
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. HOLBROOK; ABD'ALLAH LATEEF;
TERRANCE LEWIS; MARGARET ROBERTSON;
NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE; NAACP PENNSYLVANIA
STATE CONFERENCE; PHILADELPHIA BRANCH OF
THE NAACP; UNIVERSITY OF PENNSYLVANIA
CHAPTER OF THE NAACP; PROGRESSIVE NAACP;
and UNIVERSITY OF PENNSYLVANIA CHAPTER OF
BEYOND ARREST: RE-THINKING SYSTEMATIC-
OPPRESSION,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA; THOMAS W.
WOLF, in his official capacity as Governor of Pennsylvania;
and KATHY BOOCKVAR, in her official capacity as
Secretary of the Commonwealth of Pennsylvania,

Respondents.

Docket No.
184 MD 2020

**PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS'
PRELIMINARY OBJECTIONS**

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Robert L. Holbrook, Abd’allah Lateef, Terrance Lewis, Margaret Robertson, National Association for the Advancement of Colored People, NAACP Pennsylvania State Conference, Philadelphia Branch of the NAACP, University of Pennsylvania Chapter of the NAACP, Progressive NAACP, and University of Pennsylvania Chapter of Beyond Arrest: Rethinking Systematic-Oppression (collectively, “Petitioners”) hereby submit this brief in opposition to the Preliminary Objections of the Commonwealth of Pennsylvania, Thomas W. Wolf, in his official capacity as Governor of Pennsylvania (“Governor Wolf”) and Kathy Boockvar, in her official capacity as Secretary of the Commonwealth (“Secretary Boockvar”) (collectively, “Respondents”).

PRELIMINARY STATEMENT

This case concerns the Commonwealth of Pennsylvania’s long-standing practice of counting people who are incarcerated as electoral residents of the correctional facilities where they are involuntarily (and often temporarily) imprisoned for the purpose of drawing its legislative reapportionment plans. Petitioners challenge this practice, known as prison-based gerrymandering, as violating Article I, Section 5 and Article II, Section 16 of the Pennsylvania Constitution and 25 Pa. Cons. Stat § 1302(a)(3). In effect, prison-based gerrymandering uses prison populations to artificially inflate the political power and access to representation of voters who live in primarily rural counties that contain

most of Pennsylvania's correctional facilities, while at the same time, diluting the political power of voters who live in primarily urban counties where very few correctional facilities are located.

Because the practice of prison-based gerrymandering offends the requirements of equal representation and free and equal elections, Petitioners challenge every application of this practice as it effects the constitutionality of current and future state legislative reapportionment plans. While the Commonwealth's operative final legislative reapportionment plan is impacted by the Commonwealth's practice of counting incarcerated people as residents of the districts where they are incarcerated, Petitioners do not only seek to invalidate the application of the practice to the current plan, but rather, seek to invalidate the practice itself. For this reason, the once-per-decade, 30-day appeals process for challenging the drawing of a particular redistricting plan under Article II, § 17 of the Pennsylvania Constitution does not apply here. No provision in Article II, § 17, which sets forth the process by which the Legislative Reapportionment Commission (LRC) must file a legislative reapportionment plan, contemplates any specific process for counting incarcerated people or other Pennsylvania residents. Instead, the LRC relies on data provided by the Commonwealth, which chooses to assign incarcerated people to a prison location.

Respondents (not the LRC) possesses the pre-incarceration addresses of people who are incarcerated and could adjust its reapportionment dataset, but instead continues the unlawful practice of counting incarcerated people as electoral residents of prisons for purposes of drawing decennial legislative reapportionment plans. It is the Respondents who have ignored their constitutional mandate to fashion districts “as nearly as equal in population as practicable,” and failed to use Census-provided adjusted data that would have enabled them to account for incarcerated residents as residents of their pre-incarceration address. Neither federal nor state law require the Commonwealth to assign incarcerated people the addresses where they happen to be located on Census Day as part of the U.S. Census Bureau’s 94-171 data for the Commonwealth’s decennial congressional or legislative reapportionment plan. *Borough of Bethel Park v. Stans*, 449 F.2d 575, 583 n.4 (3d Cir. 1971) (Although a state is entitled to the number of representatives in the House of Representatives as determined by the federal census, it is not required to use these census figures as a basis for apportioning its own legislature”). Indeed, the Commonwealth processes and edits P.L. 94-171 data received from the U.S. Census Bureau before it is used for its legislative reapportionment plan,¹ but does not adjust the addresses of incarcerated people to reflect their actual residence. Moreover, as of 2010, the

¹ See *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 719 n.6 (Pa. 2013).

Census Bureau provides adjusted data files that reflect group quarters population with the purpose of assisting states in accounting for incarcerated persons.² Despite Respondents' attempt to evade responsibility, Respondents are the entities with the power to remedy the unlawful policy of prison-based gerrymandering as at least nine states have done through legislative solutions or state executive action.

This action has been timely brought against the proper parties. This Court should not delay in addressing the Commonwealth's practice of prison-based gerrymandering, which violates the Pennsylvania Constitution and statutory law and is currently in effect.

STATEMENT OF THE CASE

The Petition for Review concerns Pennsylvania's practice of counting incarcerated people as electoral residents of the correctional facilities where they are imprisoned, often temporarily, rather than as electoral residents of where they were last registered or their pre-incarceration addresses. This practice violates Commonwealth law on three separate bases.

First, Pennsylvania's "prison-based gerrymandering" scheme violates Article I, § 5 of the Pennsylvania Constitution, which requires that "[e]lections shall be free

² See U.S. Census Bureau, *2010 Census Group Quarters Enumeration Assessment Report*, <https://www.census.gov/programs-surveys/decennial-census/decade/2010/program-management/cpex/2010-cpex-243.html>.

and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art I, § 5. 9. The Pennsylvania Supreme Court has held that Article I, § 5 “guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government[,]” and “mandates that all voters have an equal opportunity to translate their votes into representation.” *League of Women Voters v. Commonwealth*, 178 5 A.3d 737, 804 (Pa. 2018) (emphasis added). “[A]ny legislative scheme which has the effect of impermissibly diluting the potency of an individual’s vote for candidates for elective office relative to that of other voters will violate the guarantee of ‘free and equal’ elections afforded by Article I, Section 5.” *Id.* at 809.

Second, the Commonwealth’s use of prison-based gerrymandering in its state legislative apportionment plans violates the “Free and Equal” elections guarantee, because the practice inflates the voting power of the predominantly white voters who reside in legislative districts that contain prisons, while diluting the voting power of the disproportionately Black and Latino voters who reside in imprisoned people’s home communities—thus depriving these voters of “an equal opportunity to translate their votes into representation.” *See id.* at 804. Thus, the Commonwealth’s use of prison-based gerrymandering in reapportionment plans for the General Assembly also violates Article II, § 16 of the Pennsylvania Constitution, which

mandates that Pennsylvania's 50 senatorial and 203 representative districts shall be "as nearly equal in population as practicable." Pa. Const. art II, § 16.

Finally, the Commonwealth's use of prison-based gerrymandering is incompatible with Pennsylvania statutory law. Counting incarcerated people as residents of the districts where they are imprisoned violates 25 Pa. Cons. Stat. § 1302(a)(3), which mandates that, "[e]xcept as otherwise provided in this subsection 6 [1302(a)], no individual who is confined in a penal institution shall be deemed a resident of the election district where the institution is located. The individual shall be deemed to reside where the individual was last registered before being confined in the penal institution, or, if there was no registration prior to confinement, the individual shall be deemed to reside at the last known address before confinement." None of the exceptions in the statute are applicable here.

Petitioners seek a declaration that Pennsylvania's practice of prison-based gerrymandering, and the deviations from population equality thus caused, violate Article I, Section 5 and Article II, Section 16 of the Pennsylvania Constitution, as well as 25 Pa. Cons. Stat. § 1302(a)(3), and to permanently enjoin Respondents from enforcing any reapportionment plans that rely on the Commonwealth's unconstitutional policy of allocating incarcerated people as residents of the electoral districts where they are incarcerated.

STATEMENT OF JURISDICTON

This Court has original jurisdiction over this action pursuant to 42 Pa. Cons. Stat. § 761(a), because it is a civil action against officers of the Commonwealth government acting in their official capacities.

This Court also has original jurisdiction pursuant to the Declaratory Judgments Act, 42 Pa. Cons. Stat. §§ 7531-7541. Such jurisdiction is established because this action challenges Respondents' interpretations of Article I, Section 5 and Article II, Section 16 of the Pennsylvania Constitution and 25 Pa. Cons. Stat § 1302(a)(3) and prays this Court to vindicate Petitioners' rights under each of these provisions.

LEGAL STANDARD

Preliminary objections must be overruled unless “it is clear and free from doubt that the facts pled are legally insufficient to establish a right to relief.” *Dotterer v. Sch. Dist. of Allentown*, 92 A.3d 875, 880 (Pa. Commw. Ct. 2014). “[W]here any doubt exists as to whether the preliminary objections should be sustained, that doubt should be resolved by a refusal to sustain them.” *Pa. State Troopers Ass’n v. Commonwealth*, 606 A.2d 586, 587 (Pa. Commw. Ct. 1992).

The “Court must consider as true all the well-pleaded material facts set forth in [the] petition for review and all reasonable inferences that may be drawn from those facts,” *Werner v. Zazyczny*, 681 A.2d 1331, 1335 (Pa. 1996), and must view

those facts in a light most favorable to Petitioners. *Harrisburg School Dist. V Hickok*, 762 A.2d 398, 403 n.4 (Pa. Commw. Ct. 2000).

Additionally, “no testimony or other evidence outside of the [petition] may be considered to dispose of the legal issues presented.” *Cardella v. Public Sch. Emps. Ret. Bd.*, 827 A.2d 1277, 1282 (Pa. Commw. Ct. 2003). The merits of a claim are also not considered—the inquiry is limited to whether any valid claim has been alleged. *Ins. Adjustment Bureau v. Ins. Comm’r for Pa.*, 485 A.2d 858, 860 (Pa. Commw. Ct. 1984). And if “any theory of law would support a claim, preliminary objections are not to be sustained.” *Goodheart v. Thornburgh*, 522 A.2d 125, 128 (Pa. Commw. Ct. 1987), on remand, 545 A.2d 399 (Pa. Commw. Ct. 1988) (permitting equal protection claim to survive preliminary objections).

ARGUMENT

I. PETITIONERS HAVE SUED THE PROPER PARTIES

A. The Named Respondents and the Commonwealth are Proper Parties

Governor Wolf and Secretary Boockvar both have responsibilities related to the reapportionment of the Commonwealth’s legislative reapportionment and are proper parties to this action. *See* Pet. For Review ¶¶ 74-76, 117, 131-132.

Governor Wolf is being sued in his official capacity as head of the executive branch. According to the Pennsylvania Constitution, “supreme executive power

shall be vested in the Governor, who shall take care that the laws be faithfully executed” Pa. Const. art. IV, § 2. Governor Wolf, as the chief executive officer of the Commonwealth, is responsible for the faithful execution of the laws of the Commonwealth, including the guarantee of equal representation under Article II § 16 and “free and equal” elections afforded by Article I § 5 of the Pennsylvania constitution, as well as state statutes administered by the executive branch, including 25 Pa. Cons. Stat. § 1302(a)(3). Further, the Governor bears responsibilities related to census data used for legislative reapportionment, where following each decennial census,³ in accordance with federal law, “the Governor of the State” and “officers of public bodies having responsibility for legislative apportionment or districting of such State” receive from the Director of the U.S. Census Bureau population counts for state legislative districts, counties, municipalities, census tract, and other geographies. *See* 13 U.S.C.A. § 141; P.L. 94-171.

Secretary Boockvar is also being sued in her official capacity. The Secretary is the Commonwealth’s chief elections officer and has express duties in the reapportionment process set forth in Article II § 17 as “the elections officer of the Commonwealth who under law shall have supervision over elections.” Pa. Const. art. II, §§17(b)-(c), (h). Furthermore, where Petitioners’ allege a violation of 25 Pa.

³ In addition, the Pennsylvania State Data Center, which serves as the Commonwealth’s official source of population and economic statistics and acts as the state’s liaison to the U.S. Census Bureau, was established by executive order of the governor.

Cons. Stat. § 1302(a)(3), the Secretary also has express administration and enforcement duties related Pennsylvania's election related statutes. *See* 25 Pa. Cons. Stat. § 1108 (stating that the Department of State shall administer this part of the Commonwealth's consolidated statutes regarding elections). Together with the Governor, the Secretary also bears responsibility for overseeing efforts to ensure the accuracy and completeness of the 2020 Census in the Commonwealth, which will determine where incarcerated persons are counted. Pa. ST 25 P.S. § 2628.

The Commonwealth is also a proper party in a challenge to the constitutionality of a state law or practice, particularly a matter concerning the constitutionality of a redistricting plan. *See, e.g., League of Women Voters*, 178 A.3d at 821; *see generally Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002). Notwithstanding Respondents' position that the LRC and its members may be the only parties with an interest in how incarcerated people are counted for purposes of the Commonwealth's legislative reapportionment plan (Resp. Br. at 20), it would be contrary to reason that the LRC, an entity that exists anywhere from a few months to a couple of years,⁴ is the only party with any interest in the constitutionality of a

⁴ The 2011-12 Legislative Reapportionment Commission formed in 2011 and disbanded in 2013. *See* Pennsylvania Legislative Redistricting website, <http://www.redistricting.state.pa.us/index.cfm>.

reapportionment plan that remains be in place and determines legislative elections in the Commonwealth for the span of a decade.

Additionally, Pennsylvania Rule of Civil Procedure 422(a) states “[s]ervice of original process upon the Commonwealth or an officer of the Commonwealth, or a department, board, commission or instrumentality of the Commonwealth, or a member thereof, shall be made at the office of the defendant and the office of the attorney general by handing a copy to the person in charge thereof[;]” thus, this Rule expressly contemplates that the Commonwealth can be a respondent. Furthermore, where Petitioners are seeking declaratory relief and to enjoin Respondents from engaging in the practice of prison-based gerrymandering for the purposes of drawing the Commonwealth’s legislative reapportionment plans, sovereign immunity does not bar claims against the Commonwealth. *See Pennsylvania Federation of Dog Clubs v. Commonwealth*, 105 A.3d 51 (Pa. Commw. Ct. 2014), *aff’d*, 115 A.3d 309 (Pa. 2015) (finding that “sovereign immunity does not bar a declaratory judgment action or injunction seeking to prohibit state parties from acting) (citation omitted).

B. The Legislative Reapportionment Commission Has Disbanded and is Not an Indispensable Party to this Action

In contrast to the Governor, the Secretary of the Commonwealth, and Commonwealth, the LRC is not a necessary or indispensable party to this action. As Respondents acknowledged in their preliminary objections, the LRC no longer

exists. The 2011-12 LRC completed its work in 2013 and has been disbanded.⁵ Because the LRC is not presently constituted in any form, it has no enforceable interests.

A party is generally considered indispensable “when his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 581 (2003) (quoting *Sprague v. Casey*, 550 A.2d 184, 189 (1988)). Here, the LRC has no role in determining how residents are counted within the Commonwealth’s datasets. Rather, it is the Commonwealth’s system of prison-based gerrymandering that is at issue and any remedy or decree will involve the Respondents changing its practice, not the LRC.

The LRC’s participation in appeals does not create interests in the present case, which does not arise from the § 17 process. As stated above, Petitioners are not seeking to avail themselves of the § 17 appeals process in order to invalidate the application of the practice of prison-based gerrymandering to the current legislative reapportionment plan, but rather challenge the practice itself and every application to the process by which legislative reapportionment plans are drawn.

⁵ See Pennsylvania Legislative Redistricting website, <http://www.redistricting.state.pa.us/index.cfm>.

Moreover, insofar as the LRC, which is currently a non-existent legislative entity, has any interests or rights connected to the claims here, these interests, if any, are adequately represented by the existing Respondents, including the Commonwealth itself.

C. Petitioners have Adequately Stated Claims Against Respondents

As outlined in Petitioners' Petition for Review, the Commonwealth's policy of prison-based gerrymandering violates Article I, Section 5 and Article II, Section 16 of the Pennsylvania Constitution because it (a) artificially and arbitrarily inflates the political power of the voters who live in counties where correctional facilities are located; and (b) artificially and arbitrarily dilutes the political power of the voters who live in the counties where very few correctional facilities are located. The unconstitutional effects of prison-based gerrymandering result from the Commonwealth's policy of miscounting people for redistricting and not from the LRC's determination about how to draw district lines. *See* Pet. For Review ¶¶ 124-140.

The Secretary of State, along with the Governor's Office, are responsible for overseeing Census management and the allocation of residents within Pennsylvania. 25 Pa. Stat. Ann. § 2628 (West) ("The Department of State may utilize up to \$4,000,000 of funds . . . for an executive branch agency, which is subject to the policy, supervision and control of the Governor, for communication, administration

and assistance within each county of the Commonwealth for the purpose of ensuring a complete and accurate census count of the Commonwealth in the 2020 Federal decennial census.”). Despite the availability of information that would allow the Commonwealth to reallocate incarcerated people to their last known pre-incarceration addresses or last known registration address, and the requirement that it do so under 25 Pa. Cons. Stat. § 1302(a)(3), the Commonwealth fails to reassign incarcerated people to the correct residence in its data. *See* Pet. For Review ¶¶ 117, 131-132. The Department of Corrections maintains records on persons incarcerated in state prisons, including their last known residence, and through this agency the Commonwealth possesses the home address of people in penal facilities. In addition, the Census bureau includes correctional population data in its main redistricting dataset.⁶ However, the Commonwealth of Pennsylvania does not adjust its data for redistricting purposes and thus maintains a system of prison-based gerrymandering.⁷

As the head of the executive branch—which includes the Department of Corrections—the Governor is responsible for the Commonwealth’s failure to ensure that the data used in the legislative reapportionment process is adjusted to account for imprisoned people at the addresses where they resided before incarceration. The

⁶ *See, e.g.,* Sam Roberts, *New Option for the States on Inmates in the Census*, N.Y. TIMES (Feb. 11, 2010), at A18, <http://www.nytimes.com/2010/02/11/us/politics/11census.html>;

⁷ Indeed, nine states have chosen to end prison-based gerrymandering through legislation and executive action. PRISON POLICY INITIATIVE, *Solutions* <https://www.prisonersofthecensus.org/solutions.html>

Governor also has the duty to ensure that the Commonwealth's legislative plan and elections held pursuant to the challenged reapportionment map are held in a lawful manner. *Shapp v. Butera*, 22 Pa. Cmwlt., 229, 234, 348 A.2d 910, 913 (1975) (“the Governor has that power which has been delegated to him by the Constitution and statutory provisions, or which may be implied properly from the nature of the duties imposed upon the Governor”). The Governor has violated this duty each time elections were conducted under the present unconstitutional map that employs prison-based gerrymandering.

As the chief elections officer of the Commonwealth, Secretary of State Boockvar also has a duty to correct this unlawful practice. Under the Pennsylvania Constitution, Secretary Boockvar is responsible for publishing the reapportionment plan and supervising elections following the reapportionment process, which as currently conducted have unconstitutionally employed prison-based gerrymandering. *See* Pa. Const. Art. II § 17 (b) & (i). Thus, both the Governor and the Secretary are responsible, in part, for Petitioners' harms and are necessary to any remedy.

The relief sought in this case cannot be fully granted without the Commonwealth ending its practice of using a redistricting plan that relies on prison-based gerrymandering in compliance with the declaration and prohibitory, prospective injunction sought by Petitioners. To be clear: there is no redistricting

map that will address the constitutional violation created through the Commonwealth's practice of prison-based gerrymandering. The problem can only be remedied by ending the Commonwealth's practice of assigning people confined to a penal institution to the address of the penal facility, within the Commonwealth's datasets. The Commonwealth is thus a proper and necessary party. *See generally York-Adams Cty. Constables Ass'n by Sponseller v. Court of Common Pleas of York Cty.*, 474 A.2d 79, 81 (Pa. Commw. 1984) ("Necessary parties are those whose presence . . . is essential if the Court is to resolve completely the controversy before it and render complete relief.")

In short, the Commonwealth, the Governor, and the Secretary of State are the entities with a duty to address prison-based gerrymandering and end the ongoing violation of statutory and constitutional law.

D. Petitioners' Claims are not Barred by Sovereign Immunity

Because Petitioners seek a declaration that Pennsylvania's system of prison-based gerrymandering violates Article I, Section 5 and Article II, Section 16 of the Pennsylvania Constitution, as well as 25 Pa. Cons. Stat. § 1302(a)(3), and an injunction to prevent this violation in the future, sovereign immunity does not bar this action. First, sovereign immunity "is not applicable to declaratory judgment actions." *Legal Capital, LLC v. Med. Prof'l Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000) (citation omitted). This includes when declaratory relief may

“affirmatively affect the functioning of state officials administering our statutory law.” *Fawber v. Cohen*, 532 A.2d 429, 434 (Pa. 1987).

Second, Commonwealth courts have long recognized that “suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.” *Philadelphia Life Insurance Co. v. Commonwealth*, 410 Pa. 571, 576, 190 A.2d 111, 114 (1963). Respondents rely on *Stackhouse v. Commonwealth of Pennsylvania, Pennsylvania State Police*, for the proposition that the injunctive relief sought in this case is barred by sovereign immunity. *Stackhouse v. Commonwealth of Pennsylvania, Pennsylvania State Police*, 892 A.2d 54 (Pa. Commw. Ct. 2006). However, in *Stackhouse*, the Court distinguished between the substance of two requests for injunctive relief and further clarified that prohibitory injunctions were entirely permissible, while injunctions seeking to compel affirmative actions were barred. First, the Court concluded that sovereign immunity did not apply where the petitioner, a state police employee, sought an injunction to restrain state officials from using any information gathered in an internal investigation against her to hurt her application for a job promotion. *Id.* at *61. In contrast, the court found that sovereign immunity did apply where the Petitioner sought an order mandating guidelines and other policies for internal affair investigations. *Id.* at *62. Here, much like the first injunction sought in *Stackhouse*, Petitioners seek to restrict the Commonwealth from using a particular kind of

information (the addresses of penal institutions) for redistricting purposes. Petitioners do not seek to mandate a certain reapportionment plan or other affirmative act; the Commonwealth is free to determine the plan or policy it wishes to adopt. Thus, petitioners are not seeking to compel affirmative action on the part of state officials, but a declaration and order that Petitioners must end the practice of assigning people who are incarcerated to the address of a penal facility, a practice which the Pennsylvania Constitution and statutory law prohibit. *See Duquesne Slag Products Company v. Lench*, 403 A.2d 1065 (1979), *aff'd*, 490 Pa. 102, 415 A.2d 53 (1980) (“the doctrine of sovereign immunity does not bar suits that seek to compel state officials to carry out their duties only in a lawful manner”).

II. PETITIONERS’ CLAIMS ARE TIMELY AND RIPE FOR ADJUDICATION

A. Petitioners’ Claims are Timely and Not Foreclosed by Any Statute of Limitations or Statute of Repose

Respondents’ objection that Petitioners claims concerning the 2012 plan are untimely relies exclusively on the 30-day timeframe set forth in Article II § 17 that applies only to “an appeal from the final plan directly to the Supreme Court.” To reiterate, Petitioners do not seek to avail themselves of the appeals process set forth in Article II §17(d). Instead, with respect to the current reapportionment plan, Petitioners bring claims under the Declaratory Judgments Act, 42 Pa. Cons. Stat. §§ 7531-7541, and 42 Pa. Cons. Stat. § 761(a), seeking a declaration that the plan’s use

of prison-based gerrymandering violates Article I § 5 and Article II § 16 of the Pennsylvania Constitution and 25 Pa. Cons. Stat. § 1302(a)(3). None of these statutes or constitutional provisions are subject to any statute of limitations or statute of repose that would render any of Petitioners’ claims untimely. Because this is not an action arising under § 17, the statute of repose contained therein has no bearing on the claims here and cannot be construed to dispossess voters of their constitutional rights under Article I § 5 and Article II § 16 or immunize legislative redistricting plans from constitutional challenge.

Notably, the Declaratory Judgments Act explicitly provides that declaratory relief is “additional and cumulative to all other available remedies,” with three narrow exceptions not relevant here. *See* 42 Pa. Cons. Stat. § 7541(b)-(c); *see also id.* § 7537 (“[T]he existence of an alternative remedy shall not be a ground for the refusal to proceed under this subchapter.”). Thus, declaratory relief is available in the present case—and is “additional and cumulative” to whatever remedies may or may not be available through the Article II § 17(d) appeal process. *See* Pet. for Review at ¶¶ 77-78, 145-66.

B. Petitioners’ Claims Concerning Any Future Legislative Redistricting Plans are Ripe for Adjudication

Petitioners’ claims are also wholly ripe. Respondents’ acknowledgement that “those incarcerated should be counted, for purposes of establishing legislative

districts, as residing in their pre-incarceration place of residence” (Resp. Br. at 1) effectively concedes the fact that the complained-of method of counting has been employed by the Commonwealth and currently has the force of law. Because Petitioners challenge the *existing* system of counting prisoners for redistricting purposes, this is an *actual* controversy between the parties that is ripe for adjudication. *Chester Cmty. Charter Sch. v. Commonwealth*, 996 A.2d 68, 80 (Pa. Commw. 2010).

As noted above, Petitioners assert these claims pursuant, in part, to Pennsylvania’s Declaratory Judgments Act, whose “purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.” 42 Pa. Cons. Stat. § 7541(a). This is precisely the aim here: to settle Petitioners’ constitutional and statutory rights, both currently and in the near future, with respect to the Commonwealth’s scheme of counting incarcerated people as electoral residents of the legislative districts in which they are incarcerated. As such, “the declaration sought will practically help to end the controversy between the parties,” which further supports the ripeness of this litigation. *Chester Cmty. Charter Sch. v. Commonwealth*, 996 A.2d 68, 80 (Pa. Commw. 2010); *see also Lakeland Joint School Dist. Authority v. School Dist.*, 200 A.2d 748, 751 (Pa. 1964) (“The obviously antagonistic views and positions adopted by the parties indicate not only the

existence of an ‘actual controversy’ but of a controversy which will imminently, unavoidably and inevitably lead to litigation and there is no other adequate remedy. Under such circumstances, relief by declaratory judgment provides the only efficient and expedient method of terminating the controversy.”).

Further, even if Petitioners were only seeking to adjudicate their rights as to future redistricting plans—rather than the existing method of counting prisoners—the claims would still be ripe. By the time that this Court hears argument on Respondents’ preliminary objections, the current state legislative maps will have effectively been abandoned in lieu of the maps the LRC will need to draw for the upcoming 2022 state House and Senate elections. Based on the previous redistricting cycle, the Commonwealth will begin receiving data and forming a new LRC at the beginning of 2021⁸, which is less than three months away. Indeed, obtaining declaratory relief in advance of the Commonwealth’s receipt decennial Census data, will ensure that the Commonwealth is prepared with home address data in order to adjust the Census data file to account for incarcerated people at their pre-incarceration addresses, instead of proceeding with next legislative reapportionment cycle applying the same flawed practice that offends the state’s Constitution.

⁸ See Pennsylvania Legislative Redistricting website <http://www.redistricting.state.pa.us/Commission/Commission.cfm> (showing timeline of the prior LRC) (last visited on Oct. 12, 2020).

Here, the legal issues are fully developed, and waiting for the Commonwealth to apply another faulty dataset or for the formation of another LRC “would add little to this Court’s review of the legal issues raised.” *Gregory v. Pa. State Police*, 160 A.3d 274, 277 (Pa. Commw. 2017). Petitioners’ claims are ripe and should be adjudicated now.

III. THE COMMONWEALTH COURT HAS JURISDICTION OVER PETITIONERS’ CLAIMS

Pursuant to 42 Pa. Cons. Stat. § 761(a), the Commonwealth Court has exclusive original jurisdiction over this case because Petitioners’ claims present a civil action against the Commonwealth government and officers of the Commonwealth government acting in their official capacities, and under the Declaratory Judgments Act, 42 Pa. Cons. Stat. §§ 7531-7541.⁹ In addition, Petitioners here challenge the legality of prison-based gerrymandering pursuant to Article I § 5 and Article II §16 of the Pennsylvania Constitution and to 25 Pa. Cons. Stat § 1302(a)(3), and are not seeking only to challenge the legality of the current

⁹ 42 Pa. Cons. Stat. § 725(1) provides that “[t]he Supreme Court shall have exclusive jurisdiction of appeals from final orders of . . . [the] Legislative Reapportionment Commission,” but this case is *not* an appeal from a final order of the Legislative Reapportionment Commission. Instead, it is a civil action under 42 Pa. Cons. Stat. § 761(a) against the Commonwealth government and officers of the Commonwealth government acting in their official capacities, and a petition for review in the nature of declaratory relief under the Declaratory Judgments Act. Pet. for Review at ¶¶ 77-78.

reapportionment plan pursuant to the appeals process set forth in Article II § 17. *See* Pet. for Review at ¶¶ 77-78.

Respondents, however, ask this Court to dismiss Petitioners’ claims on the grounds that Article II § 17 forecloses the Commonwealth Court’s jurisdiction of this case. Article II § 17 sets forth the process and timeline for the drawing of state legislative districts following each decennial census and provides a means of obtaining judicial review at the beginning of the redistricting cycle prior to implementation of the plan. Specifically, § 17 states that “[a]ny aggrieved person [seeking to challenge a legislative apportionment plan] may file an appeal from the final plan directly to the Supreme Court within thirty days after the [plan is filed].” Pa. const. art. II, § 17(d).

Notwithstanding Respondents’ assertions to the contrary, Article II § 17 does not expressly foreclose the Commonwealth Court’s jurisdiction over constitutional challenges to legislative redistricting plans brought on grounds beyond those within the timeframe contemplated by § 17. Indeed, nothing in § 17’s plain text, ratification history, the relevant case law, or the Pennsylvania Supreme Court’s rules of construction support’s Respondents’ argument or construction of this provision.

First, the text of Article II § 17 states that an aggrieved person seeking to challenge a legislative redistricting plan “may” obtain judicial review through the

provision's procedures, it does not state that an aggrieved person "must" do so as the exclusive means of challenging such a plan. *Compare* Pa. const. art. II, § 17(d) *with* Obj. ¶ 84. Also, the text of Article II § 17 says *nothing* about cases based on other jurisdictional grounds than § 17(d), or cases filed at other times than § 17(d)'s 30-day period.

If Article II § 17 was intended to abrogate this Court's jurisdiction over cases arising outside of the § 17(d) process, or to grant exclusive jurisdiction over such cases to the Supreme Court, its text would express that intent in "clear and unequivocal language." *Delaware River Port Auth. v. Pa. Pub. Util. Comm'n*, 145 A.2d 172, 175 (Pa. 1958). But Article II § 17 expresses no intent to limit jurisdiction in cases like this one. To argue otherwise, Respondents read words and requirements into Article II § 17 that are not there—which Pennsylvania courts may not do. *See JP Morgan Chase Bank N.A. v. Taggart*, 203 A.3d 187, 198 (Pa. 2019) (an interpretation that relies on adding absent words is not reasonable); *Johnson v. Lansdale Borough*, 146 A.3d 696, 711 (Pa. 2016) (Although courts "must listen attentively to what [a provision] says," they must also listen "to what it does not say."). Here, Article II § 17 should be given effect without adding words or assuming a jurisdiction-stripping intent expressed nowhere in its text. A plain reading of § 17 simply establishes a constitutional mechanism to reapportion the Commonwealth and provides a non-exclusive opportunity for judicial review before a

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

Indeed, the 30-day period set forth in Article II § 17 during which any aggrieved person *may* file an appeal from the final plan has elapsed for the post-2010 redistricting cycle, meaning it is now jurisdictionally impossible to file a § 17 challenge with the Pennsylvania Supreme Court. Therefore, the Supreme Court does not presently have any form of original jurisdiction over any challenge to state legislative redistricting plans.

Second, Article II § 17's ratification history also does not support an interpretation where the provision forecloses this Court's jurisdiction over cases challenging the Commonwealth's redistricting process outside of the § 17 process. When analyzing the intent behind a constitutional provision, Pennsylvania courts focus on "the intent of voters who ratified the constitution." *Robinson Township v. Commonwealth*, 623 Pa. 564, 635 (Pa. 2013), and further, look to "the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history." *League of Women Voters*, 178 A.3d at 802-803 (Pa. 2018) (citations omitted). Here, the legislative record indicates that the impetus for Article II § 17's adoption was the General Assembly's refusal to perform its constitutionally mandated duty to reapportion the Commonwealth. At the time of the U.S. Supreme Court's foundational redistricting

decisions, such as *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964), districts in Pennsylvania’s Senate had not been redrawn since 1921.¹⁰ The process by which the Commonwealth drew its state legislative maps was changed during a limited constitutional convention that took place in 1967-68. The resulting Article II § 17 reveals no intent to implement a process that would bar any other form of constitutional challenge.

Third, if accepted, Respondents’ interpretation of Article II § 17 would fundamentally abrogate Petitioners’ rights under other constitutional provisions, including Article I §§ 5 and 11, and undermine the judiciary’s role in Pennsylvania’s constitutional structure. When interpreting constitutional provisions, the Commonwealth’s courts “must strive in its interpretation to give concomitant effect to all constitutional provisions.” *In re Bruno*, 101 A.3d 635, 660 (Pa. 2014). Accordingly, Article II § 17 cannot be interpreted to abrogate the scope of Pennsylvanians’ rights under Article I § 5, the Free and Equal Elections Clause. This clause provides an enumerated right that is both explicit and expansive in its reach, “mandat[ing] clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters*, 178 A.3d at 804. (emphasis in original). The Supreme Court has held

¹⁰ See Mark Turzai, Rodney A. Corey & James G. Mann, *The Protection Is in the Process: the Legislative Reapportionment Commission, Communities of Interest, and Why Our Modern Founding Fathers Got It Right*, 4 U. Pa. J. L. & Pub. Aff. 353, 359 (2019).

that the Free and Equal Elections Clause “should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.” *Id.* at 814. Respondents’ construction of Article II § 17 would drastically abrogate the scope of Article I § 5, rendering its text an empty promise for all but 30 days of each decade. And by closing the courts to such claims, Respondents’ arguments would also impermissibly abrogate Article I § 11’s enumerated guarantee that “[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” Pa. Const. art. I, § 11.

Finally, Respondents’ reading of Article II § 17 as foreclosing this Court’s jurisdiction over any challenges to legislative redistricting plans would lead to an absurd or unreasonable result. *See* 1 Pa. Cons. Stat. § 1922(1) (instructing courts to presume “[t]hat the General Assembly does not intend a result that is absurd . . . or unreasonable.”); *League of Women Voters*, 178 A.3d at 802 (approving the use of 1 Pa. Cons. Stat. § 1922 to review a constitutional provision). According to Respondents, Article II § 17 provides Pennsylvania’s citizens one opportunity for 30 days per decade to seek judicial review of a legislative redistricting plan. Such that outside of this 30-day period neither this Court *nor any other court* may hear

cases about the Commonwealth’s legislative redistricting plan, even when those cases raise constitutional claims. This result is unreasonable and contradicts two centuries of precedent affirming the right and duty of Pennsylvania courts to declare when a law—or an apportionment plan with the force of law—is “repugnant to the constitution.” *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 469 (Pa. 1948); *see League of Women Voters*, 178 A.3d at 822; *see also Respublica v. Duquet*, 2 Yeates 493, 501 (Pa. 1799). The absurdity of Respondents’ reading of § 17 is further demonstrated by the fact that several of the present Petitioners were legally incapable of participating in the provision’s appeals process in 2011-13 and would effectively have no remedy for their constitutional harms. For example, Petitioners Robert L. Holbrook, Abd’allah Lateef, and Terrance Lewis were incarcerated—and thus ineligible to vote—during the entirety of the post-2010 redistricting process, when § 17(d)’s 30-day window was last open. Pet. for Review ¶¶ 18-20, 28-32; 37-40. Lacking the right to vote, they also lacked standing to participate in the Article II § 17(d) process under the Supreme Court’s holding in *Albert v. 2001 Legislative Reapportionment Comm’n*, which limits standing in such challenges to authorized voters. *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 995 (Pa. 2002). In 2018, 2017, and 2019, respectively, Petitioners Holbrook, Lateef, and Lewis were released from incarceration. Pet. for Review ¶¶ 21, 30, 40. They subsequently registered to vote. *Id.* ¶¶ 23, 32, 43. But Article II § 17(d)’s 30-day

window was already closed by the time they became eligible voters. Similarly, during the post-2010 redistricting process, members of Petitioner organizations the University of Pennsylvania Chapter of the NAACP (“UPenn NAACP”), the Progressive NAACP,¹¹ and University of Pennsylvania Chapter of Beyond Arrest: Rethinking Systematic-Oppression (“UPenn Bars”) were too young to be eligible to register to vote or have standing to appeal the redistricting plans pursuant to Article II § 17(d). *Id.* ¶¶ 63, 67, 72. Yet all Petitioners are suffering ongoing and imminent future harms to their voting and representational rights under Article I § 5 and Article II § 16. *Id.* ¶¶ 16-73. Petitioners’ only available recourse is the present action. Respondents’ interpretation of Article II § 17, by foreclosing this recourse, would deny or significantly delay any remedy, thus infringing Petitioners’ rights to “remedy by due course of law, and right and justice administered without . . . denial or delay.” Pa. Const. art. I, § 11. Accordingly, Respondents’ interpretation of Article II § 17 should be rejected as absurd or unreasonable. This court should not delay in correcting these ongoing violations of Pennsylvania constitutional and statutory law.

¹¹ All members of Petitioner organizations the UPenn NAACP and the Progressive NAACP are also members of Petitioner organizations the National Association for the Advancement of Colored People (“NAACP”) and the NAACP Pennsylvania State Conference (“Pennsylvania NAACP”). *See* Pet. for Review at ¶ 61 & n.7; ¶ 65 & n.8.

CONCLUSION

For the forgoing reasons, Respondents' have failed to establish that "it is clear and free from doubt that the facts pled are legally insufficient to establish a right to relief." Accordingly, Petitioners respectfully request that this Court overrule all of Respondents' Preliminary Objections.

Dated: October 16, 2020

Respectfully submitted,

/s/ Kahlil C. Williams

Kahlil C. Williams
PA Bar No. 325468
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
williamskc@ballardspahr.com
Tel: (215) 864-8346
Fax: (215) 864-8999

Of Counsel

Catherine Meza*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
700 14th Street NW, Suite 600
Washington, D.C. 20005
cmeza@naacpldf.org
Tel: (202) 682-1300
Fax: (212) 226-7592
* Not admitted in Pennsylvania; admitted
in New York and the District of Columbia.
Pro hac vice motion forthcoming.

Leah C. Aden*
Cara McClellan*
Steven Lance*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
laden@naacpldf.org
cmcclellan@naacpldf.org
slance@naacpldf.org
New York, NY 10006
Tel: (212) 965-2200
Fax: (212) 226-7592

* Not admitted in Pennsylvania; admitted in New York. *Pro hac vice* motion forthcoming.

Janette Louard*

Anson Asaka**

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE, INC.

Office of General Counsel

1201 16th Street, NW, Suite 419

Washington, D.C. 20036

jlouard@naacpnet.org

aasaka@naacpnet.org

Tel: (410) 580-5797

* Not admitted in Pennsylvania; admitted in Ohio. *Pro hac vice* motion forthcoming.

** Not admitted in Pennsylvania; admitted in Maryland and the District of Columbia. *Pro hac vice* motion forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2020 a true and correct copy of the foregoing Petitioners' Brief in Opposition to Respondents' Preliminary Objections was served on the following persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121 and 1514(c):

Service via by first-class mail addressed as follows:

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

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

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

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

