discussed above, Philadelphia is not in privity with individual City Council members. Thus, collateral estoppel does not apply.

III. PETITIONERS PROPERLY ALLEGE CLAIMS ON THE MERITS.

A. Petitioners Have Stated a Claim Under the State-Created Danger Doctrine.

Turning at last to the merits, Respondents' objections to Count I fail. The Third Circuit and numerous other courts have held that due process guarantees "can impose an affirmative duty to protect if the state's own actions create the very danger that causes the plaintiff's injury." *Morrow*, 719 F.3d at 167 (citing *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996)); *see also id.* at 177 ("liability may attach where the state acts to *create* or *enhance* a danger that deprives the plaintiff of his or her . . . right to substantive due process.").

This "state-created danger" doctrine has been applied in a variety of contexts, often where the state has exposed someone to third-party violence or other danger by restricting the plaintiff's liberty, including in educational institutions, foster homes, and traffic stops. *See e.g. Maxwell ex rel. Maxwell v. Sch. Dist. of City of Phila.*, 53 F. Supp. 2d 787, 789, 792-93 (E.D. Pa. 1999) (state-created danger applicable where student was raped after school defendants locked classroom door "effectively blocking student's ability to leave the room"); *Kneipp*, 95 F.3d at 1208-11 (state-created danger applicable where officer abandoned intoxicated person following car stop); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993) (similar). The doctrine has also been applied where affirmative acts by officials increase the opportunity for a crime. *See, e.g.*, *Pearce v. Est. of Longo*,

766 F. Supp. 2d 367 (N.D.N.Y. 2011) (state-created danger applicable where police department and chief enabled domestic abuser by "discourag[ing] [plaintiff] from making reports or seeking an Order of Protection" and "affirmatively order[ing] that [the attacker] be permitted to remain on duty and keep his weapons."), *aff'd in relevant part*, 473 F. App'x 16, 18-19 (2d Cir. 2012); *D.N. ex rel. Nelson v. Snyder*, 608 F. Supp. 2d 615, 627 (M.D. Pa. 2009) (state-created danger applicable where police department destroyed officer's confession to possession of child pornography and he subsequently abused a foster child in his care).

Under Article I, Section 1 of the Pennsylvania Constitution, the state-created danger doctrine is at least as protective of the right to life as the federal doctrine. *See, e.g.*, *R. v. Commonwealth, Dep't of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994).

Four elements are required to prove a claim of state-created danger:

1) the harm ultimately caused was foreseeable and fairly direct;

2) a state actor acted with a degree of culpability that shocks the conscience;

3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and

4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Morrow, 719 F.3d at 177.[20] Petitioners have amply pleaded, and at trial will prove, all four elements.

1. The Harm Was Foreseeable and Direct.

The deadly toll of the Firearm Preemption Laws was foreseeable to Respondents. Indeed, it has stared them in the face for nearly fifty years, as thoroughly set forth in the Petition for Review. *See* Pet. ¶¶ 61-89. When Section 6120 was first debated in the General Assembly in 1973, numerous members from the Philadelphia area warned of the lethal consequences of preemption in particular neighborhoods in the City. *Id*. ¶¶ 64-65. Before the General Assembly expanded Section 6120 in 1993, members from the Philadelphia area, and then-Governor Bob Casey Sr., again spelled out in no uncertain terms how the law would result in more gun deaths in Philadelphia's hardest-hit communities, and how municipal-level firearm regulations, including those passed by Philadelphia and Pittsburgh,

[20] Respondent Corman cites the elements as articulated in a footnote in *Arocho v. Cnty. of Lehigh*, 922 A.2d 1010, 1023 n.18 (Pa. Commw. 2007), and Respondent Cutler cites the factors as articulated in *R.W. v. Manzek*, 888 A.2d 740, 743-744 (Pa. 2005). *See* Corman Br. 37-38; Cutler Br. 23-24. Both cases relied on the Third Circuit's decision in *Kneipp*. While the differences are not material, Petitioners submit this Court should look to the Third Circuit's later, *en banc* decision in *Morrow*. Notably, the Commonwealth and the General Assembly rely on *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281-82 (3d Cir. 2006), which is consistent with *Morrow*. *See* Commonwealth Br. 24-25; GA Br. 21.

save lives. *Id*. ¶¶ 71-77. Again in 1999, *id*. ¶¶ 79-82, and 2014, *id*. ¶¶ 83-87, Philadelphia-area members reiterated that expanding the Firearm Preemption Laws would increase gun deaths and injuries in Black, Hispanic, and impoverished neighborhoods.

The harms have also been direct, because local firearm ordinances that would be in effect but for the Firearm Preemption Laws are proven to reduce gun violence. Licensing requirements have successfully reduced gun violence in multiple jurisdictions, as published studies have documented for decades. *Id*. ¶¶ 96-98. Peer-reviewed studies have also documented for decades that waiting periods and one-gun-per-month limits dramatically reduce gun violence, the prevalence of straw purchases, and gun trafficking. *Id*. ¶¶ 107-108. The life-saving effect of laws allowing Extreme Risk Protection Orders, which allow family members or law enforcement to temporarily remove guns in crisis situations, are well documented. *Id*. ¶¶ 118-20. The General Assembly has repeatedly been informed of these empirical findings but has opted to flout them every time. *Id*. ¶¶ 99, 109-11, 121.

2. Respondents Acted with Deliberate Indifference.

Petitioners agree that the second element of the state-created-danger test requires conduct that "shocks the conscience." But "[t]he level of culpability required for behavior to shock the conscience largely depends on the context in

which the action takes place." *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 246 (3d Cir. 2016). Unlike "a hyperpressurized environment, such as a high-speed police chase, [where] intent to harm is required," situations like legislating afford "time to make unhurried judgments." *Id.* In this latter situation, "deliberate indifference is sufficient" to satisfy the shock-the-conscience element. *Id*. (cleaned up). "Deliberate indifference" in turn can be shown by a "conscious disregard of a substantial risk of serious harm." *Vargas v. City of Phila.*, 783 F.3d 962, 973-74 (3d Cir. 2015) (cleaned up).

As enumerated above, and in the Petition for Review, members of both houses have repeatedly predicted the deaths and injuries that would follow from the Firearm Preemption Laws, but Respondents' reaction has been to plunge their heads into the sand.[21] Indeed, the General Assembly has refused to repeal or narrow the Firearm Preemption Laws more than a dozen times since 2001, never even allowing a floor vote. Pet. ¶ 88. Repeated warnings meant the legislature knew or should have known of the substantial risk of serious harm created by the Firearm Preemption Laws, and the repeated decisions to disregard this reality evinces—and indeed is a textbook case of—deliberate indifference that shocks the conscience.

[21] They remain in the sand. *See, e.g.*, Corman Br. 41 ("[I]t was not reasonably foreseeable that the decision [to enact the Firearm Preemption Laws] would cause harm to anyone.").

3. The Dangers of Gun Violence Overwhelmingly Fall on Discrete Classes of Persons.

Respondents object that "none of the Petitioners belong to a discrete class of individuals who are distinguishable from the general public." GA Br. 22; *accord* Corman Br. 40; Cutler Br. 24-25; Commonwealth Br. 26. To the contrary, Individual Petitioners are members of communities that bear a tragically disproportionate share of the scourge of gun violence. "Black Pennsylvanians are ***19*** times more likely to die by gun homicide than White Pennsylvanians." Pet. ¶ 29. In Pennsylvania, the firearm homicide rate among non-Hispanic Black men ages 15-24 years old is 114.6 deaths per 100,000 persons, closely followed by the firearm homicide rate of non-Hispanic Black men ages 25-34 years old with a rate of 105.9 deaths per 100,000 persons. Pet. ¶ 30. In contrast, non-Hispanic White men have a firearm homicide rate of less than 3 deaths per 100,000 persons for the same age groups. Pet. ¶ 30. Philadelphia has the highest firearm homicide rate of any county in Pennsylvania, followed by Allegheny. Pet. ¶ 33. "Firearm homicides occur most often in Philadelphia's poorest neighborhoods," Pet. ¶ 34, especially in predominantly Black neighborhoods, Pet. ¶ 32. Likewise, in Pittsburgh, gun violence is heavily concentrated in Black neighborhoods. Pet. ¶¶ 37-39. All the Respondents analogize the risk of gun violence to the risk of traffic deaths on a highway (Commonwealth Br. 25; GA Br. 22 n.10; Cutler Br. 25 n.6; Corman Br. 38), but the analogy is inapt: Nearly everyone travels on highways at some time,

but most Pennsylvanians never live in deeply impoverished and/or heavily Black or Hispanic urban neighborhoods.

Respondents cannot claim to have been unaware of the vastly greater burden of gun violence suffered by these specific communities, compared to the general public. To give just two examples, the House Judiciary Committee heard testimony in 2007 that "[h]omicide is the leading cause of death for young Black men, and Philadelphia, Pennsylvania leads the nation," Pet. ¶ 111. In 2014, the House heard that "[o]f the 247 murders Philadelphia witnessed in 2013, 201 of them, (81.4%) were by gunshot. And among [these] murders, 191 of the 247 victims were black, 224 were male, and 160 were under age 34," Pet. ¶ 85 (second alteration in original).

4. Respondents Have Acted Affirmatively.

Enacting legislation constitutes action. Passing the Firearm Preemption Laws was action. Repeatedly amending Section 6120 to make it more restrictive was action. Voting down motions on the floor to amend or repeal the Firearm Preemption Laws was action. So was repeatedly sending gun violence prevention bills to languish in committees. Everything Respondents did concerning preemption and gun violence prevention is action, *see* Pet. ¶¶ 61-89, and therefore subject to the state created danger doctrine.

Respondents' arguments to the contrary are unavailing. They cite no authority suggesting the acts alleged in the Complaint are not "affirmative acts." The General Assembly argues that its "enactment of Section 6120 is *not* an affirmative act *directed at any specific individual*" (GA Br. 24 (emphasis added)), but "directed at any specific individual" is not part of the fourth prong of the test. Courts have upheld many state-created danger claims based on actions that were not "directed" at anyone. *See, e.g.*, *D.N. ex rel. Nelson v. Snyder*, 608 F. Supp. 2d 615, 627 (M.D. Pa. 2009); *Schieber v. City of Phila.*, No. 98-cv-5648, 1999 WL 482310 (E.D. Pa. July 9, 1999); *Gormley v. Wood-El*, 93 A.3d 344, 365 (N.J. 2014).

The Commonwealth argues that "Petitioners do not allege that the Commonwealth has acted at all—rather, Petitioners allege that the Commonwealth failed to act." Commonwealth Br. 27. This is all a mischaracterization. *See, e.g.*, Pet. ¶ 6 ("By enacting and repeatedly expanding the Firearm Preemption Laws, Respondents have affirmatively increased the risks of gun violence in Petitioners' communities."), ¶ 133 ("Respondents have affirmatively used their authority in a way that renders Petitioners more vulnerable to gun violence than had Respondents not acted at all.").

Had Respondents not acted at all, Philadelphia and other municipalities would have ordinances in effect that reduce gun violence, particularly in their

hardest-hit communities. *E.g.*, Pet. ¶¶ 60, 91-92. But because Respondents have taken affirmative steps to restrain local governments, the fourth element of the state-created-danger test is met.[22]

5. Legislation is Subject to State-Created-Danger Claims.

Respondents argue that "the state created danger doctrine has never been used to nullify an ordinance or statute," relying on language from *Johnston*, 859 A.2d at 13. *See* Commonwealth Br. 26. Neither *Johnston* nor any other authority bars Petitioners' claim here: In the unique context of a statute preempting local regulation, a state-created-danger claim is an appropriate mechanism for challenging the statute's constitutionality where the elements of the doctrine can be satisfied.

Johnston is readily distinguishable. There, the plaintiffs were residents of two townships who challenged the constitutionality of ordinances requiring

[22] Courts have found an "affirmative act" when officials eliminate sources of help or assistance without providing meaningful alternatives. For example, in *Schieber*, 1999 WL 482310, neighbors heard the victim screaming for help from her apartment and called the police, who responded to the "Priority 1" call. Upon arrival, the officers knocked on the victim's door but made no further inquiry; the officers told the neighbors who were ready to assist that the victim was not home. The officers left, and the victim was found dead the next day. The court found that it was foreseeable that the officers' failure to intervene created an additional danger for the victim; if the officers had not exercised their authority as they did, neighbors would have intervened. *Id*. at *4; *see also, e.g.*, *Sanders v. Bd. of Cnty. Comm'rs*, 192 F. Supp. 2d 1094, 1112 (D. Colo. 2001) (finding "affirmative act" where police officials "refus[ed] to permit any access to or rescue of" teacher in Columbine High School after risk of shooting ceased).

homeowners to connect their homes to the local water system. *Id.* at 9. Among other theories, they argued that the ordinances violated their "substantive due process rights under the state-created danger theory." *Id.* at 13. While a panel of this Court rejected this claim, and declined to apply stated-created danger jurisprudence to nullify a statute or ordinance, the Court also noted that "if the 'state-created danger' theory could be used to render a statute unconstitutional, it does not fit the facts of this complaint," because "the harm alleged by Residents was conjectural, not imminent and real," and because the alleged harm applied equally to all residents of the townships. *Id.* at 13-14. The plaintiffs thus could not establish the elements of a state-created danger claim. *Id.*

That is not the case here. *See supra* pp. 49-57. The supposed harm in *Johnston* was highly conjectural: The plaintiffs "asserted that as a result of the terrorist attacks on September 11, 2001, and the nation's war on terrorism, there is now a real and present danger of terrorist attacks on public water systems." *Id.* at 9. But as the Court pointed out, "[t]here [were] no allegations, for example, that the Water Authority, the Townships or Armstrong County have been identified as special targets for terrorists." *Id.* at 13 n.15. In stark contrast, the harm of gun violence in Petitioners' communities is manifest on a daily basis, and the link between the Firearm Preemption Laws and gun violence is documented by an extensive body of published, well-respected research. *See supra* pp. 51-52. And the

harms do not equally affect the public at large, but are highly concentrated on individuals in particular discrete communities, groups, and sub-groups. *See supra* pp. 54-55.

Moreover, there is no principled basis to uniquely immunize all legislation from state-created danger challenge. The state-created danger doctrine invokes substantive due process protections; it stems from the U.S. Supreme Court's decision in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989), and provides an exception to the rule that due process guarantees do not normally impose a duty on state actors to protect against actions by third parties. *See Morrow*, 719 F.3d at 166. Legislation, like executive action, is generally subject to substantive due process review. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702 (1997). Where legislation "create[s] the very danger that causes the plaintiff's injury," *Morrow*, 719 F.3d at 166, and where the other elements of the claim can be proved, there is no reason to exempt it from a state-created danger challenge.

Respondents repeatedly characterize the Firearm Preemption Laws as policy determinations and thus, for some reason, not subject to judicial review. Cutler Br. 1, 32; Corman Br. 32-33; GA Br. 42-45; Commonwealth Br. 14-17. But courts have upheld state-created-danger challenges to policy decisions by executive officials. For example, in *Gormley v. Wood-El*, 93 A.3d 344 (N.J. 2014), a court-

appointed attorney filed a state-created-danger suit against officials at a state psychiatric hospital based on their policy requiring attorneys to meet with clients in an unsupervised "day room" where assaults frequently occurred. The New Jersey Supreme Court concluded that the history of prior assaults adequately proved that officials acted with deliberate indifference. "Giving Gormley the benefit of the most favorable evidence and inferences, defendants executed a policy, over a course of years, in complete disregard of the known danger that mentally disturbed patients were attacking professionals, such as Gormley, in the ward's day room." *Id.* at 365. Evidence that the defendants exhibited "complacency with the ongoing violence committed against attorneys" could be "viewed by a jury as shocking by itself." *Id*. If an executive policy decision can be subject to state-created danger challenge, so too can a legislative one; it can infringe the "substantive-due-process right . . . to be free from state-created danger" just as much, if not more. *Id.* at 359.

Nor must a state-created danger claim seek damages as opposed to equitable relief. *Cf.* Cutler Br. 24; GA Br. 24; Corman Br. 3, 37-39. Courts have awarded injunctive relief in state-created danger cases and closely related due process cases. In *M.D. by Stukenberg v. Abbott*, the Fifth Circuit upheld in part an "expansive injunction mandating dozens of specific remedial measures" which made sweeping changes to Texas's foster care system. 907 F.3d 237, 271 (5th Cir. 2018) (citing state-created danger cases); s*ee also Lozano v. Baylor Univ.*, 408 F. Supp. 3d 861,

887 n.8 (W.D. Tex. 2019) (explaining that *Stukenberg* was "based on the 'state created danger' line of cases"); *see also Gormley*, 93 A.3d at 363-64 (in state-created-danger case, "qualified immunity does not bar actions for injunctive relief"); *Bennett ex rel. Irvine v. City of Phila.*, No. 03-cv-5685, 2003 WL 23096884, at *5 (E.D. Pa. Dec. 18, 2003) (declining to dismiss state-created-danger count seeking injunction against a city, a municipal agency, and one of their employees concerning effective procedures for locating children missing from the agency's care); *J.P. v. Sessions*, No. 18-cv-6081, 2019 WL 6723686, at *36 (C.D. Cal. Nov. 5, 2019) ("where the status quo is 'exactly what will inflict the irreparable injury,' the possibility of alternative relief through a claim for damages not a sufficient basis to deny injunctive relief").[23]

In sum, Petitioners have adequately alleged the elements of a state-created-danger claim. Even if *Johnston* could be read as broadly prohibiting state-created-danger challenges to legislation, it should be limited to its facts; indeed, *Johnston*'s

[23] The Commonwealth asserts that the state-created danger doctrine "is on shaky ground" in the Third Circuit. Commonwealth Br. 23. Not so. In *Johnson*, 975 F.3d 394, two judges who joined the majority opinion suggested in concurrences that the Third Circuit "revisit" the doctrine. *Id.* at 404 (Matey, J., concurring); *id.* at 405 (Porter, J., concurring). Neither opinion seriously advocated abandoning the doctrine entirely or articulated a basis for doing so; after all, the doctrine stems from the U.S. Supreme Court's decision in *DeShaney*, 489 U.S. at 197. *See Morrow*, 719 F.3d at 166. Rather, Judge Porter's concurrence (which Judge Matey also joined) advocated "combining" different standards on the second element (regarding deliberate indifference) in a way that would have no relevance to this case. *Johnson*, 975 F.3d at 406 (Porter, J., concurring).

state-created danger analysis has not been cited by this Court or any other since it was issued in 2004. But the Court need not resolve that issue now. Respondents fall far short of showing "with certainty that the law will not permit recovery," and their preliminary objections on Count I should be denied. *Pa. Virtual Charter Sch.*244 A.3d at 889 (citation omitted)).

B. Petitioners Have Stated a Claim for Respondents' Violation of Substantive Due Process.

Article I, Section I grants all Pennsylvanians "certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty." Pa. Const. art. I, § 1. Before the enactment of the Firearm Preemption Laws, Pennsylvanians like the Individual Petitioners ensured their ability to "enjoy[] and defend[] life and liberty" by, among other things, instituting local regulations on firearms to prevent gun violence in their communities. *See supra* pp. 5-6. In Count II of the Petition for Review, Petitioners allege that because the Firearm Preemption Laws interfere with such protections, they run afoul of Article I, Section 1.

Respondents' arguments to the contrary are not persuasive. Each fails to show any legitimate interest advanced by the Firearm Preemption laws, let alone that the Laws are "substantially related to an important government interest." *Yanakos v. UPMC*, 218 A.3d 1214, 1216 (Pa. 2019), *reargument denied*, 224 A.3d

1255 (Pa. 2020). Respondent Cutler's more extreme argument–that the Firearm Preemption Laws do not infringe on a protected interest at all–is patently wrong.

1. The Firearm Preemption Laws infringe on rights protected by Article I, Section 1.

Article I, Section 1 was "established for the protection of personal safety and private property." *Appeal of Ervine*, 16 Pa. 256, 263 (1851). Respondent Cutler contends that the Firearm Preemption Laws do not implicate any interest protected by Article I, Section 1. This is a dubious proposition. Article I, Section I protections include the right to "enjoy[] and defend[] life and liberty," as well as rights of substantive due process "interwoven within our judicial framework to guarantee fundamental fairness and substantial justice." *Khan v. State Bd. of Auctioneer Examr's*, 842 A.2d 936, 946 (Pa. 2004).

The Firearm Preemption Laws block Pennsylvanians like Individual Petitioners from protecting themselves from gun violence with local regulations. Petitioners have alleged that local regulations like licensing (i.e., permit-to-purchase) requirements, bulk-purchasing (i.e., one-gun-per-month) restrictions, and extreme-risk-protection ordinances would substantially reduce the risks of gun violence in their communities. See Pet. ¶¶ 90-125. The Firearm Preemption Laws eviscerate the ability of Individual Petitioners to collectively enact such measures that safeguard their right to "enjoy[] and defend[] life and liberty." *Id.* ¶ 141. In doing so, the Firearm Preemption Laws violate Article I, Section 1. *Id.* ¶ 139-44.

The decision of this Court's en banc majority in *Robinson Township I* supports this conclusion. That case involved a challenge to Act 13 pertaining to fracking in the Marcellus Shale reserve, which "preempt[ed] local regulation, including environmental laws and zoning code provisions[.]" 52 A.3d at 468 (footnote omitted). The petitioners—individuals, municipalities, and an association—asserted that Act 13 violated the substantive due process protections of Article I, Section 1. *Id.* at 480. This Court agreed. The majority opinion explained that "[z]oning is an extension of the concept of a public nuisance which protects property owners from activities that interfere with the use and enjoyment of their property," and reasoned that Act 13 "violates substantive due process because it allows incompatible uses in zoning districts and does not protect the interests of neighboring property owners from harm, alters the character of the neighborhood, and makes irrational classifications." *Id.* at 481, 485.

Our Supreme Court affirmed in a divided opinion. *Robinson Twp. II*, 83 A.3d at 985. The plurality based its ruling on the Environmental Rights Amendment and did not address the petitioners' due process claims, but it did not signal disapproval of this Court's due process analysis. *See id.* Justice Baer, providing the deciding vote, indicated he would affirm this Court's due process ruling as "the narrower avenue to resolve th[e] appeal." *Id.* at 1001 (Baer, J., concurring). Justice Baer's concurrence is instructive.

He explained that, because local zoning ordinances protect interests safeguarded by Article I, Section 1, zoning is a "constitutionally ordained mandate." *Id.* at 1002. Although "zoning in Pennsylvania is implemented through the Municipalities Planning Code," which "is obviously a state statute, passed by the General Assembly in 1968, and therefore just as obviously can be amended by the legislature," the General Assembly can do so only "with full respect and deference to the constitutional underpinning of those laws." *Id.* at 1002-03. "In other words, what the Commonwealth giveth to municipalities, the Commonwealth can taketh away, but with an important limitation: only when constitutionally permissible." *Id.* at 1002. Justice Baer concluded that Act 13 exceeded this limitation. He emphasized "Pennsylvania's extreme diversity," noting that "[t]he population density of Philadelphia is 11,450 people per square mile, while in Cameron County it is 13 people per square mile." He therefore questioned "[h]ow can the legislature's 'one size fits all' within Act 13 possibly protect the constitutional rights of the landowners of this diverse citizenry and geography?" *Id.* at 1006. Justice Baer concluded that Pennsylvanians "in different parts of the Commonwealth (indeed, different neighborhoods in the same municipality), will be arbitrarily impacted by the imposition of Act 13 upon our political subdivisions," in violation of Article I, Section 1. *Id.* at 1008.

The reasoning in *Robinson Township I* and Justice Baer's concurrence in *Robinson Township II* demonstrate that the Firearm Preemption Laws infringe upon a protected due process interest. Just as preemption of local zoning laws implicates Article I, Section 1, so too does preemption of local firearm regulations. The fact that zoning laws protect property rights, rather than the right "to enjoy[] and defend[] life and liberty," does not change this; both rights are on the same footing in Article I, Section 1. And among the interests served by zoning laws are "police power objectives relating to the safety and welfare of [a locality's] citizens," just like local other local safety regulations. *Robinson Twp. I*, 52 A.3d at 483 (quoting *Huntley & Huntley, Inc. v. Borough Council of Borough of Oakmont*, 964 A.2d 855, 865 (Pa. 2009)). Indeed, the Pennsylvania Supreme Court held long ago that the Legislature cannot eliminate common-law doctrines (like the torts of conspiracy or trespass) that protect Article I, Section 1 rights because "the power to limit th[ese] indefeasible right[s]" is "excepted out of the general powers of government." *Erdman v. Mitchell*, 56 A. 327, 331-32 (Pa. 1903). That belies any assertion that the Legislature may eliminate local measures protecting the same rights without any constitutional scrutiny whatsoever. Respondents cite no authority to the contrary.

2. The Firearm Preemption Laws do not survive Article I scrutiny.

In addition to showing a constitutionally protected interest, the Petition for Review sufficiently alleges that the Firearm Preemption Laws fail constitutional scrutiny of any level.

The level of scrutiny applied is dependent on the nature of the right infringed. The Firearm Preemption Laws infringe upon "important rights." *Yanakos v. UPMC*, 218 A.3d 1214, 1222 (Pa. 2019). This is because of the "explicit inclusion in our constitution" and "historical significance" of Article I, Section 1's "inherent and indefeasible right" to "enjoy[] and defend[] life and liberty." *Id.*; *see also James v. SEPTA*, 477 A.2d 1302, 1306 (Pa. 1984) ("important" interests are "are liberty interests or a denial of a benefit vital to the individual" (citing Laurence Tribe, *Am. Const. Law* § 16-31 (1978)); *Fischer v. Dep't of Pub. Welfare*, 502 A.2d 114, 122 (Pa. 1985) (same). Statutes that infringe on "important rights" are "subject to a heightened level of scrutiny," "colloquially deemed intermediate scrutiny." *Yanakos*, 218 A.3d at 1222. Such statutes must be "substantially or closely related to an important government interest." *Id.* at 1216.[24] The Firearm Preemption Laws are not.

[24] While *Yanakos* involved an Article I, Section 11 challenge, the same standard has been applied in due process challenges involving important rights. *See Robinson Township II*, 83 A.3d at 1003 (Baer, J., concurring) (zoning ordinances

At this stage, however, the Court need not determine the appropriate level of review, because the Firearm Preemption Laws cannot withstand rational basis review, either. Statutes that implicate a constitutional interest but do not invoke heightened scrutiny, including statutes implicating driving privileges or occupational interests, nevertheless must "bear[] a real and substantial relationship to a legitimate legislative purpose," and must be "neither arbitrary nor discriminatory." *Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 947 (2004). Laws may fail this test where they "sweep unnecessarily broadly." *Pennsylvania Med. Soc. v. Foster*, 608 A.2d 633, 636 (Pa. Commw. Ct. 1992) (citing *Adler v. Montefiore Hosp. Ass'n Association of W. Pennsylvania*, 311 A.2d 634, 640 (1973), *cert. denied*, 414 U.S. 1131 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)); *accord Peake v. Commonwealth*, 132 A.3d 506, 519 (Pa. Commw. Ct. 2015); *see also Dep't of Transp., Bureau of Driver Licensing v. Middaugh*, 244 A.3d 426, 434 (Pa. 2021) (law may violate due process where application "will do little to achieve the evident legislative

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"must bear a substantial relationship to the health, safety, morals, or general welfare of the community" (citing *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1342 (Pa. 1982), *Surrick v. Zoning Hearing Bd. of Upper Providence Twp.*, 382 A.2d 105, 108 (Pa. 1977)); *accord, e.g., Upper Salford Twp. v. Zoning Hearing Bd. of Upper Salford Twp.*, 238 A.3d 534 (Pa. Commw. Ct. 2020) (citing *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 962 A.2d 653, 661 (Pa. 2009)); *see also, e.g., Lutz v. City of York, Pa.*, 899 F.2d 255, 270 (3d Cir. 1990) (applying intermediate scrutiny to provision restricting right to intrastate travel).

objective"). The Firearm Preemption Laws fail this standard, too.

Respondents fail to articulate a "legitimate" state interest advanced by the Firearm Preemption Laws, let alone an "important" one. Respondents do not contend the Firearm Preemption Laws improve public safety or reduce gun violence. Respondent Cutler claims they further the Commonwealth's "interest in regulating firearms on a statewide basis." Cutler Br. 29; *accord* Commonwealth Br. 28-29. But that logic is circular. Legislating for legislation's sake is not a legitimate state interest that can justify infringing upon Article I, Section 1 rights, and neither is preempting for preemption's sake. Respondents cite no authority suggesting otherwise; they cite only *Ortiz*, but as explained above, that case did not involve an Article I, Section 1 challenge. See *supra* pp. 41-48.

The General Assembly makes passing references (none in its preliminary objections to Count II) to a need for "uniform laws," including an individual senator's concern with "ordinances which make criminal on one side of a municipal boundary conduct or actions which are not criminal 6 feet away on the other side of a city or county line" which could "make criminal the innocent and inadvertent oversights of otherwise law-abiding citizens." GA Br. 23 & n.11; *see also id.* at 13. Respondents offer no explanation or authority showing this qualifies as an 'important interest." In any event, none of the kinds of ordinances discussed in the Petition for Review could implicate such concerns. Permit-to-purchase

requirements and one-gun-per-month limits, for instance, would apply only to sales in a jurisdiction that had adopted such measures. There could be no concern that a gun owner who lawfully purchased a firearm in one jurisdiction could violate the laws of another. Nor would local extreme risk protection laws, which would apply only to residents of a particular jurisdiction, raise uniformity concerns.

Respondent Corman appears to argue that the protection of the right to bear arms under Article I, Section 21 is the legitimate state interest justifying the Firearm Preemption Laws, citing the Supreme Court's observation in *Ortiz* that the right to bear arms "shall not be questioned in any part of the [C]ommonwealth." Corman Br. 44. But preempting local regulations that do not run afoul of Article I, Section 21, like the licensing, bulk purchasing, and extreme-risk-protection ordinances described in the Petition for Review or any number of other measures, would do nothing to further this interest. *See* Pet. ¶¶ 90-125.

Respondents do not otherwise explain what benefits are derived from precluding lifesaving local regulations. In contrast, the Petition for Review explains how the Firearm Preemption Laws have increased the risk of gun violence in certain neighborhoods of Philadelphia and Pittsburgh. *See* Pet. ¶¶ 126-30. These laws underlie why Black Pennsylvanians are 19 times more likely to die from gun homicide than White Pennsylvanians, and why each one of the Individual Petitioners were at higher risk of losing family members to gun violence. Pet. ¶¶

128-30. Respondents say nothing as to why that serves the Commonwealth. That silence speaks volumes.

At the least, the Petition for Review adequately alleges that the Firearm Preemption Laws do not bear a "real and substantial relationship" to a legitimate state interest, *Khan*, 842 A.2d at 947, let alone a "substantial[] or close[]" relationship to an "important" one, *Yanakos*, 218 A.3d at 1226. The preliminary objections to Count II should be overruled.

C. Philadelphia Has Stated a Claim for Impermissible Interference with Delegated Responsibilities.

Gun violence continues to plague Philadelphia, even as Respondents actively withhold key tools Philadelphia needs to address this public health crisis. After delegating away a portion of its own responsibility to "protect[] and promot[e] the health of the people," *see* 16 P.S. § 12002(a), the State cannot now hamstring Philadelphia from fulfilling that obligation. Indeed, to do so would permit a legislative end-run around the Commonwealth's own constitutionally imposed duties to maintain order and to preserve the safety and welfare of all citizens. Because Petitioners have sufficiently alleged that the Firearm Preemption Laws impermissibly interfere with Philadelphia's delegated responsibility to address the public health crisis present in its borders, Respondents' Preliminary Objections that the Third Cause of Action fails to state claim, *see* Commonwealth

Br. 29-30, Cutler Br. 30-32, Corman Br. 45-47, GA Br. 28-33, should be overruled.

The Supreme Court's decision in *Allegheny County. v. Commonwealth* demonstrates the violation alleged in Count III. In that case, the Allegheny County Jail was struggling to comply with a federal court order to reduce its overcrowded population. 490 A.2d 402, 407 (Pa. 1985). The Court noted that the Commonwealth has a fundamental obligation to "maintain order and to preserve the safety and welfare of all citizens," a duty it maintains even when it delegates some portion of that responsibility to local governments. *Id*. at 410-11. When it does so, the Commonwealth is obliged to provide those localities with the resources necessary to carry out that responsibility, because any "delegation of responsibility does not relieve the state of its primary duty to assure the satisfactory discharge of the obligation." *Id*. at 411. Accordingly, the Court awarded Allegheny County equitable relief, and ordered the Bureau of Corrections to transfer individuals from the Allegheny County jail to state facilities. *Id*. at 414.

Likewise, in *Pennsylvania Human Relations Commission v. School District of Philadelphia* the School District of Philadelphia was struggling to comply with a series of remedial orders "that, if properly developed and implemented, would effectively deal with the pervasive discriminatory conditions in the School District." 681 A.2d 1366, 1369 (Pa. Commw. Ct. 1996). Noting that the

Pennsylvania Constitution obliges the General Assembly "to provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth," *id*. at 1383 (quoting Pa. Const. art. III, § 14), and that the Commonwealth had delegated part of that responsibility to the local school districts, *id*., the Court held that the Commonwealth had the obligation to fund any costs of complying with the remedial orders that the school district lacked the resources to provide. *Id*. at 1389.

From these cases, it is clear that the Commonwealth impermissibly interferes with delegated responsibilities when (1) the State is under some constitutionally imposed obligation that (2) it has delegated some responsibility for carrying out to a local government while (3) failing to provide the local government with adequate resources to carry out that delegated responsibility. *See Allegheny Cnty.*, 490 A.2d at 410-11; *see also Pa. Hum. Rels. Comm'n*, 681 A.2d at 1383. That is the case here. The Commonwealth has a fundamental duty to "maintain order and to preserve the safety and welfare of all citizens." *Allegheny Cnty.*, 490 A.2d at 410-11. Respondents delegated a portion of this fundamental duty to Philadelphia and other political subdivisions when it charged county public health departments with specific duties, including "protection and promotion of the health of the people," 16 P.S. § 12002(a), and preventing or removing "conditions which constitute a menace to public health." 16 P.S. § 12010. By maintaining and expanding the

Firearms Preemption Laws, Respondents have deprived Philadelphia and other political subdivisions of the resources necessary to carry out these delegated duties. The preliminary objections to Count III should be overruled.

1. The Commonwealth delegated to the City of Philadelphia an obligation to address gun violence while withholding its ability to fulfill its obligation.

The Commonwealth has an "obligation to maintain order and to preserve the safety and welfare of all citizens." *Allegheny Cnty.*, 490 A.2d at 410. Indeed, the General Assembly has expressly acknowledged that "[t]he protection and promotion of the health of the people in the furtherance of human well-being, industrial and agricultural productivity and the national security is one of the highest duties of the Commonwealth." 16 P.S. § 12002(a) (section entitled "Legislative findings and purpose"). And the horrors of gun violence, including average annual fatalities of 1,544 Pennsylvanians, and a firearm homicide rate of 15.0 deaths per 100,000 Philadelphians annually, constitute a threat to the safety of Pennsylvanians and Philadelphians necessitating regulation. Pet. ¶¶ 28, 33; *see also In re E.S.*, No. 6 MDA 2016, 2016 WL 7726916, at *12 (Pa. Super. Ct. Nov. 15, 2016) (citing *Lehman v. Pa. State Police*, 839 A.2d 265, 273 (Pa. 2003)).

The Commonwealth delegated to Philadelphia a portion of its responsibility to protect Pennsylvania citizens under the Local Health Administration Law ("LHAL)," 16 P.S. § 12001, *et seq.*, and the Disease Prevention and Control Law

("DPCL"), 35 P.S. § 521.1, *et seq*. The LHAL made explicit precisely which obligation it was delegating, with the General Assembly noting that the Commonwealth's "cardinal duty" to protect and promote the health of its citizens can only be satisfactorily discharged when, *inter alia*, public health services "are … provided on the most economical basis by local communities working in partnership with the Commonwealth." 16 P.S. § 12002(b). The LHAL accordingly mandates that county departments of health "shall prevent or remove conditions which constitute a menace to public health." *Id*. at § 12010(c); *see also Wilkes-Barre Area Vocational Sch. v. Greater Nanticoke Area Sch. Dist*, 539 A.2d 902, 905 (Pa. Commw. Ct. 1988) ("The use of the word 'shall' in a statute is generally considered imperative"). The scourge of gun violence in Philadelphia is just such a menace. Pet. ¶¶ 32-35, 148. The LHAL thus delegates the responsibility to address the public health ills of gun violence, in part, to Philadelphia. Likewise, the Commonwealth has delegated a separate, independent, portion of its duty to protect Commonwealth citizens through the DPCL. The legislature mandated that "Local boards and departments of health shall be primarily responsible for the prevention and control of communicable and non-communicable disease." 35 P.S. § 521.3(a). Even so, the ultimate responsibility for satisfactorily discharging these duties always remains with the State. *See Allegheny Cnty.*, 490 A.2d at 410-11.

As the Petition details, Philadelphia does not have the resources it needs to carry out these delegated responsibilities. It explicitly alleges that the "General Assembly's enactment of the Firearm Preemption Laws, particularly in the absence of adequate statewide firearm regulations, deprives Philadelphia of the ability to fulfill its delegated duty to address gun violence." Pet. ¶ 150. Indeed, Philadelphia has alleged, with specificity, those tools it needs to carry out its duty to address the gun violence epidemic. *See id*. ¶¶ 94-125. And the Petition sets out, with heart-wrenching detail, how the current resources provided to Philadelphia have been inadequate to address the swelling gun violence in the City. *See, e.g.*, *id*. ¶¶ 32-33; Answr. to Corman Br. ¶ 25(b).[25]

2. Respondents' objections are unavailing.

Respondents' objections belabor the preemptive effect of the Firearm Preemption Statutes, urging that notwithstanding the LHAL and DPCL, the Firearm Preemption Statutes all but eliminate Philadelphia's authority to regulate firearms. *See* GA Br. 29 ("the City of Philadelphia cannot legislate in contravention of state law, even if doing so would promote public health, safety,

[25] Indeed, even as this litigation continues, gun violence continues to ravage a city that does not even have the resources to prevent its increase, never mind begin remediation. *See Mapping Philadelphia's Gun Violence Crisis*, Off. of Controller – City of Phila., https://controller.phila.gov/philadelphia-audits/mapping-gun-violence/#/2021 (last updated Apr 2, 2021).

and welfare"); *see also* Corman Br. 46; Commonwealth Br. 29; Cutler Br. 37. Again (*see supra*, p. 32 n.17), unlike in the slew of irrelevant decisions Respondents cite,[26] the scope of the Firearm Preemption Statutes is not being debated in this suit, it is the reason for it: The Commonwealth's near-total rescission of the City's *authority* to regulate firearms is precisely what interferes with the City's *responsibility* to address the consequences of gun violence. *See*, *e.g.*, *Allegheny Cnty.*, 490 A.2d at 411 (distinguishing between the responsibility to carry out a delegated duty and the authority to utilize tools necessary for carrying out that responsibility). The Commonwealth's general ability to define the scope of municipal authority under Article IX, §§ 1-2 or 53 P.S. § 13133(b) is beside the point. *Cf.* GA PO ¶¶ 17-20, 24-25; Commonwealth PO ¶ 36; Corman Br. 46, Commonwealth Br. 29-30, GA Br. 30-31, Cutler Br. 16. The question under *Allegheny County* is not whether Philadelphia has the authority to regulate firearms in the face of the Firearm Preemption Statutes, but whether Philadelphia must be provided such power in order to fulfill a separately delegated duty. [27]

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[26] *See Holt's Cigar Co., Inc. v. City of Phila.*, 952 A.2d 1199, 1203 (Pa. Commw. Ct. 2008), *aff'd in part, rev'd in part*, 10 A.3d 902 (Pa. 2011), *Dep't of Licenses & Inspections v. Weber*, 147 A.2d 326, 327 (Pa. 1959), *Cigar Ass'n of Am. v. City of Phila.*, No. 20-3220, 2020 WL 6703583 at *2 (E.D. Pa. Nov. 13, 2020).

[27] Respondent General Assembly also makes an argument, unsupported by legal authority, that as a matter of statutory construction "a general principle enumerated in one piece of legislation cannot be used as a sword to override the express terms of another piece of legislation." GA Br. 31. But that argument fails for the same

Respondents Corman and General Assembly also contend that the Commonwealth has no obligation to pass gun safety legislation at all. *See* GA Br. 29-30; Cutler Br.30, n.8. Yet again: No Petitioner argues it does. But it cannot allow gun violence to continue devastating communities unchecked by the body responsible for preserving its citizens' safety. Here, what the Commonwealth must do is provide localities with adequate resources to fulfill obligations it delegates to them. *See Allegheny Cnty.*, 490 A.2d at 410-11. No Respondent disputes that the Commonwealth has an "obligation to maintain order and to preserve the safety and welfare of all citizens." *Allegheny Cnty.*, 490 A.2d at 410. Respondents have delegated a portion of that obligation—addressing "menace[s] to public health" like gun violence—to the City of Philadelphia, and as the Superior Court recognized in *In re E.S.*, addressing gun violence requires safety regulation. *See In re E.S.*, 2016 WL 7726916 at *12 ("It is well established that the right to bear arms, although constitutionally protected, is subject to reasonable regulation necessary to protect the public health safety and welfare"). As Petitioners have sufficiently alleged, the epidemic of gun violence has ravaged this

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reasons. Petitioners do not contend that the LHAL "overrides" the Firearm Preemption Statutes. Rather, the Petition demonstrates that Philadelphia cannot carry out the portion of the Commonwealth's *constitutional duty* delegated to the City without new firearm regulations, at either the state or local level. To the extent General Assembly argues that such delegation must give way to the Firearm Preemption Statutes, it ignores *Allegheny County*'s holding.

Commonwealth's vulnerable communities, necessitating regulation at either the state or local level. Pet. ¶¶ 32-35, 150. Respondents have prevented either from happening, violating their duty to protect Pennsylvania citizens.

In an exercise of statutory gymnastics, Respondent Corman contends that because Respondents have enacted and enforced the Firearm Preemption Statutes, the "result is that the municipalities' 'responsibility to address gun violence,' if any, does not include the responsibility (or authority) to enact gun control measures to address gun violence." Corman Br. 46 (emphasis removed); *see also* Corman PO ¶¶ 24-25. But that argument does not withstand a plain reading of the statutes. The LHAL *mandates* that Philadelphia "prevent or remove conditions which constitute a menace to public health." *Id*. at § 12010(c). The word "condition" has a broad meaning of "a particular mode of being of a person or thing; existing state; situation with respect to circumstances."[28] The term is modified only by the requirement that condition be a "menace" to public health, which Philadelphia has alleged gun violence to be. Pet. ¶¶ 32-35, 148. Philadelphia is therefore required to carry out the Commonwealth's obligation to protect Pennsylvanians from these dangerous weapons. To the extent Respondent Corman argues these statutes must be construed to ignore the plain delegation of

[28] *Condition*, Dictionary.com, http://dictionary.reference.com/browse/condition (last visited Apr. 5, 2021).

responsibility, he cites no text, precedent, or principle of construction for this proposition. *Cf.* 1 Pa.C.S. § 1501, *et seq*.

Going even further, the General Assembly argues the LHAL has no applicability to gun violence. GA ¶ 28; GA Br. 32. It offers no explanation, however, for why gun violence is not a "menace[] to public health" within the meaning of the LHAL. And its contention that the LHAL is merely used "to address violations of existing laws regarding public health" (GA Br. 32) is plainly contradicted by the authority it cites. In *In re Appeal of Culp*, Bucks County refused to approve a mobile license that was required under Bucks County's own health regulations, based on the mobile home's failure to comply with other Bucks County health regulations, including deficiencies in the sewer system and water supply, and a lack of proper documentation of electrical inspections," which this Court described as a "menace to public health." 522 A.2d 1176, 1177 (Pa. Commw. Ct. 1987). *Id*. at 1179.[29] *Culp* thus shows that a county may do more than enforce "existing laws" (presumably *state* laws) under the LHAL; it may enact, *inter alia*, licensing and inspection requirements as prophylactic measures to protect public health. These are the same kinds of measures Philadelphia would

[29] The General Assembly also contends that Section 12010(c) "is not a grant of authority to pass new law in areas expressly preempted by the General Assembly." GA Br. 31-32. The City does not contend it is; the City alleges it has the responsibility, *but not* the authority, to pass firearm regulations to address gun violence. *See supra* pp. 74-76.

pass in order to carry out its delegated duties but for the impermissibly interfering Firearm Preemption Statutes. *See, e.g.*, Pet. ¶¶ 94-105. Without measures to protect its citizens from the terrors of gun violence, Philadelphia is unable to protect its residents from a public health menace, including the alarming rate of firearm homicide, *id*. ¶ 32, the mental health crisis manifest in firearm suicides occurring in its borders on average *once per week*, *id*. ¶ 36, and the enormous physical and mental health crises experienced by individuals trapped in their homes in high-gun-violence neighborhoods by their fear of gun violence. *See id*. ¶ 12(e).[30]

As for the DPCL, an independently sufficient basis for finding delegated responsibilities, the General Assembly argues that gun violence is not a "disease" within the meaning of the statute. *See* GA Br. 32-33. But the General Assembly relies entirely on the definition of "communicable disease"; it ignores completely that the City's responsibilities under the statute also include the prevention and control of "non-communicable disease." 35 P.S. § 521.3(a). Moreover, the DPCL permits county health departments to enact measures not only to directly regulate diseases, but to address conditions that contribute to the spread of disease (communicable and non-communicable). *See, e.g., Pa. Rest. & Lodging Ass'n v.*

[30] *See also* Samantha Melamed, *Young Men of Color in Philly Stay Home to Stay Safe*, Phila. Inquirer (Mar. 11, 2021), https://www.inquirer.com/news/philadelphia/temple-university-professor-jamie-fader-criminology-dont-have-time-for-drama-20210311.html.

City of Pittsburgh, 211 A.3d 810, 828-29, & nn. 17-18 (Pa. 2019) (concluding that city law requiring paid sick leave "relat[es] to disease prevention and control" by preventing sick individuals from showing up to work.). To say the least, gun violence contributes to the spread of disease, by filling hospital beds, inflicting physical and mental trauma, and visiting countless other public-health ills upon the City. *See, e.g.*, Pet. ¶ 34 n.22.

Lastly, Respondent Corman tries to avoid the binding precedent of *Allegheny County* by minimizing its holding, contending that it stands "only" for the proposition that

> "where the political subdivision can demonstrate that its resources" for purposes of carrying out a statutorily delegated duty "are clearly inadequate, it is the responsibility of the State to either provide additional facilities or to allocate to the political subdivision reasonable funds to discharge its delegated responsibility."

Corman Br. 47. To the extent Corman argues that Philadelphia may seek only additional funds to carry out its delegated duty, that is plainly contradicted by the holding of *Allegheny County*, which awarded equitable relief in the form of a preliminary injunction. 490 A.2d at 414. To the extent Corman argues that Philadelphia was required to plead and list each and every way in which the tools it has are inadequate to address gun violence, *see, e.g.*, Corman Br. 47 ("They do not allege that municipalities have attempted to curb gun violence through other programs that have proven to be effective, such as targeted policing."), he ignores

what is replete on the face of the Petition: Philadelphia is unable to fulfill its duty to protect its citizens without effective gun regulations. *See*, *e.g.*, Pet. ¶¶ 32-36, 90-125, 150-51.[31] To the extent Corman challenges these factual allegations, that is impermissible at this stage, where all facts alleged, and *all reasonable inferences from those facts*, are decided in Petitioners' favor. *See Commonwealth ex rel. Nicholas v. Pa. Lab. Rels. Bd.*, 681 A.2d 157, 159 (Pa. 1996). Indeed, whether Philadelphia has adequate tools to carry out that delegated responsibility is best answered with a fully developed factual record. *See*, *e.g.*, *Pa. Hum. Rels. Comm'n*, 681 A.2d at 1371-74, 1383 (making findings of facts and later noting that the school district had demonstrated the lack of resources to comply with the remedial orders).

Accordingly, the Petition sufficiently pleads a claim in its Third Cause of Action. Respondents' preliminary objections must therefore be overruled.

[31] Indeed, *Allegheny County* did not require strict necessity; the Court noted that even in the absence of equitable relief, the Allegheny County Jail could fully comply with the court order by merely releasing additional prisoners. 490 A.2d at 407 ("On October 20, 1983, after a hearing on the County's motions, the District Court rejected the County's requests and ordered the Director and Warden of the Jail to release on their own recognizance prisoners held in default of the lowest amount of bail until the population limits mandated by the May 25 order were met.").

IV. RESPONDENT CORMAN'S "SCANDALOUS AND IMPERTINENT MATTER" OBJECTION IS BASELESS.

Finally, Respondent Corman provides no basis for the assertion that specific paragraphs of the Petition constitute a "scandalous and impertinent matter" under Pa. R.C.P. 1028(a)(2). No other Respondent attempts a similar objection, and Respondent Corman's objection amounts to little more than a list of paragraph numbers from the Petition. Respondent Corman labels the listed paragraphs in a conclusory fashion as "irrelevant background information," "derogatory light," and/or "speculation," but makes no attempt to explain how any of these paragraphs meets these general descriptions. *See* Corman PO ¶ 30; Corman Br. 49-51. Petitioners and the Court are left to speculate as to why Respondent Corman selected the identified paragraphs and why each is labeled as "scandalous" or "impertinent."

Under Rule 1028(a)(2), the Court may strike allegations as "scandalous or impertinent," only in extreme cases where the objecting party demonstrates that they are "immaterial and inappropriate to the proof of the cause of action." *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108, 115 (Pa. Commw. Ct. 1998), *aff'd*, 757 A.3d 367 (Pa. 2000). As this Court has emphasized, "the right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice." *See Valley Forge Chapter of Trout Unlimited v. Twp. of Tredyffrin*, No. 161 M.D. 2016, 2016 WL 7369088, at *8 n. 7

(Pa. Commw. Ct. Dec. 20, 2016) (*citing Dep't of Envtl. Res. v. Hartford Accident & Indem. Co.*, 396 A.2d 885, 888 (Pa. Commw. Ct. 1979)). But Respondent Corman cannot even articulate how inclusion of any of the challenged paragraphs is prejudicial.

Respondent Corman cites to—but does not analyze—an extreme example of scandalous and impertinent matters addressed by this Court in *Common Cause*. *See* Corman Br. 48. The petitioners there characterized the Pennsylvania legislature as "such a disgrace of special interest legislation and secretive game-playing with the public interest," and stated that the legislature had "utter disregard for the Constitution and the People of this state . . ." *Common Cause/Pa. v. Commonwealth*, Pet. 1-6. And they focused on legislative action not actually before the court. *Common Cause*, 710 A.2d at 115. It is no surprise, then, that this Court concluded such material was both "impertinent" and "cast a derogatory light on the legislative and executive branch leadership" of the Commonwealth. *Common Cause*, 710 A.2d at 115.

Respondent Corman cannot explain how the allegations here bear any resemblance to *Common Cause*. Far from engaging "impertinent" matters, the Petition here describes legislative history of the passage, amendment, expansion, and enforcement of the very Firearm Preemption Laws at issue. *See* Pet. ¶¶ 61-89. And that description cannot be said to mischaracterize the procedural history in

any way. *Cf. Piunti v. Commonwealth, Dep't of Lab. & Indus., Unemployment Comp. Bd. of Rev.*, 900 A.2d 1017, 1020 (Pa. Commw. Ct. 2006) (striking admittedly incorrect characterizations). Quoting the exact words of the General Assembly's own members, the Petition simply describes how Respondents knowingly passed, amended, expanded, and enforced the Firearm Preemption Laws in the face of publicly recorded statements by other members highlighting the harmful effects the legislation would have on increasing gun violence in the Commonwealth. *See* Pet. ¶¶ 4-6, 28, 55-56, 64, 66-67, 71-74, 77, 71-72, 84-85, 88-90.

Even if, *arguendo*, these paragraphs contain strong advocacy and/or hyperbole, the Court is surely capable of parsing the relevant facts without being prejudiced by such hyperbole. *See Commonwealth ex rel. Pappert v. TAP Pharm. Prod., Inc.*, 885 A.2d 1127, 1148 (Pa. Commw. Ct. 2005). Because these allegations are neither scandalous nor impertinent to Petitioner's claims, the Court should not strike any facts alleged in the Petition.

CONCLUSION

Respondents' preliminary objections should be overruled.

[SIGNATURE ON FOLLOWING PAGE]

DATED: April 5, 2021 Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United 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 this Court's Order of March 12, 2021.

/s/ Benjamin D. Geffen
Benjamin D. Geffen

Addendum

THE

CONSTITUTION

AND

ORDINANCES

OF

THE CITY

OF

PHILADELPHIA.

PHILADELPHIA:

Printed by HALL & SELLERS, in MARKET between FRONT and SECOND-STREETS.

MDCCXC.

1790.

remain in any ſtreet, lane or alley, as aforeſaid, ſhall forfeit and pay the ſum of *one dollar*. *Provided*, That nothing herein contained ſhall be conſtrued to interfere with any rules or regulations made or directed by the ordinance for regulating the markets in this city.

Proviſo.

No foot-ways to be uſed in the manner deſcribed.

And be it further ordained and enacted, That if any perſon or perſons ſhall wilfully ride, drive, or lead a horſe, or drive a carriage of any kind along, or unlade or caſt out of any cart, or other carriage, any timber, cord-wood, brick, ſtone, or coal, on or acroſs any paved foot way in any of the ſtreets, lanes or alleys in the built parts of this city, he or they ſo offending ſhall forfeit and pay the ſum of *five ſhillings*.

Penalty.

No horſes to be ſhod in the ſtreet.

And be it further ordained and enacted by the authority aforeſaid, That if any blackſmith, or other perſon, ſhall cauſe any horſe, mare or gelding to ſtand in any of the ſtreets, lanes or alleys, within the built parts of this city, whilſt he is ſhoeing, or preparing to ſhoe, ſuch horſe, mare or gelding, every ſuch blackſmith, or other perſon, ſhall pay a fine of *five ſhillings* for each offence.

Penalty.

No cannon to be fired or illuminations made in the built parts of the city, unleſs, &c.

And whereas the firing of cannon, or other great pieces of artillery or ordnance, and the illuminating of houſes within the city, on occaſions of public rejoicing, have been attended with many great miſchiefs and inconveniencies: *It is therefore ordained and enacted by the authority aforeſaid*, That no perſon or perſons whatſoever ſhall fire or diſcharge any cannon, or other piece of artillery or ordnance, or illuminate, or cauſe or permit to be illuminated, any houſe within the built parts of this city, without the permiſſion of the Mayor of the city for the time being firſt had and obtained in writing under his hand, under the penalty of forfeiting and paying, for every piece of cannon or other artillery or ordnance ſo fired, or houſe ſo illuminated, the ſum of *five dollars*.

Penalty.

And

And be it further ordained and enacted by the authority aforeſaid, That all and every the fine and fines impoſed by this ordinance ſhall be recoverable, with coſts of ſuit, by any perſon who ſhall ſue for the ſame, before the Mayor, Recorder, or any Alderman of the ſaid city; and ſhall go, one moiety to the perſon or perſons who ſhall ſue for the ſame, and the other moiety to the uſe of the city. 1790. Application of fines.

Signed, by Order of the Board,

SAMUEL POWEL, MAYOR.

Enacted and paſſed into an Ordinance, at Philadelphia, *the eighteenth day of* January, Anno Domini *one thouſand ſeven hundred and ninety.*

ANTHONY MORRIS, *Clerk of the Corporation.*

CHAP. VII.

By the MAYOR, ALDERMEN *and* CITIZENS *of* PHILADELPHIA.

An ORDINANCE *directing the Mode of ſelling Oyſters.*

IT is hereby ordained and enacted by the Mayor, Aldermen and Citizens of Philadelphia, *in Common Council aſſembled, and by the authority of the ſame,* That, from and after the firſt day of *March* next, no Oyſters in their ſhells ſhall be ſold in the city, or at the wharves thereof, in any other manner than by count, or tale. And if any perſon or perſons ſhall be guilty of ſelling ſuch Oyſters in any other manner, he, ſhe or they, ſo Oyſters to be ſold only by count, or tale.

offending,