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IN THE SUPREME COURT OF PENNSYLVANIA

No. 19 EAP 2022

STANLEY CRAWFORD, *et al.*,

Appellants

v.

THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Appellees

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON MAY 26, 2022 AT NO. 562 M.D. 2020

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INTRODUCTION

There is no dispute that gun violence is a serious problem that has had a major impact on the citizens of the Commonwealth of Pennsylvania. The Office of Attorney General works constantly with law enforcement partners in all parts of the Commonwealth to address this violence. In fact, the Attorney General's Gun Violence Task Force and Strategic Response Teams partner with local law enforcement in Philadelphia to reduce gun violence in the City. Over fifty agents and prosecutors of the Office of Attorney General are specially assigned to investigate violent crime and gun trafficking in Philadelphia. Working daily in Philadelphia neighborhoods most impacted by gun violence, those agents are focused on seizing crime guns and stopping the flow of illegal guns that victimize the community. Since the inception of the Gun Violence Task Force, over 2,500 illegally used guns have been seized and over 1,500 arrests have been made.

But this case is not about the merits of any specific proposal to reduce gun violence, or whether the General Assembly acted wisely when it opted for uniformity and limited municipalities' ability to regulate firearms. Such policy questions are for the policy-making branches.

Rather, this case raises a straightforward legal question: Under the Pennsylvania Constitution, does the General Assembly have the authority to enact statewide polices which preempt municipal regulations? On this question, this Court

has clearly and repeatedly held that the Pennsylvania Constitution endows the General Assembly with that authority. *Ortiz v. Com.*, 681 A.2d 152, 156 (Pa. 1996); *City of Phila v. Schweiker*, 858 A.2d 75 (Pa. 2004); *Fross v. Cnty. of Allegheny*, 20 A.3d 1193 (Pa. 2011); *Holt's Cigar Co. v. City of Phila.*, 10 A.3d 902 (Pa. 2011); *see also* PA. CONST. art. IX, § 2 ("A municipality . . . may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time."). And for good reason.

Appellants are asking this Court to usurp the role of the General Assembly, convert itself into a panel of policymakers, and select Appellants' preferred firearms policies. Although Appellants attempt to shroud their policy arguments in law, the clothes do not fit. Appellants bend the legal doctrines they invoke beyond their breaking points.

The relief Appellants seek in this case—a declaration that Pennsylvania's firearms preemption provision is *unenforceable in its entirety*—would sweep well beyond the facts of this case. It could ultimately extend beyond cities like Philadelphia and Pittsburgh, which seek to enact firearms ordinances that are more restrictive than state law. For instance, if carried to its logical conclusion, Appellants' arguments could also apply to those municipalities that have declared themselves "Second Amendment Sanctuaries" and have already enacted firearms ordinances that purport to be *less restrictive* than the provisions of Pennsylvania's

Uniform Firearms Act. *See, e.g.*, Hopewell Twp., Washington Cnty., Ord. No. 02-2021 (adopted 5/10/21); Upper Bern Twp., Berks Cnty., Ord. No. 155-2020 (adopted 5/7/20); Wayne Twp., Lawrence Cnty., Ord No. 01-2020 (adopted 3/5/20). The General Assembly added a preemption provision to the Uniform Firearms Act to avoid the very Balkanization of Pennsylvania that Appellants now invite this Court to create.

The proper forum for bringing about the policy changes Appellants seek is the General Assembly. Those policy changes cannot be accomplished by suing the Commonwealth.

STATEMENT OF JURISDICTION

This is an appeal from a final order of the Commonwealth Court in a matter which was originally commenced in that court. This Court has jurisdiction under 42 Pa.C.S. § 723(a).

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

"When faced with any constitutional challenge to legislation" this Court presumes constitutionality, "because there exists a judicial presumption that our sister branches take seriously their constitutional oaths." *Stilp v. Com.*, 905 A.2d 918, 938-39 (Pa. 2006) (citing 1 Pa.C.S. § 1922(3)). A party challenging the constitutionality of a duly enacted statute thus "bears a very heavy burden of persuasion." *Ibid.* A legislative enactment "will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution." *Ibid.* A challenge to the constitutionality of legislation presents a question of law over which the Court's review is plenary. *Pa. Turnpike Comm'n v. Com.*, 899 A.2d 1085, 1094 (Pa. 2006).

When considering preliminary objections in the nature of a demurrer, a court generally accepts as true all well-pleaded material allegations and any reasonable inferences that may be drawn from those averments. But legal conclusions, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion encompassed in the petition for review need not be accepted as true. *Kerentz v. Consol. Rail Corp.*, 910 A.2d 20, 26 (Pa. 2006); *Stilp v. Gen. Assembly*, 940 A.2d 1227, 1232 n.9 (Pa. 2007).

There is a fundamental error that permeates Appellants' brief with respect to the standard of review. Appellants lean heavily on the general standard of review for

preliminary objections. *See, e.g.*, Br. 51 (emphasizing a court's "duty at the preliminary objections stage to accept as true all material facts and all inferences reasonably described therefrom.") (cleaned up, citation omitted). While invoking the correct standard, Appellants then invite the Court to misapply it.

Appellants' brief and petition for review are replete with argumentative allegations, expressions of opinion, and legal conclusions that carry no weight and should not be credited as true. *See, e.g.*, R.132a (pet. for rev. ¶ 133) ("Respondents have affirmatively used their authority in a way that renders Petitioners more vulnerable to gun violence than had Respondents not acted at all."); Br. at 52 ("Petitioners have adequately alleged that Respondents acted with deliberate indifference that shocks the conscience").

As explained *infra,* Appellants are attempting to contort certain doctrines beyond recognition: *e.g.*, expanding the state-created-danger doctrine to encompass legislative policymaking. *See* Br. at 54 ("Voting down motions on the floor to amend or repeal the [firearm preemption laws] was action."). But resolution of that issue (and others) turns on questions of law, not fact. This is precisely the purpose of preliminary objections.

STATEMENT OF THE QUESTIONS INVOLVED

I. Should this Court render an advisory opinion on the abstract legal issues Appellants raise in the absence of a specific ordinance that is being challenged?

Suggested Answer: No.

II. Does the General Assembly have the Constitutional authority to preempt municipal regulations through uniform enactments?

Suggested Answer: Yes.

III. Should this Court adopt Appellants' legal theories that: (a) the General Assembly's enactment and/or refusal to repeal the preemption provision violated the state-created-danger doctrine; (b) the preemption provision violates substantive due process; and (c) the preemption provision interferes with public health authority delegated to municipal health departments?

Suggested Answer: No.

IV. Alternatively, should this Court affirm the lower court's mandate as to the Commonwealth because suits against the Commonwealth are not authorized and the Commonwealth is entitled to sovereign immunity?

Suggested Answer: Yes.

STATEMENT OF THE CASE

Appellants (petitioners below) are the City of Philadelphia, CeaseFire Pennsylvania Education Fund (an advocacy group), and ten individual Pennsylvania citizens all of whom have lost loved ones to gun violence. The individual Appellants are Stanley Crawford, Tracey Anderson, Delia Chatterfield, Aisha George, Rita Gonsalves, Maris Gonsalves-Perkins, Wynona Haper, Tamika Morales, Cheryl Pedo, and Roaslind Pichardo.

Appellants brought this action in the Commonwealth Court's original jurisdiction, naming the following as respondents: the Commonwealth of Pennsylvania; the Pennsylvania General Assembly; the Speaker of the Pennsylvania House of Representatives; and the President Pro Tempore of the Pennsylvania Senate. Appellants appeal from the Commonwealth Court's final order sustaining Appellees' preliminary objections in the nature of a demurrer.

Appellants' legal theories involve the interplay of several provisions of the Pennsylvania Constitution and Section 6120 of the Pennsylvania Uniform Firearms Act, 18 Pa.C.S. § 6120. The Commonwealth will outline each relevant provision before turning to the pertinent factual and procedural history of this action.

A. The Pennsylvania Constitution vests legislative power in the General Assembly, and explicitly enables the General Assembly to enact laws that limit the powers of municipal governments.

Like its federal counterpart, the Pennsylvania Constitution divides the government of the Commonwealth into three equal branches. And, "to maintain the independence of the three branches, our system embodies a separation of powers." *Jefferson Cnty. Ct. of Emps. Ass'n v. Pa. Lab. Rels. Bd.*, 985 A.2d 697, 706 (Pa. 2009). The Pennsylvania Constitution clearly provides that: "The legislative power shall be vested" in the General Assembly. PA. CONST. art. II, § 1.

In addition to the broad grant of general legislative authority under Article II, Article IX of the Pennsylvania Constitution also grants the General Assembly the specific power to enact laws that restrain municipal governments and impose uniformity across the Commonwealth. That provision provides that: "A municipality . . . may exercise any power or perform any function not denied by this Constitution, by its home rule charter or *by the General Assembly at any time*." *See* PA. CONST. art. IX, § 2 (emphasis added).

This Court has held that, under Article IX, Section 2, a municipal government cannot enact an ordinance that conflicts with, *inter alia*, substantive limitations imposed by the General Assembly. *City of Phila. v. Schweiker*, 858 A.2d 75, 84 (Pa. 2004); *Pa. Rest. & Lodging Assoc. v. City of Pgh.*, 211 A.3d 810, 816 (Pa. 2019). Thus, "[p]ursuant to Article IX, Section 2 of the Pennsylvania Constitution, home

rule charters are subservient to limitations imposed by the General Assembly." *City of Pgh. v. Fraternal Ord. of Police, Ft. Pitt Lodge No. 1*, 161 A.3d 160, 170 (Pa. 2017).

Philadelphia's home rule charter reinforces this subservience, and makes clear that it may not "exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are . . . [a]pplicable in every part of the Commonwealth . . . [and] [a]pplicable to all cities of the Commonwealth[.]" *See* 53 P.S. §§ 13133(b) and (c).

B. Acting pursuant to its Constitutional authority, the General Assembly enacted the Uniform Firearms Act and preempted local firearms ordinances. In *Ortiz v. Commonwealth*, this Court upheld that preemption.

Pennsylvania enacted its first Uniform Firearms Act in 1931 to "regulate and license the sale, transfer, and possession" of firearms throughout the Commonwealth. *See* Act of June 11, 1931, P.L. 497, No. 158; *Henry v. Pechin*, 31 Pa. D&C 484, 486 (Del. Co. Quar. Sess. 1937); *see also Com. v. McKnown*, 79 A.3d 678, 697 (Pa. Super. 2013) (Fitzgerald, J., concurring). As its title makes clear, the Act was designed to ensure uniformity throughout the Commonwealth. *See Allegheny Cnty. Sportsmen's League v. Rendell*, 860 A.2d 10, 21 n.6 (Pa. 2004) (the word "uniform" in the Uniform Firearms Act "refers to the law being uniform throughout the Commonwealth of Pennsylvania").

Consistent with that intended purpose, in 1974 the General Assembly incorporated a firearms preemption clause into the Act. *See* Act of Oct. 18, 1974, P.L. 768, § 2; *see also Schneck v. City of Phila.*, 383 A.2d 227, 229 (Pa. Cmwlth. 1978). That provision reads as follows:

> (a) General rule.—No county, municipality or township may in any manner regulate the lawful ownership, possession, transfer or transportation of firearms, ammunition or ammunition components when carried or transported for purposes not prohibited by the laws of this Commonwealth.

18 Pa.C.S. § 6120.

In 1996, this Court upheld the constitutionality of Section 6120, declaring that the General Assembly acted within its constitutional authority under Article IX, Section 2 when it preempted local firearms regulations. *See Ortiz v. Commonwealth*, 681 A.2d 152 (1996). There, Philadelphia and Pittsburgh argued that their respective municipal ordinances banning certain assault weapons were essential to maintaining peace in those cities and that the "regulation of weapons [was] intrinsic to the existence" of municipal governance. *Id.* at 154-56. Like its claims in the case *sub judice*, in *Ortiz* Philadelphia emphasized that it was "besieged" by gun violence at that time and that its ordinance was necessary to combat that violence. *Id.* at 157 (Nigro, J., dissenting).

This Court described the municipalities' claims that they had the inherent right to override statewide limitations imposed by the General Assembly as "frivolous."

Id. at 156. This Court emphasized that "[b]y constitutional mandate, the General Assembly may limit the functions to be performed by home rule municipalities" and that "municipalities may not perform any power denied by the general assembly." *Id.* at 154-56 (citing, *inter alia,* PA. CONST. art. IX, § 2). Because Section 6120 denied "all municipalities the power to regulate the ownership, possession, transfer or possession of firearms[,]" this Court held that the "municipalities' attempt to ban the possession of certain types of firearms [was] constitutionally infirm." *Id.* at 155.

This Court also emphasized that the General Assembly's enactment was particularly appropriate in light of the individual right to bear arms embedded in the Pennsylvania Constitution, which provides that "[t]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned." *Id.* at 156 (quoting PA. CONST. art. I, § 21). Because firearms ownership is constitutionally protected, this Court recognized that the "regulation of firearms is a matter of concern in all of Pennsylvania, not merely Philadelphia and Pittsburgh." *Ibid.* Thus, "the General Assembly, not city councils, is the proper forum for the imposition of such regulation." *Ibid.*

Since *Ortiz*, this Court has reiterated that, through Section 6120, the General Assembly has reserved "the exclusive prerogative to regulate firearms in this Commonwealth." *See Com. v. Hicks*, 208 A.3d 916, 926 n.6 (Pa. 2019). And it has consistently declined to intervene when the Commonwealth Court has invalidated

municipal ordinances that imposed firearms restrictions in contravention of Section 6120. *See Clarke v. House of Representatives*, 957 A.2d 361 (Pa. Cmwlth. 2008), *aff'd*, 980 A.2d 34 (Pa. 2009); *NRA v. City of Phila.*, 977 A.2d 78 (Pa. Cmwlth. 2009), *allocatur denied*, 996 A.2d 1068 (Pa. 2010); *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172 (Pa. Cmwlth. 2016), *allocatur denied*, 169 A.3d 1046 (Pa. 2017).[1]

C. The Commonwealth Court correctly rejected Appellants' legal theories.

Between February 14 and May 27 of 2022, the Commonwealth Court decided four separate cases dealing with the firearms preemption provision in the Uniform Firearms Act: (1) *City of Phila. v. Armstrong*, 271 A.3d 555 (Pa. Cmwlth. 2022); (2) *Firearm Owners Against Crime v. City of Pgh.*, 276 A.3d 878 (Pa. Cmwlth. 2022) (3) *Anderson v. City of Pgh.*, 280 A.3d 351 (Pa. Cmwlth. 2022); and (4) *Crawford v. Commonwealth*, 277 A.3d 649 (Pa. Cmwlth. 2022)—the case *sub judice*.

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[1] In addition to Section 6120 of the Uniform Firearms Act, the Home Rule Charter and Optional Plans Law has a parallel provision, which provides that certain municipalities with home rule charters cannot "enact any ordinance or take any other action dealing with the regulation of the transfer, ownership, transportation or possession of firearms." 53 Pa.C.S. § 2962(g). Critically, however, Subsection 2962(g) does not apply to Philadelphia. *See* 53 Pa.C.S. § 2901(b) ("This subpart applies to all municipalities *except cities of the first class* and counties of the first class") (emphasis added). Appellants have acknowledged that Subsection 2962(g) does not apply to Philadelphia. *See* R.251a (answer to Commonwealth's POs at ¶ 20) ("Petitioners acknowledge that 53 Pa.C.S. § 2962(g) does not apply to Petitioner the City of Philadelphia").

The first three of the above cases—*City of Phila. v. Armstrong*, *Firearm Owners Against Crime v. City of Pgh.*, and *Anderson v. City of Pgh.*—arose in the typical manner. That is, Pittsburgh and Philadelphia enacted gun ordinances, those ordinances were challenged in courts of common pleas in the first instance, and the Commonwealth Court (sitting in its appellate jurisdiction) held that the ordinances were invalid under the preemption provision of the Uniform Firearms Act. *Ibid.*

Instead of seeking to have Section 6120 invalidated in its entirety—the relief Appellants seek here—in those cases, Pittsburgh and Philadelphia advanced more modest arguments about the precise scope of the preemption provision. Specifically, Philadelphia and Pittsburgh took the position that Section 6120 was a "conflict preemption" provision—*i.e.*, a local ordinance is invalid only when it contradicts or frustrates the policy established by the General Assembly [2]—and thus permitted the specific ordinances at issue in those cases. *See Firearm Owners Against Crime v. City of Pgh.*, 276 A.3d at 898 (Ceisler, J., concurring in part and dissenting in part);

[2] This Court has identified three forms of state preemption of local lawmaking authority: express; conflict; and field. *Hoffman Min. Co., Inc. v. Zoning Hearing Bd. Of Adams Twp.*, 32 A.3d 587, 593-94 (Pa. 2011). Under express or explicit preemption, the statute includes a preemption clause, which specifically bars local authorities from acting on a particular subject matter. *Ibid.* Under conflict preemption, a local ordinance is invalid when it contradicts the state statute or frustrates its purpose. *Ibid.* Finally, under the doctrine of field preemption, the General Assembly's enactment evinces an implicit intent to occupy the field completely, thus precluding all local enactments. *Ibid.*

City of Phila. v. Armstrong, 271 A.3d at 569 (Leadbetter, J. concurring). Petitions for allowance of appeal are currently pending in these three cases. *See City of Phila. v. Armstrong*, 81 EAL 2022; *Firearm Owners Against Crime v. City of Pgh.*, 174 WAL 2022; *Anderson v. City of Pgh.*, 175 WAL 2022.[3]

But this case stands apart and is unusual in several important respects. Appellants brought this action in the Commonwealth Court's original jurisdiction by filing a petition for review seeking declaratory and permanent injunctive relief. *See* R.46a-155a. Appellants named the Commonwealth, the General Assembly, and legislative leaders as respondents. Unlike the other three cases referenced above, the petition here did not seek review of specific municipal ordinances that Philadelphia's city council had actually enacted. Instead, Appellants provided a non-exhaustive list outlining the types of ordinances that they claimed Philadelphia's city council *would enact* if Section 6120 did not exist. R.113a-130a.

The specific legal theories Appellants raised were also idiosyncratic. Appellants asserted the following three claims:

First, Appellants claimed that the preemption provision was invalid under the state-created-danger doctrine. R.131a-133a. The state-created-danger doctrine

[3] For the reasons detailed *infra*, the Commonwealth respectfully suggests that these cases present better vehicles than the case *sub judice* for this Court to speak to the issues Appellants attempt to raise here.

provides a narrow exception to the general rule that the state has no affirmative obligation to protect citizens from harm. *See Johnson v. City of Phila.*, 975 F.3d 394, 398-400 (3d Cir. 2020). Under that theory, a state may be held liable for monetary damages if it commits an "affirmative act" that plays an active part in creating a danger for a specific individual. *Ibid*.

Second, Appellants asserted that the preemption provision violates purported substantive due process rights under Article I, Section 1 of the Pennsylvania Constitution. *See* R.133a-135a. According to Appellants, this requires the enactment of measures consistent with their policy goals. *See* R.134a (pet. for rev. ¶ 141) (emphasis added); *see also* Br. at 28-29 (citing R.133a-135a).

Third, the City of Philadelphia[4] claimed that the firearms preemption provision interferes with public health authority delegated to municipalities under the Disease Prevention and Control Law, 35 P.S. § 521.1 *et seq.*, and the Local Health Administration Law, 16 P.S. § 12001 *et seq.* R.135a-138a. Appellants asserted that when the General Assembly established municipal health departments and tasked them with "the prevention and control of communicable and non-communicable disease," *see* 35 P.S. § 521.3, this allowed municipal health departments to regulate firearms. *Ibid.*

[4] The interference with delegation claim was raised on behalf of the City of Philadelphia only, not CeaseFire or the individual petitioners. R.135a.

As relief, Appellants asked the Commonwealth Court to declare that Pennsylvania's firearms preemption provision violates the Constitution and to permanently enjoin further enforcement of that provision. *See* R.133a (pet. for rev. ¶ 138); R.138a-139a (pet. for rev., prayer for relief, ¶¶ 153-159).

The Commonwealth, as well as all co-respondents, filed preliminary objections. R.156a-168a (Commonwealth's POs); *see also* R.169a-192a (General Assembly's POs); R.204a-228a (Speaker's POs); 229a-240a (President Pro Tempore's Amended POs). The Commonwealth asserted that Appellants' claims were not justiciable, the Commonwealth as an entity was not a proper party to this action, Appellants' claims raised policy questions properly left to the General Assembly, and Appellants' claims were legally baseless. R.156a-168a (Commonwealth's POs); *see also* Commonwealth's 3/4/21 Br. in Support of POs; Commonwealth's 5/3/21 Reply Br.

Following argument *en banc* before a five-judge panel, the Commonwealth Court sustained the preliminary objections on the legal insufficiency of Appellants' claims and dismissed the case with prejudice. *Crawford*, 277 A.3d at 678-79.

The Opinion Announcing the Judgment of the Court (OAJC) was authored by Judge McCullough and joined by Judge Fizzano Cannon. The OAJC remarked upon the unusual nature of Appellants' legal claims, observing that their state-created-danger claim in particular was "a slippery one that is difficult to fully grasp and

appreciate in the legal sense." *Id.* at 656, 670. That is because the usual state-created-danger claim seeks damages for constitutional torts and involves "discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury." *Id.* at 664-68 (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152-53 (3d Cir. 1995)). By contrast, the Appellants here sought to invalidate a generally applicable statute and attempted to expand the concept of affirmative state action under the state-created danger doctrine to encompass legislative policymaking. *Id.* at 670-72.

The OAJC then thoroughly analyzed each claim and explained why they were legally baseless. *Id.* at 663-678. The OAJC acknowledged the problem of gun violence, but concluded that Appellants' policy arguments about the best way to address that problem "are reserved to the social policy-making branch of our government, the General Assembly." *Id.* at 678 (citations omitted). Judge Cohn Jubelirer concurred in the result. 277 A.3d at 679.

Judges Ceisler and Wojcik dissented. 277 A.3d at 679-694. The dissenting judges relied heavily on the procedural posture of the case and accepted as true Appellants' conclusory allegations about which policies would reduce gun violence. *See, e.g.*, *id.* at 680 ("Petitioners [] aver that enforcement of the Firearm Preemption Statutes actually increases the likelihood of gun violence"); *id.* at 692 ("At this stage

of the proceeding, this Court need only consider whether the Petition for Review adequately alleges a substantive due process claim[.]").

This direct appeal from the Commonwealth Court's final order followed.

SUMMARY OF THE ARGUMENT

The Pennsylvania Constitution clearly gives the General Assembly the authority to enact statewide policies that preempt municipal regulations. PA. CONST. art. IX, § 2 ("A municipality . . . may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time."). This Court has applied this longstanding constitutional principle in a variety of contexts, including the one presented here. *Ortiz v. Com.*, 681 A.2d 152, 156 (Pa. 1996); *City of Phila v. Schweiker*, 858 A.2d 75, 84-86 (Pa. 2004); *Fross v. Cnty. of Allegheny*, 20 A.3d 1193 (Pa. 2011); *Holt's Cigar Co. v. City of Phila.*, 10 A.3d 902 (Pa. 2011). In an effort to overcome this undeniable fact of our constitutional order, Appellants advance three claims. But the atypical nature of this case precludes this Court from even reaching them as doing so would require this Court to break from its long tradition of refusing to render advisory opinions.

In contrast to other cases involving the firearms preemption provision that are currently percolating in Pennsylvania courts, this case does not involve challenges to specific ordinances. Instead, Appellants have merely outlined a non-exhaustive list of ordinances they claim Philadelphia's city council "would enact." Further, Appellants attempt to mire this Court in abstract legal issues, some of which they affirmatively waived below. Appellants thus seek an advisory opinion from this Court. By contrast, there are other cases with pending petitions for allowance of

appeal that would allow this Court to consider the issues appellants attempt to raise here. *See City of Phila. v. Armstrong*, 271 A.3d 555 (Pa. Cmwlth. 2022); *Firearm Owners Against Crime v. City of Pgh.*, 276 A.3d 878 (Pa. Cmwlth. 2022); *Anderson v. City of Pgh.*, 280 A.3d 351 (Pa. Cmwlth. 2022).

Setting aside the abstract nature of this suit, there is no principled basis for Appellants' request to invalidate the firearms preemption provision in its entirety. Appellants advance three unusual claims in support of that extraordinary request.

First, Appellants claim that the General Assembly's enactment of the firearms preemption provision, and its later decision not to repeal it, violated the state-created-danger doctrine. But this case falls well outside the typical state-created-danger paradigm. A state-created-danger case involves a claim for monetary damages against an identifiable state actor—usually a police officer or other first responder—and affirmative conduct by that state actor which impacts an identifiable plaintiff, not simply the public at large. This case bears *none* of these necessary hallmarks.

In the absence of an identifiable state actor, Appellants attempt to implicate all 523 members of the Pennsylvania General Assembly and the Commonwealth as an entity. Instead of seeking monetary damages on behalf of discrete plaintiffs, they purport to represent the interests of all 12 million Pennsylvanians, and seek broad declaratory relief that a generally-applicable statute is invalid. And instead of an

affirmative act, Appellants identify the existence of a statute and purported legislative *inaction*. Appellants ask this Court to become the only court in the country to invalidate a generally applicable legislative enactment under the state-created-danger-doctrine. This Court should not ratify Appellants' effort to radically expand the state-created-danger doctrine.

Second, Appellants seek an equally novel expansion of broad substantive due process principles, and ask this Court to recognize an *individual* right "to *collectively* enact" preferred municipal regulations. They cite no relevant authority to support that claim. Instead, Appellants hang their hats on a single inapposite case, this Court's *Robinson Twp. v. Com.*, 83 A.3d 901 (Pa. 2013). The plurality opinion in that case made clear it was not reaching the substantive due process claim at all, and was instead resolving the case under the Pennsylvania Constitution's Environmental Rights Amendment. Appellants' heavy reliance on a concurring opinion by a single Justice in that case only serves to demonstrate the weakness of their claim. There is no substantive due process right to collectively enact preferred municipal regulations.

Third, Appellants ask this Court to re-write public health statutes, which were designed to combat the spread of disease, to give municipal health departments the authority to regulate firearms. Nothing in the texts of those statutes supports Appellants' view that the General Assembly intended to give municipal health

departments that authority. But even if these statutes could somehow be interpreted to give municipal health departments the authority to regulate firearms, the General Assembly still had the authority to remove that power at a later date when it enacted the preemption provision.

Alternatively, even if Appellants could somehow overcome all of these defects, this Court should still affirm the Commonwealth Court's mandate dismissing the Commonwealth as a party to this action. The Commonwealth is not a proper party and is entitled to sovereign immunity.

ARGUMENT

I. Appellants seek an advisory opinion on abstract legal questions to validate hypothetical municipal ordinances that Philadelphia claims it would adopt.

Appellants begin their brief by attempting to mire this Court in an abstract issue that they affirmatively waived below. Br. at 21-27. Specifically, Appellants assert that the Commonwealth Court improperly interpreted Section 6120 of the Uniform Firearms Act as a field preemption provision, which means that the General Assembly has occupied the entire regulatory field in question, precluding all local enactments. *See Hoffman Min. Co., Inc. v. Zoning Hearing Bd. Of Adams Twp.*, 32 A.3d 587, 593-94 (Pa. 2011).

In their Commonwealth Court brief, however, Appellants affirmatively *disclaimed* that they were advancing any argument about the precise scope of the firearms preemption provision. *See* Respondents' Br. in opp. to POs. at 77 ("the scope of the Firearm Preemption Statutes is not being debated in this suit"). And instead of seeking a narrow ruling that certain municipal ordinances are permitted under Section 6120, Appellants sought a broad mandate that the provision is unenforceable *in its entirety*. R.138a-139a (pet for rev, prayer for relief, ¶¶ 153-156).

This issue is therefore waived. *In re F.C. III*, 2 A.3d 1201, 1212 (Pa. 2010) ("By requiring that an issue be considered waived if raised for the first time on

appeal, our courts ensure that the trial court that initially hears a dispute has had an opportunity to consider the issue.").

Even if this issue had not been waived, this case would still not present an opportunity for this Court to determine the precise scope of the firearms preemption provision. Appellants' claims involve aspirational ordinances that they allege Philadelphia's city council "would adopt." The hypothetical nature of the issue thus hinders the Court's ability to examine the type of preemption that applies to Section 6120.

And this is not the only abstract issue Appellants attempt to raise here. Appellants also ask this Court to invalidate a statutory provision that does not even apply to Philadelphia, namely, Subsection 2962(g) of the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2962(g). As noted *supra* at page 13, fn. 1, Subsection 2962(g) provides that municipalities with home rule charters cannot "enact any ordinance or take any other action dealing with the regulation of the transfer, ownership, transportation or possession of firearms." 53 Pa.C.S. § 2962(g). Critically, however, the statute is clear that Subsection 2962(g) does not apply to Philadelphia at all. *See* 53 Pa.C.S. § 2901(b) ("This subpart applies to all municipalities *except cities of the first class* and counties of the first class") (emphasis added).

Appellants begrudgingly acknowledged this reality below. *See* R.251a (answer to Commonwealth's POs at ¶ 20) ("Petitioners acknowledge that 53 Pa.C.S. § 2962(g) does not apply to Petitioner the City of Philadelphia"). But that acknowledgement has not caused Appellants to retreat from their request to invalidate that provision completely. *See* Br. at 8, 62.

This Court has a "long tradition of refusing to give advisory opinions." *Dep't of Env'tl Res. v. Jubelirer*, 614 A.2d 204, 212-13 (Pa. 1992). Further, a claim under the Declaratory Judgments Act, 42 Pa. C.S. § 7531 *et seq.*, requires a petitioner to demonstrate a real or actual controversy with the respondent. *Pgh. Palisades Park, LLC v. Com.*, 888 A.2d 655, 659 (Pa. 2005); *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003); *see also Brouillette v. Wolf*, 213 A.3d 341, 357 (Pa. Cmwlth. 2019). "A declaratory judgment must not be employed to determine rights in anticipation of events which may never occur . . . or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991); *see also Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 502 (Pa. 2021) (Donohue, J., dissenting) ("we have determined that the uncertainty and insecurity earmarked for resolution under the Declaratory Judgments Act must be actual uncertainty and insecurity, not hypothetical, speculative or theoretical").

Appellants ask this Court to break from its longstanding, principled tradition of refusing to issue advisory opinions by entertaining their legal theories in the context of a hypothetical dispute over hypothetical ordinances the City of Philadelphia claims its city council "would adopt." This Court should decline to do so, especially when there are other cases with pending petitions for allowance of appeal that would allow this Court to consider these issues, which were actually presented in those actions. *See City of Phila. v. Armstrong*, 271 A.3d 555 (Pa. Cmwlth. 2022); *Firearm Owners Against Crime v. City of Pgh.*, 276 A.3d 878 (Pa. Cmwlth. 2022); *Anderson v. City of Pgh.*, 280 A.3d 351 (Pa. Cmwlth. 2022).[5]

Because the claims Appellants attempt to raise are done so in an abstract, manner, this action represents an exceedingly poor vehicle for this Court to examine its prior decision in *Ortiz* or determine whether Section 6120 is a field preemption provision.

[5] In *Firearm Owners Against Crime v. City of Pgh.*, for example, the precise scope of Section 6120's preemptive reach was directly in play, and Pittsburgh offered well-developed advocacy on whether Section 6120 is in fact a field preemption law. *See generally* City of Pgh. Br., 3/30/20, 1754 C.D. 2019. That advocacy, and the presence of specific municipal ordinances on the books, enabled the Commonwealth Court to fully explore that issue. *See Firearm Owners Against Crime v. City of Pgh.*, 267 A.3d at 897; *id.* at 898-902 (Ceisler, J., concurring in part, dissenting in part). And in contrast to this case, there, the application of Subsection 2962(g) of the Home Rule Charter and Optional Plans Law and its interplay with Section 6120 of the Uniform Firearms Act was a live issue because it involved a municipality that is actually subject to that provision. 276 A.2d at 894; *id.* at 899 (Ceisler, J., concurring in part, dissenting in part).

II. The Pennsylvania Constitution expressly gives the General Assembly the authority to preempt municipal regulations through uniform statewide policies, but Appellants nonetheless ask this Court to usurp that authority.

Setting aside the abstract nature of this dispute, this suit is fundamentally an effort to get this Court to usurp the General Assembly's inherent authority to enact statewide substantive policies which preempt municipal regulations. There is no principled basis for that request.

Where, as here, an issue requires this Court to interpret the Constitution, the "ultimate touchtone is the actual language of the Constitution itself." *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (citations omitted). And that language "must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Ibid.* Here, the language of the relevant constitutional provision could not be clearer.

Article IX, Section 2 of the Pennsylvania Constitution expressly limits the authority of municipalities and grants the General Assembly the specific ability to enact laws that restrain municipal governments and impose uniformity across the Commonwealth. PA. CONST. art. IX, § 2 ("A municipality . . . may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time."); *see also Schweiker*, 858 A.2d at 82 ("Article 9 Section 2 of the Constitution specifically provides that the powers and

authority [of municipalities] are expressly limited by acts of the General Assembly.").

Consistent with the plain language of Article IX Section 2, this Court has repeatedly rejected efforts by municipalities to undercut statewide substantive policies established by the General Assembly.

As noted *supra*, this Court's decision to uphold the firearms preemption provision in *Ortiz* was specifically grounded in Article IX, Section 2. 681 A.2d at 154-56 ("[b]y constitutional mandate, the General Assembly may limit the functions to be performed by home rule municipalities" and "municipalities may not perform any power denied by the general assembly."). And this Court described the municipalities' claims that they had the inherent right to override statewide limitations imposed by the General Assembly as "frivolous." *Id.* at 156.

Scores of post-*Ortiz* decisions from this Court involving different statutes, outside the context of firearms, have held that the General Assembly has authority over Pennsylvania's municipalities. Three salient cases make this point.

First, in *Schweiker*, this Court rejected Philadelphia's claim that parking was an "inherently local function" that did not affect any statewide interest, holding that Article IX, Section 2 of the Constitution gave the General Assembly the authority to transfer control of a state-established parking entity from the Mayor of Philadelphia to the Governor. 858 A.2d at 78-88. This Court went on to note that, even if

Philadelphia arguably had powers under its home rule charter to control parking, the General Assembly had the authority to "remove such powers at a later date" because "[t]hat body retains express constitutional authority to limit the scope of any municipality's home rule governance." *Id.* at 87.

Second, in *Fross* this Court held that a county's ordinance pertaining to sex offenders was preempted by Megan's Law and related provisions of the Sentencing and Parole Codes. 20 A.3d at 1195. This Court noted that if all counties were free to adopt their policies with respect to sex offenders then "[t]he statewide [legislative] scheme would be eviscerated." *Id.* at 1207.

Third, in *Holt's Cigar Co.*, this Court held that Philadelphia's effort to ban the sale of *legal* tobacco products was preempted by state law. 10 A.3d at 904-07 (citing, *inter alia*, *Schweiker*). There, as here, Philadelphia advanced public policy reasons for its ordinance that were rooted in specific local issues, emphasizing that the tobacco products in question were being utilized in an illegal manner by some purchasers in the City. *Id.* at 912-914; *see also id.* at 915-917 (Castille, C.J., dissenting) (discussing the rationale for the ordinance). But this Court correctly rejected those arguments, concluding that Philadelphia's ordinance ran afoul of specific policy decisions the General Assembly made when it enacted the Controlled Substance, Drug, Device and Cosmetic Act and was therefore preempted. *Id.* at 913-914.

Although *Ortiz*, *Schweiker*, *Foss*, and *Holt's Cigar Co.* each involved different laws, they all turned on the same fundamental principle: Under Article IX, Section 2, municipal governments have no authority to override substantive statewide policies established by the General Assembly. Appellants seek to eviscerate that fundamental principle in order to get this Court to select a policy that the General Assembly specifically considered and rejected. As this Court has repeatedly recognized, it is not the function of this Court to make such policy choices.

This Court has long recognized that the judiciary's adversarial process, by its nature, is ill-suited to render public policy determinations on "specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions." *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941); *see also Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1123-24 (Pa. 2013) ("The adversarial judicial system is not an appropriate forum for analyzing whether [] legislation works well or poorly, as intended or in ways unseen."). That is because "[u]nlike the legislative process, the adjudicatory process is structured to cast a narrow focus on matters framed by the litigants before the Court in a highly directed fashion." *Official Com. of Unsecured Creditors of Allegheny Health Educ. & Rsch. Found. v. PriceWaterhouseCoopers, LLP*, 989 A.2d 313, 333 (Pa. 2010).

The General Assembly, by contrast, has "broader tools available . . . in making social policy judgments, including the availability of comprehensive investigations[.]" *Id.* at 333 n.27 (citing *Pegram v. Herdrich*, 530 U.S. 211, 221-22 (2000)); *see also Pegram*, *supra* ("Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here") (internal quotation marks and citation omitted).

As a result of these inherent differences between the legislature and the judiciary, "judges plainly stand at a disadvantage in the substantive law making process, which also, quite frankly, is often steeped in difficult political judgments, including choices among vital competing interests." *Villani v. Seibert*, 159 A.3d 478, 492 (Pa. 2017). The power of courts to formulate pronouncements of public policy is therefore "sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law." *Mamlin v. Genoe*, 17 A.2d at 409.

The General Assembly has determined that the best way to balance the constitutional right to bear arms with legitimate public safety concerns is to comprehensively regulate the purchase and possession of firearms through a single statewide enactment. "This is the function of our General Assembly: it makes social policy judgments and decides among competing interests." *Keystone RX LLC v. Bureau of Workers' Comp. Fee Rev. Hearing Off.*, 265 A.3d 322, 333-34 (Pa. 2021)

(Wecht J., concurring). This Court has repeatedly and correctly determined that the General Assembly possesses the constitutional authority to make such policy judgments. This Court should not entertain Appellants' request to usurp that constitutional policymaking authority.

III. None of Appellants' legal theories justify invalidating the firearms preemption provision.

In an effort to avoid the inevitable conclusion that the General Assembly has the constitutional authority to enact a uniform firearms law which preempts municipal regulations, Appellants advance three legal theories. The first is that the General Assembly's enactment of the preemption provision and its subsequent refusal to repeal it somehow implicates the state-created-danger doctrine. The second is that the preemption provision somehow runs afoul of purported individual rights under Article I, Section 1 of the Pennsylvania Constitution to "collectively enact" certain measures. And the third is that the preemption provision interferes with authority delegated to municipalities to promote public health and combat the spread of disease.

The Commonwealth Court properly rejected these unavailing claims. This Court should affirm that determination.

A. No court has ever invoked the state-created-danger doctrine as a basis for invalidating a statute and Appellants cite no authority for doing so.

In count I of their petition, Appellants attempt to force the proverbial square peg into a round hole. Appellants claim that the enactment of the preemption provision, and/or the General Assembly's decision not to repeal it, violated the state-created-danger-doctrine. Br. at 54. Appellants acknowledge, as they must, that no court in the country (state or federal) has ever invalidated a generally applicable statute under the state-created-danger-doctrine. Br. at 42. But Appellants hand-wave this consideration and invite this Court to become the only court to do so. *Ibid*. The Commonwealth Court correctly declined to disfigure the state-created-danger doctrine beyond all recognition to encompass legislative policymaking. This Court should do the same.

Article I, Section 1 of the Pennsylvania Constitution provides that all Pennsylvanians have "certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. Although the Fourteenth Amendment of the United States Constitution uses different verbiage,[6] this Court has observed that the two provisions

[6] *See* U.S. CONST., amend XIV, § 1 ("[n]o state shall. . . deprive any person of life, liberty, or property, without due process of law . . .")

overlap considerably and typically call for the same standards. *See R. v. Com. Dep't of Pub. Welfare,* 636 A.2d 142, 161-62 (Pa. 1994); *Pa. Game Com'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995).

The guarantees under these clauses confer negative liberties, that is, they prohibit the state from infringing upon those fundamental rights, but they do not impose affirmative duties on the state. *Deshaney v. Winnebago,* 489 U.S. 189, 195-202 (1989) ("the Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual"); *R.W. v. Manzek*, 888 A.2d 740, 743-44 (Pa. 2005) (the state-created-danger theory under the Fourteenth Amendment "establishes an exception to the general rule that the state has no affirmative obligation to protect its citizens from the violent acts of private individuals") (citing, *inter alia*, *Deshaney*); *Ye v. United States*, 484 F.3d 634, 636 (3d Cir. 2007) ("There is no affirmative right to governmental aid or protection under the Due Process Clause of the Fourteenth Amendment.").

Seizing upon dicta from the High Court's opinion in *Deshaney*, *supra*, however, some courts have recognized a narrow exception to the general rule that the state has no affirmative obligation to protect citizens from harm: the state-created-danger doctrine. *See Johnson v. City of Phila.*, 975 F.3d 394, 398-400 (3d Cir. 2020) (discussing the evolution of the state-created-danger theory); *see also*

R.W., 888 A.2d at 743-44. Under that theory (which sounds in substantive due process) a state actor may be held liable for monetary damages if they actively play a part in creating a danger or render a person more vulnerable to a danger. *Ibid*.

While several federal courts of appeals (including the Third Circuit) have adopted the state-created-danger-theory, many have not, and the United States Supreme Court has yet to explicitly endorse the theory. *Johnson v. City of Phila.*, 975 F.3d at 399 n.6 (collecting cases).[7] As Appellants acknowledge, "this Court has not yet explicitly recognized the state-created-danger-doctrine under Article I, Section 1" of the Pennsylvania Constitution. *See* Br. at 41. And the state-created-danger theory has never been invoked as a basis to invalidate a statute or ordinance. *Johnston v. Twp. of Plumcreek*, 859 A.2d 7, 13 (Pa. Cmwlth. 2004), *allocatur denied*, 877 A.2d 463 (Pa. 2005).

If the state-created-danger doctrine were recognized under Pennsylvania law, and if it had any relevance here, the Commonwealth does not dispute that the elements under both the United States and Pennsylvania Constitutions would be the same. *R. v. Com. Dep't of Pub. Welfare*, 636 A.2d at 152-53. The doctrine requires a plaintiff to demonstrate each of the following elements: (1) foreseeable and fairly

[7] A number of Third Circuit judges have called upon that court to reexamine the doctrine. *Id.* at 404-05 (Matey, J. concurring); *id.* at 405-506 (Porter J. concurring); *see also Kedra v. Schroeter*, 876 F.3d 424, 460-62 (3d Cir. 2017) (Fisher, J. concurring).

direct harm; (2) state action marked by "a degree of culpability that shocks the conscience;" (3) a relationship between the state and the plaintiff making the plaintiff a foreseeable victim, rather than merely a member of the public in general; and (4) an affirmative use of state authority in a way that created a danger, or made others more vulnerable than had the state not acted at all. *Johnson v. City of Phila.*, 975 F.3d at 400; *see also* Br. at 45-46. However, the Commonwealth vehemently disagrees with Appellants' assertion that the state-created-danger doctrine is even implicated here, let alone that they have satisfied each of the above elements. This case falls well outside the state-created-danger paradigm.

The typical state-created-danger case involves an identifiable state actor—usually a police officer or other first responder—and affirmative conduct by that state actor that "imposes an immediate threat of harm, which by its nature has a limited range and duration." *See Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002) (licensure of a daycare was not requisite state action under the state-created-danger theory). And the conduct typically impacts an identifiable plaintiff, not the public at large. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995). "The cases where the state-created danger theory has been applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury." *Ibid.*

The seminal Third Circuit case, in which that court first adopted the state-created-danger theory, typifies claims under that theory. *See Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996). There, a husband was escorting his inebriated wife home when patrolling police officers stopped them for causing a disturbance on a public highway. *Id.* at 1201. After giving the husband permission to leave and giving him the impression that the officers would escort his wife home, the officers then abandoned the wife to walk home alone. On her way home, the wife fell, sustaining extensive injuries. *Id.* at 1201-02. The Court determined that the officers' affirmative intervention and then abandonment left the wife worse off than if there had been no intervention in the first place. *Id.* at 1209-1211.

The action at issue here bears *none* of the necessary hallmarks of a state-created-danger claim. In the absence of an identifiable state actor, Appellants attempt to implicate all 523 members of the Pennsylvania General Assembly and the Commonwealth as an entity. Instead of seeking monetary damages on behalf of discrete plaintiffs, they purport to represent the interests of all 12 million Pennsylvanians, and seek broad declaratory relief that a statute enacted 50 years ago is invalid. *See* Br. at 51. And instead of an affirmative act, Appellants identify the existence of a statute and purported legislative *inaction*. Given all of this, the Commonwealth Court correctly determined that Appellants failed to state a state-created-danger-claim.

Appellants' effort to expand what constitutes an affirmative use of state authority is especially problematic. Courts decline to even consider the other factors when there is no affirmative act by the state. *See, e.g., Bright v. Westmorland Cnty.*, 443 F.3d 276, 283 (3d Cir. 2006) ("we find it unnecessary to consider anything other than the fourth essential element of a meritorious state-created danger claim"); *Rodriquez v. City of Phila.*, 350 Fed.Appx. 710, 713 (3d Cir. 2009) (quoting *Bright*). That court has "never found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was affirmatively exercised." *Bright*, 443 F.3d at 282 (footnote omitted).

Moreover, "the bar for what constitutes an 'affirmative act' is high." *Turner v. Thomas*, 930 F.3d 640, 645 (4th Cir. 2019). The Third Circuit has cautioned against lowering that bar when litigants attempt to "characterize a state actor's failures as affirmative actions," and it has "consistently held that a plaintiff must show more than a government's failure to prevent an injury in order to prevail on a state created danger claim." *Rodriquez*, 350 at 713 (cleaned up, citations omitted). An "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him." *Ye*, 848 F.3d at 640 (quoting *Deshaney*, 489 U.S. at 200). Rather, the duty to protect arises from the limitation which it has imposed on his freedom to act "through incarceration,

institutionalization, *or other similar restraint of personal liberty*." *Id.* at 640-41 (quoting *Deshaney*) (emphasis added).

When Philadelphia itself is sued under the state-created-danger theory, it understands the risks of lowering the bar for state action, and correctly opposes efforts to do so. *See*, *e.g.*, *Johnson v. City of Phila.*, 975 F.3d at 398-402; *Rodriquez v. City of Phila.*, 350 Fed.Appx. at 712-13. In *Rodriquez*, for example, Philadelphia aptly observed that mere "labeling is insufficient to convert what amounts to a failure to do more into an affirmative exercise of authority." *Rodriquez*, *supra*, 3d Cir. Dkt. 08-4784, Phila. Appellee Br. at 24. Here, however, Philadelphia and its fellow Appellants attempt to do just that: label the enactment of a statute and legislative *inaction* as affirmative acts. As the Third Circuit explained, "[w]hen the alleged unlawful act is a policy directed at the public at large . . . the rationale behind the [state-created-danger] rule disappears[.]" *Mark*, 51 F.3d at 1153.

Appellants fail to cite a single relevant case that supports their extraordinary assertion that "[e]nacting legislation constitutes action" or that "[v]oting down motions on the floor to amend or repeal the [firearms preemption laws] was action" for purposes of the state created danger doctrine. Br. at 54. There is good reason for this failure. Courts that have considered similar efforts to implicate complex policy decisions through state-created-danger claims have correctly rejected them. The

Sixth Circuit's decision in *Walker v. Detroit Pub. Sch. Dist.*, 535 Fed.Appx. 461, 462-63 (6th Cir. 2013) is particularly instructive on this point.

There, the plaintiff claimed that a school district was liable for gang violence after it decided to merge two nearby high schools, which had a long history of violence and gang activity. *Id.* at 462-63.[8] But the Sixth Circuit accurately perceived that the plaintiffs' claims in *Walker* necessarily implicated a complex policy decision by a state entity, *i.e.*, the decision to merge two schools. *Id.* at 465-66. That court explained the inherent risks of expanding the state created danger doctrine to encompass such policymaking decisions:

> It is in the very nature of deliberative bodies to choose between and among competing policy options, and yet a substantive due process violation does not arise whenever the government's choice prompts a known risk to come to pass. Many, if not most, governmental policy choices come with risks attached, and yet, it is not a tort for the government to govern by picking one option over another. As a result, even if a state actor is aware of a substantial risk of harm when it takes action, this court is unlikely to find deliberate indifference if the action was motivated by a countervailing, legitimate governmental purpose.

Id. at 465-66 (internal citations, quotation marks, ellipsis, and brackets omitted). That same logic applies here. And that logic demands the conclusion that a legislature's policymaking decision to enact a uniform, generally applicable statute

[8] Unlike the present case—where Appellants seek to enjoin enforcement of a statute—the plaintiffs in *Walker* sought damages from the school district, making it a more typical state-created-danger case. *Ibid.*

followed by a decision not to repeal that enactment cannot possibly constitute a state-created-danger. If this Court accepted Appellants' claim, the state-created danger *exception* would swallow the rule enunciated by this Court: "the state has no affirmative obligation to protect its citizens from the violent acts of private individuals." *R.W.*, 888 A.2d at 743-44 (citing, *inter alia*, *Deshaney*).

The Commonwealth acknowledges that the facts underlying this action are undeniably tragic. And, to be clear, the Commonwealth is not minimizing the harm that the individual Appellants and their loved ones suffered. But the violence was committed by private actors, not the Commonwealth or the General Assembly.

B. There is no individual substantive due process right under Article I, Section 1 of the Pennsylvania Constitution to "collectively enact" one's preferred policy choices.

Separate from their state-created-danger claim—which as noted *supra*, is itself a substantive due process claim—Appellants also raise an independent substantive due process claim. R.133a-135a. The Commonwealth Court correctly rejected this claim, too.

This Court has described substantive due process as "the esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice." *Kahn v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946 (Pa. 2004) (quoting *Com. v. Stipetich*, 652 A.2d 1294, 1299 (Pa. 1995) (Cappy, J., dissenting)). For substantive due process rights to attach, there must be a deprivation

of a constitutionally protected interest or property right. *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1042 (Pa. 2019). If there has been a deprivation of a constitutional right, the Court must then determine whether the right is "fundamental." *Ibid.* If the right is fundamental, then the statute is reviewed under strict scrutiny. *Ibid.* If the statute impacts a protected, but not fundamental, right, then it is subject to rational basis review. *Ibid.*

Here, Appellants fail to get past step one; that is, they fail to identify a constitutionally protected interest or property right.

Much like Appellants' state-created-danger claim, their stand-alone substantive due process claim is elusive. Article I, Section 1 confers *individual rights*, namely, "enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. As an initial matter, Philadelphia has no individual rights under Article I, Section 1 as a municipality that is a creature of the state.

As to the ten individual Appellants, they ask this Court to recognize an *individual* right under the Pennsylvania Constitution to "*collectively* enact" preferred municipal ordinances, even when they override state statutes, so long as the ordinance involves life, liberty, property, or reputation. *See* R.134a (pet. for rev. ¶ 141) (emphasis added); *see also* Br. at 28-29. They cite no relevant authority in support of that extraordinary expansion of substantive due process, which, if

adopted, would upend the fundamental structure of the Commonwealth. *See* PA. CONST. art. IX, § 2 ("A municipality . . . may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.").

Pennsylvanians hold radically different opinions on the best way to tackle gun violence and other important issues. And every citizen of voting age already possesses an avenue to "collectively enact" the policies they consider best: through their representatives in the General Assembly. There is, however, no Constitutional entitlement to the enactments of one's choosing.

Tellingly, Appellants cite only one case in support of their claim of a substantive due process right to "collectively enact" municipal firearms ordinances: this Court's 2013 decision in in *Robinson Twp. v. Com.*, 83 A.3d 901 (Pa. 2013). Br. at 31-32. Appellants attempt to analogize this Court's invalidation of the General Assembly's preemption of local fracking ordinances in *Robinson Twp.* to the General Assembly's preemption of local firearms ordinances here. *Ibid.* But the comparison cannot withstand even modest scrutiny. And their heavy reliance on a concurring opinion by a single Justice in that case demonstrates the weakness of their claim.

In *Robinson Twp.*, the petitioners challenged an amendment to the Oil and Gas Act (Act 13), which, *inter alia*, deprived municipalities of the ability to make zoning

decisions about where oil and gas extraction could occur. 83 A.3d at 691. The petitioners there did not dispute that the General Assembly had "the authority to preempt local laws, amend the Oil and Gas Act, or simply remove municipalities' zoning power entirely." *Id.* at 621-22. Rather, they merely challenged the constitutionality of the specific exercise of that power. *Ibid.*

Critically, the plurality opinion in *Robinson Twp.* determined that the nature of the constitutional violation arose from the Environmental Rights Amendment of the Pennsylvania Constitution, *see* PA. CONST. art I, § 27, not substantive due process. 83 A.3d at 913 n.2.

Despite the fact that the plurality opinion did not even address substantive due process, Appellants attempt to invoke Justice Baer's concurrence, expressing his view that he would have resolved the questions presented on substantive due process grounds. *Id.* at 727 (Baer, J., concurring). But even that concurring opinion lends no support to Appellants. Justice Baer's approach turned on the fact that the petitioners had reliance interests in the *existing* municipal zoning ordinances as *property owners*. Justice Baer concluded that Act 13 deprived those owners of their property interests, interests which are expressly protected under Article I, Section 1 of the Constitution. *Id.* at 727-740.

Appellants' myopic focus on the fact that *Robinson Twp.* involved preemption of municipal ordinances has rendered it incapable of perceiving these important

distinctions. The community planning zoning ordinances at issue in *Robinson Twp.*, implicated a "quintessential local issue that must be tailored to local conditions," *see* 83 A.3d at 691. Here, as this Court held in *Ortiz*, the regulation of firearms "is a matter of statewide concern" because of the constitutional right to bear arms, *see Ortiz*, 681 A.2d at 156. And unlike the General Assembly's enactment in *Robinson Twp.*, which violated a specific constitutional provision (the Environmental Rights Amendment), the General Assembly's preemption of firearms ordinances in Section 6120 of the Uniform Firearms Act was enacted to *protect* a specific constitutional right (the right to bear arms). *Ortiz*, 681 A.2d at 156 (quoting PA. CONST. art. I, § 21). In light of these important distinctions, nothing in the plurality opinion in *Robinson Twp.* or in Justice Baer's concurring opinion in that case undercuts *Ortiz* or supports Appellants' contention that Article I, Section 1 confers an individual right to "collectively enact" municipal firearms regulations.

Because Appellants fail get past the threshold issue of identifying a constitutionally protected right or interest, their substantive due process claim necessarily fails. But even if they had identified a constitutionally protected interest, the firearms preemption provision would still be valid because it easily satisfies rational basis review.

Initially, Appellants are incorrect that strict scrutiny would apply if they had established a constitutionally protected interest. That standard applies only where

"fundamental" constitutional rights are implicated. *See Nixon v. Com.*, 839 A.2d 277, 286-87 (Pa. 2003). This Court has held that inherent rights to privacy, marriage, and procreation qualify as fundamental. *Ibid.* Conversely, where, as here, a petitioner challenges an exercise of the state's police power in the realm of social and economic legislation, rational basis review applies. *See Kahn*, 842 A.2d at 946; *see also Driscoll v. Corbett*, 69 A.3d 197, 213-15 (Pa. 2013) (applying rational basis review in substantive due process challenge to judicial retirement age).

A law satisfies rational basis review under Article I, Section 1 when the law bears a real and substantial relationship to a legitimate policy objective. *See Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1104 (Pa. 2020). When undertaking this analysis, this Court is mindful that "although whether a law is rationally related to a legitimate public policy is a question for the courts, the wisdom of a public policy is one for the legislature, and the General Assembly's enactments are entitled to a strong presumption of Constitutionality[.]" *Shoul v. Com., Dep't of Transp.*, 173 A.3d 669, 678 (Pa. 2017).

In *Ortiz*, this Court correctly recognized that the General Assembly's decision to enact a uniform policy for firearms regulation was appropriate because of the right to bear arms in the Pennsylvania Constitution, making "regulation of firearms a matter of concern in all of Pennsylvania[.]" 681 A.2d at 286-87. Indeed, one year before that decision, the General Assembly made clear that the Act reflected a

delicate balance between the right to bear arms and legitimate law enforcement concerns:

> The General Assembly hereby declares that the purpose of this act is to provide support to law enforcement in the area of crime prevention and control. That it is not the purpose of this act to place any undue or unnecessary restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, transfer, transportation or use of firearms, rifles or shotguns for personal protection, hunting, target shooting, employment or any other lawful activity, and that this act is not intended to discourage or restrict the private ownership and use of firearms by law-abiding citizens for lawful purposes or to provide for the imposition by rules or regulations of any procedures or requirements other than those necessary to implement and effectuate the provisions of this act. The General Assembly hereby recognizes and declares its support for the fundamental constitutional right of Commonwealth citizens to bear arms in defense of themselves and this Commonwealth.

P.L. 1024, No. 17, Cl. 18 Act of Jun 13, 1995 (Special Session 1).

To strike this balance, the General Assembly enacted comprehensive regulations imposing, *inter alia*, licensing requirements, background checks, and minimum age requirements, *see* 18 Pa.C.S. §§ 1601-6128, but ensured that lawful gun owners would not be subject to irreconcilable requirements when they travel across the Commonwealth by preempting municipal regulations, *see* 18 Pa.C.S. § 6120(a). Appellants want this Court to replace the General Assembly's rational, uniform policy with an irrational Balkanization of municipal regulations. Nothing in Article I, Section 1 supports their effort to seek such a radical policy change from the Judiciary.

C. Municipal health departments have the statutory authority to combat disease; they have no authority to regulate guns.

In count III of the petition for review, the City of Philadelphia[9] makes the claim that when the General Assembly established county boards of health and tasked them with preventing the spread of disease, it gave municipal health departments the unfettered authority to regulate firearms. Specifically, Philadelphia points to the Local Health Administration Law, *see* 16 P.S. § 12001 *et seq.*, and the Disease Prevention and Control Law, *see* 35 P.S. § 521.1, *et seq*. Appellants take an exceedingly broad view of the authority delegated to municipal health departments under these statutes, arguing that it allows municipalities to regulate anything that causes "death, injury, and disability." Br. at 57.

Philadelphia's brief is devoid of any analysis of the actual statutes supposedly giving rise to that authority. Instead, Philadelphia relies exclusively on two inapposite out-of-state court decisions involving different claims and different statutes, *see* Br. at 58, and statements from public officials that gun violence undermines public health, *see* Br. at 58-60. But nothing in the texts of those laws, which were first enacted in the 1950s, supports Philadelphia's reading.

[9] Count III, as noted, was raised on behalf of the City of Philadelphia only, not CeaseFire or the individual petitions. R.135a.

This Court's interpretation of the Local Health Administration Law and the Disease Prevention and Control Law is guided by the Statutory Construction Act, 1 Pa.C.S. § 1901, *et seq.* This Court's duty when construing a statute is to "ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. § 1921(a). The "best indication of legislative intent is the plain language of the statute." *Corman v. Acting Sec'y Pa. Dep't of Health*, 266 A.3d 452, 471 (Pa. 2021); *see also* 1 Pa.C.S. § 1921(b).

Under Section 12010 of the Local Health Administration Law and Disease Prevention and Control Law, county health departments may "prevent or remove conditions which constitute a menace to public health." 16 P.S. § 12010(c). And the Disease Prevention and Control Law tasks local health departments with the "prevention and control of communicable and noncommunicable disease." 35 P.S. § 521.3(a). The Disease Prevention and Control Law further defines "communicable disease" as "[a]n illness due to an infectious agent or its toxic products which is transmitted, directly or indirectly, to a well person from an infected person, animal or arthropod, or through the agency of an intermediate host, vector of the inanimate environment." 35 P.S. § 521.2(c).

This Court has contrasted the definition of communicable disease with non-communicable diseases "like cancer or diabetes" which, by definition, are not transmissible from person to person. *Corman*, 266 A.3d at 477. And this Court

specifically rejected the notion that the "general expression of public health policy" in the Department of Health Act and that the above provisions of the Disease Prevention Control Law permitted the Department of Health to "act by whim or fiat in all matters concerning disease." *Ibid.* This is equally true for municipal health departments.

Philadelphia's contention that the above provisions confer a right to regulate anything that causes "death, injury, and disability," *see* Br. at 57, is an expansive reading of those statutes. But even if that reading were correct, Appellants' delegation claim would still fail for two reasons.

First, even if the Local Health Administration Law and the Disease Prevention and Control Law could somehow be read as giving municipalities the authority to regulate firearms, "it does not follow that the Legislature could not remove such powers at a later date." *Schweiker*, 858 A.2d at 87; *see also Hoffman Min. Co.*, 32 A.3d at 609 ("even in areas over which municipalities have been granted power to act, the state may bar local governing bodies from legislating in a particular field").

Second, canons of statutory construction provide that the general public health provisions of the Local Health Administration Law and the Disease Prevention and Control Law would yield to the more specific provision of the later-enacted firearm preemption clause in Section 6120 of the Uniform Firearms Act. *See* 1 Pa.C.S. §

1933 (the specific controls over the general); *see also* 1 Pa.C.S. § 1936 (later-enacted statute prevails). The Local Health Administration Law and the Disease Prevention and Control Law were enacted in the 1950s. *See* Local Health Administration Law, Act of Aug. 24, 1951, P.L. 1304; Disease Prevention and Control Law of 1955, Act of Apr. 23, 1955, P.L. 1510. The firearms preemption provision was first enacted in 1974. *See* Act of Oct. 18, 1974, P.L. 768, § 2.

The General Assembly has the constitutional authority to impose statewide policies that preempt local ordinances, PA. CONST. art. IX, § 2, and it did so here. The Commonwealth Court correctly dismissed this legally untenable claim. This Court should do the same.

* * *

Without a viable legal basis for their claims, Appellants are left with "the last line of defense for all failing . . . arguments: naked policy appeals." *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1753 (2020). Again, there can be no doubt that gun violence presents a serious problem for citizens of the Commonwealth. Appellants' policy preferences are just that: policy preferences. Our Constitution reserves such policy questions for the political branches.

IV. Alternatively, this Court should affirm the Commonwealth Court's mandate as to the Commonwealth, which is entitled to sovereign immunity and is not a proper party to this action.

Even if this case were justiciable in general, and even if Appellants could somehow overcome the substantive defects outlined *supra*, Appellants' claims against the Commonwealth would still fail. The Commonwealth is not a proper party to this action and is entitled to sovereign immunity.

The Pennsylvania Constitution provides that "[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." PA. CONST. art. I, § 11. The General Assembly has declared its intent that "the Commonwealth . . . shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity." 1 Pa.C.S. § 2310. Both monetary and "nonmonetary claims against the Commonwealth are cognizable only to the extent they fall within some specific waiver or exception to immunity." *Scientific Games Intern., Inc. v. Commonwealth*, 66 A.3d 740, 757 (Pa. 2013) (cleaned up). Through the Sovereign Immunity Act, 42 Pa.C.S. 8501, *et seq.*, the General Assembly has enumerated ten narrow instances in which sovereign immunity is waived for negligence claims against Commonwealth *agencies and employees*. None apply here. *See* 42 Pa.C.S. § 8522 (exceptions to sovereign immunity).

And even if Appellants could somehow overcome sovereign immunity, the Commonwealth of Pennsylvania would still not be a proper respondent to this suit. This Court has made clear that there is a distinction between "the Commonwealth" as an entity, and its various agencies, subdivisions, and officers. *See, e.g.*, *Tork-Hiis v. Com.*, 735 A.2d 1256, 1257-59 (Pa. 1999); *see also Brouillette v. Wolf*, 213 A.3d at 256 (quoting *Tork-Hiis*). Thus, the specific agency or state officials who allegedly acted on behalf of the Commonwealth must be named, not simply "the Commonwealth." *Ibid.*

Pennsylvania's Rules of Civil Procedure are consistent with this principle. Rule 2102 provides that "[a]n action *by the Commonwealth*" may be brought in the name of the Commonwealth of Pennsylvania, but that an action *against* the Commonwealth generally may not. Pa.R.Civ.P. 2102(a) (emphasis added); *see also Brouillette*, 213 A.3d at 356. There is only one exception: where an express "right of action" against the Commonwealth of Pennsylvania "has been authorized by statute." *See* Pa.R.Civ.P. 2012(a)(2), *Note* (citing PA. CONST. art. I, § 11 and 1 Pa.C.S. § 2310); *see also Brouillette*, *supra*. Here, the statute at issue, the Uniform Firearms Act, 18 Pa.C.S. § 1601 *et seq.*, does not authorize a cause of action against the Commonwealth.

The Commonwealth raised these issues below. *See* R.156a-168a (Commonwealth's POs); *see also* Commonwealth's 3/4/21 Br. in Support of POs;

Commonwealth's 5/3/21 Reply Br. But Appellants have made no effort to meaningfully address them. All of their filings throughout this case simply lump "the Commonwealth" together with the General Assembly respondents, but do not allege sufficient facts to keep the Commonwealth in this suit. Appellants offer no specific averments that the Commonwealth is doing, or is failing to do, anything that violates the Pennsylvania Constitution. Instead, all of their specific allegations are aimed at the General Assembly.

In *Tork-Hiis*, this Court held that the Commonwealth Court erred in allowing a party to substitute a Commonwealth agency as a respondent after "the Commonwealth" was improperly named as the sole state respondent. This Court explained that the legislature has not waived sovereign immunity as to "the Commonwealth" and that amending the complaint "to substitute a Commonwealth party for the Commonwealth amounts to the addition of a new party and not merely the correction of a captioned party name." 213 A.3d at 1258. Thus, even if this Court remands as to other parties, a remand with respect to the Commonwealth would accomplish nothing, be a waste of judicial resources, and be improper.[10]

[10] The Commonwealth Court did not address this issue because sovereign immunity is an affirmative defense that typically gets raised in an answer rather than preliminary objections. The Commonwealth did note in its preliminary objections and supporting brief that it was not a proper party.

This Court has made clear that sovereign immunity "is an absolute defense that is not waivable" and, indeed, should be resolved as early as possible. *See Brooks v. Ewing Cole, Inc.*, 259 A.3d 359, 371-374 (Pa. 2021) (denial of sovereign immunity is immediately appealable). And it is well-settled that this Court may affirm the Commonwealth Court's judgment as to the Commonwealth "for any valid reason appearing from the record." *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1200 (Pa. 2009). Therefore, even if this Court remands this matter to the Commonwealth Court, it should affirm as to the Commonwealth on the grounds that it is not a proper party and is entitled to sovereign immunity.

CONCLUSION

The Court should affirm the judgment of the Commonwealth Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 12,138 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel B. Mullen ___

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CERTIFICATE OF SERVICE

I, Daniel B. Mullen, Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For The Commonwealth Of Pennsylvania by electronic service to all counsel of record.

/s/ Daniel B. Mullen ___

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Date: December 2, 2022