IN THE SUPREME COURT OF PENNSYLVANIA

No. 19 EAP 2022

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-Appellants,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; BRYAN CUTLER, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; and KIM WARD, IN HER OFFICIAL CAPACITY AS PENNSYLVANIA PRESIDENT PRO TEMPORE,

Respondents-Appellees.

PETITIONERS-APPELLANTS' CONSOLIDATED REPLY BRIEF

On Appeal from the Order of the Commonwealth Court of Pennsylvania Entered on May 26, 2022 in No. 562 M.D. 2020

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INTRODUCTION

Petitioners are Black and Hispanic residents of the most gun-ravaged parts of our Commonwealth. Respondents do not, and cannot, dispute the enormity and disproportionality of the gun violence in Petitioners' neighborhoods. Nor do Respondents seriously dispute that they have handcuffed police in Philadelphia and Pittsburgh, forbidding enforcement of any local limits on firearms.

Instead, Respondents try to make this case about something it is not by repeating their argument that *Ortiz* controls the outcome here, even though that decision addressed a limited challenge on grounds different from those presented here. They refuse to acknowledge what the Petition and Opening Brief make clear: there is a direct line between the horrors of gun violence in Petitioners' communities and Respondents' conscience-shocking actions in enacting, maintaining, and expanding the Firearm Preemption Laws ("FPLs"), despite clear warnings that the FPLs would exacerbate gun violence in these very communities.

In those rare circumstances when the legislature oversteps its bounds and violates the core rights of individuals, our Constitution empowers and requires the judiciary to remedy the injustice. This is such a case. The Pennsylvania Constitution guarantees individuals the right to life, liberty, and self-defense, but the FPLs have trampled on those rights. The Constitution guarantees that the state will not affirmatively create or enhance dangers that imperil the lives of discrete groups, but

the FPLs have done just that. And the Constitution obligates the Commonwealth to protect public safety, but Respondents have delegated this obligation to Philadelphia while simultaneously stymieing Philadelphia's ability to fulfill it. It is "the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and under these unique and outrageous circumstances, the judiciary should allow this case to go forward.

ARGUMENT

I. Respondents Repeat the Commonwealth Court's Errors in Analyzing and Applying *Ortiz*

As explained in Petitioners' Opening Brief, the Commonwealth Court has for decades been mistaken in its rulings on § 6120 and its articulation of *Commonwealth v. Ortiz*, 681 A.2d 152 (Pa. 1996) ("*Ortiz*"). The Plurality below compounded this error by applying *Ortiz* to dismiss Petitioners' claims in this case. Opening Br. of Appellants 21–27 ("Br."). *Ortiz* addressed a claim under Article IX, § 2 of the Pennsylvania Constitution, whereas the current case raises entirely different claims, and does so against the backdrop of Commonwealth Court decisions that have for decades erroneously extended *Ortiz*. Respondents fail to engage with any of these arguments.

A. Section 6120 Does Not Preempt the Field of Gun Regulation

The holding of *Ortiz* was that § 6120 does not violate constitutional home-rule principles. Yet via a decades-long series of decisions, the Commonwealth Court has relied on a dictum about a state constitutional provision to stretch § 6120—which is an express preemption statute with significant limiting language—into a sweeping field preemption statute. This stretch has no support in this Court's precedents or in the express language of the statute. Br. 23–27.

Section 6120 expressly preempts a limited set of local ordinances: those that regulate the "lawful ownership, possession, transfer or transportation" of firearms, "when carried or transported for purposes not prohibited by the laws of this Commonwealth." 18 Pa. C.S. § 6120. Reading *Ortiz* to infer field preemption from such language would turn *every* express preemption statute into a field preemption statute, obliterating this Court's differentiation of types of preemption. *See Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty.*, 32 A.3d 587, 593–94 (Pa. 2011). Accordingly, *Ortiz* in no way precludes Petitioners' constitutional and statutory claims here.

B. The Issues in this Case Do Not Involve Article IX, Section 2

Ortiz held that the Commonwealth may regulate firearms, treating such regulation as an issue implicating statewide concerns as opposed to an issue of *purely* local concern. *Ortiz*, 681 A.2d at 155; *see also* Br. 23–24. But *Ortiz* did not consider, and this Court has never held, that the FPLs would forever be immune from constitutional scrutiny on any other grounds.

The lengthy arguments by the Commonwealth and General Assembly as to their authority to preempt municipal regulation in certain areas, in spite of home rule, Brief for the Commonwealth of Pa. at 28–31 ("Commonwealth Br."); Brief for the General Assembly at 12-18 ("GA Br."), are beside the point. Implicit in their

position is the notion that so long as a preemption statute does not offend Article IX, Section 2, it may not be challenged on any other ground. Commonwealth Br. 31. But that notion ignores the rights of the Individual Petitioners to challenge statutes that leave them aggrieved and, in this case, victimized. And it ignores the fact that all statutes, including preemption statutes, are subject to the constitutional prescripts of Article I, § 1.

Lastly, Respondents obfuscate in arguing that Petitioners are asking this Court to override a "policy" decision by the legislature. *See, e.g.*, Commonwealth Br. 31, Brief of Resp't-Appellee Speaker Bryan Cutler at 12 ("Cutler Br."). Petitioners do no such thing. Although Respondents contend that the FPLs represent a "balancing" act that took into account how "reasonable minds" may disagree about firearm violence, they give the back of the hand to dire warnings by legislators and a former governor, whose veto they overrode. Brief for Appellee Senator Kim Ward at 8–9 ("Ward Br."). At the preliminary objections stage a court must accept all allegations in the Petition, not Respondents' recharacterization of those allegations. The Petition alleges specific legislative actions that rebuffed warnings, evidence, and pleas about urban gun violence. Respondents' attempts to avoid this reality, by focusing on constitutional provisions not at issue, are nothing but a red herring.

C. The Issues Presented on this Appeal Are Not Waived

Although Petitioners argued below that neither *Ortiz* nor a series of Commonwealth Court decisions about § 6120 barred their claims, *see, e.g.*, Pet'rs.' Br. in Opp. to Resp'ts' Prelim. Obj. at 14–15, 31, 41–48, 69, 70, ("Pets.' PO Opp. Br."), the Plurality and Concurring Opinions both relied heavily on *Ortiz*, Br. 21–22; May 26, 2022 Opinion of the Court of Commonwealth at 35–38, 41 ("Op."); Concurrence 1-2. Specifically, the Plurality dismissed Counts II and III in part on the (erroneous) ground that this Court in *Ortiz* had purportedly upheld a statewide preemption of all local firearm regulations, thereby foreclosing Petitioners' claims. Op. 35–38, 41. The Concurrence *urged* this Court to "reconsider" its *Ortiz* doctrine in light of Petitioners' claims. Concurrence 1–2. In response to the lower court's reliance on *Ortiz*, Petitioners argue on appeal that the Plurality's reliance on an erroneous and expansive interpretation of *Ortiz* is itself a sufficient basis for this Court to reverse. Br. 21–27.

In arguing that Petitioners have waived this argument (Ward Br. 13–15, Commonwealth Br. 24–25), Respondents Ward and the Commonwealth misconstrue Petitioners' position. Petitioners challenge the scope of the ruling in *Ortiz*, not the scope of the FPLs. Arguments about the reach of that case cannot

possibly be waived in light of the Plurality's holding that *Ortiz* was "binding precedent" that required the dismissal of Petitioners' claims.

Moreover, Pa.R.A.P. 302 requires only that an *issue* be preserved for appeal; it does not require "identical arguments at each stage of [a] case." *Wert v. Commonwealth, Dep't of Transp.*, 821 A.2d 182, 186 n.9 (Pa.Cmwlth. 2003). In the Commonwealth Court, Petitioners squarely raised the issue of whether "the kinds of ordinances discussed in the Petition for Review could implicate . . . concerns" about "uniform laws" for gun-owners, arguing that the answer is no. Pets.' PO Opp. Br. 69. The Plurality then held that, pursuant to *Ortiz*, "the need for uniformity in certain fields of the law is a legitimate governmental and public interest, and the Firearm Preemption Statutes, coupled with the regulatory regime of the UFA, bears a substantial relation to that interest." Op. 37. Petitioners continue to press this issue on appeal, particularly so because of the misapplication of law by the Plurality. Similarly, Judge Cohn Jubelirer appropriately focused her Concurring Opinion on this misapplication of *Ortiz*, and Petitioners have aptly responded by echoing her call for this Court "'to reconsider the breadth of the *Ortiz* doctrine.'" Concurring

Opinion 2 (quoting *City of Phila. v. Armstrong*, 271 A.3d 555, 569 (Pa.Cmwlth. 2022) (Leadbetter, S.J., concurring)).[1]

II. The FPLs Violate Petitioners' Substantive Due Process Rights

The FPLs wrongfully deprive Petitioners of power to protect themselves from gun violence, burdening their fundamental right to life and directly infringing on their right of self-defense. Although the Plurality mischaracterized this protected interest as "a right to have the government protect them from private acts of violence," that is not Petitioners' claim. The right at issue is Petitioners' right to *protect themselves* through local legislation, as guaranteed by Article I, Section 1, of the Pennsylvania Constitution. Br. 28–29. Under that framing, the FPLs cannot withstand any level of constitutional scrutiny. *Id*. 33–39. Respondents' briefs ignore Petitioners' cases, misrepresent their position, and demonstrate that factual issues pervade the constitutional question presented. The Commonwealth Court's judgment dismissing Count II must be reversed.

[1] In seeking to avoid any review of the scope of *Ortiz*, the Commonwealth also argues that Petitioners seek an "advisory opinion" and challenge a statutory provision that does not apply to the City of Philadelphia. Commonwealth Br. 25-27. These statements are merely a rehash of arguments Respondents made below regarding ripeness, standing, and justiciability, which the Commonwealth Court passed over. Nevertheless, they are addressed in Section VI, *infra*.

A. The Rights at Issue Here Are Protected by the Pennsylvania Constitution

The "direct consequence" of the FPLs has been an extraordinarily high rate of firearm homicides of young Black and Hispanic men in Philadelphia and Pittsburgh, in a way that "impinges upon the exercise of a fundamental right" and is "not 'consistent with simple humanity.'" Br. 30 (quoting the Dissent and Concurrence; emphasis removed). Indeed, the FPLs deny Petitioners' fundamental right to life and liberty. *See City of Phila. v. Armstrong*, 271 A.3d 555, 569 (Pa.Cmwlth. 2022) (Leadbetter, S.J., concurring) ("When a child cannot leave his home to walk to the corner of his street without risking the prospect of being caught in a crossfire, we are denying him the most fundamental right, that of life and liberty."). In addition, the FPLs' prohibition of life-saving local regulation *directly* burdens Petitioners' important (if not fundamental) rights to self-defense. Br. 30–31.

1. The FPLs directly infringe on an important right and burden a fundamental right

The rights at issue are guaranteed to Petitioners by the Pennsylvania Constitution, which affords greater rights than those afforded by the U.S. Constitution. *Id*. at 29 (citation omitted). This Court is "free to interpret [the Pennsylvania] Constitution in a more generous manner than the federal courts; and in the past [it] ha[s] not been shy of utilizing this freedom to afford the citizens of this Commonwealth greater liberties than they would otherwise enjoy." *Fischer v.*

Dep't of Pub. Welfare, 502 A.2d 114, 121 (Pa. 1985) (citations omitted). The arguments by the General Assembly and Respondent Ward that Article 1, Section 1 is "substantially similar" to the Due Process Clause of the U.S. Constitution are dispositive of nothing; the rights conferred by the Pennsylvania Constitution are the province of this Court and its precedent.[2]

Respondents' argument that there is an insufficient connection between Petitioners' fundamental right to their lives and the FPLs (Commonwealth Br. 47; Cutler Br. 17, n.6; Ward Br. 25–26) is wrong. The outrageously high death rates of Black and Hispanic residents are a "direct consequence" of the FPLs, as judges of the Commonwealth Court have agreed. Br. 30–31. This connection is not "attenuated"; it is supported by hard data and factual allegations. *See e.g.*, R.74a (noting racial disparities in firearm homicides among men in Philadelphia and Allegheny County), R.112a–114a & accompanying footnotes (demonstrating that neighboring states *without* firearm preemption laws have lower rates of gun violence). No Respondent acknowledges these factual allegations. Respondents'

[2] The General Assembly and Respondent Ward cite only three cases on this point, none of which support them. *See* Ward Br. 20 (citing *Pa. Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995), *Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 600 (Pa. 2013) ("*HHAP*"), *Krenzelak v. Krenzelak*, 469 A.2d 987, 991 (Pa. 1983)); GA Br. 34, n.19 (quoting *Marich*). *Marich* addressed only a procedural due process challenge. 666 A.2d at 254. The other cases struck down retrospective application of statutes that impeded on vested property rights. *HHAP*, 77 A.3d at 606; *Krenzelak*, 469 A.2d at 994.

suggestion that this Court disregard this evidence of a direct connection between the FPLs and Respondents' fundamental rights to life and liberty disrespects this Court's assurance that it "will not turn a blind eye to the development of scientific research, especially where such evidence would demonstrate infringement of constitutional rights." *Commonwealth v. Torsilieri*, 232 A.3d 567, 595–96 (Pa. 2020).

Furthermore, Respondents' denial of Petitioners' right to defend themselves by local legislation, which is directly infringed by the FPLs, lacks any support. Perhaps Respondents think that this self-defense right is limited to wielding weapons. *See, e.g.,* GA Br. 39, n.20. But the right to self-defense is "much broader than the right to bear arms." *Madziva v. Phila. Hous. Auth.*, No. 1215 C.D. 2013, 2014 WL 1891388, at *3 (Pa.Cmwlth. May 12, 2014).[3]

Respondent Ward argues that Petitioners are asking for "whatever protection from the government that, in their view, they need," and that Petitioners' arguments are based on a purported right to minimum governmental protection from non-governmental parties. Ward Br. 20–24. Again, that is not what Petitioners seek, as

[3] The General Assembly is the only Respondent to acknowledge *Madziva*, and it does not dispute Petitioners' characterization of that case. *Compare* Br. 29, n.15 *with* GA Br. 39, n.20.

every other Respondent recognizes.[4] Respondent Ward's cases on this point are entirely inapposite.[5]

Respondent Ward also attempts to dismiss Petitioners' articulation of the right as "semantics" because Petitioners are still seeking government protection, but through local legislation. Ward Br. 23; *see also* Commonwealth Br. 44. But what Respondents call "semantics" is actually a distinction that makes a difference. Petitioners have protected rights to collectively enact and rely on local legislation that are constitutionally protected as a matter of substantive due process, a right recognized by the caselaw. Br. 31–33 (discussing *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa.Cmwlth. 2012) (*en banc*) (*Robinson I*) and *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (*Robinson II*)).

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[4] Cutler Br. 15 (discussing "Petitioners[']claim that the [FPLs deprive them of their ability to protect themselves from gun violence though local regulations") (brackets and quotation marks omitted); Commonwealth Br. 43 ("the ten individual Appellants . . . ask this Court to recognize an individual right under the Pennsylvania Constitution to collectively enact preferred municipal ordinances") (emphases and quotation marks removed); GA Br. 33-34 (noting Petitioners' claim to the right "to enjoy and defend life and liberty, which includes the right to protect themselves from gun violence by means of local regulation") (quotation marks omitted).

[5] *Johnston* should be confined to its speculative factual claims. *Johnston v. Twp. of Plumcreek*, 859 A.2d 7, 13 (Pa.Cmwlth. 2004). Br. 41-45. In *Robbins v. Cumberland County Children and Youth Services*, 802 A.2d 1239 (Pa.Cmwlth. 2002), the Commonwealth Court did not independently analyze any constitutional claims under the Pennsylvania Constitution; it denied money damages based on its analysis of federal constitutional principles. *Id*. at 1246–52. Lastly, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), involved no challenges under the Pennsylvania Constitution, and the challengers conceded that the state had played no part in creating any danger. *Id.* at 197.

2. Justice Baer's concurrence in *Robinson II* demonstrates that the FPLs impact protected rights

Respondents' attempts to distinguish and minimize Justice Baer's concurrence in *Robinson II* do not succeed. Justice Baer's concurrence was the "narrower avenue" for resolving the issue in *Robinson II*, 83 A.3d at 1001 (Baer, J., concurring), and this Court follows the rule that when "no single rationale explaining the result enjoys the assent of [a majority of] Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Commonwealth v. Alexander*, 243 A.3d 177, 197 (Pa. 2020) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)) (brackets in original). Nothing prohibits this Court from now adopting the sound reasoning of Justice Baer and the *en banc* Commonwealth Court, whose opinion Justice Baer largely adopted. *See Robinson II*, 83 A.3d at 1006 (discussing *Robinson I*).

Respondents attempt to distinguish *Robinson II* on the basis that that case involved a "recognized" right. Commonwealth Br. 45; Ward Br. 24.[6] But this is precisely Petitioners' point: when there is such a right—whether that is the right to property at issue in *Robinson II* or the right to life and liberty at stake here—that right cannot be infringed through preemption.

[6] Respondent Cutler makes no attempt to distinguish or attack the reasoning of Justice Baer's concurrence in *Robinson II*; instead, he attacks only its precedential value. Cutler Br. 16. The General Assembly does not address his concurrence at all.

Moreover, Petitioners' right to protect their lives through local legislation is no different from the type of right recognized in Justice Baer's concurrence, which noted that the challenged act preempting local zoning was not "a governmental intrusion into private property" "in the common sense," and "[a]rguably" "expand[ed] private property rights by mandating that individual municipalities permit property owners in residentially or agriculturally zoned areas to bring oil and gas operations onto their land." *Robinson Twp*, 83 A.3d at 1005. Even so, the government's preemption of local laws was a "governmental intrusion, at least on the individual citizen level, [] to the neighbor of the landowner who wishes to have oil and gas operations on his land." *Id*.[7] Put differently, preemption may implicate Pennsylvanians' rights under Article I, Section 1 when it promotes the rights of some citizens to the detriment of others. The Commonwealth *conceded* as much in its briefing in *Robinson II*. *See id*. at 1011 (Saylor, J., dissenting) ("[Municipalities] paint a picture of residential neighborhoods torn apart by the indiscriminate placement of gas wells … [where] neighboring landowners are victims who have no

[7] Given such reasoning, Respondent Ward's attempt to minimize this Concurrence as "not address[ing]" the question of whether a "fundamental right" was implicated, Ward Br. 25, is misguided. Since Justice Baer did not apply strict scrutiny, he must not have considered the right at issue "fundamental." *See also* Br. 36 (noting that the Concurrence appeared to apply a substantial-relationship test associated with intermediate scrutiny). The Concurrence clearly addressed whether preemption of local legislation that impacts a protected right triggers any degree of constitutional scrutiny, an issue that was contested. *See Robinson II*, 83 A.3d at 1003 ("[The Commonwealth] asserts that the Commonwealth Court created a constitutional right where one does not exist.").

rights and no recourse. *If this picture were correct, there would be good reason to conclude that Act 13 violates the substantive due process rights of Pennsylvania's citizens*.") (quoting a brief filed by the Commonwealth) (emphasis added).

This concession is hardly controversial and is contrary to the Commonwealth's position in this case. If the Commonwealth cannot refuse to regulate zoning *in toto,* it cannot entirely refuse to regulate in the field of public safety, including firearms.[8] But even without a complete absence of regulation, the Constitution is violated when the Commonwealth provides such inadequate regulation that thousands of Black and Hispanic residents are killed or injured each year *and* Respondents forbid municipalities from filling the gaps in state gun-safety laws to address local needs.

That is the situation here. Pennsylvania's gun-violence prevention laws fail to prevent the deaths and injuries of innocent people every year, especially in certain

[8] Although Justice Baer noted that the citizens and municipalities had relied on the zoning schemes that preceded the challenged statute, it is clear that this reliance was not the dispositive factor in his reasoning. *Robinson II*, 83 A.3d at 1006. In any event, as Petitioners have explained, the right of municipalities to regulate firearms likewise greatly predates the FPLs. *See* Br. 6-7.

urban areas.[9] Measures adopted in other states have been proven to save lives.[10] Petitioners are not asking this Court to rule on which measures the General Assembly should adopt, or on its "policy" choice not to adopt any of these—or other—life-saving measures. But the General Assembly cannot constitutionally refuse to adopt measures that would save lives while prohibiting localities from doing so. For example, if statewide motor vehicle regulation were minimal (for instance, a minimum age and quick background check to buy a car), without any other proven life-saving measures—like speed limits, or requiring drivers' tests, licenses, and insurance—there would be thousands of deaths and injuries, especially at intersections and on high-speed roads. If the Commonwealth simultaneously

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[9] Pennsylvania law requires a minimum age, 18 Pa.C.S. § 6110.1(a), and a background check, *id.* §§ 6111(b), 6116, for handgun purchases (but not long guns, including assault weapons). Federal law also imposes age and background-check requirements. *See* 18 U.S.C. § 922. Background checks usually take about five minutes.

Pennsylvania law also requires a license to carry a concealed weapon (but not to buy a gun), 18 Pa.C.S. §§ 6106(a), 6109(a), which is issued after another quick background check (without any investigation), some paperwork, and a small fee. Guns are prohibited in schools or courts, *id.* §§ 912, 913, but not in other government buildings. Openly carrying a gun does not require a license outside Philadelphia. *See id.* § 6108.

[10] These proven measures include, for example, safe storage laws; authorization of Extreme Risk Protection Orders (ERPOs); banning assault weapons and high-capacity magazines; requiring licensing of gun owners and registration of guns; limiting the number of guns that can be purchased over a period of time (anti-trafficking laws); lost-and-stolen reporting requirements; prohibiting guns in sensitive places like bars, gambling facilities, polling places, sports arenas, government buildings, and places of worship; requiring personalization of guns ("smart gun" technology); requiring a license to openly carry a gun; and waiting periods and/or training in gun safety before a purchaser can obtain a gun. *See* R.116a-118a, R.122a, R.127a-128a.

prohibited localities from using their own resources to reduce deaths and injuries, even in obvious ways like installing local traffic lights and stop signs, no one would question that the Commonwealth would be directly and knowingly contributing to the tragic and widespread loss of lives—with no rational basis—and thereby violating Pennsylvanians' most fundamental rights to life and liberty. The same is true with regard to the Commonwealth's enactment and maintenance of the FPLs.

B. The FPLs Fail Every Level of Constitutional Scrutiny

1. Respondents concede that the FPLs cannot survive heightened scrutiny

None of the respondents argues that the FPLs would withstand strict scrutiny. Instead, they argue that strict scrutiny should not apply, because no fundamental right is implicated. *See* Part II.A.1, *supra*.

Similarly, Respondents fail to respond to Petitioners' arguments that the FPLs infringe "important" rights and may therefore be upheld only if they are "substantially or closely related to an important government interest." Br. 35-36 (quoting *Yanakos v. UPMC*, 218 A.3d 1214, 1222 (Pa. 2019)). No Respondent addresses *Yanakos*, its "substantially. . . related" test, or Justice Baer's application of the intermediate scrutiny test to the Article I, Section 1 challenge in *Robinson II*. 83 A.3d at 1003; *see also* Br. 36. Because the Commonwealth Court failed to apply intermediate scrutiny, and because Respondents have forfeited any argument that

the FPLs would survive a heighted standard of review, the dismissal of Count II should be reversed. Br. 36.

2. Respondents fail to articulate a legitimate rationale for preempting the Proposed Regulations

Even under rational basis scrutiny—the only level of scrutiny Respondents address—the FPLs cannot survive. Respondents largely concede, correctly, that the Pennsylvania Constitution requires a more rigorous analysis under this standard than the U.S. Constitution. *See*, *e.g.*, GA Br. 35 (noting Pennsylvania's "more restrictive test," under which a challenged law must have "'a real and substantial relation' to the public interests it seeks to advance, and is neither patently oppressive nor unnecessary to these ends") (quoting *Shoul v. Dep't of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 678 (Pa. 2017) (citation omitted)); *see also* Cutler Br. 17; Commonwealth Br. 47. The FPLs fail this test because there is no relationship, let alone a substantial one, between any legitimate government interest and the means employed to achieve that interest. *Cf. Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1102 (Pa. 2020) (noting a "means-end" review is used for statutory challenges).

The sole governmental interest advanced by Respondents is "uniformity" in firearms legislation, which they contend is an appropriate end unto itself. Commonwealth Br. 47–48, Ward Br. 28–30, GA Br. 40–41, Cutler Br. 18. The General Assembly cites three cases for this proposition. GA Br. 40-41 (citing *City*

of Pittsburgh v. Allegheny Valley Bank of Pittsburgh, 412 A.2d 1366, 1370 (Pa. 1980); *PECO Energy Co. v. Twp. of Upper Dublin*, 922 A.2d 996, 1007 (Pa.Cmwlth. 2007); *Duff v. Northampton Twp.*, 532 A.2d 500, 507 (Pa.Cmwlth. 1987), *aff'd*, 550 A.2d 1319 (Pa. 1988)). But none of these cases involved rational basis challenges under Article I, Section 1—which Respondents maintain is the proper test—and none held that uniformity *per se* is a legitimate legislative objective.[11]

Regardless, it is insufficient for Respondents to simply point to an interest in uniformity: rational-basis review also requires the court to "scrutinize the relationship between the law . . . and that interest." *Ladd*, 230 A.3d at 1108. The FPLs cannot withstand that scrutiny because they preempt local ordinances, like the Proposed Regulations, that do not implicate uniformity concerns because their application is purely local. *See* Br. 36-38. Thus, the FPLs "sweep unnecessarily broadly," *Pa. Med. Soc'y v. Foster*, 608 A.2d 633, 636 (Pa.Cmwlth. 1992) (citation omitted), and "do little to achieve the evident legislative objective." *Dep't of Transp., Bureau of Driver Licensing v. Middaugh*, 244 A.3d 426, 434 (Pa. 2021).

As an alternative interest advanced by the FPLs, Respondents posit an interest in avoiding a disparate burden on the right to bear arms. Ward Br. 27; *id*. 29; Cutler Br. 18; GA Br. 40; Commonwealth Br. 47–48; *see also* Op. 31 ("Uniformity of law

[11] *See, e.g.*, *Allegheny Valley Bank*, 412 A.2d at 1007 (noting uniformity was a "method" of achieving the appropriate end of protecting "soundness" and "integrity" of banks).

encompasses the idea that one person should not suffer a greater burden under the law than another, simply because that person lives in a different [area in a] state.") (quoting Donald L. Bell, Comment, *The Adequate and Independent State Grounds Doctrine*, 16 Fla. St. U.L. Rev. 365, 383-84 (1988)).[12]

But even if the FPLs' objective is to prevent citizens from being subjected to a conflicting "balkanization" of firearms laws, Commonwealth Br. 48, *see also* Ward Br. 29, the FPLs are manifestly overbroad and irrational for that purpose. For one thing, the FPLs' stated objective that Respondents espouse actually causes the same effect: a situation where residents of certain Philadelphia and Pittsburgh neighborhoods are disproportionately harmed by gun violence as compared to all other Pennsylvanians. R.74a–80a. Again, Respondents disregard the reality of violence in the hardest-hit Philadelphia and Pittsburgh neighborhoods, and the disproportionate impact such violence has had on Petitioners, Black and Hispanic residents of these neighborhoods. Preemption of local laws that would address the needs of particular municipalities and particular communities runs *counter* to the proffered goal of uniformity—preventing disparate burdens of the firearm regulatory scheme. It does not respect Pennsylvania's "extreme diversity" and applies a "one

[12] Bell's article actually concerned uniform interpretation of the *same law*, not uniformity among different jurisdictions regardless of local needs. *See* Bell, 16 Fla. St. U.L. Rev. at 383–84 & accompanying footnotes.

size fits all" approach to over 2,500 municipalities with vastly different levels and types of gun violence. *Cf. Robinson II*, 83 A.3d at 1103 (expressing skepticism that a one-size-fits-all approach to zoning could sufficiently protect substantive due process rights); *see also* Br. 37–38. While Respondents allude to the right to bear arms, they do not argue that the Proposed Ordinances would infringe those rights, and Petitioners acknowledge that local regulations would have to be consistent with that constitutional right.[13]

In passing legislation that preempts life-saving measures, in a way that irrationally ignores Pennsylvania's diversity and does not advance the stated

[13] One amicus brief in support of Respondents acknowledges that "the constitutionality of these measures is not at issue here." Gun Owners of America Br. 13–14. Should constitutional issues arise at a later stage in this litigation, Petitioners will show in depth why neither the U.S. nor the Pennsylvania Constitution would prohibit implementation of the three proposed ordinances. For now, Petitioners note that the amicus brief of Brady and Giffords Law Center convincingly demonstrates the constitutionality of the Proposed Ordinances.

Moreover, Philadelphia enacted an ordinance in 1790 requiring a permit to fire a heavy gun. Br. 6. This enactment, and others from the same era, indicate that when the Second Amendment was ratified, permits and local ordinances were basic components of the American framework of firearms regulation. Similarly, enactments from that era allowed law enforcement to proactively disarm firearm-owners who posed a risk of physical harm by the standards of the time. *E.g.*, 1779 Pa. Laws 193, § 5 ("[T]he lieutenant or any sub lieutenant of the militia of any county or place within this state, shall be, and is hereby empowered to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state and against whom information on oath shall be given before any justice of the peace, that such person is suspected to be disaffected to the independence of this state, and shall take from every such person any cannon, mortar, or other piece of ordinance, or any blunderbuss, wall piece, musket, fusee, carbine or pistols, or other fire arms, or any hand gun . . . .").

purposes of the legislation, Respondents violated Petitioners' substantive due process rights. The dismissal of Count II must be reversed.

C. Respondents' Attacks Raise Issues of Fact

It is beyond dispute that in ruling on demurrer, a court "accept[s] as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." Br. 5 (quoting *Ladd*, 230 A.3d at 1103). The Petition offers many well-supported and specific factual allegations regarding the dangerous link between the FPLs and the violence suffered by Petitioners and their communities. *See*, *e.g.*, R.72a–80a.

The Commonwealth Court erred in considering the factual issues inherent in Respondents' attacks on Petitioners' claims. Br. 28, 38–39. Multiple Respondents and *amici* continue to raise factual disputes regarding the extent to which the Commonwealth's current firearms regulatory scheme actually reduces firearm violence. *See*, *e.g.*, Cutler Br. 22, n.7 (noting factual issues related to gun violence causation); Ward Br. 27 (speculating that local regulations would restrict the constitutional right to bear arms); *see also* Gun Owners of America's Br. 4–-5. Petitioners' detailed allegations as to the inadequacy of the present regulatory scheme must be accepted as true at this juncture. *See Ladd*, 230 A.3d at 1116 (colorable claim of substantive due process violation warranted reversal of

demurrer); *see also HHAP*, 77 A.3d at 605 ("the question of whether the legislation was finally unconstitutional requires further factual development") (addressing a challenge to a statute as unconstitutional "taking" under Article I, Section 1).

Petitioners should, at a minimum, be given the opportunity to prove these allegations.[14]

III. Petitioners Should Get Their Day in Court to Prove Their State-Created Danger Claim

A. Respondents Double Down on the Erroneous Application of *Johnston*

Respondents lean heavily on the observation that lawsuits challenging the constitutionality of statutes under the state-created danger theory have not previously succeeded. But claims could not proceed under the Education Clause, until one did. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017). Lawsuits based on the Environmental Rights Amendment could not go anywhere, until one did. *Robinson II*, 83 A.3d 901. Challenges to legislative reapportionment plans could never succeed, until one did. *Holt v. 2011 Legislative Reapportionment Comm'n,* 38 A.3d 711 (Pa. 2012). "Never before" does not mean "never can."

[14] Respondents contend that factual disputes are irrelevant, because they characterize Petitioners' constitutional challenge as a "facial" challenge, rather than an as-applied challenge. *See*, *e.g.*, Ward Br. 27 (citing the Petitioner's request for relief that Respondents be enjoined from enforcing the FPLs). But the Petition can be fairly read as seeking relief "as applied to Philadelphia and Pittsburgh."

If Petitioners' state-created danger claim is atypical, that is because the situation occasioning this lawsuit is exceptionally egregious. This is the rare case when a statute rises to the level of a state-created danger. In Philadelphia, over 100 children are shot every year. *See* R.78a. Philadelphia's gun violence makes it an extreme outlier within Pennsylvania and among large cities nationwide. R.75a–76a. In Pittsburgh, 27% of the total population but 81% of the homicide victims are Black. R.79a–80a. Respondents have known for a long time that many deaths and injuries would inevitably result from enacting and broadening the FPLs, yet they have opted to do so anyway, again and again. It is time for the judiciary to use its well-established power of judicial review to stop Respondents' endangerment of Petitioners and their communities.

B. Petitioners Have Amply Pleaded All Elements for Their State-Created-Danger Claim

Petitioners have demonstrated that their claims satisfy all four elements of a state-created-danger claim. Br. 45–56. Respondents' challenges as to each element are fundamentally flawed.

1. The Harm Ultimately Caused Was Foreseeable and Fairly Direct

Respondent Ward calls the link between the FPLs and gun violence "a serpentine daisy-chain of events," Ward Br. 37, and alleges that "it was not reasonably foreseeable that the decision [to enact the FPLs] would cause harm to

anyone." *Id.* 40. However, the link between the FPLs and firearm violence in Philadelphia was not only foreseeable; it was foreseen *and foretold*. The Petition for Review catalogs decades of warnings ignored. *E.g.*, R.93a (Rep. Mullen warning in 1974 that, "if the bill passes . . . a lot of innocent people are going to get killed"); R.102a (then-Rep. Williams stating in 1994 that the G.A. members "will be responsible for some tragic incident that will have occurred").

These pleas were not based on speculation, but were (and are) well-supported by abundant research documenting the relationship between gun laws and firearm deaths, and by widely-known facts about the concentration of gun violence within a handful of urban neighborhoods. *E.g.*, R.116a–130a. This easily clears the foreseeability bar. *See, e.g.*, *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 238 (3d Cir. 2008) (foreseeability "require[s] a plaintiff to allege an awareness on the part of the state actors that rises to level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm"); *Gormley v. Wood-El*, 93 A.3d 344, 364 (N.J. 2014) ("What is striking is not that the brutal assault on [plaintiff] in the ever-noisy and tumultuous day room was an extraordinary event but that it was rather quite ordinary. Assaults in the day room were not unexpected but fairly foreseeable.").

Several Respondents urge that "multiple factors [are] at play" in Philadelphia's gun-violence epidemic, Cutler Br. 22 n.7, including "the policing decisions that members of law enforcement make" and "the criminals who use firearms to harm people," Ward Br. 37. But Petitioners need not prove that the FPLs were the *sole* cause of all the shootings and gun homicides in Philadelphia's hardest-hit neighborhoods. It is enough to show, as Petitioners will do on remand, that these gun-violence rates are significantly higher than they would be without the FPLs,[15] and that residents of these neighborhoods were and remain likely victims of gun violence stemming from the FPLs, as opposed to "random" members of the public. *See Phillips*, 515 F.3d at 239 ("[A] distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a 'random' individual . . . .").

2. Respondents Are State Actors

The second element for a state-created-danger claim is that "a state actor acted with a degree of culpability that shocks the conscience." *Morrow v. Balaski*, 719 F.3d 160, 177 (3d Cir. 2013) (*en banc*). The Commonwealth suggests that Petitioners cannot satisfy this element on the ground that there is no "identifiable

[15] Plaintiffs routinely prove such causal links through expert testimony. *Cf., e.g.*, *City of Phila. Fire Dep't v. Workers' Comp. Appeal Bd. (Sladek)*, 195 A.3d 197, 208-09 (Pa. 2018). Whether the element of causation has been met is normally a question of fact for the fact-finder. *See, e.g.*, *Hamil v. Bashline*, 392 A.2d 1280, 1286 (Pa. 1978).

state actor—usually a police officer or other first responder." Commonwealth Br. 37. The Respondents are of course all "identifiable": indeed, they have all been served with the Petition for Review, engaged counsel, and filed briefs.

Nor is a "state actor" limited to "a police officer or other first responder." State-created-danger claims have succeeded against federal departments, agencies, and cabinet members. *J.P. v. Sessions*, No. 18-cv-6081, 2019 WL 6723686, at *4, *35-36 (C.D. Cal. Nov. 5, 2019). They also regularly proceed past the pleading stage against counties and municipalities, not just individual officials or employees. *E.g.*, *K.S.S. v. Montgomery Cnty. Bd. of Comm'rs*, 871 F.Supp.2d 389, 403 (E.D. Pa. 2012); *D.N. ex rel. Nelson v. Snyder*, 608 F.Supp.2d 615, 629 (M.D. Pa. 2009). Nothing in the precedents or logic of the doctrine limits its reach to certain types of "state actors."

3. Petitioners are Members of a "Discrete Class of Persons"

Petitioners' state-created-danger claim does not allege a risk to all "member[s] of the public in general"; rather, it conforms to the doctrine's requirement that "the plaintiff was [1] a foreseeable victim of the defendant's acts, or [2] a member of a discrete class of persons subjected to the potential harm brought about by the state's actions." *Morrow*, 719 F.3d at 177. Here, the individual Petitioners are all members of a "discrete class of persons," to wit, residents of certain neighborhoods that are

overwhelmingly poor, predominantly Black or Hispanic, and that experience firearm violence in gross disproportion to statewide rates. This group falls well within the parameters that support a state-created-danger claim. *See* Br. 51–52 (collecting cases).

Respondents complain that this group of individuals is not "limited" or "discrete" enough, Ward Br. 41, or that it is too "vaguely" defined. Cutler Br. 22. Lest there be any confusion, Petitioners do not allege that this group comprises all residents of Philadelphia, or any category defined by race or poverty alone. It is a discrete class characterized by their neighborhoods' high concentration of firearm homicide, overlapping with racial segregation in ways described to Respondents while the FPLs were pending. R.110a–111a (comment by Rep. Kirkland that, "if the shoe was on the other foot, if these were white children being gunned down on the streets, that this would be a national movement"), R.93a–94a (comment by Rep. Gleeson about the uneven distribution of gun violence across Philadelphia neighborhoods).

On remand, Petitioners will put on evidence about the concentration of gun violence in these neighborhoods. It is not necessary or appropriate at the preliminary-objections stage to introduce all this evidence or to map out the precise

Census blocks at issue and the accompanying demographics. Rather, it is enough to make allegations such as:

- "Among all Philadelphia residents who died from firearm homicide in 2016, 50% lived in census tracts with the lowest median annual household incomes (less than $25,800 per year), while only 2% lived in census tracts with the highest incomes (median household incomes greater than $52,200 per year)." R.76a–77a.

- "[C]hildren in certain Philadelphia neighborhoods suffer psychological trauma normally associated with war or catastrophic natural disasters." R.86a.

- "'[T]he problem is, if the bill passes and everyone is permitted to buy a gun in the city of Philadelphia, what is going to happen is that, for example, in my neighborhood nearly everybody is going to buy a gun . . . a lot of innocent people are going to get killed.'" R.93a (floor statement of Rep. Martin P. Mullen).

- "Gun violence in Pittsburgh is concentrated in low-income neighborhoods like Homewood, where Diron was killed and Ms. Chatterfield now lives, and Larimer, where Ms. Chatterfield lived at the time of Diron's murder." R.60a.

Respondent Ward offers speculation about factual issues, arguing that gun violence endangers not just the residents of such neighborhoods but also "any person who travels into or through those neighborhoods." Ward Br. 42. But most violent crimes take place within blocks of the victim's home. *E.g.*, Richard Block *et al.*, *The Journey to Crime: Victims and Offenders Converge in Violent Index Offences in Chicago*, 20 Sec. J. 123–137 (2007). Petitioners, who live every day in places like Strawberry Mansion or Point Breeze, are at far greater risk of being shot than,

say, a suburban resident who may occasionally happen to drive through these neighborhoods.

Some Respondents also seem to suggest that the FPLs cause increased gun violence *everywhere* and thus put all members of the public in general at risk of private violence. *See, e.g.*, Ward Br. 36–37 ("While Appellants point to gun violence that has occurred in neighborhoods in Philadelphia, Pittsburgh, and other municipalities, that type of harm is one that anyone who is present in the neighborhoods (or elsewhere) could sustain."). While a resident of neighborhoods where gun violence is not a daily occurrence may face harm from the FPLs, the risk of that state-created danger is categorically different from that harm suffered by Petitioners here. *See* R.59a–60a, R.68a–69a. The Dissenting Opinion below (at 21) was correct that Petitioners belong to "a discrete class of persons," *Morrow*, 719 F.3d at 177, who are entitled to bring this state-created-danger claim.

4. Respondents' Actions Have Subjected Petitioners to Substantial Foreseeable Risk

The Commonwealth complains that "instead of an affirmative act, Appellants identify the existence of a statute and purported legislative *inaction*." *E.g.*, Commonwealth Br. 38. But statutes do not magically materialize out of thin air;

they are enacted by the actions of legislators.[16] Though Respondents' failures to act to curb gun violence are legion, in this suit Petitioners' challenge their affirmative actions, including:

- their enactment of § 6120, R.87a, R.91a, R.96a;
- their passage of multiple amendments to tighten § 6120, R.87a, R.96a-111a; and
- their enactment of § 2962(g), R.104a.

Without these actions, Philadelphia and Pittsburgh would have firearm ordinances in effect that would meaningfully reduce gun violence in Petitioners' communities. Thus, Respondents' actions have "rendered [Petitioners] more vulnerable to danger than had the state not acted at all." *Morrow*, 719 F.3d at 177; *see also Ross v. United States*, 910 F.2d 1422, 1425, 1431 (7th Cir. 1990) (mother of drowned child had valid claim for deprivation of her child's Fourteenth Amendment right to life against county for its policy that blocked civilians from attempting rescue, thus "cutting off private sources of rescue without providing a meaningful alternative").

Similarly, contrary to the Commonwealth's denials (Commonwealth Br. 38), this case bears the essential hallmarks of state-created-danger that were discussed in the Third Circuit's seminal decision in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir.

[16] That the passage of legislation is "action" is also obvious from the common root of the words "act" (meaning to do something, or a statute), "enact," and "action."

1996). As in *Kneipp,* Respondents' enactment and maintenance of the FPLs, without any significant effort to curb gun violence, amount to "affirmative acts of the [Respondents]" that "greatly increased" the risk of injury to the Petitioners. *Id*. at 1210. Petitioners are left "in a worse position after the [Respondents] intervened than [they] would have been if [Respondents] had not done so," *id*., thereby giving rise to the state-created-danger claim.

Moreover, the Commonwealth acknowledges that "the duty to protect [imposed by the state-created danger doctrine] arises from the limitation which [the State] has imposed on [the plaintiff's] freedom to act." Commonwealth Br. 39. While in the case of an individual victim, that limitation often is in the form of "'incarceration, institutionalization, or other similar restraint of personal liberty,'" Commonwealth Br. 39–40 (quoting *DeShaney*, 489 U. S. at 200)), in this case the "limitation" is the preemption imposed by the FPLs, which prevents Petitioners from protecting themselves. *Accord Archie v. City of Racine,* 847 F.2d 1211, 1223 (7th Cir. 1988) (*en banc*) (constitutional violation occurs when the state "greatly increase[s] the risk while constricting access to self-help").[17]

[17] The Philadelphia cases the Commonwealth cites are easily distinguished. *See* Commonwealth Br. 36, 38-39. In *Johnson v. City of Philadelphia*, the claim was based on alleged inaction. 975 F.3d 394, 401 n.10 (3d Cir. 2020). In *Rodriquez v. City of Philadelphia*, 350 F. App'x 710, 713 (3d Cir. 2009), the plaintiff's "claim turn[ed] on his contention that the City could have done more."

The General Assembly contends that the FPLs lack a "but for" causal connection to any harm to Petitioners. GA Br. 45; *see also* Cutler Br. 23. This ignores what the Petition for Review alleges: "*[b]ut for* the Firearm Preemption Laws, the City of Philadelphia would pass their own safety ordinances that would prevent or mitigate the harm suffered by their residents, including Individual Petitioners." R.114a (emphasis added). That allegation is supported by 38 paragraphs of detailed allegations supporting but-for causation. R.114a–131a. This more than satisfies the standard of review at this stage of litigation, when the Court must "accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." *Ladd*, 230 A.3d at 1103. Petitioners should be permitted to prove these allegations on remand.

IV. The Dismissal of Count III Should be Reversed

Count III of the Petition for Review sufficiently alleges that the FPLs impermissibly interfere with Philadelphia's delegated duty to promote and protect the health of the people by preventing and removing "menaces to public health," such as gun violence. Respondents argue that the Pennsylvania Local Health Administration Law ("LHAL") and Disease Control and Prevention Law ("DCPL") delegate only the duty to prevent and control communicable disease. They also make the circular argument that even if the LHAL and DCPL delegate a duty to

address other public health scourges, like gun violence, that delegation cannot include regulation of firearms because such regulation is prohibited by the FPLs. These arguments fail and the dismissal of Count III should be reversed.

A. By its Plain Language, the LHAL Delegates to Municipalities the Responsibility to Combat Gun Violence

The LHAL declares the "protection and promotion of the health of the people in the furtherance of human well-being" to be "one of the highest duties of the Commonwealth." 16 P.S. § 12002(a). By establishing municipal departments of health, the General Assembly partially delegated to municipalities the Commonwealth's core duty to "protect[] and promot[e] [] the health of the people." *Id.* § 12002(a). The LHAL expressly directs that once established, a municipal department of health "***shall*** prevent or remove conditions which constitute a menace to public health." 16 P.S. § 12010(c) (emphasis added).[18]

These words in the LHAL must "be construed according to … their common and approved usage . . . ." 1 Pa.C.S. § 1903(a); *see also id.* § 1921; *Corman v. Acting Sec'y of Pa. Dep't of Health*, 266 A.3d 452, 471 (Pa. 2021) ("The best indication of

[18] 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). However, this Court need not reach the question of delegation under the DCPL, because the delegation under the LHAL clearly encompasses gun violence as a menace to public health.

legislative intent is the plain language of the statute.") (citation omitted). Gun violence in Philadelphia results in hundreds of deaths and thousands of injuries and disabilities every year. It is the top cause of death for young Black men between the ages of 15 and 34. *See* R.73a–74a ¶¶ 29–31. By any definition, it is a "menace to public health." *See, e.g.*, Centers for Disease Control and Prevention, *Introduction to Public Health*, https://www.cdc.gov/training/publichealth101/public-health.html (defining "public health" as "the science and art of preventing disease, prolonging life, and promoting health through the organized efforts and informed choices of society, organizations, public and private communities, and individuals"). It is therefore both necessary and understandable that courts, medical professionals, elected officials, and agencies of the Commonwealth commonly refer to gun violence as a public health issue. *See* Br. 57–60.

Respondents attempt to avoid the LHAL's clear delegation of the duty to prevent or remove menaces to public health, including gun violence, by focusing instead on other provisions of the LHAL and DCPL that relate specifically to disease

prevention. *See* GA Br. 46–50; Commonwealth Br. 50–51.[19] That these statutes also deal with disease prevention in no way limits public health menaces to diseases.[20]

B. The General Assembly Cannot Avoid a Claim of Interference with Delegation by Preempting Local Authority

Respondents also argue that Petitioners' interference-with-delegation claim must fail because the later-enacted FPLs prohibit Pennsylvania municipalities from regulating firearms. But here, the General Assembly did not grant and then remove powers from municipalities. Rather, the General Assembly delegated to municipalities an ***affirmative duty*** to "protect[] and promot[e] [] the health of the people" by "prevent[ing] or remov[ing] conditions which constitute a menace to public health." 16 P.S. §§ 12002(a), 12010(c).

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[19] The Commonwealth's citation to *Corman* is misplaced, as that case addressed whether the Pennsylvania Department of Health could require masking in schools throughout the Commonwealth without promulgating a new regulation. The opinion in *Corman* instructs that the Department may not "act by whim or fiat in all matters concerning disease," which concerns the manner in which the Department exercises its powers, not the scope of the LHAL's delegation of public health responsibility to municipalities. 266 A.3d at 477.

[20] Moreover, Petitioners have alleged numerous facts showing that gun violence follows predictable patterns, much like diseases, R.72a-75a, R.136a-137a, and is well-recognized as a public health issue. Br. 57-58; *see also* Stephen W. Hargarten *et al.*, *Gun Violence: A Biopsychosocial Disease*, 19 W.J. Emergency Med. 1024 (2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225933/ (discussing gun violence as a "biopsychosocial disease"); *Adolescent Gun Violence Prevention: Clinical and Public Health Solutions*, (Nancy A. Dodson ed., 2021) https://link.springer.com/chapter/10.1007/978-3-030-84710-4 ("Like other infectious diseases, incidents of gun violence tend to cluster and can spread throughout populations by means of social contagion. While this is most often thought of in the context of homicide, adolescent gun-related suicide can also cluster.")

Respondents ignore that this Court has recognized that when the Commonwealth delegates such a fundamental responsibility, it has the obligation to provide localities with the resources needed to carry out that responsibility. The "delegation of responsibility does not relieve the state of its primary duty to assure the satisfactory discharge of the obligation." *Allegheny Cnty. v. Commonwealth*, 490 A.2d 402, 411 (Pa. 1985); *see also Pa. Hum. Rels. Comm'n v. Sch. Dist. of Phila.*, 681 A.2d 1366, 1389 (Pa.Cmwlth. 1996). In the LHAL, the General Assembly explicitly acknowledged that the "protection and promotion of the health of the people . . . is one of the highest duties of the Commonwealth." 16 P.S. § 12002(a). The General Assembly chose to delegate that duty to Philadelphia and other municipalities, but then deprived Philadelphia of the authority that it needs to carry out these delegated responsibilities to address the gun violence epidemic surging in the City. R.116a–130a ¶¶ 94–125.

Most recently, Respondents have hamstrung Philadelphia's effort to prevent shootings at its recreation centers following a horrific broad-daylight shooting on recreation center grounds that took the life of a City employee. Philadelphia issued an Executive Order directing, similar to the rules of many property owners, that persons who bring firearms into city-owned recreation centers and then refuse a request to leave will be treated as trespassers. The trial court in that case felt so

constrained by the FPLs and the Court's decision in *Ortiz* that it issued a permanent injunction less than a week after the complaint in the case was filed.[21]

Having made the choice to delegate the responsibility to prevent and remove menaces to public health, Respondents cannot then block municipalities from addressing gun violence themselves, particularly where Respondents refuse to enact effective, common-sense gun safety laws at the state level.

V. The Commonwealth is Not Entitled to Sovereign Immunity and is a Proper Party to this Action

On appeal, the Commonwealth argues, for the first time, that it "is not a proper party to this action and is entitled to sovereign immunity." Commonwealth Br. 53.[22] Neither sovereign immunity nor improper joinder is a basis for dismissing the Commonwealth. Sovereign immunity is inapplicable to suits seeking declaratory judgments or injunctions to restrain state action. *See, e.g.*, *Wilkinsburg Police Officers Ass'n By & Through Harder v. Commonwealth*, 636 A.2d 134, 137 (Pa. 1993) ("[T]he distinction is clear between suits against the Commonwealth which

[21] Judge Joshua Roberts also joined the chorus of members of the Pennsylvania judiciary who have urged this Court to overrule or revisit *Ortiz*. *See* Mem. Op. dated Oct. 3, 2022, *Gun Owners of America, Inc. v. City of Phila*., No. 220902647 (C.P. Phila. 2022); on appeal, 1196 CD 2022.

[22] The Commonwealth never asserted immunity nor improper joinder as grounds for dismissal in the court below. Instead, it mentioned these issues only in a footnote, stating that "*[i]n addition* to the dispositive defenses raised in these Preliminary Objections, the Commonwealth enjoys sovereign immunity from this lawsuit pursuant to 1 Pa. C.S. § 2310." Commonwealth's Brief in Support of Its Preliminary Objections, 562 MD 2020, at 8 n.1 (emphasis added).

are within the rule of its immunity and suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be unconstitutional.") (citation omitted); *see also*, *e.g.*, *Legal Cap., LLC. v. Med. Pro. Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000) ("[s]overeign immunity . . . does not apply where the plaintiff seeks to restrain the agency from performing an affirmative act"); *Phila. Life Ins. Co. v. Commonwealth*, 190 A.2d 111, 114 (Pa. 1963) ("suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity") (emphasis omitted). Petitioners' suit, which seeks a declaratory judgment that the FPL are unlawful and an injunction restraining the Commonwealth from enforcing the FPLs, falls squarely within the province of this judiciary's mandate to strike down unconstitutional laws. R.138a–139a.

The Commonwealth nevertheless argues that "[b]oth monetary and nonmonetary claims" against the Commonwealth are barred unless "they fall within some specific waiver or exception to immunity." Commonwealth Br. 53 (citing *Sci. Games Intern., Inc. v. Commonwealth*, 66 A.3d 740, 757 (Pa. 2013) (internal quotations omitted)). But *Scientific Games* is inapposite and should not control the outcome here. As the Commonwealth Court explained in a recent decision rejecting *Scientific Games* as a basis for sovereign immunity, that case "effectively sought specific performance of a contract with the Commonwealth" rather than to "restrain

allegedly unlawful activity by Respondents, regardless of any contractual rights." *S. Fayette Twp. v. PennDOT*, No. 404 MD 2021, 2022 WL 2359779, at *8 (Pa.Cmwlth. Jun. 30, 2022) (*en banc*). As a result, *Scientific Games* represents "a limited exception to the general rule that sovereign immunity does not bar prohibitory relief." *Id*.

The Commonwealth also asserts that it is immune from suit because Petitioners' claims do not fall into one of the "ten narrow exceptions" enumerated in the Sovereign Immunity Act, 42 Pa.C.S. §§ 8521, *et seq*. Commonwealth Br. 53. But that Act governs only immunity in tort actions seeking damages, and thus is also inapplicable. *See id.* § 8522(a) (waiving immunity "as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable"). The Sovereign Immunity Act is "not intended as a shield for Commonwealth officials against alleged violations of constitutional and/or statutory rights." *Bullock v. Horn*, 720 A.2d 1079, 1081–82 (Pa.Cmwlth. 1998) (holding that the Act is relevant only to cases that involve the Commonwealth's negligence); *see also, e.g.*, *Smith v. Commonwealth*, 488 A.2d 1174, 1175 (Pa.Cmwlth. 1985), *aff'd*, 501 A.2d 247 (Pa. 1985). And the Commonwealth cannot use the Sovereign Immunity Act to shield itself from Petitioners' claims here.

The Commonwealth also argues that it is not a "proper respondent to this suit" because "the specific agency or state officials who allegedly acted on behalf of the Commonwealth must be named, not simply 'the Commonwealth.'" Commonwealth Br. 54 (citation omitted). But the rule requiring litigants to sue a specific Commonwealth "party" comes from the Sovereign Immunity Act, as is evident from the sources the Commonwealth cites. *See id.* at 54-55. The Commonwealth relies primarily on *Tork-Hiis v. Commonwealth*, 735 A.2d 1256 (Pa. 1999), but that was "a tort action for damages." *Id.* at 1257. Accordingly, the basis of the Court's ruling in that case was that tort actions under the Sovereign Immunity Act must be brought against a specific Commonwealth agency. *Id.* at 1258 (citing 42 Pa.C.S. § 8501). In *Brouillette v. Wolf*, the other case the Commonwealth cites, the Commonwealth Court relied heavily on *Tork-Hiis,* and an inapposite Commonwealth Court case regarding a request for an affirmative injunction, to conclude that meaningful relief had to be "directed to the actions of some identifiable Commonwealth party." 213 A.3d 341, 356 n.16 (Pa.Cmwlth. 2019). *Brouillette* is not binding on this Court and its reasoning does not apply here.

The Commonwealth's reliance on Pa R.C.P. 2102(a)(2), Commonwealth Br. 54, is similarly misplaced. Rule 2102 governs merely the "style of actions" in suits against the Commonwealth in the courts of common pleas, and is not itself a basis

for immunity. As the explanatory comment to Rule 2102 makes clear, the origin of subdivision (a)(2) was, once again, the Sovereign Immunity Act. The Comment explains that in response to the passage of the Act waiving immunity against "Commonwealth parties" only, "Rule 2102 has been amended to alert and guide the bench and bar *in these cases* by adding new subdivision (a)(2) governing the designation of a Commonwealth party as defendant." Pa.R.C.P. No. 2102 Explanatory Comment (1991) (emphasis added). The Comment is explicit that "the limited scope of new Rule 2102(a)(2) reflects the limited jurisdiction of the courts of common pleas in actions against the Commonwealth or a Commonwealth party," and that "[i]t is *not anticipated* that the new rule, in view of its limited scope, *will affect actions not within the jurisdiction of the courts of common pleas* or actions pursuant to statutes *which do not refer to Commonwealth parties*." *Id.* (emphases added).

Moreover, the Pennsylvania Rules of Civil Procedure expressly contemplate that the Commonwealth will be a defendant or respondent in some cases. Rule 422(a) prescribes the proper method for "[s]ervice of original process upon the Commonwealth." Rule 1006(c), which concerns joint or joint and several liability against two or more defendants, contains an exception for "actions in which the Commonwealth is a party defendant." The Commonwealth Attorneys Act also

recognizes that the Commonwealth is subject to suit: section 204 of the Act, concerning "[l]egal advice and civil matters," states that "[t]he Attorney General shall represent *the Commonwealth* and all Commonwealth agencies . . . in any action brought by or *against the Commonwealth* or its agencies." 71 P.S. § 732–204(c) (emphases added). The Judicial Code similarly contemplates suits against the Commonwealth. Pursuant to 42 Pa.C.S. § 761(a)(1), the scope of the Commonwealth Court's original jurisdiction includes actions or proceedings against the "Commonwealth government" generally.

Consistent with these principles, the Commonwealth is frequently a respondent in actions for declaratory and injunctive relief. *See*, *e.g.*, *Wilkinsburg Police Officers Ass'n*, 636 A.2d 134; *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Peake v. Commonwealth*, 132 A.3d 506 (Pa.Cmwlth. 2015). Especially where, as here, there is no specific state agency or official charged with enforcing the challenged statute, it is the role of the Commonwealth itself to defend it. *See, e.g.*, *City of Pittsburgh v. Commonwealth*, 535 A.2d 680, 683 (Pa.Cmwlth. 1987), *aff'd*, 559 A.2d 513 (Pa. 1989) (directing the Commonwealth to answer a petition for review challenging the constitutionality of a state statute because "[t]his is properly a province of the

Attorney General"); *accord* 71 P.S. § 732–204(a)(3) ("It shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction.").

In sum, the Commonwealth is a proper party to this suit and the Court should reject its request for dismissal.

VI. This Court Should Not Affirm the Plurality's Decision on Alternative Grounds

The Commonwealth and Respondent Ward challenge the Petition on grounds of standing, *res judicata*, ripeness, and justiciability. Ward Br. 47–61, Commonwealth Br. 25–27. These arguments were not addressed by the Plurality, and they all lack merit.

A. Petitioners Have Standing

As a preliminary matter, Respondent Ward appears to acknowledge that Philadelphia has standing to challenge 18 Pa.C.S. § 6120. Ward Br. 51. Thus, this Court need not consider whether any other parties have standing to challenge § 6120. *See Pennsylvanians Against Gambling Expansion Fund v. Commonwealth*, 877 A.2d 383, 393 (Pa. 2005) (finding that where one party has standing, the Court need not consider whether another party also has standing).

Moreover, the Individual Petitioners have standing. The FPLs have exacerbated gun violence in the Individual Petitioners' communities, leading to deaths in their families and placing them at a high risk of death or serious injury. This gives them the required "substantial, direct, and immediate interest in the outcome of the litigation." *Fumo v. City of Phila.,* 972 A.2d 487, 496 (Pa. 2009). These grieving victims of gun violence have adequately alleged that they are "aggrieved" by the FPLs.

Respondent Ward asserts that the Individual Petitioners lack standing to challenge the FPLs because those laws regulate only municipalities, not individuals. Ward Br. 11, 48–49. That ignores a vast array of cases holding that a party has 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, Inc. v. City of Pittsburgh,* 346 A.2d 269, 289 (Pa. 1975) (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.Cmwlth. 2013) (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), *rev'd on other grounds*, 188 A.3d 1135 (Pa. 2018).[23]

Respondent Ward's real quarrel is factual: she disputes whether the FPLs are the cause of the injury to Individual Petitioners. Ward Br. 49 (arguing that "[t]he Preemption Provisions do not direct or otherwise cause gun violence"). But the Individual Petitioners need not prove causation to establish standing. 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).

Respondent Ward also argues that the Individual Petitioners lack a "substantial, direct, and immediate interest in the outcome of the litigation" because their injuries are "speculative and prospective" and "hypothetical." They are not, and it is offensive to say so given the facts Petitioners allege. Gun violence has permanently scarred each of their lives. *See* R.56a–69a ¶¶ 9-18, R.80a ¶ 40. They are each a member of a subgroup that faces a dramatically higher risk of gun violence

[23] *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 662 (Pa. 2005), does not support Respondent Ward's argument. In that case, the Court concluded merely that the petitioners lacked standing to challenge a statute governing licensing fees because the petitioners had not applied for licenses yet, let alone demonstrated how the statute would injure them if they obtained licenses. *Id*. at 660. In other words, those challengers had not yet been aggrieved, which cannot be said for Petitioners here, who have already suffered from gun violence. The case does not mean that private actors cannot challenge a statute that regulates government conduct. Moreover, the portion of the opinion quoted by Respondent Ward, Ward Br. 48–49, concerned *taxpayer* standing, which is not at issue here. *Pittsburgh Palisades*, 888 A.2d at 660.

than the general citizen. *Id.* The Petition details the well-supported connection between the FPLs and the gun violence they have suffered. *See* Part III.B.4, *supra*.[24]

B. Philadelphia's Claims are Not Barred by *Res Judicata*

Respondent Ward contends that two decades-old decisions—*Ortiz* and *Clarke*—bar Philadelphia from challenging 18 Pa.C.S. § 6120 under the doctrine of *res judicata*. Ward Br. 51. That is wrong because both the claims and the parties are different.

Res judicata, or claim preclusion, applies only when there exists a coalescence of four factors, including identity of the causes of action and identity of the persons or parties to the action. *Robinson v. Fye*, 192 A.3d 1225, 1231 (Pa.Cmwlth. 2018) (quoting *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995)). In addition to claims 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).

[24] CeaseFirePA Education Fund also has standing to challenge the FPLs. It has more than adequately pleaded facts establishing that it has had to divert resources from proactively supporting local gun-safety measures to counteracting the effects of preemption, including helping local governments navigate the FPLs and their amendments. *See* R.81a–83a ¶¶ 45–48. 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 resources in order to address the complained-of conduct. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also Applewhite v. Commonwealth*, No. 330 MD 2012, 2014 WL 184988 at *7-8 (Pa.Cmwlth. Jan. 17, 2014) (holding that an organization's diversion of resources "is a direct harm sufficient for standing").

"Identity of the causes of action … exists 'when the subject matter and the ultimate issues are the same in both the old and new proceedings.'" *Id.* at 1232 (emphasis added). Respondent Ward argues the claims are the same because, broadly speaking, "[t]he subject in controversy in *Clarke* and *Ortiz* was the restriction of municipalities' ability to regulate firearms, just as it is here." Ward Br. 55. But there is no overlap between the ultimate issues in this case and those in either *Ortiz* or *Clarke*.

In *Ortiz*, the ultimate issue was whether principles of home rule dictate that municipalities have the power to enact certain firearms legislation despite the FPLs. 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 the FPLs. 957 A.2d at 363-64.

By contrast, the ultimate issues here are whether the FPLs violate the substantive due process guarantees, including the state-created danger doctrine, under Article I, Section I of the Pennsylvania Constitution, and impermissibly interfere with the Commonwealth's obligation to maintain order and to preserve the safety and welfare of all citizens. *See* R.131a–138a ¶¶ 131–52. These are not "minor differences in form . . . or allegations," as Respondent Ward asserts. Ward

Br. 54. They are entirely different claims from those in *Ortiz* and *Clarke*, which no court has considered before this case.[25]

This case also does not satisfy the "identity of parties" element of *res judicata.* The City was not a party in either *Ortiz* or *Clarke*. Nor is the City in privity with the individual members of Philadelphia City Council who were parties in those cases. "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." *Fye*, 192 A.3d at 1234 (citation omitted).

Precedent counsels against finding privity between cities and their elected officials. For example, 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

[25] Barring Philadelphia's claims in this case would not serve the interests of preventing inconsistent decisions or encouraging reliance on adjudication. If Petitioners prevail on the merits, there would be nothing inconsistent between the decision in this case and those in *Ortiz* and *Clarke*. *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 1, or otherwise.

(Pa.Cmwlth. 1988); *Commonwealth v. Pullano*, 625 A.2d 1226, 1228 (Pa.Super. 1993). 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.

In *Ortiz* and *Clarke,* the individual City Council members who were petitioners acted independently from the City, in accordance with their unique right to do so under the Philadelphia Home Rule Charter. 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."). The City Council members in *Ortiz* and *Clarke* did not represent the same "legal right" that Philadelphia represents in this case.

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

C. This Matter is Ripe for Disposition

This suit seeks declaratory relief and thus is governed by the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531–7541. That 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." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1218 (Pa.Cmwlth. 2018) (quoting *Wecht v. Roddey*, 815 A.2d 1146, 1150 (Pa.Cmwlth. 2002)) (internal quotation marks omitted).

Citing *Mt. Lebanon v. County Board of Elections*, 368 A.2d 648 (Pa. 1977), Respondent Ward argues that the claims are not ripe for review because Petitioners have not "identif[ied] any ordinance that a municipality has enacted." Ward Br. 57. But that case is inapposite. There the claims were not ripe because the municipality sought to challenge proposed legislation. Petitioners here are not challenging proposed legislation; they are challenging the FPLs, 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" from a challenge to "a taxing statute" whose "provisions are in force").

"[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 . . . from entangling themselves in abstract disagreements." *Commonwealth v. Koehler*, 229 A.3d 915, 941 (Pa. 2020) (citation and quotation marks omitted). This case is not an abstract disagreement. Philadelphia and other municipalities have repeatedly passed laws and ordinances to reduce gun violence, which courts have repeatedly struck down as preempted by the FPLs. *See* R.114a–115a ¶ 92, R.120a-121a ¶¶ 103–05, R.126a ¶¶ 114–115, R.129a ¶ 123. The City need not engage in the futile act of passing 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.[26]

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

Petitioners ask the Court to hold that the FPLs violate Article I, Section 1 of the Pennsylvania Constitution. That is not "asking the Judiciary to don a legislative

[26] The Commonwealth's similar argument—that Petitioners seek an advisory opinion on abstract legal questions—fails for the same reasons. Commonwealth Br. 24–27. The FPLs are 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. Likewise, Petitioners have alleged, with specificity, precisely those ordinances that Philadelphia would pass should the FPLs be declared unconstitutional. R.114a ¶ 91, R.119a ¶ 99, R.120a–121a ¶¶ 103-105, R.126a ¶¶ 113-115, R.129a ¶ 123.

mantle" or "substitute its policy judgment for the General Assembly's policy judgment," as Respondent Ward claims. Ward Br. 59. Nor is it usurping constitutional policymaking authority, as the Commonwealth claims. Commonwealth Br. 28-32; *see also* GA Br. 29-33. It is simply asking the Court to perform its time-honored responsibility 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). "This is not a radical proposition in American law." *Id.* at 927 (citing *Marbury*, 5 U.S. at 166). Deciding whether a statute violates Article I, Section 1 (or any other constitutional provision) is well within the judiciary's prerogative. *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*, 839 A.2d 277 (invalidating a provision of the Protective Services Act under Article I, Section 1).

The separation-of-powers principles is not a trump card that obliterates judicial review. The General Assembly's power to preempt is "not absolute," and this Court has struck down preemption laws that violate the Pennsylvania

Constitution before. *Robinson Twp. II,* 83 A.3d at 946. The Court should do so here.

CONCLUSION

For the foregoing reasons, and those stated in Petitioners' Opening Brief, the Commonwealth Court erred in sustaining Respondents' preliminary objections. Its judgment should be reversed.

DATED: January 31, 2023 Respectfully submitted,

/s/ Jasmeet K. Ahuja

Mary M. McKenzie, I.D. No. 47434
Benjamin D. Geffen, I.D. No. 310134
Claudia De Palma, I.D. No. 320136
PUBLIC INTEREST LAW CENTER
1500 JFK BLVD., SUITE 802
Philadelphia, PA 19102
(267) 546-1308
mmckenzie@pubintlaw.org
bgeffen@pubintlaw.org
cdepalma@pubintlaw.org

Virginia A. Gibson, I.D. No. 32520
Jasmeet K. Ahuja, I.D. No. 322093
Robert E. Beecher, I.D. No. 327410
HOGAN LOVELLS US LLP
1735 Market St, 23rd Floor
Philadelphia, PA 19103
(267) 675-4600
virginia.gibson@hoganlovells.com
jasmeet.ahuja@hoganlovells.com
rob.beecher@hoganlovells.com

Attorneys for Individual Petitioners and CeaseFire Pennsylvania Education Fund

Diana Cortes, City Solicitor, I.D. No. 204274
Lydia Furst, Divisional Deputy City Solicitor, I.D. No. 307450
CITY OF PHILADELPHIA LAW DEPARTMENT
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
(215) 683-5000
diana.cortes@phila.gov
lydia.furst@phila.gov

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 length limitation set forth in the Court's Order of December 12, 2022. According to the word count of the word-processing system used to prepare this brief, the brief contains 12,628 words, not including the supplementary matter as described in Pa.R.A.P. 2135(b).

/s/ Jasmeet K. Ahuja
Jasmeet K. Ahuja