

IN THE
**COMMONWEALTH COURT OF
PENNSYLVANIA**

Docket No. 218 MD 2022

**FIREARMS OWNERS AGAINST CRIME – INSTITUTE FOR LEGAL,
LEGISLATIVE AND EDUCATIONAL ACTION, *et al.***
Petitioners

v.

**ROBERT EVANCHICK,
COMMISSIONER OF THE
PENNSYLVANIA STATE POLICE**
Respondent

**Post-Hearing Memorandum of Law in Support of a Writ of
Mandamus, Declaratory and Permanent Injunctive Relief or, in the
alternative, for a Preliminary Injunction**

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I. STATEMENT OF JURISDICTION

Jurisdiction in this matter is conferred upon the Commonwealth Court of Pennsylvania pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, § 2, effective June 27, 1978, 42 Pa.C.S. § 761(a)(1), which provides, in pertinent part, “[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity.”

II. STATEMENT OF BASIS FOR SPECIAL AND SUMMARY RELIEF

Special relief, in the nature of injunctive relief, is provided for by Pa.R.A.P. 1532(a), which provides:

Special relief. At any time after the filing of a petition for review, the court may, on application, order the seizure of property, dispose of seized property, issue a preliminary or special injunction, appoint a temporary receiver or grant other interim or special relief required in the interest of justice and consistent with the usages and principles of law.

Summary relief, in the nature of a writ of mandamus and declaratory relief, is provided for by Pa.R.A.P. 1532(b), which provides:

Summary relief. At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.

As this Court held in *Marshall v. Com., Pennsylvania Bd. of Prob. & Parole*, 638 A.2d 451, 453 (Pa. Cmwlth. 1994), “an application for summary relief

may be granted without the filing of an answer and prior to disposing of outstanding preliminary objections.”

III. ACTION IN QUESTION

Pennsylvania State Police Commissioner, Colonel Robert Evanchick’s and his Pennsylvania State Police’s rules, policies, and practices that, in direct defiance of the General Assembly’s mandate,¹ purposely understaff the PSP’s Pennsylvania Instant Check System (“PICS”) Operations Section,² which is responsible for performing firearm purchase and transfer background checks, as well as, performing background checks for purposes of obtaining or renewing a Pennsylvania License to Carry Firearms (“LTCF”),³ through the Pennsylvania Instant Check System (“PICS”) for the entire state, and which has resulted in the

¹ See, 18 Pa.C.S. § 6111.1(b)(1) (declaring that “[u]pon receipt of a request for a criminal history, juvenile delinquency history and mental health record check of the potential purchaser or transferee, the Pennsylvania State Police *shall immediately* during the licensee's call or by return call forthwith: . . . inform the licensee making the inquiry either: (A) that the potential purchase or transfer is prohibited; or (B) provide the licensee with a unique approval number)(emphasis added).

See also, 18 Pa.C.S. § 6111.1(c) (declaring that the “Pennsylvania State Police shall employ and train such personnel as are necessary to administer expeditiously the provisions of this section.”)

² The PSP’s website - <https://www.psp.pa.gov/firearms-information/Pages/Firearms%20Records.aspx> - refers to this unit as the Instant Check Unit and as a sub-unit of the Firearms Division. During Lt. Shandra Keeler’s testimony and throughout her Declaration (*see e.g.*, J-15, ¶¶ 4-5), it has been referred to as the PICS Operations Section.

³ See, J-1, PSP’s Firearm Annual Report, 2020, page 5 (*declaring* “In addition to firearms checks, the [Pennsylvania Uniform Firearms Act] mandates that sheriffs or chiefs of police of cities of the first class conduct a PICS check before issuing a license to carry a firearm”).

See also, J-15, Declaration of Lt. Keeler, ¶ 5.

disenfranchisement of individuals’ statutory and constitutional rights under the Pennsylvania and U.S. Constitutions.

Specifically, as Lt. Keeler testified to during the hearing on May 12, 2022, the average delay for processing background checks went from 15 minutes in 2019 to 82 minutes in 2021 – a 550% increase⁴ – and although the PICS Operations Unit is supposed to have 72 employees,⁵ the PSP currently only employs 64 in the Unit.⁶ Moreover, beyond admitting that it needs 20 additional employees^{7, 8} to ensure that PICS background checks are performed, “instantaneously” and “immediately,” as required by 18 Pa.C.S. §§ 6111, 6111.1, she testified that the PSP has not posted any job openings for these positions, even though it already has the funding for them.⁹ As a result of the PSP’s practice and policy of not fully staffing the PICS Operations Section, Lt. Keeler testified on direct examination

⁴ See also, J-15, Declaration of Lt. Keeler, ¶ 23.

⁵ 8 Legal Assistant Supervisors and 64 Legal Assistant 2 Operators.

⁶ 8 Legal Assistant Supervisors and 56 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶¶ 8, 10.

⁷ 2 Legal Assistant Supervisors and 18 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶ 15.

⁸ Lt. Keeler testified that the additional 20 would be in addition to the full complement of 72; thereby, resulting in a total of 92 employees, comprised of 10 Legal Assistant Supervisors and 82 Legal Assistant 2 Operators.

⁹ *See also*, J-7 (*declaring*, “[t]he majority of funding for these positions will be covered under the Gun Checks appropriation, even though the positions are complemented under the GGO”). Lt. Keeler testified that the 20 positions for the PICS Operations Section would be covered by the existing Gun Check appropriation and that the verbiage “majority of funding” was utilized because the Gun Checks appropriation could not be used for the additional 12, who would not be placed into the PICS Operations Section, because the Gun Check appropriation is a restricted appropriation that can only be utilized for purposes of paying salaries and benefits to employees in the PICS Operations Section.

that the delays in performing background checks reach 9-10 hours, but on cross-examination, admitted that since the PSP does not include in its average delay time calculation the time the PICS Operation Section is closed (*i.e.* 10 PM to 8 AM),¹⁰ the actual delays may be more akin to 19-20 hours and she admitted that the background check for Benjamin Brown – the owner of Landmark Firearms, LLC and a responsible person on its Federal Firearm license, who could not be a prohibited person – took over 20 hours.¹¹

Accordingly, Respondent Evanchick’s current practice and policy of understaffing the PICS Operations Section is resulting in delays and disenfranchisement of individuals’ statutory and constitutional rights under the Pennsylvania and U.S. Constitutions. As an additional result of Respondent Evanchick’s current policy and practice, Federal Firearm Licensees (“FFL”) – like Petitioner Landmark Firearms, LLC – not only have lost sale proceeds¹² but have incurred substantial un-reimbursable costs¹³ in paying the PSP for background

¹⁰ During cross-examination, Lt. Keeler confirmed that if a background check was started at 9:30 PM and was not approved until the next day at 8:05 AM, PSP would calculate the delay as 35 minutes, instead of 10 hours and 35 minutes (or 635 minutes).

¹¹ See also, J-8, Cradle to Grave Report of Landmark Firearms, LLC, page 11, transaction number 22W0310296.

¹² See J-12, Declaration of Benjamin Brown, ¶ 20, that he has “lost in excess of \$35,000.00 in income from purchaser/transfersors that have either cancelled or declined to move forward with transfers due to the PSP’s PIPCS system’s non-instantaneous, hours long delayed responses.”

¹³ 18 Pa.C.S. § 6111(b)(3)(declaring that an FFL “shall be charged a fee equivalent to the cost of providing the service but not to exceed \$2 per buyer or transferee.”) Currently and at all times

(footnote continued)

checks, where the customer cancels the pending transaction due to the significant delay.¹⁴ Moreover, FFLs – like Petitioner James Stoker d/b/a CYA Firearms – have had to elongate their firearm purchase/transfer appointments due to the understaffing of the PICS Operations Section; whereby, as a result, Petitioner Stoker’s productivity and profit have been cut at least in half.¹⁵

IV. STATEMENT OF QUESTIONS INVOLVED

1. Whether this Court should grant summary and special relief, in the nature of a writ of mandamus and declaratory and permanent injunctive relief, (1) declaring that consistent with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), the PSP is required to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (2) declaring that consistent with 18 Pa.C.S. § 6111.1(c), the PSP is required to “employ and train such personnel as are necessary” to “instantaneously” perform a background check with an “immediate[]” response approving or

(footnote continued)

relevant hereto, the PSP has charged \$2.00, per buyer. There is an additional \$3.00 “surcharge”, pursuant to 18 Pa.C.S. § 6111.2, for each firearm sold.

See also, Exhibit A, PDF pg. 5 (*declaring*, “The law included provisions for the PSP to conduct firearm background checks, to collect a \$2.00 fee from firearm dealers for each background check processed, and to collect a \$3.00 fee for the sale or transfer of each taxable firearm.”)

¹⁴ *See*, J-12, Declaration of Benjamin Brown at ¶¶ 12, 13, 19, 20.

¹⁵ *See*, J-13, Declaration of James Stoker at ¶¶ 7, 8, 11, 12, 13.

denying the purchaser/transferee; (3) enjoining Respondent's practice and policy of understaffing the PICS Operations Unit; (4) enjoining the PSP from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, require it to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and preclude it from requiring the Federal Firearms Licensee to verify such in any manner; (5) issuing a writ compelling Respondent and his PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c) by "instantaneously" performing background checks with an "immediate[]" response approving or denying the purchaser/transferee and employing and training such personnel as are necessary for the PSP to "instantaneously" perform a background check with an "immediate[]" response approving or denying the purchaser/transferee; and (6) requiring the PSP to notify this Court, within forty-eight (48) hours, of when its staffing is sufficient to ensure that it can process all background checks "instantaneously," "immediately" or, within a maximum, of five minutes.

Suggested Answer in the *Affirmative*

2. In the alternative, whether this Court should preliminarily enjoin Respondent Evanchick and his Pennsylvania State Police from (1) the enforcement of Respondent's Practice and require the Pennsylvania State Police and its officers, agents, servants, employees, and all persons in active concern or participation with them to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(c), as well as, Article 1, Sections 1, 21 of the Pennsylvania Constitution, and the Second Amendment to the U.S. Constitution, by immediately hiring and training as many new employees for the Instant Check Unit as are necessary to ensure that background checks are performed "instantaneously," and (2) preclude the Pennsylvania State Police from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, require it to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and preclude it from requiring the Federal Firearms Licensee to verify such in any manner.

Suggested Answer in the *Affirmative*

V. STATEMENT OF BASIS FOR EMERGENCY/EXPEDITED REVIEW

As recounted in the Amended Petition for Review, the Application for Special Relief in the Nature of an Emergency/Expedited Preliminary Hearing, the Application for Summary and Special Relief, and *infra*, unless this Court requires the PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c), individuals will continue to be disenfranchised of their statutory and constitutional rights under the Pennsylvania and U.S. Constitutions, including, but not limited to, being delayed, as admitted by Lt. Keeler, in excess of 20 hours in the purchasing/transferring of a firearm and being forced not only to lose substantial revenue, but also, having to pay the PSP for background checks that are cancelled due to the substantial, non-instantaneous or immediate PICS background check delayed responses.

VI. STATEMENT OF FACTS FROM THE HEARING ON MAY 13, 2022

During the hearing on May 13, 2022, the following facts were established:

A. Testimony of Benjamin Brown of Landmark Firearms, LLC

As a result of Respondent's Practice¹⁶ of understaffing the PICS Operations Section, in Petitioner Landmark Firearm's experience, on average, most background checks are currently taking 1-2 hours, with some taking in excess of

¹⁶ J-12, Declaration of Benjamin Brown, ¶ 4.

22 hours.¹⁷ Moreover, as a result of Respondent's Practice, on average, Landmark Firearms has only sold/transferred approximately 5 firearms, per day of the average gun show.¹⁸ Since approximately early 2021, as a result of Respondent's Practice, on average, Landmark Firearms obtains 3 or more commitments from purchasers/transferrers per day during a gun show, where the purchaser/transferrer cancels the transfer due to the PSP's PICS system's non-instantaneous, hours long delayed responses.¹⁹ When a purchaser/transferrer cancels the transaction prior to a response from the PSP's PICS system due to the non-instantaneous, hours long delays, not only does Landmark Firearms have to cancel the sale, return the purchaser/transferrer's money, and therefore lose out on all profits it would have received from the sale, but it additionally has to pay the PSP the \$2.00 for the background check that it did not receive back in a timely manner and which caused the loss of the sale.²⁰

During the Oaks Gun Show on April 1-3, Landmark Firearms had 10 customers decline to proceed with the paperwork upon Mr. Brown's informing them of the delays with PICS. As a result, Landmark Firearms lost approximately

¹⁷ *Id.* at ¶ 9.

¹⁸ *Id.* at ¶ 11.

¹⁹ *Id.* at ¶ 12.

²⁰ *Id.* at ¶ 13.

\$5,000.00 from these potential sales.²¹ On Saturday April 2, 2022, Landmark Firearms started two background checks around 2PM, which were not approved until approximately 8AM on Sunday, April 3, 2022.²² On Sunday, April 3, 2022, Landmark Firearms started a background check around 10:30AM and did not receive notice of approval until after the gun show was over, around approximately 7PM. As a result, Landmark Firearms lost this sale in the amount of \$895.00.²³ On Tuesday, April 5, 2022, Landmark Firearms started a background check on Mr. Brown around 3:40PM in relation to a firearm he was purchasing from his business for himself at which point the PSP's website stated that it was taking in excess of 4 hours; however, he was not approved until Wednesday, April 6, 2022, around 10AM, or more than 20 hours later.²⁴

Since approximately October 2021, as a result of Respondent's Practice, Landmark Firearms believes it has paid the PSP in excess of \$22.00 for background checks that were cancelled by purchasers/transferrors, due to the non-instantaneous or immediate, hours long delays in the responses from the PICS system.²⁵ Since approximately October 2021, as a result of Respondent's Practice,

²¹ *Id.* at ¶ 15.

²² *Id.* at ¶ 16.

²³ *Id.* at ¶ 17.

²⁴ *Id.* at ¶ 18; *see also*, J-8, Cradle to the Grave Report of Landmark Firearms, LLC, page 11, transaction 22W0310296.

²⁵ J-12, at ¶ 19.

Landmark Firearms believes it has lost in excess of \$35,000.00 in income from purchaser/transferrers that have either cancelled or declined to move forward with transfers due to the PSP's PICS system's non-instantaneous or immediate, hours long delayed responses.²⁶

B. Testimony of James Stoker of CYA Firearms

Prior to Respondent's Practice,²⁷ Petitioner Stoker allocated 30 minutes for each purchaser/transferrer.²⁸ Furthermore, prior to Respondent's Practice, during an average week, Stoker would sell/transfer approximately ten firearms and the average background check performed by the PSP would take less than ten minutes. In the past, he sold as many as twenty firearms during a week.²⁹ Since approximately May 2021, as a result of Respondent's Practice, in Stoker's personal experience, on average, most background checks take 3 to 4 hours, with some taking in excess of 7 hours.³⁰ Moreover, since approximately May 2021, as a result of Respondent's Practice, Stoker has not only had to allocate a minimum of 1 hour for each purchaser/transferrer appointment – thereby cutting his profits and productivity at least in half – but also, frequently, customers have to return at a

²⁶ *Id.* at ¶ 20.

²⁷ J-13, Declaration of James Stoker, ¶ 5.

²⁸ *Id.* at ¶ 7.

²⁹ *Id.* at ¶ 8.

³⁰ *Id.* at ¶ 9.

later time or the next day, now requiring two separate appointments for one transaction, which further reduces his profits and productivity.³¹ As a result of Respondent's Practice, Stoker believes he has invested nearly four times the man hours in order to maintain the same profit from purchaser/transferees due to the PSP's PICS system's non-instantaneous or immediate, hours long delayed responses.³² In that vein, Stoker believes he has lost in excess of 250 hours of his time, due to the PSP's PICS system's non-instantaneous or immediate, hours long delayed responses.³³

C. Testimony of Kim Stolfer of FOAC-ILLEA

Petitioner FOAC-ILLEA, consistent with its steadfast dedication to the protection of Article I, Section 21, monitors and asks members to report to it, *inter alia*, delays with PICS, as well as, instances where PICS is completely down.³⁴ Based on all information possessed by FOAC-ILLEA, since enactment and enforcement of Respondent's Practice,³⁵ the average background check performed by the PSP, as complained of by its members, takes several hours, with a significant number of those background checks taking in excess of 7 hours, and

³¹ *Id.* at ¶ 11.

³² *Id.* at ¶ 12.

³³ *Id.* at ¶ 13.

³⁴ J-14, Declaration of Kim Stolfer at ¶ 6.

³⁵ *Id.* at ¶ 5.

some taking in excess of 20 hours.³⁶ In fact, FOAC-ILLEA member Benjamin Brown, sole owner of Landmark Firearms, has been delayed over 20 hours.³⁷ FOAC-ILLEA has numerous law-abiding, non-prohibited individual members located in Pennsylvania, including Petitioner Stoker and Benjamin Brown of Landmarks Firearms, LLC, whose statutory and constitutional rights are being disenfranchised by Respondent's Practice, resulting in non-instantaneous, hours long delayed responses by PICS.³⁸ FOAC-ILLEA also has numerous law-abiding, FFL/organizational members located in Pennsylvania, including Petitioners Landmark Firearms, LLC and Stoker, whose statutory and constitutional rights are being disenfranchised by Respondent's Practice, resulting in lost sales, lost productivity, and incurring financial obligations to the PSP for background checks that were cancelled, all due to the non-instantaneous, hours long delayed responses by PICS.³⁹

D. Testimony of Lt. Shandra Keeler

Lt. Keeler testified that the average delay for processing background checks

³⁶ *Id.* at ¶ 8.

³⁷ *Id.* at ¶ 9.

³⁸ *Id.* at ¶ 11.

³⁹ *Id.* at ¶ 12.

went from 15 minutes in 2019 to 82 minutes in 2021 – a 550% increase⁴⁰ – and although the PICS Operations Unit is supposed to have 72 employees,⁴¹ the PSP currently only employs 64 in the Unit,⁴² which are divided into 8 groups/teams,⁴³ that work in two shifts. The first shift works from 7AM to 3PM and the second shift works from 2:30PM to 10:30PM;⁴⁴ whereby, Monday through Friday, the first shift is comprised of four groups/teams and the second shift is comprised of two groups/teams and on Sunday, there are only two teams/groups assigned to each shift.⁴⁵ She further admitted that while the PSP used to mandate overtime in an attempt to alleviate the delays, it no longer does and that while the shift patterns are designed to ensure that the PSP has more operators working during high volume times and that the shift patterns are reviewed annually, she could not remember the last time the shift patterns were analyzed and the PSP has no present intent to review the shift patterns, even though she agreed that it would make the most sense that the majority of inquiries would occur during the second shift – *e.g.* non-typical work hours – when the PSP currently has the fewest operators working.

⁴⁰ *See also*, J-15, Declaration of Lt. Keeler, ¶ 23.

⁴¹ 8 Legal Assistant Supervisors and 64 Legal Assistant 2 Operators.

⁴² 8 Legal Assistant Supervisors and 56 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶¶ 8, 10.

⁴³ *See also*, J-6b, 2022 Firearm Division Roster, pages 2-3; J-15, Declaration of Lt. Keeler, ¶ 10.

⁴⁴ *See also*, J-15, Declaration of Lt. Keeler, ¶ 11.

⁴⁵ *Id.* ¶ 12.

Further, beyond admitting that the PICS Operations Section needs 20 additional employees^{46, 47} to ensure that PICS background checks are performed, “instantaneously” and “immediately,” as required by 18 Pa.C.S. §§ 6111, 6111.1, she testified that the PSP has not posted any job openings for these positions, even though it already has the funding for them.^{48, 49} As a result of the Respondent’s policy and practice of not fully staffing the PICS Operations Section, Lt. Keeler testified on direct examination that the delays in performing background checks reach 9-10 hours, but on cross-examination, admitted that since the PSP does not

⁴⁶ 2 Legal Assistant Supervisors and 18 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶ 15.

⁴⁷ Lt. Keeler testified that the additional 20 would be in addition to the full complement of 72; thereby, resulting in a total of 92 employees, comprised of 10 Legal Assistant Supervisors and 82 Legal Assistant 2 Operators.

⁴⁸ *See also*, J-7 (*declaring*, “[t]he majority of funding for these position will be covered under the Gun Check appropriation, even though the positions are complemented under the GGO”). Lt. Keeler testified that the 20 positions for the PICS Operations Section would be covered by the existing Gun Check appropriation and that the verbiage “majority of funding” was utilized because the Gun Checks appropriation could not be used for the additional 12, who would not be placed into the PICS Operations Section, because the Gun Check appropriation is a restricted appropriation that can only be utilized for purposes of paying salaries and benefits to employees in the PICS Operations Section.

Lt. Keeler also testified that the Gun Check appropriation is \$4,400,000 (*see also*, J-5, Budget Excerpts, page 3), has been in effect since before 2020, and that the cost for the additional employees would likely be around \$2,400,000.

⁴⁹ Even if, *arguendo*, the Gun Check appropriation was not sufficient, Lt. Keeler testified that the PSP generally pays its employees from its General Government Operations appropriation, which went from \$183,253,000 for fiscal year 2020-2021 to \$441,366,00 for the current fiscal year (*see also*, J-5, pages 3, 6) and the staffing reduced by 60 employees (*see*, J-5, page 11, reflecting 6,220 compared to 6,160); thus, there simply is no plausible way that Respondent does not have sufficient funding, currently appropriated to his PSP, to hire 20 additional employees; but even if, *arguendo*, he has blown all of our tax-payer money on non-statutorily mandated employment and items, PSP can repurpose from its current staffing the necessary additional 20 individuals from other divisions within the PSP to the PICS Unit.

include in its average delay time calculation the time the PICS Operation Section is closed (*i.e.* 10 PM to 8 AM),⁵⁰ the actual delays may be more akin to 19-20 hours and she admitted that the background check for Benjamin Brown – the owner of Landmark Firearms, LLC and a responsible person on its Federal Firearm license, who could not be a prohibited person – took over 20 hours.⁵¹ She also testified that Landmark Firearms’ “average transaction time” was 741 minutes⁵² (or 12.35 hours) and CYA Firearms “average transaction time” was 308 minutes⁵³ (or 5.13 hours).

E. Additional Evidence from the Joint Exhibits

During Lt. Keeler’s testimony, she stated that the automated system only takes a couple minutes, no more than 5 minutes, to determine whether to auto-approve or send the inquiry to an operator. Yet, during cross-examination, she could not explain how on the Cradle to Grave Report for Landmark Firearms (J-8, page 1), transaction 21W0613820 specified a delay of 29 minutes. And that is not

⁵⁰ In response to questioning by the undersigned, Lt. Keeler confirmed that if a background check was started at 9:30 PM and was not approved until the next day at 8:05 AM, PSP would calculate the delay as 35 minutes, instead of 10 hours and 35 minutes (or 635 minutes).

⁵¹ *See also*, J-8, Cradle to Grave Report of Landmark Firearms, LLC, page 11, transaction number 22W0310296.

⁵² *See also*, J-8, Cradle to the Grave Report of Landmark Firearms, page 11, category “Average Transaction Time – Minutes”

⁵³ *See also*, J-9, Cradle to the Grave Report of CYA Firearms, page 11, category “Average Transaction Time – Minutes”

the only such lengthy delay in what the PSP contends is the speed at which its PICS system makes an initial determination as to whether to auto-approve or send to an operator for review. For example, to show the systemic delays in the system, looking at a completely different Federal Firearm Licensee's Cradle to Grave Report, that of CYA Firearms, we see numerous instances of 10+ minute delays, such as transaction numbers 21W0415973,⁵⁴ 21W0441302,⁵⁵ 21W0466898,⁵⁶ 21W0498446,⁵⁷ which are ones that just appear on the first page of the report; let alone all the others throughout the report. There is even a delay of 3311 minutes – 55.18 hours – for an auto-approval by the automated system on February 9, 2022 listed in the report.⁵⁸ And perhaps one might think that is an extreme exception; yet, just one page later, on February 26, 2022, we see a delay of 5627 minutes – or 93.87 hours – for the automated system to auto-approve the purchaser/transferee.⁵⁹

VII. ARGUMENT

A. Petitioners are entitled to summary and special relief in the nature of a writ of mandamus and declaratory and permanent injunctive relief

Pa.R.A.P. 1532 provides that:

⁵⁴ J-9, Cradle to Grave Report of CYA Firearms, page 1 (reflecting 14 minutes).

⁵⁵ *Id.* (reflecting 15 minutes).

⁵⁶ *Id.* (reflecting 46 minutes).

⁵⁷ *Id.* (reflecting 11 minutes).

⁵⁸ *Id.*, page 8, transaction number 22C0046933 (reflecting 3311 minutes).

⁵⁹ *Id.*, page 9, transaction number 22W0173959 (reflecting 5627 minutes).

(a) Special relief. At any time after the filing of a petition for review, the court may, on application, order the seizure of property, dispose of seized property, issue a preliminary or special injunction, appoint a temporary receiver, or grant other interim or special relief required in the interest of justice and consistent with the usages and principles of law.

(b) Summary relief. At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.

As this Court held in *Marshall v. Com., Pennsylvania Bd. of Prob. & Parole*, 638 A.2d 451, 453 (Pa. Cmwlth. 1994), “an application for summary relief filed pursuant to Pa.R.A.P. 1532(b) is generally the same as a motion for peremptory judgment filed in a mandamus action in the common pleas court...[a]s with a motion for peremptory judgment, an application for summary relief may be granted without the filing of an answer and prior to disposing of outstanding preliminary objections.” Since Respondent argued that this Court lacks the authority, due to sovereign immunity, to issue a preliminary injunction⁶⁰ but conceded, during the sidebar conference on May 12, 2022, that the Court could issue a writ of mandamus and grant declaratory relief, which would not be precluded by sovereign immunity, Petitioners filed an application for summary and

⁶⁰ This contention is plainly false and contrary to the binding precedent of the Pennsylvania Supreme Court in *Allegheny County v. Com.*, 507 Pa. 360, 384 (1986), where it reversed an order of the this Court and ordered the issuance of a preliminary injunction in a mandamus action requiring the Bureau of Correction and Board of Probation and Parole to take immediate physical custody of certain prisoners.

special relief to resolve any potential concern, since there can be no dispute, based on the evidence of record, that the Petitioners are entitled to relief.⁶¹

Accordingly, for the reason discussed *infra*, this Court should grant summary and special relief, in the nature of a writ of mandamus and declaratory and permanent injunctive relief,⁶² (1) declaring that consistent with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), the PSP is required to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (2) declaring that consistent with 18 Pa.C.S. § 6111.1(c), the PSP is required to “employ and train such personnel as are necessary” to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (3) enjoining Respondent’s practice and policy of understaffing the PICS Operations Unit; (4) enjoining the PSP from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and

⁶¹ While Petitioners continue to contend, as addressed in their Reply Brief, *Sur-Sur* Reply Brief, and *infra* that Respondent’s argument is meritless, to resolve Respondent’s concern, as well any of the Court, an application for summary and special relief was filed and this Memorandum argues in favor of granting summary and special relief – for which there is no dispute this Court has the power to issue – and, in the alternative, if this Court does not believe summary and special relief is warranted at the present time, in favor of granting a preliminary injunction.

⁶² For brevity and to limit duplication of argument, since the analysis for a preliminary injunction additionally requires an applicant to establish irreparable harm and immediate relief and the amount of a cost bond that are not required for a permanent injunction (*see, Buffalo Twp. v. Jones*, 813 A.2d 659, 663 (Pa. 2002)), Petitioners address all the elements, including the establishment of irreparable harm and immediate relief and the amount of a cost bond, in Section VII. B., *infra*, on their right to a preliminary injunction.

consistent therewith, require it to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and preclude it from requiring the Federal Firearms Licensee to verify such in any manner; (5) issuing a writ compelling Respondent and his PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c) by “instantaneously” performing background checks with an “immediate[.]” response approving or denying the purchaser/transferee and employing and training such personnel as are necessary for the PSP to “instantaneously” perform a background check with an “immediate[.]” response approving or denying the purchaser/transferee; and (6) requiring the PSP to notify this Court, within forty-eight (48) hours, of when its staffing is sufficient to ensure that it can process all background checks “instantaneously,” “immediately” or, within a maximum, of five minutes.

*i. Petitioners’ Right to Summary and Special Relief
in the Nature of a Writ of Mandamus and
Declaratory and Injunctive Relief is Clear*

As discussed in the Amended Petition for Review and *infra*, the Petitioners’ right to relief is clear under multiple legal bases.

a. Respondent’s Practice Violates 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c)

In enacting PICS through Act 17 of 1995, the General Assembly mandated that the background check be “instantaneous” and so there could be no dispute over the General Assembly’s intent that the system be “instantaneous,” it even named the system the “Instantaneous Criminal History Records Check System.”⁶³ Further ensuring that the system would be “instantaneous,” the General Assembly mandated, in 18 Pa.C.S. § 6111.1(b)(1), that the PSP “*shall immediately* during the licensee’s call or by return call forthwith ... inform the licensee making the inquiry either: (A) that the potential purchase or transfer is prohibited; or (B) provide the licensee with a unique approval number” and in 18 Pa.C.S. § 6111.1(c) that the “Pennsylvania State Police shall employ and train such personnel as are necessary to administer expeditiously” the PICS system.

Yet, in outright defiance of the General Assembly’s enactments and pronouncements, through Respondent’s policy and practice, Respondent Evanchick and his PSP have purposely understaffed the PICS Operational Section; thereby, resulting in delays and disenfranchisement of individuals’ statutory and constitutional rights under the Pennsylvania and U.S. Constitutions and caused

⁶³ 18 Pa.C.S. § 6111(a)(2).

substantial financial and productivity harm to Petitioners and other similarly situated individuals and businesses.

As set-forth in the Statement of Facts section of this Memorandum, Lt. Keeler, Respondent's own witness, testified that the average delay for processing background checks went from 15 minutes in 2019 to 82 minutes in 2021 – a 550% increase⁶⁴ – and although the PICS Operations Unit is supposed to have 72 employees,⁶⁵ the PSP currently only employs 64 in the Unit,⁶⁶ which are divided into 8 groups/teams,⁶⁷ that work in two shifts. The first shift works from 7AM to 3PM and the second shift works from 2:30PM to 10:30PM;⁶⁸ whereby, Monday through Friday, the first shift is comprised of four groups/teams and the second shift is comprised of two groups/teams and on Sunday, there are only two teams/groups assigned to each shift.⁶⁹ She further admitted that while the PSP used to mandate overtime in an attempt to alleviate the delays, it no longer does and that while the shift patterns are designed to ensure that the PSP has more operators working during high volume times and that the shift patterns are reviewed annually, she could not remember the last time the shift patterns were

⁶⁴ See also, J-15, Declaration of Lt. Keeler, ¶ 23.

⁶⁵ 8 Legal Assistant Supervisors and 64 Legal Assistant 2 Operators.

⁶⁶ 8 Legal Assistant Supervisors and 56 Legal Assistant 2 Operators; see also, J-15, Declaration of Lt. Keeler, ¶¶ 8, 10.

⁶⁷ See also, J-6b, 2022 Firearm Division Roster, pages 2-3; J-15, Declaration of Lt. Keeler, ¶ 10.

⁶⁸ See also, J-15, Declaration of Lt. Keeler, ¶ 11.

⁶⁹ *Id.* ¶ 12.

analyzed and the PSP has no present intent to review the shift patterns, even though she agreed that it would make the most sense that the majority of inquiries would occur during the second shift – *e.g.* non-typical work hours – when the PSP currently has the fewest operators working.

Further, beyond admitting that the PICS Operations Section needs 20 additional employees ^{70, 71} to ensure that PICS background checks are performed, “instantaneously” and “immediately,” as required by 18 Pa.C.S. §§ 6111, 6111.1, she testified that the PSP has not posted any job openings for these positions, even though it already has the funding for them. ⁷² As a result of the Respondent’s policy and practice of not fully staffing the PICS Operations Section, Lt. Keeler testified on direct examination that the delays in performing background checks reach 9-10 hours, but on cross-examination, admitted that since the PSP does not include in its average delay time calculation the time the PICS Operation Section is

⁷⁰ 2 Legal Assistant Supervisors and 18 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶ 15.

⁷¹ Lt. Keeler testified that the additional 20 would be in addition to the full complement of 72; thereby, resulting in a total of 92 employees, comprised of 10 Legal Assistant Supervisors and 82 Legal Assistant 2 Operators.

⁷² *See also*, J-7 (*declaring*, “[t]he majority of funding for these position will be covered under the Gun Check appropriation, even though the positions are complemented under the GGO”). Lt. Keeler testified that the 20 positions for the PICS Operations Section would be covered by the existing Gun Check appropriation and that the verbiage “majority of funding” was utilized because the Gun Checks appropriation could not be used for the additional 12, who would not be placed into the PICS Operations Section, because the Gun Check appropriation is a restricted appropriation that can only be utilized for purposes of paying salaries and benefits to employees in the PICS Operations Section.

closed (*i.e.* 10 PM to 8 AM),⁷³ the actual delays may be more akin to 19-20 hours and she admitted that the background check for Benjamin Brown – the owner of Landmark Firearms, LLC and a responsible person on its Federal Firearm license, who could not be a prohibited person – took over 20 hours.⁷⁴ She also testified that Landmark Firearms’ “average transaction time” was 741 minutes⁷⁵ (or 12.35 hours) and CYA Firearms “average transaction time” was 308 minutes⁷⁶ (or 5.13 hours). Those times are a FAR cry from the 15 minutes – that already was non-compliant with the law – that existed in 2019.

Respondent audaciously contends (Brief in Opp. of May 2, 2022, at 25-28) that this is acceptable and that there is no timeframe in which the PSP must provide a determination.⁷⁷ The absurdity of this is on full display, when one reviews

⁷³ In response to questioning by the undersigned, Lt. Keeler confirmed that if a background check was started at 9:30 PM and was not approved until the next day at 8:05 AM, PSP would calculate the delay as 35 minutes, instead of 10 hours and 35 minutes (or 635 minutes).

⁷⁴ *See also*, J-8, Cradle to Grave Report of Landmark Firearms, LLC, page 11, transaction number 22W0310296.

⁷⁵ *See also*, J-8, Cradle to the Grave Report of Landmark Firearms, page 11, category “Average Transaction Time – Minutes”

⁷⁶ *See also*, J-9, Cradle to the Grave Report of CYA Firearms, page 11, category “Average Transaction Time – Minutes”

⁷⁷ While Respondent contends, pursuant to 18 Pa.C.S. § 6111(b)(1.1)(iii), that “Section 6111 contains an express provision that the background check ‘shall be completed within 10 days of receipt of the information by the dealer,’” he purposely fails to advise the Court that Section 6111(b)(1.1) is *only* triggered “[i]n the event of an electronic failure” and only in relation to rifles and shotguns (*e.g.* long guns), as explicitly held by the Pennsylvania Supreme Court in *Allegheny Cty. Sportsmen’s League v. Rendell*, 580 Pa. 149, 162 (2004)(declaring that Section 6111(b)(1.1) and its subparts “only applies in the circumstance of an electronic failure, where an instantaneous background check cannot be performed for the sale of a long gun.”).

(footnote continued)

Section 6111.1(b), mandates that upon receiving a request for a background check, the PSP “*shall immediately* during the licensee’s call or by return call forthwith ... inform the licensee making the inquiry either: (A) that the potential purchase or transfer is prohibited; or (B) provide the licensee with a unique approval number.”

After being forced to acknowledge Section 6111.1(b)(1), after stating that no such requirement exists in the Uniform Firearms Act (Brief in Opp. of May 2, 2022, at 27), Respondent then, in his *Sur-Reply* Brief, doubles down by saying that the language “return call forthwith” allows the PSP as much time as it would like to respond to a background check ⁷⁸ and, in support, contends that PA Supreme Court in *Com. v. Smith*, 562 Pa. 609, 617 (2000) held that forthwith means “within a reasonable period of time.” *Sur-Reply* Brief at 3-4. While the Supreme Court did so hold in relation to the Forfeiture Act, it is extremely telling that Respondent purposely excludes the final portion of the Court’s actual holding. The Court actually held that forthwith means “within a reasonable period of time *and the defendant must not be prejudiced by the delay.*” *Id.* (emphasis added).

(footnote continued)

Lt. Keeler also made this same assertion during her testimony but then conceded that, consistent with the PA Supreme Court’s decision, it only applied during an electronic failure. ⁷⁸ In fact, the General Assembly clearly included the “return call forthwith” language to prevent the PSP from playing shenanigans by never picking up the phone and thereby contending that no request was made for a background check and therefore, it does not have a request to instantaneously or immediately respond to.

Here, there cannot be any dispute that Petitioners have been prejudiced by the delay. First and foremost, there is the disenfranchisement of their constitutional right to keep and bear arms and the statutory law requiring that the PICS system be “instantaneous,” the response be “immediate[],” and that the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate. Mr. Brown, himself, was delayed for more than 20 hours ⁷⁹ and there is no dispute, as admitted by Lt. Keeler, that he cannot be a prohibited person. Furthermore, since approximately October 2021, as a result of Respondent’s policy and practice, Landmark Firearms believes it has paid the PSP in excess of \$22.00 for background checks that were cancelled by purchasers/transferees, due to the non-instantaneous or immediate, hours long delays in the responses from the PICS system. ⁸⁰ Moreover, since approximately October 2021, as a result of Respondent’s Practice, Landmark Firearms believes it has lost in excess of \$35,000.00 in income from purchaser/transferees that have either cancelled or declined to move forward with transfers due to the PSP’s PICS system’s non-instantaneous or immediate, hours long delayed responses. ⁸¹

⁷⁹ See also, J-8, Cradle to Grave Report of Landmark Firearms, LLC, page 11, transaction number 22W0310296.

⁸⁰ J-12, at ¶ 19.

⁸¹ *Id.* at ¶ 20.

In relation to CYA Firearms, since approximately May 2021, as a result of Respondent's policy and practice, Mr. Stoker has not only had to allocate a minimum of 1 hour for each purchaser/transferor appointment – thereby cutting his profits and productivity at least in half – but also, frequently, customers have to return at a later time or the next day, now requiring two separate appointments for one transaction, which further reduces his profits and productivity.⁸² As a result of Respondent's policy and practice, Stoker believes he has invested nearly four times the man hours in order to maintain the same profit from purchaser/transferors due to the PSP's PICS system's non-instantaneous or immediate, hours long delayed responses.⁸³ In that vein, Stoker believes he has lost in excess of 250 hours of his time, due to the PSP's PICS system's non-instantaneous or immediate, hours long delayed responses.⁸⁴

Thus, as Respondent's policy and practice is violative of the statutory requirement, pursuant to 18 Pa.C.S. §§ 6111, 6111.1, that the PICS system be “instantaneous,” the response be “immediate[,]” and that the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate, Petitioners' right to relief is clear.

⁸² J-13, at ¶ 11.

⁸³ *Id.* at ¶ 12.

⁸⁴ *Id.* at ¶ 13.

b. Respondent’s Practice Violates Due Process

“The touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

“In terms of procedural due process, government is prohibited from depriving individuals of life, liberty, or property, unless it provides the process that is due.”

Com. v. Turner, 622 Pa. 318, 335 (2013).

Article I, Section 1 of the Pennsylvania State Constitution states

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

Article I, Section 21 of the Pennsylvania State Constitution states

The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.

“Substantive due process is the esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice.” *Com. v.*

Stipetich, 539 Pa. 428, 439 (1995). As explained by the Pennsylvania Supreme

Court, “[f]or substantive due process rights to attach, there must be a deprivation of

a constitutionally protected interest or property right. *Germantown Cab Co. v.*

Philadelphia Parking Auth., 206 A.3d 1030, 1042 (Pa. 2019).

As Article I, Section 1 of the Pennsylvania State Constitution proclaims, all men have the inherent and inalienable right to defend life and liberty. And as

further clarified by Article I, Section 21, this encompasses the right to bear arms. And let there be no dispute, as this Court held in *Caba v. Weaknecht*, 64 A.3d 39, 58 (Pa. Cmwlth. 2013) the right to keep and bear arms, pursuant to Article I, Section 21, is an “enumerated right predating even the ratification of the Second Amendment.”

Respondent’s policy and practice violates Petitioners’ and those similarly situated’s procedural and substantive due process rights by not providing an instantaneous background check system with immediate response for purchasing/transferring firearms and obtaining LTCFs, in outright defiance of the General Assembly’s mandates and pronouncements. Although Respondent Evanchick and his PSP can and are required to comply with Sections 6111 and 6111.1, they have purposely understaffed the PICS Operations Section; thereby denying Petitioners and those similarly situated their constitutional right to bear arms, as well as, divesting the FFL Petitioners and those similarly situated of property – *i.e.* their money and time – in breach of the requirement that the PICS system be “instantaneous,” the response be “immediate[,]” and that the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate.

Thus, as Respondent’s policy and practice violates any notion of due process, Petitioners’ right to relief is clear.

* * * *

Accordingly, this Court should grant summary and special relief, in the nature of a writ of mandamus and declaratory and permanent injunctive relief, (1) declaring that consistent with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), the PSP is required to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (2) declaring that consistent with 18 Pa.C.S. § 6111.1(c), the PSP is required to “employ and train such personnel as are necessary” to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (3) enjoining Respondent’s practice and policy of understaffing the PICS Operations Unit; (4) enjoining the PSP from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, require it to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and preclude it from requiring the Federal Firearms Licensee to verify such in any manner; (5) issuing a writ compelling Respondent and his PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c) by “instantaneously” performing background checks with

an “immediate[.]” response approving or denying the purchaser/transferee and employing and training such personnel as are necessary for the PSP to “instantaneously” perform a background check with an “immediate[.]” response approving or denying the purchaser/transferee; and (6) requiring the PSP to notify this Court, within forty-eight (48) hours, of when its staffing is sufficient to ensure that it can process all background checks “instantaneously,” “immediately” or, within a maximum, of five minutes.

B. In the Alternative, if This Court is not Inclined to Grant Summary and Special Relief, Petitioners are Entitled to a Preliminary Injunction

As declared by the PA Supreme Court in *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 502 (Pa. 2014), a petitioner must establish the following criteria for the issuance of a preliminary injunction:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

Consistent therewith and the evidence of Record, Petitioners seek an order

(1) enjoining Respondent’s policy and practice of understaffing the PICS

Operations Section and ordering the PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b), (c), as well as, Article 1, Sections 1, 21 of the Pennsylvania Constitution, by immediately hiring and training as many new employees or repurposing current employees for the PICS Operations Section as are necessary to ensure that background checks, otherwise referred to as PICS checks, are all performed “instantaneously,” “immediately” or otherwise, do not take more than 5 minutes;⁸⁵ (2) until such time as the PSP complies with the Court’s Order, enjoining the PSP from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, ordering the PSP to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and that it shall not require the Federal Firearms Licensee to verify this in any manner; and (3) requiring the PSP to notify this Court, within forty-eight (48) hours, of when its staffing is sufficient

⁸⁵ While Petitioners acknowledge that the law requires that the PICS system be “instantaneous,” the response be “immediate[,],” and that the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate, they include this additional language of the background check not taking more than 5 minutes as a guidepost or bumper so that Respondent can ensure that he is in compliance with the law and this Court’s ruling and so that Petitioners can likewise determine Respondent’s compliance.

to ensure that it can process all background checks “instantaneously,” “immediately” or, within a maximum, of five minutes.

i. Petitioners’ Right to Relief is Clear

As discussed *supra* in Section VII(A)(i), Petitioners’ right to relief is clear under multiple legal bases.

ii. An Injunction is Necessary to Prevent Immediate and Irreparable Harm

As this Court, citing to the Pennsylvania Supreme Court’s decision in *Pennsylvania Public Utility Commission v. Israel*, 356 Pa. 400 (1947), declared, “[t]his traditional prerequisite to the issuance of an injunction is not applicable where as here the Legislature declares certain conduct to be unpermitted and unlawful. For one to undertake and pursue such statutorily prohibited conduct constitutes irreparable injury which is the proper subject of injunctive relief.” *City of Erie v. Nw. Pennsylvania Food Council*, 322 A.2d 407, 412 (Pa. Cmwlth. 1974). Stated slightly differently, “the violation of an express statutory provision constitutes *per se* irreparable harm and a preliminary injunction may issue where the other necessary elements are met.” *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Cmwlth. 2016).

Even if, *arguendo*, Petitioners were required to establish irreparable harm that cannot be compensated by damages, beyond the disenfranchisement of Petitioners' and those similarly situated's statutory and constitutional rights, which cannot be compensated by financial damages, as the PSP has sovereign immunity against any financial judgments,⁸⁶ Petitioners, including FOAC-ILLEA's member and those who are similarly situated, are foreclosed in obtaining any damages, including even the fees Federal Firearm Licensees, like Landmark Firearms, are required to pay and are paying the PSP, even if the customer cancels the transaction due to the PSP's delay in responding to the background check.⁸⁷ Moreover, Landmark has already lost \$35,000 in income, as a result of Respondent's policy and practice, and CYA Firearms had lost 250 hours of time and counting. And as Lt. Keeler testified, PSP has no current intentions of complying with its statutory requirements and Respondent audaciously contends that there is no timeframe in which the PICS Operations Section must make a determination.

Thus, Petitioners have established the irreparable harm prong, as Respondent's policy and practice is directly contrary to the law and even if,

⁸⁶ See, 1 Pa.C.S. § 2310; 42 Pa.C.S. § 8521.

⁸⁷ J-12, at ¶ 13.

arguendo, Petitioners were required to show irreparable harm, they have established it.

iii. Greater Injury Will Result From Refusing the Injunction Than Granting It

As this Court, *en banc*, in *Dillon* declared “unlawful regulation ... shows that a greater injury will occur by refusing to grant the injunction because [the regulation] is unenforceable.” *Dillon*, 83 A.3d at 470 n.1; *see also*, *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d at 1181 *declaring* that greater injury would result from permitting a statutory violation to continue). As Respondent’s policy and practice is directly contrary to the law and, as a result of Respondent’s policy and practice, Petitioners and those similarly situated are being disenfranchised from their statutory and constitutional rights, there simply cannot be any greater injury than the refusal to grant an injunction. Furthermore, the financial harm to Petitioners is ongoing and cannot be compensated through damages, because the PSP has sovereign immunity, generally precluding any financial judgments against it.

iv. Status Quo

“The *status quo ante* to be preserved by a preliminary injunction is the last actual, peaceable, lawful, noncontested status which preceded the pending

controversy.” *Dillon*, 83 A.3d at 472 n.7.

In this case, there can be no dispute that the last noncontested status existed immediately prior to Respondent’s policy and practice. In fact, as Respondent’s own witness – Lt. Keeler – testified, that the average delay for processing background checks went from 15 minutes in 2019 to 82 minutes in 2021 – a 550% increase.⁸⁸ She admitted that the background check for Benjamin Brown – the owner of Landmark Firearms, LLC and a responsible person on its Federal Firearm license, who could not be a prohibited person – took over 20 hours only a month ago.⁸⁹ She also testified that Landmark Firearms’ “average transaction time” was 741 minutes⁹⁰ (or 12.35 hours) and CYA Firearms “average transaction time” was 308 minutes⁹¹ (or 5.13 hours). Those times are a FAR cry from the 15 minutes – that already was non-compliant with the law – that existed in 2019.

And all of these delays, as Lt. Keeler testified to, are the result of Respondent’s policy and practice of understaffing the PICS Operations Unit. As Lt. Keeler testified, the PICS Operations Unit is supposed to have 72 employees,⁹²

⁸⁸ *See also*, J-15, Declaration of Lt. Keeler, ¶ 23.

⁸⁹ *See also*, J-8, Cradle to Grave Report of Landmark Firearms, LLC, page 11, transaction number 22W0310296.

⁹⁰ *See also*, J-8, Cradle to the Grave Report of Landmark Firearms, page 11, category “Average Transaction Time – Minutes”

⁹¹ *See also*, J-9, Cradle to the Grave Report of CYA Firearms, page 11, category “Average Transaction Time – Minutes”

⁹² 8 Legal Assistant Supervisors and 64 Legal Assistant 2 Operators.

but Respondent currently only employs 64 in the Unit.⁹³ Moreover, beyond admitting that the PICS Operations Section needs 20 additional employees^{94, 95} to ensure that PICS background checks are performed, “instantaneously” and “immediately,” as required by 18 Pa.C.S. §§ 6111, 6111.1, she testified that the PSP has not posted any job openings for these positions, even though it already has the funding for them.⁹⁶

v. *Will Not Adversely Affect the Public*

As the PA Supreme Court declared, once the General Assembly has prohibited conduct, “it is tantamount in law to calling it injurious to the public.” *Israel*, 52 A.2d at 321. This Court *en banc* in *Dillon* echoing *Israel* Court holding, held that “[t]he argument that a violation of law can be a benefit to the public is without merit.” 83 A.3d at 474. Thus, a statutory violation, in addition to not

⁹³ 8 Legal Assistant Supervisors and 56 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶¶ 8, 10.

⁹⁴ 2 Legal Assistant Supervisors and 18 Legal Assistant 2 Operators; *see also*, J-15, Declaration of Lt. Keeler, ¶ 15.

⁹⁵ Lt. Keeler testified that the additional 20 would be in addition to the full complement of 72; thereby, resulting in a total of 92 employees, comprised of 10 Legal Assistant Supervisors and 82 Legal Assistant 2 Operators.

⁹⁶ *See also*, J-7 (*declaring*, “[t]he majority of funding for these position will be covered under the Gun Check appropriation, even though the positions are complemented under the GGO”). Lt. Keeler testified that the 20 positions for the PICS Operations Section would be covered by the existing Gun Check appropriation and that the verbiage “majority of funding” was utilized because the Gun Checks appropriation could not be used for the additional 12, who would not be placed into the PICS Operations Section, because the Gun Check appropriation is a restricted appropriation that can only be utilized for purposes of paying salaries and benefits to employees in the PICS Operations Section.

requiring a showing of irreparable harm, “relieve[s] the trial court of undertaking the balance of the harm inquiry.” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020).

vi. Reasonably Suited to Abate the Offending Activity

The relief that Petitioners’ seek is reasonably suited to abate the offending activity as the requested injunction directly and exclusively abates the offending activity by compelling the PSP to comply with the statutory law enacted by the General Assembly, that the PICS system be “instantaneous,” the response be “immediate[,]” and that the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate.

*vii. Only a Nominal Cost Bond Should be Required*⁹⁷

Pursuant to Pa.R.C.P. 1531(b), a cost bond is generally required for a preliminary injunction to issue to a non-government plaintiff. While Petitioners believe no cost bond should be required when the Government, itself, violates the laws and Constitution of Pennsylvania, so to ensure that no issue arises in this

⁹⁷ As this Court declared in *Berger By & Through Berger v. W. Jefferson Hill Sch. Dist.*, 669 A.2d 1084, 1086 (Pa.Cmwlth. 1995), “[t]here is no bond requirement in connection with a permanent injunction.”

regard, Petitioners respectfully request that any cost bond be nominal or in the nature of \$1.00 legal tender.

C. Sovereign Immunity does not apply to *any* of the relief sought by Petitioners

While Respondent’s counsel conceded at sidebar on May 12, 2022 that sovereign immunity does *not* preclude this Court from issuing a writ of mandamus or declaratory relief, as established by the legion of binding precedent, none of the relief sought by Petitioners – preliminary injunction, permanent injunction, declaratory relief or a writ of mandamus – is barred by sovereign immunity, and as discussed further *infra*, contrary to Respondent’s baseless argument that this Court lacks the power to grant a preliminary injunction, the PA Supreme Court in *Allegheny County v. Com.*, 507 Pa. at 384 explicitly directed this Court to issue a preliminary injunction in a mandamus action.

While the Commonwealth, its officers, and employees enjoy sovereign immunity from suit, that immunity is not a blanket protection or a justification of the abdication of their constitutional and statutory obligations.⁹⁸ Respondent correctly identified that most claims for *damages* are barred, but erroneously

⁹⁸ *See*, Pa.R.C.P. 1091-1100, which explicitly deal with mandamus actions and, more specifically, Rule 1094, which addresses actions “commenced to compel performance of ... a public act or duty ... by an executive or administrative department.”

contended that *all* claims seeking to compel affirmative action from state officials are similarly barred. Brief in Opp. of May 2, 2022, at 16-17.

As held by the Pennsylvania Supreme Court, actions against the state, its officials, and employees seeking declaratory relief are *not* precluded by sovereign immunity. *Legal Cap., LLC v. Med. Pro. Liab. Catastrophe Loss Fund*, 561 Pa. 336, 342 (2000) (“To the extent that legal Capital only seeks declaratory judgment...sovereign immunity does not apply because it is not applicable to declaratory judgment actions.”); *see also, Fawber v. Cohen*, 516 Pa. 352, 360 (1987). As cited to by Respondent, the Pennsylvania Supreme Court in *Philadelphia Life Ins. Co. v. Commonwealth*, 410 Pa. 571, 576 (1963), held that

The distinction is clear between suits against the Commonwealth which are within the rule of its immunity and suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be unconstitutional. Suits which seek to compel affirmative action on the part of state officials...are within the rule of immunity; suits which simply seek to restrain state officials from performing affirmative acts are not within the rule of immunity.

See also Fawber v. Cohen, 516 Pa. at 360 (emphasis removed). However, Respondent failed to advise this Court that our Supreme Court would clarify, just a year later, that “mandamus will lie to compel performance by a public official of a legal duty even if the existence and/or scope of the duty must be found and defined in the mandamus action itself.” *Volunteer Firemen’s Relief Ass’n of City of Reading v. Minehart*, 415 Pa. 3035, 311-12 (1964). Consistent therewith, this

Court in *Penn. Human Relations Com'n v. School Dist. of Philadelphia*, 681 A.2d 1366, 1381 (Pa. Cmwlth. 1996), declared that “[t]he Commonwealth and Governor are not immune from suit instituted to compel the performance of a mandatory duty.”

More recently, this Court confirmed that an “exception to the rule barring mandatory injunctions against the Commonwealth parties is that an action in mandamus will lie to compel a state officer or agency to perform a ministerial or mandatory statutory duty.” *Finn v. Rendell*, 990 A.2d 100, 105 (Pa. Cmwlth. 2010); *see also, Stackhouse v. Com., Pennsylvania State Police*, 892 A.2d 54, 59 n. 6 (Pa. Cmwlth. 2006)(*declaring*, “immunity will not bar a mandamus action to compel an agency or officer to perform a ministerial or mandatory statutory duty”); *Buoncuore v. Pennsylvania Game Comm'n*, 830 A.2d 660, 662 (Pa. Cmwlth. 2003)(*declaring*, “actions in mandamus are not subject to immunity” and that “this Court rejects the notion that compliance with a clearly stated statutory duty constitutes a ‘penalty’ rather than a ministerial act.”); *Milestone Materials, Inc. v. Dep't of Conservation & Nat. Res.*, 730 A.2d 1034, 1039 (Pa. Cmwlth. 1999)(*declaring*, “unlike cases where a discretionary duty is involved, the law is well settled that the doctrine of sovereign immunity does not bar suits that seek to compel state officials to carry out their duties only in a lawful manner.”); *City of Philadelphia v. Shapp*, 403 A.2d 1043 (Pa. Cmwlth. 1979)(*holding*, that sovereign

immunity does not bar a mandamus action against the Governor and the Department of Transportation to compel their performance in accordance with constitutional and legislative mandates.) Perhaps even more importantly, as mentioned previously, Respondent's contention is directly at odds with the binding precedent from the PA Supreme Court in *Allegheny County v. Com.*, 507 Pa. at 384, which reversed an order of this Court and ordered the issuance of a preliminary injunction in a mandamus action requiring the Bureau of Correction and Board of Probation and Parole to take immediate physical custody of certain prisoners.

As 18 Pa.C.S. §§ 6111 and 6111.1(b)(1), (c) impose mandatory, non-discretionary, duties upon the Respondent to perform “instantaneous” background checks using the “Instantaneous Criminal History Records Check System,” whereby the response by the PSP of approving or denying the purchaser/transferee is to be “immediate[,]” and for Respondent to “employ and train such personnel as are necessary to administer expeditiously” these requirements – all of which Petitioners have established that he has failed to comply with – there can be no dispute that Petitioners are entitled to a writ of mandamus and declaratory and injunctive relief to compel fulfillment of these mandatory duties and as such, sovereign immunity is inapplicable. Furthermore, Petitioners' injunctive request pertaining to the \$2.00 fee is also not barred by sovereign immunity, as they are

not asking this Court to warranty the results of the background check as Respondent alleges. Brief in Opp. of May 2, 2022, at 18. Rather, Petitioners are only asking this Court to preclude the Respondent from charging a fee for a service it is *not* providing, *i.e. instantaneous* checks with *immediate* responses, and only in such circumstances as the PSP fails to provide that service, causing the subject of the background check to cancel the transaction.

As the relief sought by Petitioners is not barred by sovereign immunity, this Court should reject the Respondent's meritless contention.

D. The separation of powers doctrine is not violated by this Court forcing compliance with the Constitution or duly enacted law of the General Assembly

As this Court declared, in citing to the Pennsylvania Supreme Court's decision in *Commonwealth v. Sutley*, 474 Pa. 256 (1977), "[t]he judicial branch does not usurp the power of the executive branch by interpreting and applying a legislative enactment and directing that the Secretary comply with it." *Banfield v. Cortes*, 922 A.2d 36, 44 (Pa. Cmwlth. 2007).

As Petitioners only seek to compel Respondent's compliance with their constitutional rights⁹⁹ and statutory law,¹⁰⁰ there is no violation of the separation

⁹⁹ Pursuant to Article 1, Sections 1, 21 of the Pennsylvania Constitution.

of powers doctrine. Contrary to Respondent’s contention (Brief in Opp. of May 2, 2022, at 20), Petitioners do not seek to interfere with “appropriations decisions,” but rather, seek to compel Respondent’s compliance with the General Assembly’s enactments in 18 Pa.C.S. § 6111.1(b)(1), (c), that “[u]pon receipt of a request for a [background check] of the potential purchaser or transferee, the Pennsylvania State Police *shall immediately* during the licensee’s call or by return call forthwith inform the licensee making the inquiry either: ... (A) that the potential purchase or transfer is prohibited; or (B) provide the licensee with a unique approval number” and that “Pennsylvania State Police [] employ and train such personnel as are necessary to administer expeditiously” PICS background check determinations. How Respondent complies with that statutory obligation – whether via hiring more individuals with the PSP’s remaining available General Government Operations appropriation (or restricted Gun Checks appropriation ¹⁰¹) or repurposing existing employees to the PICS Unit – is immaterial to Petitioners. They only seek to vindicate their constitutional rights and enforce the General Assembly’s mandate that the PICS system be “instantaneous,” the response be “immediate[],” and that

(footnote continued)

¹⁰⁰ Pursuant to 18 Pa.C.S. §§ 6111.1(b)(1), (c).

¹⁰¹ See, J-7, wherein Respondent acknowledged that the funding for additional employees can “be covered under the Gun Checks Appropriation.”

the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate.

VIII. CONCLUSION

For the foregoing reasons and those alleged in the Amended Petition for Review, Petitioners, Firearm Owners Against Crime – Institute for Legal, Legislative, and Educational Action, Landmark Firearms LLC, and James Stoker, respectfully request that this Honorable Court grant their Application for Summary and Special Relief, in the nature of a writ of mandamus and declaratory and permanent injunctive relief and issue an order (1) declaring that consistent with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), the PSP is required to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (2) declaring that consistent with 18 Pa.C.S. § 6111.1(c), the PSP is required to “employ and train such personnel as are necessary” to “instantaneously” perform a background check with an “immediate[]” response approving or denying the purchaser/transferee; (3) enjoining Respondent’s practice and policy of understaffing the PICS Operations Unit; (4) enjoining the PSP from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, require it to assume that any Federal Firearms Licensee that

utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and preclude it from requiring the Federal Firearms Licensee to verify such in any manner; (5) issuing a writ compelling Respondent and his PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b)(1), (c) by “instantaneously” performing background checks with an “immediate[.]” response approving or denying the purchaser/transferee and employing and training such personnel as are necessary for the PSP to “instantaneously” perform a background check with an “immediate[.]” response approving or denying the purchaser/transferee; and (6) requiring the PSP to notify this Court, within forty-eight (48) hours, of when its staffing is sufficient to ensure that it can process all background checks “instantaneously,” “immediately” or, within a maximum, of five minutes.

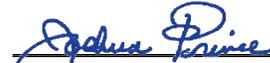
In the alternative, if this Court does not believe summary and special relief is warranted at the present time, Petitioners respectfully request that this Honorable Court grant their Application Special Relief in the Nature of a Preliminary Injunction and issue an order (1) enjoining Respondent’s policy and practice of understaffing the PICS Operations Section and ordering the PSP to immediately comply with 18 Pa.C.S. §§ 6111, 6111.1(b), (c), as well as, Article 1, Sections 1, 21 of the Pennsylvania Constitution, by immediately hiring and training as many

new employees or repurposing current employees for the PICS Operations Section as are necessary to ensure that background checks, otherwise referred to as PICS checks, are all performed “instantaneously,” “immediately” or otherwise, do not take more than 5 minutes;¹⁰² (2) until such time as the PSP complies with the Court’s Order, enjoin the PSP from requesting the \$2.00 fee for any background checks, where the customer cancels the purchase/transfer of the firearm due to the delays of the PICS system and consistent therewith, ordering the PSP to assume that any Federal Firearms Licensee that utilizes PICS and does not remit the \$2.00 background check fee is the result of the customer cancelling the purchase/transfer of the firearm due to the delays of the PICS system and that it shall not require the Federal Firearms Licensee to verify this in any manner; and (3) require the PSP to notify this Court, within forty-eight (48) hours, of when its staffing is sufficient to ensure that it can process all background checks “instantaneously,” “immediately” or, within a maximum, of five minutes.

¹⁰² While Petitioners acknowledge that the law requires that the PICS system be “instantaneous,” the response be “immediate[],” and that the PSP employ as many individuals as necessary to ensure it is instantaneous and immediate, they include this additional language of the background check not taking more than 5 minutes as a guidepost or bumper so that Respondent can ensure that he is in compliance with the law and this Court’s ruling and so that Petitioners can likewise determine Respondent’s compliance.

Respectfully Submitted,

Date: May 16, 2022



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CERTIFICATION

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

CERTIFICATE OF SERVICE

I, Joshua Prince, hereby certify that on May 16, 2022, I caused a true and correct copy of the foregoing Memorandum of Law to be served, via PACFile, on the entities specified below:

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