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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SARA LADD, SAMANTHA HARRIS, AND POCONO MOUNTAIN VACATION PROPERTIES, LLC, Petitioners, v. REAL ESTATE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA AND DEPARTMENT OF STATE (BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS) OF THE COMMONWEALTH OF PENNSYLVANIA, Respondents.	No. 321 MD 2017

PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS

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INTRODUCTION

Petitioner Sara ("Sally") Ladd brought this case to vindicate her right to earn an honest living as a short-term vacation-property manager in the Commonwealth of Pennsylvania. Sally is a 61-year-old entrepreneur who works from her home in New Jersey helping people rent out their vacation properties on the Internet. She offered her services exclusively in the Pocono Mountains until Pennsylvania's Bureau of Professional and Occupational Affairs called to inform her that she was under investigation for the unlicensed practice of real estate. This led Sally to discover that, in order to continue working, she would have to obtain a real-estate broker's license, which would require, among other things, spending three years working for an established broker, passing two exams, and opening her own brick-and-mortar office in Pennsylvania. Unwilling and unable to subject herself to these burdensome and unnecessary requirements, Sally began terminating her contracts with satisfied clients, including Petitioner Samantha Harris.

Petitioners filed their Petition for Review on July 17, 2017, alleging that Pennsylvania's Real Estate Licensing and Registration Act (RELRA), 63 Pa. Cons. Stat. §§ 455.101, *et seq.*, imposes unconstitutional restrictions on Sally's right to pursue a chosen occupation under Article I, Section 1 of the Pennsylvania Constitution. The case is now before this Honorable Court on Respondents'

Preliminary Objections, filed on August 17, 2017. For the reasons set forth below, Petitioners respectfully request that the Court overrule those Objections.

STATEMENT OF FACTS

The facts in this case are set forth fully in the Petition for Review. While Respondents have presented an accurate summary of many of those facts, *see generally* Respondents' Brief in Support of Preliminary Objections 2–6, because that summary still contains multiple inaccuracies, Petitioners offer the following specific corrections:

- Respondents state that "[a]t any time, Ms. Ladd is leasing properties on behalf of at least five clients." Resp'ts' Br. 3. In fact, Sally had stopped operating by the time the Petition was filed, she never "leased" any property, and she managed *at most* five clients' properties. Petition for Review ¶¶ 29–33, 67–68.
- Respondents state that Sally "advised her clients as to their legal obligations with respect to taxes." Resp'ts' Br. 4. In fact, Sally worked only to make her clients aware of Pennsylvania's "hotel tax." Petit. ¶ 34.
- Respondents state that Sally challenges RELRA's requirements that she spend three years "gaining relevant experience" and "maintain a presence in Pennsylvania." Resp'ts' Br. 5. In fact, Petitioners argue that RELRA

requires Sally to obtain mostly *irrelevant* experience and to "maintain a fixed office" in Pennsylvania. Petit. ¶¶ 58, 63–66, 83–85.

- Respondents state that Petitioners challenge RELRA's constitutionality on the ground that its licensing requirements are "excessive." Resp'ts' Br. 3. That is true, although Petitioners also challenge RELRA's constitutionality for all the additional reasons set forth in the Petition, including that requiring short-term vacation-property managers like Sally to obtain RELRA's onerous real-estate broker's license does not bear a real and substantial relationship to the public health, safety, or welfare; that it imposes an undue burden on Sally's right to pursue a chosen occupation; and that its application to Sally serves purely protectionist purposes. Petit. ¶¶ 83–86.
- Respondents state that Petitioners request that Sally be free to "operate her vacation rental business, [Pocono Mountain Vacation Properties], outside of the law." Resp'ts' Br. 3. In fact, Petitioners request that Sally be free to "pursue her chosen occupation free from arbitrary, irrational, and protectionist legislation," Petit. ¶ 81, as guaranteed by Article I, Section 1 of the Pennsylvania Constitution.

JURISDICTION

Petitioners bring this lawsuit pursuant to Article I, Section 1 of the Pennsylvania Constitution and the Declaratory Judgments Act, 42 Pa. Cons. Stat.

section 7532. This Court has jurisdiction over this action under *id.*, section 761(a)(1).

STANDARD OF REVIEW

"The test on preliminary objections is whether it is clear and free from doubt from all of the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief." *Bower v. Bower*, 531 Pa. 54, 57 (1992). "When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom." *Haun v. Cmty. Health Sys., Inc.*, 14 A.3d 120, 123 (Pa. Super. Ct. 2011) (quoting *Hykes v. Hughes*, 835 A.2d 382, 383 (Pa. Super. Ct. 2003)). "[W]here any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections." *Pa. State Lodge, Fraternal Order of Police v. Com., Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 416 (Pa. Commw. Ct. 2006).

ARGUMENT

Petitioners contend that requiring Petitioner Sally Ladd to comply with RELRA's onerous licensing requirements violates her right under Article I, Section 1 of the Pennsylvania Constitution to work as a short-term vacation-property manager, as well as Petitioner Samantha Harris's right to avail herself of those services. Pennsylvania courts have for almost a century required that laws

restricting the right to pursue a chosen occupation "not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which [they] employ[] must have a real and substantial relation to the objects sought to be attained." *Nixon v. Commonwealth*, 576 Pa. 385, 401–02 (2003). Petitioners argue that RELRA fails that test as applied to Sally's work.

Respondents have filed four Preliminary Objections in an attempt to dismiss the case, each of which fails. First, Respondents object that Petitioners have failed to plead an actual controversy. But RELRA's constitutionality is disputed and denying declaratory review would impose substantial hardships on Petitioners, which satisfies the actual-controversy requirement. Second, Respondents object that Petitioners have failed to exhaust statutory remedies. But the DJA allows relief notwithstanding statutory remedies, and in any case, no adequate alternative remedies exist. Third, Respondents object that Petitioners have failed to state a claim. But violation of the right to pursue a chosen occupation under Article I, Section 1 of the Pennsylvania Constitution is a cognizable legal claim. Finally, Respondents object that Harris does not have standing. But the Court need not decide that issue, and in any case, a victory here would allow Harris to immediately continue using Sally's services, which is sufficient for standing. All four Preliminary Objections must therefore be denied.

I. Response to Preliminary Objection One: Petitioners Have Pled An Actual Controversy Because RELRA's Constitutionality Is Disputed And Denying Review Would Impose Substantial Hardships

Respondents first object that Petitioners have failed to plead an "actual controversy," as required to sustain an action under the Declaratory Judgments Act (DJA), 42 Pa. Cons. Stat. §§ 7531, *et seq*. *See* Respondents' Preliminary Objections ¶ 27. But Respondents are mistaken; the issues are fully developed and this case is ripe for review.

The whole point of the DJA is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, or other legal relations." 42 Pa. Cons. Stat. § 7541(a). Indeed, the Act was specifically designed to "curb the courts' tendency to limit the availability of judicial relief to only cases where an actual wrong has been done or is imminent." *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 607 Pa. 527, 541 (2010). To that end, the plain language of the DJA grants courts the power to "declare rights, status, and other legal relations." 42 Pa. Cons. Stat. § 7532. That power extends specifically to cases brought by "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute," *id.* § 7533, and generally to "any proceeding, where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty," *id.* § 7536. The DJA must be "liberally construed and administered" to afford the relief it promises. *Id.* § 7541(a).

Respondents are correct that an actual controversy is required to sustain an action under the DJA. *Bayada*, 607 Pa. at 541. But when considering whether that requirement is met, courts ask not whether a "full-fledged battle" has broken out between the parties, as Respondents suggest, but only whether "the *issues* are adequately developed for judicial review and what hardship the parties will suffer if review is delayed." *Pa. Indep. Oil & Gas Ass'n v. Com., Dep't of Envtl. Prot.*, 135 A.3d 1118, 1128 (Pa. Commw. Ct. 2015) (internal quotes and citations omitted). To meet that standard, the parties need only harbor conflicting legal claims suggestive of impending litigation. *Id.*

There is no question that Petitioners have pled an actual controversy under that test. Sally was successfully operating her short-term vacation-property management business before one of Respondents' enforcement agents informed her that she was under investigation for the unlicensed practice of real estate. *See* Petit. ¶ 60. This led Sally to discover that RELRA requires an onerous real-estate broker's license for any person who, *inter alia*, "manages any real estate" or "undertakes to promote the . . . rental of real estate," and that continuing to work without obtaining that license would subject her to fines and prosecution. 63 Pa. Cons. Stat. §§ 455.201, 455.303, 455.305; *see* Petit. ¶¶ 61–62. Sally does not contest that RELRA applies to her services. *See* Petit. ¶¶ 1, 25–27, 61. What she contests is the constitutionality of the General Assembly's decision to regulate her

(and anyone similarly situated) through RELRA in the same heavy-handed way that traditional real-estate brokers are regulated. *See* Petit. ¶¶ 1–4, 62–68, 72–77.

In other words, the actual controversy here is not over whether RELRA applies to Sally—both parties agree it does—but whether it is *constitutional* that it applies to her. And the only way to resolve that question is through the DJA. Respondents, for their part, have no discretion to simply agree with Petitioners and stop enforcing the law.[1] *See Lyman v. City of Philadelphia*, 529 A.2d 1194, 1195 (Pa. Commw. Ct. 1987) ("While administrative agencies can pass upon the constitutionality of their own regulations, they do not possess the authority to pass upon the validity and constitutionality of acts of the General Assembly."). It is precisely because administrative agencies have no such authority that Pennsylvania courts have long recognized the DJA as the appropriate avenue for determining whether a statute violates the constitutional rights of those affected by it. *See Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm'n*, 447 A.2d 675, 679 (Pa. Commw. Ct. 1982).

Declaratory review is especially appropriate where, as here, denial would impose substantial hardships on the challenger. In *Pennsylvania Independent*, for instance, an oil-and-gas association brought a pre-enforcement challenge to enjoin the Department of Environmental Protection from applying unconstitutional well-

[1] And in any case, Respondents have elected to actively press the opposite position. *See* Resp'ts' Br. 8–13.

permitting standards. 135 A.3d at 1123. The association argued that its members owned property specifically for drilling, that they needed unconstitutional permits that were both lengthy and costly to obtain in order to proceed, and that its members need not defy the law or else subject themselves to a burdensome permitting process just to challenge that process under the DJA. *Id.* at 1121, 1124. The Commonwealth Court agreed, recognizing that a declaratory judgment could easily resolve the conflict without subjecting the association's members to a burdensome and futile permitting process. *Id.* at 1128.

Sally faces a similar situation. Like the petitioners in *Pennsylvania Independent*, who were deprived of drilling on land they owned, Sally has been deprived of operating the short-term vacation-property management business that she built and was relying on for retirement income. *See* Petit. ¶¶ 11–42, 72–74. Like the petitioners in *Pennsylvania Independent*, who were forced either to ignore the law and see their permits denied or else comply with burdensome permitting requirements, RELRA has forced Sally to either continue working and risk fines and prosecution, *see* Petit. ¶¶ 59–61, 67, or else expend immense time and money attempting to comply with RELRA's burdensome licensing process, *see id.* ¶¶ 50–58, 62–66. And just as in *Pennsylvania Independent*, a declaration in Sally's favor would immediately resolve this controversy and spare her from the serious burdens RELRA imposes on her ability to earn a living. *See id.* ¶¶ 63, 67–68, 72–77.

Finally, Because Respondents misconstrue Petitioners' challenge as seeking only judicial assurance that RELRA does not apply to Sally—rather than a declaration that such application is unconstitutional—the cases they rely on are inapposite. *See* Resp'ts' Br. 17–18. Respondents cite to *Linesville VDW v. Commonwealth.*, 337 M.D. 2015 (Pa. Commw. Ct. Feb. 5, 2016) and *Morrison v. Commonwealth, State Board of Medicine*, 618 A.2d 1098 (Pa. Commw. Ct. 1992), for the proposition that Petitioners are not entitled to such assurance because mere advisory opinions are inappropriate. But both *Linesville* and *Morrison* involved attempts to clarify the legality of proposed courses of action under ambiguous statutory provisions. *See Linesville*, 337 M.D. 2015 at 1–2; *Morrison*, 618 A.2d at 1098. Here, both parties *agree* that RELRA requires Sally to obtain an onerous broker's license. *Compare* Petit. ¶ 61 ("This phone call led Sally to review RELRA and discover that her property-management services constituted the practice of real estate."), *with* Resp'ts' Br. 11–12 ("Ms. Ladd's activities fall squarely within the plain language of the Act, as admitted."). The controversy, again, is over whether that is constitutional. *Linesville* and *Morrison* are therefore inapposite.

In short, Respondents have failed to carry their burden of proving "free and clear from doubt" that Petitioners did not plead an actual controversy under the DJA. The parties clearly dispute whether it is constitutional for Pennsylvania to require Sally to obtain RELRA's onerous real-estate broker's license simply to

perform short-term vacation-property management services. And a declaratory judgment would immediately resolve that dispute, while denying review would impose substantial hardships on Sally. The Court should overrule Objection One.

II. Response To Objection Two: Petitioners Have Not Failed To Exhaust Because The DJA Allows Relief Notwithstanding Statutory Remedies, And In Any Case, No Adequate Alternative Remedies Exist

Respondents next object that Petitioners have failed to exhaust existing statutory remedies. *See* Prelim. Objects. ¶ 38. But Respondents are mistaken for multiple reasons, including that the DJA provides an avenue for relief notwithstanding existing statutory remedies; that no alternative remedies even exist; and that the remedy Respondents do propose would be inadequate.

The DJA *expressly* disclaims the principle that statutory remedies foreclose declaratory relief. 42 Pa. Cons. Stat. § 7541(b) ("The General Assembly finds and determines that the principle rendering declaratory relief unavailable in circumstances where an action at law or in equity or a special statutory remedy is available has unreasonably limited the availability of declaratory relief and such principle is hereby abolished."); *id.* § 7537 ("[T]he existence of an alternative remedy shall not be a ground for the refusal to proceed under this subchapter."). That is why the DJA allows challengers to seek a declaration of "rights, status, and other legal relations *whether or not further relief is or could be claimed*," *id.* § 7532 (emphasis added), and stresses that "the remedy provided by this subchapter

shall be *additional and cumulative to all other available remedies* except as provided in subsection (c)," *id.* § 7541(b) (emphasis added).[2]

The Pennsylvania Supreme Court reiterated all of this recently in *Bayada*, in response to the very same arguments Respondents raise here. *See* 607 Pa. at 541. There, an in-home-care company sought a declaratory judgment in the Commonwealth Court's original jurisdiction that a Department of Labor and Industry overtime-pay regulation conflicted with the Minimum Wage Act. *Id.* at 534. The Supreme Court requested supplemental briefing on the question of ripeness, which the dissenters below disputed, in part because the corporation had allegedly failed to exhaust the administrative-hearing process. *Id.* at 538, 540. The Court rejected that argument because the DJA "affords a broad basis for relief" that "shall not be limited" by the availability of alternative statutory remedies. *Id.* at 541.

Respondents' invocation of *Lashe v. Northern York County School District*, 417 A.2d 260, 263 (1980) (citing *Lurie v. Republican Alliance*, 412 Pa. 61, 63 (1963)), does not change this. Respondents cite that case for the proposition that a "well-settled rule" precludes declaratory review where a statutory remedy is available. *See* Resp'ts' Br. 18. But *Lashe* predates the modern DJA, and the

[2] Subsection (c) does not apply here, providing exceptions only for: (1) actions involving a divorce or annulment; (2) proceedings within the exclusive jurisdiction of a tribunal other than a court; or (3) proceedings involving an appeal from an order of a tribunal. 42 Pa. Cons. Stat. § 7541(c).

exhaustion requirement operative in that case was "based on Section 1504 of the Statutory Construction Act of 1972." 417 A.2d at 263. That was the very provision the Declaratory Judgments Act of 1976 explicitly superseded. *See* 42 Pa. Cons. Stat. § 7541(b); *accord Bayada*, 607 Pa. at 541. *Lashe* only applied the old rule because the plaintiffs did not proceed under the amended DJA. *See generally* 417 A.2d 260. *Lashe* is therefore inapposite.

Moreover, even if the Court were to find that Petitioners needed to exhaust statutory remedies, this case is subject to two well-recognized exceptions to that principle for situations where: (1) there is no statutory remedy available; or (2) the existing remedy would be inadequate under the circumstances. *See Borough of Green Tree v. Bd. of Prop. Assessments, Appeals & Review of Allegheny Cty.*, 459 Pa. 268, 276 (1974). Here, Petitioners have no available statutory remedy, and the remedy Respondents propose would be completely inadequate in view of the relief Petitioners actually seek.

First, Sally has no genuine remedy *to* exhaust. RELRA allows the Real Estate Commission to bring enforcement actions for unlicensed practice and to hold certain discretionary hearings during the pendency of such cases. 63 Pa. Cons. Stat. §§ 455.406, 455.701(a). The Administrative Procedure Law offers an avenue for appeal for persons aggrieved by any such enforcement. 2 Pa. Cons. Stat. § 702. But as Respondents correctly note, this is a *pre-enforcement* challenge, *see*

Resp'ts' Br. 17, and RELRA provides no method for seeking pre-enforcement review. Instead, Sally's situation is like that of the in-home-care company in *Bayada*, which was threatened with an audit and sought declaratory review to remove the uncertainty imposed on its business operations. *See* 607 Pa. at 534. Just like that company, Sally's only option to continue operating her business without risking prosecution is to bring this action under the DJA.

Second, even if Sally had a statutory remedy, any such remedy would have been completely inadequate in her case. A statutory remedy is deemed inadequate if it either: (a) does not allow for adjudication of the issue raised; or (b) would allow irreparable harm to occur to the petitioner during the pursuit of that remedy. *LCN Real Estate, Inc. v. Borough of Wy.*, 544 A.2d 1053, 1058 n.8 (Pa. Commw. Ct. 1988). Both are true here.

Awaiting enforcement and appearing at hearings before the Real Estate Commission or pursuing an administrative appeal would be inadequate—indeed, futile—because an administrative agency has no authority to strike down its own enabling legislation. *See Ruszin v. Com., Dep't of Labor & Indus., Bureau of Workers' Comp.*, 675 A.2d 366, 370 (Pa. Commw. Ct. 1996). Pennsylvania courts have long recognized that such futility renders an administrative remedy inadequate. *See Green Tree*, 459 Pa. at 281 ("The reason, we believe, is that the determination of the constitutionality of enabling legislation is not a function of the

administrative agencies thus enabled."); *see, e.g.*, *Lyman,* 529 A.2d at 1195 (preliminary objection for failure to exhaust overruled where attorneys sued City of Philadelphia seeking declaratory judgment that City Code provision was unconstitutional as applied to attorneys); *Del. Valley Apartment House Owner's Ass'n v. Com., Dep't of Rev.*, 389 A.2d 234, 237 (Pa. Commw. Ct. 1978) (preliminary objection for failure to exhaust overruled where apartment owner-operator association sued Department of Revenue seeking declaratory judgment that provision of Tax Reform Code was unconstitutional). That is precisely the situation here, where Petitioners challenge the constitutionality of the Commission's own enabling legislation, which Respondents have no authority to invalidate.

The authorities Respondents cite are not to the contrary. *See* Resp'ts' Br. 20. Respondents rely heavily on *Funk v. Commonwealth, Department of Environmental Protection*, 71 A.3d 1097, 1100 (Pa. Commw. Ct. 2013), for the proposition that as-applied constitutional challenges to statutes enforced by administrative agencies always require exhaustion. But *Funk* stands for no such sweeping proposition. Rather, *Funk* stands for the far more limited proposition that exhaustion is required "where the legislature has provided an administrative procedure to challenge and obtain relief from an agency's action." *Id.* at 1101.

In *Funk*, such a procedure was available. There, Funk was aggrieved that the Department of Environmental Protection (DEP) had not submitted her petition for a rulemaking to the Environmental Quality Board on the grounds that the Board did not have the authority to promulgate the regulations sought. *Id.* at 1100. Funk filed suit, arguing that, to the extent the Climate Change Act denied the Board that authority, it violated the Pennsylvania Constitution. *Id.* But the Commonwealth Court denied review because the Pennsylvania legislature had created a specific administrative procedure for Funk to challenge the DEP's decision: appeal to the Environmental Hearing Board, which could have decided that the DEP's interpretation of the law was wrong, obviating the need for any constitutional ruling. *Id.* at 1102–3. And, in fact, Funk had filed such an appeal with the Hearing Board, which was then pending. *Id.* at 1101.

In other words, exhaustion was required in *Funk* because Funk's constitutional claims were entirely speculative; they depended on whether the Hearing Board would agree with DEP's interpretation of the law. *Id.* ("[N]o challenge to the constitutionality of any statute will even need to be resolved unless the EHB upholds DEP's interpretation of the statutes."). Because the exhaustion requirement was designed to allow administrative agencies an opportunity to resolve constitutional grievances on their own, and Funk's pending appeal could have done just that, the court found declaratory review premature. *Id.* at 1103.

In this case, by contrast, no administrative process can resolve Sally's constitutional claim. Unlike the petitioner in *Funk*, Sally challenges the constitutionality of an unambiguous statute: RELRA. And unlike the Hearing Board in *Funk*, Respondents here have no authority to resolve her constitutional grievance: neither the Real Estate Commission nor the Department of State (Bureau of Professional and Occupational Affairs) can simply declare RELRA's licensing requirements unconstitutional as applied to Sally. Simply put, Sally's challenge does not require exhaustion because Respondents have no power to grant the relief she seeks.

Respondents' reliance on *dicta* from *Chestnut Hill College v. Pennsylvania Human Relations Commission*, 158 A.3d 251, 266 (Pa. Commw. Ct. 2017), is misplaced for the same reasons. That case involved a similar as-applied challenge by a college to certain provisions of the Fair Educational Opportunities Act in an attempt to prevent the Human Relations Commission from considering a student's racial discrimination claims. *Id.* at 256. The college sought a declaratory judgment that resolving the student's claims would result in unconstitutional entanglement of church and state, which would deprive the Commission of subject-matter jurisdiction. *Id.*

As an initial matter, the Commonwealth Court noted that the college had previously waived its constitutional challenge under Rule of Appellate Procedure

2119. *Id.* at 265. But commenting in *dicta*, the court incorporated *Funk*'s reasoning to explain that the issue should be decided in the first instance by the Commission, because there was no guarantee—or even any particular reason to believe—that the resolution of the student's complaint would involve unconstitutional entanglement with religious matters. *Id.* at 257, 266. This meant that, just like in *Funk*, there was a possibility that the Commission could have wholly avoided the college's constitutional concern. That reasoning does not apply here where, just as in *Lyman* and *Delaware Valley*, Respondents have no authority to determine the constitutional validity of their own enabling legislation. *Chestnut Hill* is therefore also inapposite.

Respondents' proposed remedy fares no better. Respondents appear to be under the impression that Sally could simply apply for a real-estate broker's license today and challenge any denial at a later date. *See* Resp'ts' Br. 19. But the "[a]bility to obtain a license and challenge any denial is not an administrative remedy for determining whether a license is necessary." *Green v. Pa. State Bd. of Veterinary Med.*, 116 A.3d 1164, 1169 (Pa. Commw. Ct. 2015). Such a remedy would be obviously inadequate on both grounds articulated in *LCN Real Estate*: First, it would not allow for adjudication of Sally's claim because, again, Respondents have no authority to pass on the constitutionality of requiring her to obtain so burdensome a license. Second, it would require Sally to sustain the

irreparable harm of taking 300 hours of mostly-irrelevant instruction and spending three years of her life doing work that has nothing to do with her own just to *apply* for that license.[3] That was precisely the sort of burdensome process rejected in *Pennsylvania Independent*. *See* 135 A.3d at 1129 ("[T]he relief suggested by DEP, an appeal to the EHB, is not adequate because [petitioner] is challenging the 'process' as a whole, not the denial of a particular permit or license, and it is seeking declaratory relief, which the EHB does not have authority to grant.").

This Court should follow suit. Both the DJA and the prevailing case law expressly disclaim the notion that Sally should have to subject herself to the burdensome charade of applying for a real-estate broker's license she is not eligible for simply to later raise her constitutional claim in a futile forum. Because Respondents have failed to demonstrate otherwise, the Court should overrule Objection Two.

III. Response To Objection Three: Petitioners Have Stated A Cognizable Claim Under The Pennsylvania Constitution For Violation Of The Right To Pursue A Chosen Occupation

Respondents also object that Petitioners have failed to state a cognizable legal claim. *See* Prelim. Objects. ¶ 42. Specifically, Respondents argue that: (1)

[3] Indeed, RELRA makes clear that Sally could only apply for a license after first subjecting herself to most of the burdens that she seeks to avoid through this challenge. *Compare* 63 Pa. Cons. Stat. § 455.512 (providing that an application for a license must be received within three years of an applicant's passing the broker's license examination), *with id.* §§ 455.511, 455.521 (providing that 300 hours of approved instruction and three years working under an established broker are conditions-precedent to an applicant's taking the examination).

Petitioners have no constitutionally protected interest in this case; (2) occupational-licensing laws are categorically immune from constitutional challenge; and (3) Petitioners' claims fail on the merits. *See* Resp'ts' Br. 8–13. But those arguments completely misconstrue Petitioners' constitutional claims, over-read precedent, and invite this Court to prematurely weigh the strength of Petitioners' case, which turn on factual disputes that cannot be resolved at the preliminary-objection stage.

Petitioners bring a purely state-constitutional claim under Article I, Section 1 of the Pennsylvania Constitution. *See* Petit. ¶¶ 1–4, 81–85. The core of their argument is that RELRA violates Sally's substantive-due-process right to pursue her chosen occupation because, as applied to the niche work she actually does, RELRA's onerous licensing requirements fail the almost century-old test recently reiterated in *Nixon*. *See* 576 Pa. at 401–02. In order for Respondents to prevail on a demurrer, they must demonstrate beyond "any doubt" that Petitioners will be unable to prove facts legally sufficient to establish a right to relief under that theory. *Haun*, 14 A.3d at 123 (quoting *Hykes*, 835 A.2d at 383).

In *Nixon*, aspiring employees of older-adult-care facilities sought a declaration that an amendment to the Older Adults Protective Services Act disqualifying certain persons with criminal records from employment violated their right to pursue a chosen occupation under Article I, Section 1. *Nixon*, 576 Pa. at

388–93. The Pennsylvania Supreme Court explained that that right is subject to a "means-end" analysis:

> According to that test, which was defined by this Court almost a century ago, a 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." *Gambone*, 101 A.2d at 637; *see also Adler*, 311 A.2d at 640; *Pastor*, 272 A.2d at 490–91; *Foster*, 608 A.2d at 637.

Nixon, 576 Pa. at 400–01. The Court proceeded to weigh the government's purported justification for the amendment—in light of the record evidence—before deciding that it did not bear a real and substantial relationship to the Commonwealth's interest in protecting the elderly and infirm from abuse, and therefore violated the aspiring employees' right to pursue a chosen occupation. *Id.* at 400–04; *accord Peake v. Commonwealth*, 132 A.3d 506, 518 (Pa. Commw. Ct. 2015).

Petitioners follow the *Nixon* framework in arguing that, whatever the Commonwealth's interest in regulating Sally's work happens to be, restricting her right to pursue it through RELRA's onerous licensing requirements bears no "real and substantial" relationship to that end, and in any case, is "unduly oppressive or patently beyond the necessities of the case." *Compare Nixon*, 576 Pa. at 400–01, *with* Petit. ¶¶ 1–4, 83–84. In support of that claim, Petitioners have alleged—in brief—that Sally's short-term vacation-property management services involved helping owners book inexpensive rentals over the Internet for just a few days at a

time; that she limited her services to the Pocono Mountains and never managed more than five vacation properties at once; that she ran her business almost exclusively from home on her laptop and had no employees; and that she never bought or sold any real property, nor did she facilitate the creation of any landlord-tenant relationship, on behalf of others. *See* Petit. ¶¶ 24–30. Petitioners have further alleged that treating Sally like a traditional real-estate broker and subjecting her to the full panoply of RELRA's licensing requirements sweeps unnecessarily broadly; imposes an undue burden on her right to pursue a chosen occupation; and fails to protect the public health, safety, or welfare. *See id.* ¶¶ 64–66. Nothing more is needed to state a substantive-due-process claim under Article I, Section 1.

With this understanding of Petitioners' claim, the reasons for denying Respondents' request for a demurrer are clear. First, Respondents argue that because Pennsylvania requires a broker's license for Sally's services, and Sally does not possess that license, she cannot claim any genuine interest in pursuing her chosen line of work. *See* Resp'ts' Br. 9–10. But that argument confuses Petitioners' claim that Sally has a *liberty interest* in pursuing her chosen occupation with the claim—not made in this case—that Sally has a *property interest* in the possession of a particular license. The cases Respondents cite deal only with the latter—with the process due to a party whose interest in a professional license has vested, but who is threatened with the loss of that license.

See Barran v. State Bd. of Med., 670 A.2d 765, 771 (Pa. Commw. Ct. 1996) (procedural due process not violated where medical license was denied by Medical Board, then granted by a hearing examiner, then denied again by Medical Board); *Quintana, D.O. v. State Bd. of Osteopathic Med. Exam'rs*, 466 A.2d 250 (Pa. Commw. Ct. 1993) (substantive due process not violated where Osteopathic Board revoked osteopathic license for prescribing controlled substances to patients in another state without first examining them). Here, by contrast, Petitioners contend not that Sally was deprived of her interest in a particular license, but that she was deprived of her right to pursue a career as a short-term vacation-property manager free from unconstitutionally excessive licensing requirements. *See* Petit. ¶¶ 1–4, 81–86. Those cases are therefore inapposite.

Next, Respondents contend that Petitioners have failed to state a claim because this case is foreclosed by *Green v. Pennsylvania State Bd. of Veterinary Medicine*, 116 A.3d 1164 (Pa. Commw. Ct. 2015), which Respondents appear to believe insulates all occupational-licensing laws from constitutional challenge. *See* Resp'ts' Br. 10. But Respondents over-read *Green*, which was fundamentally about statutory interpretation by an administrative agency. There, the Veterinary Board had interpreted Section 3(h) of the Acupuncture Act as requiring Green to obtain an acupuncture license before she could perform acupuncture services on diagnosed animals. *Green*, 116 A.3d at 1167. Green claimed that interpretation was

mistaken, and that the Board had therefore violated her constitutional right to practice her chosen profession without proper statutory authority. *Id.* at 1167, 1170. The court rejected that claim on the merits because, as a matter of law, the Veterinary Board's interpretation of Section 3(h) was correct. *Id.* at 1169.

By contrast, this case is not about statutory interpretation, but whether RELRA's particular licensing requirements are constitutional when applied to Sally's short-term vacation-property management services. Unlike Green, whose claim depended on a mistaken interpretation of Section 3(h), Petitioners fully concede that RELRA applies to Sally's services. And unlike Green, who did not challenge the substance of the Acupuncture Act under Article I, Section 1, Petitioners argue that RELRA's licensing requirements fail the test articulated in *Nixon* when applied to Sally's work. Because the argument that a particular licensing scheme fails Pennsylvania's rational-basis test is sufficient to state a claim under Article I, Section 1, *Green* is inapposite. *See, e.g.*, *Ass'n of Settlement Cos. v. Dep't of Banking*, 977 A.2d 1257 (Pa. Commw. Ct. 2009) (preliminary objection in the nature of a demurrer overruled where debt-settlement-service providers, relying in part on *Nixon*, challenged licensing scheme under state and federal rational-basis test).

More broadly, to read *Green* as establishing a rule that merely invoking a legitimate government end in the context of economic regulations obviates the

need for judicial scrutiny would be to discard decades of Article I, Section 1 jurisprudence. *Cf., e.g.*, *Pa. State Bd. of Pharmacy v. Pastor*, 441 Pa. 186, 197 (1971) (court engaged in further scrutiny of government's asserted purpose of reducing sale of adulterated drugs); *Com. ex rel. Woodside v. Sun Ray Drug Co.*, 383 Pa. 1, 11 (1955) (court engaged in further scrutiny of government's asserted purpose of preventing potential fraud on public from sale of products using cheaper milk-shake ingredient); *Gambone v. Commonwealth*, 375 Pa. 547, 552 (1954) (court engaged in further scrutiny of government's asserted purpose of preventing misleading gas-price advertisements). Because the Pennsylvania Constitution demands a genuine "means-ends review," *Nixon*, 576 Pa. at 399, this Court should firmly reject Respondents' expansive reading of *Green*.

Finally, Respondents contend that a demurrer is appropriate because RELRA is constitutional on the merits. Respondents allege that the scheme is designed to further the end of ensuring that those who handle expensive assets like real estate are "minimally competent," *see* Resp'ts' Br. 12, and that it serves that goal by means that are "not overly broad," *see id.* But these assertions, which turn on facts that are in dispute, go to the strength of Petitioners' case, and Petitioners have no burden at this early stage to prove the merits of their constitutional claims. *See Int'l Union of Operating Eng'rs v. Linesville Constr. Co.*, 457 Pa. 220, 223 (1974). Instead, it is Respondents who bear the burden of proving beyond "any

doubt" that Petitioners will be unable to prove facts legally sufficient to establish a right to relief under their theory. *See Haun*, 14 A.3d at 123 (quoting *Hykes*, 835 A.2d at 383).

Respondents have failed to carry that burden. Despite the fact that this is a purely state-constitutional challenge, Respondents rely on the most deferential form of *federal* rational-basis review (providing that a law will not be struck down if there is "any reasonably conceivable state of facts" that might support it) to support their contention that RELRA is constitutional. *See* Resp'ts' Br. 12 n.2. But that is not the test in Pennsylvania, as *Nixon* makes clear. *See* 576 Pa. at 401–02; *see also Pastor*, 441 Pa. at 191 ("Thus Pennsylvania, like other state economic laboratories, has scrutinized regulatory legislation perhaps more closely than would the Supreme Court of the United States.") (internal quotes and citations omitted). Moreover, Respondents have done nothing to explain how the licensing requirements described throughout the Petition—for instance, the requirement that Sally spend three years working for (and sharing profits with) an established real-estate broker performing work that has nothing to do with her own—so clearly serve the purposes they recite under Pennsylvania's test that Petitioners' claims must fail on their face. *See* Petit. ¶¶ 46–59, 62–63.

Respondents have therefore fallen far short of their burden of proving "free and clear from doubt" that Petitioners will be unable to support their constitutional claims. The Court should summarily overrule Objection Three.

IV. Response To Objection Four: While The Court Need Not Decide It, Petitioner Harris Has Standing Because RELRA Prevents Her From Continuing To Use Sally's Services

Respondents last argue that Petitioner Harris lacks standing to sue. *See* Prelim. Objects. ¶ 50. While this Court need not decide the issue, to the extent it elects to, Harris does indeed have standing.

As a preliminary matter, Pennsylvania follows the prevailing rule that where one petitioner has standing to bring a claim, courts need not inquire into the standing of additional petitioners making that claim. *See, e.g.*, *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 292 (2005); *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 563 n.8 (2003); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007). Here, Petitioners state a single constitutional claim for injuries that are aspects of the same basic grievance: A short-term vacation-property manager (Sally) provides services *through* her business (PMVP) *to* various clients (like Harris); RELRA forbids that without an excessively burdensome license; that violates Petitioners' substantive-due-process rights under Article I, Section 1. Because Respondents do not challenge Sally's or

PMVP's standing and Harris is not seeking any greater relief than that of her Co-Petitioners, this Court need not inquire into Harris's standing.

To the extent the Court reaches that question, however, Harris certainly does have standing. The Pennsylvania Supreme Court has long maintained that "[t]he keystone to standing . . . is that the person must be negatively impacted in some real and direct fashion." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 204 (2005). Under the DJA, this demands a controversy that is "real and concrete, such that the party initiating the local action has, in fact, been 'aggrieved.'" *Commonwealth v. Donahue*, 626 Pa. 437, 447 (2014) (quoting *Palisades Park*, 585 Pa. at 204)). A party has been aggrieved "when the party has a 'substantial, direct and immediate interest' in the outcome of the litigation." *Id.* at 448 (quoting *Johnson v. Am. Standard*, 607 Pa. 492, 510 (2010)). Harris satisfies each requirement.

First, Harris's interest is substantial because it is particularized. *See id.* Harris was one of only a small handful of vacation-property owners in the Pocono Mountains who Sally actually served. *See* Petit. ¶¶ 21, 33, 41. Unlike the general population also technically banned from using Sally's services, Harris has had to terminate a pre-existing relationship with Sally, and *that* is the unique relationship that Harris now seeks the freedom to restore. *See id.* ¶¶ 70–71, 78–79.

Respondents argue that because *nobody* in Pennsylvania is free to contract with Sally for her services until she obtains a real-estate broker's license, Harris has no substantial interest in doing so. *See* Resp'ts' Br. 23. But that cannot be the rule—if it were, it would be impossible for affected individuals to challenge generally-applicable regulations simply because other, uninterested individuals were also technically bound by them. Instead, all the DJA actually requires is that a challenger must be among those "affected" by a statute. 42 Pa. Cons. Stat. § 7533. Here, Harris clearly was and is.

Second, Harris's interest is direct and immediate because there is a causal connection between RELRA and her alleged harm. *See Donahue*, 626 Pa. at 448. Contrary to Respondents' claims, causation is not broken simply because a law does not directly regulate a party; instead, a third party need only be negatively impacted by the regulation to gain standing. *See, e.g.*, *id.* at 448–49. Here, RELRA's restrictions on Sally have already forced Harris to terminate her relationship with Sally. *See* Petit. ¶ 78; *see also* Resp'ts' Br. 23 ("Ms. Harris is . . . not legally able to contract with Ms. Ladd for broker services."). That is an immediate and ongoing harm that Harris will continue to suffer until this Court strikes down the excessive burdens RELRA imposes on Sally's ability to operate. *See id.* ¶ 79. Respondents' final argument that Sally's failure to apply for a license breaks any causal connection between RELRA and Harris's harm also fails

because, as explained at *supra* 19 n.3, Sally *could not* have simply applied for a license.

In sum, this Court need not opine on Harris's standing because there is no dispute that Sally and PVMP have standing or that Harris's interest in this case arises out of the same contractual relationship and constitutional grievance that gave rise to Sally's and PMVP's claims. Even if the Court elects to reach that question, however, Harris clearly has standing because she has alleged a "substantial, direct, and immediate interest" in the outcome of the litigation—namely, that a victory would leave her free to continue using Sally's excellent property-management services. *See* Petit. ¶¶ 78–79. The Court should therefore overrule Objection Four.

CONCLUSION

For the foregoing reasons, Respondents have failed to carry their burden of proving "free and clear from doubt" that this case should be dismissed. Petitioners therefore respectfully request that this Honorable Court overrule all four Preliminary Objections.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PA. R. APP. P. 2135

I hereby certify that Petitioners' Brief in Opposition to Respondents' Preliminary Objections complies with all requirements of Pennsylvania Rule of Appellate Procedure 2135(a)(1). Specifically, the undersigned certifies that Petitioners' Brief exceeds 30 pages, but complies with Rule 2135(a)(1) because it contains 6,953 words, according to the word processing software used to prepare the brief, excluding those parts of the brief exempted by Rule 2135(b).

Dated: November 8, 2017

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