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YOU SHOULD TAKE THIS PAPER TO A LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**DAUPHIN COUNTY BAR ASSOCIATION
Lawyer Referral Service
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Plaintiffs Judge John Driscoll, Judge John W. Herron, Senior Judge Benjamin Lerner, Judge Sandra Mazer Moss, Judge Joseph D. O’Keefe, and Judge Leonard N. Zito (collectively “Plaintiffs”) hereby bring the following action against the Governor and certain officers of the Commonwealth of Pennsylvania (collectively “Defendants”) to enjoin the enforcement of Article V, Section 16 of Pennsylvania Constitution, which mandates that all Pennsylvania justices and judges retire at the end of the calendar year in which they turn seventy years old. Plaintiffs contend that this mandatory retirement provision violates their rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution and under Article I of the Pennsylvania Constitution, and in support thereof, aver the following:

INTRODUCTION

1. Plaintiffs file this action against Defendants because Defendants will or already have prematurely forced Plaintiffs out of their jobs for no reasonable, or even rational, basis, in violation of Plaintiffs’ rights under the Constitution of the United States.

2. Article V, Section 16 of Pennsylvania Constitution (the “mandatory retirement provision”) requires justices and judges of the Commonwealth to retire at the end of the calendar year in which they turn seventy years old, in violation of Plaintiffs’ rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

3. Plaintiffs ask this Court to nullify and declare invalid the mandatory retirement provision of the Pennsylvania Constitution, permanently enjoin Defendants from enforcing this provision, and uphold Plaintiffs’ rights under the United States Constitution and the Pennsylvania Constitution.

THE PARTIES

4. Plaintiff John Driscoll is Administrative Judge of Juvenile Court of Westmoreland County. He is a resident of and performs his official duties in the Tenth Judicial District of Pennsylvania. Plaintiff Driscoll was born on February 13, 1942. He was first appointed to the bench on December 15, 1994 and was elected in 1995 to a ten (10) year term and thereafter retained in 2005. His present term will end as of January 1, 2016, but he will be forced to retire on January 1, 2013.

5. Plaintiff John W. Herron is Chair of the Administrative Governing Board of the First Judicial District, Administrative Judge of the Trial Division, and a judge in the Orphans' Court. He is a resident of and performs his official duties in the First Judicial District of Pennsylvania. Plaintiff Herron was born on January 27, 1944. He was first elected to the bench in November, 1987 to a ten (10) year term and thereafter retained in two subsequent elections in 1997 and 2007. His present term will end as of January 1, 2018, but he will be forced to retire on January 1, 2015.

6. Plaintiff Benjamin Lerner is a Senior Judge of the Philadelphia Court of Common Pleas. He is a resident of and performs his official duties in the First Judicial District of Pennsylvania. Plaintiff Lerner was born on February 2, 1941. He was first appointed to the bench on May 6, 1996. His appointed term expired at the end of 1997. He was reappointed on June 3, 1998 and was elected in 1999 to a ten (10) year term and thereafter retained in 2009. He was forced to retire on January 1, 2012.

7. Plaintiff Sandra Mazer Moss is a Judicial Team Leader in the Civil Section of the Trial Division of the First Judicial District and is Chair of the Board of Judges Civil Rules Committee. She is a resident of and performs her official duties in the First Judicial

District of Pennsylvania. Plaintiff Moss was born on October 10, 1942. She was first elected to the bench in November, 1983 to a ten (10) year term and thereafter retained in 1993 and 2003. Her present term will end as of January 1, 2014, but she will be forced to retire on January 1, 2013.

8. Plaintiff Joseph D. O’Keefe is the Administrative Judge of the Orphans’ Court Division in the First Judicial District. He is a resident of and performs his official duties in the First Judicial District of Pennsylvania. Plaintiff O’Keefe was born on January 13, 1944. He was first elected to the bench in November, 1983 to a ten (10) year term and thereafter retained in 1993 and 2003. He will stand for retention in November, 2013, and assuredly be reelected to a ten (10) year term ending January 1, 2024. He will be forced to retire on January 1, 2015.

9. Plaintiff Leonard N. Zito is the Administrative Judge for the Criminal Court of Northampton County. He is a resident of and performs his official duties in the Third Judicial District of Pennsylvania. Plaintiff Zito was born on January 26, 1943. He was first appointed to the bench on July 1, 2004 and served the unexpired term of the Honorable Jack A. Panella who was elected to the Superior Court. He again was appointed on October 8, 2008 to fill the unexpired term of the Honorable Robert A. Freedberg who was appointed to the Superior Court. Judge Zito was thereafter elected in November of 2009 to a ten (10) year term. His present term will end as of January 1, 2020, but he will be forced to retire on January 1, 2014.

10. Defendant Thomas W. Corbett (“Corbett”) is Governor of the Commonwealth of Pennsylvania.

11. Defendant Carol T. Aichele (“Aichele”) is the Secretary of the Commonwealth of Pennsylvania.

12. Defendant Robert M. McCord (“McCord”) is the Treasurer of the

Commonwealth of Pennsylvania.

13. Defendant Zygmunt A. Pines (“Pines”) is the Court Administrator of the Commonwealth of Pennsylvania

JURISDICTION AND VENUE

14. Jurisdiction is proper in the Commonwealth Court of Pennsylvania pursuant to 42 Pa. Cons. Stat. § 761(a) because this action is brought against officers of the Commonwealth government acting in their official capacities.

15. Venue is proper in this Court pursuant to 42 Pa. Cons. Stat. § 8523(a).

FACTS

16. In Pennsylvania, justices and judges are elected to terms of ten years. PA. CONST. art. V, §§ 13, 15(a). Magisterial district judges and judges of the City of Philadelphia’s municipal and traffic courts are elected to terms of six years. *Id.* § 15(a). Vacancies are filled by appointment by the Governor, with approval of the Senate; the appointed justice or judge serves out the appointed term until the next municipal election, when that justice or judge runs for reelection, or a new justice or judge is elected by the voters. *Id.* § 13.

17. To be qualified to be a justice or judge in Pennsylvania, a person must be a citizen of the Commonwealth and a member of the bar of the Pennsylvania Supreme Court. PA. CONST. art. V, § 12. Furthermore, justices and judges of statewide courts must reside within the Commonwealth for a period of one year preceding their election or appointment and during their continuance in office. *Id.* Other judges must reside within their respective districts for a period of one year preceding their election or appointment and during their continuance in office. *Id.* Magisterial district judges and judges of the traffic court of the City of Philadelphia must be members of the bar of the Pennsylvania Supreme Court or must complete a course of training

and instruction in the duties of their respective offices and pass an examination prior to assuming office. *Id.* These are the only requirements for justices and judges that are mandated by Article V, Section 12 of the Pennsylvania Constitution, titled “Qualifications of justices, judges and justices of the peace.” *Id.*

18. Justices and judges are compensated by the Commonwealth as provided by law, and “[t]heir compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.” PA. CONST. art. V, § 16(a).

19. Justices and judges may not be removed from office before the expiration of their ten-year terms except under limited circumstances enumerated in Article V, Section 18 of the Pennsylvania Constitution, and only after a pre-termination opportunity to be heard. PA. CONST. art. V, § 18.

20. Accordingly, the electors of the Commonwealth confer property rights on the individuals they elect to judicial posts.

21. Article V, Section 16 of Pennsylvania Constitution, in pertinent part, provides, “Justices, judges and justices of the peace shall be retired on the last day of the calendar year in which they attain the age of 70 years.” PA. CONST. art. V, § 16.

22. If, pursuant to this mandatory retirement provision, the office of any justice or judge should be declared to be open due to the age of the justice or judge without the consent of that justice or judge, that vacancy would not be filled until Defendant Corbett, as Governor, appointed a replacement, with the approval of the Senate. In addition, by virtue of his office, Defendant Corbett is committed to the enforcement of the Pennsylvania Constitution, including the mandatory retirement provision. Therefore, Defendant Corbett has the final

authority to enforce the mandatory retirement provision.

23. Defendant Aichele, as Secretary of the Commonwealth, is responsible for notifying and designating to the county board of each county all offices, including justices and judges, for which candidates are to be nominated.

24. Defendant Aichele is also responsible for certifying to county boards of election for primaries and election the names of the candidates for all Commonwealth offices, including senators, representatives, and judges of all courts of record.

25. Defendant Aichele certifies, as a judicial vacancy, the office of any justice or judge who has attained seventy years of age and who has years remaining on his or her term. Defendant Aichele does not certify, for inclusion on the ballot of a retention election, any justice or judge who has attained seventy years of age.

26. Defendant McCord, as Treasurer of the Commonwealth, is responsible for paying all salaries established by law. Defendant McCord will not pay a salary for judicial service to a justice or judge who attains seventy years of age. Defendant McCord will, however, commence to disburse funds to which such a justice or judge is entitled pursuant to the provision of the State Employees' Retirement Code.

27. Defendant Pines, as Court Administrator, is appointed by the Pennsylvania Supreme Court. PA. CONST. art. V, § 10. He is responsible for the maintenance of central records relating to the qualifications, employment status, basis of compensation, and other personnel information of all personnel of the judicial system compensated in whole or in part through funds appropriated to the judicial system.

28. Defendant Pines authorizes Defendant McCord to discontinue the salary of any justice or judge who attains seventy years of age and thereby causes justices and judges to

be barred and removed from the Commonwealth payroll pursuant to the mandatory retirement provision.

29. Defendant Pines also certifies to Defendant Corbett and to Defendant Aichele a vacancy in any judicial office held by a justice or judge who attains seventy years of age.

30. Accordingly, Defendants, in enforcing the mandatory retirement provision, will force or already have forced each Plaintiff to retire at the end of the calendar year during which he or she turns seventy years old.

31. A judge who has been forced to retire may, with his or her consent, become a “senior judge,” i.e., be assigned by the Supreme Court in temporary judicial service. PA. CONST. art. V, § 16(c). The legislature has enacted laws pursuant to Article V, Section 16(c) providing for assignment of former judges and compensation for such services. Senior judges, like non-senior status judges, can be assigned any duties in the Commonwealth.

32. There is no provision for physical or mental examination of judges who apply for senior status.

33. The current annual salary for a judge of the Courts of Common Pleas who is not senior is \$169,541 per year. *See* 204 Pa. Code § 211.2. The current annual salary of a judge of the Commonwealth Court who is not senior is \$184,282. *Id.* The current annual salary of a judge of the Superior Court who is not senior is \$184,282. *Id.* The current annual salary of a justice of the Supreme Court who is not senior is \$195,309. *Id.* Included in the benefits of non-senior status judges are: sick leave with pay, paid vacation, pay regardless of whether the judge is in chambers or in court, or attending a judicial conference, as well as life insurance benefits. The amount of money contributed to the pension fund by the Commonwealth for the

benefit of any judge increases with each additional year of credited service attributed to that judge – until the judge reaches the age of seventy.

34. The current compensation for senior judges is \$522 per in-court day actually worked. 204 Pa. Code § 211.2. The actual compensation is often in fact less because of general budgetary restrictions applicable to all judges who are age seventy or older. Senior judges receive no paid sick days, paid vacation or life insurance benefits. Moreover, no compensation is provided for days spent working in chambers. Per diem payments to senior judges are not considered compensation under the State Employees Retirement Act of 1974, and therefore do not increase the pension of such judges.

35. The availability of funds to pay senior judges to perform their duties is dependent on the appropriation of funds for that purpose by the legislature. At times, the legislative appropriation for the payment of per diem salary of senior judges has not been sufficient to pay the per diem salary for all the days of service of senior judges. As a result, many senior judges work for part of the time with no compensation at all.

36. There are 13 days in a year which are court holidays, for which senior judges can earn no salary. If a judicial conference is held, non-senior status judges are paid for attendance, senior judges are not.

37. Judges under age seventy who perform judicial services receive their judicial salary for unlimited periods of time while they are unable to work because of illness, as long as it appears that they will, at some future time, be able to return to their judicial duties. Senior judges, however, do not receive any sick days.

38. In the face of an increasing caseload in the courts of Pennsylvania, it is unlikely that civil cases could be adjudicated within a reasonable time period or that the Speedy

Trial Act in criminal cases would be complied with, without the service of judges over seventy years of age.

39. There is no reasonable – or even rational – basis for paying senior judges less money for the same work than judges who have not yet been forced to retire.

40. Judges over seventy who wish to continue performing their judicial duties are generally permitted to do so. Thus, even if judges who are over seventy are more likely than judges under seventy to become incapacitated, judges over seventy are not denied the opportunity to serve on the bench, albeit for reduced compensation. If any senior judge becomes disabled, he or she is subject to the same method of removal as are non-senior status judges who become incapacitated. Accordingly, simply putting judges over seventy on “senior status” does not prevent the harm caused by incapacitated judges, nor does it insulate senior judges from the embarrassment of removal.

41. Each of the Plaintiffs is in good physical and mental health, has a long exemplary tenure as a judicial officer of the Commonwealth of Pennsylvania, and is eminently qualified to continue to perform the duties of judicial office.

42. The mandatory retirement provision unfairly and arbitrarily deprives Pennsylvania justices and judges of their employment solely on the basis of age, rather than on the basis of any rational or reasonable test of physical, mental, or professional ability, contrary to federal law as set out in the Fourteenth Amendment to the United States Constitution.

43. The mandatory retirement provision deprives Pennsylvania justices and judges of their property interest in their continued employment solely on the basis of age without conferring upon them a pre-termination opportunity to be heard or a post-termination opportunity to contest their ability to serve competently in the roles to which they were elected by the people

of the Commonwealth.

44. All the Plaintiffs were elected to ten year terms that extended beyond – and in some cases well beyond – their forced individual retirement dates; therefore, the electorate unreasonably is being deprived of their service solely on the basis of an arbitrary age classification without regard to the Plaintiffs’ individual abilities to well and faithfully perform their judicial duties.

45. It is believed and therefore averred that no other elected or appointed officials in Pennsylvania are forced to retire or are disqualified from holding elected or appointed office by reason of attaining a maximum age, and other employees of the Commonwealth of Pennsylvania, who are not in physically demanding positions, are not forced to retire upon attaining a maximum age.

46. As a result, Plaintiffs have been singled out by the Pennsylvania Constitution on the sole basis of age for different treatment from other officers and employees of the Commonwealth of Pennsylvania.

47. Age, like race, sex, and national origin, is an immutable characteristic.

48. Age frequently bears no relation to ability to perform or contribute to society.

49. The mere fact that a justice or judge reaches the chronological age of seventy does not affect his or her ability to perform judicial duties, and the vast majority of justices and judges reaching the age of seventy are capable of continuing to perform those duties.

50. Furthermore, judging is a “learning by doing” activity whose efficiency increases as judicial experience increases. To be a good judge requires good judgment, and judgment is a function of, *inter alia*, age and experience. Judicial performance thus frequently

peaks late in life.

51. Many states and the federal system have no mandatory retirement provision, showing a recognition that older judges can continue to adjudicate full-time beyond their 70th birthdays.

52. The expanding use of technology and increasing utilization of law clerks also enables judges to remain productive past 70.

53. There can be no doubt that the United States of America has had a long and unfortunate history of age discrimination. Many citizens in our country have been subjected to stereotyped distinctions between the young and the old, including that older people are often senile, incompetent, lack productivity, suffer from rigid thinking, are unable to continue to learn, forgetful, and likely to develop dementia.

54. The mandatory retirement provision of the Pennsylvania Constitution has the lamentable effect of perpetuating these pernicious stereotypes.

55. Congress itself has concluded that classifications based upon age are inherently invidious – particularly in the employment arena. In 1967, Congress passed the Age Discrimination in Employment Act (“ADEA”), which prohibits employment discrimination against people forty years of age or older. 29 U.S.C. § 621. Congress found and declared the following:

(a) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(b) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(c) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; and

(d) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

56. Congress's findings support the conclusion that age discrimination has an unfortunate and long-standing history in this country.

57. A rational and reasonable alternative to the mandatory retirement provision already exists in Pennsylvania and has been ratified by the people of the Commonwealth: the removal procedures found in Article V, Section 18 of the Pennsylvania Constitution.

58. A justice or judge may be suspended, removed from office or otherwise disciplined under Section 18 of Article V for conviction of a felony; violation of Section 17 of Article V (pertaining to prohibited activities); misconduct in office; neglect or failure to perform the duties of office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court. PA. CONST. art. V, § 18.

59. In the case of a mentally or physically disabled justice or judge, Section 18 of Article V provides the Court of Judicial Discipline with discretion to formulate the appropriate remedy and tailor it to the particular circumstances of the case and “as warranted by the record”; the Court may enter an order of removal from office, retirement, suspension, or other limitations on the activities of the justice or judge PA. CONST. art. V, § 18.

60. Section 18 of Article V provides for a variety of procedural protections to ensure that no justice or judge is treated unfairly solely on the basis of age. Specifically, under Section 18, a justice or judge who is the subject of a complaint filed with the Judicial Conduct Board or initiated by the board or of an investigation conducted by the board must be apprised of the nature and content of the complaint and afforded an opportunity to respond fully to the complaint prior to any probable cause determination by the board. PA. CONST. art. V, § 18. If the board finds probable cause to file formal charges concerning mental or physical disability against a justice or judge, the board must notify the subject of the charges and provide the subject with an opportunity to resign from judicial office or, when appropriate, to enter a rehabilitation program prior to the filing of the formal charges with the Court of Judicial Discipline. *Id.* Upon the filing of formal charges with the Court of Judicial Discipline by the board, the court must promptly schedule a hearing or hearings to determine whether a sanction should be imposed against a justice or judge. *Id.* All hearings conducted by the court must be public proceedings conducted pursuant to the rules adopted by the court and in accordance with the principles of due process and the law of evidence. *Id.* Parties appearing before the court have a right to discovery pursuant to the rules adopted by the court and have the right to subpoena witnesses and to compel the production of documents, books, accounts, and other records as relevant. *Id.* A justice or judge has the right to appeal a final adverse order of discipline of the court. *Id.*

61. The Pennsylvania Rules of Judicial Administration also contain a policy for removal of mentally incapacitated judges that does not rely on age discrimination. Specifically, pursuant to Pennsylvania Rules of Judicial Administration 704, if a President Judge of a Court is aware of a judge who has been unable to substantially perform his or her duties for at least fifteen days within any thirty-day period but has not filed a report of illness or disability, it is the responsibility of the President Judge to communicate to the judge that a report must be submitted. If no response is received from the judge, the Court Administrator shall report the lack of response to the Supreme Court for appropriate action. *Id.*

62. In addition, if a President Judge believes that a judge is suffering from a mental or physical disability that renders him or her incapable of substantially performing his or her judicial duties, and that immediate action is warranted, the President Judge, after consultation with the Court Administrator, may place the judge on administrative leave. *Id.*

63. In light of recent social science understanding of aging populations in America, it is untenable to rely on stereotypes relating to aging to force Pennsylvania's judges to retire against their will.

64. In 1974, there were approximately 20 million Americans aged 65 and older. *See Brief of Amicus Curiae AARP, Mass. v. Murgia*, 1975 U.S. S. Ct. Briefs LEXIS 24, at *27 (Sept. 4, 1975). Forty years later, there are approximately 35 million Americans 65 and older. M. Joanna Mellor, DSW, et al. ed., *Baby Boomers: Can My Eighties Be Like My Fifties?* 8 (2005). By 2030, there will be more than 75 million Americans of that age. *Id.* at 8. Indeed, “[t]he current older U.S. population is living longer than ever before and the trend is expected to continue, with the Baby Boomers experiencing an even longer life expectancy.” M. Joanna Mellor, DSW, et al. ed., *Baby Boomers: Can My Eighties Be Like My Fifties?* 24 (2005).

65. As the population ages, the incidence of cognitive decline has decreased remarkably in recent years. “In a large nationally representative survey of older Americans [a social science study has found that] between 1993 and 2002, the prevalence of cognitive impairment consistent with dementia decreased from 12.2% to 8.7%, representing an absolute decrease 3.5 percentage points, and a relative decrease of nearly 30%.” See Kenneth M. Langa, et al., *Trends in the Prevalence and Mortality of Cognitive Impairment in the United States: Is There Evidence of a Compression of Cognitive Morbidity?*, *Alzheimers Dement.* 6 (Mar. 2008). Following this trend, the decrease is likely even greater as of 2012.

66. In fact, the probability of cognitive impairment among older Americans has consistently decreased, even since the early 1990s.

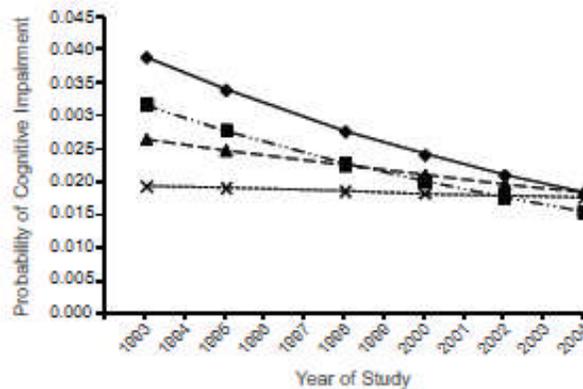


Figure 1. Unadjusted and adjusted trends in the probability of cognitive impairment among older Americans in the US Health and Retirement Study, 1993–2004. Estimates are from successive logistic regression models with a year trend variable: unadjusted (diamonds; $P < 0.001$); age-adjusted (squares; $P < 0.001$); adjusted for age and prior exposure to the cognitive test (triangles; $P = 0.012$); and adjusted for age, prior exposure to the cognitive test, and educational level (x's; $P = 0.546$). When plotting results, we substituted 78 years for age, 0.75 for prior testing (i.e. retesting for 75% of sample), and 11 years for educational level.

Source: Kristin M. Sheffield, et al., *Changes in the Prevalence of Cognitive Impairment Among Older Americans, 1993–2004: Overall Trends and Differences by Race/Ethnicity*, *Am. J. Epidemiology* 274, 280 (May 27, 2011).

67. Notwithstanding the United States Supreme Court’s decision a generation

ago in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) or the Pennsylvania Supreme Court's decision in *Gondelman v. Commonwealth*, 520 Pa. 451 (1989), societal and demographic changes demonstrate that this precedent should no longer obtain.

68. Moreover, eliminating the mandatory retirement provision would save the Commonwealth from having to pay for increased pension costs incurred by adding replacement judges to the state retirement system, which is compounded with fewer pension payments to judges who choose to continue their service.

69. Plaintiffs Driscoll, Herron, Mazer Moss, O'Keefe, and Zito are facing a substantial threat of irreparable damage or injury because they will be forced to retire from their chosen profession, for which they have no adequate remedy at law.

70. Plaintiff Lerner already has suffered injury by being forced to retire at the end of the calendar year during which he turned seventy year old.

COUNT I
UNITED STATES CONSTITUTION – FOURTEENTH AMENDMENT:
EQUAL PROTECTION

71. The previous paragraphs of the Complaint are incorporated by reference as if fully set forth herein.

72. The mandatory retirement provision (i) is not rationally related to furthering a legitimate state interest, (ii) does not further an important government interest in a way that is substantially related to that interest, and/or (iii) is not narrowly tailored and/or the least restrictive means to further a compelling governmental interest.

73. The mandatory retirement provision of the Pennsylvania Constitution discriminates against persons age seventy and older, and thus violates Plaintiffs' equal protection rights under the Fourteenth Amendment to the United States Constitution.

74. The mandatory retirement provision also infringes upon Plaintiffs' fundamental right to work, and thus violates Plaintiffs' equal protection rights under the Fourteenth Amendment to the United States Constitution.

75. In the alternative, in light of the combined effect of both age-based discrimination and the violation of the Plaintiffs' right to work, the mandatory retirement provision of the Pennsylvania Constitution violates Plaintiffs' equal protection rights under the Fourteenth Amendment to the United States Constitution.

COUNT II
UNITED STATES CONSTITUTION – FOURTEENTH AMENDMENT:
DUE PROCESS

76. The previous paragraphs of the Complaint are incorporated by reference as if fully set forth herein.

77. The Commonwealth confers a property interest upon elected justices and judges by providing them with compensation and employment terminable only with cause, and then categorically takes away that interest without any process, let alone due process of law, including an opportunity to be heard before being forced out of office, and a procedure for responding after removal.

78. The mandatory retirement provision of the Pennsylvania Constitution deprives Pennsylvania justices and judges of their property interests in the jobs to which they were elected by the people of the Commonwealth pursuant to Article V of the Pennsylvania Constitution, and the compensation and benefits resulting therefrom, thus violating Plaintiffs' due process rights under the Fourteenth Amendment to the United States Constitution.

79. The mandatory retirement provision provides no opportunity to justices and judges who reach the mandatory retirement age for pre-termination opportunity to be heard

or for post-termination redress.

COUNT III
PENNSYLVANIA CONSTITUTION

80. The previous paragraphs of the Complaint are incorporated by reference as if fully set forth herein.

81. It is fundamental under the Pennsylvania Constitution that “[a]ll men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” PA. CONST. art. I, § 1.

82. In addition, “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” *Id.* § 26.

83. Article I of the Pennsylvania Constitution creates a standard to which the other articles of the Pennsylvania Constitution must comply. Accordingly, any provision of the Pennsylvania Constitution must be recognized as being subordinate to the mandate of Article I and interpreted in accordance therewith.

84. Indeed, the Pennsylvania Supreme Court has recognized that “those rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government.” *Gondelman*, 520 Pa. at 467.

85. The sanctity of rights set forth under Article I of the Pennsylvania Constitution is expressly articulated in Article I, § 25 which provides, “To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”

86. By forcing Plaintiffs to retire against their will, Defendants, acting pursuant to their authority as state government officials, violate Pennsylvania's Declaration of Rights, which "may not be transgressed by government." *Gondelman*, 520 Pa. at 467; *see also id.* at 470 (Papadakos, J. dissenting).

87. Furthermore, by forcing Plaintiffs into early retirement, Defendants deny the Citizens of Pennsylvania the fundamental right to elect public officials of their choosing.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Judge John Driscoll, Judge John W. Herron, Senior Judge Benjamin Lerner, Judge Sandra Mazer Moss, Judge Joseph D. O'Keefe, and Judge Leonard N. Zito pray for judgment as follows:

- A. Judgment in their favor, and against Defendants;
- B. Declaring their rights to equal protection under the laws and to due process as guaranteed by Amendment XIV of the United States Constitution and/or the Pennsylvania Constitution;
- C. Nullifying and declaring unenforceable the Pennsylvania Constitutional provision that forces judicial retirement solely by virtue of age;
- D. Preliminarily and permanently enjoining Defendants from enforcing the Pennsylvania Constitutional provision that forces judicial retirement solely by virtue of age;
- E. Restoring Senior Judge Benjamin Lerner to active judge status; and
- F. Awarding such equitable/injunctive or other relief as the Court may deem just and proper.

Respectfully submitted,

DATED: November 14, 2012

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Judge John W. Herron, Senior Judge
Benjamin Lerner, Judge Sandra Mazer
Moss, Judge Joseph D. O'Keefe, and Judge
Leonard N. Zito*

John W. Herron states that he is Chair of the Administrative Governing Board of the First Judicial District, Administrative Judge of the Trial Division, and a judge in the Orphans' Court. He verifies that the statements made in the foregoing Complaint are true and correct to the best of his knowledge, information, and belief. The undersigned understands that the statements therein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

DATED: November 14, 2012

John W. Herron