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**ATTORNEYS FOR THE
PETITIONERS**

MATTHEW J. BROUILLETTE, et al.

Petitioners

v

THOMAS WOLF, GOVERNOR, et al.

Respondents

:
: COMMONWEALTH COURT
: OF PENNSYLVANIA
:
:
: PETITION FOR REVIEW
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:
: CASE NUMBER 410 MDA 2017
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**PETITIONERS' APPLICATION FOR
TEMPORARY PRELIMINARY INJUNCTIVE RELIEF**

Petitioners, Matthew J. Brouillette, Representative James Christiana, and Benjamin Lewis (collectively "Petitioners"), by and through their attorneys, McNelly & Goldstein, LLC, hereby submit this Brief in Support of their Application for Preliminary Injunctive Relief against Respondents, Governor Thomas Wolf, State Treasurer Joseph Torsella, and Auditor General Eugene DePasquale (collectively "Respondents"), pursuant to Pennsylvania Rule of Appellate Procedure 1532(a). *See* Pa. R.C.P. No. 1532(a). Petitioners incorporate

by reference the factual allegations contained in the Petition for Review, as if set forth in full.

Over the past two fiscal years, FY2016-2017 and FY2017-2018, Governor Wolf has repeatedly sought to borrow funds from the Pennsylvania Treasury (the “State Treasury”), and has indicated his willingness to borrow from other sources, in order to sustain government spending levels reflected in the past two annual General Appropriations Bills (“General Appropriation Bill”). In each of the last two fiscal years, Pennsylvania has spent more than it has collected in revenues. State Treasurer Torsella, as well as Auditor General DePasquale, have both obliged the Governor’s requests to indulge in this deficit spending. In doing so, Torsella, Wolf, and DePasquale have impermissibly caused the Commonwealth to incur long-term debt in violation of Article VIII, Section 7 of the Pennsylvania Constitution. *See Pa. Const. Art. VIII, § 7.*

On October 12, 2017, Torsella once again loaned \$700 million from the State Treasury to fund the Commonwealth’s current budget deficit. Likewise, Governor Wolf continues pushing the Pennsylvania Liquor Control Board (“PLCB”) to take measures to monetize the Board’s future earnings. *See PR Newswire 10/20/2017, “Pennsylvania Liquor Control Approves Financial, Legal Counsel to Pursue Monetization of PLCB Future Earnings* (<https://www.cnbc.com/2017/10/20/pr-newswire-pennsylvania-liquor-control->

[approves-financial-legal-counsel-to-pursue-monetization-of-plcb-future-earnings.html](#)). Wolf intends to cashier the PLCB's long-term profitability in order to provide short-term revenue to the General Fund – once again borrowing against the Commonwealth's assets without the consent of the General Assembly and its members. *Id.*

In FY2016-2017 and FY2017-2018, Pennsylvania has operated under a General Fund Budget (the "Budget") where total expenditures exceed actual and estimated revenues. This violates the Pennsylvania Constitution, which requires the Commonwealth to enact a balanced budget. In order to maintain current spending levels, Torsella, Wolf, and DePasquale must continue (a) to violate Article VIII, Section 7 of the Pennsylvania Constitution, and (b) to force the expansion of long-term debt upon the Commonwealth and its citizens.

Petitioners respectfully request: (a) that this Court issue an Order granting a temporary preliminary injunction against Respondents; (b) that the injunction immediately prohibit any Respondent from requesting or authorizing the Commonwealth to borrow assets from the State Treasury (as well as other sources) to fund any expenditure set forth in the General Appropriations Bill for FY2017-2018 or to cover shortfalls and prior deficits from previous fiscal years; and (c) that the injunction remain in effect during the pendency of this litigation, thereby

preventing further irreparable harm while this case remains ongoing. In support thereof, Petitioners aver as follows:

PREAMBLE

1. Over the past two fiscal years, FY2016-2017 and FY2017-2018, the Commonwealth has been operating with budget deficits in violation of the Pennsylvania Constitution because expenditures in each year far exceeded and continue to exceed actual and estimated revenues. *See* Pa. Const. Art. VIII, § 12(a); Pa. Const. Art. VIII, § 13.

2. As a result of the budget deficits for FY2016-2017 and FY2017-2018, Torsella, Wolf, and DePasquale have repeatedly and impermissibly authorized the Commonwealth to incur long-term debt in violation of Article VIII, Section 7 of the Pennsylvania Constitution. *See* Pa. Const. Art. VIII, § 7.

3. The Pennsylvania Constitution authorizes the Governor, the State Treasurer and the Auditor General to borrow funds on behalf of the Commonwealth *only* to address short-term cash flow deficiencies; when this sort of permissible borrowing occurs, the Commonwealth must repay this new debt incurred by the close of the fiscal year in which it is incurred. *See* Pa. Const. Art. VIII, § 7(a)(2)(ii).

4. Respondents Wolf, Torsella and DePasquale, however, are borrowing funds from the State Treasury in order to finance continued deficit spending, which extends from one fiscal year to another.

5. This practice violated both the Pennsylvania Constitution and Pennsylvania's budget statutes. *See* Pa. Const. Art. VIII, § 7; 72 P.S. § 1601-A.

6. Respondents Wolf, Torsella and DePasquale have publicly committed to continue their unconstitutional practice of borrowing funds from the State Treasury and from other sources to perpetuate deficit spending across multiple fiscal years.¹

7. Governor Wolf seeks to compromise the long-term profitability of the PLCB in order to finance the Commonwealth's Budget deficit. *See* PR Newswire, *supra*.

8. Petitioners seek an injunction to prohibit Respondents from authorizing further borrowing of funds from the State Treasury (or any other source), which would cause the Commonwealth to incur additional long-term debt in violation of the Pennsylvania Constitution. *See* Pa. Const. Art. VIII, § 7.

¹ *See e.g., See* Brubaker, Howard, 10/20/2017, "Amid State Budget Battle, PLCB Hires Advisors for Wolf's \$125 Billion Borrowing Proposal" (<http://www.philly.com/philly/business/plcb-hires-advisors-for-borrowing-proposal-20171020.html>).

BACKGROUND

9. During FY2016-2017, the appropriated spending authorized by the General Assembly and approved by the Governor exceeded actual revenues, meaning that Pennsylvania spent more money than it actually collected in FY2016-2017. *See* Petition for Review, 9/14/2017, at ¶ 50.

10. As a result, the Commonwealth accrued a deficit of \$1.55 billion in FY2016-2017. This deficit continued into FY2017-2018, growing deeper and more substantial. *Id.*

11. In order to pay all General Fund bills in FY2016-2017, upon Governor Wolf's request, Torsella authorized the Commonwealth to borrow \$2.5 billion on a line of credit from the State Treasury. *Id.* at ¶ 51.

12. The Commonwealth used \$400 million of this line in August 2016, and another \$1.2 billion of this line in September 2016. *Id.*

13. At the beginning of FY2016-2017, the Commonwealth's Independent Fiscal Office ("IFO") projected that the Commonwealth's spending would exceed revenues by \$1.86 billion in FY2016-2017. *Id.* at ¶ 52.

14. While the Budget for FY2016-2017 saw some revenue and spending changes, the Commonwealth ended the fiscal year with more than a \$1.55 billion deficit. *Id.* at ¶ 53.

15. The General Assembly and the Governor have not repaid the deficit spending accrued from FY2016-2017 using dollars collected in FY2016-2017; instead, both branches further contributed to the deficit spending by enacting an unbalanced Budget for FY2017-2018. *Id.* at ¶ 54.

16. On June 30, 2017, both houses of the Pennsylvania General Assembly passed a \$31.38 billion General Appropriations Bill for FY2017-2018, in which expenditures exceed actual and estimated revenues. *Id.* at ¶ 55.

17. Pennsylvania is now several months into the new fiscal year, FY2017-2018. *Id.* at ¶ 56. As of October 17, 2017, the Commonwealth continues to operate with an unbalanced budget. *Id.*

18. Expenditures in the \$31.38 billion General Appropriations Bill exceed actual and estimated revenues for FY2017-2018. *Id.* at ¶ 57. Pennsylvania, therefore, is now spending more money than it expects to collect for the current fiscal year, which violates the balanced budget requirements contained in both the Pennsylvania Constitution and the Pennsylvania Administrative Code. *Id.* at ¶¶ 57, 59; *see* Pa. Const. Art. VIII, §§ 12(a), 13; 71 P.S. § 238 (Adm. Code § 618).

19. The General Assembly has not passed a revenue package defining how Pennsylvania should fund its \$31.38 billion in FY2017-2018 spending; nevertheless, on July 10, 2017, Governor Wolf allowed the General Appropriations

Bill passed by the General Assembly to become law without his signature. *Id.* at ¶ 58.

20. Because the General Fund Budget is not balanced, the Commonwealth will run a budget deficit of approximately \$600 million in FY2017-2018. *Id.* at ¶ 60.

21. This \$600 million deficit is in addition to the illegal \$1.55 billion deficit remaining from FY2016-2017. *Id.*

22. State Treasurer Torsella and Auditor General DePasquale signed a \$750 million line of credit that ran from August 14-23, 2017, which temporarily prevented the balance in the General Fund from going negative. *See Navratil, Liz, Pa. Treasurer Warns Legislature Short-Term Loans Can't Continue*, philly.com, August 16, 2017.

23. This August loan was to be re-paid with \$141,000 in interest by Wednesday, August 23, 2017. *See Navratil, supra.*

24. On October 13, 2017, State Treasurer Torsella issued *another* \$700 million loan from the Treasury to cover \$1.2 billion in scheduled payments to Medicaid providers; the loan is required to be repaid by October 20, 2017. *See Murphy, Jan, 10/13/2017, "Pa. Treasurer Authorizes Another Loan to Keep State's General Fund Afloat"* (http://www.pennlive.com/politics/index.ssf/2017/10/pa_treasurer_authorizes_anothe.html).

25. Torsella authorized the loan despite ruling out a similar request for borrowing just a month prior. *See* Murphy, *supra*.

26. Without explanation as to his change of heart, Torsella retreated from his previous assertion that he would refrain from authorizing new loans from the State Treasury until the Governor and the General Assembly balanced the General Fund Budget for FY2017-2018. *See* Murphy, *supra*.

27. Auditor General Eugene DePasquale signed off on the new loan, recognizing that the Commonwealth was borrowing \$700 million “to allow the government to function” as a result of the unbalanced General Fund Budget for FY2017-2018, not to address the sort of normal cash flow variances for which this sort of intra-year borrowing is normally used. *See* Murphy, *supra*.

28. According to Torsella, this new loan will not solve the Commonwealth’s cash flow shortages beyond October 2017. *See* Murphy, *supra*.

29. Torsella indicated that, by October 27, 2017, the General Fund will become insolvent again and that it will remain insolvent for about five months. During this period, Torsella stated that expenditures are expected to exceed revenues by approximately \$1.7 billion. *See* Murphy, *supra*.

30. Torsella further conceded that he harbors concerns about the Commonwealth’s long-term fiscal health due to its reliance on borrowing to fund standard government operations. *See* Murphy, *supra*.

31. Critically, Torsella admits that the “borrow[ing, which he has authorized, is] to fill recurring deficits.” *See* Murphy, *supra*.

32. The Pennsylvania Constitution expressly prohibits the type of borrowing described by Torsella. *See* Pa. Const. art. VIII, § 7(a)(2)(ii).

33. In fact, because of actions taken during FY2016-2017, Torsella, together with Governor Wolf and the Auditor General DePasquale, violated the indebtedness provisions of the Pennsylvania Constitution. *See* Petition for Review, 9/14/2017, at ¶ 71.

34. To fund the \$1.55 billion deficit accrued during FY2016-2017, Respondents saddled the Commonwealth with millions of dollars of debt from continual borrowing, as evidenced by the loans authorized in August 2017 and October 2017. *Id.*

35. This debt was at least partially used to pay bills incurred during the prior fiscal year and continues to remain outstanding. *Id.* at ¶ 71 (citing Pa. Const. art. VIII, § 7(a)(2)(ii)).

36. During the pendency of this litigation, Respondents Wolf, Torsella and DePasquale have publicly committed to continue borrowing from the State Treasury (and from other sources) to address the long-term deficiencies caused by the Commonwealth’s unbalanced operating Budget.

37. As of October 20, 2017, the Pennsylvania Liquor Control Board has begun to move forward in implementing Governor Wolf's proposal to borrow \$1.25 billion against the future profits of the state-operated monopoly on alcoholic beverages. See Brubaker, Howard, 10/20/2017, "*Amid State Budget Battle, PLCB Hires Advisors for Wolf's \$125 Billion Borrowing Proposal*" (<http://www.philly.com/philly/business/plcb-hires-advisors-for-borrowing-proposal-20171020.html>). The borrowing could be finalized by the end of the year. *Id.*

38. The Governor's threat to continue his illegal borrowing spree is real, immediate and concrete.

INJUNCTIVE RELIEF

39. Petitioners seek the imposition of a temporary preliminary injunction – pending final determination in this case – prohibiting Respondents Wolf, Torsella, and DePasquale from requesting or authorizing the Commonwealth to borrow assets from the State Treasury or any other source to fund (i) expenditures set forth in the General Appropriations Bill for FY2017-2018, or (ii) remaining deficits from previous fiscal years.

40. Petitioners request that the injunction remain in effect during the pendency of this litigation, thereby preventing further irreparable harm while this case remains ongoing.

41. Petitioners may file an application with the Commonwealth Court “[a]t any time after the filing of a petition for review[,]” and request that the Court “issue a preliminary or special injunction[.]” Pa. R.A.P. No. 1532(a).

42. Pursuant to Rule 1531(a) of Pennsylvania Rules of Civil Procedure, this Court has authority “[to] issue a preliminary or special injunction only after written notice and hearing[.]” Pa. R.C.P. No. 1531(a). If it appears to the Court’s satisfaction “that immediate and irreparable injury will be sustained before notice can be given or a hearing held[,]” the Court may issue a preliminary or special injunction without adhering to the normal due process protections. *Id.*; *see Bahret v. Pennsylvania State Police*, No. 500 M.D. 2015, 2016 WL 2848684, at *8 (Pa. Comwlth. 2016) (applying Pa. R.C.P. to original jurisdiction matter).

43. The Supreme Court of Pennsylvania has delineated six prerequisites for the entry of a preliminary injunction:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pennsylvania v. Com., 104 A.3d 495, 501–02 (Pa. 2014) (*citing*

Warehime v. Warehime, 860 A.2d 41, 46–47 (Pa. 2004); *Summit TowneCtr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

44. This Court may deny any request for “injunctive relief where [it] has properly found that any one of the six ‘essential prerequisites’ for a preliminary injunction is not satisfied.” *SEIU Healthcare*, 104 A.3d at 501.

45. Petitioners satisfy each of the six requirements for obtaining a preliminary injunction. Respondents’ actions plainly violate the Pennsylvania Constitution. Petitioners’ right to relief is clear. Failure to enjoin Respondents’ continued borrowing will result in immediate and irreparable harm to Petitioners.

Clear Right to Relief

46. Petitioners present a clear right to relief. Wolf, Torsella and DePasquale continue to violate the plain language of Article VIII, Section 7 of the Pennsylvania Constitution. Pa. Const. Art. VIII, § 7.

47. “To establish a clear right to relief, the party seeking an injunction **need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties.**” *SEIU Healthcare*, 104 A.3d at 506 (citing *Fischer v. Dep’t of Public Welfare*, 439 A.2d 1172 (Pa.1982)) (emphasis added).

48. “[S]ince a preliminary injunction is designed to preserve the *status quo* pending final resolution of the underlying issues,” the Pennsylvania Supreme

Court has explained, “it is obvious that the ‘clear right’ requirement is **not intended to mandate that one seeking a preliminary injunction establish his or her claim absolutely.**” *Fischer*, 439 A.2d at 1174 (citation omitted; emphasis added).

49. “[I]t is unreasonable to deny injunctive relief pending a definitive ruling on the merits” where a denial would disturb the *status quo* and substantial – non-speculative – questions have been presented. *Valley Forge Historical Soc. v. Washington Mem’l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981).

50. Specifically, a clear right to relief exists where “the unambiguous language” of established law “prohibits the offending conduct sought to be prevented by the preliminary injunction[.]” *SEIU Healthcare*, 104 A.3d at 506.

Petitioners Have Standing

51. Petitioners must possess standing in order to challenge the constitutionality of Respondents’ actions.

52. As a general rule, a party may not seek to enjoin government actors from wrongfully or unlawfully spending public funds unless the party is able to demonstrate a specific injury aside from his or her interest as a taxpayer. *See Wm. Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (Pa. 1975) (requiring a plaintiff to allege and prove an interest that surpasses “the common interest of all citizens in procuring obedience to the law”).

53. The Pennsylvania Supreme Court, however, has acknowledged a narrow – yet significant and immediately applicable – exception to this general rule. *See Application of Biester*, 487 Pa. 438, 444–45, 409 A.2d 848, 852 (Pa. 1979).

54. Despite the minimal “degree of causal connection between the action complained of and the injury” – standing shall be recognized for taxpayers where necessary “to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the [traditional] standing requirement.” *Id.* at 444 n.5, 409 A.2d at 852 n.5.

55. “[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallengeable in the courts.” *Id.* (quoting *Faden v. Philadelphia Hous. Auth.*, 424 Pa. 273, 278, 227 A.2d 619, 621–22 (Pa. 1967)).

Thus, taxpayer standing may be granted when it “ensure[s] ... judicial review which would otherwise not occur,” **a circumstance that arises where “those directly and immediately affected by the complained of expenditures are beneficially affected as opposed to adversely affected.”**

56. *Seeton v. Pennsylvania Game Comm'n*, 594 Pa. 563, 571, 937 A.2d 1028, 1032 (Pa. 2007) (quoting *Biester*, 487 Pa. at 444, 409 A.2d at 852) (emphasis added); *See also Consumer Party of Pennsylvania v. Com.*, 510 Pa. 158,

169, 507 A.2d 323, 328 (Pa. 1986) *abrogated on other grounds by Pennsylvanians Against Gambling Expansion Fund, Inc. v. Com.*, 583 Pa. 275, 877 A.2d 383 (Pa. 2005).

57. This case presents the scenario described in *Biestler, supra*. No person or entity is better suited than Petitioners to challenge Respondents' unconstitutional actions, which are detailed in this Application for Preliminary Injunction and in the Petition for Review.

58. Any possible actor who would hold a more vested interest in the outcome of this litigation would *not be inclined to pursue legal action*. For example, the Attorney General's Office – which represents the interests of the Commonwealth and its citizens – is charged with *defending* Respondents' actions in this litigation.

59. All other officials would be equally disinclined from challenging the conduct at issue, either because those officials actively participated in the violations, or because any type of challenge would be contrary to political interests.

60. But for the Petition for Review and this Application for Preliminary Injunction, the Governor, the State Treasurer and the Auditor General would continue to violate the Pennsylvania Constitution and the Fiscal Code with impunity.

61. Respondents' actions would be insulated from judicial review without recognizing that Petitioners' possess standing to pursue this litigation.

62. Accordingly, under well-established precedent, Petitioners have standing in this matter – a prerequisite for prevailing on the merits. *See Biester*, 487 Pa. at 444–45, 409 A.2d at 852; *Seeton*, 594 Pa. at 571, 937 A.2d at 1032.

Respondents' Actions Abridge Clearly Established Pennsylvania Law

63. The loans that Governor Wolf has requested, and that State Treasurer Torsella and Auditor General DePasquale have authorized and intend to again authorize, violate both the Pennsylvania Constitution and statutory law under the Fiscal Code. *See* Pa. Const. art. VIII, § 7; 72 P.S. § 1601-A.

64. The Pennsylvania Constitution prohibits the Commonwealth from incurring debt, except in certain enumerated circumstances. Pa. Const. art. VIII, § 7(a).

65. Specifically, Article VIII, Section 7(a) provides, “[n]o debt shall be incurred by or on behalf of the Commonwealth except by law and in accordance with the provisions of this section.” *Id.* (emphasis added).

66. The provision *only* authorizes “[t]he Governor, State Treasurer and Auditor General, acting jointly . . . [to] incur debt for the purpose of refunding other debt, *if such refunding debt matures within the term of the original debt.*” *Id.* (emphasis added).

67. This provision allows the Governor, State Treasurer and Auditor General to borrow funds on behalf of the Commonwealth to address short-term cash flow deficiencies, *not long-term deficit spending*.

68. To the extent that the Commonwealth borrows to address short-term revenue deficiencies in the General Fund, Article VIII, Section 7 requires the Commonwealth to repay this new debt incurred *before the original debt becomes due and owing*. See Pa. Const. Art. VIII, § 7(a)(2)(ii).

69. Ordinarily, the new debt incurred must be repaid prior to the close of the fiscal year; the new debt cannot be used to finance old debt that is already due and owing. *Id.*

70. Accordingly, Article VIII, Section 7 does not authorize the Governor, State Treasurer or Auditor General to support long-term deficit spending by incurring debt on behalf of the Commonwealth. *Id.*

71. The Pennsylvania Supreme Court has long held that the Commonwealth cannot incur long-term debt, which spans several fiscal years, due to an unbalanced budget; the accumulation of such debt violates Article VIII, Section 7 of the Pennsylvania Constitution. See *Com. ex rel. Schnader v. Liveright*, 161 A. 697, 706 (1932).

72. The Pennsylvania Supreme Court interpreted and applied a prior incarnation of Article VIII, Section 7, opining that “[t]here can be no such thing as

a floating debt created through appropriations in excess of revenues[.]” *Liveright*, 161 A. at 706 (interpreting and applying a prior incarnation of Pa. Const. Art. VIII, § 7).

73. “Such debt may not be directly incurred by statute, nor through an appropriation in excess of current revenue for a gratuity or any purpose.” *Id.*

74. The Pennsylvania Constitution does not permit borrowing to fund budget appropriations in excess of actual revenues. *Liveright*, 161 A. at 708. Rather, when the budget remains unbalanced, “all [appropriations] must suffer alike and abate proportionately[.]” *Id.*

75. Further, the Supreme Court has also explained that the Pennsylvania Constitution prohibits authorizing recurrent loans to pay for debts that have already matured. *See Montgomery v. Martin*, 143 A. 505, 510 (Pa. 1928) (interpreting, *inter alia*, prior version of Pa. Const. Art. VIII, § 7).

76. Specifically, “each debt for which the obligation of the [C]ommonwealth is issued must be extinguished when it matures by funds appropriated to that purpose.” *Montgomery*, 143 A. at 510.

77. The Pennsylvania Constitution provides “no express authority to make recurrent loans” in order to fund mature debts. *Id.* The Pennsylvania Supreme Court explained, “such power is impliedly ... denied by ... provisions [such as Pa. Const. Art. VIII, § 7].” *Id.* (citation omitted).

78. Section 1601-A of the Fiscal Code codifies this Constitutional limitation on the Commonwealth's ability to borrow money to account for revenue deficiencies in the General Fund. 72 P.S. § 1601-A.²

79. Section 1601-A enables the State Treasurer and the Auditor General, “during any fiscal period to authorize and direct the borrowing, from time to time, on the credit of the current revenues levied, assessed, collectible and accruing during any current [fiscal] period[.]” *Id.*

² The Fiscal Code provides:

Whenever the General Assembly has provided revenues for the general purposes of any fiscal period and the Governor, the Auditor General and the State Treasurer determine such revenues will not be sufficient for the current and other expenses payable from the General Fund or such determination is made with regard to the revenues of the Motor License Fund, as a result of which the collectible revenues may not be sufficient to defray the current and other expenses payable from the General Fund or those of the Motor License Fund, the Governor, the Auditor General and the State Treasurer, on behalf of the Commonwealth of Pennsylvania, are hereby authorized and directed during any fiscal period to authorize and direct the borrowing, from time to time, on the credit of the current revenues levied, assessed, collectible and accruing during any current period or on the credit of such revenues of the Motor License Fund, or on the credit of the sum of such revenues of both funds, such sum or sums of money not exceeding, in the aggregate, one-fifth of the contemplated receipts from the revenues which have been provided for either of said funds or from the sum of the revenues of both funds, depending upon the fund or funds for which the loans are being made, based upon estimates submitted to the Governor through the Budget Secretary by the Department of Revenue for any current period by the General Assembly, for the general purposes or the purposes of the General Fund or Motor License Fund of any fiscal period: Provided, That the money borrowed at any one time, when added to the outstanding amount of any other such loan made during such period, shall not exceed one-fifth of the contemplated revenues for such fund or the contemplated revenues of the sum of both funds for such fiscal period.

80. Section 1601-A limits the Commonwealth's borrowing power to a single fiscal period; otherwise, the Section would abridge the Pennsylvania Constitution, which prohibits the assumption of debt to support long-term deficit spending. *See* Pa. Const. art. VIII, § 7(a)(2)(ii); 72 P.S. § 1601-A.

81. Governor Wolf, State Treasurer Torsella, and Auditor General DePasquale have abridged – and, if not restrained by this Court, will continue to abridge – Pennsylvania law with impermissible long-term borrowing.

82. Since the General Appropriations Bill for FY2017-2018 was enacted, Respondents have forced the Commonwealth to incur long-term debt in order to finance deficit spending across multiple fiscal years.

83. The current borrowing from the State Treasury – which Respondents have requested and authorized – finances, in part, mature debts accrued from the deficit amassed during FY2016-2017.

84. Specifically, in FY2016-2017, State Treasurer Torsella, jointly with Governor Wolf and Auditor General DePasquale, authorized the Commonwealth to borrow \$2.5 billion on a line of credit from the State Treasury. *See* Petition for Review, 9/14/2017, at ¶ 106.

85. Torsella, Wolf, and DePasquale used these funds to address the revenue shortfall in the Budget for FY2016-2017. *Id.* at ¶ 107.

86. FY 2016-2017 ended with a \$1.55 billion deficit, which has yet to be retired during the new fiscal period, FY2017-2018. *Id.* at ¶ 108.

87. In August 2017, Torsella, Wolf, and DePasquale approved a \$750 million line of credit, in part, to fulfill the obligations of the prior fiscal year. *Id.* at ¶ 109.

88. Once again, on October 13, 2017, State Treasurer Torsella issued *another* \$700 million loan from the Treasury to address the cash flow shortages due to the long-term deficit spending under which Pennsylvania is operating. *See* Murphy, *supra*.

89. Projections indicate that additional borrowing will be needed on or before October 27, 2017, in order to prevent the General Fund from becoming insolvent, and remaining so for more than five months. *See* Murphy, *supra*.

90. The borrowing authorized by Respondents is not designed to address short-term cash flow deficiencies; rather, the borrowing is necessary approximately every four (4) to six (6) weeks in order to protect the General Fund from a structural insolvency designed into FY2017-2018 and carried over from FY2016-2017.

91. This long-term deficit spending, which spans across fiscal years, requires borrowing to perpetuate itself and is precisely the type of indebtedness

prohibited by the Pennsylvania Constitution and the Fiscal Code. *See* Pa. Const. Art. VIII, § 7(a)(2)(ii); 72 P.S. § 1601-A.

92. The borrowing authorized by Torsella in August and October cannot be repaid “within the term of the original debt,” as the Pennsylvania Constitution requires. *See* Pa. Const. art. VIII, § 7(a)(2)(ii).

93. Rather, these loans – which DePasquale admits are necessary for the Commonwealth and its government to operate – are used to finance and perpetuate the continued deficit spending that currently spans two fiscal years – FY2016-2017 and FY2017-2018. *See* Murphy, *supra* (reporting that DePasquale “signed off on the short-term loan” and stated, “As we review the governor's proposal, anything the treasurer can do to continue to allow the government to function, and possibly prevent a credit downgrade, is important.”).

94. Without these so-called “short-term” loans to address the Commonwealth’s cash-flow deficiencies, Pennsylvania’s government could not function as a result of the \$1.55 billion deficit from FY2016-2017.

95. The FY2016-2017 debt has already matured and was not properly retired and any loan perpetuating this debt expressly violates the plain language of Article VIII, Section 7 of the Pennsylvania Constitution. *See* Pa. Const. Art. VIII, § 7.

96. Moreover, as the Pennsylvania Supreme Court held in *Liveright*, the General Assembly and the Governor cannot saddle the Commonwealth with debt simply by enacting appropriations that exceed actual revenues. *Liveright*, 161 A. at 708.

97. When Torsella and DePasquale authorize the borrowing requested by the Governor, all three Respondents force the Commonwealth to incur debt that has not been duly authorized by the executive and legislative branches via presentment and enactment of a proper balanced budget.

98. An unfunded appropriation does not provide proper authority for Respondents to borrow funds from the State Treasury. *Id.*

99. Rather, because the budget remains unbalanced, the proper remedy would be for “all [appropriations] ... [to] abate proportionately[.]” *Id.*

100. Under these circumstances, the Pennsylvania Constitution does not permit Wolf, Torsella and DePasquale to borrow on behalf of the Commonwealth in order to continue deficit spending. *Id.*

101. The Pennsylvania Constitution expressly prohibits Respondents from doing what they are attempting to do, namely, saddle the people of Pennsylvania with long term debt without the consent of the General Assembly. *See Pa. Const. Art. VIII, § 7(a)(2)(ii).*

102. Petitioners, therefore, have established their right to relief. Respondents' actions violate the Pennsylvania Constitution, as well as the Fiscal Code.

103. The question presented by Petitioners is “substantial” and “must be resolved to determine the rights of the parties.” *SEIU Healthcare*, 104 A.3d at 506.

104. “[I]t [would be] unreasonable to deny injunctive relief pending a definitive ruling on the merits[,]” especially because a denial guarantees Torsella, Wolf and DePasquale would continue the same – likely unconstitutional – actions during the pendency of this action and, thus, disturb the *status quo*. See *Valley Forge Historical Soc.*, 426 A.2d at 1129.

Immediate and Irreparable Harm

105. Without a preliminary injunction prohibiting further actions, the Respondents intend to continue borrowing from the State Treasury (and, possibly, other sources) to finance impermissible long-term debt.

106. Respondents will be confronted with the need to authorize another ‘short-term’ loan on or before October 27, 2017; otherwise, the General Fund is once again projected to become insolvent.

107. This continued and illegal borrowing from the State Treasury poses an immediate and irreparable harm, which cannot be mitigated by any other remedy.

108. To receive an injunction, the moving party must demonstrate “that ‘an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.’” *SEIU Healthcare*, 628 Pa. at 594, 104 A.3d at 508 (quoting *Summit Towne Ctr.*, 828 A.2d at 1001).

109. Specifically, the moving party must offer “concrete evidence” in order to demonstrate immediate and irreparable harm; “speculation and hypothesis” are not sufficient. *Summit Towne Ctr.*, 828 A.2d at 1003.

110. The Pennsylvania Supreme Court “reiterated that ‘actual proof of irreparable harm is required.’” *Kessler v. Broder*, 851 A.2d 944, 951 (Pa. Super. 2004) (quoting *Summit Towne Ctr.*, 828 A.2d at 1002-1003).

111. “[F]or purposes of a preliminary injunction[,] the claimed harm must be irreversible before it will be deemed irreparable.” *Greenmoor, Inc. v. Burchick Const. Co.*, 908 A.2d 310, 314 (Pa. Super. 2006) (citing *Sovereign Bank v. Harper*, 674 A.2d at 1085, 1093 (Pa. Super. 1996)).

112. Irreparable harm may be demonstrated by a prima facie showing that the responding party is currently acting in violation of established law. *Pennsylvania Pub. Util. Comm'n v. Israel*, 356 Pa. 400, 406, 52 A.2d 317, 321 (Pa. 1947).

113. “When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public[,]” the Pennsylvania Supreme

Court has held. *Id.* “For one to continue such unlawful conduct constitutes irreparable injury.” *Id.*

114. At Governor Wolf’s request, State Treasurer Torsella and Auditor General DePasquale have repeatedly approved borrowing funds from the State Treasury to finance the Commonwealth’s deficit spending over the past two fiscal years.

115. Currently, the Commonwealth is operating with a deficit of \$1.55 billion from the prior fiscal year, FF2016-2017, and a deficit of approximately \$600 million for the current fiscal year, FY2017-2018.

116. Without borrowing from the State Treasury, the Commonwealth would lack the funds to function and the General Fund would become insolvent.

117. Recent and proposed loans from the State Treasury, therefore, provide impermissible inter-year financing for the mature debts comprising the budget deficit for FY2016-2017.

118. Such borrowing contravenes the plain language of Article VIII, Section 7 of the Pennsylvania Constitution, and Section 1601-A of the Fiscal Code. *See* Pa. Const. art. VIII, § 7; 72 P.S. § 1601-A.

119. So long as the budget remains unbalanced and saddled with debt from FY2016-2017, Petitioners maintain that Wolf, Torsella and DePasquale violate

Pennsylvania's Constitution and Fiscal Code each time they issue a so-called 'short-term' loan from the State Treasury.

120. In doing so, Respondents unlawfully force the Commonwealth to incur long-term debt – an act that is irreversible, and that cannot be remedied through monetary damages. *See Greenmoor*, 908 A.2d at 314.

121. No form of relief can reverse the act of illegally borrowing hundreds of millions – if not billions – of dollars in the name of the people of Pennsylvania without their consent; an injunction that prevents Respondents from authorizing additional borrowing is the only adequate remedy.

122. The Pennsylvania Constitution and the Fiscal Code “declares [borrowing funds from the State Treasury to sustain long-term indebtedness, without a resolution from the General Assembly] to be unlawful” and “tantamount in law to calling it injurious to the public[.]” *Israel*, 356 Pa. at 406, 52 A.2d at 321. “For [Respondents] to continue such unlawful conduct constitutes irreparable injury.” *Israel*, 356 Pa. at 406, 52 A.2d at 321.

Greater Harm from Refusing Injunction

123. Irreparable harm is inferred where an action sought to be restrained violates a statutory mandate. Here, the conduct violates a clear provision of the Pennsylvania Constitution.

124. Closely related to the inquiry into whether an action causes irreparable harm is the question of whether that harm will be exacerbated by the denial of injunctive relief.

125. In order to establish a right to relief, “the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings.” *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (citing *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1283 (Pa. 1992); *Valley Forge Historical Soc’y v. Washington Mem’l Chapel*, 426 A.2d 1123, 1128–29 (Pa. 1981); *Alabama Binder & Chemical Corp. v. Pennsylvania Indus. Chemical Corp.*, 189 A.2d 180, 184 (Pa. 1963).

126. Whether greater harm would result from denying injunctive relief than granting it is a fact-intensive determination. *See, e.g. Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28 (Pa. Cmwlth. 2009) (in action seeking to enjoin mortgage consultants involved in fraudulent mortgage scheme from working in mortgage financing or investment fields, Commonwealth Court weighed facts relating to harm to mortgage consultants against harm to consumers and determined that greater harm would result from denying injunction). *See also Ambrogi v. Reber*, 932 A.2d 969, 977–78 (Pa. Super. 2007) (on appeal of

injunctive relief granted where property owner had insufficient insurance to cover likely damages from fire deaths and owner appeared to be selling off assets, Superior Court held that “the trial court has weighed and balanced the rights of both sets of parties and has concluded that a carefully crafted injunction is the only way to protect Appellees' right to actually collect a judgment if they prevail at trial, while protecting Appellants' right to run the business and reinvest or otherwise use the proceeds of any property sales.”).

127. In this case, the facts amply establish that greater harm will result from denying injunctive relief than from granting it.

128. Our Constitution requires that the Commonwealth’s budget be balanced, meaning that expenditures cannot exceed revenues, and that money only be borrowed in the name of the people of Pennsylvania with the explicit consent of their General Assembly.

129. The framers of our Constitution allowed for debt for capital projects for the useful life of the projects, but all other categories of debt must be repaid within the fiscal year in which the debt was incurred, unless otherwise authorized by the General Assembly. *See* Pa. Const. Art. VIII, Sec. 7(a)(2).

130. There is no dispute that the Commonwealth’s budget has not been balanced for the past two fiscal years, which is contrary to Article VIII, Section 7.

131. Further, the facts demonstrate that the Governor, Treasurer and Auditor General continue to amass “floating debt,” which is prohibited by Pennsylvania’s Constitution. *Commonwealth ex rel. Schnader v. Liveright*, 161 A. 697, 706 (Pa. 1932) (“There can be no such thing as a floating debt created through appropriations in excess of revenues and [...]”).

132. The inclusion in our Constitution of a balanced budget requirement was a measure intended to protect the taxpayers from overspending by our elected officials.

133. Thus, it follows that continued violation of the provision is injurious to the public it was intended to safeguard. *See Pennsylvania Public Utility Comm’n v. Israel*, 52 A.2d 317, 321 (Pa. 1947) (“When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public.”).

134. The Governor, Treasurer and Auditor General have incurred debt spanning two fiscal years and continue to impermissibly amass more debt, including the most recent borrowing of \$700 million to cover a payment to Medicaid providers, extending a line of credit on or about October 13, 2017.

135. This violation of the balanced budget provision is unquestionably injurious to the taxpayers.

136. This injury to the citizens of Pennsylvania must be weighed against any injury arising from continued borrowing.

137. In September, S&P Global Ratings downgraded Pennsylvania's rating due to the chronic gap between expenses and revenues. This lowering of the Commonwealth's credit rating could result in higher costs of borrowing for the people of Pennsylvania without the consent of their General Assembly.

138. Should the deficit spending continue, it is likely that all manner of state taxes and fees will necessarily be raised to pay for this unauthorized spending. The increase in costs of borrowing and potential for higher tax rates constitute a serious, immediate and irreversible injury to taxpayers.

139. Injunctive relief should be granted when a court determines, based upon an analysis of the facts presented and weighing of the potential harm, that greater harm will result from refusing relief.

140. In this case, denying injunction relief will cause greater harm to the citizens of Pennsylvania than granting it.

Restoration of the Status Quo

141. "For purposes of injunctive relief, the *status quo* is 'the last peaceable and lawful uncontested status preceding the underlying controversy between the parties or the alleged wrongful conduct of the parties sought to be enjoined.'" *Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 584 (Pa. Cmwlth. 2012) (quoting

Tinicum Twp. v. Delaware Valley Concrete, 812 A.2d 758, 762 n. 8 (Pa. Cmwlth. 2002)).

142. Courts have held that “[t]he relevant standard requires that an injunction must address the *status quo* as it existed between the parties before the event that gave rise to the lawsuit, not to the situation as it existed after the alleged wrongful act but before entry of the injunction.” *Ambrogi v. Reber*, 932 A.2d 969, 979 (Pa. Super. 2007) (citing *Anchel v. Shea*, 762 A.2d 346, 351 (Pa. Super. 2000)).

143. Thus, this Court is charged with determining if granting the requested injunctive relief will preserve the *status quo* as it existed before the Governor, Treasurer and Auditor General began violating the Pennsylvania Constitution by borrowing to cover expenditures that exceed the available revenues allotted in the unbalanced Budget for FY2016-2017.

144. This request for a preliminary injunction is limited in scope, and does *not* seek a return to the *status quo* existing before the Commonwealth enacted unbalanced budgets for the two most recent fiscal years. Petitioners contend that an injunction will accomplish just that.

145. Prior to the Respondents’ foray into illegal deficit spending, Pennsylvania adhered to the applicable Constitutional provisions and enacted a balanced budget.

146. This stable, deficit-free, Constitutionally-compliant *status quo ante* is the relevant period for this Court to consider.

147. Granting injunctive relief, therefore, would serve to preserve the *status quo ante*, as it existed prior to the Respondents' violation of the Constitutional balanced budget requirement.

148. It would mandate that the Governor, Treasurer and Auditor General limit spending to revenues, as required by the balanced budget provision and as had been the case prior to these officials' violation of that provision.

Reasonably Suited to Abate Offending Activity

149. The injunctive relief sought by Petitioners is reasonably tailored to abate Respondents' offending conduct.

150. In order to obtain a preliminary injunction, the moving party must convince the court that the injunction "is 'reasonably suited to abate the offending activity.'" *SEIU Healthcare*, 628 Pa. at 596, 104 A.3d at 509 (quoting *Summit Towne Ctr.*, 828 A.2d at 1001).

151. An injunction enjoining Governor Wolf, State Treasurer Torsella and Auditor General DePasquale will prevent further and immediate violations of Pennsylvania's Constitution and the Fiscal Code.

152. Respondents will no longer be able to force the Commonwealth to continue to incur greater debt in order to finance unconstitutional deficit spending.

153. Currently, upon Governor Wolf's requests, Torsella and DePasquale have borrowed from the State Treasury in order to finance expenditures that exceed actual revenues being collected.

154. An injunction will end this illegal borrowing, and will force Governor Wolf to seek legislative approval – as the law requires – for inter-year borrowing in the name of the people of Pennsylvania.

Not Contrary to Public Interest

155. Granting Petitioners injunctive relief would not be contrary to the public interest. To the contrary, it would protect the public interest.

156. In *Leonard v. Thornburgh*, 463 A.2d 77 (Pa. Cmwlth. 1983), this Court refused to grant an injunction because to do so would plunge the City of Philadelphia into deficit spending, which would be contrary to the public interest.

157. In *Leonard*, taxpayers of the City of Philadelphia sought, *inter alia*, a preliminary injunction against the city to prevent it from collecting wage taxes at different rates for residents and nonresidents.

158. Even though the Court agreed with the taxpayers that they were likely to succeed on the merits, the court denied injunctive relief, concluding that enjoining the collection of the current wage tax would propel the city into a state of financial paralysis, because it would create a \$60 million deficit.

159. The City's Home Rule Charter specifically forbade the approval of any expenditures until the City's budget was balanced.

160. Thus, granting injunctive relief would have been contrary to the public interest.

161. The Governor, Treasurer and Auditor General are in the process of creating a large deficit by spending sums greater than the Commonwealth's revenues, in violation of our Constitution.

162. This is the precise scenario that the *Leonard* court refused to permit – the accrual of debt – reasoning that it would be contrary to the public interest to plunge the City into deficit spending.

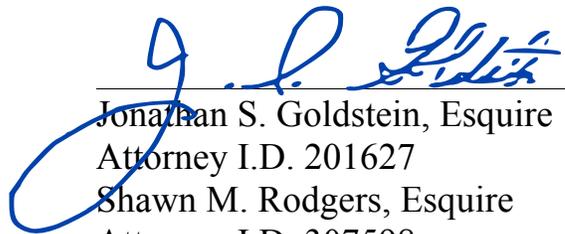
163. In *SEIU*, the Supreme Court noted that, “when the Legislature declares particular conduct to be unlawful, it is tantamount to categorizing it as injurious to the public.” *SEIU*, 104 A.2d at 509.

164. Our Constitution mandates that the Commonwealth's budget be balanced. Failure to enact a balanced budget is, *de facto*, injurious to the public.

165. Accordingly, enjoining further deficit spending in violation of our balanced budget provision, cannot be construed as contrary to the public interest. Rather, it is entirely in the interest of the public to grant injunctive relief.

WHEREFORE, Petitioners respectfully request that this Honorable Court enjoin Respondents and prohibit them from requesting or authorizing the Commonwealth to borrow assets from the State Treasury or any other source (a) to fund any expenditure set forth in the General Appropriations Bill for FY2017-2018 or (b) to fund prior deficits from previous fiscal years. The injunction should remain in effect during the pendency of this litigation, thereby preventing further irreparable harm while this case remains ongoing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, Esquire, hereby certify that I caused a true and correct copy of the foregoing Application for Preliminary Injunction, together with the accompanying Brief in Support, to be served on the 23rd day of October 2017, via first-class mail, e-filing and/or email, to the following individual(s), which service satisfies the requirements of Pa.R.A.P. 121 and Pa.R.C.P. 440.

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