

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew J. Brouillette and Rep. :
James Christiana and Benjamin :
Lewis, :
Petitioners :

v. :

No. 410 M.D. 2017
Heard: December 12, 2017

Thomas Wolf, Governor and Joseph :
Torsella, Treasurer and Eugene :
DePasquale, Auditor General and The :
Commonwealth of Pennsylvania and :
Michael Turzai, Speaker of the House :
of Representatives and Dave Reed, :
House Majority Leader and Joseph :
B. Scarnati, III, President Pro :
Tempore of the Senate and Jake :
Corman, Senate Majority Leader and :
The Pennsylvania General Assembly, :
Respondents :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COHN JUBELIRER

FILED: December 28, 2017

Presently before the Court is the Joint Motion to Dismiss for Mootness (Joint Motion) filed by Respondents Joseph Torsella, Treasurer; Eugene DePasquale, Auditor General; Joseph B. Scarnati, III, President Pro Tempore of the Senate; Jake Corman, Senate Majority Leader; and Thomas Wolf, Governor

(Respondents, collectively).¹ Respondents ask the Court to dismiss the Amended Petition for Review filed by Matthew J. Brouillette, Representative James Christiana, and Benjamin Lewis (Petitioners, collectively), challenging the constitutionality of some of the actions taken by Respondents with regard to the state budget. Respondents argue that the Amended Petition is now moot following passage of legislation that purported to balance the budget. For the reasons that follow, this Court denies the Joint Motion.

At the center of this action is the Commonwealth's General Operating Fund Budget for the past and current fiscal years. Petitioners allege Respondents have violated various Constitutional provisions by establishing unbalanced budgets and authorizing loans to cover long-term deficits.

With regard to fiscal year 2016-17, Petitioners allege that the General Operating Fund Budget closed with a \$1.55 billion deficit. According to Petitioners, the unbalanced budget violated Article VIII, Section 13, of the Pennsylvania Constitution, which provides: "Operating budget appropriations made by the General Assembly shall not exceed the actual and estimated revenues and surplus available in the same fiscal year." Pa. Const. art. VIII, § 13.

To fulfill the Commonwealth's debt obligations, Petitioners claim Governor Wolf, Treasurer Torsella, and Auditor General DePasquale approved a \$750 million line of credit in August 2017, which was used, in part, to address the \$1.55 billion deficit from the prior fiscal year. As a result of this borrowing, Petitioners contend Respondents violated Article VIII, Section 7(a)(2) of the Pennsylvania

¹ Treasurer Torsella and Auditor General DePasquale originally filed their Joint Motion on November 14, 2017. Senators Scarnati and Corman joined in the Joint Motion on November 28, 2017, and Governor Wolf joined in the Joint Motion on December 5, 2017.

Constitution, which provides, in relevant part: “The Governor, State Treasurer and Auditor General, acting jointly, may . . . (ii) incur debt for the purpose of refunding other debt, if such refunding debt matures within the term of the original debt.” Pa. Const. art. VIII, § 7(a)(2).²

In addition, Petitioners contend that as revenues failed to materialize last fiscal year, the General Assembly and Governor had a duty to cut spending to ensure a fully funded budget. This resulted in a deficit, which Petitioners call an “unfunded loan” that “illegally followed the Commonwealth” into the current fiscal year. (Am. Pet. for Review, ¶ 51.)

According to Petitioners, the deficit was compounded by the enactment of the budget for the current fiscal year 2017-18. On June 30, 2017, both houses of the General Assembly passed a \$31.38 billion General Appropriations Bill. The bill became law on July 10, 2017, after the Governor failed to act on it. At the time the spending bill passed, there was no revenue package in place to fund it. As a result, Petitioners contend that expenditures have exceeded actual and estimated revenues in violation of the Constitution.

Finally, Petitioners argue that the Governor had authority under Article IV, Sections 15 and 16 of the Pennsylvania Constitution, Pa. Const. art. IV, §§ 15-16, to veto the budget, in whole or in part, but failed to do either.

The above-described conduct forms the basis of Petitioners’ three-count Amended Petition for Review. Count I seeks declaratory judgment against

² Petitioners aver that this constitutional provision is codified in Section 1601-A of the Fiscal Code, Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. § 1601-A, which permits the Treasurer and Auditor General of Pennsylvania “during any fiscal period to authorize and direct the borrowing, from time to time, on the credit of the current revenues levied, assessed, collectible and accruing during any current [fiscal] period.”

Governor Wolf on the grounds he violated Article VIII, Section 12 of the Pennsylvania Constitution by not requiring a balanced budget and Article IV, Sections 15 and 16 of the Pennsylvania Constitution by not vetoing all or part of the appropriations bill that exceeded estimated revenue. Count II names Governor Wolf, Senators Scarnati and Corman, The Pennsylvania General Assembly, Speaker of the House of Representatives Michael Turzai, and House Majority Leader Dave Reed.³ It seeks declaratory judgment on the grounds Respondents violated Article VIII, Sections 12(a) and 13 of the Pennsylvania Constitution by allowing an unbalanced budget and Article IV, Sections 15 and 16 of the Pennsylvania Constitution, as it relates to the Governor's veto authority. In Count III, Petitioners seek declaratory relief⁴ against Governor Wolf, Treasurer Torsella, Auditor General DePasquale, and the Commonwealth of Pennsylvania for violating Article VIII, Section 7 of the Pennsylvania Constitution, which relates to the alleged illegal long-term borrowing, and Article VIII, Section 12, of the Pennsylvania Constitution, which relates to the Governor's submission of a balanced operating budget to the General Assembly.

In the Joint Motion, Respondents argue that the passage of the four pieces of legislation on October 30, 2017, have rendered Petitioners' claims moot because it will result in approximately \$34.7 billion in revenue, which eliminates any deficit from the past fiscal year or in the current fiscal year. This legislation included Act 40 of 2017,⁵ which amended the Administrative Code of 1929.⁶ It, *inter alia*,

³ Representatives Turzai and Reed have not joined in the Joint Motion but have filed preliminary objections.

⁴ At oral argument, Petitioners stated that the inclusion of injunctive relief in the heading was a typographical error and acknowledged that they are only seeking declaratory relief.

⁵ Act of October 30, 2017, P.L. 379.

⁶ Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 51-732.

increases various administrative fees and authorizes a transfer of \$200 million from the Joint Underwriting Association to the General Fund. Act 42 of 2017⁷ amended, *inter alia*, the Pennsylvania Race Horse Development and Gaming Act⁸ and authorizes a number of new forms of gambling and lottery games. Application fees and license fees are estimated to generate \$238 million for the General Fund in fiscal year 2017-18. Act 43 of 2017⁹ amends the Tax Reform Code of 1971.¹⁰ It makes a number of changes to various tax provisions, but its largest impact on the budget relates to tobacco settlements. Act 43 authorizes the Commonwealth Financing Authority to enter into a sales agreement or to issue bonds utilizing a portion of the annual payments from the Tobacco Master Settlement Agreement. This provision is expected to generate \$1.5 billion for the General Fund this year. Finally, Act 44 of 2017¹¹ amends the Fiscal Code.¹² It provides, *inter alia*, for deposit into the General Fund of approximately \$30.4 million received from settlement funds, distribution of nearly \$360 million from the Tobacco Settlement Fund for health-related programs, a deposit of \$50 million into the General Fund from slot machine licenses, and authorizes the transfer of \$300 million in special funds and restricted accounts to the General Fund.

At oral argument, Respondents argued that there is simply no constitutional provision that requires the passage of a revenue package at the exact same time as an appropriations bill. Under Respondents' view, Article VIII, Section 13 of the Pennsylvania Constitution simply requires the budget be balanced at the close of

⁷ Act of October 30, 2017, P.L. 419.

⁸ 4 Pa. C.S. §§ 1101-1904.

⁹ Act of October 30, 2017, P.L. 672.

¹⁰ Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §§ 7101-10004.

¹¹ Act of October 30, 2017, P.L. 725.

¹² Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. §§ 1-1805.

the fiscal year.¹³ In any case, they argue that enactment of the October 30, 2017, legislation cured any violation. They point out that each year, passage of the operating budget occurs before passage of the revenue package and the time between passage of the two parts can vary from hours to days or longer. They argue it is impossible to pass the budget and revenue package in tandem because events can happen that they need consider, such as the Governor vetoing certain line items or expected revenue not being realized. They argue this is simply part of the legislative process, with which the courts should not interfere, citing the Constitutional separation of powers doctrine.¹⁴ They emphasize that any effort to undo any past constitutional wrongs would result in turmoil for everyone, which is another reason to exercise judicial restraint. They also argue that because the issues raised are moot, any opinion this Court issues would be an advisory opinion, which the Court should refrain from issuing.

Respondents further argue that a number of variables must occur in order for this case to repeat itself, including, but not limited to:

- (1) the Commonwealth encounters another revenue shortfall and ends the fiscal year with actual General Fund revenue receipts substantially less than estimated revenue; **and**
- (2) the Legislature enacts a General Fund Operating Budget for the subsequent fiscal year without contemporaneously passing

¹³ Respondents argued that the close of the fiscal year renders any violations that occurred during that fiscal year moot, even if they did not arise until the end of the fiscal year.

¹⁴ Whether this action presents a non-justiciable political question is the subject of a series of preliminary objections that the parties have filed. The parties have also re-raised mootness in their preliminary objections, along with a number of other arguments, such as lack of standing, failure to state a claim (demurrer), and legislative and/or sovereign immunity. In addition, the Auditor General asserts he was not a signatory to the documents at issue. The parties realize that the preliminary objections are not currently before this Court.

legislation providing sufficient additional revenue to satisfy the prior fiscal year revenue shortfall and the appropriated expenditures for the next fiscal year; **and**

- (3) the Governor neither exercises his appropriations veto authority (Pa. Const. art[.] IV, § 16) nor identifies budgetary appropriations that are to be accounted as reserved, in an amount to ensure the enacted budget does not exceed estimated revenues for the current fiscal year; **and**
- (4) the certified revenue estimate for the fiscal year exceeds the General Fund Operating Budget total appropriated expenditures of the same year; **and**
- (5) the General Assembly fails to pass subsequent legislation (within the same fiscal year) providing sufficient revenue to satisfy the prior fiscal year revenue shortfall and to ensure the current fiscal year General Fund Operating Budget does not exceed estimated revenues.

(Respondents' Memorandum of Law at 7-8 (emphasis in original).) According to Respondents, "[t]he timing, modification or alternative outcome of any one of these events occurring as described would substantially alter the factual and legal premise of the state residents' cause of action, thereby subjecting any state constitutional judicial review to changing variables." (*Id.* at 8.)

Respondents also argue that, contrary to Petitioners' assertions, nothing prevents this Court or any other court from acting within a fiscal year. Therefore, to the extent the very specific facts of this case do repeat themselves, the matter will not evade review, provided the challenge is timely lodged. Here, Respondents point out that Petitioners waited until September to file their original petition for review instead of acting immediately at the start of the new fiscal year in July and at no point sought expedited review.

At oral argument, Petitioners responded that the case is not moot because the constitutional violations already occurred and are ongoing. They also argued that the enacted Budget was unbalanced during this fiscal year for a period of four months until the revenue package passed and is currently out of balance once again after a federal court stayed transfer of some of the funds.¹⁵ Therefore, they argued, the case is not moot.¹⁶ They ask the Court to interpret the constitutional provisions at issue and craft guidelines for those involved in the budget process to follow, but stress that they are not asking the Court to substitute its judgment for that of the lawmakers by telling the General Assembly how to spend the Commonwealth's money. They simply want the Court to issue a declaration, similar to that issued in *Common Cause of Pennsylvania v. Commonwealth of Pennsylvania*, 668 A.2d 190 (Pa. Cmwlth. 1995), *aff'd*, 677 A.2d 1206 (Pa. 1996), that the alleged conduct is illegal and cannot be repeated. Petitioners claim any such opinion would not be advisory because the violations are ongoing, and the Court should be able to

¹⁵ In support of their claim that the budget is currently unbalanced, on December 20, 2017, Petitioners filed a praecipe to attach to their response to the Joint Motion a copy of Economic & Budget Outlook: Fiscal Years 2017-2018 to 2022-2023, which is published by the Independent Fiscal Office, and an affidavit of Nathan A. Benefield.

¹⁶ Alternatively, Petitioners contend that, even if the case is moot, this case fits an exception to the mootness doctrine. There are three exceptions to the mootness doctrine, which apply if: “(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.” *Costa v. Cortes*, 142 A.3d 1004, 1016 (Pa. Cmwlth. 2016), *aff'd*, 145 A.3d 721 (Pa. 2016) (quoting *Cytemp Specialty Steel Div., Cyclops Corp. v. Pa. Pub. Util. Comm’n*, 563 A.2d 593, 596 (Pa. Cmwlth. 1989)). Should the Court find the matter is moot, Petitioners urge the Court to deny Respondents’ Joint Motion under the first exception. Given this Court’s disposition, it is not necessary to determine whether an exception to the mootness doctrine applies.

determine whether the alleged actions comport with the requirements of the Constitution.

We begin with a brief overview of the mootness doctrine. Courts generally will not decide moot cases. *Costa v. Cortes*, 142 A.3d 1004, 1016 (Pa. Cmwlth. 2016), *aff'd*, 145 A.3d 721 (Pa. 2016). It is well established that courts “do not render decisions in the abstract or offer purely advisory opinions.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005). Stated another way, our courts “are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong.” *Mistich v. Pa. Bd. of Probation and Parole*, 863 A.2d 116, 121 (Pa. Cmwlth. 2004) (quoting *Spencer v. Kemma*, 523 U.S. 1, 18 (1998)). “[A]n actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed” in order to avoid mootness. *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 600 (Pa. 2002). An intervening change in facts or the law may render an issue moot. *In re Gross*, 382 A.2d 116, 119-20 (Pa. 1978).

The courts of this Commonwealth are understandably reluctant to decide moot questions that raise constitutional issues. *Gross*, 382 A.2d at 120; *Costa*, 142 A.3d at 1017; *Harris v. Rendell*, 982 A.2d 1030, 1035-36 (Pa. Cmwlth. 2009), *aff'd*, 992 A.2d 121 (Pa. 2010). Our Supreme Court has stated that “Constitutional questions are not to be dealt with abstractly.” *In re Gross*, 382 A.2d at 120 (quotations omitted). Rather, “[t]he court ‘prefer[s] to apply the well-settled principles that [it] should not decide a constitutional question unless absolutely required to do so.’” *Harris*, 982 A.2d at 1035 (quoting *Krenzelak v. Krenzelak*, 469 A.2d 987, 991 (Pa. 1983)).

However, at this early procedural juncture, there are sufficient legal and factual issues that remain in dispute, such that this Court cannot find Petitioners' constitutional claims moot. This Court begins by noting that, although Respondents argue the Amended Petition for Review in its entirety is moot based upon the passage of the subsequent legislation that purports to balance the budget, they do not explain how this legislation renders moot the claim that they allegedly have engaged in long-term borrowing in violation of Article VIII, Section 7. While Respondents do argue that any borrowing that has occurred does not violate the Constitution, and dispute Petitioners' interpretation of the constitutional provisions, such is not a basis for concluding this claim is moot.

In addition, there are factual matters in dispute, including whether or not the General Fund Budget is currently balanced. The parties agreed at oral argument that, at this juncture, the Court must accept Petitioners' factual averments as true. This Court realizes that Respondents dispute facts alleged by Petitioners, but those disputes are not properly before this Court now, and do not provide a basis for concluding that the claims are moot.

In summary, Respondents have not demonstrated that Petitioners' claims are moot. Accordingly, this Court denies Respondents' Joint Motion to Dismiss.



RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, December 28, 2017, upon consideration of Respondents' Joint Motion to Dismiss for Mootness (Joint Motion), Petitioners' response thereto, and the parties' respective memoranda of law and oral argument, the Joint Motion is **DENIED**. If they have not already done so, Respondents shall file preliminary objections or an answer within 14 days of the date of this Order.



RENÉE COHN JUBELIRER, Judge

Certified from the Record

DEC 28 2017

and Order Exit