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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| AMY MCFALLS, *et al.* | : | |
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| *Petitioners* | : | |
| | : | NO. 4 MD 2021 |
| v. | : | |
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| 38th JUDICIAL DISTRICT, *et al.* | : | |
| | : | |
| *Respondents* | : | |
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**Reply Brief in Support of Respondents the 38th Judicial District, the Honorable Thomas M. Del Ricci, and Michael R. Kehs, Esquire's Preliminary Objections to the Petition for Review**

Plaintiffs' Brief in Opposition to Judicial Respondents' Preliminary Objections makes a few arguments that warrant a response.

### 1. Petitioners' standing response misses their request for future relief.

In response to Judicial Respondents' standing argument, Petitioners assert that they have standing because they are obligated to pay costs already imposed, face penalties if they do not, and did not receive adequate notice at the time of sentencing. (Petitioner's Brief at 37-38.)

Yet, Petitioners do not seek only retroactive relief related to costs imposed for their cases – they also want future relief unrelated to their cases. Namely, to enjoin the imposition or collection of duplicative costs in the future, to require the Court of Common Pleas to implement a program regarding costs and notice, and to declare that the Court of Common Pleas cannot impose costs unless it provides a timely bill of costs. (Petition for Review ¶¶ 102, Wherefore Clause.)

Petitioners' Brief, however, does not address how they have standing for this future relief. Nowhere do they argue that they will be subject to direct, immediate, or future harm stemming from how the Court of Common Pleas imposes costs and what notice is required. While Petitioners allege that they are currently paying balances, that is

a separate question from whether future court procedures about how the court imposes costs in the first place will harm them.

Next, Petitioners allege that class members who will allegedly be subject to future duplicative costs have standing. But that overlooks the fact that Petitioners themselves must have standing to bring a class action. *See Nye v. Erie Ins. Exch.*, 470 A.2d 98, 100 (Pa. 1983); *Citizens for State Hosp. v. Commonwealth*, 553 A.2d 496, 498 (Pa. Cmwlth. 1989), *aff'd*, 600 A.2d 949 (Pa. 1992). They do not, though. And they do not address this.

Petitioners' cited cases that purport to support their argument do the opposite. First, in *Kuren v. Luzerne Co.,* standing was not at issue. Moreover, the reason that the individual plaintiffs could bring a class action pertaining to indigent representation in criminal cases is because their criminal cases were pending. Thus, the lack of representation directly injured them. 146 A.3d 715, 720 (Pa. 2016).[1]

Here, conversely, what happened in sentencing and how costs were imposed in Petitioners' criminal cases is in the past. How cost

[1] Likewise, standing was not at issue in *Fawber v. Cohen*, 532 A.2d 429 (Pa. 1987), which Petitioners also cite.

information is presented to criminal defendants going forward does not injure Petitioners.

Next, Petitioners' reliance on *Dillon v. City of Erie* does not help their cause. 83 A.3d 467 (Pa. Cmwlth. 2014). There, the petitioner had standing to challenge a firearm ordinance because he "was threatened with the actual enforcement" of the ordinance and its penalties. *Id.* at 475. Here, conversely, no threat exists that Petitioners will be subject to the imposition of costs in the future.

Nor does *Firearm Owners Against Crime v. City of Harrisburg*, help Petitioners. 218 A.3d 497 (Pa. Cmwlth. 2019).[2] There, the firearm-owning petitioners challenged ordinances pertaining to firearms where enforcement was "current, actual, and threatened[.]" *Id.* at 506. Thus, the petitioners had a real fear of criminal prosecution, and the ordinances chilled their protected rights related to firearms. *Id.* at 506-07. Once again, Petitioners do not allege that they will be subject to the Court of Common Pleas' sentencing procedures in the future.

[2] The Supreme Court of Pennsylvania granted allocatur on the pertinent standing issue in *Firearm Owners Against Crime v. Papenfuse*, 230 A.3d 1012 (Pa. 2020).

At bottom, Petitioners do not have standing to challenge how the Court of Common Pleas operates.

### 2. Petitioners' Brief confuses what "policy" is at issue and the nature of judicial discretion.

The sole policy that Petitioners base their claims on is that Judicial Respondents "allow" judges the judicial discretion in individual cases to impose duplicative costs as part of imposing a sentence. (Petition for Review ¶ 36.) That is it. They make no claim that duplicative costs are imposed outside of a sentencing judge's discretion, such as administratively or on top of costs a judge imposes.

Petitioners' Brief attempts to muddy this issue by claiming that judges do not have discretion to "violate the law." But whether judges have discretion to "violate the law" misses the point. If Petitioners believe that illegal costs were imposed, they are free to raise that argument in their criminal case. Indeed, the cases Petitioners cite about whether costs are part of a sentence are appeals in criminal cases. Not civil cases.

To accept Petitioners' argument would mean that every time a judge "violated the law" – such as admitting inadmissible evidence, misinterpreting case law, imposing an illegal sentence, abusing their

discretion, and a host of other reasons that judicial officers may make mistakes – that a judicial district is somehow liable because it allowed judges to exercise judicial discretion. Not only is this novel argument unsupported by law, but it also has the practical effect of opening a flood of collateral lawsuits against the courts.

Even more, under Petitioners' model, every judicial district and appellate court must have a "policy" that judges are not allowed to exercise their discretion. Or perhaps a policy that judges can exercise discretion only if that discretion does not "violate the law."

### 3. Petitioners skip over their request for affirmative actions, which sovereign immunity bars.

Petitioners do not dispute that sovereign immunity applies to suits seeking to "compel affirmative action on the part of state officials." *Stackhouse v. Pennsylvania*, 892 A.2d 54, 59 (Pa. Cmwlth. 2006)(quoting *Fawber v. Cohen*, 532 A.2d 429 (Pa. 1987)), *alloc. denied*, 903 A.2d 539 (Pa. 2006). Instead, they argue that sovereign immunity is not applicable because they seek just declaratory relief. Not so.

To the contrary, Petitioners want this Court to order Judicial Respondents to take affirmative actions: creating a new policy on how costs are presented to defendants, adjusting balances, and contacting

credit reporting agencies. (Petition, Wherefore Clause.) Such affirmative steps – like creating policies – fall within sovereign immunity, as this Court held in *Stackhouse*. *See id.* (holding that sovereign immunity precluded claim that the state police must implement guidelines and policies).[3]

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[3] Petitioners assert that immunity cannot be raised in preliminary objections, yet claim no prejudice and offer no reason to strike the immunity defense other than citing to the civil procedure rules. But this Court correctly holds that immunity can be ruled upon via preliminary objections, even when the petitioner objects, unless the petitioner "advances some reason 'other than prolonging the matter[.]'" *Firearms Owners Against Crime*, 218 A.3d at 515 (citing *Feldman v. Hoffman*, 107 A.3d 821, 835 (Pa. Cmwlth. 2014)); *Thompson v. Puskar*, 2014 WL 803455, at *3 (Pa. Cmwlth. 2014)(same), *cert. denied*, 574 U.S. 1034 (2014); *R.H.S. v. Allegheny Co. Dep't of Human Servs.,* 936 A.2d 1218, 1228 (Pa. Cmwlth. 2007)(recognizing that while the plaintiff was "technically correct" that immunity is an affirmative defense, immunity was apparent from the complaint's face and no prejudice existed in ruling on the defendant's preliminary objections), *alloc. denied*, 936 A.2d 1218 (Pa. 2008); *see also Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 60 n.7 (Pa. Cmwlth. 2006)(holding that immunity may be raised in preliminary objections where delaying its application serves "no purpose"), *alloc. denied*, 903 A.2d 539 (Pa. 2006); *but see Lucabaugh v. City of Pottsville,* 2017 WL 1034608, at *4 n.4 (Pa. Cmwlth. 2017)(stating that a court may not rule on immunity raised by preliminary objections when the opposing party objects). Further, immunity is immunity from suit, and may be raised at any time. *See Zanders v. Bigley*, 2018 WL 5316103, at *2 (Pa. Cmwlth. 2018); *Taylor v. City of Philadelphia*, 692 A.2d 308, 313 (Pa. Cmwlth. 1997), *aff'd,* 699 A.2d 730 (Pa. 1997). That is because immunity defenses are not waivable. *Tulewicz v. SEPTA*, 606 A.2d 427, 429 (Pa. 1992).

### 4. Petitioners' retort to this Court's lack of jurisdiction rests on a distinguishable case and skims over their requested relief that seeks affirmative administrative changes.

Petitioners' reliance on *Gass v. 52nd Judicial Dist.* is misplaced. 223 A.3d 212 (Pa. 2019). First, that case involved an injunction to enjoin a probation department's policy. The petitioners there did not – as Petitioners here do – seek to compel affirmative actions by a court. Petitioners' statement that they do not seek changes to "internal operations" is just wrong: they want this Court to order the Court of Common Pleas to create new policies. Specifically, by ordering Judicial Respondents:

> to develop within 30 days a program of effective and timely notice which is to include an itemized bill of all costs given to defendants and counsel at the time of sentencing that correlates the costs imposed to the charges in the case, and a rewritten form of sentencing order.

(Petition for Review, Wherefore Clause.) In other words: changes to internal operations.

Next, this Court in *Gass* sua sponte interpreted a preliminary injunction action as a writ of prohibition. *See id.* at 212 (stating that the Commonwealth Court based its reasoning on "Petitioners' ostensible

assertion that the Judicial District was 'without jurisdiction,' a phrase akin to a prohibition claim.")

Here, conversely, Judicial Respondents are not claiming that this case is a writ of prohibition, but instead pointing out that Petitioners are seeking affirmative changes in how the Court of Common Pleas operates, which involves its administration. But, only the Supreme Court has "supervisory and administrative authority" over the courts, and only that Court "shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts[.]" Pa. Const. Art. V, § 10.

Finally, Judicial Respondents did not waive this jurisdiction defense. For one, subject matter jurisdiction is not waivable. *Commonwealth v. Jones*, 929 A.2d 205, 208 (Pa. 2007); *Szymanski v. Allegheny Co. Court Criminal Div.*, 465 A.2d 1081, 1082 (Pa. Cmwlth. 1983)(holding that question of jurisdiction under 42 Pa.C.S.A. § 761 not waivable). Second, Judicial Respondents' Preliminary Objections stated that other reasons might be raised in the Brief. (Preliminary Objections ¶ 18.) Petitioners have identified no prejudice as to how Judicial

Respondents raising the argument in their Brief, which Petitioners were able to respond to, prejudiced them.

### 5. Petitioners' argument that costs are not part of a sentence relies on appeals in criminal cases, not collateral attacks against a court in civil court.

Petitioners' argument that they are not making a collateral attack because court costs are separate from a criminal sentence tellingly relies on cases that are appeals within criminal cases (except for cases solely against a clerk's office). They do not cite any case where a separate court, such as this one, in its original jurisdiction held that a sentencing judge erred in exercising their discretion to impose costs.

The vital distinction here is that Petitioners are not claiming that a sentence was wrongly interpreted by a clerk or some other entity or that costs were added outside of a judge's discretion. Instead, their claim is only that Judicial Respondents are allowing judges the discretion in cases they are presiding over to impose costs.

Again, Petitioners were free to use their available options to ask for reconsideration or appeal within their criminal cases. That is the procedurally proper way to claim that costs imposed by a judge were improper – just like in the cases Petitioners rely on.

Respectfully submitted,

***s/Michael Daley, Esquire***
Michael Daley, Esquire
Nicole Feigenbaum, Esquire

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

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**Certificate of Service**

The undersigned certifies that on June 2, 2021, he caused the foregoing *Reply Brief* to be served on counsel of record via PACfile.

**/s/ Michael Daley**
Michael Daley, Esquire

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