IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stanley Crawford, Tracey Anderson, Delia Chatterfield, Aishah George, Rita Gonsalves, Maria Gonsalves-Perkins, Wynona Harper, Tamika Morales, Cheryl Pedro, Rosalind Pichardo, Ceasefire Pennsylvania Education Fund, and The City of Philadelphia, Petitioners	:	
v.	:	No. 562 M.D. 2020
	:	Argued: June 9, 2021
The Commonwealth of Pennsylvania, The Pennsylvania General Assembly, Bryan Cutler, in his official capacity as Speaker of The Pennsylvania House of Representatives, and Jake Corman, in his official capacity as President Pro Tempore of the Pennsylvania Senate, Respondents	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

DISSENTING OPINION BY
JUDGE CEISLER FILED: May 26, 2022

Because I would overrule each of Respondents' Preliminary Objections to the Petition for Review, except for the objection challenging CeaseFire Pennsylvania Education Fund's (CeaseFire PA) standing, I respectfully dissent.

I. Introduction

It is no secret that gun violence is on the rise and reaching epidemic levels in urban areas throughout this country, including two major cities in this

Commonwealth: the City of Philadelphia (Philadelphia) and the City of Pittsburgh (Pittsburgh). In their Petition for Review, Petitioners allege myriad facts demonstrating both the prevalence and the severity of gun violence in their communities and the grave toll it has taken on the lives of the individual Petitioners, who are Black and Hispanic residents of high-crime, low-income neighborhoods in Philadelphia and Pittsburgh. Petitioners allege that Philadelphia and Pittsburgh, like many other municipalities in Pennsylvania, have attempted to combat this crisis by adopting local legislation aimed at protecting their residents from gun violence. However, those attempts have been stymied by Respondents' enactment and enforcement of two statutes: Section 6120(a) of the Uniform Firearms Act of 1995, 18 Pa. C.S. § 6120(a) (Section 6120(a)),[1] and Section 2962(g) of the Home Rule Charter and Optional Plans Law, 53 Pa. C.S. § 2962(g) (Section 2962(g))[2] (together, Firearm Preemption Statutes), which preclude Pennsylvania municipalities from enacting virtually all forms of local firearm regulation.[3]

Petitioners aver that Philadelphia, Pittsburgh, and other municipalities throughout Pennsylvania would be better equipped to thwart gun violence in their

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[1] Section 6120(a) provides: "*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(a) (emphasis added).

[2] Section 2962(g) provides: "*A municipality shall not 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) (emphasis added).

[3] Notably, while both Firearm Preemption Statutes preempt local regulation of firearms, they contain key differences. For example, Section 6120(a) applies only to the regulation of "lawful ownership, possession, transfer or transportation" of firearms, while Section 2962(g) is not limited to lawful ownership. Also, Section 2962(g) applies only to "firearms," while Section 6120(a) preempts regulation of "firearms, ammunition or ammunition components."

communities through stricter regulation, were they not prohibited from doing so by the Firearm Preemption Statutes. Petitioners further aver that enforcement of the Firearm Preemption Statutes actually increases the likelihood of gun violence, particularly in communities that are poor and populated by racial minorities.

In *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996), the Pennsylvania Supreme Court held that the "regulation of firearms is a matter of statewide concern" because the ownership of firearms is constitutionally protected under Article I, Section 21 of the Pennsylvania Constitution.[4] While I agree that the regulation of firearms is a matter of statewide concern, it cannot be disputed that the impacts of gun violence are inevitably local. As Petitioners and the various *Amici Curiae* assert, the Firearm Preemption Statutes more negatively impact urban, populous municipalities than their rural, less populous counterparts.[5] The significant difference in gun violence rates between urban and rural communities in Pennsylvania, as alleged in the Petition for Review, demonstrates precisely why there is a need for local regulation in this area.

Pennsylvania's municipalities have an important duty to protect the health, welfare, and safety of their citizens. In my view, protecting citizens against the threat of gun violence lies at the heart of this duty.

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[4] "The right of the citizens to bear arms in defence of themselves and the State shall not be questioned." Pa. Const. art. I, § 21.

[5] As the City of Harrisburg (Harrisburg) argues in its *Amicus Curiae* brief: "It is no accident[] . . . that most cases litigated under [Section] 6120[(a)]'s preemption clause arise out of Philadelphia, Pittsburgh, and Harrisburg; plainly, these are municipalities which, year after year, experience the greatest measure of gun violence." Harrisburg's *Amicus Curiae* Br. at 8 (citing cases).

As discussed more fully below, at this stage of the proceedings, I believe Petitioners have pled more than sufficient facts to overcome Respondents' Preliminary Objections, except for the challenge to CeaseFire PA's standing.[6]

II. Standing

A. Individual Petitioners

Respondents assert that the individual Petitioners lack standing because their rights to defend themselves and to be free from harm do not surpass the common interests of all citizens. Respondents posit that many other citizens of this Commonwealth are similarly affected by gun violence or have a family member or friend that was a victim of gun violence. Thus, Respondents contend that the individual Petitioners have nothing more than an abstract interest in ensuring that the Firearm Preemption Statutes do not violate the Pennsylvania Constitution. I cannot agree.

Our Supreme Court has articulated the requirements for standing as follows:

> [T]he core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge.
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> An individual can demonstrate that he has been aggrieved if he can establish that he has *a substantial, direct and immediate interest in the outcome of the litigation*. A party has a substantial interest in the outcome of litigation if his interest surpasses that "of all citizens in procuring obedience to the law." "The interest is direct if there is a causal connection between the asserted violation and the harm

[6] In its Opinion, the Majority addresses only Respondents' demurrer objections, concluding that they are dispositive of the case. However, because I disagree with that conclusion and with the Majority's dismissal of the Petition for Review, I will address all of Respondents' objections in this Dissenting Opinion. Moreover, because the four Respondents raise a multitude of objections, many of which overlap, I will address their objections collectively by category.

> complained of; it is immediate if that causal connection is not remote or speculative."

Fumo v. City of Phila., 972 A.2d 487, 496 (Pa. 2009) (emphasis added) (internal citations omitted); *see also Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021) (explaining that, to establish standing in a declaratory judgment action, the plaintiff must allege an interest that is direct, substantial, and immediate and must show the existence of an actual controversy).

I believe the individual Petitioners have articulated a substantial interest in the outcome of this matter that surpasses the common interest of all citizens in the Commonwealth. The individual Petitioners are Black and Hispanic residents of Philadelphia and Pittsburgh who have lost loved ones to gun violence and who are themselves at a high risk of death or serious injury due to gun violence in their communities. In the Petition for Review, each individual Petitioner alleges how he or she has been specifically impacted by gun violence in his or her community. *See* Pet. for Rev. ¶¶ 9(a)-18(f). In my view, these Petitioners have clearly alleged "some discernible adverse effect" beyond an "abstract interest" in ensuring that the Firearm Preemption Statutes do not violate the Pennsylvania Constitution. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975).

The individual Petitioners have also alleged a "direct and immediate" causal connection between the Firearm Preemption Statutes and their claimed injuries. The individual Petitioners allege that, by enacting and enforcing the Firearm Preemption Statutes, Respondents have prevented Philadelphia and Pittsburgh from adopting local legislation that would protect the individual Petitioners and their families from gun violence. They aver that they are uniquely affected because of the neighborhoods in which they live and their ethnicities and because they have lost loved ones to gun violence and are still suffering emotional trauma due to those

losses and their fear for their own lives. *See* Pet. for Rev. ¶¶ 9(d), 10(e), 11(d), 11(f), 12(e), 12(f), 13(e), 14(b), 15(d), 15(f), 16(d), 17(e), & 18(e).

Accepting the averments in the Petition for Review as true, as we must, I would conclude that the individual Petitioners have established standing to maintain this action. Therefore, I would overrule Respondents' objections to the individual Petitioners' standing.

B. Philadelphia

Next, Respondents assert that Philadelphia lacks standing to maintain this action. As this Court has explained, a municipality's interest in the outcome of a lawsuit is

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

Robinson Twp. v. Com., 52 A.3d 463, 474 (Pa. Cmwlth. 2012), *aff'd in part and rev'd in part on other grounds*, 83 A.3d 901 (Pa. 2013).

I believe Petitioners have alleged sufficient facts to establish Philadelphia's standing to challenge Section 6120(a).[7] As outlined in the Petition for Review, Section 6120(a) restricts Philadelphia's power to enact much-needed local legislation to protect its residents from gun violence. In particular, Petitioners aver:

> 32. Gun violence in Philadelphia is especially troubling. One study found that over a two-year period in Philadelphia (from 2013 to 2014), the overall rate of firearm assault was five times higher for Black residents compared with White residents. Homicide rates in Philadelphia in general are higher than most other major U.S. cities

[7] In their brief, Petitioners admit that Section 2962(g) does not apply to Philadelphia. *See* Pet'rs' Br. in Opp'n to Prelim. Objs. at 28 n.14.

> (i.e., cities with a population of 250,000 or greater). In 2018, the average homicide rate in these cities was 10.0 per 100,000 people; in Philadelphia that rate was over twice as high: 22.1 per 100,000. Philadelphia now ranks second in the nation, behind just Chicago, in the number of homicides involving guns. Nationally, the homicide rate is 5 per 100,000, meaning Philadelphia's murder rate is nearly 4.4 times higher than the national average. Most of the homicides in Philadelphia are carried out with firearms, specifically handguns. In 2019, 86.8% of all homicides in . . . Philadelphia were a result of gun violence, compared to only 70% nationally.
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> 33. Between 2009 and 2018, the firearm homicide death rate by county in Pennsylvania ranged from 0.8 to 15.0 deaths per 100,000 persons. Philadelphia County had the highest death rate at 15.0 deaths per 100,000 persons, which is nearly 19 times higher than Bucks County, which had the lowest firearm homicide death rate (0.8 deaths per 100,000 persons), and it is more than twice as high as Allegheny County, which had the second-highest firearm homicide death rate of 7.1 deaths per 100,000 persons.

Pet. for Rev. ¶¶ 32-33 (footnotes omitted). In my view, these are staggering figures and unmistakably demonstrate that Philadelphia's interest in this matter is neither speculative nor remote.

Petitioners also aver that, aside from the loss of hundreds of Philadelphians' lives each year, gun violence imposes a significant economic burden on the city's financial resources. *See, e.g.*, *id.* ¶ 51 ("A firearm homicide [in Philadelphia] is associated with an estimated average cost of $1.42 million due to medical expenses, lost earnings/productivity, property damage, and criminal justice costs. On average, a non-fatal firearm-related injury costs $46,632 in medical expenses and lost productivity.") (footnotes omitted).

Petitioners further allege that the Firearm Preemption Statutes impermissibly interfere with Philadelphia's duty to protect the health, safety, and welfare of its residents. *See Ryan v. City of Phila.*, 465 A.2d 1092, 1093 (Pa. Cmwlth. 1983)

(recognizing that chief among local municipalities' responsibilities is their obligation to "protect [their] citizens' health, safety, and welfare"). Petitioners aver:

> 55. [Section 6120(a)] endangers the lives of the [individual] Petitioners and others in their communities by effectively preventing local municipalities from fulfilling their core duties to protect the health and safety of their residents. Moreover, since passing this law in 1974, the General Assembly has continued to amend Section 6120[(a)], and with each amendment, the General Assembly has further restricted the ability of municipalities like Philadelphia to address gun violence. At the same time, the General Assembly has repeatedly blocked any attempt to loosen preemption restrictions, while steadfastly refusing to act to curb gun violence at the state level. This combination is a dangerous one, and by its actions, the General Assembly has exposed the [i]ndividual Petitioners to direct risk of gun violence.
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> 56. The General Assembly's passage of Section 6120[(a)] and amendments thereto, coupled with its refusal to pass evidence-based gun safety legislation on the state level, operate to actively prevent an effective gun safety approach that would save the lives, property, and bodily integrity of Pennsylvania residents, particularly in low-income neighborhoods in [Philadelphia and Pittsburgh].

Pet. for Rev. ¶¶ 55-56.

In *Franklin Township v. Department of Environmental Resources*, 452 A.2d 718, 721-23 (Pa. 1982), our Supreme Court held that a local municipality had standing to challenge the Department of Environmental Resources' permit for a landfill, in light of the "responsibilit[y] of local government" to "protect[] and enhance[] . . . the quality of life of its citizens." I believe that protecting residents from gun violence is equally, if not more, essential to the protection and enhancement of Philadelphia residents' quality of life. *See City of Phila. v. Com.*, 838 A.2d 566, 579 (Pa. 2003) (holding that Philadelphia had standing to challenge

the effects of allegedly unconstitutional legislation because the legislation interfered with Philadelphia's interests and functions as a governing entity).

I would conclude that Philadelphia has sufficiently averred an interest in this litigation that is neither speculative nor remote. Therefore, I would overrule Respondents' objections to Philadelphia's standing.

C. CeaseFire PA

With regard to the standing of an association, such as CeaseFire PA, our Court has explained:

> An association has standing to bring an action on behalf of its members where *at least one of its members is suffering an immediate or threatened injury as a result of the challenged action*. . . . This rule applies equally to nonprofit membership corporations. . . .
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> To have standing on this basis, the plaintiff organization must allege *sufficient facts to show that at least one of its members has a substantial, direct and immediate interest. . . . Where the organization has not shown that any of its members have standing, the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing*.

Ams. for Fair Treatment, Inc. v. Phila. Fed'n of Teachers, 150 A.3d 528, 533-34 (Pa. Cmwlth. 2016) (emphasis added); *see Papenfuse*, 261 A.3d at 473-74.

Here, the Petition for Review does not identify a single member of CeaseFire PA who is aggrieved by this matter. That omission alone precludes CeaseFire PA from establishing associational standing on behalf of its members.

Furthermore, to the extent Petitioners claim that CeaseFire PA has standing based on its mission of advocating for gun control measures, *see* Pet. for Rev. ¶¶ 41-48, an *en banc* panel of this Court recently rejected a similar claim. In *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 249

A.3d 598, 606 n.11 (Pa. Cmwlth. 2021) (*en banc*), we stated that "[a]n organization does not have standing by virtue of its purpose." This Court further explained: "'Where the organization has not shown that any of its members have standing [individually], *the fact that the challenged action implicates the organization's mission or purpose is not sufficient to establish standing*.'" *Id.* (quoting *Ams. for Fair Treatment*, 150 A.3d at 534) (emphasis added). Here, CeaseFire PA has not demonstrated that any of its members have standing individually; thus, the fact that the Firearm Preemption Statutes may implicate CeaseFire PA's mission or purpose is insufficient to confer standing under our Court's precedent.[8]

Therefore, I would sustain Respondents' objections challenging CeaseFire PA's standing.

III. Non-Justiciable Political Questions

Next, Respondents assert that Petitioners' claims constitute non-justiciable political questions that are outside the purview of judicial consideration. Our Supreme Court has described the political question doctrine as follows:

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[8] Citing federal cases, Petitioners also argue that an organization may establish standing in its own right if it has suffered a concrete injury *to itself* as a result of the complained-of conduct. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982) ("Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback in the organization's abstract social interests."); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 308 (3d Cir. 2014) (recognizing that to establish an injury to itself, an organization "must show that its activities or operations were sufficiently disrupted by the disputed conduct"). Petitioners admit, however, that this Court is not bound by federal case law analyzing standing under Article III of the United States Constitution. *See* Pet'rs' Br. in Opp'n to Prelim. Objs. at 25 n.13.

In any event, even applying that analysis, I would conclude that CeaseFire PA has not established standing in its own right. CeaseFire PA avers that the Firearm Preemption Statutes have forced it to divert its efforts and resources away from advocacy and public education in order to challenge the preemption of local gun control ordinances. *See* Pet. for Rev. ¶¶ 47-48. These generalized allegations do not establish a concrete, discernable injury to the organization's finances or operations as required to establish standing in its own right.

> The applicable standards to determine whether a claim warrants the exercise of judicial abstention or restraint under the political question doctrine are well[-]settled. Courts will refrain from resolving a dispute and reviewing the actions of another branch *only where "the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for 'self-monitoring.'"*

William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 437 (Pa. 2017) (alteration in original) (citation omitted) (emphasis added). However, courts "'will not refrain from resolving a dispute [that] involves *only an interpretation of the laws of the Commonwealth*, for the resolution of such disputes is our constitutional duty.'" *Id.* at 438 (emphasis added) (citation omitted). Moreover, "'[t]he need for courts to fulfill their role of enforcing constitutional limitations is *particularly acute where the interests or entitlements of individual citizens are at stake*.'" *Id.* (emphasis added) (citation omitted).

Applying these considerations to the averments in the Petition for Review, I would conclude that Petitioners' claims are not barred by the political question doctrine. Here, Petitioners allege that the Firearm Preemption Statutes: (1) unconstitutionally infringe on their indefeasible rights to life and liberty under Article I, Section 1 of the Pennsylvania Constitution; and (2) impermissibly interfere with Philadelphia's public health-related duties statutorily delegated by the Commonwealth. Resolution of these claims will require this Court to conduct statutory interpretation and to articulate the limitations, if any, on the Commonwealth's constitutional powers with respect to gun control legislation. These are not non-justiciable political questions, but lie squarely within our Court's authority. *See Council 13, Am. Fed'n of State Cnty. & Mun. Emps. v. Com.*, 986 A.2d 63, 75 (Pa. 2009) (recognizing that the judicial branch has the power and

authority "'to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts'") (citation omitted).

It is true, as Respondents point out, that matters of public policy are reserved exclusively for the legislature and that the General Assembly has the discretion to decide, as a matter of public policy, whether to enact, amend, or repeal a particular statute. While Petitioners make several policy arguments in support of their claims, the crux of Petitioners' allegations is that the Firearm Preemption Statutes impinge on the exercise of their fundamental rights under Article I, Section 1 of the Pennsylvania Constitution, which weighs in favor of justiciability and against the finding of a political question. *See Gondelman v. Com.*, 554 A.2d 896, 899 (Pa. 1989) ("Any concern for a functional separation of powers is, of course, overshadowed *if the classification impinges upon the exercise of a fundamental right*[] . . . .") (emphasis added); *Sweeney v. Tucker*, 375 A.2d 698, 709 (Pa. 1977) ("[T]he political question doctrine is *disfavored when a claim is made that individual liberties have been infringed*.") (emphasis added). Indeed, our Supreme Court has stated: "Where civil liberties are concerned, '[o]ne does not think of [the legislature] as functionally equipped or designed to interpret the Constitution without review, nor under our system, does one wish to leave to [the legislature] the unbridled authority to determine the constitutionality of its own acts.'" *Sweeney*, 375 A.2d at 709-10 (alterations in original) (citation omitted).

Therefore, I would overrule Respondents' objections based on non-justiciable political questions.

IV. Ripeness

Respondents also assert that Petitioners' claims are not ripe for disposition. Respondents assert that, in support of their claims for relief, Petitioners

impermissibly refer to ordinances that have not yet been passed but may be passed at some unspecified time in the future, should the Firearm Preemption Statutes be deemed unconstitutional. Therefore, Respondents contend that there is no actual controversy. However, I believe this contention is belied by the allegations in the Petition for Review.

Generally, the doctrine of ripeness requires "the presence of an actual controversy." *Bayada Nurses, Inc. v. Dep't of Lab. & Indus.*, 8 A.3d 866, 874 (Pa. 2010). "When determining whether a matter is ripe for judicial review, courts generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." *Id.*

Because the Petition for Review seeks declaratory relief, this case is governed by the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531-41. As this Court has explained:

> [T]he Declaratory Judgments Act[] . . . provides a *relatively lenient standard for ripeness in declaratory judgment actions*. The Declaratory Judgments Act is remedial in nature. 42 Pa. C.S. § 7541(a). *"Its 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." Id.* An action is ripe for adjudication under the Declaratory Judgments Act *where it presents "the ripening seeds of a controversy." Wecht v. Roddey*, 815 A.2d 1146, 1150 (Pa. Cmwlth. 2002).

Phantom Fireworks Showrooms, LLC v. Wolf, 198 A.3d 1205, 1217-18 (Pa. Cmwlth. 2018) (*en banc*) (emphasis added).

I believe Petitioners have sufficiently alleged that the Firearm Preemption Statutes have precluded, and continue to preclude, Philadelphia and Pittsburgh from passing much-needed gun control legislation to protect their residents. In their Petition for Review, Petitioners identify numerous examples of past ordinances –

including permit-to-purchase laws, one-gun-per-month limits, and extreme risk protection orders – that have been struck down because of the Firearm Preemption Statutes. *See* Pet. for Rev. ¶¶ 57-60, 92, 99, 110-11, & 124; *see also id.* ¶ 88 (averring that the General Assembly has blocked 17 previous attempts to narrow or repeal the Firearm Preemption Statutes). Petitioners aver that these types of ordinances, tailored to the specific needs of the communities they are intended to protect, would have significantly reduced gun violence if not for the Firearm Preemption Statutes. Simply because these ordinances are no longer in effect, or were never passed, due to preemption does not render this controversy unripe.

Respondents compare Petitioners' challenge to the Firearm Preemption Statutes with several cases challenging proposed or unenforced legislation. *See, e.g.*, President *Pro Tempore*'s Br. in Support of Prelim. Objs. at 27-29. I believe Respondents' reliance on these cases is misplaced, however, because Petitioners here do not challenge proposed legislation or unenforced ordinances. Rather, Petitioners challenge the Firearm Preemption Statutes, which are currently in effect and have been applied, and continue to be applied, to their detriment. *Cf. Phantom Fireworks*, 198 A.3d at 1218 (distinguishing a challenge to "a zoning ordinance that had not been enforced or applied" with a challenge to "a taxing statute" that is presently "in force").

In my view, Petitioners have shown a demonstrable pattern of Pennsylvania municipalities passing gun control legislation, only to have that legislation subsequently preempted. I do not believe that Philadelphia, or any other municipality, is required to pass new gun control ordinances in order to render this controversy ripe, particularly in light of the lenient ripeness standard applicable in declaratory judgment actions.

Therefore, because I would conclude that "the ripening seeds of a controversy" are clearly present here, I would overrule Respondents' objections based on ripeness.

V. Res Judicata and Collateral Estoppel

Respondents assert that Philadelphia's causes of action are barred by the doctrines of res judicata and collateral estoppel. Our Court has explained these principles as follows:

> Res judicata encompasses two related, yet distinct principles: technical res judicata and collateral estoppel. Technical res judicata provides that where a final judgment on the merits exists, a future lawsuit on the same cause of action is precluded. Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were actually litigated and necessary to a previous final judgment.
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> Technical res judicata requires the coalescence of four factors: (1) identity of the thing sued upon or for; (2) *identity of the causes of action*; (3) identity of the persons or parties to the action; and (4) identity of the quality or capacity of the parties suing or being sued. *Res judicata applies to claims that were actually litigated as well as those matters that should have been litigated. Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings*.
>
> Similarly, collateral estoppel bars a subsequent lawsuit where (1) *an issue decided in a prior action is identical to one presented in a later action*, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

J.S. v. Bethlehem Area Sch. Dist., 794 A.2d 936, 939 (Pa. Cmwlth. 2002) (internal citations omitted) (emphasis added).

In arguing that Philadelphia's action is barred by res judicata and collateral estoppel, Respondents rely on three cases: *Ortiz*; *Clarke v. House of Representatives*, 957 A.2d 361 (Pa. Cmwlth. 2008), *aff'd*, 980 A.2d 34 (Pa. 2009); and *Schneck v. City of Philadelphia*, 383 A.2d 227 (Pa. Cmwlth. 1978).

Ortiz was a declaratory judgment action in which members of Philadelphia's City Council and others sued the Governor, the Pennsylvania Attorney General, and Philadelphia's District Attorney. The *Ortiz* petitioners sought to enjoin Section 6120(a)'s preemption of local assault weapons regulations enacted by Philadelphia and Pittsburgh, as well as a declaration that Section 6120(a) violated both cities' home rule power to enact local legislation. *Clarke* was a declaratory judgment action in which members of Philadelphia's City Council sought a declaration that several of Philadelphia's then-existing gun control ordinances were not preempted by Section 6120(a). *Schneck* was a class action suit against Philadelphia in which individual gun purchasers sought to enjoin enforcement of a Philadelphia firearm ordinance on preemption grounds.

None of these cases, however, involved an Article I, Section 1 constitutional challenge, nor did they challenge the Firearm Preemption Statutes' interference with Philadelphia's ability to fulfill its delegated duties under the Local Health Administration Law (LHAL), Act of August 24, 1951, P.L. 1304, *as amended*, 16 P.S. §§ 12001-12028, or the Disease Prevention and Control Law of 1955 (DPCL), Act of April 23, 1956, P.L. (1955) 1510, *as amended*, 35 P.S. §§ 521.1-521.21. As such, the causes of action in this case differ significantly from the causes of action in *Ortiz*, *Clarke*, and *Schneck*.

Respondents' collateral estoppel objection fails for the same reason. Collateral estoppel bars a subsequent lawsuit only where a legal issue decided in the

prior action is identical to one presented in the later action. *J.S.*, 794 A.2d at 939. As explained above, the Courts in *Ortiz*, *Clarke*, and *Schneck* did not consider or decide whether the Firearm Preemption Statutes violate individual citizens' rights under Article I, Section 1 of the Pennsylvania Constitution or whether they interfere with Philadelphia's delegated duties under the LHAL or the DPCL.

Therefore, because this case involves different causes of action and different legal issues than the prior cases, I would overrule Respondents' objections based on res judicata and collateral estoppel.

VI. Scandalous or Impertinent Matter

President *Pro Tempore* of the Pennsylvania Senate Jake Corman (President *Pro Tempore*) objects to numerous paragraphs in the Petition for Review on the basis that they contain scandalous or impertinent averments. In particular, he contends that the challenged averments "cast a derogatory light on the General Assembly or the Commonwealth," "pertain to statements and information regarding gun violence that certain legislators presented to the General Assembly as it was considering whether to enact or amend the [Firearm] Preemption [Statutes]," "concern how [the i]ndividual Petitioners or other citizens were impacted by gun violence," and "are focused on irrelevant background information or are purely speculative." President *Pro Tempore*'s Br. in Support of Prelim. Objs. at 48-49.

Under our Rules of Civil Procedure, preliminary objections may be filed for "failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter." Pa.R.Civ.P. 1028(a)(2). To be scandalous and impertinent, "the allegations must be immaterial and inappropriate to the proof of the cause of action." *Common Cause/Pa. v. Com.*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998) (*en banc*), *aff'd*, 757 A.2d 367 (Pa. 2000). However, "the right of a court to strike

impertinent matter should be *sparingly exercised* and *only when* [*the objecting*] *party can affirmatively show prejudice*." *Dep't of Env't Res. v. Hartford Accident & Indem. Co.*, 396 A.2d 885, 888 (Pa. Cmwlth. 1979) (emphasis added).

Here, President *Pro Tempore* offers a lengthy list of allegedly offending paragraphs in the Petition for Review and categorizes them by the general manner in which he believes they run afoul of Pa.R.Civ.P. 1028(a)(2). *See* President *Pro Tempore*'s Br. in Support of Prelim. Objs. at 47-51. However, President *Pro Tempore* does not identify the specific language in each paragraph to which he takes offense, nor does he explain how he has been prejudiced by any of the challenged averments. Instead, he baldly asserts that the averments are "wholly irrelevant to Petitioners' causes of action and in some respects scandalous[] too." *Id.* at 51. I would conclude that this unsupported declaration is insufficient to justify striking the averments.

Therefore, I would overrule President *Pro Tempore*'s objections based on scandalous or impertinent averments.

VII. Demurrer

I will now turn to the three demurrer Preliminary Objections that form the basis of the Majority's Opinion.

A. State-Created Danger

First, I disagree with the Majority's conclusion that Petitioners have failed to plead a legally sufficient state-created danger claim. To state a claim of state-created danger, a petitioner must satisfy four requirements:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;

> (3) a relationship between the state and the [petitioner] existed such that the [petitioner] was a foreseeable victim of the [respondent's] acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006) (internal quotation marks and footnotes omitted).

In concluding that Petitioners have failed to state a viable state-created danger claim, the Majority relies on *Johnston v. Township of Plumcreek,* 859 A.2d 7 (Pa. Cmwlth. 2004). In *Johnston*, residents of several townships challenged local ordinances requiring them to connect their homes to the public water system, which they claimed were unconstitutional due to the threat of terrorist attacks upon the public water supply. The *Johnston* Court considered the state-created danger doctrine in the context of the residents' substantive due process claims made under 42 U.S.C. § 1983, relating to violations of civil rights, and Article I, Section 1 of the Pennsylvania Constitution, ultimately concluding that the doctrine was not applicable to either claim. This Court held:

> First, the state-created danger [doctrine] has been used to make states liable in damages where the state, by affirmative exercise of its power, has rendered an individual unable to care for himself. The leading case in this area of law is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189[] . . . (1989), in which the [United States] Supreme Court held that a county agency could not be held liable in damages where a child suffered abuse while in his father's custody. The Court reasoned that the Due Process Clause does not guarantee minimal safety for citizens but, rather, protects citizens from overreaching by the state. *DeShaney* placed limits upon what is known

> as the "state-created danger" theory for creating Section 1983 civil rights liability in damages to the situation where the state has limited the liberty of the citizen to act in his own behalf. However, as far as can be determined, the "stated-created danger" body of jurisprudence has never been used to nullify a statute or ordinance.
>
> Second, even if the "state-created danger" theory could be used to render a statute unconstitutional, it does not fit the facts of this complaint. In *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998), the [United States] Court of Appeals [for the Sixth Circuit] held that the state could not be held liable for a "risk that affects the public at large." The state has to be aware that its actions specifically endanger an individual in order to be held liable. . . . All government activities involve some risk; for example, motorists are killed each year on state highways. The mere construction of a highway, however, does not give rise to civil rights liability to each of those accident victims in part because the risk is general and not specific to an individual. Here, the trial court correctly observed that the harm alleged by Residents was conjectural, not imminent and real.
>
> The [o]rdinances do not violate [the r]esidents' substantive due process rights under the state-created danger theory. Under *DeShaney*, the [t]ownships do not have an obligation to guarantee that terrorists, who are private actors whether homegrown or international, will not contaminate the [w]ater [a]uthority's system. Further, there are no allegations in the complaint that [the r]esidents, as opposed to any and all citizens of this country, are in imminent danger and at special risk. Most importantly, the state-created danger theory is a construct by which damages are awarded for constitutional torts. It is not used to nullify statutory law, and we will not do so here.

Johnston, 859 A.2d at 12-14 (footnotes omitted).

Significantly, in reaching this decision, the *Johnston* Court emphasized that "if the 'state-created danger' theory could be used to render a statute unconstitutional, it [did] not fit the facts of th[at] complaint" because "the harm alleged by [the r]esidents was *conjectural, not imminent and real*," and because "there [were] *no allegations* in the complaint that [the r]esidents, as opposed to any

and all citizens of this country, [were] in imminent danger and at special risk." *Id.* at 13-14 (emphasis added). It was on this basis that our Court concluded that the residents could not establish a state-created danger claim.

I believe *Johnston* is factually distinguishable from this case in a critical respect. The alleged harm in *Johnston* was purely conjectural. The residents in *Johnston* "asserted that as a result of the terrorist attacks on September 11, 2001, and the nation's war on terrorism, there is now a real and present danger of terrorist attacks on public water systems." *Id.* at 9. However, as this Court noted, "[t]here [were] *no allegations*, for example, that the [w]ater [a]uthority, the [t]ownships or Armstrong County *ha*[*d*] *been identified as special targets for terrorists*." *Id.* at 13 n.15 (emphasis added). Here, however, the individual Petitioners *have* articulated precisely how the Firearm Preemption Statutes have placed them at "special risk" compared to the general public due to their ethnicities, the cities in which they live, and the recent shooting deaths of their loved ones. These allegations are not based on conjecture, but on very real facts. *See* Pet. for Rev. ¶¶ 9(a)-18(f). Contrary to the Majority, I do not believe our Court's pronouncement in *Johnston* – that "as far as can be determined," the state-created-danger doctrine "has never been used to nullify a statute or ordinance" – should be read as blanketly prohibiting all state-created-danger challenges to state laws, because our ruling in that case was clearly limited to its facts. *See Johnston*, 859 A.2d at 13-14.[9]

I would conclude that Petitioners have stated a legally sufficient state-created danger claim. Therefore, I would overrule this objection.

[9] As Petitioners correctly point out, no Pennsylvania appellate court has cited or relied on *Johnston* for its state-created danger analysis since the decision was issued in 2004.

B. Substantive Due Process

Petitioners allege that the Firearm Preemption Statutes violate their substantive due process rights to enjoy and defend life and liberty under Article I, Section 1 of the Pennsylvania Constitution. Our Supreme Court has explained:

> Substantive due process is the "esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice," and its precepts *protect fundamental liberty interests against infringement by the government*. . . .
>
> [F]or substantive due process rights to attach *there must first be the deprivation of a property right or other interest that is constitutionally protected*.

Khan v. State Bd. of Auctioneer Exam'rs, 842 A.2d 936, 946 (Pa. 2004) (emphasis added) (footnote and internal citation omitted). In particular, Petitioners assert that the Article I, Section 1 protections include the right to "enjoy[] and defend[] life and liberty" and that the Firearm Preemption Statutes prevent Petitioners from protecting themselves from gun violence.

The Majority applies the rational basis test to Petitioners' substantive due process challenge and concludes that the Firearm Preemption Statutes bear a substantial relationship to a legitimate state interest – namely, the statewide regulation of firearms. Even assuming that the rational basis test is the correct standard to be applied here, I would conclude that Petitioners have stated a legally sufficient substantive due process claim.

The General Assembly's power to preempt local legislation is not absolute, and our Supreme Court has previously struck down preemption statutes that violate Article I of the Pennsylvania Constitution. *See, e.g.*, *Robinson Twp. v. Com.*, 83

A.3d 901, 946 (Pa. 2013).[10] That is because preemption statutes, like other laws, are "subject to restrictions enumerated in the [Pennsylvania] Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth," including "the express exception of certain fundamental rights reserved to the people in Article I of our Constitution." *League of Women Voters v. Com.*, 178 A.3d 737, 803 (Pa. 2018).

Citing *Ortiz*, the Majority concludes that the Firearm Preemption Statutes further the Commonwealth's legitimate interest in regulating citizens' possession and ownership of firearms on a statewide basis. In *Ortiz*, the Supreme Court was faced with a constitutional challenge involving the right to bear arms under Article I, Section 21 of the Pennsylvania Constitution. The *Ortiz* Court concluded:

> *Because the ownership of firearms is constitutionally protected, its regulation is a matter of statewide concern.* The [Pennsylvania C]onstitution does not provide that the right to bear arms shall not be questioned in any part of the [C]ommonwealth except Philadelphia and Pittsburgh, where it may be abridged at will, but that it shall not be questioned in any part of the [C]ommonwealth. Thus, *regulation of firearms is a matter of concern in all of Pennsylvania, not merely in Philadelphia and Pittsburgh, and the General Assembly, not city councils, is the proper forum for the imposition of such regulation.*

681 A.2d at 156 (emphasis added); *accord Clarke*, 957 A.2d at 364 (invalidating local ordinances that "regulate[d] firearms – an area that both Section 6120[(a)] and [*Ortiz*] have made clear is an area of statewide concern over which the General Assembly has assumed sole regulatory power").

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[10] Notably, the Supreme Court's plurality decision in *Robinson Township* did not endorse or reject our Court's Article I, Section 1 substantive due process analysis and deemed the environmental statute at issue unconstitutional on other grounds. Justice Baer, in his Concurring Opinion, specifically stated that he agreed with our Court's substantive due process analysis and believed it was the proper basis for ruling that the challenged statute was unconstitutional. *See Robinson Twp.*, 83 A.3d at 1001-08 (Baer, J., concurring).

Critically, however, *Ortiz* did not involve a substantive due process challenge under Article I, Section 1 of the Pennsylvania Constitution, as is alleged in this case. In light of *Ortiz*'s holding that the "regulation of firearms is a matter of concern in all of Pennsylvania," this Court is being asked to balance the constitutional right of Petitioners to defend their lives and liberty under Article I, Section 1 and the constitutional right of all Pennsylvania citizens to bear arms under Article I, Section 21. That question was not before the Supreme Court in *Ortiz*. Therefore, I do not believe *Ortiz* bars the present substantive due process challenge to the Firearm Preemption Statutes.

Furthermore, 26 years have passed since *Ortiz* was decided. The United States of 1996 is very different from the United States of 2022. As painstakingly described in the Petition for Review, gun violence in our country and in our Commonwealth has reached epidemic levels and is wreaking havoc on the lives of the individual Petitioners and their families. Perhaps it is time for our Supreme Court to revisit *Ortiz* in light of these circumstances.

At this stage of the proceedings, this Court need only consider whether the Petition for Review adequately alleges a substantive due process claim under Article I, Section 1 of the Pennsylvania Constitution. I believe that it does. Therefore, I would overrule this objection.

C. Interference with Delegation

Lastly, I disagree with the Majority's conclusion that Philadelphia (the only Petitioner to assert this claim) has failed to state a viable claim of interference with delegated duties. In the Petition for Review, Philadelphia avers that Section 6120(a) impermissibly interferes with the public health-related duties that the Commonwealth expressly delegated to it under both the LHAL and the DPCL.

Section 10(c) of the LHAL provides in pertinent part: "After it has been established, the county department of health . . . shall *prevent or remove conditions which constitute a menace to public health*." 16 P.S. § 12010(c). In this case, Philadelphia has specifically alleged that gun violence is a menace to the public health of its residents. Pet. for Rev. ¶¶ 32-35, & 148. It has also offered specific examples of how gun violence poses a health risk to the individual Petitioners who reside in high-crime, low-income neighborhoods in Philadelphia. *See id.* ¶¶ 9-18. Philadelphia avers that without localized gun control measures, it is unable to protect its residents from the high rate of firearm homicides, *id.* ¶ 32, the mental health crisis manifest in increasing firearm suicides occurring in Philadelphia, *id.* ¶ 36, and the physical and mental health crises experienced by residents of high-crime neighborhoods due to their fears of gun violence, *id.* ¶¶ 9-18.

Section 3(a) of the DPCL states:

> Local boards and departments of health shall be primarily responsible for *the prevention and control of communicable and non-communicable disease*, including disease control in public and private schools, in accordance with the regulations of the board and subject to the supervision and guidance of the [Pennsylvania D]epartment [of Health].

35 P.S. § 521.3(a) (emphasis added).[11] Under this provision, the Commonwealth has delegated to Philadelphia the primary responsibility of preventing and controlling "non-communicable disease" and the authority to address conditions within its borders that contribute to the spread of non-communicable disease. In this case, Philadelphia avers that gun violence contributes to the spread of disease in

[11] Section 2(f) of the DPCL defines "local board or department of health" as "[t]he board of health or the [d]epartment of public health of a city, borough, incorporated town or township of the first class, or a county department of health, or joint county department of health." 35 P.S. § 521.2(f).

Philadelphia by filling hospital beds with individuals injured by gun violence, inflicting severe mental trauma on the victims of gun violence, and imposing other public health-related ills on the city's institutions. *See* Pet. for Rev. ¶¶ 13(e), 34, 36, 40, 49, 51, & 52; *cf. Pa. Rest. & Lodging Ass'n v. City of Pittsburgh*, 211 A.3d 810, 828-29, & nn.17-18 (Pa. 2019) (concluding that a city ordinance requiring paid sick leave "relat[es] to disease prevention and control" by preventing sick individuals from showing up to work).

Respondents contend that neither the LHAL nor the DPCL grants Philadelphia the authority to enact legislation in areas expressly preempted by the General Assembly. Philadelphia, however, does not argue that the statutes grant such authority; rather, Philadelphia argues that it has been given the *responsibility*, but *not the authority*, to pass local regulations to address the public health crisis caused by gun violence. Philadelphia avers that, in this way, Respondents have interfered with its statutorily delegated duties.

Our Supreme Court has recognized that the Commonwealth has a fundamental duty to "maintain order and to preserve the safety and welfare of all citizens." *Cnty. of Allegheny v. Com.*, 490 A.2d 402, 410-11 (Pa. 1985). Pursuant to the LHAL and the DPCL, the Commonwealth expressly delegated a portion of this duty to Philadelphia, by charging county health departments with the "protection and promotion of the health of the people," Section 2(a) of the DPCL, 16 P.S. § 12002(a), the prevention or removal of "conditions which constitute a menace to public health," Section 10 of the DPCL, 16 P.S. § 12010, and the prevention and control of the spread of "non-communicable disease," Section 3(a) of the LHAL, 35 P.S. § 521.3(a). Petitioners aver that by continuing to enforce and expand the Firearm Preemption Statutes, Respondents have deprived Philadelphia of its ability

to carry out these duties, because it cannot enact life-saving ordinances that would protect its residents from gun violence. *See Pa. Rest.*, 211 A.3d at 828 (explaining that the DPCL is "a holistic scheme that, for purposes of disease prevention and control, favors local regulation . . . over state-level regulation, and correspondingly *allows local lawmakers to impose more stringent regulations than state law provides*") (emphasis added); Section 16 of the DPCL, 35 P.S. § 521.16 (allowing municipalities to "enact ordinances or issue rules and regulations relating to disease prevention and control, which are not less strict than the provisions of this act or the rules and regulations issued thereunder by the [State Advisory Health B]oard").

In rejecting Petitioners' interference with delegation claim, the Majority relies exclusively on *Ortiz* and concludes that its holding necessarily forecloses Petitioners' claim. I cannot agree. As discussed above, *Ortiz* involved Philadelphia's authority to enact gun control legislation pursuant to its home rule charter. The petitioners in *Ortiz* did not raise an interference with delegation claim, nor was the Supreme Court asked to consider the impact of Section 6120(a) on Philadelphia's statutorily delegated duties under either the LHAL or the DPCL.

I would conclude that the Petition for Review states a legally sufficient claim that Respondents have impermissibly interfered with Philadelphia's statutorily delegated duties under the LHAL and the DPCL. Therefore, I would overrule this objection.

VIII. Conclusion

It is well settled that "[i]n order to sustain preliminary objections, *it must appear with certainty that the law will not permit recovery*, and any doubt should be resolved by a refusal to sustain them." *Pa. Virtual Charter Sch. v. Dep't of Educ.*, 244 A.3d 885, 889 (Pa. Cmwlth. 2020) (*en banc*) (emphasis added). I would

conclude that Respondents have not shown with certainty that the law will not permit recovery in this case. I believe Petitioners have pled sufficient facts to overcome Respondents' Preliminary Objections, except for their challenge to CeaseFire PA's standing.

While I recognize that *Ortiz* is binding precedent, it did not address the specific constitutional challenge asserted here. *Ortiz* was also decided in 1996. In the nearly three decades since that decision, gun violence in our Commonwealth has skyrocketed, increasing exponentially in the past few years alone. Allowing local municipalities to adopt more stringent regulations to protect their residents from gun violence is becoming an increasingly urgent matter. As Justice Russell Nigro convincingly stated in his Dissenting Opinion in *Ortiz*: "[W]henever the state legislature fails to enact a statute to address a continuing problem of major concern to the citizens of the Commonwealth, a municipality should be entitled to enact its own local ordinance in order to provide for the public safety, health and welfare of its citizens." 681 A.2d at 157 (Nigro, J., dissenting). I could not agree more.

Therefore, I would overrule each of Respondents' Preliminary Objections to the Petition for Review, except for the objection challenging CeaseFire PA's standing. For these reasons, I respectfully dissent from the Majority's Opinion.

ELLEN CEISLER, Judge

Judge Wojcik joins in this Dissenting Opinion.