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**ATTORNEYS FOR THE
PETITIONERS**

MATTHEW J. BROUILLETTE, et al.

Petitioners

v

THOMAS WOLF, GOVERNOR, et al.

Respondents

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: COMMONWEALTH COURT
: OF PENNSYLVANIA
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: PETITION FOR REVIEW
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: CASE NUMBER 410 MD 2017
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**PETITIONERS' RESPONSE IN OPPOSITION TO THE
JOINT MOTION OF TREASURER TORSELLA AND AUDITOR
GENERAL DEPASQUALE TO DISMISS FOR MOOTNESS**

Petitioners, Matthew J. Brouillette, Representative James Christiana, and Benjamin Lewis (collectively "Petitioners"), by and through their attorneys, McNelly & Goldstein, LLC, hereby submit this Response in Opposition to the Joint Motion to Dismiss for Mootness filed by Respondents, State Treasurer Joseph Torsella ("Torsella"), and Auditor General Eugene DePasquale ("DePasquale") (collectively "Respondents"), pursuant to Rules 1532(b), 123(a) and/or 1972(a)(4) of the Pennsylvania Rules of Appellate Procedure. See Pa.

R.A.P. No. 1532(b), 123(a) and 1972(a)(4). Petitioners incorporate by reference the factual allegations contained in the Amended Petition for Review, as if set forth in full. Petitioners aver as follows:

1. Admitted.
2. Admitted.
3. Admitted in part; denied in part. It is admitted only that Petitioners initiated this action by filing Petition for Review on or about September 14, 2017, and an Amended Petition for Review on or about November 7, 2017. The original Petition for Review and the Amended Petition for Review are written documents that speak for themselves; accordingly, any attempts to characterize those documents are deemed denied. All remaining averments set forth in paragraph 3 are denied.
4. Denied. The averments in paragraph 4 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied. To the extent that a response is required, the original Petition for Review and the Amended Petition for Review are written documents that speak for themselves; accordingly, any attempts to characterize those documents are deemed denied.
5. Denied. The averments in paragraph 5 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied.

6. Denied. The averments in paragraph 6 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied.

7. Denied. The averments in paragraph 7 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied.

General Fund Budget

8. Denied. The averments in paragraph 8 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied. To the extent that a response is required, the Operating General Fund Budget (Act 1A of 2017) is a written document – and references other written documents – that speaks for themselves; accordingly, any attempts to characterize those documents are deemed denied. By way of further response, when the General Operating Budget was enacted in July of 2017, the appropriations exceeded actual and estimated revenues. The additional revenues provided for in the legislation enacted on or about October 30, 2017, depend heavily upon speculative future estimates on various revenue sources that may or may not come to fruition.

9. Admitted in part; denied in part. It is admitted only that the prior FY2016-2017 ended with approximately a \$1.55 billion deficit. All remaining averments are specifically denied. The remaining averments contained in paragraph 9 are based upon written documents – as cited in the paragraph – that

speak for themselves; accordingly, any attempts to characterize those documents are deemed denied.

10. Admitted in part; denied in part. It is admitted only that the Operating Budget for the General Fund became law on July 11, 2017, without the Governor's signature. All remaining averments are specifically denied. The remaining averments contained in paragraph 10 are based upon written documents – as cited in the paragraph – that speak for themselves; accordingly, any attempts to characterize those documents are deemed denied.

11. Admitted in part; denied in part. It is admitted only that the Independent Fiscal Office and, subsequently in February 2017, the Governor's Executive Budget were issued. The remaining averments contained in paragraph 11 are based upon an official statement by the Independent Fiscal Office and the Governor's Executive Budget, which are written documents that speak for themselves; accordingly, any attempts to characterize those documents are deemed denied.

12. Admitted in part; denied in part. It is admitted that, when enacted, the General Fund Operating Budget for FY2017-2018 contained appropriations that exceeded the actual and estimated revenues and surplus. The remaining averments contained in paragraph 12 are based upon an official statement by the Independent Fiscal Office and the Governor's Executive Budget, which are written documents

that speak for themselves; accordingly, any attempts to characterize those documents are deemed denied.

13. Admitted in part; denied in part. It is admitted only that the statutory amendments delineated in paragraph 13 were enacted. All other averments are specifically denied. The statutory amendments delineated in paragraph 13 are written documents that speak for themselves; accordingly, any attempts to characterize those documents are deemed denied. By way of further response, to the extent that the averments in paragraph 13 constitute conclusions of law, no response is required of Petitioners; those averments are therefore deemed denied.

14. Denied. The Act 40 of 2017 is a written document that speaks for itself; accordingly, any attempt to characterize Act 40 of 2017 is deemed denied. By way of further response, to the extent that the averments in paragraph 14 constitute conclusions of law, no response is required of Petitioners; those averments are therefore deemed denied.

15. Denied. The Act 42 of 2017 is a written document that speaks for itself; accordingly, any attempt to characterize Act 42 of 2017 is deemed denied. By way of further response, to the extent that the averments in paragraph 15 constitute conclusions of law, no response is required of Petitioners; those averments are therefore deemed denied.

16. Denied. The Act 43 of 2017 is a written document that speaks for itself; accordingly, any attempt to characterize Act 43 of 2017 is deemed denied. By way of further response, to the extent that the averments in paragraph 16 constitute conclusions of law, no response is required of Petitioners; those averments are therefore deemed denied.

17. Denied. The Act 44 of 2017 is a written document that speaks for itself; accordingly, any attempt to characterize Act 44 of 2017 is deemed denied. By way of further response, to the extent that the averments in paragraph 17 constitute conclusions of law, no response is required of Petitioners; those averments are therefore deemed denied.

18. Denied. The Letter of the Secretaries of Revenue and Budget (Dated Nov. 6, 2017) is a written document that speaks for itself; accordingly, any attempt to characterize this Letter is deemed denied. By way of further response, to the extent that the averments in paragraph 18 constitute conclusions of law, no response is required of Petitioners; those averments are therefore deemed denied.

19. Denied. The averments in paragraph 19 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied.

20. Denied. The averments in paragraph 20 constitute conclusions of law to which no response is required of Petitioners and are therefore deemed denied.

WHEREFORE, Petitioners demand that this Court **deny** Respondents' Motion to Dismiss the Amended Petition for Review as Moot.

NEW MATTER

21. Petitioners incorporate by reference the foregoing paragraphs of its Response to Respondents' Motion to Dismiss as if they were set forth fully at length herein.

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

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

24. These violations are of great public import, are "capable of repetition yet [they will continually] evade review" if subsequent – retroactive – legislation purports to cure the defect before the claims have been fully litigated. *Philadelphia Pub. Sch. Notebook v. Sch. Dist. of Philadelphia*, 49 A.3d 445, 448–

449 (Pa. Cmwlth. 2012) (quoting *Cytemp Specialty Steel Div., Cyclops Corp. v. Pennsylvania Pub. Util. Comm'n*, 563 A.2d 593, 596 (Pa. Cmwlth. 1989)(citation omitted); see *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975–76, 195 L. Ed. 2d 334 (2016).

BACKGROUND

25. During FY2016-2017, the appropriated spending authorized by the General Assembly and approved by the Governor exceeded actual revenues, meaning that Pennsylvania spent more money than it actually collected in FY2016-2017. See Amended Petition for Review, 11/7/2017, at ¶ 50.

26. As a result, the Commonwealth accrued a deficit of \$1.55 billion in FY2016-2017.

27. This deficit continued into FY2017-2018, growing deeper and more substantial. *Id.* In order to pay all General Fund bills in FY2016-2017, upon Governor Wolf's request, Torsella authorized the Commonwealth to borrow \$2.5 billion on a line of credit from the State Treasury. *Id.* at ¶ 51.

28. The Commonwealth used \$400 million of this line in August 2016, and another \$1.2 billion of this line in September 2016. *Id.* At the beginning of FY2016-2017, the Commonwealth's Independent Fiscal Office ("IFO") projected

that the Commonwealth's spending would exceed revenues by \$1.86 billion in FY2016-2017. *Id.* at ¶ 52.

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

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

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

32. When the Operating Budget became law, the Commonwealth did not pass a revenue package defining how Pennsylvania would fund the \$31.38 billion in FY2017-2018 spending; nevertheless, on July 10, 2017, Governor Wolf allowed the General Appropriations Bill passed by the General Assembly to become law without his signature. *Id.* at ¶ 58.

33. Because the General Fund Budget was not balanced when it was enacted, the Commonwealth ran a budget deficit of approximately \$600 million for nearly four months of FY2017-2018. *Id.* at ¶ 60.

34. This \$600 million deficit was in addition to the illegal \$1.55 billion deficit, which remained from FY2016-2017. *Id.*

35. Pennsylvania, therefore, enacted a budget that forced the Commonwealth to spend more money than it expected to collect for the current fiscal year, FY2017-2018; at the time of enactment, this violated the balanced budget requirements contained in both the Pennsylvania Constitution and the Pennsylvania Administrative Code. *Id.* at ¶¶ 57, 59; *see* Pa. Const. Art. VIII, §§ 12(a), 13; 71 P.S. § 238 (Adm. Code § 618).

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

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

38. On October 13, 2017, State Treasurer Torsella issued *another* \$700 million loan from the Treasury to cover \$1.2 billion in scheduled payments to Medicaid providers; the loan was required to be repaid by October 20, 2017. *See* Murphy, Jan, 10/13/2017, "*Pa. Treasurer Authorizes Another Loan to Keep State's*

General Fund Afloat” (http://www.pennlive.com/politics/index.ssf/2017/10/pa_treasurer_authorizes_anothe.html).

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

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

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

42. Torsella indicated that, by October 27, 2017, the General Fund would become insolvent again and that it would remain insolvent for about five months.

43. During this period, Torsella stated that expenditures were expected to exceed revenues by approximately \$1.7 billion. *See* Murphy, *supra*.

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

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

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

47. In fact, because of actions taken during FY2016-2017, Torsella, together with Governor Wolf and Auditor General DePasquale, violated the indebtedness provisions of the Pennsylvania Constitution. *See* Amended Petition for Review, 11/7/2017, at ¶ 71.

48. By passing an unbalanced Operating Budget for both FY2016-2017 and FY2017-2018, the Commonwealth was – in effect – saddled with an unauthorized loan in the amount of those appropriations that exceeded revenues. *See Com. ex rel. Schnader v. Liveright*, 308 Pa. 35, 66–67, 161 A. 697, 706 (1932).

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

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

51. Several months into the new fiscal year, FY2017-2018, the Commonwealth continued to operate with a facially unbalanced budget until, on October 30, 2017, the General Assembly passed and the Governor signed four

statutory amendments purporting to provide additional sources of revenue. *See* Act of October 30, 2017, No. 44, P.L. __ (HB 674-Fiscal Code Amendments); Act of October 30, 2017, No. 43, P.L. __ (HB 542 Tax Reform Code Amendments); Act of October 30, 2017, No. 42, P.L. __ (HB 271- Expanding Gaming); and Act of October 30, 2017, No. 40, P.L. __ (HB 118- Administrative Code Amendments).

52. On November 14, 2017, Respondents filed a Motion to Dismiss the Amended Petition for Review, contending that this legislation rendered Petitioners' claims moot. *See* Respondents' Motion to Dismiss, 11/14/2017.

53. On November 28, 2017, Petitioners filed a timely Response in Opposition. For the reasons that follow, the Amended Petition for Review should not be dismissed as moot.

A. The Claims Raised in the Amended Petition for Review Are Capable of Repetition Yet Evading Review.

54. Respondents contend that the issues raised in the Amended Petition for Review have been rendered moot by legislation enacted on October 30, 2017. *See* Respondents' Brief, 11/14/2017, at 9-10.

55. Specifically, Respondents cite the four bills that the General Assembly passed – and that Governor Wolf signed – which purport “to provide additional General Fund revenue to align the current fiscal year General Fund budget appropriations with currently estimated revenue receipts[.]” *Id.* at 5 (*citing*

Act of October 30, 2017, No. 44, P.L. __ (HB 674-Fiscal Code Amendments); Act of October 30, 2017, No. 43, P.L. __ (HB 542 Tax Reform Code Amendments); Act of October 30, 2017, No. 42, P.L. __ (HB 271- Expanding Gaming); and Act of October 30, 2017, No. 40, P.L. __ (HB 118- Administrative Code Amendments).

56. In other words, Respondents argue that no case or controversy exists any longer because “the enactment of Acts 40, 42, 43 and 44 of 2017” mended the imbalance present in the General Fund Operating Budget. *See* Respondents’ Brief, 11/14/2017, at 10.

57. Respondents vastly oversimplify the claims alleged in the Amended Petition for Review, as well as the circumstances under which a Petition should be dismissed for mootness.

58. It is irrelevant whether the enactment of this new legislation *now solves* the revenue shortfall, which existed since the General Appropriations Bill passed in July 2017.

59. For the past two fiscal years, until October 30, 2017, the Commonwealth has operated through deficit spending in violation of the Pennsylvania Constitution. *See* Pa. Const. art. VIII, § 12(a); Pa. Const. art. VIII, § 13.

60. In both FY2016-2017 and FY2017-2018, the Commonwealth passed an operating budget where expenditures exceeded actual and estimated revenues. *See Id.*

61. Although the legislation passed on October 30, 2017 purports to balance the General Fund Budget for this fiscal year, it cannot erase the constitutional violations that have already occurred – and those violations that will inevitably occur again, most likely in July of 2018 when the General Fund Budget must be enacted for FY2018-2019.

62. The General Fund Budget, by definition, operates for one fiscal year; legislation providing additional revenue sources may be enacted at any time during that year, which, as Respondents argue, may seemingly render the questions in the Petition for Review moot.

63. Yet the same constitutional violation likely will persist with each new fiscal year, with the strong possibility that litigation to address each new violation could be rendered moot because there is insufficient time during a single fiscal year for such litigation to conclude.

64. This case should not be dismissed for mootness; otherwise, the questions raised in the Amended Petition for Review will *always* be rendered moot and “effectively den[ied] appellate review of this type of litigation.” *See Wiest v.*

Mt. Lebanon Sch. Dist., 320 A.2d 362, 364 (Pa. 1974) (citing *Roe v. Wade*, 410 U.S. 113, 93 (1973)).

1. *Exception to the Mootness Doctrine*

65. “The mootness doctrine requires that an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Pap's A.M. v. City of Erie*, 812 A.2d 591, 600 (Pa. 2002) (citation omitted).

66. Absent a present case or controversy, courts will typically dismiss a matter as moot. *See Pennsylvania Liquor Control Board v. Dentici*, 542 A.2d 229 (Pa. Cmwlth. 1988).

67. Pennsylvania appellate courts, however, have recognized certain notable exceptions to the mootness doctrine. *See Rendell v. State Ethics Com'n*, 983 A.2d 708, 719 (Pa. 2009); *Pilchesky v. Lackawanna Cty.*, 88 A.3d 954 (Pa. 2014).

68. “Although [courts] generally will not decide moot cases, exceptions are made when (1) the conduct complained of is capable of repetition yet evading review, or (2) involves questions important to the public interest, or (3) will cause one party to suffer some detriment without the Court's decision.” *Philadelphia Pub. Sch. Notebook v. Sch. Dist. of Philadelphia*, 49 A.3d 445, 448–449 (Pa. Cmwlth. 2012) (quoting *Cytemp Specialty Steel Div., Cyclops Corp. v.*

Pennsylvania Pub. Util. Comm'n, 563 A.2d 593, 596 (Pa. Cmwlth. 1989)(citation omitted).

69. “[A] case is ‘capable of repetition, yet evading review’ when ‘(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.’” *Com. v. Buehl*, 462 A.2d 1316, 1319 (Pa. Super. 1983) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*)); see *Spencer v. Kemna*, 523 U.S. 1, 17 (1998); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975–76 (2016).

70. In this case, the violations of the Pennsylvania Constitution alleged in the Amended Petition for Review should not be dismissed as moot. Petitioners’ claims are “ ‘capable of repetition, yet evading review.’ ” *Kingdomware Techs.*, 136 S. Ct. at 1976 (2016) (quoting *Spencer*, 523 U.S. at 17).

71. First, given that Petitioners’ claims are closely linked to the length of a single fiscal year, “the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration[.]” *Id.*

72. Second, “there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again.” *Id.*

73. The budgeting process shall commence in the same fashion for FY2018-2019, and the probability is high that the Commonwealth and its citizens

shall once again face the passage of an unbalanced General Fund Operating Budget. This has occurred during the last two fiscal years.

2. *The Constitutional Violations Befalling Pennsylvania's Budget Process Shall Consistently Evade Judicial, Yet the Same Violations Will Inevitably Repeat with Each Fiscal Year.*

74. The Amended Petition for Review describes two specific practices that violate the Pennsylvania Constitution: (a) the passage of an unbalanced Operating Budget, and (b) the improper authorization of the Commonwealth to assume debt in order to finance the resulting deficit spending.

75. Respondents claim that retroactively balancing the Operating Budget renders these issues moot. *See* Respondents' Brief, 11/14/2017, at 9-11.

76. Respondents' argument would permanently remove these constitutional violations from judicial review.

77. As evidenced by Respondents' Motion to Dismiss, these violations likely exist for less than six months – and, *at most*, just over one fiscal year.

78. Thus, the limited duration prevents these issues from being fully litigated in the lower court, with absolutely no opportunity for appellate review.

Violation of Pa. Const. art. VIII, §§ 12(a) and 13

79. The first violation occurs during the budget process. In the budget cycles for the last two fiscal years, FY2016-2017 and FY2017-2018, the General Assembly and the Governor enacted a General Fund Operating Budget where

expenditures in the General Appropriations Bill exceeded actual and estimated revenues. *See* Pa. Const. art. VIII, § 12(a); Pa. Const. art. VIII, § 13.

80. Petitioners maintain that the passage of such an Operating Budget itself violates Sections 12 and 13 of Article VIII of the Pennsylvania Constitution. *Id.*

81. Sections 12(a) and 13 of Article VIII impose a procedural requirement for the enactment of a General Appropriations Bill, similar to the procedural requirements discussed by this Court in *Common Cause of Pennsylvania v. Com.*, 668 A.2d 190, 195–99 (Pa. Cmwlth. 1995), *aff'd*, 677 A.2d 1206 (1996).

82. Specifically, Section 13 requires the “adopt[ion of] a capital budget for the ensuing fiscal year,” and that the “[o]perating budget appropriations [...] shall not exceed the actual and estimated revenues and surplus available in the same fiscal year.” Pa. Const. art. VIII, § 13(a) and (b).

83. When the General Fund Operating Budget became law in July 2017, and the spending in the General Appropriations Bill exceeded actual and estimated revenues, the Pennsylvania Constitution was violated, irrespective of whatever legislation was enacted three or four months later. *See id.*

84. The same is true for the prior FY2016-2017; the constitutional violation occurred, regardless of whether the Governor and the General Assembly attempted to retroactively cure the defect.

85. For FY2016-2017, the Commonwealth closed the fiscal year with a \$1.55 billion deficit. During the current fiscal year, the Commonwealth added approximately \$600 million to the \$1.55 billion deficit when it enacted the current General Appropriations Bill in July of 2017.

86. In *Common Cause of Pennsylvania*, this Court recognized that the appropriate remedy “is the entry of a prospective declaratory judgment.” 668 A.2d at 200.

87. This Court reasoned that neither relief in mandamus nor a permanent injunction would be appropriate because, *inter alia*, the General Appropriations Bill had been passed approximately four months prior, and enjoining payments to individuals and for necessary government functions “would produce chaos in state government with the immediate potential to harm the citizenry of the Commonwealth.” *Id.*

88. Although *Common Cause of Pennsylvania* did not deal with the question of mootness, this case presents a similar scenario – that “all citizens, would be irreparably harmed if unconstitutional acts were allowed to continue unabated.” *Id.*

[W]here the facts are agreed upon and the question presented is whether or not a violation of a mandatory constitutional provision has occurred, it is not only appropriate to provide judicial intervention, and if warranted a judicial remedy, [courts in Pennsylvania] are mandated to do no less.

Id. at 195 (quoting *Consumer Party v. Commonwealth*, 510 Pa. 158, 180, 507 A.2d 323, 334 (Pa. 1986)).

89. The violations of Section 13, however, will go unabated if this Court determines that the question has been mooted by the passage of legislation on October 30, 2017.

90. The time span between the violation and the cessation or expiration of that violation is too short to allow the question to be fully litigated. *See Buehl*, 462 A.2d at 1319; *Spencer*, 523 U.S. at 17.

91. When General Assembly and the Governor enacted the cited legislation on October 30, 2017, only a few months had passed since the Operating Budget for FY2017-2018 became law in violation of the Pennsylvania Constitution.

92. Moreover, only slightly longer than one year had elapsed since the General Assembly and the Governor enacted the prior Operating Budget for FY2016-2017.

Violation of Pa. Const. art. VIII, § 7

93. The second violation enables the deficit spending derived from an unbalanced Operating Budget, and is equally ephemeral in nature.

94. Contrary to Respondents' argument, the violations alleged under Count III of the Petition for Review directly originate from the passage of an unbalanced budget.

95. By appropriating more spending than the revenues collected by the Commonwealth, the General Appropriations Bills for FY2016-2017 and FY2017-2018 acted as an improper loan saddling Pennsylvania with unauthorized debt. *See Com. ex rel. Schnader v. Liveright*, 161 A. 697, 706 (Pa. 1932).

96. "There can be no such thing as a floating debt created through appropriations in excess of revenues [...]," the Pennsylvania Supreme Court held. *Id.* (interpreting and apply a prior incarnation of Pa. Const. art. VIII, § 7).

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

98. Yet, over the course of FY2016-2017 and the beginning of FY2017-2018, State Treasurer Torsella and Auditor General DePasquale have allowed the Commonwealth to incur debt in this manner.

99. By authorizing lines of credit from the State Treasury in order to finance the Commonwealth's deficit spending, Respondents Torsella and DePasquale have violated Section 7 of Article VIII of the Pennsylvania Constitution. *See Pa. Const. art. VIII, § 7.*

100. As with the violation of Section 13 discussed above, if the legislation enacted on October 30, 2017, renders this violation moot, then it shall also perpetually evade judicial review.

101. “[A]ll citizens, [however,] would be irreparably harmed if [this] unconstitutional act[] were allowed to continue unabated.” *Common Cause of Pennsylvania*, 668 A.2d at 200.

102. Whether the State Treasurer, the Auditor General and the Governor have the authority to finance deficit spending by authorizing the Commonwealth to incur debt is question of public interest, for which every citizen in this Commonwealth deserves an answer. *Id.*; see *Philadelphia Pub. Sch. Notebook*, 49 A.3d at 448–449.

103. This question, however, will never be resolved if this Court determines that the inquiry is moot.

104. Instead, the State Treasurer and the Auditor General will be free to extend lines of credit from the State Treasury to finance appropriations that exceed actual and estimated revenues in a given fiscal year – in other words, to finance unauthorized loans that also risk evading review. See *Liveright*, 308 Pa. at 67, 161 A. at 706.

105. The time between the violation and the cessation or expiration of that violation will always prevent this question from being fully litigated. *See Buehl*, 462 A.2d at 1319; *Spencer*, 523 U.S. at 17.

3. *The Constitutional Violations Addressed in the Amended Petition for Review Will Inevitably Repeat with Each Fiscal Year, in all likelihood Repeating in FY2018-2019.*

106. Past is prologue. For the last two fiscal years, the Commonwealth has enacted General Fund Operating Budgets that – on their face – violate Article VIII, Section 13 of the Pennsylvania Constitution. Pa. Const. art. VIII, § 13.

107. For both FY2016-2017 and FY2017-2018, the appropriations contained in each year's General Appropriations Bill exceeded actual and estimated revenues and surplus. *Id.*

108. As explained above, the violation of Section 13 predictably leads to a violation of Article VIII, Section 7, as well. *See Pa. Const. art. VIII, § 7; Liveright*, 308 Pa. at 67, 161 A. at 706.

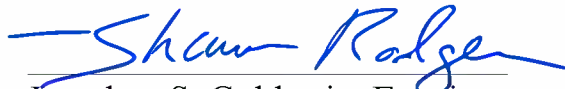
109. These violations are not only capable of repetition; they are currently entrenched in a pattern that has already repeated itself over the last two fiscal years.

110. This pattern of budget disputes, which unavoidably appears to trigger the enactment of an unbalanced Operating Budget, is likely to continue in FY2018-2019.

111. “[T]here [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again” perpetrated by the same group of Respondents. *Buehl*, 462 A.2d at 1319 (Pa. Super. 1983) (quotation and citation omitted; brackets in original); see *Spencer*, 523 U.S. at 17; *Kingdomware Techs.*, 136 S. Ct. at 1975–76.

WHEREFORE, Petitioners respectfully request that this Honorable Court deny the Motion to Dismiss as Moot filed by Respondents Torsella and DePasquale.

Respectfully submitted,



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