Received 04/15/2013 Supreme Court Middle District

Filed 04/15/2013 Supreme Court Middle District

# IN THE SUPREME COURT OF PENNSYLVANIA
# MIDDLE DISTRICT

| No. 19 MAP 2013 | No. 20 MAP 2013 |
|---|---|
| SENIOR JUDGE JOHN DRISCOLL, et al., | JUDGE ARTHUR TILSON, |
| Plaintiffs/Appellants, | Plaintiff/Appellant, |
| v. | v. |
| THOMAS W. CORBETT, JR., et al., | THOMAS W. CORBETT, JR., et al., |
| Defendants/Appellees. | Defendants/Appellees. |

Appeal Upon Grant of Extraordinary Jurisdiction
from Commonwealth Court Nos. 43 MD 2013 & 48 MD 2013

## JOINT BRIEF OF PLAINTIFFS/APPELLANTS

DECHERT LLP
Robert C. Heim (Pa. 15758)
Alexander R. Bilus (Pa. 203680)
David S. Caroline (Pa. 306547)
William T. McEnroe (Pa. 308821)
2929 Arch Street
Philadelphia, PA 19104

*Attorneys for Plaintiffs/Appellants Senior Judge Driscoll, Senior Judge Moss, and Judge O'Keefe*

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
William T. Hangley (Pa. 03533)
Michele D. Hangley (Pa. 82779)
Jonathan L. Cochran (Pa. 314382)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933

*Attorneys for Plaintiff/Appellant Judge Tilson*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CODE

OTHER AUTHORITIES

## STATEMENT OF JURISDICTION

The Commonwealth Court had original jurisdiction over these matters pursuant to 42 Pa. Cons. Stat. § 761(a). This Court has plenary jurisdiction pursuant to 42 Pa. Cons. Stat. § 726, its general power of superintendency over all lower tribunals of the Commonwealth, and this Court's orders of March 28, 2013 granting Appellants' Applications for Extraordinary Relief.

## STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

Because this case raises a question of law, the standard of review is *de novo* and the scope of review is plenary. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals*, 44 A.3d 3, 6 (Pa. 2012); *Moscatiello v. Hilliard*, 595 Pa. 596, 600, 939 A.2d 325, 327 (2007); *Universal Am-Can, Ltd. v. W.C.A.B. (Minteer)*, 563 Pa. 480, 486, 762 A.2d 328, 331 (2000).

## STATEMENT OF QUESTION INVOLVED

1. Whether Article V, Section 16(b) of the Pennsylvania Constitution violates Appellants' rights under Article I of the Pennsylvania Constitution.

**Suggested Answer:** Yes.

## STATEMENT OF THE CASE

### I. Form of the Action and Procedural History

On January 28 and 31, 2013, Appellants Senior Judge John Driscoll, Senior Judge Sandra Mazer Moss, Judge Joseph D. O'Keefe and Judge Arthur Tilson filed complaints in the Commonwealth Court against Appellees Governor Thomas W. Corbett, Jr., Secretary Carol T. Aichele, and Court Administrator Zygmont A. Pines. Both complaints challenge the actions of Appellees, government officials, who interpret and enforce Article V, Section 16(b) of the Pennsylvania Constitution (the "Mandatory Retirement Provision") in such a way that Appellants are deprived of their rights under Article I of the Pennsylvania Constitution. On February 6, 2013, Appellants filed Applications for Extraordinary Relief asking this Court to assume jurisdiction over Appellants' claims. On March 13, 2013, Appellant Tilson discontinued his action against Appellee Pines. On March 28, 2013, this Court granted the Applications and ordered expedited briefing on the following issue: "Whether Article V, Section 16 of the Pennsylvania Constitution violates Applicant's rights under Article I of the Pennsylvania Constitution."

## II. Statement of Facts[1]

### A. The Mandatory Retirement Provision Forces Judges Out of Their Jobs Solely Because of Their Age.

For almost 200 years, the judges of the Commonwealth of Pennsylvania enjoyed the same limited employment security as other elected public officials: they were elected for terms of years, and could be removed during their terms only if they did something wrong or became incapacitated. That changed in 1968 when the Constitutional Convention of 1967-1968, in a remarkable case of overkill, added the Mandatory Retirement Provision to the Constitution as a means of "removing aged and disabled judges from the bench." Pennsylvania Constitutional Convention of 1967-1968, Reference Manual No. 5, 202 (1968) (hereinafter "Constitutional Convention Reference Manual") (attached hereto as Appendix A).

---

[1] The facts asserted by Appellants are supported by their verified complaints and publications. This Court is empowered to take judicial notice of adjudicative facts that are not subject to reasonable dispute and previously has done so with regard to facts similar to those asserted here. *See, e.g.*, *Der Hagopian v. Eskandarian*, 396 Pa. 401, 404, 153 A.2d 897, 899 (1959) ("Further, we can take judicial notice of the fact that not all forms of mental illness hit one like a bolt of lightning."). If the Court concludes that a factual record is necessary for its determination, Appellants request that the Court either remand to the Commonwealth Court or appoint a special master for discovery and the development of an appropriate record.

The Mandatory Retirement Provision provides in part that Pennsylvania's judges "shall be retired" reaching the age of 70 years:

> Justices, judges and justices of the peace shall be retired on the last day of the calendar year in which they attain the age of 70 years. Former and retired justices, judges and justices of the peace shall receive such compensation as shall be provided by law.

Pa. Const. Article V, Section 16(b).[2]

---

[2] Prior to 2001, the mandatory retirement provision provided that jurists "shall be retired upon attaining the age of 70 years." However, in 2001 the provision was amended to specify that the retirement takes place "on the last day of the calendar year in which they attain the age of 70 years." *See* Joint Resolution No. 3, 1998, P.L. 1329, H.B. No. 1329, § 1(3); Joint Resolution No. 1, 2000, P.L. 1057, S.B. No. 231, § 1(2). In passing this technical amendment, there is no evidence that the people or the legislature gave any substantive consideration to the mandatory retirement age itself. Rather, the Attorney General provided the following explanation of the amendment, which appeared on the ballot:

> The purpose of the ballot question is to change the mandatory retirement date for justices of the Supreme Court, judges and justices of the peace (now known as district justices). Presently, the Pennsylvania Constitution requires that a justice of the Supreme Court, judge or justice of the peace retire on his or her 70th birthday. The ballot question would change this mandatory retirement date to the last day of the calendar year in which the justice of the Supreme Court, judge or justice of the peace turns 70. The effect of the proposed amendment would be to extend the term of a justice of the Supreme Court, judge or justice of the peace beyond his or her 70th birthday to

Appellants are able and experienced judges of the Commonwealth. Although Appellants possess exemplary records of judicial service, are of sound physical and mental health, and have or had years remaining in the 10-year terms to which the public reelected them, they have been or soon will be stripped of their positions solely on the basis of their age.

Under the Mandatory Retirement Provision and the enabling provision of 42 Pa. Cons. Stat. § 3351, as interpreted and applied by Appellees, Appellants have been, or will be, forced to leave the judgeships to which they were elected at the end of the calendar year in which they turn 70 years old. If Appellants wish to continue serving the public after that year, and even if their elected terms are years away from expiring, they only can do so at the discretion of this Court as "senior judges," a designation that entails the same responsibility

---

> December 31st of the year in which that birthday occurs. The proposed ballot question is limited to setting the mandatory retirement date. *No change is made to the mandatory retirement age, which remains 70 years.*

*See* Pennsylvania Department of State, Proposed Amendments to the Constitution of Pennsylvania, http://www.portal.state.pa.us/portal/server.pt/community/amendment_to_the_constitution/12715%7C#jr2000-1 (last visited Apr. 15, 2013) (emphasis added).

and work performed by younger judges but that drastically reduces the judges' pay and benefits.

To Appellants' knowledge, no other elected or appointed official of the Commonwealth, no matter the mental or physical rigors or challenges of the position, is subjected to such government-sanctioned age discrimination.

### B. The Underlying Assumptions of the 1968 Mandatory Retirement Provision are Demonstrably Incorrect in 2013.

#### 1. The Presumption of Physical and Mental Decay

It is not clear what empirical data (if any) the 1967-68 conventioneers took into account in concluding that judges who attained the witching birthday were so much more likely to be "mentally or physical unable to perform their duties . . . by reason of old age" as to require their wholesale removal from the bench. Constitutional Convention Reference Manual at 199; *see also id.* at 203 (stating that some judges may "retain full powers past normal age"). But data on that question is abundantly available today, and it is exactly contrary to the Convention's assumptions.

By way of example, a recent well documented investigation of judicial capability concluded that increased age had no effect on the

quantity or quality of opinions written by federal appellate judges. *See* Christopher R. McFadden, *Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. Rev. 81, 120 (2000) (citing Richard Posner, *Aging and Old Age* 184-92 (1995)) (attached hereto as Appendix B). Study after scholarly study has confirmed that both the health[3] and cognitive functioning[4] of today's older Americans are significantly better than those of previous generations.

---

[3] *See, e.g.*, Freedman, *et al.*, *Trends in Late-Life Activity Limitations in the United States: An Update From Five National Surveys*, 50 Demography 661, 662 (2013) ("Dozens of studies have documented and verified substantial declines in the prevalence of late-life activity limitations in the United States from the mid-1980s through the late 1990s. . . . Indeed, these declines have been viewed as one of the most significant advances in the health and well-being of Americans in the past quarter-century.") (citations omitted) (attached hereto as Appendix C); Eileen M. Crimmins, *Trends in the Health of the Elderly*, 25 Ann. Rev. Pub. Health 79, 85 (2004) ("Most studies of the period from 1980 to the present have found some decline in disability among the older population.") (citations omitted) (attached hereto as Appendix D).

[4] Kenneth M. Langa, *et al.*, *Trends in the Prevalence and Mortality of Cognitive Impairment in the United States: Is There Evidence of a Compression of Cognitive Morbidity?*, Alzheimer's & Dementia 4 (2008)("In a large nationally representative survey of older Americans [a study has found that] between 1993 and 2002, the prevalence of [cognitive impairment] consistent with dementia decreased from 12.2% to 8.7%, representing an absolute decrease of 3.5

Moreover, demographics have changed significantly since 1968. Average life expectancy among Americans has increased from 70.2 years in 1968 to 78.1 years in 2008,[5] while the median age of the population has increased by almost ten years.[6] As of today, a 70 year old man has a life expectancy of 83 years, and a 70 year old woman has a life expectancy of 86 years. *See* Find the Data, *Compare 70 Year Old Life Expectancy*, http://life-span.findthedata.org/d/d/70 (last visited April 14, 2013). And perceptions of older persons and public awareness of the scourge of age discrimination have changed dramatically in the 45 years since 1968. This is most readily apparent in the near-

---

percentage points, and a relative decrease of nearly 30%.") (attached hereto as Appendix E); Kristin M. Sheffield, et al., *Changes in the Prevalence of Cognitive Impairment Among Older Americans, 1993-2004: Overall Trends and Differences by Race/Ethnicity*, Am. J. Epidemiology 274, 280 (May 27, 2011) (attached hereto as Appendix F).

[5] *Compare* U.S. Dept. of Health, Educ., and Welfare, Vital Statistics of the United States 1968, Vol. II §5, 5-5, *with* U.S. Dept. of Health and Human Servs., U. S. Life Tables 2008, 1 (2012).

[6] In 1968 the median age in the United States was 28.1 years, the lowest it had been in decades. *See* United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects: The 2010 Revision*, New York (2011), *available at* http://esa.un.org/unpd/wpp/JS-Charts/aging-median-age 0.htm. In 2012, by contrast, it was 37.1 years. *See* CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/fields/2177.html, last visited Apr. 11, 2013.

universal expansion and strengthening of our anti-age discrimination laws. In addition to the federal Age Discrimination in Employment Act ("ADEA"), at least 48 states now have laws prohibiting age discrimination. *See* ELT, Inc., *50-State Survey of Discrimination Laws*, at http://www.elt.com/resources/integrity-suite/discrimination-laws/#40 (last visited Apr. 11, 2013). And in 1991, the Pennsylvania Human Relations Act was amended to protect individuals beyond age 70. *See* Pennsylvania Human Relations Act—Omnibus Amendments, 1991 P.L. 414, No. 51 (amending 43 P.S. § 954).

### 2. The Rationale that Mandatory Retirement Spares the "Unpleasantness" of Removing Senile Judges from the Bench.

Another purported benefit of mandatory retirement considered by the Constitutional Convention was that it "eliminates unpleasantness of removing aged and disabled judges on an individual selective basis." Constitutional Convention Reference Manual 203. Whatever benefits the Constitutional Convention may have predicted would accrue from relying on blanket generalizations about older individuals, in practice the mandatory retirement provision has not done anything to eliminate the unpleasantness of individual removal of disabled judges—because

the 1968 amendments to the Constitution themselves also provided for individual removal of disabled judges. Specifically, Section 18 of Article V, titled "Suspension, Removal, Discipline and Other Sanctions," provides that "[u]nder the procedure prescribed herein, any justice or judge . . . may be retired for disability seriously interfering with the performance of his duties." PA. CONST. art. V, § 18(d). In contrast to the Mandatory Retirement Provision's blanket forced retirement of all judges over a certain age, Section 18 sensibly and properly provides for a number of procedural protections to avoid unfair treatment of any individual judge. *Id.* Nevertheless, in view of Section 18, judges are still exposed to the "unpleasantness" of individual selective removal when circumstances are such that removal is appropriate.

And the fact that forcing all 70-year-old judges to retire might remove some incapacitated judges (while, probably, leaving some on the bench) does not mean there is a rational basis for the provision. The same could be said about a policy of forcing retirement on all blue-eyed judges or all judges who cannot carry a tune. The science establishes that the presumption of senescence is simply unjustified.

### 3. The Rationale that Age Discrimination Is a Common and Acceptable Practice.

The members of the Constitutional Convention apparently thought they were "catching a wave" with their Mandatory Retirement Provision, because they perceived a "current trend towards mandatory retirement in other public and private employments." Constitutional Convention Reference Manual, 204. In reality, they were swimming against the tide of American history. Like the suggestion that senility is a frequent problem for jurists older than 70, any trend towards mandatory retirement, if it ever existed, has long since evaporated and even reversed itself. Indeed, under the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, and the Pennsylvania Human Relations Act, 43 P.S. § 951, *et seq.*, discrimination based on age has been made illegal in most employment contexts. Notably, too, the perceived "trend towards mandatory retirement" never reached elected public officials other than judges in Pennsylvania; they, and they alone, suffer from this "trend."

### 4. The Notion that Mandatory Retirement Increases Judicial Manpower.

The final rationale relied on by the Constitutional Convention was that a mandatory retirement system, when combined with a senior

judge system that provides for part time service, "substantially increases judicial manpower." Constitutional Convention Reference Manual, 203. But there is no reason to believe that any additional judicial manpower would not still be available if the discriminatory provision is eliminated. Many judges will elect to retire completely at or before age 70, especially if their pensions have "maxed out." Some will die, others might be removed for disability, and still others will want to work part-time as senior judges to have the benefit of more flexibility in their lives. Hence, there will still be judicial vacancies to fill and increased judicial manpower will still be available without sacrificing able and experienced older judges. Plenty of judicial systems are able to handle their caseloads without a system of forced retirement based on age. For example, the experience of the federal courts has shown that voluntary retirement is perfectly compatible with a thriving senior judge system. Federal senior judges, who receive no additional compensation for their work and "essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts' workload annually." United States Courts, Frequently Asked

Questions, Federal Judges, http://www.uscourts.gov/Common/FAQS.aspx (last visited April 11, 2013).

### C. The Mandatory Retirement Provision Knowingly Targets the Blameless.

Remarkably, the drafters of the Mandatory Retirement Provision knew and overtly acknowledged that, in their zeal to remove the potential bad apple—the occasional senile or incapacitated judge—and to be able to accomplish that without having to make a case, the system would discard all the good apples that remained in the barrel: "[P]revention of harm by a few senile judges more than offsets loss of judges who retain full powers past normal age." Appendix A Constitutional Convention Reference Manual, 203.

As a practical matter, of course, the system does not eliminate all older judges; it just requires those who wish to continue working to do so without the normal compensation of their offices.[7]

---

[7] For example, the current compensation for senior judges is $534 per in-court day actually worked. 204 Pa. Code § 211.2. The actual compensation is often in fact less because of general budgetary restrictions applicable to all judges who are age 70 or older. Senior judges receive no paid sick days, paid vacation or life insurance benefits. Moreover, no compensation is provided for days spent working in chambers. Driscoll R. 14a-15a (Verified Complaint).

Appellants have brought these actions and sought this Court's review in the hope that they might—like all other elected and appointed officials of the Commonwealth—be judged and treated as individuals by their abilities rather than their birthdays.

## SUMMARY OF THE ARGUMENT

This Court has the power and duty to review and declare unconstitutional any laws of the Commonwealth, including constitutional amendments like the Mandatory Retirement Provision, when those laws violate the inherent rights of Pennsylvania citizens guaranteed by Article I.

The Mandatory Retirement Provision forces judges to retire at age 70, or to continue serving at drastically reduced compensation. The provision amounts to state-sanctioned age discrimination in employment. It purposefully discriminates against older citizens, and compels them to surrender their duly elected offices even though they have shown no loss of capability and, indeed, may be performing at their highest level. The provision is not rationally related to any legitimate state interest, nor does it substantially further an important

state interest, and therefore it violates Appellants' equal protection rights under Article I of the Pennsylvania Constitution.

Moreover, the Mandatory Retirement Provision deprives Appellants of an interest in their continued employment as judges in direct contravention of their substantive due process rights under Article I.

## ARGUMENT

This Court should strike down the Mandatory Retirement Provision because it violates Appellants' inherent rights to equal protection of the laws and due process under Article I of the Pennsylvania Constitution.

### I. This Court Has the Power to Adjudicate Whether the Mandatory Retirement Provision Violates Appellants' Inherent Rights.

This Court has rightly held that it has the power and duty to decide whether a provision of the Pennsylvania Constitution can itself be unconstitutional under that very Constitution. In *Stander v. Kelley*, 433 Pa. 406, 250 A.2d 474 (1969), the Court held that the constitutionality of Article V of the Pennsylvania Constitution—the same Article that is at issue in this case—was a matter for judicial review and that an amendment to the Constitution can be ruled

unconstitutional if it conflicts with other provisions of the Constitution. As explained below, the Court's decision in *Stander* comports with the text and judicial understanding of the Constitution, which make clear that there are certain rights recorded in Article I of the Pennsylvania Constitution that cannot be infringed upon—even by a constitutional amendment.

### A. This Court has held that the constitutionality of a constitutional amendment is a proper subject for judicial review.

In *Stander*, the plaintiffs brought a set of constitutional challenges to the 1968 amendments to Article V. The Commonwealth argued that constitutionality of Article V was not justiciable, because "the ultimate sovereign power of our Government reposes in the people and the people have approved by their vote the new Judiciary Article." *Id.* at 410, 250 A.2d at 476. The Court rejected the Commonwealth's argument, explaining that the relevant case law established that "(1) A vote of the people cannot validate and Constitutionalize anything which violates a provision of the Constitution, and (2) This question or issue of Constitutionality is justiciable after the voters have adopted such a provision." *Id.* at 412-13, 250 A.2d at 477 (citations omitted).

Accordingly, this Court concluded, constitutionally recognized rights of individuals are protected even against a popular vote amending the Constitution:

> Constitutionally ordained rights must and will be protected by the Courts against the will as well as against the vote of a majority of the people. . . . *One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.*

*Id.* at 413, 250 A.2d at 478 (second ellipsis in original) (footnote and quotation marks omitted) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)); *see also Commonwealth v. Tharp*, 562 Pa. 231, 235-36, 754 A.2d 1251, 1253 (2000) ("[T]he people of the Commonwealth have the authority to amend their state constitution as they deem fit, so long as they do not violate some other provision of the Pennsylvania or the United States constitutions.") (citing *Stander*, 433 Pa. at 412-13, 250 A.2d at 477); *Bergdoll v. Kane*, 557 Pa. 72, 75, 731 A.2d 1261, 1263 (1999) (considering constitutionality of an amendment to the Constitution and striking the amendment because the process of its adoption was not constitutional); *Mellow v. Pizzingrilli*, 800 A.2d 350,

354 (Pa. Commw. Ct. 2002) (entertaining constitutional challenge to an amendment that had been approved by voters).

### B. Constitutional amendments cannot abrogate the inherent and inviolate rights recognized in Article I of the Pennsylvania Constitution.

The text and purpose of Article I of the Constitution supports *Stander*'s principle that the constitutionality of the Constitution is a matter for judicial determination because Article I recognizes certain inherent rights that are inviolate and cannot be infringed. Article I is titled the "Declaration of Rights." It states that its purpose is "[t]hat the general, great and essential principles of liberty and free government may be recognized and unalterably established." Section 1 of Article I, which is titled "Inherent Rights of Mankind," provides:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. Art. I § 1. Section 25 of Article I, titled "Reservation of Powers in People" provides:

> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the

> general powers of government and *shall forever remain inviolate*.

*Id.* § 25 (emphasis added).

These "inherent" rights were not created by the Constitution—the Constitution simply acknowledged their existence and their paramouncy. As this Court has explained, the "Pennsylvania Constitution did not create these rights. The Declaration of Rights assumes their existence as inherent in man's nature." *W. Pa. Soc. Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 512 Pa. 23, 30-31, 515 A.2d 1331, 1335 (1986). Section 1 of Article I originated in the Pennsylvania Constitution of 1776; the authors of that Constitution intended "to reduce to writing a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681." *Commonwealth v. Edmunds*, 526 Pa. 374, 392-93, 586 A.2d 887, 896 (1991) (citing White, *Commentaries on the Constitution of Pennsylvania* (1907)).

This Court has long understood the fundamental principle of law that there are certain inherent rights that exist independent of the people's authority to form a government:

> From time immemorial man has always looked with marked aversion on any curtailment of his natural rights. . . . [L]ong before the dawn rose on the Constitution of the United States, and long before Magna Charta clipped the claws of monarchial absolutism, the dignity of man proclaimed inalienable rights through law . . . .

*Com. ex rel. Levine v. Fair*, 394 Pa. 262, 280, 146 A.2d 834, 844 (1958).[8]

---

[8] The idea of super-constitutional "natural rights" is not unique to the Pennsylvania Constitution; indeed, it was a prime topic of philosophical thought at the time of the founding of the Commonwealth. In 1769, Blackstone described natural rights as "absolute" and "those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." William Blackstone, Commentaries on the Laws of England, Book 1, Chapter 1 123 (1753). Similar principles can be found in the United States Declaration of Independence, which states "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and in the Virginia Bill of Rights of 1776, which states "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." *See also* Thomas Paine, *The Rights of Man Volume II* (1792) ("It is a perversion of terms to say that a charter gives rights. . . . Rights are inherently in all the inhabitants . . . . The fact therefore must be that the individuals themselves, each in his own personal and sovereign right, entered into a compact with each other to produce a government: and this is the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.").

Because the natural rights that are recorded in Article I are "inherent," "indefeasible," and "inviolate," these rights cannot be transgressed by any law—no matter whether the law is a statute created by the legislature, common law developed by the courts, or even—as recognized by the Court in *Stander*—a constitutional amendment passed by the people. This Court repeatedly has acknowledged this principle, and has refused to suggest "that the rights enumerated in the Declaration of Rights exist only against the state. These rights are specifically reserved to the people; each inhabitant of the Commonwealth . . . shares in them and enjoys them. The framers of our constitution considered them basic rights of human beings; we have called them 'the Hallmarks of Western Civilization.'" *W. Pa. Soc. Workers 1982 Campaign*, 512 Pa. at 31, 515 A.2d at 1335 (quoting *Andress v. Zoning Bd. of Adjustment*, 410 Pa. 77, 86, 188 A.2d 709, 713 (1963)); *see also Spayd v. Ringing Rock Lodge No. 665, Bhd. of R.R. Trainmen of Pottstown*, 270 Pa. 67, 71, 113 A. 70, 72 (1921) ("The Constitution does not confer the right, but guarantees its free exercise, without let or hindrance from those in authority, at all times, under any and all circumstances; and, when this is kept in view, it is apparent

that such a prerogative can neither be denied by others nor surrendered by the citizen himself.").

Following this principle, the Court has held that any law violating the right to own property, one of the natural rights recognized in Article I, Section 1, "must be deemed a nullity; *not only because it is inconsistent with the constitution, but against natural right and justice*." *Eakin v. Raub*, 12 Serg. & Rawle 330, 1825 WL 1913 (Pa. 1825) (emphasis added). Likewise, in *Appeal of White* this Court held that "the right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. *It does not owe its origin to constitutions. It existed before them.*" 287 Pa. 259, 267, 134 A. 409, 412 (1926) (emphasis added) (quoting *Spann v. Dallas*, 111 Tex. 350, 356 (1921)); *see also Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 95, 306 A.2d 308, 318 (1973) (recognizing and reaffirming the "long-standing notion" that ownership of property is an inherent natural right). Similarly, in *Bishop v. Piller*, this Court held that certain rights of family association were inherent rights, noting "[i]t does not take lengthy study of the

writings of philosopher John Locke to conclude that our citizens retain natural rights." 536 Pa. 41, 46-47, 637 A.2d 976, 978-79 (1994).

### C. This Court's statement in *Gondelman v. Commonwealth* that constitutional amendments cannot violate the Pennsylvania Constitution is erroneous, contrary to precedent, and should be rejected.

Almost a quarter century ago, in *Gondelman v. Commonwealth*, 520 Pa. 451, 554 A.2d 896 (1989), this Court was asked to decide the same question that is before the Court today, that is, whether judges' equal protection rights are infringed by the Mandatory Retirement Provision, and the Court held they were not. In doing so, however, the *Gondelman* majority actually bypassed the important equal protection calculus discussed elsewhere in this brief, and contented itself with the superficial statement that a constitutional amendment approved by a majority of the voters is impervious to state constitutional scrutiny: "It is absurd to suggest that the rights enumerated in Article I were intended to restrain the power of the people themselves." *Id.* at 467, 554 A.2d at 904. According to the *Gondelman* Court, a constitutional amendment could never violate the Pennsylvania Constitution because the people of Pennsylvania had voted for it. *Id.* at 468-69, 554 A.2d at 904-05. Accordingly, the *Gondelman* Court declined to make an actual

analysis of the constitutionality of the Mandatory Retirement Provision under Pennsylvania constitutional precedents.

But, as *Stander* and myriad state constitutional decisions remind us, basic human rights are constitutionally protected from intrusion—whether that intrusion comes from the whim of a tyrant against the rights of the majority, or from the tyranny of the majority against the rights of the few, and whether it is by fiat, ordinance, statute, or even constitutional amendment. This aspect of *Gondelman* has been roundly criticized for ignoring the actual constitutional law of Pennsylvania. *See* Ken Gormley, ed., *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 656 (2004) ("*Gondelman*'s broad statement (*i.e.*, that amending the Pennsylvania Constitution is constrained only by the Federal Constitution) is inapposite to established Pennsylvania Constitutional jurisprudence.").

Accordingly, the Court should overturn *Gondelman*, reaffirm *Stander*, and review the constitutionality of the Mandatory Retirement Provision.[9]

---

[9] The Court also has the power to consider the constitutionality of the Mandatory Retirement Provision because the execution of that provision requires government action that is subject to constitutional

## II. The Mandatory Retirement Provision Violates Appellants' Inherent Rights to Equal Protection.

The Mandatory Retirement Provision discriminates against Appellants on the basis of their age, and limits their ability to work. Ironically, too, it does so in derogation of the express will of the people of this Commonwealth, who have elected each of the Appellants to a ten-year term of office that is being interrupted and aborted for no good

---

review. Article I, Section 26 provides "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." As Justice Papadakos pointed out in his dissent in *Gondelman*, the Mandatory Retirement Provision "does not say that jurists shall retire; rather they *shall be retired*—who is to effect the retirement of jurists if it is not *government*? . . . Such action by *government*, as admitted by the majority, is prohibited by Article 1, Section 26 of the Pennsylvania Constitution which is, in effect, part of the Bill of Rights of all of the people." *Gondelman*, 520 Pa. at 470, 564 A.2d at 905 (Papadakos, J. dissenting). Retirement does not happen voluntarily or exclusively by constitutional fiat, but only through government action. For example, the Secretary of the Commonwealth certifies as a judicial vacancy the office of any justice or judge who has attained 70 years of age and who has years remaining on his or her term. The Secretary does not certify for inclusion on the ballot of a retention election, any justice or judge who has attained 70 years of age. Driscoll R. 13a; Tilson R. 32a. Likewise, the Court Administrator authorizes the Pennsylvania Treasurer to discontinue the salary of any justice or judge who attains 70 years of age and thereby causes justices and judges to be barred and removed from the Commonwealth payroll pursuant to the Mandatory Retirement Provision. *Id.*

reason. As shown below, this provision violates Appellants' rights to equal protection.

### A. The Court should apply an intermediate level of scrutiny to a law that draws a classification on the basis of age and impacts the right to work.

The right to equal protection—the right to be treated equally by the law—is one of the inherent rights recognized by Article I. *See Love v. Borough of Stroudsburg*, 528 Pa. 320, 324-25, 597 A.2d 1137, 1139 (1991). The question of whether a person's right to equal protection has been violated arises when a law draws classifications between people and treats them differently. The level of scrutiny applied by the Court to determine whether the law is constitutional depends on the type of classifications drawn by the law and nature of the rights impacted by the law: (1) a law that draws a "suspect" classification or impacts a "fundamental" right is subject to strict scrutiny; (2) a law that draws a "sensitive" classification or impacts an "important" right is subject to intermediate scrutiny; and (3) a law that implicates neither suspect or sensitive classes nor fundamental or important rights is subject to a rational basis test. *Id.* at 325, 597 A.2d at 1139; *see also Small v. Horn*, 554 Pa. 600, 615, 722 A.2d 664, 672 (1998).

Under strict scrutiny, a challenged law must be narrowly tailored to achieve a compelling governmental interest, and be the least restrictive means for achieving that interest. *Commonwealth v. Bell*, 512 Pa. 334, 344, 516 A.2d 1172, 1178 (1986). Under the rational basis test, the challenged law must be rationally related to a legitimate government interest.[10] *Id.*

Under intermediate scrutiny, which is the standard that the Court should apply here, the law must be substantially related to the achievement of an important government interest. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *James v. SEPTA,* 505 Pa. 137, 147, 477 A.2d 1302, 1307 (1984). The intermediate standard of review

---

[10] This Court has applied a more restrictive form of the rational basis test when considering substantive due process claims under the Pennsylvania Constitution. *Nixon v. Commonwealth*, 576 Pa. 385, 401, 839 A.2d 277, 288 n.15 (2003). That test is that the challenged law "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Id.* at 400-01, 839 A.2d at 288 (citations omitted). In light of the significance of the right to work and the sensitive nature of the classification drawn by the Mandatory Retirement Provision, as discussed in the text below, the Court should consider whether to import this more stringent form of the rational basis test into its equal protection analysis.

> is characterized by the following techniques: (1) requiring that the governmental interest asserted be an important one, though not "compelling" as is required in a strict scrutiny review; (2) requiring that the governmental classification be drawn so as to be closely related to the objectives of the legislation; (3) requiring that a person excluded from enjoyment of an important right or benefit because of his membership in a class be permitted to challenge the denial on the grounds that his *particular* denial would not further the governmental purpose of the legislation.

*Id.* (citations omitted).

Here, the Mandatory Retirement Provision draws a classification based on age—and in particular singles out older citizens for different treatment—and impacts the right to work while frustrating the will of the electorate. As discussed below, the Court should apply an intermediate scrutiny to determine whether this provision violates equal protection.

The right to work is an "undeniably important" right. *See Nixon*, 576 Pa. at 400-02, 839 A.2d at 287-88 (noting that the "right to pursue a lawful occupation" in one of the "undeniably important" rights guaranteed under Article I of the Pennsylvania Constitution). When a person "is deprived of the right to labor, his liberty is restricted, his

capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work." *Smith v. Texas*, 233 U.S. 630, 636 (1914). The right to work has been called "an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the declaration of independence . . . . This right is a large ingredient in the civil liberty of the citizen." *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring); *see also Brace Bros. v. Evans*, 5 Pa. C.C. 163, *2 (Allegheny Cnty. Ct. Com. Pl. 1888) ("[T]he rights of life and liberty . . . include the right to provide a living for one's self and family by any lawful means."). Even if old age were not a "sensitive" classification, the importance of the right to work, without more, means that the Court should apply heightened scrutiny to the Mandatory Retirement Provision. *See James*, 477 A.2d at 1306 (applying strict scrutiny to classification affecting access to courts because, although classification was not drawn on "sensitive" grounds, interest in access to the courts was an important right).[11]

[11] In fact, in light of the significance of the right to work, a strong argument could be made that the right is fundamental and therefore laws impacting it must pass strict scrutiny. *But see Nixon*, 576 Pa. at

Moreover, the Court should find that a law that distinguishes between 70-year-olds and those younger than 70 draws a "sensitive" classification. Although this Court has not elaborated on when a classification is "sensitive" and when it is not, the federal courts' treatment of the subject is instructive:

> The Supreme Court uses certain factors to decide whether a new classification qualifies as a quasi-suspect class. They include: A) whether the class has been historically "subjected to discrimination"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and D) whether the class is "a minority or politically powerless." Immutability and lack of political power are not strictly necessary factors to identify a suspect class. Nevertheless, immutability and political power are indicative, and we consider them here.

*Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 786 (2012) (citations omitted).

The class of over-70 judges meets the key criteria. First, older citizens constitute a class that has been subject to repeated and

---

401, 839 A.2d at 288. At the very least, the right to work is an "important" right and laws that infringe on this right deserve intermediate scrutiny.

arbitrary discrimination. There can be no doubt that the United States of America has had a long and unfortunate history of age discrimination in employment. Many citizens in our country have been subjected to stereotyped distinctions between the young and the old, including that older people are often senile, incompetent, lack productivity, suffer from rigid thinking, are unable to continue to learn, forgetful, and likely to develop dementia.

The United States Congress itself has concluded that classifications based upon age are inherently invidious—particularly in the employment arena. In 1967, Congress passed the Age Discrimination in Employment Act, which prohibits employment discrimination against people forty years of age or older. 29 U.S.C. § 621. Congress found and declared the following:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger

> ages, high among older workers; their numbers are great and growing; and their employment problems grave; [and] (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

*Id.* For similar reasons, the Pennsylvania Legislature also outlawed age discrimination in employment when it passed the Pennsylvania Human Relations Act. *See* 43 P.S. §§ 951-963.

The second factor, "whether the class has a defining characteristic that frequently bears [a] relation to ability to perform or contribute to society," *Windsor*, 699 F.3d at 181, also indicates that a quasi-suspect class is present here. While age may have a relationship to an employee's ability to perform physical tasks, *see Mass. Bd. of Retirement v. Murgia,* 427 U.S. 304, 311 (1976), reaching the "magic" age of 70 does not "frequently" correlate with loss of ability to engage in the intellectual pursuit of judging. Indeed, the opposite is true; age and experience improve judges' abilities. *See supra* Part II.B.

The third factor, whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Windsor*, 699 F.3d at 181, also goes in Appellants' favor. Being old is an

immutable quality in that a person has no choice but to age, and cannot reverse the process. And, as discussed above, old age is obvious and, unfortunately, makes older citizens obvious targets for discrimination.

This leaves only the fourth factor, "whether the class is a minority or politically powerless." While older citizens are in a minority—and were a smaller minority in 1968—they have not traditionally been viewed as politically powerless. This factor, however, is far less important than the others. "The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n. 24 (1985) (Marshall, J., concurring in part and dissenting in part) (citations omitted).

Because the Mandatory Retirement Provision draws a classification on the basis of age and impacts the right of older judges to work, the Court should apply intermediate scrutiny to determine whether the provision violates equal protection.[12]

---

[12] Although the United States Supreme Court previously decided to apply only a rational basis test to another state's mandatory retirement provision, *see Gregory v. Ashcroft*, 501 U.S. 452, 470-71

### B. The Mandatory Retirement Provision fails under either intermediate scrutiny or the rational basis test.

The Mandatory Retirement Provision cannot withstand an intermediate level of scrutiny or a rational basis review. The provision utterly fails to substantially further its purported goal—of removing incapacitated judges from the bench—or to be rationally related to that goal, for multiple reasons.

---

(1991), and this Court in *Gondelman* decided it was constrained by federal law to apply a rational basis test when considering whether the Mandatory Retirement Provision violates the federal constitution, *see* 520 Pa. at 459-60, 554 A.2d at 900, nothing prevents this Court from applying intermediate scrutiny under the Pennsylvania Constitution in this case. In fact, this Court has stated that "[w]e have recognized that Pennsylvania may afford greater protection to individual rights under its Constitution." *W. Pa. Soc. Workers 1982 Campaign*, 512 Pa. at 28, 515 A.2d at 1334 (citing *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981)); R. Woodside, *Pennsylvania Constitutional Law*, 116-19 (1985)); *see also Pap's A.M. v. City of Erie*, 571 Pa. 375, 399, 812 A.2d 591, 605 (2002) (concluding that the Pennsylvania Constitution provides greater protection of freedom of expression than the federal constitution); *In re "B*," 482 Pa. 471, 485, 394 A.2d 419, 425 (1978) (concluding that the Pennsylvania Constitution provided "more rigorous and explicit protection for a person's right of privacy" than the federal constitution). In light of the importance placed by the Pennsylvania Constitution and this Court on protecting the inherent rights announced in Article I, it is imperative that the Court approach the determination of what level of Pennsylvania equal protection scrutiny should apply with a fresh analysis of the issue, rather than conjecture on how the issue might be resolved under the federal constitution.

First, the passage of time since the provision first was enacted has eroded any possible justification for evicting Pennsylvania judges—many of whom are at their judicial prime upon reaching the age of 70—unceremoniously from the bench. There is no basis to conclude that "most" judges suffer a deterioration in performance when they turn 70, and in fact the opposite is true. And as the population as a whole ages, the incidence of cognitive decline has decreased remarkably in recent years. Driscoll R.22a-23a; Tilson R. 20a-21a. "In a large nationally representative survey of older Americans [a study has found that] between 1993 and 2002, the prevalence of [cognitive impairment] consistent with dementia decreased from 12.2% to 8.7%, representing an absolute decrease of 3.5 percentage points and a relative decrease of nearly 30%." *See* Kenneth M. Langa, *et al.*, *Trends in the Prevalence and Mortality of Cognitive Impairment in the United States: Is There Evidence of a Compression of Cognitive Morbidity?*, Alzheimer's & Dementia 4 (2008) (Appendix E). Following this trend, the decrease is likely even greater as of 2013. These changes are observable even since the early 1990s. Driscoll R.22a-23a; Tilson R. 20a-21a. Thus, rather than relying on pernicious and outmoded stereotypes of older

Americans to justify the Mandatory Retirement Provision's discriminatory treatment, the Court should recognize that empirical data shows that the provision's classification is wholly irrelevant to achieving its objective.

Second, the continued existence of the senior judge system will ensure that there is sufficient judicial manpower. There is simply no empirical basis for concluding otherwise. Some judges will retire before age 70, some after age 70, and some will only wish to continue as "senior judges." Hence, any rationale predicated on the need for "additional manpower"—which under the present system merely involves paying less compensation to judges over 70 who wish to continue their judicial duties on a full-time basis—is, at best, pretextual.

Third, the irrationality of the Mandatory Retirement Provision is laid bare by the existence of the second removal provision in the Pennsylvania Constitution, which explicitly provides for removal of incapacitated judges—in notable contrast to the Mandatory Retirement Provision, which only serves to pay older judges less for the same work as younger judges. *See* PA. CONST. art. V, § 18. In addition to directly

targeting judges who have become incapacitated (rather than simply sweeping aside a broad swath of older judges in an attempt to clear out any incapacitated judges), Section 18 of Article V also provides for a variety of procedural protections to ensure that no justice or judge is treated unfairly solely on the basis of age. *Id.* Because any judges who become incapacitated while on the bench can be selectively removed, there is no need for the Mandatory Retirement Provision's overbroad attempt to further that objective.

The Mandatory Requirement Provision discriminates against older Pennsylvania judges by requiring those who wish to continue with their full-time judicial duties to accept less pay for the same work, offering fewer benefits, and stigmatizing them as a group. It cannot withstand intermediate scrutiny. For the same reasons, the Mandatory Retirement Provision also fails the rational basis test. The provision is a relic of unconstitutional discrimination, which the Court should not uphold. Accordingly, under the inviolate principles of Article I, the Mandatory Retirement Provision cannot pass constitutional muster and the Court should enjoin the Appellees from enforcing it.

## III. The Mandatory Retirement Provision Violates Appellants' Inherent Rights to Due Process.

The Mandatory Retirement Provision also deprives Appellants of an interest in their continued employment as judges—jobs to which they were duly elected, and from which they can otherwise only be removed with adequate process—in direct contravention of their substantive due process rights under Article I of the Pennsylvania Constitution.

Article I of the Pennsylvania Constitution recognizes a right to possess and enjoy property that is as fundamental as the right to life and liberty. "This Court has repeatedly recognized that 'property owners have a constitutionally protected right to enjoy their property.'" *Twp. of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 599 Pa. 568, 578-79, 962 A.2d 653, 659 (2009) (quoting *In re Realen Valley Forge Greenes Assocs.,* 576 Pa. 115, 131, 838 A.2d 718, 727 (2003)) (brackets omitted). The interest recognized in Article I extends not just to physical property, but to the ability for a person to practice his or her profession. *Khan v. State Bd. of Auctioneer Examiners*, 577 Pa. 166, 183, 842 A.2d 936, 946 (2004) (citing *Nixon v. Commonwealth*, 576 Pa. 385, 839 A.2d 277 (2003)) ("[A]ll persons within this Commonwealth

possess a protected interest in the practice of their profession."). The right to engage in a profession is, at the least, considered "important." *Id.* at 577 Pa. 185, 842 A.2d 947.

When reviewing whether a state action unconstitutionally deprives a person of a protected interest, a substantive due process inquiry balances "the rights of the parties involved subject to the public interests sought to be protected." *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 20 (Pa. Commw. Ct. 2012). Substantive due process claims affecting rights not found to be fundamental are generally subject to rational basis review. *Id.* at 21. But Pennsylvania's Constitution provides for an even more restrictive rational basis test than provided for by the federal constitution. *Nixon*, 576 Pa. at 401, 839 A.2d at 288 n.15. This Court has recognized the standard to mean that a law may "'not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.'" *Johnson*, 59 A.3d at 21 (quoting *Adler v. Montefiore Hosp. Ass'n of W. Pa.*, 453 Pa. 60, 72, 311 A.2d 634, 640-41 (1973)).

Appellants are individuals who, absent the Mandatory Retirement Provision, would all be gainfully employed in the occupation which they have chosen, and to which the voters of the Commonwealth elected them. If this Court were to find that the challenged provision does not implicate a fundamental right, the provision is subject to Pennsylvania's "stricter" form of rational basis review to determine whether the provision violates substantive due process. *See Nixon*, 576 Pa. at 401, 839 A.2d at 288 n.15. For the same reasons discussed above with regards to Appellants' equal protection claims under Article I, the Mandatory Retirement Provision deprives the Appellants of a property interest protected by the rights to substantive due process under Article I without a rational basis for doing so.

## CONCLUSION

For the foregoing reasons, the Court should strike down the Mandatory Retirement Provision because it violates Petitioners' rights under Article I of the Constitution.

Respectfully submitted,

Robert C. Heim (Pa. 15758)
Alexander R. Bilus (Pa. 203680)
David S. Caroline (Pa. 306547)
William T. McEnroe (Pa. 308821)
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

*Attorneys for Plaintiffs/Appellants Senior Judge Driscoll, Senior Judge Moss, and Judge O'Keefe*

William T. Hangley (Pa. 03533)
Michele D. Hangley (Pa. 82779)
Jonathan L. Cochran (Pa. 314382)
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933

*Attorneys for Plaintiff/Appellant Judge Tilson*

Dated: April 15, 2013

## PROOF OF SERVICE

The undersigned hereby certifies that true and correct copies of the Joint Brief of Plaintiffs/Appellants, Supporting Appendix, and accompanying Reproduced Records for Nos. 43 MD 2013 & 48 MD 2013 were sent via email to each of the following, which satisfies the service requirements of Pa. R.A.P. 121 as amended by the March 28, 2013 Order of the Court:

J. Bart DeLone (Pa.42540)
Office of the Attorney General
Appellate Litigation Sect
15th Floor, Strawberry Square
Harrisburg, PA 17120
*Counsel for Appellees Corbett and Aichele*

A. Taylor Williams
Administrative Office of
Pennsylvania Courts
Suite 1414 1515 Market Street
Philadelphia, PA 19102
*Counsel for Appellee Pines*

Dated: April 15, 2013

William T. McEnroe (Pa. 308821)
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

*Counsel for Plaintiffs/Appellants Senior Judge Driscoll, Senior Judge Moss, and Judge O'Keefe*