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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOM WOLF, Governor of the Commonwealth of Pennsylvania, and LEIGH M. CHAPMAN, Acting Secretary of the Commonwealth of Pennsylvania,	:	
***Petitioners*,**	:	
v.	:	**No. 482 MD 2022**
GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
***Respondent*.**	:	

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

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I. INTRODUCTION

At issue in this case is whether Petitioners, who allege no harm to their own legal interests, can compel the judiciary to issue an advisory opinion on the General Assembly's exclusive Article XI, section 1 amendment process authority about a hypothetical event that "*may or may not ever occur*."[1]

As if this isn't a tall enough order, Petitioners also ask this Court to find that Article XI, section 1 contains a *second* separate vote requirement that requires legislators to cast an individual vote on each proposed constitutional amendment. No court in Pennsylvania has ever found this. This Court shouldn't become the first.

Petitioners' brief in opposition leaves Respondent's preliminary objections unscathed. And so this Court should sustain Respondent's preliminary objections, deny the Application for Summary Relief, and dismiss the Petition for Review.

II. ARGUMENT

A. Neither Petitioner Has Been Aggrieved So Each Lacks Standing

As an ostensible basis to confer standing, Petitioners (at 10-11) give top billing to the unremarkable fact that they have sworn an oath to defend the state Constitution. So have hordes of other professionals and local and state public

[1] *Wolf v. General Assembly*, No. 482 M.D. 2022 at 24 (Oct. 26, 2022) (Dumas, J.) (emphasis added).

employees and officials. But an oath—without more—is not enough to confer standing.

For starters, *Piunti v. Com., Dep't of Labor & Indus.*[2] makes this point. There, this Court found that the petitioners—a group of unemployment-compensation lawyers—had standing to challenge a change to Pennsylvania's unemployment compensation statute that allowed a party in an unemployment compensation proceeding to be represented by a non-lawyer. In other words, the legislation allowed for non-lawyers to practice unemployment compensation law. *Piunti*, 900 A.2d at 1021. And this threat—not petitioners' constitutional oath alone—is what made the petitioners' interest substantial, direct, and immediate. "Petitioners' interest is *substantial* because it differs from that of the public generally in that the public does not have a license to practice law. [Petitioners'] interest is *direct* and *immediate* because Section 214 of [Pennsylvania's unemployment compensation statute] authorizes non-attorneys to practice law as a replacement for and in competition with Pennsylvania's licensed attorneys." *Id.* (emphasis added). No surprise, then, that Petitioners buried *Piunti*'s lede.

Next up is *Lawless v. Jubelirer*.[3] Petitioners give *Lawless* the same facile treatment as *Piunti*. By Petitioners' telling, the *Lawless* petitioners had standing based

[2] 900 A.2d 1017, 1022 (Pa. Cmwlth. 2006).

[3] 789 A.2d 820 (Pa. Cmwlth. 2002).

on their constitutional oaths *alone*. Not the case. Before concluding that the petitioners had standing, the *Lawless* court pored over the case's facts using a five-part test. *Lawless*, 789 A.2d at 827. The court's test required that "to be granted standing, petitioners must demonstrate that":

> (1) the governmental action would otherwise go unchallenged, (2) those directly and immediately affected by the governmental action are not inclined to challenge it, (3) judicial relief is appropriate, (4) there is no redress through other channels, and (5) no other persons are better suited to assert the claim.

Id. (citing *Consumer Party v. Commonwealth*, 507 A.2d 323 (Pa. 1986)). Indeed, it was under this five-part test—not petitioners' constitutional oaths alone—"that [p]etitioners maintain[ed] that they have standing." *Id.*

This brings us to *Bergdoll v. Kane*.[4] Petitioners rely on *Bergdoll* for the high-minded but hollow proposition "that Governor Wolf and Acting Secretary Chapman have standing as Commonwealth officers to maintain this action to enforce Article XI, § 1 for the benefit of Pennsylvanian voters, including the requirement that 'yea and nay' votes be taken and recorded on first passage in the General Assembly." Pet'rs' Br. 11. But Respondent has already dismantled Petitioners' reliance on *Bergdoll*. Very simply, *Bergdoll* offers Petitioners no aid because it involved a

[4] 731 A.2d 1261 (Pa. 1999).

challenge to a ballot question. There is no ballot question here. And so *Bergdoll* supports Respondent, not Petitioners.[5]

Shifting gears, Petitioners claim that they also have standing also because SB 106 "directly impacts their official responsibilities." Pet'rs' Br. 12. In supposed support of this claim, Petitioners toss out a grab-bag of disparate constitutional provisions that set forth responsibilities belonging to Petitioners that are allegedly "impact[ed]" by SB 106. *See id.* at 12-13. And in support of this, Petitioners scrounge-up one brand-new case—*McLinko v. Com.*, *Dep't of State*.[6] But *McLinko* doesn't do quite the work that Petitioners think it does. There, the petitioner, a member of the Bradford County Board of Elections, challenged the constitutionality of the universal mail-in provisions of Act 77. *McLinko*, 270 A.3d at 1247. In turn, the Acting Secretary of State challenged petitioner's standing, asserting "that [petitioner's] duties under the Election Code do not give him a substantial or particularized interest in the statute's constitutionality." *Id.* at 1266.

[5] Petitioners' effort (at 11 n.6) to discredit *Scarnati v. Wolf*, 135 A.3d 200, 208 n.9 (Pa. Cmwlth. 2015) *rev'd on other grounds Scarnati v. Wolf*, 173 A.3d 1110 (Pa. 2017) is doubly disingenuous. One: *Scarnati*'s partial reversal in the Supreme Court had nothing to do with the reason Respondent cited it—that Legislators' invocation of the Article VI, section 3 oath could not confer legislative standing. So the Commonwealth Court's standing analysis in *Scarnati* remains good law. Two: Petitioners assert that because "this case does not concern legislative standing," *Scarnati* "is of no moment." Petitioners cannot seriously be arguing that this Court should reject its own reasoning that Legislators' Article VI, section 3 oath does not confer standing while claiming that their identical Article VI, section 3 oath does.

[6] 270 A.3d 1243, 1247 (Pa. Cmwlth. 2022).

In deciding that petitioner had standing to bring the claim, the Commonwealth Court focused on three factors: 1) the presence of a statutory duty to fulfill; 2) the Board of Elections' performance of discretionary duties, including judicial, quasi-judicial, and executive tasks, under the Election Code; and 3) the direct relationship between petitioner's "legal obligations and the statute at issue." *Id.*[7] First, the court acknowledged that because McLinko's duties arose under the Election Code, he was operating under a statutory duty. Second, the court found that McLinko's role was imbued with discretionary functions, including the quasi-judicial responsibilities of issuing subpoenas, summoning witnesses, compelling the production of evidence, and overseeing hearings related to election matters. *Id.* at 1267. Finally, the court held that McLinko's actions were directly related to Act 77 because his role on the board of elections made him directly responsible for counting and certifying no-excuse mail-in votes, which he believed were illegal. *Id.*

Here, though, the Secretary's sole duty is to publish the proposed amendments. The publication is a ministerial task designed to ensure the public has sufficient notice of the proposed amendments. Article XI, section 1 does not endow

[7] These three factors distinguished McLinko's qualifications with those of the county clerk in the earlier *Troutman* case, in which the Pennsylvania Supreme Court found the clerk did not have standing to challenge an administrative order of the court. *See McLinko*, 270 A.3d at 1267; *see generally Troutman v. Court of Common Pleas*, 936 A.2d 1 (Pa. 2007). In *Troutman*, the Court found that 1) that the clerk's duty arose out of an administrative order of the court, not a statute; 2) the clerk's *duties were purely ministerial* (he was tasked with sealing records); and 3) the relationship with the between the clerk's duties and the statute at issue was "tenuous" rather than direct. *Troutman*, 936 A.2d at 8-9.

the Secretary with the power to interpret the constitutionality of the General Assembly's internal procedures, nor does it give her the power to interfere with publication. Unlike the petitioner in *McLinko*, the Secretary's relevant duties have no judicial, quasi-judicial, or executive qualities.[8] Indeed, the Secretary has no discretionary authority in the administration or implementation of the amendment process. Finally, the Secretary's relationship to the proposal of these amendments is tenuous at best. Article XI, section 1 requires the Secretary to "cause" the amendments to be published. The passive voice at play in the wording of Article XI reflects the passive role the Secretary plays in the process. Devoid of any discretionary qualities, the Secretary's constitutional duty to publish proposed amendments cannot be transformed into standing whenever the Secretary dislikes the proposed amendments.

Given the lack of even a ministerial duty related to the General Assembly's proposal of amendments, this Court's *McLinko* analysis applies with greater force to the Governor. The Governor has no duties under Article XI, section 1 as the process

[8] The *McLinko* court's discussion of what is a quasi-judicial function throws into sharp relief how lacking Petitioners' claim to standing really is. "[O]ur Supreme Court has held that the Election Code makes a county board of elections 'more than a mere ministerial body. It clothes [the board] with quasi-judicial functions,' such as the power to 'issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections.'" *McLinko*, 270 A.3d at 1267 (quoting *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)). Petitioners' roles under Article XI, section 1—or any of the other constitutional provisions they cite—come nowhere near qualifying as quasi-judicial functions.

specifically excludes the Governor's veto power. Without a duty to exercise, the Governor cannot claim any material relationship to the way amendments are proposed in the manner of *McLinko*.

Moving along, Petitioners (at 12-13) take a swing at *Commonwealth ex rel. Att'y General v. Griest*.[9] They miss. For starters, Petitioners overstate Respondent's reliance on *Griest* and the factual distinctions they draw do not matter. But what does matter is that Petitioners ignore that *Griest* involved the governor's attempt to use a constitutional provision other than Article XI, section 1—like Petitioners do here—as authority to intervene in the Legislature's constitutional amendment process. Petitioners ignore that *Griest* held that the Secretary's duties under now-Article XI, section 1 are purely ministerial. *Griest*, 46 A. 505 at 506. And Petitioners ignore that *Griest* held that Article XI, section 1 "is [a] separate and independent article standing alone and entirely unconnected with any other subject." *Id*. In fact, *Griest* held that Article XI, section 1 is so complete and self-contained from other constitutional provisions that it is "devoid of any right or authority to intervene, derived from any source [whatsoever]." *Id.* Petitioners' attempts to strong-arm themselves into the constitutional amendment process "can only be done by reading into [Article XI, section 1] words which are not there, and which are altogether inconsistent with, and contrary to, the words which are there." *Id.* at 507. With no

[9] 46 A. 505 (Pa. 1900).

words in Article XI, section 1 to rely on, Petitioners' attempts must fail. Bottom line: *Griest* controls. And Petitioners do not articulate why this Court shouldn't stand by it.

Petitioners next submit (at 14) that Respondent "argu[es] that state officials lack standing to challenge ministerial duties." That's wrong: Respondent argues that state officials' ministerial duties do not confer standing. This is what *Troutman*[10] says. This is what *Perzel*[11] says. This is what *J.H.*[12] says.

Petitioners repeat this mistake (at 15) when they submit that Respondent "argu[es] that standing should be denied here because state officials were dismissed as defendants in other actions that were unrelated to their official duties." This isn't Respondent's argument. Respondent's argument goes like this: Under *Holbrook*, *Porter*, *Pa. State Educ. Ass'n*, and *1st Westco Corp.,* state officials "are proper parties in declaratory relief actions only when they have or claim an interest that would be affected by the declaration[.]" *Porter v. Commonwealth,* 2020 Pa. Commw. Unpub. LEXIS 400, *8, 238 A.3d 548 (Pa. Cmwlth. July 29, 2020) (citing *Pa. State Educ. Ass'n v. Dep't of Educ.,* 516 A.2d 1308, 1310 (Pa. Cmwlth. 1986)). And because

[10] *Troutman v. Court of Common Pleas (In re Admin. Order No. 1-MD-2003)*, 936 A.2d 1, 9 (Pa. 2007). *See also supra*, note 9.

[11] *Perzel v. Cortes*, 870 A.2d 759, 765 (Pa. 2005).

[12] *Com. v. J.H.*, 759 A.2d 1269, 1271 (Pa. 2000).

Petitioners do not have "an interest that would be affected" by their action for declaratory relief, they are not "proper parties."[13] *Id.*

Ultimately, neither Petitioner has been aggrieved and so each Petitioner lacks standing. Because of this, the Court should sustain Respondent's first and second preliminary objections.

B. Petitioners' Claims Are Not Ripe

As a coda to their advocacy on ripeness, Petitioners boast (at 24) that "[r]ipeness is not a close call." Respondent agrees. This case is miles from being ripe. At any rate, Petitioners cite heavily (at 16-18) to *Phantom Fireworks Showrooms, LLC v. Wolf*[14] in support of their ripeness position. But they never analogize it to this case. They never discuss its facts. They never discuss the contours of its holding. They never explain its application to this case. And they never tell this Court how *Phantom Fireworks Showrooms* concretely supports their case. These are not accidental oversights; they are affirmative omissions.[15] The reason for this is simple: *Phantom Fireworks Showrooms* doesn't support their case; it supports Respondent's.

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[13] Petitioners' quibble (at 15) about who's a defendant there and who's a plaintiff here is beside the point.

[14] 198 A.3d 1205 (Pa. Cmwlth. 2018).

[15] And save for a few *very* carefully curated parentheticals, Petitioners decline to meaningfully discuss any of the cases they cite in support of their ripeness claim.

First, *Phantom Fireworks Showrooms* involves a challenge to *existing* law. *See Phantom Fireworks Showrooms*, 198 A.3d at 1212 ("In its final form, *enacted as Act 43* . . . modif[ies] the provisions of the Fireworks Law.") (emphasis added). But SB 106 is not an existing law. And so not only is *Phantom Fireworks Showrooms* distinguishable on this point, but it also underscores the lack of ripeness here.

Second, the Court in *Phantom Fireworks Showrooms* found that the petitioners alleged that they "already experience[ed] business losses"—stemming from the challenged law—that petitioners "ha[d] no legal recourse to recover its business losses," and that petitioners could "only hope to address such losses" by suing. *Id.* at 1218.

Not so here. Petitioners allege no harm to their own legal interests. Instead, they allege harm only to *voters*.[16] *See*, *e.g.*, Pet'rs' Br. 17 ("Requiring entry of 'yea and nay' votes in the legislative journals on first passage ensures *voters* the opportunity to elect representatives to the next General Assembly[.]") (emphasis added); *id.* at 18 ("The single collective 'yea and nay' vote on the omnibus amendments in SB 106 denied information necessary for *voters* to knowingly exercise

[16] It is on a similar basis that Petitioners' dependence on *South Fayette Twp. v. Pa. Dep't of Transp.,* 282 A.3d 395 (Pa. Cmwlth. 2022) flops. There, this Court discerned a "clear[]" "causal connection" between Respondents' challenged conduct and "the harm [p]etitioners allege will result" from that conduct—namely, a diversion of resources. But here, what "clear causal connection" is there between SB 106 and alleged harm to Petitioners? None.

their constitutional right to replace representatives who do not share their views.") (emphasis added); *id.* ("The omnibus vote 'has occurred' and *voters* 'already suffer[ed] loss[]' of their right to information and therefore 'this case is ripe for adjudication.'") (emphasis added) (bracketing in original); *id.* at 19 ("[T]he unconstitutional requirements have already been repeatedly published in newspapers throughout the Commonwealth and *Pennsylvanians* have already suffered confusion concerning the impact of SB 106 on the right to vote.") (emphasis added);[17] *id.* at 23 ("And the harm already occurred—*voters* have already been deprived of their right to know how their representatives would have voted for each amendment.") (emphasis added).[18]

Wecht v. Roddey[19] cuts sharply against Petitioners, too. There, in the face of a standing and ripeness challenge, this Court focused on the relative inevitably of litigation. "[D]eclaratory judgment is not appropriate," this Court wrote, "to determine rights in anticipation of *events which may never occur* but is appropriate where there is imminent and *inevitable* litigation." *Id.* at 1150 (emphasis added)

[17] In support of this proposition, Petitioners cite (at 19 n.7) the Declaration of Sajda Adam. But this Court has already dealt with Ms. Adam's declaration. *See Wolf v. General Assembly*, No. 482 M.D. 2022 at 24 (Oct. 26, 2022) (Dumas, J.) ("Respondent also points out that Proposed LOWV Intervenor, Sajda Adam, admits in her declaration that there are no changes in SB 106 to the voting age and residency requirement. This Court agrees with Respondent.").

[18] Petitioners' parenthetical citations (at 17-18) to *Kremer v. Grant,* 606 A.2d 433, 438 (Pa. 1992) and *Commonwealth ex rel. Woodruff v. King,* 122 A. 279, 282-83 (Pa. 1923) also make plain that Petitioners do not allege harm to themselves—they allege harm only to voters.

[19] 815 A.2d 1146 (Pa. Cmwlth. 2002).

(citing *Silo v. Ridge,* 728 A.2d 394 (Pa. Cmwlth. 1999)). There cannot be a serious dispute that the event of SB 106 becoming a ballot question—the point at which this case would become ripe—is one "which may never occur." Put differently: SB 106 becoming a ballot question is neither "unavoidable" nor "inevitable." *See* Pet'rs' Br. 18-20 (describing the unrealized, yearslong, rigorous, multi-step odyssey needed before SB 106 *could* become a ballot question). Indeed, on this determinative score, this Court has already persuasively spoken.

"[T]he proposed amendments included in SB 106 have received only first passage," wrote Judge Dumas just one month ago. "Only after SB 106's second passage *in the next General Assembly*, *which may or may not ever occur*, will the proposed amendments be submitted to the electorate."[20] *Wolf v. General Assembly*, No. 482 M.D. 2022 at 24 (Oct. 26, 2022) (Dumas, J.). (emphasis added). With this lack of inevitability, this case is not ripe.[21]

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[20] Undeterred by this Court's language, Petitioners command that the case is ripe now—regardless of the status of second passage—simply because they say so. *See*, *e.g.*, Pet'rs' Br. 21-22 ("The General Assembly and Republican Caucus Intervenors argue that these disputes should be considered only after the amendments are submitted to the electorate . . . but the law in Pennsylvania is to the contrary."); *id.* at 22 ("Where, as here, the plaintiff challenges the legislature's authority to propose that a matter be submitted to electorate as a ballot question, the dispute is ripe for declaratory relief even though the electorate has not yet voted on the question."); *id.* at 22-23 ("[Respondent] suggests . . . that any remedy should await drafting of ballot questions . . . but [this] argument [doesn't] hold[] water."); *id.* at 23 ("The defects are ripe for adjudication now."); *id.* ("It is of no moment that previous litigation under Article XI, § 1 involved challenges to ballot questions."); *id.* ("It is not necessary to wait for the defective amendments to be reduced to ballot questions to decide whether the mandatory procedure in Article XI, § 1 was followed."). But that does not follow ripeness precedent.

[21] This lack of inevitability punctures Petitioners' reliance on *Lakeland Joint Sch. Dist. Authority v. School Dist.*, 200 A.2d 748, 751 (Pa. 1966) ("The obviously antagonistic views and positions

Respondent's third preliminary objection should be sustained.

C. Petitioners' Claims Are Political Questions

Part and parcel of their fondness for a good strawman, Petitioners assert (at 24) that "[w]hether the General Assembly violated the Constitution is not a political question." That is not Respondent's argument, and that is not the question before this Court. The question is whether, because the procedure of proposing constitutional amendments is exclusively committed to the legislature under Article XI, Petitioners' claims—which relate to procedures not set forth in the Constitutional language—lie outside the reach of the judiciary as non-justiciable political questions. The answer, of course, is yes.

Petitioners begin with *William Penn Sch. Dist. v. Pa. Dep't of Educ.*[22] But they leave out *William Penn*'s reliance on Chief Justice Castille's previous synthesis of the

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adopted by the parties indicate not only the existence of an 'actual controversy' but of a controversy which will imminently, *unavoidably* and *inevitably* lead to litigation[.]") (emphasis added).

Likewise with *Sewer Auth. of City of Scranton v. Pa. Infrastructure Inv. Auth. of Comm.,* 81 A.3d 1031, 1038 (Pa. Cmwlth. 2013) ("Under the general ripeness doctrine . . . the plaintiff seeking declaratory relief must demonstrate the existence of an actual controversy 'indicating imminent and *inevitable* litigation.'") (emphasis added) (citation omitted).

Same with *Pa. Indep. Oil & Gas Ass'n v. Commonwealth*, 135 A.3d 118, 1128 (Pa. Cmwlth. 2015) ("It is apparent that a conflict between DEP and PIOGA's members concerning the validity of DEP's permitting process as applied to all applicants is '*unavoidable* [and] the ripening seeds of a controversy appear.'") (emphasis added) (quoting *Lakeland Joint School District Authority*, 200 A.2d at 751)).

[22] 170 A.3d 414 (Pa. 2017).

political question doctrine in *Robinson Township*. There, the Chief Justice pained to make clear that the political question doctrine did not preclude judicial review of *existing law*. He wrote:

> We have made clear, however, that we will not refrain from resolving a dispute which involves only an interpretation of *the laws* of the Commonwealth, for the resolution of such disputes is our constitutional duty. Any concern for a functional separation of powers is, of course, overshadowed if the *statute* impinges upon the exercise of a fundamental right. Furthermore, a *statute* is not exempt from a challenge brought for judicial consideration simply because it is said to be the General Assembly's expression of policy rendered in a polarized political context. Whatever the context may have been, *it produced legislation*; *and it is the legislation that is being challenged*.

William Penn Sch. Dist., 170 A.3d at 438 (cleaned up) (emphasis added). But SB 106 is not an existing law. Instead, it is merely an incipient and incomplete joint resolution in the middle of the Article XI, section 1 journey—a process that is explicitly delegated to the legislative branch. And it very well may never be anything more than this.

Chief Justice Castille was not done. Citing the United States Supreme Court, he continued on about the judiciary's obligation to review *existing law*:

> The idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts *in the form of law* . . . is in opposition to the theory of our institutions. The duty rests upon all courts . . . when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed *by legislation*. The perpetuity of our institutions, and the liberty which is enjoyed under them, depend, in no small degree, upon the power given the judiciary

> to declare null and void all *legislation* that is clearly repugnant to the supreme law of the land.

Id. at 438-39 (cleaned up) (emphasis added).[23]

Likewise, Petitioners' citation (at 25) to *Thornburgh v. Lewis,* 470 A.2d 952 (Pa. 1983) gives them no aid. *Thornburgh*, too, involved judicial review of existing law—Section 620 of the Administrative Code, 71 P.S. § 240. *See Thornburgh*, 470 A.2d at 957. Same with *Hosp. & Health Sys. Ass'n of Pa. v. Commonwealth*, which also involved judicial review of existing law—Act 50.[24] 77 A.3d 587, 593 (Pa. 2013).

Scrounging for authority, Petitioners cite (at 26) *Commonwealth ex rel. Schnader v. Beamish*, 164 A. 615 (Pa. 1932) for the proposition that "precedent holds that the General Assembly's compliance with Article XI, § 1 is subject to judicial review." But *Beamish* has nothing to do with the General Assembly's compliance with the constitution. *Beamish* is about the Secretary of the Commonwealth's constitutional duty to publish proposed constitutional amendments in newspapers. The court wrote:

> The purpose of this proceeding was to obtain an interpretation of section 1, article XVIII, of the Constitution of the Commonwealth. From the agreed statement of facts it appears that William N. Hardy, on behalf of the Pennsylvania Newspaper Publishers' Association, filed with the attorney general a petition requesting

[23] In his concurring opinion, Justice Dougherty also pointed out the necessary presence of an existing law as a predicate to judicial review. *See id.* at 465 ("[I]t is the duty of the judicial branch to ensure that any constitutional right is not impaired or destroyed by *legislation*.") (cleaned up) (emphasis added).

[24] Act of Oct. 9, 2009, P.L. 537, No. 50.

> that an alternative writ of mandamus be issued in the name of the Commonwealth, *commanding the secretary of the Commonwealth to advertise fourteen proposed constitutional amendments* once a week during each week in two newspapers in each county of the Commonwealth, for three months immediately preceding the next general election.

Id. at 615-16. How Petitioners take from this that *Beamish* is "precedent hold[ing] that the General Assembly's compliance with Article XI, § 1 is subject to judicial review" is unclear.

Similarly unclear is Petitioners' suggestion (at 27) that *Pa. Prison Soc'y v. Commonwealth*, 776 A.2d 971 (Pa. 2001) has specific application to a time when—as here—the proposed constitutional amendments have not yet been submitted to the electorate as ballot questions. That is not so: *Pa. Prison Soc'y* involved a ballot question. And Petitioners' aphorism that "[t]he role of the judiciary in enforcing the mandatory procedure in Article XI, § 1 is beyond question" is another strawman. Respondent's position is not that the judiciary has no role in enforcing Article XI, § 1, Respondent's position is that the judiciary has no role in enforcing Article XI, § 1 at this stage of the process. Indeed, until SB 106 becomes a ballot question (*if* it does), there is nothing to enforce.

Last, Petitioners set out (at 28-29) to meaningfully distinguish *Grimaud, Mellow, Sweeney, Blackwell, Common Cause*, and *Markham*. But Petitioners' extraneous distinctions do not indict Respondent's position. First, Petitioners point out that *Markham, Blackwell*, and *Sweeney* "did not involve a challenge to compliance

with the constitutional amendment process." Pet'rs' Br. 28. Though that may be true, Respondent doesn't rely on these cases for their procedural posture; Respondent relies on them for their holdings. Second, Petitioners conclude that *Grimaud, Mellow*, and *Common Cause* "all recognize that judicial review is appropriate and mandated where . . . the claim is that the legislature failed to follow constitutionally mandated procedures." *Id.* But *Grimaud* (and *Mellow*) is clear—there are no procedural or voting requirements to be found in Article XI, section 1. Therefore, courts "will not inquire into these internal procedures nor look beyond the recorded votes, for judicial review is precluded pursuant to the Political Question Doctrine." 865 A.2d at 847.

Respondent's fourth preliminary objection should be sustained.

D. Petitioners' Newly Discovered Second Separate Vote Requirement is Fiction

To avoid grappling with Article XI, section 1's plain language and a century of case law—including this Court's observations—Petitioners go with an old saw: that this is a case of "first-impression." Appl. for Summ. Relief at 8 n.1. But novelty is no substitute for reality. And the reality is that Petitioners' theory that separate votes are required on each proposed amendment has never been advanced in Pennsylvania—much less decided. This novel theory's lack of substance has been obvious for two hundred years.

To begin, the origins of Article XI, section 1 do not rest with Pennsylvania's constitutional framers. Rather, the delegates at the 1837–1838 Constitutional Convention adopted the framework and substance of the constitutional amendment process from New York's constitution—including the requirement that "such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon[.]"[25] Pennsylvania was not the sole adopter of New York's constitutional language as it continued to proliferate throughout several state constitutions in the decades and centuries to come. When presented with Petitioners' proposition that a separate, individual vote is required for every proposed

[25] 12 *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, To Propose Amendments to the Constitution, Commenced at Harrisburg on May 2, 1837*, 64-66, 94 (1837) (Mr. Dickey of Beaver County stating: "I hope the members of the convention will bear in mind the fact, that this amendment now before us comes from the constitution of the state of New York [.]"). *Compare* Pa. Const. of 1838 Art. X, § 1 *with* N. Y. Const. of 1821 Art. VIII, § 1.

amendment, every state court—Iowa,[26] Rhode Island,[27] Idaho,[28] Nebraska,[29] Ohio[30]—has rejected it. *See Commonwealth v. Johnson*, 86 A.3d 182, 197 (Pa. 2014)

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[26] *Jones v. McClaughry*, 151 N.W. 210, 217 (Iowa 1915) ("The Constitution contains no requirement that the proposal of each amendment shall be voted on separately in either house. Sec. 29 of Article 3 of the Constitution relates to an act of the legislature and Sec. 1 of Article 10, in saying 'any amendment or amendments,' may be proposed by either house and that if agreed to 'such proposed amendment shall be entered on their journals with the yeas and nays taken thereon,' is complied with if such entry is of a resolution containing several amendments as though there were but one. Surely the larger number includes the less and each amendment contained therein may be said to have been entered and the yeas and nays taken thereon.") (emphasis added).

[27] *In re Op. of S. Ct.*, 71 A. 798, 800-801 (R.I. 1909) ("It thus appears that these proposed amendments concern three entirely distinct subjects, and relate to three distinct articles of the Constitution; and it is entirely appropriate and within the constitutional power of the General Assembly at its present session, if it approve said proposition, to provide that such proposition containing separate amendments be published and submitted to the electors as separate proposed amendments to the Constitution, as will more fully appear in discussing the next question.") (also citing *Trustees v. McIver*, 72 N.C. 76 (N.C. 1875) (original bill passed North Carolina legislature with seventeen proposed amendments, but subsequent General Assembly rejected nine and adopted the remaining eight in separate bills)).

[28] *McBee v. Brady*, 100 P. 97, 101 (Idaho 1909) ("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 why the same may not be done by a joint resolution in the manner followed in the case under consideration, and while amendments may be proposed in this manner, yet the submission of such amendments to the electors involves an entirely different proposition, and the Legislature is required to submit the amendment or amendments so that each amendment may be voted upon separately.").

[29] *State ex rel. Loontjer v. Gale*, 853 N.W.2d 494, 510 (Neb. 2014) ("But *In re Senate File No. 31* established two important points that are relevant here. First, it illustrates that the Legislature's independent proposals to amend the constitution must be presented to the voters for a separate vote even if they are proposed in a single resolution. However, the proposals under consideration were obviously contrary to each other, so the case does not give much guidance for determining independent subjects. Second, the court held that the constitutional requirements for legislative bills do not apply to the Legislature's proposed amendments. Thus, the 'single subject' rule that applies to legislative bills under article III, § 14, does not apply to ballot measures for constitutional amendments.") (citing *In re Senate File 31*, 41 N.W. 981, 986 (Neb. 1889)).

[30] *State ex rel. Slemmer v. Brown*, 295 N.E.2d 434, 436-37 (Ohio App. 1973) ("There 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.") *cited with approval in State ex rel. Ethics First-You Decide Ohio Political Action Comm. v. DeWine*, 66 N.E.3d 689, 694 (Ohio 2016); *State ex rel. Ohioans for Secure and Fair Elections v. LaRose*, 152 N.E.3d 267, 288 (Ohio 2020) (three judge concurrence) ("In contrast, Article XVI, Section 1

(reiterating that "related case-law from other states" is essential when reviewing issues arising under the Pennsylvania Constitution) (citation omitted).

Though "the polestar of constitutional analysis . . . should be the plain language of the constitutional provisions at issue," *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014), Petitioners prosecute their claims through *ipse dixit*, breezily asserting that "[t]he use of both the singular and plural—'amendment or amendments'—already requires that *each* amendment be individually voted on and recorded." Pet'rs' Br. 35 (emphasis added). Petitioners insist that this argument is based on a "natural reading" of the text, under which "[t]he operative unit for voting is the amendment." *Id.* at 32. But Petitioners' reading would make the first noun in a series of nouns (i.e., "amendment") modify the rest of the clause and would render the next noun in the series (i.e., "amendments") meaningless. In other words, Petitioners approach their "natural reading" backward.

Indeed, constitutional interpretation requires "that each and every clause [and each and every word] in a written constitution ha[ve] been inserted for some useful purpose and courts should avoid a construction that would render any portion of the constitution meaningless." *Walsh v. Tate*, 282 A.2d 284, 288 (Pa. 1971). And a truly natural reading recognizes that the clause at issue has a series of nouns (e.g.,

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contemplates that multiple amendments may be proposed in a single joint resolution of the General Assembly, and it requires a separate vote of the people in order to protect their freedom to decide which amendments to the Constitution should be adopted.").

"amendment or amendments") followed by a modifying phrase (e.g., "shall be entered on their journals with the yeas and nays taken thereon"). This is known as the "series-qualifier canon." Under this canon, "a modifier at the end of a series of nouns applies to the entire series." *Facebook, Inc. v. Dunguid*, 141 S. Ct. 1163, 1165 (2021) (using the series-qualifier canon to interpret statutory phraseology). "Amendment or amendments" is a "concise, integrated clause," and "[i]t would be odd to apply the modifier . . . to only a portion of this cohesive preceding clause." *Id.* at 1169.

So applying the series-qualifier canon here, the modifying phrase "shall be entered on their journals with the yeas and nays taken thereon" applies to both nouns in the series:

- "such proposed *amendment* shall be entered on their journals . . .", and;
- "such proposed *amendments* shall be entered on their journals . . . ."

This plain reading allows two separate phrases to be teased out from the text, depending on whether the General Assembly proposes a solitary amendment or multiple amendments. And the two phrases (bulleted above) give meaning to each word in "such proposed amendment or amendments[,]" unlike Petitioners' ultimate reading, which omits the second noun ("amendments") entirely.

By including both the singular and plural forms of the noun "amendment," the framers envisioned scenarios in which multiple amendments would be proposed.

Likewise, the framers did not differentiate the procedure to be used when one or many amendments were proposed. Instead, they used the same modifying phrase for each scenario—not once—but six times. *See* PA. CONST. art. XI, §1. The reason for the framers' deliberate choices is obvious. As this Court's learned brethren in Ohio observed, "[t]he use of the plural 'amendments' throughout with respect to action by the General Assembly coupled with the requirement that electors shall be enabled to vote separately[31] on each amendment clearly connotes no limitation upon the General Assembly with respect to proposing more than one amendment by a single joint resolution." *State ex rel. Slemmer v. Brown*, 295 N.E.2d 434, 436-37 (Ohio App. 1973).

Petitioners' strained attempt (at 45) to misconstrue the context of the word "such" does them no favors. Indeed, "such" refers to something previously mentioned. Here, it relates back to the plural word "amendments." *See* PA. CONST. art. XI, §1 ("*Amendments* to this Constitution may be proposed in the Senate or

[31] Even more poignantly, the original language of Article XI, section 1 distinguishes between Petitioners' newly discovered separate vote requirement and the long-recognized mandate that the General Assembly submit each amendment to the electorate for an individualized vote, *see* Resp't Br. in Supp. of. Prelim. Obj. at 30: "[p]rovided, that if more than one amendment be submitted, it shall be in such manner and form *that the people may vote for each amendment separately and distinctly*." 12 *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, To Propose Amendments to the Constitution, Commenced at Harrisburg on May 2, 1837*, 100-101 (1837) (emphasis added)." When the framers of Article XI intended for amendments to be voted on separately, they explicitly stated as much. But the framers did not require that "each House" record its vote on "such proposed amendment or amendments" "separately" or "distinctly." In its sparse and convoluted plain language analysis, Petitioners' brief elides this uncomfortable comparison. Pet'rs' Br. 34-36.

House of Representatives; and *if the same* shall be agreed to by a majority of the members elected to each House, *such* proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon[.]") (emphasis added). As discussed above, "[t]he use of the plural 'amendments' throughout with respect to action by the General Assembly" shows a deliberate choice by the constitutional framers to grant the legislature the discretion to record their votes in their favored manner. *State ex rel. Slemmer*, 295 N.E.2d at 436-37. Here, the legislative branch recorded their votes on SB 106's first passage.

The Pennsylvania Supreme Court and this Court's holdings on the strictures of Article XI, section 1 harmonize with *State ex rel. Slemmer* and other states' conclusions. For instance, *Grimaud* addressed a challenge—under Article XI, section 1—to the House of Representatives' vote on a joint resolution proposing a constitutional amendment on second passage. 865 A.2d at 847. Unlike Article II, section 12, which requires votes in the General Assembly to be recorded "on any question," the Court not only held that Article XI, section 1 imposed no special procedural or voting restrictions on the General Assembly, but that future challenges to those procedures would be foreclosed:

> Here, Article XI, § 1 sets forth a fairly comprehensive procedure for amending the Constitution, but is silent on the manner of how legislative votes should be conducted. *Cf. Pa. Const. art. II, § 12 ("The yeas and nays of the members on any question shall, at the desire of any two of them, be entered on the journal*."). . . . As the Constitution does not regulate the manner in which the

> legislature approves amendments, no constitutional violation exists. The Constitution's lack of guidance reflects an intent to defer the choice of procedure to the legislature." A challenge to the Legislature's exercise of a power which the Constitution commits exclusively to the Legislature presents a non-justiciable 'political question'." *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 705 (Pa. 1977).
>
> Because the plain language of Article XI, § 1 does not require the legislature to engage in a specific procedure while proposing amendments, *we will not inquire into these internal procedures nor look beyond the recorded votes, for judicial review is precluded pursuant to the Political Question Doctrine*.

Id. (emphasis added).

For the same reasons, in *Mellow v. Pizzingrilli*, this Court rejected a challenge to a constitutional amendment that claimed that the two joint resolutions[32] proposing multiple amendments did not have identical language.[33] *Mellow*, 800 A.2d 350, 358 (Pa. Cmwlth. 2002) (en banc). Rather than mandating that the General Assembly follow a specific procedure, this Court held that:

> Other than the express requirements set forth in Article XI, the procedure to be used in proposing such amendments is

[32] Joint Resolution 3 of 1993 proposed three constitutional amendments. During its second passage in the General Assembly, one of the three proposed amendments was omitted, though "[t]he substantive language of the other two proposals was identical to that found in JR 1998-3." *Id.*

[33] The practice of proposing multiple amendments in a single joint resolution has been a long-standing and, until now, unchallenged historical practice in Pennsylvania. *See, e.g.*, Resp't Br. in Supp. of Prelim. Objs. at 35 nn.18-19 (listing four previous examples of the General Assembly's practice of proposing multiple constitutional amendments in a single resolution). Petitioners assert that historical practice has no place in constitutional analysis. Pet'rs' Br. 36. This has not always been their position. *See Commonwealth v. Williams*, 129 A.3d 1199, 1211-12 (Pa. 2015) ("Governor Wolf asserts that this broad and unfettered executive power has been reflected in both constitutional text and historical practice since the Commonwealth's earliest days.").

> exclusively committed to the legislature. Because Article XI does not require identical language or content in the ***resolutions*** (as opposed to the proposed amendment itself), there is no constitutional violation.

Id. at 359 (emphasis added).

Grimaud and *Mellow* have acute application; yet Petitioners ignore them. But Petitioners do discuss (and distort) the holdings in *Kremer* and *Commonwealth ex rel. Woodruff*. In doing so, they wrongfully assert that the "specific intent behind the vote recording . . . requirement[]" is to allow the voters to select candidates for election to the next General Assembly based on their votes on proposed constitutional amendments. Pet'rs' Br. 33. From this, Petitioners extrapolate that a separate vote requirement on each proposed amendment under Article XI, section 1 is required. But neither case has anything to do with vote recording. These cases discuss the purpose of the constitutional publication requirement:

> [We] review[] the record to determine whether the *advertising requirements have been met*[.] . . . *The reason for this [advertising] requirement is to afford the electorate abundant opportunity to be advised of proposed amendments and to let the public ascertain the attitude of the candidates for election to the General Assembly "next afterwards chosen." Commonwealth ex rel. v. King,* 278 Pa. 280, 122 A. 279 (1923); *Tausig v. Lawrence,* 328 Pa. 408, 197 A. 235 (1938).

Kremer v. Grant, 606 A.2d 433, 438 (Pa. 1992) (emphasis added). Nothing in Article XI, section 1, *Kremer*, *Commonwealth ex rel. Woodruff* (or any other case) requires

the Secretary to publish any votes on any of SB 106's proposed constitutional amendments.[34]

Finally, Petitioners (at 36-37) cite a swath of constitutional provisions in an apparent attempt to suggest that amendments should receive the same treatment as garden-variety bills do. In doing so, Petitioners ignore what is inconvenient—that Article XI, section 1 relies on no other constitutional provision for effectuation. The Supreme Court drove home this point in *Wolf v. Scarnati*:

> The Constitution itself, specifically Article XI, Section 1, provides the "complete and detailed process for the amendment of that document." *Kremer v. Grant*, 529 Pa. 602, 606 A.2d 433, 436 (Pa. 1992). We have characterized the process of amending our Constitution as "standing alone and entirely unconnected with any other subject. Nor does it contain any reference to any other provision of the constitution as being needed . . . . It is a system entirely complete in itself; requiring no extraneous aid, either in matters of detail or of general scope, to its effectual execution." *Commonwealth ex rel. Att'y Gen. v. Griest*, 196 Pa. 396, 46 A. 505, 506 (Pa. 1900).

233 A.3d 679, 688 (Pa. 2020). Courts have also consistently found that "Article XI, Section 1 does not impose a single-subject[35] requirement for amendments proposed thereunder." *See Pa. Prison Soc'y v. Commonwealth*, 776 A.2d 971, 981 n.4 (Pa.

[34] In fact, in her publications in August, September, and October 2022, Secretary Chapman never once included any vote totals for SB 106. Resp't Br. in Supp. of Prelim. Objs. Ex. B.

[35] This requirement should not be confused with the single-subject test to determine whether a single proposed amendment that has been submitted to the electorate makes multiple changes to the Pennsylvania Constitution, thus violating the separate vote requirement. *See League of Women Voters v. Degraffenreid*, 265 A.3d 207, 219 (Pa. 2021) (citing *Grimaud*, 865A.2d at 841-42).

2001); *Mellow*, 800 A.2d at 359 ("Because a proposed constitutional amendment is not a 'law,' the provisions of Article III [including the single subject rule] relating to the enactment of legislation are inapplicable. Rather, Article XI sets forth 'a complete and detailed process for the amendment of [the state constitution] . . . .'") (quoting *Kremer v. Grant*, 606 A.2d 433, 436 (Pa. 1992)); *see also Costa v. Cortes*, 142 A.3d 1004, 1013 (Pa. Cmwlth. 2016) (quoting *Mellow*).[36]

For these reasons, Respondent's fifth preliminary objection should be sustained.

E. The Separate Vote Requirement Governs How Amendments Are Submitted to the Voters, Not How They Are Proposed by the General Assembly

As a corollary to their meritless argument that they have discovered within Article XI, section 1 a second separate vote requirement, Petitioners argue that SB 106's proposed Article I, section 30 violates Article XI, section 1's sole separate vote requirement. But this ignores the obvious: Article XI, section 1's separate vote requirement has no application right now. *Grimaud v. Commonwealth*, 865 A.2d 835, 841 (Pa. 2005) (applying the separate vote requirement to "determine whether a *ballot question* violates Article XI, § 1").[37] Petitioners tacitly admit this when they

[37] Indeed, in *League of Women Voters v. Degraffenreid*, 265 A.3d 207, 232-233 (Pa. 2021), the Supreme Court held that "we interpret and apply this [separate vote] requirement consistent with the intent of the framers of the 1838 Constitution" who even more clearly denoted that the separate vote requirement was only triggered "if more than one amendment [is] submitted, it shall be in

assert that "SB 106 violates Article XI, § 1 . . . by requiring *voters* to cast a single vote on two distinct questions." Pet'rs' Br. 38 (emphasis added).

To avoid any lingering scrutiny of the demonstrably dubious claim that Article XI, section 1's separate vote requirement applies to amendments being proposed in the General Assembly, Petitioners spend considerable time (at 38-42) on the dangers of logrolling. According to the Supreme Court's analysis in *League of Women Voters*, the separate vote requirement's purpose is to "prohibit the practice of 'logrolling' by the legislature in the crafting of a proposed amendment to be *submitted to the voters*." 265 A.3d at 231 (emphasis added). Indeed, the original language of the separate vote requirements bears this out: "[p]rovided, that if more than one amendment be submitted, it shall be in such manner and form *that the people may vote for each amendment separately and distinctly*." *Id.* at 232 (quoting PA. CONST. of 1838 art. X, § 1) (emphasis added). But this logrolling language is limited to the way ballot questions are submitted to the voters, and there is no ballot question here.

Having tried to muddy the waters with a logrolling issue that does not exist, Petitioners assume for arguments' sake that proposed Article I, section 30 will pass through "the General Assembly next afterwards chosen." Petitioners use this

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such manner and form *that the people may vote for each amendment separately and distinctly*." (emphasis added).

assumption to wrongfully assert that proposed Article I, section 30 consists of two separate amendments. This is not this case right now, as explained in the ripeness section above. But, even considering this hypothetical, proposed Article I, section 30 is constitutionally sound. Although Petitioners rely on *Bergdoll* to assert that an amendment changing the Constitution "in two ways cannot be presented in a single question" (at 43), that is not the test for constitutional amendments. Under current law, the Supreme Court in *League of Women Voters* established a separate vote subject-matter test. This test requires that "a proposed amendment making multiple changes to our Constitution" must make such changes "in an interrelated fashion to accomplish one singular objective, which means that it must determine whether the changes depend on one another for the fulfillment of that objective." 265 A.3d at 237-38 (adapting *Grimaud*'s "sufficiently interrelated" test) (citing *Grimaud*, 865 A.2d at 841-42).

Proposed Article I, section 30 easily satisfies this test because it does not affect *constitutional* rights. To start with, Petitioners do not explain how an already judicially rejected constitutional right to taxpayer-funded abortion can bring about multiple changes through the amendment process. *See Fischer v. Dep't of Public Welfare*, 502 A.2d 114 (Pa. 1985). While pre-*Dobbs* discussions on rights to abortion and rights to taxpayer-funded abortion may have been treated separately, Petitioners acknowledge there has never been a constitutional right to taxpayer-funded abortion

to speak of in Pennsylvania. Pet'rs' Br. 40-41. There is also currently no recognized constitutional right to abortion emanating from the Pennsylvania Constitution.

Even if proposed Article I, section 30 consisted of two questions that affected different constitutional provisions, it would still satisfy *League of Women Voter*'s interrelated test. Proposed Article I, section 30's (allegedly separate) components work toward one singular objective—to solidify that any right to abortion is purely statutory and does not emanate from the Constitution. Petitioners devote significant ink superficially discussing (at 40-41) how a constitutional right to taxpayer-funded abortion and a right to an abortion are two propositions—causing them to claim that the propositions "are not dependent on each other to be effective." Pet'rs' Br. 40. But this ignores that a constitutional right may include a corresponding funding requirement imposed on the government—even when such a funding requirement is absent from the plain language. *See*, *e.g.*, *Kuren v. Luzerne Cnty.*, 146 A.3d 715, 718, 732 n.6 (Pa. 2016) (holding that the right to counsel provided under Article I, section 9 of the Pennsylvania Constitution and in the Sixth Amendment of the U.S. Constitution creates a cause of action "entitling a class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office."). So too here. A constitutional right to taxpayer-funded abortion could arise from a constitutional right to abortion.

Despite the obvious interrelatedness between the rights to abortion and taxpayer-funded abortion, Petitioners still compare (at 42-44) proposed Article I, section 30 with the Victim's Rights Amendment—a three-paragraph, 482-word single amendment granting at least fourteen new rights paired with an eight-part ballot question drafted by Secretary Degraffenreid. *See League of Women Voters*, 265 A.3d at 210-212, 239-240. But proposed Article I, section 30 comes in at seventeen words. So, a far more suitable comparison is the proposed bail amendment upheld in *Grimaud*—a twenty-one-word proposed amendment with a two-part ballot question. 865 A.2d at 841 ("[A]fter examining the ballot question, we conclude the proposed changes were related to a single subject, bail. The changes were sufficiently interrelated (all concerned disallowance of bail to reinforce public safety) to justify inclusion in a single question."); *see also* PA. CONST. art. I, § 13 (conferring individuals with several rights in a single amendment: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.").

Respondent's sixth preliminary objection should be sustained.

F. Proposed Article I, section 30 Does Not Annul Any Indefeasible or Inherent Rights

Petitioners' claim (at 46) that proposed Article I, section 30 will "eradicate natural rights." But Petitioners proffer no case—not one—holding that rights relating to abortion, or taxpayer-funded abortion, are "inherent and indefeasible"

under Article I, section 1 of the Pennsylvania Constitution. That is because there are none.

Though Petitioners ply on dicta (at 46-48) to define the phrase "inherent and indefeasible rights," they skip out on any discussion of *Driscoll* or its holding. In *Driscoll*, judicial officers—like Petitioners—sought to nullify Article V, section 16(b)'s mandatory retirement age for judicial officers, citing Article I, sections 1 and 25. *Driscoll v. Corbett*, 69 A.3d 197, 200-201 (Pa. 2013). The judicial officers relied heavily on *Stander v. Kelley*—like Petitioners—to argue that Article I, sections 1 and 25 granted them certain "natural-rights" that no other constitutional provision could ever violate. *Id.* Additionally, the judicial officers—like Petitioners—recognized that *Gondelman* rejected these arguments but requested that they be overruled. *Id.* at 201-02. The Supreme Court did not overrule them. "As the *Gondelman* decision emphasizes, one such natural right of the people is the right to alter their government as they see fit, as reflected in [Article I, section 2]." *Id.* at 209.

Having refused to reject *Gondelman* or *Stander* (and to a lesser extent, *Commonwealth v. Tharp*, which Petitioners also cite), the *Driscoll* court recognized the "substantial tension between the pronouncements of these two cases." *Id.* at 208. The *Driscoll* court's solution was simple. Recognize certain inviolable rights—but only those also recognized under federal constitutional law:

> This difficulty may be more theoretical than practical since state constitutions cannot eliminate rights otherwise available to

> citizens under the United States Constitution. Accordingly, *to the extent that there is a confluence between the rights of mankind under the Pennsylvania Constitution and rights accorded under the federal Constitution,* such rights must be vindicated over and against inconsistent majoritarian acts at the state level.

Id. (cleaned up) (emphasis added). For Petitioners, this exceedingly narrow holding provides no succor—there is no confluence between Pennsylvania and federal[38] constitutional rights on the issues before this Court.

Petitioners are rightfully wary of the Supreme Court's and this Court's decisions in *Gondelman*—they are fatal to what remains of their claim. But to distinguish them, Petitioners offer the flimsiest of pretexts. First, Petitioners bizarrely assert (at 50) that the proposal of constitutional amendments through the General Assembly does not represent an exercise of the power of the people, while a constitutional convention—which is called by the General Assembly and attended by several members as delegates—does.[39] Similarly, Petitioners also conclude that "SB 106 is [a] legislative act, not a voter initiative or referendum." Pet'rs' Br. 49.

[38] *Dobbs* denies any current or historical federal constitutional right to abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2242, 2248-49 (2022).

[39] The Constitutional Convention of 1967-68 only took place "in accordance with the terms of its call (Act No. 2 of 1967)[.]" *Creamer v. Twelve Common Pleas Judges*, 281 A.2d 57, 60 (Pa. 1971). Moreover, Act No. 2 of 1967 called for the election of 150 convention delegates to be joined by twelve members of the General Assembly's leadership— the President Pro Tempore of the Senate, the Speaker of the House, and the leaders and whips of all four legislative caucuses. *Id.* § 2. A copy of Act. No. 2 of 1967 is available for download in Microsoft Word form from the General Assembly's website at http://www.legis.state.pa.us/WU01/LI/LI/US/DOC/1967/0/0002..DOC.

Petitioners cite no authority for this proposition.[40] Not only does none exist, but Petitioners' arguments have been previously rejected. *See Pa. Prison Soc'y*, 776 A.2d at 979 (quoting *Griest*, 46 A. at 506) ("[The amendment process] … is not lawmaking, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its constitution."); *see also Costa*, 142 A.3d at 1013-14 (quoting *Mellow*, 800 A.2d at 359) ("In this respect, [amendment of the Pennsylvania Constitution] is *not a legislative act* at all, but a separate and specific power granted to the General Assembly[.]") (emphasis added).

There is no constitutional impediment to the people exercising their constitutional right under Article I, section 2 to "alter their government as they see fit," *Driscoll*, 69 A.3d at 209, under Article XI, section 1's "specific exercise of the power of a people to make its constitution," *Pa. Prison Soc'y*, 776 A.2d at 979.

Respondent's seventh preliminary objection should be sustained.

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[40] Petitioners also try to discredit this Court's opinion in *Gondelman* by noting that the three-judge majority opinion, which the Supreme Court affirmed 6-1, did not garner the support of a majority of this Court. Pet'rs' Br. 50 n.19. This is false. Judge Craig also authored a concurring opinion (joined in part by Judge Colins) which begins by stating that "[t]his opinion signifies joinder in Judge Palladino's [majority] Opinion . . . , and also offers a brief concurring supplement[.]" *Gondelman v. Commonwealth*, 550 A.2d 814, 823 (Pa. Cmwlth. 1988). This "brief concurring supplement" then adopts the majority's views and cuts off Petitioners' rebuttal at the knees in concluding that *"[t]he judiciary should avoid substituting its view as to the relative weight of various constitutional provisions, in place of the necessarily equal import of voter ratification of all provisions.*" *Id.* at 823-24 (emphasis added).

G. Proposed Article I, section 30 is Not Unconstitutionally Vague

Petitioners next claim (at 52) that proposed Article I, section 30 is "fatally ambiguous." And even though this Court cautioned that "[l]ogic . . . dictates that our inquiry cannot be whether an amendment in some way implicitly impacts another constitutional provision[,]"[41] this is exactly the exercise in which Petitioners engage here.

For starters, Petitioners' oft-repeated questions (at 52-53) present no real dilemmas. Petitioners posit whether the lack of a constitutional right relating to abortion would deny a doctor's right to a jury trial or to counsel if they performed an illegal abortion.[42] But proposed Article I, section 30 does not affect a defendant's right to a jury trial or to counsel. Indeed, neither right emanates from "any right relating to abortion." *See, e.g.*, *Blum v. Merrell Dow Pharm.*, 626 A.2d 537, 542 (Pa. 1993) (discussing the history of the right to a jury trial); *Commonwealth v. Padilla*, 80 A.3d 1238, 1251 n.13 (Pa. 2013) ("[T]he right to counsel under Article I, § 9 of the Pennsylvania Constitution is co-terminus with the Sixth Amendment right to counsel for purposes of determining when the right attaches.").

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[41] *Grimaud v. Commonwealth*, 806 A.2d 923, 930 (Pa. Cmwlth. 2002) *aff'd by Grimaud*, 865 A.3d 835 (Pa. 2005).

[42] This hypothetical assumes that the statutory right to abortion has been repealed. This is not what proposed Article I, section 30 does.

Petitioners query whether a doctor refusing to perform an abortion based on race or ethnicity would violate that woman's equal protection rights. But here, too, equal protection rights do not depend on constitutional abortion rights. As long as there is a statutory right to abortion, any denial of an abortion based on race or ethnicity would result in an equal protection violation. *See*, *e.g.*, *Bievenour v. Commonwealth, Unemployment Comp. Bd. of Review*, 401 A.2d 594, 595 (Pa. Cmwlth. 1979) (citation omitted) ("The right to receive unemployment compensation benefits in Pennsylvania is a statutory right and, as such, has statutory provision limitations but, where a state law defines eligibility for statutory entitlement, that eligibility is subject to the protection of the Fourteenth Amendment and may not be limited in any way that works an invidious discrimination or constitutes a denial of due process.").

Moving along, Petitioners rely on *Barud* for the proposition that proposed Article I, section 30 is void for ambiguity because it lacks "reasonable standards by which a person may gauge their future conduct." Pet'rs' Br. 53 (quoting *Commonwealth v. Barud*, 681 A.2d 162, 165-66 (Pa. 1996)). As the *Barud* court explained in the statutory context, "the void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* (citations omitted). Not

only is proposed Article I, section 30 not a criminal statute, but it does not prohibit any conduct and, voters therefore need not gauge their future conduct against it. Article I, section 30 only clarifies what should not be *constitutional* rights. Petitioners' brief does not dispute that proposed Article I, section 30 would not repeal or restrict the current statutory rights to abortion. If voters need to gauge their conduct by any standards, existing and future statutory rights to abortion will provide them with those standards.

Next, Petitioners press on to claim (at 54) that proposed Article I, section 30 cannot be tolerated because *Schnader* and *Sprague* require that the electorate be provided with an adequate opportunity to be fully advised of the proposed changes. But neither *Schnader* nor *Sprague* are remotely applicable. Both cases address secretaries' failures to properly comply with Article XI, section 1. *Commonwealth ex rel. Schnader v. Beamish*, 164 A. 615 (Pa. 1932) (admonishing the secretary for failing to timely publish proposed constitutional amendments); *Sprague v. Cortes*, 145 A.3d 1136, 1137-38 (Pa. 2016) (Baer, J., op. in supp. of affirmance) (explaining challenge to secretary's ballot question as "unlawfully misleading because it advises voters only of the proposed amended constitutional language and does not inform voters that the existing mandatory judicial retirement age is 70").

Even accepting that a proposed amendment must "fully inform the voters" of the proposed changes, Article I, section 30 does so. First, if proposed Article I,

section 30 ever passed through a second General Assembly, it would simply clarify that all rights relating to abortion are statutory.

Respondent's seventh preliminary objection should be sustained.

H. The Proposed Amendment to Article VII, section 1 Does Not Violate Federal Law

Petitioners submit (at 54) that SB 106's "proposed amendment on its face offends the U.S. Constitution and, as a result, cannot serve as the basis for changing the Pennsylvania Constitution." But Petitioners are not challenging the "proposed amendment"—indeed, their own reproduction of the offending text (at 55) merely shows an underlined "A" as the only change to Article VII, section 1.[43] So at its core, Petitioners' claim boils down to this: even though SB 106 makes no changes to the current text, the mere fact that the current text *appears* in SB 106 makes it unconstitutional. Petitioners offer no support for this claim. Given this, Petitioners bypass SB 106 altogether to attack Article VII, section 1 itself—a constitutional provision unchanged since 1968.[44] In taking on this strawman, Petitioners demand an improper advisory opinion with no practical effect on an issue that nobody

[43] The Secretary's published public notice of SB 106 also admits that this is the only change to the current text of Article VII, section 1. Resp't Br. in Supp. of Prelim. Objs., Ex. B. Petitioners do not address this admission.

[44] The Pennsylvania Constitution is among that of several states that contains unenforceable language on age and/or residency. *See, e.g.*, ALA. CONST. art. VIII, § 1; DEL. CONST. art. V, § 2; IOWA CONST., art. II § 1; MICH. CONST. art. II, § 1; WYO. CONST. art. 6, § 2. Regardless, in every state, an individual meeting the federal age and residency requirements, and not otherwise excluded, is qualified to vote.

disputes.[45] *See, e.g.*, *Gulnac v. South Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (finding courts must avoid deciding constitutional questions "in a vacuum where it would have no practical effect on the parties."). Petitioners assert (at 57) that "the [Respondent] agrees that SB 106 conflicts with federal law." Respondent made no such admission. It is Petitioners who are saddled with the Secretary's own published public notices of SB 106, which admit that there are no changes to the current text of Article VII, section 1. Resp't Br. in Supp. of Prelim. Objs. at 48-49, Ex. B. And it is Petitioners who do not address their own admission that SB 106 does not affect the longstanding voter age and residency requirements.

Petitioners kick up dust by referring to an earlier version of SB 106[46]—which included a minor edit to Article VII, section 1 to make the text conform to the actual, enforceable requirements. *See* Pet. for Review ¶¶ 14–22; Pet'rs' Br. 55-56. But this earlier edit was not included in SB 106 and is therefore not before this Court. Though

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[45] It would also appear that this Court already rejected the same invitation proffered by the *League of Women Voters*:

> Respondent also points out that Proposed LOWV Intervenor, Sajda Adam, admits in her declaration that there are no changes in SB 106 to the voting age and residency requirement. *See* Appl. to Intervene, Proposed Petition for Review at Ex. D, ¶ 5 (stating that "[b]ecause there are no changes to the actual language regarding voting age and residency, without any clarifying context it appears that 21 would be the age required by the Pennsylvania Constitution to vote. I am confused about whether those age and residency requirements are intended to be and/or are going to be changed by SB 106."). This Court agrees with Respondent.

Wolf v. General Assembly, No. 482 M.D. 2022 at 24 (Oct. 26, 2022) (Dumas, J.).

[46] *See* Pet. for Review, Ex. C; Pet'rs' Br. 55.

they do not seek any specific relief based on this earlier draft, Petitioners essentially ask this Court to redraft SB 106 to their liking. But this the Court cannot do. *See Sprague*, 145 A.3d at 1141-42 (Baer, J., op. in supp. of affirmance) ("As the judiciary is the branch entrusted with interpreting the Constitution, its drafting is left to the other branches of government.").

Last, Petitioners suggest (at 57) that this Court must intervene and declare a proposed amendment unconstitutional—not for what it does—but for what it does *not* do. So the claim that this proposed amendment causes confusion is confused. But in any event, if SB 106 passes the General Assembly a second time, the Secretary's ballot questions and the Attorney General's plain English statement will inform voters that SB 106 *does not* ask them to change the voting age and residency requirements. *See* Resp't Br. in Supp. of Prelim. Objs. at 19; *Sprague*, 145 A.3d at 1141 (Baer, J., op. in supp. of affirmance) ("the ballot question as worded by the Secretary, in conjunction with the Attorney General's Plain English Statement, ensures that voters will receive all the information that they need to make an informed choice: the proposed constitutional language in the ballot question, and the purpose and effect of such language in the Plain English Statement.").

Respondent's seventh preliminary objection should be sustained.

I. Proposed Article I, Section 30 Does Not Substantively Alter Any Other Constitutional Provisions

With little explanation, Petitioners submit (at 58-59) that proposed Article I, section 30 "diminishes" the right to privacy, reproductive freedom, equal protection, and freedom from gender discrimination under Article I, sections 1, 25, 26, and 28. But after *Grimaud*, "[t]he question is whether the single ballot question *patently affects* other constitutional provisions, not whether it *implicitly* [affects]" other constitutional provisions. 865 A.2d at 842 (internal citation omitted) (emphasis added).

And Petitioners can merely offer suggestions as to which constitutional provisions might be affected by proposed Article I, section 30. As discussed in Section III.D, the right to abortion or taxpayer-funded abortion has never been recognized as an "inherent and indefeasible" right under Article I, section 1 since it first appeared in 1776 or under any other provision of the Pennsylvania Constitution. Petitioners again cite no case law finding that such a right exists under the Pennsylvania Constitution. Given that constitutional rights to abortion and taxpayer-funded abortion have not been recognized, they cannot affect existing constitutional rights to privacy, equal protection, or freedom from discrimination. Moreover, it would stretch the bounds of reason if clarifying the state of constitutional law suddenly affected other preexisting constitutional rights. That's what Petitioners ask.

Petitioners suggest (at 60) that proposed Article I, section 30 "provides no notice" and "annuls" various rights. But proposed Article I, section 30 does not "annul" any previously recognized constitutional rights, and so there can be no notice to provide.[47]

Respondent's eighth preliminary objection should be sustained.

J. The Proposed Amendment to a Narrow Class of Concurrent Resolutions Does Not Substantively Alter Article IV, Section 2 Or the Separation of Powers

Petitioners claim that the proposed amendment to Article III, section 9 substantively alters the constitutional separation of powers enshrined in Article IV, section 2 and Article IV, section 15. Pet'rs' Br. 60-63. But expressly limiting the Governor's overreach *vis-à-vis* a power delegated to the executive branch by the General Assembly does not upset the separation of powers—it preserves it. And while Petitioners hesitate to discuss the Regulatory Review Act (at 63 n.23), consideration of the concurrent regulatory review resolution process illustrates why Petitioners' argument is baseless.

[47] In apparent recognition that statutory rights to abortion will not be impacted, Petitioners remark that these rights should not be left to the "whim" (at 59) of every General Assembly. This is dismissive of hundreds, if not thousands, of statutory rights important to every Pennsylvanian, and it minimizes the Governor's own role in approving or vetoing legislation. Petitioners also ignore the fact that there has been a statutory right to abortion since 1982, through numerous General Assemblies over the last forty years.

To preserve the legislative power's supremacy and prevent the unrestrained exercise of pseudo-lawmaking authority by an overzealous executive branch, the General Assembly enacted the Regulatory Review Act to ensure that every regulation is promulgated with fidelity to the legislative intent. The Regulatory Review Act expresses an intent and purpose to curtail excessive regulation by the Executive Branch:

> The General Assembly finds that it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania. It is the intent of this act to establish a method for ongoing and effective legislative review and oversight in order to foster executive branch accountability; [and] to provide ultimate review of regulations by the General Assembly[.]

71 P.S. § 745.2(a). Recognizing that the buck must stop with the sole branch with lawmaking authority under the Pennsylvania Constitution, the General Assembly also enacted Section 7(d) of the Regulatory Review Act. 71 P.S. § 745.7(d). Under Section 7(d), the General Assembly expressly reserved the power to disapprove of an agency's proposed regulation that contravenes the legislative intent of an enabling statute. *Id.*

History has shown, however, that the General Assembly's grant of a role to the Governor in Section 7(d)—specifically, the ability to veto concurrent resolutions disapproving of proposed regulations—completely thwarted the express purpose

and intent behind the General Assembly's reservation of power to review and approve agency regulations. The Governor has vetoed *all but one of the* Concurrent Regulatory Review Resolutions that the General Assembly has adopted since the Regulatory Review Act was amended in 1982[48] to include the disapproval process set forth in Section 7(d). And so, the proposed amendment to Article III, section 9 intends to address this constitutional power imbalance.

Even if there is a reasonable question about presentment, "[o]ur Constitution reserves the ultimate political power to the people in Article I, § 2." *Bergdoll v. Commonwealth*, 858 A.2d 185, 202, (Pa. Cmwlth. 2004). That power includes the "inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper." PA. CONST. art. I, § 2. And, very recently, the citizens did just that. On May 18, 2021, the electorate adopted an amendment to Article III, section 9 to expressly exempt concurrent resolutions terminating a disaster emergency declaration from the presentment requirement.[49] This proposed amendment went unchallenged in court.

Finally, Petitioners' assertion that removing the Governor's power to veto *concurrent regulatory review resolutions* disapproving executive rulemaking

[48] Act 1982-238 (H.B. 27), P.L. 1023, § 1, approved Dec. 9, 1982.

[49] Petitioners cite *Wolf v. Scarnati* for the proposition that Article III, section 9 is "an integral part[]" of the "constitutional design for the separation of powers[,]" yet conveniently fail to acknowledge this referendum by the citizens that followed on its heels. Pet'rs' Br. 61 (quoting *Wolf v. Scarnati*, 233 A.3d 679, 687-88 (Pa. 2020).

somehow substantively impacts the Governor's power to veto *bills* under Article IV, sections 2 and 15 is completely unfounded. Petitioners merely cite these provisions and provide no further explanation for how the four proposed words—"disapproval of a regulation"—inserted into Article III, section 9 impacts the Governor's authority to veto legislation. Indeed, Petitioners even characterize the effect as limited "to the narrow class of concurrent resolutions which are not required to be 'presented to the Governor[.]'" Pet'rs' Br. 60. And by its very plain terms, the four words in proposed amendment to Article III, section 9 do not facially impact any other provision of the Pennsylvania Constitution—they merely correct an imbalance in the separation of powers.

Thus, this Court should grant Respondent's ninth preliminary objection.

K. The Proposed Amendment to Article VII, section 1 Does Not Substantively Alter Free and Equal Elections or the Requirement that Election Law Be Uniform

Petitioners contend (at 64) that the proposed amendment to Article VII, section 1 "substantively alter[s]" the constitutional right to "free and equal" elections under Article I, section 5 "as well as" under Article VII, section 6 of the Pennsylvania Constitution. In support of this contention, Petitioners rely heavily (at 65-66) on the *Applewhite* cases. By Petitioners' telling, the *Applewhite* cases hold that any form of voter identification—including that in the proposed amendment to Article VII, section 1—is unconstitutional.

But the *Applewhite* cases do not sweep so broadly. Those cases involved a photo-identification mandate that required voters to "display *one* of the specified forms of *compliant photo ID* listed in the [new Election Code] definition." *Applewhite v. Commonwealth*, 2014 Pa. Commw. Unpub. LEXIS 756, at *6 (Pa. Cmwlth. Jan. 17, 2014) (citing 25 P.S. §§ 2602(z.5), 3050(a)) (emphasis added); s*ee also Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012) ("[T]he Law contemplates that the primary form of photo identification to be used by voters is a Department of Transportation (PennDOT) driver's license or the non-driver equivalent provided under Section 1510(b) of the Vehicle Code, 75 Pa.C.S. § 1510(b)."). This Court's reasoning for finding the photo-identification mandate in *Applewhite* unconstitutional is instructive instantly:

> The Voter ID Law does not provide a non-burdensome means of obtaining compliant photo ID. The supporting documentation requirement for a PennDOT secure ID and the exhaustion requirement for the DOS ID do not comport with liberal access. *Id.* Respondents candidly acknowledged that the Voter ID Law does not pass constitutional muster without the DOS ID[.]
>
> Like a house of cards, everything rises and falls upon the legitimacy of the DOS ID. As analyzed above, the DOS ID is an unauthorized agency creation, and is difficult to obtain. Thus, the Voter ID Law does not contain, on its face, any valid non-burdensome means of providing compliant photo ID to qualified electors. Accordingly, the Voter ID Law is facially unconstitutional.

Applewhite, 2014 Pa. Commw. Unpub. LEXIS 756, at *50-51.

In contrast, the proposed amendment to Article VII, section 1 does not require voters to obtain a PennDOT photo ID—much less a PennDOT secure photo ID. Instead, all that is needed is "unexpired government-issued identification." SB 106, § 4. The words "photo" or "photograph" do not appear anywhere in the proposed amendment—and any government-issued identification (federal, state, or local) will do. Further, most of the forms of identification currently required under the Election Code for absentee and mail-in voting are also acceptable under SB 106. *See* 25 P.S. § 3146.8(g)(3) (requiring county boards to verify "the proof of identification as required under this act"); 25 P.S. § 2602(z.5)(3)(i)-(iv) (enumerating various types of identification that a voter may use in completing a ballot application).

The Court should sustain Respondent's ninth preliminary objection.

L. Proposed Article VII, section 15 Does Not Alter the Judiciary's Authority

Petitioners' arguments (at 67-69) opposing proposed Article VII, section 15 teeter on a studied false equivalency—that an election *audit* is the same as an election *contest*. Of course, they aren't the same. And because they aren't the same, proposed Article VII, section 15 does not disturb the judiciary's Article VII, section 13 authority.

To start, Petitioners contend (at 67) that the Constitution gives the judiciary "exclusive constitutional authority over election contests."[50] Wrong. Article VII, section 13 divides authority over election contests between the legislative and judicial branches. PA. CONST. art. VII, § 13. This Article requires the General Assembly to "designate the courts and judges by whom the several classes of election contests shall be tried, and regulate the manner of trial and matters incident thereto." *Id.* Carrying out its constitutionally delegated duties, the General Assembly categorizes nomination and election contests into five distinct classes, designating the proper jurisdiction and procedures for each class in the Election Code. *See* 25 P.S. § 3291. In several, it is the General Assembly which is the ultimate decision-maker.[51]

Having dispensed with the fiction that the judiciary has "exclusive constitutional authority over election contests," next up is Petitioners' false

[50] Petitioners cite (at 67-68) *In re Contested Election of Senator* as ostensible support for this proposition. There, the Supreme Court clarified the relationship between Article II, section 9 of the Constitution (stating that "[e]ach house shall judge of the election and qualification of its members") and then-existing Article VIII, section 17 (designating the "trial and determination of contested elections of members of the General Assembly" to "the courts of law"). *In re Contested Election of Senator*, 2 A. 341, 342 (Pa. 1886). Contrary to Petitioners' characterizations, the Court's holding confirmed that the *General Assembly* has the power to make the final determination in an election contest involving one of its members, *not* the courts. *See id.* at 343-44 ("Neither the facts found by the court, nor its opinion as to who is entitled to the certificate of election, are to control the judgment of the respective house. The legal effect thereof on the house is no greater than the report of one of its own committees.").

[51] Election contests involving the Governor and Lieutenant Governor are tried and decided by the General Assembly, while the General Assembly has the final say in election contests involving members of the General Assembly. *See* 25 P.S. §§ 3312-3330, 3401-3409.

equivalency. An election audit is not an election contest. An election contest is an adversarial proceeding brought by an "aggrieved" party challenging a specific aspect of an election and seeking specific relief. *See* 25 P.S. § 3157(a) ("Any person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom within two days after such order or decision . . . setting forth why he feels that an injustice has been done, and praying for such order as will give him relief."); *see also id.* §§ 3157(a)(2), 3261-62, 3456-3477; *see also In re Contest of 2003 Gen. Election for the Office of Prothonotary*, 841 A.2d 606, 608 (Pa. Cmwlth. 2004) (involving election contest under § 3157) *rev'd on other grounds,* 849 A.2d 230 (Pa. 2004); *In re 2003 Election for Jackson Twp. Supervisor*, 840 A.2d 1044 (Pa. Cmwlth. 2003) (same); *Lewis v. Phila. Cnty. Bd. of Elections*, 2018 Phila. Ct. Com. Pl. LEXIS 52, *6 (Phila. Ct. Com. Pl. July 31, 2018) (same).

Unrelated to election-contest procedures is the auditing provision of the Election Code, *see* 25 P.S. § 3031.17, which directs the county boards of elections to "conduct a statistical recount of a random sample of ballots after each election." This is a drastically different function from the election contest provisions discussed above; election contests and election audits already perform separate functions, and the existence of one does not impose on, threaten, or cancel out the other. Indeed, allowing the Auditor General to audit elections poses no more threat to the

judiciary's ability to hear election contests than does the Election Code's current auditing procedures.[52]

Given the above, Petitioners resort to suggesting that carrying out a basic legislative function would result in "chaos," institute an "oligarchical tribunal," and generate a "standardless parallel process" to contest elections. But crafting statutes that provide for the auditing of elections and election results by the Auditor General is an ordinary exercise of legislative power. *See* 71 P.S. § 311 ("[T]he . . . Auditor General shall exercise its powers and perform its duties as provided in . . . applicable laws"); *see also Commonwealth ex rel. Woodruff v. Lewis*, 127 A. 828, 830 (Pa. 1925) (the duties of the Auditor General are "subject to legislative control"); *see also Commonwealth ex rel. Bell v. Powell*, 94 A. 746, 749 (Pa. 1915) ("as the legislature originally prescribed those duties [of the Auditor General], it has the power to alter them, and an act making such alteration cannot for that reason be held to be unconstitutional"). The heart of the legislative power "is the power to make, alter, and repeal laws." *Pa. State Ass'n of Jury Comm'rs v. Commonwealth*, 78 A.3d 1020, 1035 (Pa. 2013) (internal quotations and citations omitted); *see also Blackwell v.*

[52] Petitioners cite *League of Women Voters*, 265 A.3d 207, 241 (Pa. 2021) for the proposition that proposed Article VII, § 15 substantively alters the exclusive power of the judiciary to determine election contests. Petitioners are wrong. The judiciary does not have exclusive power over election contests. *See* PA. CONST. art. VII, § 13. And election contests and election audits already exist side-by-side in the Election Code. *See* 25 P.S. § 3157(a) (election contests); 25 P.S. § 3031.17 (election audits).

State Ethics Comm'n, 567 A.2d 630, 637 (Pa. 1989) ("The legislature may . . . delegate authority and discretion in connection with the execution and administration of a law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation.").

Thus, the Court should sustain Respondent's ninth preliminary objection.

III. CONCLUSION

For the reasons set forth above and in Respondent's opening brief, this Court should sustain Respondent's Preliminary Objections, deny the Application for Summary Relief, and dismiss the Petition for Review.

Respectfully submitted,

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Dated: Nov. 28, 2022

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CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF COMPLIANCE

Under Pa. R.A.P. 2135(d), the preceding Brief in Opposition to Petitioners' Application for Summary Relief and Brief in Reply to Petitioners' and Petitioner-Aligned Intervenors' Briefs in Opposition to Respondent's Preliminary Objections was produced using 14-point font in the text and 12-point font in the footnotes and contains 13,564 words. This word count relies on the word count of the word processing system used to prepare this Brief. The word count is less than the total words permitted under Pa. R.A.P. 2135(a)(1).

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