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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 482 M.D. 2022

TOM WOLF, *et al.*,

Petitioners,

v.

THE GENERAL ASSEMBLY OF
THE COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER-INTERVENORS SENATOR JAY COSTA, DEMOCRATIC LEADER OF THE PENNSYLVANIA SENATE, AND THE PENNSYLVANIA SENATE DEMOCRATIC CAUCUS IN SUPPORT OF PETITIONERS' APPLICATION FOR SUMMARY RELIEF

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I. INTRODUCTION

Pursuant to this Court's October 26, 2022 Order, Senate Democratic Leader Jay Costa ("Democratic Leader Costa" or "Senator Costa") and the Senate Democratic Caucus (collectively referred herein as the "Democratic Senate Intervenors") file this reply brief in response to arguments raised by Respondent General Assembly ("Respondent" or "General Assembly") and Respondent-Intervenors, the Senate Republican Caucus and the House Republican Caucus (collectively referred herein as "Respondents"), in their reply briefs in support of their respective Preliminary Objections and their briefs in opposition to Petitioners' Application for Summary Relief. Many of Respondents' arguments were previously raised in their earlier submissions, and were addressed in the briefs and reply briefs of Petitioners Governor Tom Wolf ("Governor") and Secretary Leigh M. Chapman ("Secretary"), the House Democratic Caucus, and the Democratic Senate Intervenors. Overall, their arguments ultimately reflect an anti-democratic bent regarding the process by which we amend the fundamental legal instrument of this Commonwealth—the Pennsylvania Constitution. While Respondents make numerous process arguments, their ultimate goal is to limit the authority of the People over the mechanisms by which our constitution may be amended. Thus, they assert arguments that thwart the popular sovereignty over the amendment process, and seek mechanisms for the General Assembly to amend more easily the

Pennsylvania Constitution—including passage of proposed amendments through a single, omnibus joint resolution as occurred with Senate Bill 106 ("SB 106")

Rather than addressing the multitude of allegations in Respondents' reply briefs, which Petitioners and Petitioner-Intervenors have already addressed in their opening briefs, the Democratic Senate Intervenors will focus their attention on five issues which merit this Court's attention: Respondents' erroneous claims that (1) the Democratic Senate Intervenors lack standing for most of counts advanced in the Petition for Review ("Petition"); (2) the Petition is not ripe and passage of SB 106 has done no harm; (3) the plain language of Article XI, Section 1 supports their interpretation and application of the constitutional provision; (4) the General Assembly's previous enactment of a handful of resolutions with multiple amendments constitutionalizes the passage of SB 106; and (5) decisions of other states' supreme courts interpreting the amendment procedures of their constitutions support Respondents' position. All these claims lack merit and should be rejected by the Court.

First, while the General Assembly and the House Republican Caucus do not challenge the standing of the Democratic Senate Intervenors, the Senate Republican Caucus claims that the Democratic Senate Intervenors only have standing for the first claim in the Petition, *i.e.*, that Respondents violated the Pennsylvania Constitution by passing five separate constitutional amendments through one

omnibus resolution in SB 106.[1] In making this argument, the Senate Republican Caucus misunderstands Democratic Senate Intervenors' legislative standing with respect to all the claims asserted. Not only were they forced to cast a single vote on five proposed amendments in an act of unconstitutional logrolling, they also were forced to vote on amendments that themselves violated the single subject test, as discussed at length in Democratic Senate Intervenors' opening brief. Without the declaratory or injunctive relief sought by Petitioners and Petitioner-Intervenors, they likely will be forced to vote again on these constitutionally infirm provisions in the next legislative session.

Second, Respondents incorrectly assert that the claims advanced in the Petition are not ripe because the proposed amendments have not yet become law, and, therefore, Petitioners and Petitioner-Intervenors supposedly have not been harmed.[2] To make this argument, the General Assembly distinguishes between a bill, which becomes law upon its passage, and a first or second resolution proposing an

[1] *See* Reply Brief in Further Support of Preliminary Objections and Brief in Opposition to Application for Summary Relief by Senator Kim Ward and Pennsylvania Senate Republican Caucus (hereinafter "Senate Republicans' Reply Brief") at 7-9.

[2] *See* Respondent's Brief in Opposition to Petitioners' Application for Summary Relief and in Reply to Petitioners' and Petitioner-Aligned Intervenors' Briefs in Opposition to Respondent's Preliminary Objections (hereinafter "General Assembly's Reply Brief") at 9-13; Senate Republicans' Reply Brief at 9-10; Memorandum of Law of Intervenors Kerry A. Benninghoff, Majority Leader of the Pennsylvania House, and the Pennsylvania House Republican Caucus in Opposition to Petitioners' Application for Summary Relief and in Reply in Further Support of Their Preliminary Objections to the Petition for Review (hereinafter "House Republicans' Reply Brief") at 15-19.

amendment to our Constitution, which does not become law unless and until the voters approve the amendment.[3] In the General Assembly's mistaken view, because the amendment has not yet become law, it is not yet subject to challenge. However, the first passage of the proposed amendments through SB 106—despite its constitutional infirmity—constitutes a completed legislative act. In fact, passage of SB 106 affords the Respondent in the new, upcoming legislative session the opportunity to hold a second vote on a similarly defective resolution. Respondents' act of forcing a single up-or-down vote on a defective omnibus resolution enumerating multiple, proposed constitutional amendments which themselves violate the single-subject rule, has caused Democratic Senate Intervenors harm and will likely cause them the same harm once again in the new legislative session.

Third, Respondents erroneously argue that the plain language of Article XI, Section 1 makes clear that there is no prohibition against voting on multiple, unrelated constitutional amendments in a single, omnibus resolution.[4] To advance such a claim, the General Assembly engages in a long explication of the language of Article XI, Section 1 that concludes that the words clearly allow the General Assembly to vote on multiple constitutional amendments in one resolution.[5] But, as

[3] *See* General Assembly's Reply Brief at 9-10.
[4] See General Assembly's Reply Brief at 17-27; Senate Republicans' Reply Brief at 11-13; House Republicans' Reply Brief at 19-21.
[5] *See* General Assembly's Reply Brief at 20-26.

ably explained by Petitioners, a much more straightforward interpretation shows that the provision was simply meant to ensure that each amendment must be voted on separately with the "yeas" and "nays" for each recorded in the legislative journal.[6] If that were not sufficient to settle the matter, the language of Article XI, Section 1 and other provisions of the constitution, as well as the purpose and intent of the amendment procedures, and recognition that constitutional amendments constitute changes to the fundamental law of the Commonwealth, support Petitioners' interpretation. Respondents urge this Court to ignore the clear history and intent underlying our constitution, as presumably they understand that the context and purpose of Article XI, Section 1 is unfavorable to their legal position.

Fourth, the Senate Republican Caucus alleges that since there have been other instances in which multiple amendments adopted by the voters were voted upon by the General Assembly in one omnibus resolution, such a practice is constitutional.[7] But the mere fact that the General Assembly has on a few occasions enacted proposed amendments through the passage of one joint resolution does not confer constitutionality on the method of their adoption. In none of the examples provided

[6] *See* Petitioners' Brief in Support of Application for Summary Relief and Opposition to Preliminary Objections (hereinafter "Petitioners' Original Brief") at 30-36; Intervenor-Petitioners Leader Joanna E. McClinton and the Democratic Caucus of the Pennsylvania House of Representatives' Brief in Support of the Petition for Review and in Opposition to the Preliminary Objections Filed by Respondent and Intervenor-Respondents (hereinafter "House Democrats' Original Brief") at 20-25.

[7] *See* Senate Republicans' Reply Brief at 1-4.

by Respondents was there any constitutional challenge to the amendments before or after their adoption by the voters, and therefore, our judiciary never has had an opportunity to consider the constitutionality of such a practice. As importantly, Respondents' "past practice" argument ignores the fact that the vast bulk of the amendments approved by the voters since 1968 were passed by the General Assembly in a resolution containing only one amendment, demonstrating that our legislature regularly understood and employed the proper process to amend the Pennsylvania Constitution.

Fifth, the General Assembly's and the Republican Senate Caucus' claim that other state supreme courts in Idaho, Iowa, Nebraska, Ohio, and Rhode Island have interpreted similar provisions to Article XI and found no prohibition to passage of multiple proposed amendments through an omnibus resolution cannot withstand scrutiny.[8] First, the bulk of the other state amendment provisions are not similar to Article XI. Four do not require successive votes during separate legislative sessions before being presented to voters for adoption—a necessary requirement in Pennsylvania. Second, one state's constitution, Rhode Island, does not have a single subject test and the other four formulate the single subject test as a prohibition against "electors" considering multiple proposed amendments in one vote. In

[8] *See* General Assembly's Reply Brief at 18-19, 22-23; Senate Republicans' Reply Brief at 4-6, Appendix I-III.

contrast, Pennsylvania makes no reference to "electors" or "voters" in its single subject provision. Thus, reliance upon the out-of-state cases is misplaced. Even ignoring these distinctions, which this Court should not, two of the cases relied upon by Respondents do not hold that the constitutions at issue allow the passage of multiple amendments through a joint resolution and none addresses the requirement to record legislators' "yeas" and "nays" on each proposed constitutional provision to ensure that the voters may approve or disapprove of their representatives' actions at the next election.

For all these reasons, as well as the arguments advanced in the opening briefs of Petitioners and Petitioner-Intervenors, this Court should grant the Petitioners' Application for Summary Relief and dismiss the Preliminary Objections of the Respondents.

II. ARGUMENT

A. The Democratic Senate Intervenors Have Standing in This Matter.

At no point in this litigation has the General Assembly or the House Republican Caucus argued that the Democratic Senate Intervenors lack standing to advance the claims in the Petition and the relief sought in the Application for Summary Relief. By failing to challenge Democratic Senate Intervenors' standing in Respondents' preliminary objections and briefs, both the General Assembly and the House Republican Caucus waived any challenge to do so now. *In re Estate of Schram*, 696 A.2d 1206, 1209 n. 4 (Pa. Cmwlth. 1997) ("[A] party may waive its opportunity to contest the standing of another party by not raising the issue in a timely manner.").

The Senate Republican Caucus does challenge the standing of the Democratic Senate Intervenors for most of the claims advanced in the Petition. While the Senate Republican Caucus acknowledges that the Democratic Senate Intervenors have standing to advance the first claim asserted in the Petition—the claim challenging passage of multiple amendments through one, omnibus joint resolution—they incorrectly claim that Senator Costa and the Senate Democratic Caucus have no standing to advance the remaining claims. However, they misconstrue the nature of the remaining claims asserted in the Petition and the Democratic Senate Intervenors' legislative standing with respect to those claims.

It is hornbook law that any party to litigation – including legislators – must have standing to bring the action or be a party to the action. *Markham v. Wolf,* 136 A.3d 135, 140 (Pa. 2015) (citing *Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (2007)). In *Markham*, relying upon its decision in *Fumo v. City of Philadelphia*, 972 A2d 487, 502 (Pa. 2009), the Pennsylvania Supreme Court analyzed what are the necessary prerequisites for a legislator to have standing to challenge a legislative act:

> "Legislators … have been permitted to bring actions based upon their special status where there was a discernable and palpable infringement on their authority as legislators." *Fumo*, 972 A.2d at 501. We stressed that such standing "has been recognized in limited circumstances in order to permit the legislator to seek redress for an injury the legislator … claims to have suffered in his official capacity, rather than as a private citizen." *Id.* We further opined that standing has been recognized in this context to protect "legislator's right to vote on legislation" and to protect against a "diminution or deprivation of the legislator's … power or authority," but has not been recognized in actions "seeking redress for a general grievance about the correctness of governmental conduct." *Id*.

Markham, 136 A.3d at 143 (citing and quoting *Fumo*, 972 A.2d at 502)).

Despite the claims of the Senate Republican Caucus, the Democratic Senate Intervenors have standing to assert all the claims in the Petition against Respondents. All of those claims concern the "palpable infringement on their authority as legislators." *Fumo*, 972 A.2d at 501. The Republican Majority in the Senate forced a vote on SB 106 with little warning, limited debate, and no ability to amend the

resolution even though it was constitutionally infirm. In doing so, the Republican Majority undermined the Democratic Senate Intervenors' authority as legislators. They were forced not only to cast a single up-or-down vote on multiple amendments in one, omnibus joint resolution, but also to cast a single vote on amendments that themselves clearly and palpably violate the single subject test of Article XI as recognized and defined by our Supreme Court in *League of Women Voters v. Degraffenreid*, 265 A.3d 207, 230-32 (Pa. 2021). Both requirements infringed on the Democratic Senate Intervenors' authority as legislators.

As importantly, without the declaratory and injunctive relief sought in the Petition, the General Assembly will likely submit SB 106 for its second vote in the same manner, further undermining the Democratic Senate Intervenors' authority as legislators. Indeed, this Court, in deciding the various Applications for Intervention, recognized the legislative standing of the four caucuses, which include Democratic Senate Intervenors, when stating: "[t]he instant matter concerns. . . [the] legislative power to propose and vote on constitutional amendments, which is set forth in article XI, section 1." Court Opinion regarding Applications for Intervention, October 26, 2022, at 20.

For these reasons, and those enumerated in their opening briefs and applications, Democratic Senate Intervenors have standing to advance the claims in the Petition.

B. Petitioners' Claims Are Ripe.

The General Assembly alleges that the claims advanced by Petitioners and Petitioner-Intervenors are not ripe because SB 106 did not result in adoption of the five amendments and therefore the Petition does not involve a "challenge to existing law." Furthermore, the General Assembly claims that Petitioners and Petitioner-Intervenors are only seeking protection of voters' rights, and not their own. These arguments are meritless.

"When determining whether a matter is ripe for judicial review, courts 'generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed.'" *Bayada Nurses, Inc. v. Commonwealth, Dep't of Lab. and Indus.,* 8 A.3d 866, 871 n.4 (Pa. 2010). In this matter, the issue in question is "adequately developed" and the Democratic Senate Intervenors have already suffered "hardship" through the passage of SB 106 and will suffer additional hardship if it is presented again for another vote in the new legislative session.

Despite the General Assembly's claim that SB 106 does not involve a challenge to "existing law" as the amendments have not passed a second time in the next legislative session, it most certainly consists of a completed (although constitutionally infirm) legislative act in the multi-step process for amending our Constitution. Through passage of SB 106 in the current legislative session, the

Secretary of State was required to secure publication of the amendments in newspapers throughout the Commonwealth and voters went to the polls to elect members of both houses of the General Assembly after its passage. As it now stands, without the relief sought by Petitioners, the General Assembly may bring SB 106 to a vote in the next legislative session. Nothing in their briefs suggests that Respondents even question whether they have successfully completed the first steps of the amendment process of Article XI, Section 1, allowing them to move forward with a vote for second passage. Thus, while the amendments have not yet become law, the passage of SB 106 constitutes a discrete legislative act by the General Assembly to amend our Constitution which the Democratic Senate Intervenors may challenge as constitutionally deficient.

Additionally, the General Assembly's assertion that only voters can claim to have been harmed and not the Petitioners and Petitioner-Intervenors is belied by what occurred, at least with respect to the Democratic Senate Caucus. As discussed above, the Republican Majority's insistence upon a single up-or-down vote on an omnibus joint resolution with multiple proposed amendments has already infringed upon the legislative authority of the Democratic Senate Intervenors. The Majority denied them their right and responsibility to propose, debate, offer amendments, and vote on each of the constitutional amendments at issue here, individually. If the dispute between the parties is not resolved, they very likely will suffer the very same

harm in the next legislative session. Thus, the dispute is concrete, not speculative, and constitutes a hardship of the Democratic Senate Intervenors.

For these reasons, and those enumerated in Democratic Senate Intervenors' original brief, the claims asserted in the Petition and for which Petitioners seek relief through their Application for Summary Relief are ripe.

C. A Review of Article XI, Section 1, Other Provisions of Our Constitution, the Constitutional Convention of 1837-38, and the Significance of Amending Our Foundational Document, All Support the Interpretation Advanced by Petitioners and Petitioner-Intervenors.

1. Nothing in the language of Article XI expressly permits the passage of multiple constitutional amendments in one, omnibus joint resolution.

Despite contrary evidence of the intent underlying adoption of Article XI, Section 1, the General Assembly engages in a lengthy and tortured interpretation of its text, including application of the "series-qualifier canon" to argue that the provision was intended to allow the passage of multiple amendments in one, omnibus joint resolution.[9] However, while the General Assembly correctly cites *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014) for the proposition that constitutional interpretation must begin with the plain meaning of the provision in question, it refuses to acknowledge that even a cursory review of Article XI demonstrates that it does not expressly authorize the passage of proposed constitutional amendments

[9] *See* General Assembly's Reply Brief at 19-23.

through one, omnibus joint resolution. Instead, as ably argued by Petitioners and the House Democratic Caucus, the provision speaks of passage of an "amendment" or "amendments." Nowhere does it mention a resolution. *See* PA. CONST. art. XI, § 1. Furthermore, the provision, unlike other provisions in other state constitutions cited by the Respondents, includes a single subject test without any reference to "electors" or "voters," at least suggesting that the single subject test applies to the vote by the legislature on the resolution as well as the electors' votes at the polls. *See id*. ("When two or more amendments are submitted, they shall be voted upon separately."). In the end, the provision requires that an amendment or amendments may be voted upon and the yeas and nays regarding such amendment or amendments be recorded. *Id*. Nothing in the provision expressly permits enactment of proposed constitutional amendments through a single, omnibus joint resolution, and for reasons explained below, such a reading is disfavored.

2. Our Supreme Court's explication of the proper method to interpret a constitutional provision, including a review of prior case law on the matter, its constitutional history, and its purpose clearly supports Petitioners and Petitioner-Intervenors.

If this Court is unable to determine the meaning of Article XI, Section 1 through its plain language, our Supreme Court has explained the required interpretative analysis:

> [I]f, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity

> becomes apparent in the plain language of the provision, we follow the rules of interpretation similar to those generally applicable when construing statutes. *See, e.g., Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 945 (Pa. 2013); *Commonwealth v. Omar*, 602 Pa. 595, 981 A.2d 179, 185 (Pa. 2009). If the constitutional language is clear and explicit, we will not "delimit the meaning of the words used by reference to a supposed intent." *Robinson Township*, 83 A.3d at 945 (quoting *Commonwealth ex rel. MacCallum v. Acker*, 308 Pa. 29, 162 A. 159, 160 (Pa. 1932)). If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history. 1 Pa. C.S. §§ 1921, 1922; *accord* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189, 195 & 200 (2002) (state constitutions, ratified by electorate, are characterized as "voice of the people," which invites inquiry into "common understanding" of provision; relevant considerations include constitutional convention debates that reflect collective intent of body, circumstances leading to adoption of provision, and purpose sought to be accomplished).

League of Women Voters v. Commonwealth, 178 A.3d 737, 802 (Pa. 2018). Our Supreme Court also has recognized that "[a] specific provision will prevail over a general principle found elsewhere but, because the Constitution is an integrated whole, we are cognizant that effect must be given to all of its provisions whenever possible." *Robinson Twp. v. Commonwealth*, 637, 83 A.3d 901, 946 (Pa. 2013)

Although not cited by Respondents in their most recent briefs to this Court, our Supreme Court has clearly found "constitutional logrolling" impermissible. In reaching that conclusion, the Court engaged in a lengthy discussion concerning the Constitutional Convention of 1837-38. *See Degraffenreid*, 265 A.3d at 230-31. As explained by the Pennsylvania Supreme Court, John J. M'Cahen ("Mr. M'Cahen"), a delegate to the 1837-38 Convention and the author of the provision, stated that the provision was meant to "***prevent the legislature*** from connecting two dissimilar amendments, one of which might be good and the other evil, and in consequence of which connexion [sic] the good which was wanted, might be rejected by the people rather than be taken with the evil which accompanied it." *Id*. (citation omitted) (emphasis added). Because Mr. M'Cahen's proposed provision faced no opposition and was approved by a majority of the delegates to the 1837-38 Convention, our Supreme Court concluded: "[I]t is evident that … the delegates to [the Convention were] … intent to prohibit the practice of 'logrolling' by the legislature in the crafting of a proposed amendment to be submitted to the voters." *Id*. at 231. While *Degraffenreid* dealt with logrolling with respect to a single amendment with multiple subjects and held that the amendment in question violated the single subject test, its conclusion equally applies to this situation in which the legislature enacts multiple amendments involving disparate issues thorough a single, omnibus joint resolution

while denying consideration of any amendments to, or separate votes upon, the same.

Such a reading is also supported by other decisions of our Supreme Court which explain the purpose of the General Assembly voting in two successive legislative sessions: to guarantee the people have an opportunity to express their approval or disapproval of the first passage of a proposed amendment in a general election. "[A]ll proposed amendments [must] be approved by two successive sessions of the General Assembly, ***which ensure[s] that the people had the opportunity to express their wishes on whether they desired the passage of the proposed amendments in an election for their representatives***." *Degraffenreid*, 265 A.3d at 230. The intervening election between the two votes on an amendment by the General Assembly allows the electorate to cast a ballot against their representative if they disagree with their vote on a constitutional amendment. "[I]f an informed electorate disagrees with the proposed amendments, ***they will have an opportunity to indicate their displeasure at the ballot box and elect individuals to the next General Assembly with different attitudes***." *Kremer v. Grant*, 606 A.2d 433, 438 (Pa. 1992); *see also Commonwealth ex. rel. Woodruff v. King*, 122 A. 279, 282-83 (Pa. 1938); *Tausig v. Lawrence*, 197 A. 235, 238 (Pa. 1938). This long-acknowledged purpose of Article XI's requirement of two successive votes was

thwarted by Respondents when they enacted five proposed amendments through one, omnibus joint resolution.

In the end, Respondents refuses to acknowledge that amending a state constitution involves changing a foundational document, reflecting the will of the people and their popular sovereignty. *See* Jessica Bulman-Pozen and Miriam Sefter, *The Democracy Principle in State Constitutions*, 119 MICHIGAN L. REV. 859, 881 (2021) ("The clearest and most longstanding commitment of state constitutions is to popular sovereignty.") Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. at 198. ("State constitutions owe their legal validity and political legitimacy to the state electorate, not to 'Framers' or state ratifying conventions as is the case with the Federal Constitution.").

Rather than recognize the significance of the task of rewriting or modifying our foundational document, and the heavy burden of ensuring that Pennsylvanians' popular sovereignty is not infringed in that process, Respondents define the process as far simpler than the enactment of a statute. Whereas the Pennsylvania Constitution bars the General Assembly from passing a bill involving more than one subject or changing the purpose of a bill through the legislative process, *see* PA. CONST. art. III, §§ 1, 3, Respondents argue that enactment of amendments should be afforded considerably fewer procedural protections. Such a position ignores our Supreme

Court's recognition that the judiciary must serve the critical role in ensuring that the General Assembly adheres to the meaning of Article XI in an effort to protect popular sovereignty: "[I]n matters relating to alterations or changes in its provisions, the courts must exercise ***the most rigid care to preserve to the people the right assured to them by that instrument***." *Pa. Prison Soc'y v. Commonwealth*, 776 A.2d 971, 977 (Pa. 2001) (emphasis added) (citation omitted). "Nothing short of ***literal compliance*** with the mandate [in Article XI, Section 1] will suffice." 606 A.2d at 436 (emphasis added) (citation omitted).

For all these reasons and the reasons enumerated in the briefs of Petitioners and Petitioner-Intervenors, this Court should find that the Respondent engaged in impermissible "constitutional logrolling" when it passed multiple amendments in one omnibus joint resolution, and grant the Application for Summary Relief.

D. The Handful of Incidents in Which the General Assembly Enacted Proposed Amendments in One Joint Resolution Does Not Constitutionalize the Practice.

Respondents cite a handful of incidents in which multiple amendments were enacted by the General Assembly in one, omnibus joint resolution and later approved by the voters. From that, they argue that the practice is now constitutional. As an initial matter, while Respondents provide a short list of incidents in which multiple amendments were enacted with one joint resolution, they fail to acknowledge that the vast bulk of the 49 amendments enacted since 1968 occurred through a resolution

containing one amendment. *See* Danielle Ohl, "A complete guide and amendment tracker for proposed changes to the Pennsylvania Constitution," SpotlightPA (January 22, 2022), publicly available online at https://www.spotlightpa.org/news/2022/01/pennsylvania-constitution-amendments-tracker-complete-guide/ . (reporting that there have been 49 amendments approved by voters since 1968).

Furthermore, there were no legal challenges to the amendments cited by the Respondents, so the constitutional question whether they were enacted in conformance to Article XI was never considered, much less determined, by any court. The mere fact that no one raised a constitutional challenge to those amendments does not render the practice constitutional. In fact, Respondents recognize that the issue of "constitutional logrolling" with respect to an omnibus joint resolution involving several proposed amendments is one of first impression—although they oddly try to treat this fact as support for their position.

Finally, Respondents' claim that to grant the Application for Summary Relief would somehow result in finding the cited amendments to be unconstitutional lacks merit. As Robert Woodside explains in his seminal treatise on the Pennsylvania Constitution, lawyers raising a procedural challenge to an amendment are wise to do so before it is submitted to the people for their consideration:

> As a practical matter, lawyers representing a client opposed to a proposed amendment to the Constitution

> should, whenever possible, bring an action to prevent the taking of a vote on the ground of unlawful procedure. They should not wait until after the vote is taken and then attempt to remove the provision from the Constitution because of a defect in the procedure leading to that vote… Then, too, psychologically judges are more likely to prohibit the submission of a proposal to the voters where the procedure is not in full compliance with law than to set aside an amendment which the electorate has approved.

ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW (1985), at 553, 554.

Woodside's argument is that procedural challenges to the amendment process after adoption by voters is not likely to be favorably received by our judiciary. Consistent with this view, our Supreme Court, in applying the single subject rule of Article III, Section 3, held that litigants may not raise stale challenges to a statute based upon alleged violation of that rule. *Sernovitz v. Dershaw*, 127 A.3d 783, 785 (Pa. 2015) (citing Montana case in which court rejected challenge to the single subject test with respect to constitutional amendment after adoption by the voters). Given that no one raised a challenge to the process by which the prior amendments were enacted in a single, omnibus joint resolution, it is unlikely that a court would view such a challenge favorably at this time.

For all these reasons, and those set forth in the briefs of Petitioners and Democratic House Petitioners, this Court should reject Respondents' argument that

prior passage of multiple amendments constitutionalizes the practice or constitutes evidence that it is permissible.

E. Respondents' Reliance on Other State Court Decisions Interpreting Their Own State's Amendment Process Is Unavailing.

In support of their contention that passage of multiple amendments through a single omnibus resolution is constitutionally permissible, Respondents cite decisions from five state supreme courts, those of Idaho, Iowa, Nebraska, Ohio, and Rhode Island, interpreting the amendment provision in their respective state's constitution. While Respondents correctly state that our judiciary may consider decisions of other courts interpreting a similar provision of another state constitution, four of the five provisions in question are not at all similar and, therefore, the state court decisions cited are not even persuasive authority.

Four of the provisions in question (Idaho, Nebraska, Ohio, and Rhode Island) are significantly different from Article XI of the Pennsylvania Constitution. Rhode Island's amendment provision from its 1841 constitution is dramatically different than Article XI. It has no single subject requirement and a convoluted process by which members of the Legislature consider an amendment at ward and town meetings at which the members of the Legislature are also voted upon. *See* R.I. Const. of 1841, art. XIII. If elected members of the house and senate approve the

measure, it then goes to the voters and is approved if three-fifths of the electors vote in favor. *Id*.

Unlike Pennsylvania, Idaho, Nebraska, and Ohio's amendment provisions cited in the cases does not require passage in two successive legislative sessions—a critically important part of the process in Pennsylvania. *See* Idaho Const. of 1890, art. XX, §§ 1, 2; Neb. Const., art. XVI, § 1; Ohio Const. of 1912, art. XVI, as amended in 1954. The constitutional provisions at issue in Idaho, Nebraska, and Ohio require a supermajority of both houses of the legislature in order to be considered for approval by the voters, whereas Pennsylvania only requires a simple majority.

Significantly, none of the cases cited by Respondents deal directly with the specific issue presented to this Court. While those out-of-state cases discuss the permissibility of passing multiple amendments in one joint resolution, they do not address the failure to record the "yeas" and "nays" of the legislature on each proposed constitutional provision to ensure that the voters may approve or disapprove of the actions taken by the members.

Despite Respondents' claims to the contrary, two of the cited cases do not categorically hold that multiple proposed amendments may always be enacted in a single, omnibus joint resolution. In *McBee v. Brady*, the Idaho Supreme Court stated: "In the absence of specific directions as to the method to be pursued in proposing

amendments to the Constitution, there can appear ***no good reason*** the same may not be done by a joint resolution in the manner followed in the case…." 100 P. 97 101 104 (Idaho 1909). However, in contrast to Idaho, Pennsylvania requires passage of the amendment or amendments in two successive sessions, which our Supreme Court explained is a critical component to protect popular sovereignty, by allowing voters to express their pleasure or displeasure with their representatives' voting records at the polls. *See* PA. CONST. art. XI, § 1; *Degraffenreid*, *supra*. Thus, unlike Idaho, Pennsylvania has a compelling reason not to allow proposed amendments to pass in a single omnibus resolution. Similarly, in *State ex rel. Slemmer v. Brown*, the Ohio Supreme Court stated that "[t]here is nothing in Section 1, Article XVI, Ohio Constitution, which expressly prohibits the General Assembly from proposing more than one amendment to the constitution by a single joint resolution." 295 N.E. 2d 434, 436-37 (Ohio App. 1973). Pennsylvania, however, has express language requiring that a proposed amendment be submitted in two successive legislative sessions for the express purpose to afford voters the opportunity to reject or approve of the decision of their representative regarding the amendment. *See* PA. CONST. art. XI, § 1; *Degraffenreid*, *supra*.

For all these reasons, as well as those set forth in the briefs of Petitioners and Democratic House Intervenors, this Court should reject Respondents' reliance on the out-of-state cases cited in their brief.

III. CONCLUSION

For all the foregoing reasons, and for the reasons stated in the briefs of Petitioners and of the Democratic House Intervenors, with which Democratic Senate Intervenors concur, Petitioner-Intervenors Senator Jay Costa and the Democratic Senate Caucus respectfully request that this Court grant Petitioners' Application for Summary Relief and overrule Respondent's and Respondent-Intervenors' Preliminary Objections.

Respectfully submitted,

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Dated: December 5, 2022

CERTIFICATE OF COMPLIANCE

I, Amy L. Rosenberger, hereby certify that this brief contains 5,625 words within the meaning of Pa. R.A.P. 2135(a). In making this certification, I have relied upon the word count function of the word-processing system used to prepare this brief.

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

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CERTIFICATE OF SERVICE

I, Amy L. Rosenberger, do hereby certify that I have served the foregoing Reply Brief of Petitioner-Intervenors Senator Jay Costa, Democratic Leader of the Pennsylvania Senate and the Pennsylvania Senate Democratic Caucus in Support of Petitioners' Application for Summary Relief, via the Court's PACFile system which service satisfies the requirements of Pa. R.A.P. 121:

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