

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**IN RE:** : **Case No. 11-06938-MDF**  
: **Chapter 9**  
**CITY OF HARRISBURG, PA,** :  
**Debtor** :  
: **Hearing Date: 11/23/11 at 9:30 AM**

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**THE COUNTY OF DAUPHIN'S REPLY BRIEF  
IN SUPPORT OF ITS OBJECTION TO THE DEBTOR'S  
CHAPTER 9 BANKRUPTCY PETITION**

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The County of Dauphin submits this Reply Brief in support of its Objections to the Chapter 9 bankruptcy petition (“Petition”) filed on behalf of the “City of Harrisburg, PA” (the “Debtor”), and in response to the Brief (the “Debtor's Brief”) filed by the city council of the Debtor (“City Council”) in support of that Petition, and requests that the Petition be dismissed and deemed void *ab initio*.

**I. ARGUMENT:**

As set forth in the County of Dauphin's initial Brief, and further established below, Pennsylvania law expressly barred the Debtor from filing the Petition, *see* Act 26 of 2011, 72 P.S. § 1601-D.1 (“Act 26”). Even disregarding the explicit restriction of Act 26, under the Municipalities Financial Recovery Act, Act 47 of 1987, 53 P.S. § 11701.101, *et seq.* (“Act 47”), City Council was not permitted to file the Petition unilaterally, nor by mere resolution. The Debtor therefore fails to meet the “specific authorization of state law” requirement for municipal bankruptcy filings set by 11 U.S.C. § 109(c).<sup>1</sup>

The Debtor's Brief defends City Council's authority to file the Petition by contesting the constitutionality of Act 26 on a variety of grounds, and generally contends that Act 47 permits City Council to unilaterally file bankruptcy by merely expressing its opinion for such course through resolution, rather than by passing an authorizing ordinance requiring a filing by the Debtor's Mayor. *See* County of Dauphin Brief at 6-7. As discussed below, the Debtor's contentions are baseless.

The Debtor's faulty analysis is evident from the outset of its Brief, which misstates the applicable standard of review. The Debtor contends that Chapter 9 of the U.S. Bankruptcy Code

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<sup>1</sup> The Debtor delves into a lengthy discussion of the additional authorization criteria of section 109 and the good faith requirements of section 921(c) of the Bankruptcy Code. *See* Debtor's Brief at 10-13. By the Court's Order of October 19, 2011, these issues have been reserved, and, accordingly, this Reply Brief focuses exclusively on the state authorization requirement of section 109(c)(2).

should be “liberally construed” to provide relief to municipalities, Debtor's Brief at 2-3, based on *In re City of Bridgeport*, 128 B.R. 688, 692 (Bankr. D. Conn. 1991). That case, however, examined the prior language of 11 U.S.C. § 109(c)(2), which required only “general authoriz[ation]” by state law. Section 109(c)(2) was amended in 1994 to require “specific authoriz[ation] . . . by State law” and to overrule *In re City of Bridgeport*.

As accurately set forth in the County of Dauphin's initial brief, the “specific authorization” provision of § 109(c)(2) reflects Congressional intent that bankruptcy courts should strictly limit access to Chapter 9 cases in recognition of the states' authority over municipalities pursuant to the Tenth Amendment of the U.S. Constitution. *See* County of Dauphin Brief at 3-4.

**A. Act 26 Bars the Debtor And Other Distressed Cities Of The Third Class From Declaring Bankruptcy.**

**1. The Debtor cannot challenge state law under the federal Constitution.**

The Debtor raises federal constitutional challenges to Act 26. *See, e.g.*, Debtor's Brief at 5, 28-30. It is black letter law that a municipality cannot raise a federal constitutional challenge to state law. *See City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp.2d 353 (S.D.N.Y. 2000) (“It has long been the case that a municipality may not invoke the protections of the Fourteenth Amendment against its own state.” (citing *City of Newark v. New Jersey*, 262 U.S. 192, 196, 43 S.Ct. 539, 67 L.Ed. 943 (1923))); *Sch. Dist. of Phila. v. Pa. Milk Mktg. Bd.*, 683 A.2d 972 (Pa. Commw. 1996) (“[T]he school district lacks the capacity to make this challenge on the ground that a school district has no rights under the federal constitution which it may assert in opposition to the will of the Commonwealth, its creator.”); *Commonwealth, Dep't of Env'tl. Res. v. Borough of Carlisle*, 330 A.2d 293, 297 (Pa. Commw. 1974); *Appeal of*

*Cornerstone Television*, 59 Pa. D. & C.4th 402 (C.P. Allegheny 2001) (“[A]n established body of case law holding that the provisions of the federal constitution do not apply to state legislation defining relationships between the state and the instrumentalities that the state has created to fulfill its governmental obligations.”).<sup>2</sup>

## **2. Act 26 does not violate the Pennsylvania Constitution.**

The Debtor contends that Act 26 violates the Pennsylvania Constitution in five respects: (1) impairment of vested rights under Pa. Const. art. 1, § 17, *see* Debtor's Brief at 21; (2) the original purpose clause, Pa. Const. art. 3, § 1, *see* Debtor's Brief at 23; (3) the single subject rule, Pa. Const. art. 3, § 3, *see* Debtor's Brief at 23-24; (4) impermissible special legislation in violation of Pa. Const. art. 3, § 20, *see* Debtor's Brief at 25-26; and, (5) the “equal protection clause,” Pa. Const. art. 3, § 32, *see* Debtor's Brief at 28. This Court may decide the constitutionality of state legislation in the course of determining a debtor's eligibility for federal bankruptcy protection. *See In re Tykla*, 353 B.R. 437 (Bankr. W.D. Pa. 2006).

The Debtor, however, must overcome a strong presumption that the legislation is constitutional. *See Curtis v. Kline*, 666 A.2d 265, 268 n.3 (Pa. 1995) (“We are . . . guided by the principle that a strong presumption exists that all legislation promulgated by the General Assembly is constitutional.”). “A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution; all doubts are to be resolved in favor of a finding of constitutionality.” *Commonwealth v. Mayfield*, 832 A.2d 418, 421 (Pa. 2003); *see also Tykla*, 353 B.R. at 437 (recognizing that constitutional challenges face an “exceptionally heavy burden”). Specifically, when municipalities seek to void state legislation through constitutional

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<sup>2</sup> The sole exception to this doctrine is where a municipality alleges under the Supremacy Clause that the municipality must comply with federal legislation that conflicts with state law. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 627-30 (10th Cir. 1998). This exception is not at issue in this case.

challenges, “[a]ny fair, reasonable doubt as to the existence of power in a municipality is resolved by the courts against its existence.” *Denbow v. Borough of Leetsdale*, 729 A.2d 1113, 1118 (Pa. 1999).

**a. Act 26 does not retroactively impair a vested right.**

The Pennsylvania legislature may enact, amend, and repeal laws as it sees fit. *See Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth*, 997 A.2d 392, 398 (Pa. Commw. 2010) (“The law is well settled that, in the absence of a constitutional bar, the General Assembly is free to repeal and amend previous legislation.”); *City of Phila. v. Schweiker*, 817 A.2d 1217, 1223 (Pa. Commw. 2003) (“The legislature is cloaked with the authority to modify and repeal prior enactments.”), *aff'd*, 858 A.2d 75 (Pa. 2004). Legislation may have retroactive effect, so long as such laws “disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, and do not vary existing obligations contrary to their situation when entered into and when prosecuted.” *Smith v. Fenner*, 161 A.2d 150, 154 (Pa. 1960).

The Debtor contends that Act 26 retroactively impaired the Debtor's alleged vested right under Act 47 to file a Chapter 9 petition and therefore Act 26 violated Article 1, § 17 of the Pennsylvania Constitution. *See Debtor's Brief at 21-22.*<sup>3</sup> The Debtor's argument fails because municipalities have no vested rights in a statutory scheme; and, even if the Debtor could have a vested right to declare bankruptcy, such right had not vested before the passage of Act 26.

**i. Debtor, as a municipality, has no vested rights under state statutes.**

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<sup>3</sup> The Debtor alternatively references this argument as a challenge to Act 26 as an *ex post facto* law or impairment of contract. Because Act 26 is not a penal law and no contractual right is at issue, the Debtor's argument is properly characterized as a challenge to Act 26 as a retroactive impairment of a vested right. *See Barasch v. Pa. Pub. Util. Comm'n*, 532 A.2d 325, 338 (Pa. 1987) (“Neither the federal constitution nor our state constitution invalidates a non-penal statute merely because it is retroactive, unless such legislation impairs contractual or other vested rights.”); *see also Commonwealth Ass'n of Sch. Adm'rs v. Bd. of Educ.*, 740 A.2d 1225, 1230 (Pa. Commw. 1999) (“[R]ights granted under a statute are not contractual in nature, vest no contractual rights in anyone, and no constitutional rights are implicated if they are changed or eliminated.”).

The Debtor is a municipality, a mere creature of the state, and has no sovereignty to protect it from state legislative action. “[I]t is fundamental that municipalities are creatures of the state and that the authority of the Legislature over their powers is supreme.” *Naylor v. Twp. of Hellam*, 773 A.2d 770, 773 (Pa. 2001); *see also Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 660-61 (1819); *Warner Cable Commc'ns Inc. v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 211 (E.D. Pa. 1992) (“[A] borough or other municipal corporation is not a sovereign with inherent powers, but rather a creature of the state. As such, it is completely subject to the state legislature's authority and may do only those things which the legislature has placed in its power.” (citing *In re Borough of Ambridge*, 417 A.2d 291, 292 (Pa. Commw. 1980))). As to municipalities, the Commonwealth “has authority to . . . enlarge or diminish their powers . . . and overrule their legislative action whenever it is deemed unwise, impolitic or unjust, and even abolish them altogether.” *In re City of Pittsburg*, 66 A. 348, 352 (Pa. 1907).

As such, the Pennsylvania Supreme Court has stated expressly that a municipality has no vested rights in a prior statutory scheme that are protected from subsequent legislative action:

Municipal corporations are . . . created, governed, and the extent of their powers determined by the Legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their . . . corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania.

*Commonwealth ex rel. Elkin v. Moir*, 49 A. 351 (Pa. 1901); *see also Henderson v. Del. River Joint Toll Bridge Comm'n*, 66 A.2d 843, 850 (Pa. 1949) (“Pennsylvania's exercise of her legislative power in material regard was not in the least restricted by reason of any vested municipal rights in the municipalities concerned or in their inhabitants.”); *Kraus v. City of Phila.*, 109 A. 226, 231 (Pa. 1919) (Stewart, J., dissenting) (“The municipality being but an instrument of the state, capable of doing only such things as the state permits, it results that it can have no

vested right in any privilege given it by the state, and such privilege the state may withdraw at its pleasure.); *E. Pennsboro Sch. Dist. v. W. Fairview Sch. Dist.*, 21 Pa. D. 813, 815 (C.P. Cumberland 1912) (“The theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of a sovereign state with its governmental agents and mandatories.”).

The Debtor, as a creature of the state, had no vested rights under Act 47 that could not be abrogated by the subsequent enactment of Act 26. Thus, the legislature could revoke at any time the Debtor's purported right under Act 47 to declare bankruptcy through Act 26.

**ii. The Debtor has no vested right to declare bankruptcy.**

Notwithstanding the Debtor's status as a municipal creature of the state, a bankruptcy debtor generally has no vested right in the statutory scheme setting the qualifications for bankruptcy. See *Hudson Cnty. Welfare Dep't v. Roedel*, 34 B.R. 689, 694 (D.N.J. 1983), *aff'd*, 734 F.2d 5 (3d Cir. 1984) and *aff'd sub nom. In re Roedel*, 734 F.2d 7 (3d Cir. 1984). Because “a discharge in bankruptcy is a legislatively created benefit . . . [the legislature] may grant it on conditions, and could withhold it altogether if it chose.” *Id.*; accord *In re Gibbons*, 311 B.R. 402, 403 (S.D.N.Y. 2004) (“A petition in bankruptcy . . . is merely an application for discharge; prior to receiving a discharge, a debtor 'has no vested right in having the law remain as it was at the time he filed his petition.’” (quoting *Hudson Welfare Dep't*, 34 B.R. at 694)). Bankruptcy courts have recognized that “hopes alone do not create a right,” *Hudson Welfare Dep't*, 34 B.R. at 689, which is in line with Pennsylvania's definition of “vested rights,” as discussed below.

**iii. The Debtor had no vested right because Act 26 was passed before the filing of the Petition and before the Debtor was eligible to file the Petition.**

Even if the Debtor could assert a vested right under Act 47 to declare bankruptcy, the Debtor's alleged right was not vested before Act 26 was enacted, and the Debtor's vested rights claim therefore fails. A “vested right” is “[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent.” *Hosp. & Healthsystem Ass'n of Pa.*, 997 A.2d at 399 (quoting BLACK'S LAW DICTIONARY 1438 (9th ed. 2009)) (internal quotation marks omitted). The Commonwealth Court of Pennsylvania has further explained vested rights as follows:

Rights are only vested when they are *fixed* and without condition. Moreover, they “*must be something more than a mere expectation*, based upon an anticipated continuance of existing law. It must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another.”

*Id.* (emphasis added) (quoting *Konidaris v. Portnoff Law Assocs., Ltd.*, 953 A.2d 1231, 1242 (Pa. 2008)) (internal citation omitted).

Before the passage of Act 26, the Debtor had, at most, a mere expectation that it could be permitted to declare bankruptcy if it completed the Act 47 process. Act 47 authorized a Chapter 9 filing only upon the occurrence of specific preconditions, *i.e.*, “a majority of [City Council] fail[ing] to adopt [the Act 47] plan.” The Debtor had not met the Act 47 preconditions before Act 26 was passed. Act 26 was passed and deemed effective on June 30, 2011. City Council did not reject the Act 47 plan until a vote on July 19, 2011. Therefore, the City was not eligible to declare Chapter 9, and had not declared bankruptcy, by the date of enactment of Act 26.

As of the effective date of Act 26, the Debtor had a mere expectation that it would retain the statutory authorization to file bankruptcy in the future. The Debtor had not yet become

eligible for or availed itself of that authorization before it was revoked by the legislature. The Debtor therefore had no vested right to bankruptcy protection.<sup>4</sup>

**b. Act 26 did not violate the Original Purpose Rule.**

Act 26 was passed as part of Senate Bill 907, a copy of which is attached hereto as Exhibit A. The Debtor contends Act 26 violates Article 3, § 1 of the Pennsylvania Constitution because Act 26 varied from the "original purpose" of Senate Bill 907. The original purpose rule prohibits alteration or amendment of legislation during the enactment process so as to change the legislation's "original purpose." *See* Pa. Const. art. III, § 1 ("[N]o bill shall be altered or amended on its passage through either House, as to change its original purpose."). Senate Bill 907 was subject to only two amendments during its course through the legislature.<sup>5</sup> The first amendment, offered in the Senate on May 19, 2011, made only minor alterations. The second amendment added the provisions of Act 26 to Senate Bill 907. The only question, therefore, is whether Act 26 was such a departure from the original purpose of Senate Bill 907 as to violate the original purpose rule.

To test for a violation of the rule, a court must perform a "comparative analysis" of the bill's original purpose and its final purpose, and, second, "a court must consider whether, the title and contents of the bill are deceptive." *Pennsylvanians Against Gambling Expansion Fund, Inc. (PAGE) v. Commonwealth*, 877 A.2d 383, 409-10 (Pa. 2005). In recognition of the "realities of the legislative process which can involve significant changes to legislation in the hopes of

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<sup>4</sup> Courts are to read legislation to avoid any retroactive application, if possible. *See, e.g., Krenzelak v. Krenzelak*, 469 A.2d 987, 990 (Pa. 1983). Here, because the Debtor had not filed for bankruptcy before the enactment of Act 26, the Court should read Act 26 prospectively, avoiding entirely the City's claim that Act 26 retroactively impinged on a vested right.

<sup>5</sup> The legislative history of Senate Bill 907 is available online at: <http://www.legis.state.pa.us/CFDOCS/Legis/HA/Public/HaCheck.cfm?txtType=PDF&sYear=2011&sInd=0&body=S&type=B&bn=0907&pn=0943&aYear=2011&an=02304>

consensus,” courts are to expect “that legislation will be transformed during the enactment process.” *City of Phila. v. Rendell*, 888 A.2d 922, 933 (Pa. Commw. 2005). “The General Assembly is given full opportunity to amend and even expand a bill, and not run afoul of the constitutional prohibition on an alteration or amendment that changes its original purpose.” *Id.* at 933-34 (alteration in original) (quoting *PAGE*, 877 A.2d at 408-09) (internal quotation marks omitted).

**i. Act 26 did not change the original purpose of Senate Bill 907 to regulate the fiscal obligations and responsibilities of state instrumentalities.**

In determining the original purpose of legislation, a reviewing court should hypothesize, based on the text of the statute, as to a reasonably broad original purpose. *PAGE*, 877 A.2d at 409; *City of Phila. v. Commonwealth*, 838 A.2d 566, 588 (Pa. 2003) (“hypothesizing reasonably broad topics [in original purpose analysis] is appropriate . . . because it helps ensure that Article III does not become a license for the judiciary to 'exercise a pedantic tyranny' over the efforts of the Legislature” (quoting *In re Commonwealth, Dep't of Transp.*, 515 A.2d 899, 902 (Pa. Commw. 1986))). Courts have accepted a variety of reasonably broad original purposes. *See, e.g., PAGE*, 877 A.2d at 407 (upholding a bill to “regulate gaming”); *Christ the King Manor v. Commonwealth, Dep't of Pub. Welfare*, 911 A.2d 624, 637 (Pa. Commw. 2006) (upholding “regulation of Pennsylvania's publicly funded healthcare programs”).

Senate Bill 907 consists of provisions directing or limiting spending by Commonwealth agencies and instrumentalities, imposing conditions on continued funding to those instrumentalities, and requiring or forbidding specific actions by those instrumentalities (and threatening the withholding of funds as a penalty for noncompliance with such directives), along with other provisions that direct the spending or authorize actions by Commonwealth agencies

and authorities. *See, e.g.*, Senate Bill 907 at 26 (altering the investment authority of the State Workers' Insurance Board); *id.* at 40 (removing prior restriction on Pennsylvania Health Care Cost Containment Council from collecting income from sale of consumer information); *id.* at 49 (authorizing the state Budget Office to enter into an agreement with the U.S. Treasury Department); *id.* at 49-50 (conditioning funding of the Auditor General's office on completion of certain tasks by the Auditor General); *id.* at 50-51 (directing PHEAA to accept the maximum amount of matching funds available from the federal government); *id.* at 59 (requiring Pennsylvania Horseman's Organizations to implement certain fiscal controls).<sup>6</sup>

Considering these provisions, the reasonably broad purpose of Senate Bill 907 can be stated as: direction of the fiscal obligations and responsibilities of instrumentalities of the Commonwealth, including municipalities, agencies, and authorities.

Act 26 is germane to this reasonably broad purpose. Act 26 directs the fiscal management of distressed cities of the third class. Such municipalities are instrumentalities of the state, no different from the Commonwealth agencies addressed in other sections of Senate Bill 907. *See* Section I.A.3, *supra*; *see also Kunze v. Duquesne City*, 190 A. 538, 541 (Pa. Super. 1937) ("[A] municipality . . . is a creature of the state and an agency of the state, and undoubtedly the Legislature may change remedies affecting such municipalities.").

This reasonably broad purpose is supported by Act 26's placement in the Fiscal Code, which governs the finances of municipalities and other instrumentalities of the Commonwealth.

The Fiscal Code is:

An Act relating to the finances of the State government; . . . affecting every department, board, commission and officer of the State government, *every political subdivision of the State*, and certain officers of such subdivisions, every person, association and corporation required to pay, assess, or collect taxes or to

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<sup>6</sup> *See also* House Committee on Appropriations Fiscal Note for Senate Bill 907, attached hereto as Exhibit D (summarizing these provisions).

make terms or reports under the laws opposing taxes for State purposes, or to pay license fees or other monies to the Commonwealth, or any agency thereof, every state depository and every debtor or creditor of the Commonwealth . . . .

*See* Title to Senate Bill 907 (Exh. A) at 1 (emphasis added).

While the Debtor takes issue that Senate Bill 907 amends both the Fiscal Code and Act 47, part of the Municipal Code, Act 47 has the same common purpose as the both Senate Bill 907 and the Fiscal Code, "foster[ing] fiscal integrity in municipalities so that they . . . pay principal and interest on their debt obligations when due." 53 P.S. § 11701.102(a). Thus, the original purpose of Senate Bill 907 is the same as that of the Fiscal Code and Act 47, to provide for and protect the fiscal health and integrity of the Commonwealth and its instrumentalities.

Act 26 does not depart from this common purpose. The manner in which Act 26 addresses distressed cities is closely comparable with the manner in which the remainder of Senate Bill 907 addresses other state instrumentalities. For example, Senate Bill 907 requires the Auditor General "deliver an annual audit of commonwealth-managed federally funded programs by March 31, 2012 and each March 31 thereafter," or, "the State Treasurer shall not authorize the release of any funds appropriated to the auditor general in the quarter following the failure of the auditor general to deliver the audit." Exhibit A at 49-50. Nearly identically, Act 26 directs that no distressed cities of the third class shall file a chapter 9 petition, and that state funding shall be withheld from any such municipality that fails to comply. *Id.* at 13-14. Senate Bill 907 directs PHEAA and the Budget Office to enter into fiscal agreements with the federal government, *id.* at 50-51; comparably, Act 26 forbids distressed cities from filing for federal bankruptcy protection. Moreover, Senate Bill 907 provides for loans to municipalities for capital projects, to be administered by the Department of Community and Economic Development, *id.* at 6-12, while

Act 26 and Act 47 provide for that Department to administer fiscal programs for distressed municipalities.

Both the original provisions of Senate Bill 907 and the Act 26 provisions amended to that bill govern the fiscal conduct of state instrumentalities to advance the legislature's judgment regarding responsible fiscal policy for the Commonwealth as a whole. Like the other provisions of Senate Bill 907, Act 26 governs the fiscal relationship between the Commonwealth and its instrumentalities (including, by threatening to withhold state funding to municipalities that declare bankruptcy). Certainly, the legislature within its authority and discretion may find that municipal bankruptcy filings may adversely affect the finances of the Commonwealth and its municipalities. Act 26 therefore is germane to the Commonwealth's interests in fiscal governance of its instrumentalities. Because Act 26 is germane to Senate Bill 907's "reasonably broad purpose," the first prong of the original purpose test is satisfied.

**ii. Act 26's title and contents are not deceptive.**

The second prong of the original purpose test is "whether, in its final form, the title and contents of the bill are deceptive." *PAGE*, 877 A.2d at 409. Despite that the title of Senate Bill 907 states that its fiscal amendments "provid[e] for financially distressed municipalities," the Debtor contends that Act 26 failed to provide "reasonable notice" to the City of Harrisburg regarding the bill's contents as to the City's authorization to file bankruptcy. *See Debtor's Brief* at 23-24.

When looking to whether either the title or contents of a bill are deceptive in violation of Article 3, Section 1, Pennsylvania courts have found that "[t]he final title of a bill is not deceptive if it 'placed reasonable persons on notice of the subject of the bill.'" *Phila v. Rendell*, 888 A.2d at 934 (quoting *PAGE*, 877 A.2d at 409). Thus, as long as the act puts a municipality

on reasonable notice that the legislature is amending the relevant statutory provisions as provided for in the title, the second prong of the original purpose test is satisfied. *See id.*

Here, Act 26's use of the term “financially distressed municipality” precisely implicates its purpose of altering municipalities' financial and legal obligations under Act 47. *See* 53 P.S. §11701.102 (providing certain administrative and judicial provisions that apply only to “financially distressed municipalities”); 12 Pa. Code § 115 *et seq.* (same). A municipal officer of a city determined to be financially distressed under Act 47, held to a reasonable person standard,<sup>7</sup> has ample notice of Act 26's effects on financially distressed municipalities through the bill's title and relevant contents. Moreover, the Debtor fails to allege that legislators were “actually deceived” by Act 26 at the time of passage, which undercuts its claim of deception. *See Christ the King Manor*, 911 A.2d at 637.<sup>8</sup>

Act 26's clear title “provid[es] for financially distressed municipalities,” putting the Debtor and other distressed cities on notice about the potential impact of the legislation on its substantive rights. The legislature's use of instructive language on the face of the bill's title and its contents satisfies the reasonable person standard to which the Debtor is held, and thus does not violate Article 3, section 1 of the Pennsylvania Constitution.

**c. Act 26 does not violate the Single Subject Rule.**

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<sup>7</sup> The Debtor's brief conflates the applicable standards applied under various constitutional provisions. Although municipalities may be held to a slightly higher standard under the single subject review of Article 3, Section 3, courts only hold municipalities' actions to that of a “reasonable person” when looking to deceptive title or contents under Article 3, section 1, *see PAGE*, 877 A.2d at 409, and Debtor's general statement that “[m]ore stringent analysis applies when it comes to public entities,” the Debtor's Brief at 24, does not apply to original purpose analysis under Article 3, section 1.

<sup>8</sup> Although the Debtor cites to House testimony from an earlier draft of Act 26 in which one legislator “venture[s] to say” that some members may not understand the full text of the bill, this does not allege actual deception *at the time of passage*. Moreover, under Pennsylvania law, the enrolled bill doctrine enforces a presumption that Act 26 was enacted in the manner required by law, and bars the court from considering the “subjective, individualized ... impressions of specific legislators” in determining its validity. *See City of Phila. v. Commonwealth*, 838 A.2d 566, 580 (Pa. 2003) (“[T]aking such testimony into account would be 'going behind' the statute as enacted and inappropriately delving into the mental processes of the legislators who voted on it.”).

The Debtor contends that Act 26 violates the single subject requirement of Article 3, section 3 of the Pennsylvania Constitution. *See* Debtor's Brief at 24-25. That section provides:

No bill shall be passed containing more than one subject, which shall be clearly expressed in its title . . . .

The single subject rule of Article 3, section 3 “was intended merely to prohibit the practice of passing what were known as 'omnibus' bills, containing subjects foreign to each other, and whose title was on that account calculated to mislead and deceive.” *Mallinger v. Pittsburgh*, 175 A. 525, 526 (Pa. 1934).

Act 26 was passed as part of Senate Bill 907, a copy of which is attached hereto as Exhibit B. As set forth above, *see* Section I.A.2.b.i, Senate Bill 907 contains a variety of provisions directing the fiscal obligations and responsibilities of Commonwealth instrumentalities. These include Act 26's restraint on municipal bankruptcy filings, and concurrent fiscal penalty for municipalities that file for chapter 9, *see* Section I.A.3, below, along with other provisions that direct the spending or authorize actions by other Commonwealth instrumentalities. *See* note 6, and accompanying text, *supra*.

As the Debtor admits, “the constitutional single-subject requirements are met” so long as the provisions of a statute “assist in carrying out the bill's main objective or are otherwise germane to the bill's subject.” *Id.* at 24 (citing *Spahn v. Zoning Bd. of Adjustment*, 977 A.2d 1132, 1148 (Pa. 2009)); *see also* *PAGE*, 877 A.2d at 397. “Plurality of subjects is not objectionable so long as they are reasonably germane to each other.” *Lehigh Nav. Coal Co. v. Pa. Pub. Util. Comm'n*, 1 A.2d 540, 546 (Pa. Super. 1938). Legislation “may still contain any number of provisions properly connected with and germane to the expressed subject, without violating” the single subject rule. *Mallinger*, 175 A. at 526. Courts examining a single subject rule challenge must exercise “deference by hypothesizing reasonably broad topics” to “ensure

that Article III does not become a license for the judiciary to exercise a pedantic tyranny over the efforts of the Legislature.” *City of Phila.* 838 A.2d at 578.

The most recent and relevant application of the doctrine is the Superior Court's decision in *Commonwealth v. Neiman*, 5 A.3d 353 (Pa. Super. 2010). In *Neiman*, the challenged law combined amendments to the Deficiency Judgment Act with a new enactment imposing civil penalties on sexually violent predators (commonly known as Megan's Law). *See Neiman*, 5 A.3d at 358. The court held that the Megan's Law requirement for taking of DNA samples from incarcerated felony sex offenders did not bear a "proper relation" to the Deficiency Judgment Act amendments regarding joint and several liability for acts of negligence, were not germane, and therefore violated the single subject rule. *Id.* at 357-58.

The *Neiman* court made clear that the germaneness test of the single subject rule requires only that subjects "relate to the same subject or object . . . have [a] proper legislative relation to each other." *Id.* (citing *Payne v. Sch. Dist. of Borough of Coudersport*, 31 A. 1072 (Pa. 1895); *see also PAGE*, 877 A.2d at 392 (single subject of "regulation of gaming" properly encompassed creation of state boards and funds along with issuance of private licenses and distribution of license revenues to municipalities); *Fumo v. Pub. Util. Comm'n*, 719 A.2d 10, 12-15 (Pa. Commw. 1998) (regulation of taxicabs and deregulation of electricity generation went to common object of regulation of public utilities). It is irrelevant whether all of the provisions of a bill include amendments to a single Pennsylvania code. *See Neiman*, 5 A.3d at 358 (citing *DeWeese v. Weaver*, 824 A.2d 364 (Pa. Cmwlth. 2003); *Fumo*, 719 A.2d at 10).

Here, all of the provisions of Senate Bill 907, including Act 26, relate to the same object: directing the fiscal obligations and responsibilities of Commonwealth instrumentalities. As set forth in Section I.A.2.a.i, above, the Debtor is a creature of the state, indistinguishable in the

constitutional context from a state agency or authority. Senate Bill 907 directs the fiscal activities of these entities, requiring certain controls, conditioning their funding on certain activities, and directing they enter into certain agreements. Act 26 identically governs the fiscal activities of distressed cities of the third class. The fiscal security and health of the Commonwealth and its municipal subdivisions are plainly germane to one topic in Senate Bill 907 and are impacted where a municipality is unable to meet its financial obligations or adopt a financial recovery plan on its own. In light of the deference the Court must provide to the legislature, the purpose and common subject of these provisions is clear. Senate Bill 907, containing Act 26, therefore satisfies the single subject rule.

**d. Act 26 was not special legislation.**

The Pennsylvania Constitution, Article 3, § 32, restricts the legislature from passing any “local or special law . . . [r]egulating the affairs of . . . cities.” In the context of municipal government, the bounds of the special legislation provision are clear: “A law dealing with all cities or all counties of the same class is not a special law, but a general law, uniform in its application. But a law dealing with but one county of a class consisting of ten, would be local or special.” *Wings Field Pres. Assocs., L.P. v. Com., Dep't of Transp.*, 776 A.2d 311, 316 (Pa. Commw. 2001) (alteration in original) (quoting *Appeal of Torbik*, 696 A.2d 1141, 1146 (Pa. 1997)) (internal quotation marks omitted). Indeed, the Pennsylvania Constitution makes clear that “laws passed relating to each class [of municipalities] . . . shall be deemed general legislation.” Pa. Const. art. 3, § 20; *see also Tykla*, 353 B.R. at 437 (“[L]egislation applying to *all* cities or to *all* counties of the same class is 'general' rather than 'special.'”). Conversely, “[l]egislation that applies to only *one* county of a class of which there are, say, ten members is

'special.'" *Id.* (citing *Wings Field*, 776 A.2d at 316); *see also Heuchert v. State Harness Racing Comm'n*, 170 A.2d 332, 336 (Pa. 1961).

**i. Legislative classifications are not forbidden unless the classification would create a “class of one”.**

Pennsylvania's constitutional protection against special legislation “was not intended to prevent the General Assembly from creating statutory classifications to meet diverse needs.” *Wings Field*, 776 A.2d at 316. To prove that legislation is special, and therefore unconstitutional, the Court's threshold inquiry must show that the class was limited to one member at the time of enactment, was “substantially closed” to new members, and provided a process for potential entrance that was practically prohibitive. *Id.* at 1048-49; *see also Harristown Dev. Corp. v. Commonwealth, Dep't Gen. Servs.*, 614 A.2d 1128, 1132 n.3 (Pa. 1992) (“[A] classification of one member is not unconstitutional so long as other members might come into that class.”).

Pennsylvania courts therefore find legislative classifications invalid as special legislation only where the classification at issue is so narrowly drawn that the legislation could only apply to one entity. For example, the Pennsylvania Supreme Court held in *Harrisburg School District v. Hickok*, 761 A.2d 1132 (Pa. 2000), that legislation classifying “a school district of the second class with a history of low test performance which is coterminous with the city of the third class which contains the permanent seat of government” was special legislation because the legislation, both on its face and through its application, applied to no other municipality than the Harrisburg School District, thereby establishing an invalid “class of one,” in violation of the “special legislation” clause of the Pennsylvania Constitution. *Id.* at 1135.

**ii. Act 26 does not create a class of one, but applies to all distressed cities of the third class, and therefore Act 26 is not special legislation.**

Act 26 is generally applicable to an *entire class* of cities that are determined to be financially distressed. *See* 72 P.S. § 1601-D.1(a) (stating that Act 26 “applies to a city of the third class which is determined to be financially distressed under . . .the Municipalities Financial Recovery Act”). The scope of the Act covers all cities of the third class, and contains no other qualifications that would limit its scope to an invalid “class of one.”

Pennsylvania has *more than fifty* third class cities and, as of January 2011, at least twenty Pennsylvania municipalities had filed for protection under Act 47 as “financially distressed.” *See* Declarations of Financial Distress, Pennsylvania Department of Community and Economic Development, attached hereto as Exhibit C. The Act 26 classification therefore includes more than one member, is open to new membership by any third class city determined to be financially distressed (a process that has become much more common in the current economic downturn), and does not present prohibitively complicated entry requirements for potential new class members. All of these factors show that Act 26 is general, not special, legislation and that it complies with Pennsylvania Constitution Article 3, section 32 as interpreted by the Pennsylvania Supreme Court.

**e. Act 26 does not violate the Equal Protection Clause.**

The Debtor contends that Act 26 violates the federal and state equal protection clauses. The Debtor's Brief at 28. As set forth in Section I.A.1, above, Debtor, as a municipality, has no standing to challenge Pennsylvania law under the United States Constitution. Admittedly, however, as stated by the Debtor, the special legislation provision of Article 3, section 32 has

been held to be coextensive with the federal Equal Protection clause. *See Pa. Turnpike Comm'n v. Commonwealth*, 899 A.2d 1085, 1094 (Pa. 2006).

The state constitution does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Id.* “In other words, a classification must rest upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation.” *Id.*

As set forth in Section I.A.2.d, above, Act 26 applies to all Pennsylvania cities of the third class that have been determined to be financially distressed under Act 47. It is unclear what irrational distinction the Debtor contends is drawn by this classification. The legislative purpose for the classification is to restrict financially distressed cities from filing for federal bankruptcy protection. To the extent the Debtor views this as an unfair classification, the Debtor is incorrect. That certain cities, including the Debtor, have been determined to be financially distressed establishes a reasonable ground of difference between those cities and third class cities, generally. This distinction has a fair and rational relationship to the legislative purpose of safeguarding the fiscal security of the Commonwealth and its political units. Act 26 therefore does not violate the equal protection guarantees of the Pennsylvania Constitution.

**3. Act 26's penalty provision does not moot its prohibition on municipal bankruptcy filings.**

The Debtor contends that Act 26 does not bar the Debtor's filing, despite its plain commandment that “Notwithstanding any other provision of law, no distressed city may file a petition for relief under 11 U.S.C. Ch. 9 . . . or any other Federal bankruptcy law.” 72 P.S. § 1601-D.1(b). The Debtor bases its argument on the inclusion of a penalty provision in Act 26, which provides that “all Commonwealth funding” shall be suspended should any distressed city

of the third class file for bankruptcy. *See* Debtor's Brief at 30-33. The Debtor contends that this penalty provision makes Act 26 “directory” rather than “mandatory,” and that it may simply ignore the plain commandment of the legislature and lose state assistance. *Id.*

The Debtor is incorrect. First, as a general matter, regardless of whether Act 26 is directory or mandatory, “[b]oth mandatory and directory provisions of the legislature are meant to be followed.” *People United to Save Homes v. Dep't of Env'tl. Prot.*, 792 A.2d 1, 3 (Pa. Commw. 2001).

Further, Act 26 falls squarely under the definition of “mandatory” legislation adopted by the Pennsylvania Supreme Court. In *In re Cramer's Election Case*, 93 A. 937 (Pa. 1915), the Supreme Court stated the established rule of construction that “where a legislative provision is accompanied with a penalty for failure to observe it, the provision is mandatory. It would offend against the plain and unmistakable meaning of such a statute to otherwise construe it.” *Id.* at 940. The court was clear that a provision seeking compliance (i.e., directing an express limitation on financially distressed municipalities authorization to file bankruptcy), when accompanied with a penalty (i.e., termination of all state aid), establishes that the provision is mandatory. As such, non-compliance with the legislative provision, in this case filing bankruptcy despite revocation of authorization under Act 47, renders the proceedings to which it relates illegal and void. *See Phila. Gas Works v. Commonwealth*, 741 A.2d 841, 846 (Pa. Commw. 1999) (“A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void . . . .” (quoting *Deibert v. Rhodes*, 140 A. 515, 517 (Pa. 1928)) (internal quotation marks omitted)).

Additionally, Pennsylvania courts have consistently held that the intent of the legislature, is controlling as to the effect of non-compliance with a statute. *See, e.g., Commonwealth v.*

*Baker*, 690 A.2d 164, 167 (Pa. 1997) (“[I]t is the intent of the legislature which governs [whether statutory provisions are to be considered mandatory.]” (quoting *Francis v. Corleto*, 211 A.2d 503, 509 (Pa. 1965)) (internal quotation marks omitted)). Thus, if construing a statute as “directory” contravenes the apparent intent of the legislature, then the statute must be mandatory and any proceedings relating to non-compliance must be voided. Act 26 is not intended as directory (merely “directing that certain proceedings be done in a certain manner or at a certain time,” *In re Sale of Real Estate by Lackawanna Cnty. Tax Claim Bureau*, 22 A.3d 308, 313 (Pa. Commw. 2011)) but rather expressly limits municipalities' substantive right to file bankruptcy petitions. Thus, construing the Act 26 penalty provision—in light of the entire statute—as directory (i.e., allowing voluntary non-compliance without voiding related bankruptcy proceedings) would nullify an entire subsection of the statute in contravention of legislative intent, an interpretation that runs afoul of a canon of construction cited in Debtor's Brief. *See* Debtor's Brief at 31 (“Case law indicates that no word of a statute is to be left meaningless unless no other construction is possible.”); *see also Commonwealth v. Baumer*, 243 A.2d 472, 474 (Pa. Super. 1968) (stating same).

The plain language chosen by the legislature states that the limitation on bankruptcy is to exist “notwithstanding any other provision of law,” 72 P.S. § 1601-D.1(b), and therefore this limitation must be given full effect regardless of the penalty provision of 1601-D.1(c). Thus, the mere inclusion of a penalty provision does not moot Act 26's express revocation of the required state authorization to file bankruptcy under Chapter 9.

The Debtor is also incorrect that the phrase “is determined” in Act 26 causes Act 26 to apply to only future distressed municipalities. Having argued that Act 26 is “special legislation” aimed directly at Harrisburg, the Debtor cannot also contend that the legislature did not intend

for Act 26 to encompass Harrisburg among the covered municipalities, merely because it "had been" declared distressed by the passage of Act 26. This would be an absurd result, in contravention of the Statutory Construction Act. *Holland v. Marcy*, 883 A.2d 449, 452 (Pa. Super. 2005 ("[O]ur goal is to ascertain the intent of the General Assembly in adopting the statute." (citing 1 Pa.C.S. § 1921(a)). Further, the Debtor ignores that once a city is determined to be financially distressed under Act 47, that determination remains in effect until terminated by the Secretary of the Department of Community and Economic Development. *See* 53 P.S. § 11701.253, such that Harrisburg remains a distressed city under that act. Finally, as above, the plain language of Act 26 states "notwithstanding any other provision of law . . . no distressed city may file a [bankruptcy] petition," 72 P.S. § 1601-D.1(b), making no distinction on the timing of the distress declaration.

**B. Act 47 Did Not Permit City Council To Unilaterally File the Petition.**

As set forth in County of Dauphin's initial brief, Act 47 did not permit City Council to unilaterally file a bankruptcy petition on behalf of the Debtor. *See* County of Dauphin Brief at 8-11. The Debtor entirely fails to address County of Dauphin's argument that Act 47 permits the authority to file for bankruptcy to be exercised "only upon the vote by a majority of [City Council]," 53 P.S. § 11701.261(b), which, under Third Circuit precedent, establishes City Council's vote as a necessary, but not a condition for the bankruptcy filing itself. County of Dauphin Brief at 9-11 (citing *Twp. of Tinicum v. U.S. Dep't of Transp.*, 582 F.3d 482, 488-89 (3d Cir. 2009)).

In addition to the *Township of Tinicum* decision, the Third Circuit has reiterated that the legislature's use of the word "only" in setting a condition makes such condition "necessary, but not automatically sufficient" to trigger the result. *See In re Application of U.S. for an Order*

*Directing a Provider of Elec. Comm'n Serv. to Disclose Records to Gov't*, 620 F.3d 304, 315-16 (3d Cir. 2010).

In keeping with the Statutory Construction Act, the distinction between “authority may be exercised . . . upon the vote [of City Council]” and “authority may be exercised *only* upon the vote [of City Council]” is dispositive. If the authority to file bankruptcy under Act 47 did not remain discretionary even after the vote of City Council, the legislature's use of the word “only” would be superfluous. *Id.* As in the *Township of Tinicum* and *In re Application* decisions, the use of “*only* upon” makes the City Council's vote necessary, but not sufficient, to authorize a chapter 9 filing.

As such, City Council's vote was a necessary precondition to a chapter 9 filing by the Debtor, but, Act 47 does not provide that the vote of city council is all that is required to make such a filing. Under the general law, the filing of the Petition may be accomplished only by the Mayor acting upon an ordinance of City Council, and not by City Council unilaterally by mere resolution. *See* County of Dauphin Brief at 10-11 (citing *City of Erie v. Dep't of Env'tl. Prot.*, 844 A.2d 586, 591 (Pa. Commw. 2004)). Act 47 does not depart from this procedure. Therefore, City Council's unilateral filing of the Petition was not a filing on behalf of the “municipality” of Harrisburg, as required by § 109(c) of the Bankruptcy Code, and the Petition should be dismissed and declared void *ab initio*.

**II. CONCLUSION:**

The Petition should be dismissed and declared void *ab initio* because the Debtor was not authorized to file for bankruptcy protection under Pennsylvania law and City Council was not authorized to unilaterally file the Petition on behalf of the Debtor by passage of a mere resolution.

**McNEES, WALLACE & NURICK LLC**

Date: November 18, 2011

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**CERTIFICATE OF SERVICE**

I, Clayton W. Davidson, of the firm of McNees Wallace & Nurick, LLC, hereby certify that I served a true and correct copy of The County of Dauphin's Brief in Support of its Objection To The Debtor's Chapter 9 Bankruptcy Petition upon the parties listed below by filing it with the Clerk of the Bankruptcy Court using the CM/ECF system.

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