IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE MIDDLE DISTRICT

No. 4 MAP 2002

EARL NIXON, REGINALD CURRY, KELLY WILLIAMS, MARIE MARTIN, THEODORE SHARP, and RESOURCES FOR HUMAN DEVELOPMENT, INC.,

Appellees,

v.

THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGING OF THE COMMONWEALTH OF PENNSYLVANIA, and DEPARTMENT OF HEALTH OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellants.

BRIEF OF APPELLEES

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DATED: June 7, 2002

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Whether the employment-prohibiting provisions of the Older Adults Protective Services Act – which prohibit nursing homes, home health-care agencies, residential mental health and mental retardation facilities, and other covered health-care facilities from employing, in any capacity, any individual who was convicted of any one of a broad range of enumerated misdemeanors and felonies at any time in his or her life – violate the Constitution of the Commonwealth of Pennsylvania.

Answered in the affirmative by the en banc Commonwealth Court.

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

The standard of review of a decision by a court sitting in equity is limited. See Carroll v. Ringgold Educ. Ass'n, 545 Pa. 192, 198, 680 A.2d 1137, 1140 (1996). "A chancellor's findings of fact will not be disturbed absent an abuse of discretion, a capricious disbelief of the evidence, or a lack of evidentiary support on the record for the findings." Masloff v. Port Auth. of Allegheny Cty., 531 Pa. 416, 421, 613 A.2d 1186, 1188 (1992). Further, this Court has stated that it "will not reverse a grant of injunctive relief 'unless . . . the rules of law relied on are palpably wrong or clearly inapplicable.'" Jersey Shore Area Sch. Dist. v. Jersey Shore Educ. Ass'n, 519 Pa. 398, 402, 548 A.2d 1202, 1204 (1988) (quoting Lindenfelser v. Lindenfelser, 385 Pa. 342, 343-44, 123 A.2d 626, 627 (1956)).

COUNTER-STATEMENT OF THE CASE

A. Form of Action and Procedural History of the Case

On August 8, 2000, appellees commenced this action in the original jurisdiction of the Commonwealth Court to challenge the constitutionality of the employment-prohibiting provisions of The Older Adults Protective Services Act ("OAPSA" or "the Act"), 35 P.S. §§ 10225.501-.508, which, inter alia, prohibit nursing homes, home health-care agencies, residential mental health and mental retardation facilities, and other health-care facilities from employing in any capacity any individual who was convicted of any one of a broad range of misdemeanors and felonies at any time during his or her life. R. 13a-33a. In their Petition for Review in the Nature of a Complaint in Equity filed with the Commonwealth Court, appellees sought: (1) a declaration that the employment-prohibiting provisions of the Act violate the Constitution of the Commonwealth of Pennsylvania as applied to them and (2) an order permanently enjoining the Commonwealth and several of its agencies from enforcing the unconstitutional provisions of the Act against them. Id. In connection with their Petition, the individual appellees also sought a preliminary injunction to allow them to return to their former employment with care-giving facilities covered by the Act. See Petition for Preliminary Injunction.

On August 31, 2000, the Honorable Dan Pellegrini of the Commonwealth Court held a hearing on appellees' Petition for a Preliminary Injunction. R. 34a-64a. At the hearing, the Commonwealth admitted that appellees would make "excellent care workers for . . . older Pennsylvanians." R. 48a. Judge Pellegrini also expressed grave doubts about the rationality of the Act. R. 45a-54a. However, upon learning that the Commonwealth (a) stipulated to the factual averments contained in appellees' supporting declarations and (b) agreed that the case could be resolved with finality by deciding the Commonwealth's then-forthcoming preliminary objections, Judge Pellegrini declined to issue a preliminary injunction and, instead, scheduled an

expedited hearing before the en banc Commonwealth Court to rule on the constitutionality of the challenged provisions of the Act. R. 35a-36a, 55a.

On September 11, 2000, the Commonwealth filed preliminary objections in the nature of a demurrer based solely on the argument that the employment-prohibiting provisions of OAPSA are not unconstitutional. R. 65a-67a. On September 25, 2000, appellees filed a Motion for Summary Relief Pursuant to Pa. R.A.P. 1532(b), in which appellees sought a final ruling that OAPSA's employment-prohibiting provisions are unconstitutional as applied to them. R. 68a-77a. On November 1, 2000, the Commonwealth Court, sitting en banc, heard argument on the Commonwealth's preliminary objections and appellees' Motion for Summary Relief.

B. Prior Determination

By Order dated December 11, 2001, the en banc Commonwealth Court overruled the Commonwealth's preliminary objections and granted appellees' Motion for Summary Relief. See 12/11/01 Opinion ("Op."), attached hereto as Exhibit A. A 5-2 majority of the Commonwealth Court, in an opinion authored by Judge Smith who was joined by President Judge Doyle and Judges Pellegrini, Friedman and Kelley,[1] held that the Act's "arbitrary and irrational" employment-prohibiting provisions violate the Constitution of the Commonwealth of Pennsylvania. Id. at 11-12. The Commonwealth Court ruled that appellees' "well-pled facts vividly illustrate the constitutional infirmities present in [the challenged provisions] and the draconian impact of [their] enforcement . . . and establish that no rational relationship exists between the classification imposed upon [appellees] and a legitimate governmental purpose. " Id.

[1] In its brief, the Commonwealth omitted Judge Kelley from its identification of the majority.

Judge Flaherty authored a dissenting opinion, in which Judge McGinley joined, stating that he would find the challenged statutory provisions to be constitutional based upon the importance of the governmental interest in protecting senior citizens and the presumption of constitutionality. Id. at JF-4 to JF-6.

The opinions are reported at 789 A.2d 376 (Pa. Cmwlth. 2001).

C. Statement of Facts

1. The Older Adults Protective Services Act

The Older Adults Protective Services Act prohibits nursing homes, home health care agencies, residential mental health and mental retardation facilities, and other health care facilities from employing any individual who was convicted of any one of a broad range of enumerated misdemeanors and felonies at any time in his or her life.[2] Specifically, the Act provides that all covered facilities must require job applicants, as well as current employees and all operators and administrators who may have direct contact with care-dependent patients, to submit a criminal history report. See 35 P.S. § 10225.502. If the criminal history report reveals

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[2] On November 6, 1987, the General Assembly passed the Older Adults Protective Services Act (Pub. L. 381, No. 79) ("OAPSA"), 35 P.S. §§ 10211-10224, to address the "abuse, neglect, exploitation and abandonment" of older adults. See 35 P.S. § 10212 (Legislative Policy). As originally enacted, OAPSA aimed to provide programs of protective services for older adults, 35 P.S. § 10214, and established reporting and investigative responsibilities concerning complaints of abuse. 35 P.S. §§ 10215-16. On December 18, 1996, the General Assembly passed Act 169 (Pub. L. 1125, No. 169) ("Act 169"), 35 P.S. §§ 10225.101-.508, amending OAPSA to include provisions that prohibit any covered "facility" from hiring or retaining any individual with a disqualifying criminal record. As originally enacted in 1996, Act 169 established two categories of disqualifying criminal convictions: those crimes that automatically disqualified an individual from obtaining or continuing employment in a covered facility irrespective of when the conviction occurred, and other crimes (such as assault and low-level drug crimes) that disqualified an individual only if the conviction had occurred within the past ten years. See Act 169 § 5, then codified at 35 P.S. § 10225.503 (1997). On June 9, 1997, the Legislature passed Act 13 (Pub. L. 160, No. 13) ("Act 13"), amending OAPSA by, inter alia, rewriting the enumerated disqualifying felonies and misdemeanors and, more importantly, removing the ten-year limitation period. See 35 P.S. § 10225.503 (as amended).

that the individual has ever been convicted of any one of more than 35 enumerated state crimes (or their federal counterparts) – including low-level drug crimes, forgery, felony prostitution, or two theft misdemeanors – the Act prohibits the facility from employing the individual in any capacity. See 35 P.S. § 10225.503.

Notwithstanding its title, OAPSA is not limited in scope to older adults: Its provisions apply to programs within all adult daily living centers, nursing homes, and other health-care agencies and programs providing services to care-dependent adults of any age within the Commonwealth. See 35 P.S. § 10225.103 (defining "facility" to include domiciliary care homes,[3] home health-care agencies,[4] long-term care nursing facilities,[5] older-adult daily living centers,[6] and personal care homes[7]). Moreover, the Act's broad employment-prohibiting provisions are nondiscretionary and irrebuttable: The employment ban applies regardless of

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[3] See 71 P.S. § 581-2 ("a protected living arrangement in the community which provides a safe, supportive, homelike residential setting for three or less adults who are unrelated to the domiciliary care provider, who cannot live independently in the community, and who are placed by an area agency").

[4] See 35 P.S. § 10225.103 ("a home health care organization or agency licensed by the Department of Health" or a "public or private agency or organization, or part of an agency or organization, which provides care to a care-dependent individual in the individual's place of residence").

[5] See 35 P.S. § 448.802a ("a facility that provides either skilled or intermediate nursing care or both levels of care to two or more patients, who are unrelated to the licensee, for a period exceeding 24 hours").

[6] See 62 P.S. § 1511.2 ("any premises operated for profit or not-for-profit in which older adult daily living services are simultaneously provided for four or more adults who are not relatives of the operator").

[7] See 62 P.S. § 1001 ("any premises in which food, shelter and personal assistance or supervision are provided for a period exceeding twenty-four hours for four or more adults who are not relatives of the operator, who do not require the services in or of a licensed long-term care facility but who do require assistance or supervision in such matters as dressing, bathing, diet, financial management, evacuation of a residence in the event of an emergency or medication prescribed for self administration").

(a) when the criminal conviction occurred, (b) the nature of the employment position for which the individual applied or previously performed at a facility, and (c) whether the care-providing employer reasonably believes that the particular individual is best-qualified for the position. See 35 P.S. § 10225.503(a).[8]

2. The Appellees[9]

a. Earl R. Nixon

Appellee Earl R. Nixon is a 50-year-old, legally blind man who, until June 2000, lived in Pittsburgh, Pennsylvania with his wife. R. 145a, 147a, ¶¶ 1, 8. Mr. Nixon, a life-long resident of Pennsylvania, has worked in the health-care field for more than a decade. R. 145a, ¶ 2. In the late 1980s, after a career as a small-business owner, he participated in employment services offered by the Pennsylvania Office of Vocational Rehabilitation. R. 147a, ¶ 9. Finding that he enjoyed working with the disabled, he began a new career in April 1990 as a direct-care specialist for the Allegheny Valley School ("AVS"), a facility that provided care to profoundly retarded and non-ambulatory patients. Id. ¶ 12. Two years later, he was promoted to residential service manager of AVS, responsible for the supervision of direct-care staff, the scheduling of

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[8] The Act does provide an exemption for those individuals who were in the continuous employ of the same facility for the 12 months immediately preceding July 1, 1998. See 35 P.S. § 10225.508(1). The Act's employment prohibitions, however, apply to those individuals employed for less than one year, as well as to all new job applicants. Id. In addition, the Act provides that "if an employee who is [otherwise] exempt . . . seeks employment with a different facility, the employee and the facility shall comply with [the reporting requirements]." See 35 P.S. § 10225.508(3).

[9] At the hearing on appellees' Petition for a Preliminary Injunction, the Commonwealth stipulated to the factual averments contained in appellees' supporting declarations. R. 35a-36a. The Commonwealth Court, in reaching its decision, also relied upon a number of the following factual averments. See Op. (Ex. A) at 5-7. The declarations contained in appellees' Memorandum of Law in Support of the Motion for Summary Relief, R.78a-214a, are identical to those attached to the Petition for Preliminary Injunction.

daily assignments, and the implementation of goal plans and behavioral management programs. R. 147a-148a, ¶ 13.

In July 1996, Mr. Nixon left AVS to work for the University of Pittsburgh Medical Center ("UPMC"), initially as the resident manager of UPMC's Seneca Hills Retirement Community. R. 148a, ¶ 14. Shortly thereafter, UPMC promoted Mr. Nixon to manager of its Seneca Manor Assisted Living Facility ("Seneca Manor"). R. 149a, ¶ 17. After achieving his Personal Care Administrator License from the Community College of Allegheny County in February 1998, Mr. Nixon became the administrator of Seneca Manor, responsible for all administrative, marketing, and budgeting matters for the facility. R. 148a-149a, ¶¶ 16-17. While acting as administrator, he also assisted UPMC in its successful bid for licensing from the Commonwealth with respect to two different facilities. R. 149a, ¶ 18. Mr. Nixon worked for UPMC until February 25, 2000, when he was forced to leave after a disagreement with management over the direction of the organization. R. 149a-150a, ¶ 21.

Upon losing his position, Mr. Nixon looked for other jobs in Pennsylvania in his trained field. R. 150a, ¶ 23. As a result of a prior conviction, however, Mr. Nixon was barred from employment by the Act. Id. On February 24, 1971 – more than 31 years ago – Mr. Nixon, at the age of 19, had been arrested on marijuana charges. R. 146a, ¶ 4. Mr. Nixon and several of his friends, who had purchased marijuana for personal use, were subsequently charged with possession and control of the drugs. Id. Mr. Nixon was convicted and sentenced to three years probation. Id. ¶ 5. He served probation without incident, performing community service by serving meals to the elderly – an activity that he continued even after his sentence had been served. Id. Mr. Nixon never suffered from a substance addiction and has not used illegal drugs since the incident. Id. ¶ 6.

Despite the fact that Mr. Nixon is more than twice as old as he was when convicted as a teenager, the Act precludes him from continuing to work in his chosen profession within the Commonwealth of Pennsylvania. Notwithstanding the growing number of assisted-living facilities and the intense competition for staff in the region, no Pennsylvania facility is permitted to employ Mr. Nixon in any capacity, despite his Personal Care Administrator License and nearly ten years of commendable service. The Act simply presumes irrebuttably that Mr. Nixon is a potential threat to care-dependent patients and precludes any facility from concluding otherwise.

Because he was unable to find work in his chosen field, Mr. Nixon first attempted to pursue opportunities in property management in the Pittsburgh region. R. 150a, ¶ 24. After this proved unsuccessful, he was forced to leave his native state and move to Michigan, where he took a position with National Church Residences managing a senior citizens complex. Id. ¶ 25. At his new position, Mr. Nixon has significantly less authority and makes $13,000 less in salary than at his former employment in Pennsylvania. Id. More importantly, as a result of his compulsory relocation, he and his wife – both of whom had spent their entire lives in the Pittsburgh area – were forced to move away from their seriously ill parents. R. 150a-151a, ¶ 26. Mr. Nixon would move back to Pennsylvania at the first possible opportunity if his criminal record would no longer prevent him from working in assisted-living facilities. R. 151a, ¶ 27.

The Commonwealth has conceded that, despite his past criminal conviction, Mr. Nixon is an "excellent care worker." R. 48a.

b. Reginald Curry

Appellee Reginald Curry is a 49-year-old Philadelphia native who has provided direct services to youth and the mentally disabled for nearly 30 years. R. 153a, ¶ 2. Upon

graduating from high school in 1969, Mr. Curry began studying music at the Model Cities Cultural Art Program ("MCCAP"). R. 154a, ¶ 5. He later was employed by MCCAP as a youth services counselor, working on a daily basis with juvenile delinquents. Id. He remained at MCCAP until 1980, when he took a job as counselor with the R.W. Brown Boys Club, performing similar work counseling juvenile delinquents involved in gang activities. Id. ¶ 6.

From 1984 to 1991, Mr. Curry continued to work to better his community. R. 155a, ¶ 7. From 1984 to 1987, he held two jobs: youth services counselor at the Lower Kensington Environmental Center, a residential facility for delinquent youth, and resident counselor at The Association for Independent Growth, a community living arrangement program for clients with mental health or mental retardation issues. Id. He later became a paratransit driver for seniors. Id. ¶ 9.

In 1998, Mr. Curry began working for Northwest Human Services as a driver, transporting clients with mental health and mental retardation issues to various appointments and other tasks. Id. He particularly enjoyed the interactions with clients. Id. Regrettably, in March 1999, the Act forced his employer to terminate his employment as a result of a 1973 conviction. Id.

Mr. Curry's then-27-year-old conviction arose out of an incident that took place when he was 19. R. 154a, ¶ 3. In September 1972, Mr. Curry was arrested for stealing $30 and released on nominal bail. Id. He was subsequently convicted of larceny – which, at that time, was a felony[10] – and sentenced to 18 months probation. Id. He served his sentence without incident. Id.

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[10] Less than three months after Mr. Curry's felony conviction, the Pennsylvania Legislature raised the felony level of larceny to those crimes involving more than $2,000. At the time, however, the $30 at issue was sufficient to constitute a felony. See Act of

As a result of the then-27-year-old conviction for what is now a misdemeanor, Northwest Human Services was forced to fire Mr. Curry, despite his exemplary service. R. 155a, ¶ 9. Several weeks later, Mr. Curry began working as a residential advisor at Resources for Human Development ("RHD"), providing daily services to clients with mental health issues. R. 156a, ¶ 10. In July 1999, however, Mr. Curry again was terminated as a result of the Act. Id. Luckily, RHD was so impressed with Mr. Curry that it found him a job within its Connections Program, a service that is outside the scope of the Act's provisions. Id. In his new role, Mr. Curry works to bring homeless individuals into shelters. Id. While he is grateful to RHD for rehiring him, he nonetheless misses the ongoing and substantial relationships he forged with his clients in his previous role and would strongly prefer to return to his former position of residential advisor. Id. ¶¶ 11-12. RHD found Mr. Curry's services as a residential advisor to be excellent and it would return him to the next available position in that role were it not for the Act's prohibition. R. 159a, ¶¶ 5-8.

Mr. Curry has spent most of his life in the field of human services, working with disadvantaged youth and the elderly at residential facilities and community living arrangements. R. 156a, ¶ 12. As a result of the Act, he is now precluded from engaging in his chosen profession, despite nearly 30 years of exemplary service. Id.

The Commonwealth has conceded that, despite his past criminal conviction, Mr. Curry is an "excellent care worker." R. 48a.

c. Kelly Williams

Appellee Kelly Williams is 50 years old and lives in Norristown, Pennsylvania. R. 161a, ¶ 1. Ms. Williams is the primary caretaker for her two young grandchildren. R. 163a,

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December 6, 1972 (Pub. L. 1482, No. 334), amending 18 P.S. § 3903.

¶ 8. Since 1988, Ms. Williams has worked in the health care field, beginning as a nursing assistant. Id. ¶ 6. In 1994, she earned an Associates Degree in phlebotomy (the art of drawing blood for transfusion and diagnosis purposes) from Montgomery County Community College. Id. ¶ 7. One year later, she became a Certified Phlebotomist and member of the American Society of Clinical Pathologists. Id.

Prior to the effective date of the Act, Ms. Williams worked at Montgomery Hospital in Norristown as a phlebotomist, a position that required her to travel to nursing homes in order to draw patients' blood. R. 163a-164a, ¶ 9. She enjoyed the personal interaction and relationships that developed with her regular patients and she was well liked by her co-workers. Id. Because Ms. Williams had not been employed by Montgomery Hospital for the twelve months preceding the effective date of the Act, however, the Hospital was forced to obtain a criminal record check from her. The check revealed that in 1976 – 26 years ago – Ms. Williams, then 24 years old, had been convicted of armed robbery. R. 162a, ¶ 3. At the time, she was addicted to heroin and foolishly went along with a friend's plan to rob a gas station. Id. Her friend displayed a firearm during the robbery, although no shots were fired and no one was hurt. Id. Ms. Williams pled guilty to armed robbery and was sentenced to six months in prison and two years probation. Id.

In 1986, after nearly 20 years of addiction, Ms. Williams entered and successfully completed an inpatient drug treatment program at Giuffre Medical Center. Id. ¶ 5. She has been clean and sober for the past 16 years. Id. Her employment record reveals that she is a dependable worker with an excellent attendance record. R. 168a, ¶ 7) Indeed, the Commonwealth has conceded that, despite her past criminal conviction, Ms. Williams is an "excellent care worker." R. 48a.

Despite the fact that her supervisors were pleased with her performance and trusted her with her patients, Montgomery Hospital, upon learning of her 24-year-old conviction, was forced to terminate Ms. Williams' employment. R. 164a, ¶¶ 10-11; R. 168a-169a, ¶¶ 7-10. Her supervisors were so impressed by her performance, however, that they assisted her in obtaining alternate employment and would hire her back if the law permitted and a position were available. Id.

Ms. Williams is currently working as a lab technician for a large medical group in Lansdale, but she does not have the opportunity to advance professionally, makes significantly less money, and is no longer entitled to retirement benefits. R. 164a, ¶ 13. If permitted, Ms. Williams would return to her previous position at Montgomery Hospital.

d. Marie Martin

Appellee Marie Martin is 37 years old and lives in Easton, Pennsylvania. R. 171a, ¶ 1. She has worked in the health-care field since 1991. R. 172a, ¶ 7. After becoming a certified nursing assistant in 1993, she began working for the Eastwood Nursing Center, a rehabilitation and nursing center in Easton. R. 172a-173a, ¶ 8. In 1997, she began working as a residential support staff member for On Our Own, a residential home for adults with mental disabilities operated by RHD. R. 173a, ¶¶ 9-10. RHD found her to be a model employee, noting that she had exceptional ability to work well with any of the clients, and she was well loved by her patients and colleagues alike. R. 179a-180a, ¶¶ 7-9. Indeed, the Commonwealth has conceded that, despite her past criminal conviction, Ms. Martin is an "excellent care worker." R. 48a. Unfortunately, against its judgment, RHD was forced to fire this valuable employee because of a 14-year-old drug conviction. R. 172a, ¶ 4; R. 174a, ¶ 17. RHD would happily hire her back if the law were to permit it. R. 180a, ¶ 12.

After an abusive childhood, Ms. Martin had turned to drugs when she was only 20 years old and suffered from a heroin addiction until 1990. R. 171a-172a, ¶¶ 2-6. However, for the past 14 years she has been continually employed and drug-free, and she has not been accused or convicted of another crime at any other time. R. 172a, ¶ 6.

Ms. Martin was diagnosed with cancer in 1996, and has continued to receive treatment for her condition. R. 172a-174a, ¶¶ 8, 13-15. She suffers significant pain and a variety of related health problems. Id.; see also R. 175a, ¶ 20. Graciously, RHD, which never wished to terminate Ms. Martin, continued to cover her health insurance costs until January 2000, allowing her to continue with her cancer treatments. R. 175a, ¶ 18. Unable to obtain alternate employment in the field for which she has been educated and trained in the local area, however, Ms. Martin must now commute two hours a day to a job in New Jersey, a state that does not prohibit the employment of qualified individuals for health care provider positions based solely on a past criminal conviction. Id. ¶ 20.

In her current position, Ms. Martin must make a lengthy commute and engage in the painful task of heavy lifting. Id. ¶¶ 20-22. Although the long commute and heavy lifting are exacerbating her health problems, the Act prohibits her from finding employment closer to her home, or, as she most wishes, from continuing to work at her former position with RHD. Id.

e. Theodore Sharp

Appellee Theodore Sharp, 53 years old, lives in Philadelphia with his wife and two children. R. 182a, ¶¶ 1-2. For nearly 30 years, Mr. Sharp has dedicated his life to the service of others. Id. ¶ 2. In 1972, he performed counseling work for HELP, a program in Philadelphia designed to assist runaways. R. 183a-184a, ¶ 6. He also worked for the Medical

College of Pennsylvania as a nursing assistant and, in 1980, formed People in Progress, a volunteer project for tutoring and counseling at-risk youth. R. 184a, ¶¶ 6-7.

Unfortunately, Mr. Sharp became addicted to cocaine, having begun using drugs in 1974. Id. ¶ 8. In 1975, he was arrested and convicted of possession of drugs. Id. ¶ 9. In March 1986, he was arrested and charged with possession of cocaine with intent to deliver. R. 185a, ¶ 11. That same day, Mr. Sharp's daughter, Sharee, was placed in foster care. Id. Mr. Sharp was devastated. Id. Afraid that going to jail would permanently sever the relationship with his daughter, he failed to appear for his court date. Id. Mr. Sharp resolved at that time, however, to reclaim his life. Id. ¶ 12. He entered and successfully completed a three-month detoxification program in early 1988 and began performing maintenance at a senior citizens apartment building shortly thereafter – a job he kept for four years. Id.

Mr. Sharp was determined to reclaim his daughter Sharee from foster care. Id. ¶ 13. In 1990, after two years of being drug-free and continuously working, he began the arduous task of demonstrating that he had turned his life around. R. 185a-186a, ¶¶ 13-14. After years of visitation, meeting with social workers, and legal proceedings, his quest was successful: He brought Sharee home in 1992. Id. ¶ 13.

In 1992, Mr. Sharp also began working for Petitioner RHD. R. 183a, ¶ 3. Since 1996, he has worked at RHD as a case manager for semi-independent mentally ill patients, assisting clients who have left residential facilities to become and remain as independent as possible. Id. While it is difficult work, he finds it rewarding and has been successful in his field. Id. ¶ 4. Mr. Sharp has also been actively involved in RHD's Values System, a committee charged with ensuring that all persons at RHD are treated with dignity and respect, and is a member of the Executive Committee of RHD's Act 169 Group, a support group formed in 1998

to help various staff members who have lost their jobs as a result of OAPSA. Id. ¶ 5. The Commonwealth has conceded that, despite his past criminal conviction, Mr. Sharp is an "excellent care worker." R. 48a.

In 1994, having spent a number of years building a new life and family, one thing remained unresolved for Mr. Sharp: his 1986 arrest. R. 185a-186a, ¶ 14. As the final step of his rehabilitation, he voluntarily turned himself in to the police and pled guilty to the charge. Id. At the sentencing hearing, the judge, apparently impressed with the steps Mr. Sharp had taken to rehabilitate himself, sentenced him only to five years' probation, a sentence that he served fully without incident. Id.

As a result of this conviction, Mr. Sharp's employment opportunities are severely curtailed. R. 183a, ¶ 2; R. 186a, ¶ 15. While he is currently exempt from the Act's provisions so long as he remains in his current position, he may not seek higher-paying positions elsewhere in his field. Id. More importantly, he is unable to accept part-time work in his field to supplement his $24,500 income, as he would like, to establish a savings account for his children's college education. R. 183a, ¶ 2.

f. Resources for Human Development

Appellee Resources for Human Development ("RHD") is a nonprofit social-service organization that, along with approximately 125 other social programs, provides residential programming and services for individuals with mental illness, mental retardation and chemical dependency issues. R. 191a-192a, ¶¶ 3-4. While RHD's central offices are located in Philadelphia, it operates programs throughout the Commonwealth and in several other states. Id. ¶ 3. With an annual budget in excess of $72 million, RHD employs approximately 2,300 persons

and serves more than 12,000 people in need per year – the vast majority of whom are Pennsylvania residents. R. 192a, ¶¶ 5-7.

Given the size of its organization, RHD hires hundreds of individuals each year. Id. ¶ 10. OAPSA has had a devastating effect on RHD's ability to recruit and retain outstanding employees. Id. Many of RHD's programs providing residential services to adults fall within the scope of the Act and therefore must comply with the prohibition against hiring or retaining ex-offenders. Between July 1, 1997 and July 30, 1998, RHD hired 362 individuals to work in facilities for care-dependents persons. R. 192a-193a, ¶ 11. Because none of those individuals had been continuously employed in their respective positions for one full year prior to OAPSA's effective date, the Act required RHD to secure criminal records checks on each. Id. Upon completion of these checks, RHD was forced – against its will – to terminate the employment of 25 otherwise qualified individuals, including appellees Mr. Curry and Ms. Martin. Id. While RHD attempted to lessen the impact of OAPSA on its employee base by transferring, when possible, several of the affected employees to positions not covered by the law (e.g., Mr. Curry), RHD could not accommodate many other individuals, including Ms. Martin. R. 193a, ¶ 12.

The Act has significantly interfered with RHD's hiring and retention of qualified staff, thereby compromising its ability to provide the best possible services to its clients. R. 193a, ¶ 16. In addition to having a deleterious racial impact on RHD's staff,[11] the Act has forced RHD – already struggling to staff positions in this tight labor market – to fire a large number of otherwise qualified employees. R. 194a, ¶ 19. Indeed, in the wake of this labor shortage attributable to OAPSA, RHD was forced to terminate a program it formerly operated at the Veterans Administration Hospital in Coatesville, Pennsylvania, designed to allow veterans

[11] Of the 25 RHD employees affected by the Act, 23 were African-American. R. 193a, ¶ 15.

suffering from mental illness to leave the hospital and live in a semi-independent setting. Id. ¶ 20. Despite the value and success of this program, RHD's labor shortage was so acute that it had to terminate the contract. Id.

RHD views the Act as an unwarranted intrusion into its right to hire individuals who, in its professional judgment, are best qualified for the positions. R. 194a-195a, ¶ 22. Many of RHD's applicants and employees come from the inner city and are under-educated. R. 193a-194a, ¶ 17. For a multitude of reasons, these individuals perform the work in social services that few are willing to perform. Id. In the past, RHD has hired certain applicants notwithstanding their criminal records if they have made significant efforts at rehabilitation over the years and if they have shown that they can provide outstanding support services to the populations RHD serves: the elderly, persons with mental illness or mental retardation, and those with substance addictions. Id. RHD's experience has shown that certain people with criminal records can in fact become valuable employees and members of the community – for example, Ms. Martin and Mr. Curry. Id. As a result of the Act's overbroad provisions, however, RHD is barred from exercising its professional judgment as to who is best qualified, and has been forced to terminate outstanding employees, which has led to the termination of or reduction in social-service programs it provides in this Commonwealth. R. 194a-195a, ¶ 22. RHD believes that OAPSA actually undermines the protection of the vulnerable populations the Act presumably was intended to protect. R. 195a, ¶ 24.

SUMMARY OF ARGUMENT

The Commonwealth Court properly ruled that the employment-prohibiting provisions of OAPSA are "arbitrary and irrational" and violate the Constitution of the Commonwealth of Pennsylvania. The anti-employment provisions clearly violate Article I, Section 1 of the Pennsylvania Constitution by depriving the individual appellees of their right to pursue lawful occupations on account of criminal convictions that do not evidence a present inability to perform their jobs. Under well-established Pennsylvania law, the General Assembly may not infringe a citizen's inalienable right to engage in lawful employment because of a past criminal conviction unless that conviction accurately reflects upon the individual's present ability to discharge his or her responsibilities. The Act, as applied to each of the individual appellees – each of whom the Commonwealth concedes is an "excellent care worker," R. 48a – unconstitutionally deprives appellees of their right to engage in their chosen fields on account of past criminal convictions that, by the Commonwealth's own admission, are not relevant to their current ability to perform their jobs. Accordingly, OAPSA's employment-prohibiting provisions violate Article I, Section 1 of the Pennsylvania Constitution as applied to appellees.

OAPSA's employment-prohibiting provisions also violate appellees' rights to due process of law by creating an irrebuttable presumption of unfitness for employment in any capacity at a covered facility. Despite operating to deprive appellees of their constitutional right to pursue their chosen lawful occupation, the Act provides absolutely no procedures by which affected individuals may seek a pre- or post-deprivation hearing before an impartial tribunal to present evidence establishing that they are not a threat to care-dependent patients and are otherwise competent to perform their jobs. Accordingly, OAPSA's employment-prohibiting provisions violate appellees' due process rights guaranteed by the Pennsylvania Constitution.

ARGUMENT

The Act's employment-prohibiting provisions broadly preclude anyone previously convicted of any one of a broad range of felonies and misdemeanors from holding any position in any covered health-care facility within the Commonwealth. These provisions prohibit some of the most dedicated and longstanding health-care workers from providing care to needy Pennsylvanians based upon the simplistic and irrational premise that a single criminal conviction of virtually any sort makes one a dangerous criminal for life who forever represents a risk to the safety of vulnerable citizens. As the Commonwealth Court held, OAPSA's "draconian" anti-employment provisions are "arbitrary and irrational" and violate Article I, Section 1 of the Pennsylvania Constitution. Op. (Ex. A) at 11-12.

The Commonwealth's reliance upon the presumption of constitutionality and the importance of the governmental purpose sought to be furthered by the challenged provisions – i.e., the protection of vulnerable citizenry – is misplaced and provides no basis for reversing the Commonwealth Court's decision. While legislative enactments enjoy a presumption of constitutionality, the law is clear that where, as here, the General Assembly has exceeded its constitutional authority, the courts of Pennsylvania are duty-bound to strike such offensive legislation and preserve the delicate balance of powers between the branches of government set forth in the Pennsylvania Constitution. See, e.g., Adler v. Montefiore Hosp. Ass'n, 453 Pa. 60, 74, 311 A.2d 634, 641 (1973) ("While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked for a reason unrelated to sound standards and not in furtherance of the common good.") (internal quotation omitted), cert. denied, 414 U.S. 1131 (1974). Further, although the protection of vulnerable citizens in health-care facilities throughout the

Commonwealth is an indisputably important governmental interest, the importance thereof in no way renders "rational" what is otherwise irrational legislation or otherwise eliminates the requirement that the General Assembly choose a rational means or mechanism for furthering that interest. This Court has repeatedly held that the means chosen to advance a governmental interest must not be "unreasonable, unduly oppressive or patently beyond the necessities of the case" but instead must bear "a real and substantial relation to the objects sought to be attained." Gambone v. Commonwealth, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954). Nothing about the heightened importance of the governmental interest implicated in OAPSA obviates this constitutional requirement.

The Act's blanket prohibition on employment for all persons ever convicted of disqualifying felonies or misdemeanors – affirmatively prohibiting the consideration of any other single factor, including the time elapsed from the conviction, the circumstances surrounding the conviction, successful efforts at rehabilitation, and/or employment history – violates Article I, Section 1 of the Pennsylvania Constitution because it is arbitrary and fails to advance rationally the protection of vulnerable citizens. Indeed, in a cruel twist of irony, OAPSA's anti-employment provisions have actually harmed this vulnerable patient population by removing highly qualified individuals, like appellees here, from the critically under-staffed patient-care industry on account of past conduct that has no relationship to the individual's present ability to perform the job.

In addition to violating Article I, Section 1 of the Pennsylvania Constitution, OAPSA's employment-prohibiting provisions violate appellees' due process rights by creating an irrebuttable presumption of unfitness for employment in any capacity at a covered facility based upon a single criminal conviction of whatever age and circumstance. Despite depriving

appellees and other affected individuals of their constitutional right to pursue a lawful occupation, the Act provides absolutely no procedures by which appellees (or their employers) may seek a pre- or post-deprivation hearing before an impartial tribunal to present evidence establishing that they are not a threat to care-dependent patients and are otherwise competent to perform their jobs. This legislative scheme stands in stark contrast to the due process protections afforded "white collar" professionals, such as physicians and attorneys, who are entitled to notice and a hearing before even a suspension from the practice of their profession.

In the Commonwealth Court, the Commonwealth argued that the United States Supreme Court has abandoned the "irrebuttable presumption" doctrine and that OAPSA need only pass the rational basis test. Appellees, however, are alleging a violation of the Pennsylvania Constitution – not the Constitution of the United States – and recent decisions from this Court and the Commonwealth Court make clear that the "irrebuttable presumption" doctrine is alive and well in the jurisprudence of Pennsylvania. Because the presumption that every ex-offender is unfit to perform any position at any health-care facility is clearly not one of universal truth, and because a reasonable means of ascertaining the presumed facts is available, OAPSA's anti-employment provisions violate appellees' right to due process guaranteed by the Pennsylvania Constitution.

A. The Anti-Employment Provisions of OAPSA Violate Article I, Section 1 of the Pennsylvania Constitution by Depriving Appellees of Their Right to Pursue Lawful Occupations Based Upon Criminal Convictions That Do Not Evidence a Present Inability to Perform Their Jobs

The Constitution of this Commonwealth broadly protects the rights of Pennsylvania citizens to pursue and engage in lawful occupations. Article I, Section 1 of the Constitution provides:

> All men are born equally free and independent, and have certain inherent and indefeasible 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.

PA. CONST. art. I, § 1.[12] As the Commonwealth Court noted in its decision, "the Supreme Court has consistently interpreted Article I, Section 1 as guaranteeing an individual's right to engage in any of the common occupations of life." Op. (Ex. A) at 7-8, citing Hunter v. Port Auth. of Allegheny Cty., 277 Pa. Super. 4, 419 A.2d 631 (1980), Adler v. Montefiore Hosp. Ass'n, 453 Pa. 60, 311 A.2d 634 (1973) and Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954).

The Commonwealth has a legitimate interest in protecting its citizenry and may consider the character of a candidate for employment if that character relates to the duties to be performed; it may not, however, infringe upon a citizen's "right to conduct a lawful business unless it can be shown that such deprivation is reasonably related to the state interest sought to be protected." Secretary of Revenue v. John's Vending Corp., 453 Pa. 488, 492, 309 A.2d 358, 361 (1973); see also Commonwealth v. Christopher, 184 Pa. Super. 205, 209, 132 A.2d 714, 716 (1957) ("The fundamental right to earn a livelihood in pursuit of some lawful occupation is protected by our respective constitutions and cannot be taken away by arbitrary or capricious legislation."); Hunter, 277 Pa. at 10, 419 A.2d at 634 (recognizing that both statutory and case law prohibit denials of employment based upon a criminal record unless the record reflects upon the applicant's present ability to perform the job's duties).

In John's Vending, this Court squarely addressed the issue of when the Commonwealth may appropriately restrict an individual's right to pursue a lawful occupation

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[12] "[A] cause of action arises directly under the Constitution for the violation of rights guaranteed under article I, section 1, and no affirmative legislation is needed for the vindication of those rights in the civil courts." Hunter v. Port Auth. of Allegheny Cty., 277 Pa. Super. 4, 14 n.6, 419 A.2d 631, 636 n.6 (1980).

because of a past criminal conviction. In that case, the Pennsylvania Cigarette Tax Board ("Board") had revoked the wholesale cigarette dealer's license previously issued to John's Vending upon learning that a 50% shareholder and former president of the company had been convicted of several crimes in the past. 453 Pa. at 490, 309 A.2d at 360. At a hearing before the Board, the evidence established that the shareholder had been convicted of selling untaxed liquor in 1951, of possessing and transporting unstamped whiskey in 1952, and of possessing and selling derivatives of opium in 1954 and in 1955. Id. Upon the Board's recommendation, the Secretary of Revenue revoked the license of John's Vending, and the Commonwealth Court affirmed the Secretary's decision. Id. at 491, 309 A.2d at 360.

On appeal, however, this Court unanimously reversed the Commonwealth Court and reinstated the license of John's Vending. Id. at 495, 309 A.2d at 362. After affirming the inalienable right to engage in lawful employment, the Court examined the statutory provision that precluded the issuance of a wholesale cigarette dealer's license to those entities whose principals had been convicted of crimes of moral turpitude. Id. at 493, 309 A.2d at 361. While recognizing the reasonableness of "consider[ing] the character of persons being licensed to perform [the duties of collecting taxes on behalf of the Commonwealth], specifically with regard to integrity and honesty," the Court nonetheless held that "[t]he facts before us here force us to conclude . . . that there is no material relevance between the past derelictions of this applicant and his present ability to perform duties required by the position." Id.

Specifically, the Court found that the shareholder's criminal convictions, having occurred between 16 to 19 years in the past, were not relevant to predicting his future behavior. Id. at 493, 309 A.2d at 361-62 ("[T]he fact that these crimes occurred almost twenty years ago renders them of little value in predicting future conduct of their perpetrator."). The Court

reasoned that although it may be logical to assume that a person who committed certain acts in the past would be more likely to commit those acts in the future, "that basis exists only where those events occurred so recently that the particular character trait of the individual involved can reasonably be assumed to have remained unchanged." Id. at 493-94, 309 A.2d at 362. The Court found that the past convictions at issue were simply too remote to constitute a rational basis for prohibiting John's Vending from conducting its lawful business:

> Where, as here, nearly twenty years has expired since the convictions and the record reveals that the individual has held this position of responsibility for twelve years without any allegation of impropriety, it is ludicrous to contend that these prior acts provide any basis to evaluate his present character.

Id. at 494, 309 A.2d at 362 (emphasis added).

Based upon the fact that the shareholder's convictions could not rationally be assumed to render him unfit to hold the license, this Court ruled that the statute could not be interpreted as applying to his situation:

> [W]here the prior convictions do not in any way reflect upon the appellant's present ability to properly discharge the responsibilities required by the position, we hold that the convictions cannot provide a basis for the revocation of a wholesaler's license.

Id. at 495, 309 A.2d 362.[13]

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[13] The Court also found that revoking the license of John's Vending ran afoul of the "deeply ingrained public policy" of this Commonwealth to avoid stigmatizing former offenders: "To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concepts of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation." Id. at 494-95, 309 A.2d at 362. Noting the rehabilitative efforts made by the shareholder since the time of his convictions, the Court declared that "[w]e do not believe that the legislature could have intended such an unfeeling result." Id. at 495, 309 A.2d at 362.

The Commonwealth Court, sitting en banc, recently echoed the same sentiment in Mixon v. Commonwealth, 759 A.2d 442 (Pa. Cmwlth. 2000), aff'd per curiam, 566 Pa. 616, 783 A.2d 763 (2001), where, in invalidating a section of the Voter Registration Act that prohibited ex-felons from registering to vote for five years after being released from incarceration, it noted:

Similarly, in Hunter v. Port Authority of Allegheny County, the Superior Court held that an applicant for a bus driver position stated a cause of action for violation of Article I, Section 1 of the Pennsylvania Constitution where he alleged that the Port Authority of Allegheny County refused to hire him because of a 13-year-old misdemeanor conviction for aggravated assault for which he had been pardoned. 277 Pa. Super. at 6-13, 419 A.2d at 632-635. Relying in large part upon the Supreme Court's decision in John's Vending, the court explained that although "[p]ublic employers are not always precluded from considering a job applicant's prior convictions in making hiring decisions," when an employer refuses to hire an individual because of his criminal record, "the employer's denial of employment must be reasonably related to the furtherance of a legitimate public policy."[14] Id. at 17, 419 A.2d at 638. Because the Superior Court found that the reasonableness of the Port Authority's refusal to hire the plaintiff did not appear on the face of the complaint, it ruled that the trial court had erred in granting the Port Authority's preliminary objections. Id.

> Such a statute has the appearance of penalizing ex-incarcerated felons for their status. Moreover, implicit in a presumption that an unregistered individual who commits a crime, and is punished therefor, remains civilly corrupt for five years following release, is the unwarranted assumption that there was no possibility of rehabilitation during that period of incarceration and for five years thereafter. There is nothing of which we are aware to support this logic. . . .

Id. at 451-52.

[14] The Hunter court recognized that in certain circumstances the fact of a prior conviction may be relevant to, or even conclusive on, the individual's fitness for a particular job. For instance, "an absolute bar against the employ of convicted arsonists as firemen would probably present no constitutional problems" and a bar against the employment of convicted felons as police officers "would probably be reasonable." Id. at 17, 419 A.2d at 638. Notably, this dispute does not implicate any of those concerns.

Applying the precepts of the above decisions to the appellees in this case, it is clear that the Commonwealth Court's decision should be upheld. As in John's Vending, none of appellees' ancient and stale convictions are "materially relevant" to their "present ability to perform duties required by the[ir] position[s]." See 453 Pa. at 493, 309 A.2d at 361.

- Mr. Nixon, a licensed Personal Care Administrator with more than a decade of service in public health care, is prohibited from finding work in his chosen field because of a 32-year-old conviction for possession of marijuana committed at the young age of 19.

- Mr. Curry, who has more than twenty years experience in the field of human services, was first fired and then forced to switch to a less-desirable position as the result of a now 29-year-old conviction as a youth for stealing $30.

- After turning her life around, Ms. Williams was fired from her job as a phlebotomist with the Montgomery Hospital due to a now 26-year-old conviction for a robbery she committed while under the influence of drugs.

- Ms. Martin, a residential aide working with autistic adults, was fired from the job she loved, and at which she excelled, due to a now 14-year-old drug conviction.

- Mr. Sharp, after dedicating his life to public service for nearly thirty years, is precluded from accepting part-time work to provide for the education of his children – and is essentially frozen forever in his current position (assuming he does not lose it) – as a result of an 18-year-old drug arrest.

Because appellees' respective convictions "do not in anyway reflect upon [their] present ability to properly discharge the responsibilities required by [their] positions," the challenged provisions of the Act cannot constitutionally be applied to them. See John's Vending, 453 Pa. at 495, 309 A.2d at 362. In each case, the remoteness in time of the conviction, coupled with each appellees' admirable employment record and high level of achievement in his or her former positions, demonstrates beyond peradventure the lack of "material relevance between the past derelictions of [these individuals] and [their] present ability

to perform duties required by the[ir] position[s]."[15] Id. at 493, 309 A.2d at 361. The Commonwealth has conceded as much, since it has agreed that appellees, notwithstanding their criminal records, would make "excellent care workers." R. 48a. Inasmuch as the Commonwealth has acknowledged that appellees' records are not indicative of their present ability to perform their jobs, OAPSA's employment-prohibiting provisions clearly violate the Pennsylvania Constitution as applied to appellees.[16]

Notwithstanding its concession, the Commonwealth argued before the Commonwealth Court, and continues to argue before this Court on appeal, that the challenged statutory provisions withstand constitutional scrutiny. In so arguing, the Commonwealth relies upon the following: (1) the presumption of constitutionality afforded legislative enactments; (2) the notion that, in accordance with Heller v. Doe, 509 U.S. 312 (1993), it has no obligation to produce evidence to sustain the rationality of the statutory classification and that the one in the challenged statutory provisions here has a reasonable basis; (3) that a number of inapplicable and distinguishable federal court decisions have allowed certain restrictions on the rights of

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[15] Indeed, this Court, faced with a much less compelling record in John's Vending, held that the shareholder's four convictions – each of which involved the sale of illegal or untaxed goods – were not "materially relevant" to determining whether he should be licensed to act as a wholesale cigarette dealer authorized to collect taxes on behalf of the Commonwealth. Instead, the Court, noting the remoteness in time of the convictions – 16 to 19 years prior – and, recognizing the shareholder's twelve years of unblemished work in the field, found it "ludicrous to contend that these prior acts provide any basis to evaluate his present character." Id. at 494, 309 A.2d at 362 (emphasis added).

[16] Appellees and the Commonwealth agree that the success of the substantive due process claim of the non-profit RHD, premised upon the Act's undue interference with RHD's ability to exercise its professional judgment in deciding which individual applicants are best-qualified to serve in its health-care positions, turns on whether the challenged provisions meet the rational-basis test. (See Commonwealth's Brief in Support of Preliminary Objections at 20.) Because OAPSA's employment-prohibiting provisions fail to bear any "real and substantial relation" to a legitimate governmental interest, see Gambone, 375 Pa. at 551, 101 A.2d at 637, RHD has successfully asserted a violation of its substantive due process rights as a matter of law.

convicted felons; and (4) that the John's Vending decision is not applicable to the facts of this case given the heightened interest of the Commonwealth in protecting its citizenry and given the General Assembly's clear legislative intent. None of these arguments, however, has merit and this Court, as did the Commonwealth Court, should reject them in toto.

First, while legislative enactments do enjoy a presumption of constitutionality, see, e.g., Pennsylvania Liquor Control Bd. v. Spa Athletic Club, 506 Pa. 364, 370, 485 A.2d 732, 735 (1984), Pennsylvania courts (and this Court in particular) have nevertheless remained vigilant in ensuring that the General Assembly does not overstep its constitutional authority. See, e.g., Adler v. Montefiore Hosp. Ass'n, 453 Pa. 60, 74, 311 A.2d 634, 641 (1973) ("While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked for a reason unrelated to sound hospital standards and not in furtherance of the common good.") (internal quotation omitted), cert. denied, 414 U.S. 1131 (1974); Hertz Drivurself Stations v. Siggins, 359 Pa. 25, 33, 58 A.2d 464, 469 (1948) ("[While] the presumption of constitutionality attending a legislative enactment endures until it plainly and unquestionably appears that the challenged statute violates the fundamental law[,] equally well settled is the rule that a law repugnant to the constitution is void and that it is not only the right but the duty of a court so to declare when the violation unequivocally appears.") (internal citations omitted); Mixon v. Commonwealth, 759 A.2d 442, 447 (Pa. Cmwlth. 2000) ("While deference is generally due the legislature, we are mindful that the judiciary may not abdicate its responsibility to ensure that the government functions within the bounds of constitutional prescription under the guise of its deference to a coequal branch of government."), aff'd per curiam, 566 Pa. 616, 783 A.2d 763 (2001). Given this clear law, the Commonwealth's reliance upon the presumption of constitutionality in no way

provides an independent basis for reversing the decision of the Commonwealth Court, particularly in light of that court's decision that the challenged statutory provisions violate the Pennsylvania Constitution.

Second, while the Commonwealth is certainly free to choose not to adduce evidence in support of the rationality of the challenged provisions, its bald and unsupported assertion that the Act is rational does not somehow make it so. The Commonwealth seems to argue that there is, theoretically, some rational basis for the draconian anti-employment provisions of OAPSA, but it never says what that rational basis might be, let alone provide a reason why these "excellent care workers" must be barred from helping vulnerable Pennsylvanians, thereby worsening the care of our most vulnerable citizens.[17] This is not a case, as suggested by the Commonwealth, where appellees are challenging "imperfect" legislative classifications on the grounds that they were made without "mathematical nicety" or may result in "some inequality." (App. Br. at 16.) Here, the General Assembly, rather than make any attempt to craft a legislative scheme that has "a real and substantial relation to the objects sought

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[17] One reason for the Commonwealth's failure to make such an evidentiary showing may be that established social science literature and criminological research predict that each of the individual appellees is no more likely to commit a crime in the future – and perhaps even less so – than an average person in the general population who has not been previously convicted of a crime. R. 204a-205a, ¶¶ 34-35. In considering the likelihood that someone who has committed a crime in the past will commit a crime in the future, the most important factors influencing the probability of future criminality are (1) age, (2) the amount of time since the last conviction, (3) whether the person has social "stakes" – e.g., marriage, employment and/or other close personal relationships, and (4) if the crime was related to drug use, whether the person has undergone drug treatment and remained drug-free. R. 200a, ¶ 13. The characteristics and histories of the individual appellees since their respective convictions, described supra, predict such a "negligible probability" of subsequent re-conviction for a criminal offense that "the fact of their conviction makes them no more likely to commit a crime than the likelihood that demographically similar Americans who have no criminal history would commit a crime." R. 204a-205a, ¶ 35. Accordingly, there simply is no rational basis for assuming that these appellees present a greater risk than mere chance of committing a crime in the future because, more than ten years ago, they were convicted of a crime. Id.

to be attained," Gambone, 375 Pa. at 551, 101 A.2d at 637, enacted an arbitrary and irrational provision prohibiting anyone who had been convicted of a disqualifying felony or misdemeanor at any time in his or her life from holding any employment position at any covered facility. Thus, it is not as if the General Assembly made a reasoned but imperfect attempt to draw a line at some rational point; rather, it chose not to draw any line in favor of an outright, permanent, and absolute ban.

While the Commonwealth has broad police power and may legislate for the purpose of preserving the public health, safety and morals, "the power is not unrestricted; its exercise, like that of all other governmental powers, is subject to constitutional limitations and judicial review." Id. at 550-51, 101 A.2d at 636. As this Court declared in Mahony v. Township of Hampton, 539 Pa. 193, 196, 651 A.2d 525, 527 (1994):

> [A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.

Id. at 196, 651 A.2d at 527 (quoting Lutz v. Armour, 395 Pa. 576, 578-79, 151 A.2d 108, 110 (1959)); see also Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 191-92, 272 A.2d 487, 491 (1971); Gambone, 375 Pa. at 551, 101 A.2d at 637 ("Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon unlawful occupations."). This Court has been particularly vigilant in invalidating legislative enactments (like the challenged provisions of OAPSA here) that, though based upon the Commonwealth's police power, lack any "real and substantial relation" to the interest sought to be protected. See, e.g., Mahony, 539 Pa. at 198, 651 A.2d at 528 (invalidating local ordinance that prohibited the private operation of gas wells in residential districts but permitted public operation of such wells); Pastor, 441 Pa. at 197, 272

A.2d at 494 (invalidating statute that prohibited the advertising of drug prices); Lutz, 395 Pa. at 581, 151 A.2d at 111 (invalidating local ordinance that prohibited the hauling and disposal of trash that originated outside township borders); Gambone, 375 Pa. at 554, 101 A.2d at 638 (invalidating statute that prohibited gasoline price signs in excess of certain size requirements). Indeed, the John's Vending and Hunter decisions may be best understood as premised upon the lack of a "real and substantial relation" between the governmental interests purportedly advanced and the means chosen to effectuate or protect those interests. Here, of course, the Commonwealth Court properly concluded that OAPSA's anti-employment provisions are "arbitrary and irrational" and not rationally related to the important governmental interest of protecting senior citizens of Pennsylvania. In so ruling, the Commonwealth Court acted in complete accord with the jurisprudence of this Court.

Third, the Commonwealth's extensive reliance upon the rational basis test and federal court decisions holding that legislatures may constitutionally prohibit convicted felons from engaging in certain activities is both misplaced and erroneous. Rather than address applicable Pennsylvania decisions, the Commonwealth attempts to argue rationality by "cherry picking" several federal decisions that do not address the relevant issue, all the while conveniently ignoring those federal decisions that are in fact on point.

Appellees are proceeding under Article I, Section 1 of the Pennsylvania Constitution – not under the Fifth or Fourteenth Amendment of the United States Constitution. This Court has "stated with increasing frequency that it is both important and necessary that [courts] undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated." Commonwealth v. Edmunds, 526 Pa. 374, 389, 586 A.2d 887, 894-95 (1991). While federal decisions may be accorded weight

"where they are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees," Pennsylvania courts are free to reject federal decisions, including those of the United States Supreme Court, so long as they "remain faithful to the minimum guarantees established by the United States Constitution." Id. at 389-90, 586 A.2d at 895 (internal quotation omitted).

In examining the Edmonds factors, it is clear that Article I, Section 1 of the Pennsylvania Constitution is textually distinct from, and actually predates, federal constitutional protections.[18] As Justice Roberts made clear in Pastor, strong reasons of policy and tradition support treating Pennsylvania's constitutional protections as distinct from federal analysis in general, see 441 Pa. at 191, 272 A.2d at 490, and the Pennsylvania decisions canvassed above reveal a particular tradition of independently protecting the right to engage in a lawful occupation under Article I, Section 1 of the Pennsylvania Constitution as a part of the right of "acquiring" property. Indeed, in Pastor, this Court expressly acknowledged that it scrutinizes economic regulatory legislation, like that embodied in OAPSA's employment-prohibiting provisions, more stringently than required by federal law. See id. ("Pennsylvania, like other state 'economic laboratories,' has scrutinized regulatory legislation perhaps more closely than would the Supreme Court of the United States.") (internal citation omitted). In determining whether

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[18] The reference in the current iteration of Article I, Section 1 to all citizens being "equally free and independent" and having rights of "acquiring, possessing and protecting property" first appeared in the Declaration of Rights of Pennsylvania's Constitution of 1776. PA. CONST. of 1776 ch. 1, § 1. Pennsylvania's Constitution of 1790 included a slightly modified version as the first section of its Declaration of Rights: whereas the 1776 Declaration of Rights characterized the rights as "inherent and unalienable," PA. CONST. of 1776, ch. 1, § 1, the 1790 Declaration of Rights referred to them as "inherent and indefeasible," PA. CONST. of 1790, ch. 1, § 1. The 1790 Declaration of Rights also explicitly recognized the right of "acquiring, possessing and protecting" one's reputation. Id. at art. IX, § 1. The protection of citizens' "inherent and indefeasible" rights has been retained in identical language in all subsequent constitutions. See PA. CONST. art. I, §§ 1, 25; PA. CONST. of 1874, art. I, §§ 1, 26; PA. CONST. of 1838, art. IX, §§ 1, 26.

OAPSA's anti-employment provisions violate Article I, Section 1 of the Pennsylvania Constitution, therefore, this Court should be guided by Pennsylvania jurisprudence rather than the federal decisions cited by the Commonwealth.

But even if federal law were applicable to this case (which it is not), the challenged statutory provisions would not pass constitutional muster. Not only is every federal case cited in the Commonwealth's brief distinguishable,[19] but federal courts that have faced the

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[19] For instance, Lewis v. United States, 445 U.S. 55 (1980), United States v. Craven, 478 F.2d 1329 (6th Cir.), cert. denied, 414 U.S. 866 (1973), and United States v. Lewitzke, 176 F.3d 1022 (7th Cir.), cert. denied, 528 U.S. 914 (1999), all dealt with the right of ex-felons and certain misdemeanants to possess firearms, a right significantly less important than that implicated here – i.e., the constitutional right to engage in lawful employment. While it may be rational to prohibit certain prior criminals from possessing firearms, it does not follow ipso facto that such individuals should likewise be precluded from lawful employment, particularly in Pennsylvania, where the right to engage in a lawful occupation is guaranteed by Article I, Section 1 of the Constitution. Further, although the Supreme Court in Richardson v. Ramirez, 418 U.S. 24 (1974), upheld the constitutionality of a state statute denying convicted felons the right to vote, it did so solely on the ground of § 2 of the Fourteenth Amendment, which the Court found permitted such restrictions. Id. at 42-43. The Court expressly noted that the case was "[u]nlike most claims under the Equal Protection Clause." Id. at 41. Because § 2 of the Fourteenth Amendment (or any other aspect of federal law) is not implicated in this case, Richardson is of no consequence.

Baer v. City of Wauwatosa, 716 F.2d 1117 (7th Cir. 1983) and Upshaw v. McNamara, 435 F.2d 1188 (1st Cir. 1970), in turn, each dealt with administrative decisions to deny specific individuals employment based upon past criminal behavior, rather than blanket prohibitions on employment such as that challenged here. In Baer, for instance, the court held that the city could constitutionally revoke the plaintiff's gun dealer license after the plaintiff was convicted of having sex with a minor in his gun shop and had testified under oath that he would sell assault guns to "anybody who wants to buy them." 716 F.2d at 1121. In Upshaw, the court held that the Boston Police Commissioner could constitutionally deny the plaintiff employment as a police officer due to a past felony conviction, even where the conviction was later pardoned. 435 F.2d at 1190-91, n.2. Thus, neither case has relevance to this dispute.

Finally, the Commonwealth's reliance upon Hawker v. New York, 170 U.S. 189 (1898), De Veau v. Braisted, 363 U.S. 144 (1960), and Hill v. Gill, 703 F. Supp. 1034 (D.R.I.), aff'd mem., 893 F.2d 1325 (1st Cir. 1989), is equally flawed. Hawker, a century-old Supreme Court decision of questionable vitality – see, e.g., Smith v. Fussenich, 440 F. Supp. 1077, 1081 (D. Conn. 1977) ("Recent developments in the law indicate that Hawker no longer has vitality.") (internal quotation omitted) – dealt solely with whether a New York statute prohibiting convicted felons from practicing medicine was an impermissible ex post facto law. See 170 U.S. at 190-91

exact issue here – i.e., an across-the-board prohibition on employment on account of a past criminal conviction – have regularly and consistently found such prohibitions to violate the Constitution of the United States. See, e.g., Furst v. New York City Transit Auth., 631 F. Supp. 1331, 1337-38 (E.D.N.Y. 1986) (under rational basis test, invalidating municipal authority's policy of refusing to employ ex-felons); Kindem v. City of Alameda, 502 F. Supp. 1108, 1111-12 (N.D. Cal. 1980) (under rational basis test, invalidating City Charter that barred municipal employment of ex-felons); Smith v. Fussenich, 440 F. Supp. 1077, 1080-81 (D. Conn. 1977) (under rational basis test, invalidating state statute that prohibited ex-felons from employment with licensed private detective agency or security guard agency); Butts v. Nichols, 381 F. Supp. 573, 579-80 (S.D. Iowa 1974) (under rational basis test, invalidating state statute that prohibited employment of ex-felons in civil service system).[20]

("The single question presented is as to the constitutionality of this statute when applied to one who had been convicted of a felony prior to its enactment."). Because appellees have not challenged OAPSA on ex post facto grounds, Hawker is entirely irrelevant to this dispute. Moreover, while De Veau and Hill upheld employment prohibitions of ex-felons against constitutional challenge, each case dealt with a policy that prohibited an ex-felon from a specific position. Based upon the specific facts of the case and the duties embodied in the specific position, each court found that the prohibition was reasonably related to a legitimate governmental interest. In contrast, OAPSA's broad prohibition on employment is not limited to a specific job – its provisions cover everything from a dishwasher to an employee providing direct patient care, from a lawn maintenance supervisor to a receptionist, at a host of different types of covered health-care facilities. As described infra, federal courts that have considered across-the-board employment prohibitions like that in OAPSA, as opposed to prohibitions tailored to specific positions such as those at issue in De Veau and Hill, regularly hold such blanket prohibitions to be violative of the United States Constitution.

[20] See also Thompson v. Gallagher, 489 F.2d 443, 449 (5th Cir. 1973) (under rational basis test, invalidating city ordinance that prohibited municipal employment of veterans discharged other than honorably); Davis v. Bucher, 451 F. Supp. 791, 799 (E.D. Pa. 1978) (under rational basis test, invalidating City of Philadelphia's absolute bar on employing former drug users); Osterman v. Paulk, 387 F. Supp. 669, 670 (S.D. Fla. 1974) (invalidating municipality's policy of refusing employment to anyone who failed a polygraph examination regarding "any current use, within the last six months, of marijuana").

For example, in Furst, the court struck down, under the rational basis test, a municipal authority's policy of prohibiting the employment of ex-felons. 631 F. Supp. at 1337-38. Although recognizing that "[t]he City unquestionably has a legitimate interest in hiring qualified, competent and trustworthy employees, and in employing persons who will inspire the public's confidence," the court ultimately concluded that the blanket prohibition failed to further any legitimate governmental interest:

> Although the rational relationship test allows a public employer wide discretion in fashioning employment classifications, such a policy is simply too broad to accomplish any legitimate governmental purpose. Before excluding ex-felons as a class from employment, a municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job.

Id. (internal quotation omitted); see also Thompson, 489 F. 2d at 449 ("We have no hesitancy in calling the ordinance which bars that class of persons from city employment, without any consideration of the merits of each individual case, irrational."); Kindem, 502 F. Supp. at 1111 ("Despite this low threshold [of the rational basis test] . . . this court is unconvinced that the across-the-board ban on hiring ex-felons is reasonably related to any legitimate state goal."); Smith, 440 F. Supp. at 1080 ("[T]he statute's across-the-board disqualification fails to consider the probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of the conviction, and other mitigating circumstances related to the nature of the crime and the degree of participation."); Butts, 381 F. Supp. at 580 ("The Iowa statutory scheme . . . has an across-the-board prohibition against the employment of felons in civil service positions. There is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests."). Thus, although not applicable, federal decisions addressing across-the-board prohibitions on employment of ex-felons – like those embodied in OAPSA's anti-employment provisions – have regularly struck down such prohibitions as

unconstitutional. Accordingly, the Commonwealth's reliance upon federal law, even if it were otherwise proper, does not support the constitutionality of the Act.

Finally, the Commonwealth's attempt to distinguish this Court's John's Vending decision on the grounds that it did not involve a governmental interest as important as that involved here and that, regardless, it is simply a case of statutory interpretation and not of constitutional ramifications, is equally without merit. The purported importance of the governmental interest does not negate or otherwise reduce the need for the measures chosen to effectuate that interest to have a "real and substantial relation to the objects sought to be attained." Gambone, 375 Pa. at 551, 101 A.2d at 637. Simply because an interest is important does not ipso facto make the means chosen to advance that interest rational. A ban on employing red heads does not become rational because it relates, say, to employment at a nuclear power plant as opposed to a municipal sanitation department. Moreover, the individual appellees have an important and compelling interest in earning a lawful living – a right that is protected by the Constitution of this Commonwealth. The General Assembly is not entitled to infringe upon petitioners' constitutional rights because it purports to be acting to protect an important state interest.

Moreover, while it is true that the John's Vending decision arose in the context of statutory interpretation, the constitutional underpinning of that decision is clear: The General Assembly may not infringe a citizen's "inalienable right to engage in lawful employment" based upon a past criminal conviction unless the conviction "reflect[s] upon the [individual's] present ability to properly discharge the responsibilities required by the position." 453 Pa. at 492, 495, 309 A.2d at 361, 362. Notwithstanding the fact that, due to the procedural posture of the case, the decision was couched in terms of statutory interpretation, John's Vending clearly and

unambiguously announced limitations on the power of the General Assembly to deprive citizens of employment based upon irrational assumptions about the meaningfulness of their criminal records. As the en banc Commonwealth Court aptly noted below, the courts of Pennsylvania have applied the general principles of law and public policy announced by the Court in John's Vending to "a myriad of other factual scenarios where the state interest involved may have been lesser or greater than those involved in this case." Op. (Ex. A) at 10 n.4. Further, even if John's Vending were limited to situations of statutory interpretation, as argued by the Commonwealth, OAPSA's employment-prohibiting provisions nonetheless run afoul of the constitutional limitations announced in decisions of this Court and other Pennsylvania courts discussed supra – including without limitation Hunter, Mahony, Pastor and Gambone. Thus, the "constitutionality viability" of John's Vending is in no way dispositive of this case.

In sum, the Commonwealth has failed to articulate any legitimate basis to reverse the rulings of the en banc Commonwealth Court. This Court should therefore find that the employment-prohibiting provisions of OAPSA violate Article I, Section 1 of the Pennsylvania Constitution, and affirm the Commonwealth Court's orders.

B. The Employment-Prohibiting Provisions of OAPSA Also Violate the Due Process Rights of Appellees by Creating an Irrebuttable Presumption of Unfitness for Employment in any Capacity at a Covered Health-Care Facility

The employment-prohibiting provisions of OAPSA also violate appellees' due process rights by impermissibly creating an irrebuttable presumption of unfitness for employment in any capacity at a covered health-care facility as a result of single, and often ancient, criminal conviction.

This Court has recognized that a citizen's constitutional right to pursue a lawful occupation is a "substantial property right" subject to the full protective mechanisms of procedural due process. See Lyness v. Commonwealth, State Bd. of Med., 529 Pa. 535, 542, 605

A.2d 1204, 1207 (1992). "While procedural due process is a flexible notion which calls for such protections as demanded by the individual situation, the essential requisites are notice and meaningful opportunity to be heard." Commonwealth, Dep't of Transp. v. Clayton, 546 Pa. 342, 351, 684 A.2d 1060, 1064 (1996). In determining whether a particular procedure satisfies the mandates of due process, a court must consider the following three factors:

> (1) the private interest that will be affected by the official action; (2) the likelihood of an erroneous deprivation of such interest as a consequence of the procedure used and the probable value, if any, of additional procedural safeguards; and (3) a balancing of the state interest served by the use of a summary proceeding against the burden that would be imposed by an additional, substitute or more rigorous procedure.

Petron v. Department of Educ., 726 A.2d 1091, 1094 (Pa. Cmwlth. 1999).

In the present case, the Act unilaterally and irrebuttably deprives appellees of an essential private interest: the constitutional right to pursue their chosen, lawful occupations. Despite this constitutional deprivation, the Act provides absolutely no procedures by which an individual may seek a pre- or post-deprivation hearing before an impartial tribunal (or any other body) to present evidence establishing that he or she is not a threat to care-dependent patients and is otherwise competent to perform his or her job. Similarly, the Act lacks any avenue for covered facilities to petition an administrative body for an individual determination that an otherwise prohibited applicant or employee is a qualified candidate for a particular position. The Act, quite simply, is barren of any due-process protections of any kind. Instead, it creates an absolute presumption that all individuals convicted at any time of one of any number of enumerated offenses are unfit to perform any of the myriad of jobs at a covered facility and, based upon this irrebuttable presumption, summarily prohibits covered facilities from hiring or retaining all such individuals.

This Court has held that an irrebuttable presumption violates due process "where the presumption is deemed not universally true and a reasonable alternative means of ascertaining the presumed facts [is] available." Clayton, 546 Pa. at 349, 684 A.2d at 1063. In Clayton, for instance, the Court reviewed the constitutionality of a state regulation mandating the revocation of an individual's driving license for one year upon the occurrence of a single epileptic fit, without providing the licensee an opportunity to present medical evidence demonstrating his or her competency to drive. Id. at 343, 684 A.2d at 1060. Relying upon a long line of United States Supreme Court decisions that found that irrebuttable statutory presumptions violate due process, this Court ruled that the Pennsylvania regulation was unconstitutional, holding that although the Commonwealth had an important interest in ensuring the safety of its highways, "it is not an interest which outweighs a person's interest in retaining his or her license so as to justify the recall of that license without first affording the licensee the process to which he is due." Id. at 353, 684 A.2d at 1065.

Similarly, in Petron, the Commonwealth Court recently struck down application of a statutory provision that authorized the immediate suspension of the professional teaching license of an educator who was charged with a crime involving moral turpitude. 726 A.2d at 1094. The plaintiff in that case had been arrested on charges of simple assault and endangering the welfare of a child after he allegedly grabbed an 11-year-old student by the neck, banged him into a locker, and threw him into a chair. Id. at 1091 n.2. The Department of Education, relying upon Section 5(a)(11) of the Teacher Certification Law, 24 P.S. § 2070.5(a)(11),[21] sought the immediate suspension of plaintiff's teaching license. At hearings before the Commonwealth's

[21] That statutory provision provides in part: "The [Commission] shall have the power and its duty shall be . . . to suspend the certificate of any professional educator indicted for a crime or misdemeanor involving moral turpitude . . . and to revoke the same upon conviction thereof. . . ." 24 P.S. § 2070.5(a)(11).

Professional Standards and Practices Commission, the plaintiff argued, inter alia, that Section 5(a)(11) violated the Pennsylvania Constitution by creating an irrebuttable presumption that he was unfit to teach without affording him a pre- or post-deprivation hearing in which he could attempt to establish his fitness despite the pending charges. Id. at 1091-92. The Commission rejected plaintiff's arguments and granted the Department's motion to suspend plaintiff's professional teaching certification. Id. at 1092.

On appeal, the Commonwealth Court agreed that the statute was unconstitutional as applied, finding that the statute's irrebuttable presumption of professional unfitness violated plaintiff's right to due process protections. Id. at 1094. While expressly recognizing "the importance of the state's interest in preserving the integrity of its teaching staff and profession," the court nonetheless held that "we cannot ignore the rights of individual teachers, particularly where a prompt, post-deprivation hearing would satisfy the requirements of due process while addressing the concerns of the state." Id. Therefore, the court concluded that because plaintiff was not afforded minimal due process protections, Section 5(a)(11) of the Teacher Certification Law, "as applied to [plaintiff], violate[d] the constitutional mandates of due process." Id.

As in Clayton and Petron, the anti-employment provisions of the Act irrebuttably presume that any individual convicted of any of the numerous enumerated crimes at any time in his or her life is unfit to hold any employment position at any of the numerous health care facilities covered by the Act. See 35 P.S. § 10225.503. As in Clayton and Petron, the Act provides no procedure by which an affected individual may obtain a pre- or post-deprivation hearing before an impartial tribunal to present evidence that could establish that the statutory presumption should not apply in light of his or her specific situation.[22] While the

[22] In striking contrast to OAPSA's irrebuttable presumption of unfitness for

Commonwealth has a significant interest in protecting the health and well-being of its citizens, it cannot ignore the due process rights of individual applicants and employees who, despite being fit to perform the duties of a particular job, are prohibited from employment as a result of ancient criminal convictions regardless of the employees' subsequent employment and personal history.

This Court has held that an irrebuttable presumption is constitutionally infirm "where [it] is deemed not universally true and a reasonable alternative means of ascertaining the presumed facts [is] available." Clayton, 546 Pa. at 349, 684 A.2d at 1063. The presumption that virtually every ex-offender is unfit to perform any position at any health-care facility is clearly not one of universal truth. While any number of factual situations may be hypothesized to demonstrate the fallacy of this presumption, there is no need for any such construct here, where

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employment based upon a single criminal conviction, the law of Pennsylvania is considerably more lenient with respect to other potential positions of trust, including that of an attorney. Specifically, this Court has recognized that an attorney may not be suspended or disbarred "except by due process of law and upon competent and relevant proofs sufficiently credible to support a just order of disbarment." In re Shigon, 462 Pa. 1, 10, 329 A.2d 235, 239 (1974). Moreover, the Court has repeatedly held that, in the requisite hearing held to determine whether an attorney should be disciplined, "the events surrounding the criminal charge must be taken into account" and "[c]onsideration is to be given to any mitigating factors that are present." Office of Disciplinary Counsel v. Valentino, 730 A.2d 479, 482 (Pa. 1999); see also Office of Disciplinary Counsel v. Christie, 536 Pa. 394, 400, 639 A.2d 782, 785 (1994); Office of Disciplinary Counsel v. Costigan, 526 Pa. 16, 23, 584 A.2d 296, 300 (1990).

After taking all relevant evidence into account, including factors of mitigation, the Disciplinary Board of Pennsylvania and this Court have refused to disbar many attorneys convicted of much more serious offenses than those of the appellees in this case. See, e.g., Christie, 536 Pa. at 401, 639 A.2d at 786 (suspending for five years an attorney convicted of 13 misdemeanor sex offenses involving minors); Valentino, 730 A.2d at 483 (suspending for five years an attorney who had suborned perjury and been convicted of mail fraud in conjunction with a scheme to defraud an insurance carrier); In re Anonymous, 14 Pa. D. & C. 3d 741 (Pa. Discp. Bd. 1980) (suspending for five years an attorney who drew a gun on a train, shot his estranged wife five times, and ordered several others to jump from the train, one of whom suffered a broken leg); see also In re Anonymous, 14 Pa. D. & C. 4th 588 (Pa. Discp. Bd. 1992) (in reinstating the license of an attorney who had formerly been disbarred after a conviction for bank fraud, the Board expressly recognized that the crime had been committed by the attorney while suffering from a cocaine addiction for which he had since successfully sought treatment).

the Commonwealth admits that each of the individual appellees is in fact fit for a position with a health care facility notwithstanding his or her prior conviction. It is therefore irrational to assume that the appellees' respective convictions render them unfit responsibly to perform their jobs.[23] Moreover, "a reasonable alternative means of ascertaining the presumed facts" is available. See Clayton, 546 Pa. at 349, 684 A.2d at 1063. The Act could certainly have included provisions for a pre- or post-deprivation hearing before an impartial tribunal by which an aggrieved individual (or covered facility) could present evidence that he or she is competent and fit to perform a particular position at a facility. Such a hearing could be similar to those routinely conducted in the occupational licensing field when a worker's fitness is questioned. Instead, the Act is entirely bereft of any protection for the due process rights of the citizens thereby affected.

Facing a similar constitutional challenge, the Superior Court of Massachusetts recently struck down certain emergency regulations promulgated by the Massachusetts Department of Health and Human Services ("HHS") containing a lifetime ban against all individuals convicted of specific criminal offenses from ever holding employment with any HHS agency where that individual would have the potential for unsupervised contact with clients. See Cronin v. O'Leary, No. 00-1713-F, 2001 WL 919969 (Mass. Super. Aug. 9, 2001) (attached hereto as Exhibit B). Specifically, the Cronin court ruled that the lifetime employment ban constituted an unconstitutional irrebuttable presumption that certain individuals posed an unacceptable risk to the recipients of HHS aid. Id. at **5-7.

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[23] Indeed, based upon an examination of certain predictive factors developed under social science literature and criminological research, the appellees in this case are no more likely to commit a crime in the future than would demographically similar Americans who have no criminal history. R. 204a-205a, ¶ 35.

Notably, the emergency regulations declared unconstitutional in Cronin were substantially narrower in scope than those challenged in the instant suit. That is, while OAPSA's provisions bar individuals convicted of a broad range of enumerated felonies and misdemeanors from holding any position at a covered health care facility, the Massachusetts regulations only barred criminally disqualified individuals from employment positions "where there is potential unsupervised contact with program clients." Id. at **2-3. The Massachusetts court nonetheless ruled that the emergency regulations – which, like OAPSA, did not provide for a pre- or post-deprivation hearing for disqualified individuals to demonstrate that they do not represent a threat despite a prior criminal conviction – constituted an unconstitutional irrebuttable presumption that certain individuals posed an unacceptable risk to the recipients of HHS aid:

> Procedure No. 001 and the [HHS] emergency regulations violate procedural due process under Article 12 of the Massachusetts Declaration of Rights in that they impose a lifetime mandatory conclusive presumption that Roe and Christian, because of their prior convictions, pose an unacceptable risk to those applying for and receiving social services from [HHS]. Roe and Christian, as a matter of procedural due process, are entitled to a fair opportunity to rebut the inference that, because of their prior convictions, they pose an unacceptable risk to [HHS] clients.

Id. at *7.[24]

While the Commonwealth has a significant interest in protecting the health and well being of its citizens, it cannot simply ignore the due-process rights of individual applicants and employees who, despite being fit to perform the duties of a particular job, are prohibited from employment as a result of ancient criminal convictions. As the Commonwealth has

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[24] Although the Cronin court relied upon the due process guarantees of Article XII of the Massachusetts' Declaration of Rights, the Supreme Judicial Court of Massachusetts has held that the Massachusetts state constitution does not provide any greater due process guarantees than its federal counterpart. See Pinnick v. Cleary, 271 N.E.2d 592, 601 n.8 (Mass. 1971) (state and federal due process provisions are "comparable").

admitted, the presumption that every ex-offender is unfit to perform any position at any health care facility is clearly not one of universal truth and in fact is false as applied to these appellees, each of whom has a long-established employment history and is well regarded by his or her employer, colleagues and supervisors. With respect to these appellees, a single criminal conviction in the past in fact was not predictive of their success in their positions in the health-care field. Because it is completely irrational to presume irrebuttably that appellees' respective convictions render them unfit to perform their jobs, in accordance with the principles announced in Clayton and Petron, the irrebuttable presumption established by the anti-employment provisions of the Act violates the Pennsylvania Constitution.

In its brief before the Commonwealth Court, the Commonwealth argued that the United States Supreme Court has abandoned the "irrebuttable presumption" doctrine and that, therefore, appellees' argument must be rejected. (Commonwealth's Brief in Support of Preliminary Objections at 18-20.) As previously discussed, however, appellees are proceeding with claims arising under the Pennsylvania Constitution – not the Constitution of the United States – and the purported holdings of the United States Supreme Court have no relevance to this particular analysis. Even assuming that the United States Supreme Court has abandoned the "irrebuttable presumption" doctrine – an assumption that appellees dispute but need not address here – the doctrine has continuing vitality in Pennsylvania jurisprudence. Both Clayton and Petron were decided more than 20 years after Salfi[25] – the decision that the Commonwealth apparently contends marked the "death knell" of the doctrine – and this Court clearly understands Salfi differently than as argued by the Commonwealth here. See Clayton, 546 Pa. at 349-50, 684 A.2d at 1063-64 (Salfi applies only to challenges to "social welfare legislation"

[25] Weinberger v. Salfi, 422 U.S. 749 (1975).

rather than to exercises of the police power that deprive citizens of lawful employment; "[n]ot insignificantly . . . Salfi overruled none of the above-referenced prior decisions of the Court wherein a challenge to a conclusive presumption was sustained upon application of the analysis enunciated in Vlandis"). Thus, to paraphrase Mark Twain, the Commonwealth's reports of the death of the "irrebuttable presumption" doctrine, at least under Pennsylvania law, have been greatly exaggerated.

CONCLUSION

For all of the foregoing reasons, appellees respectfully request that the Court affirm the order of the en banc Commonwealth Court.

Respectfully submitted,

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