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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 482 MD 2022

TOM WOLF, Governor of the Commonwealth of Pennsylvania, and LEIGH M. CHAPMAN, Acting Secretary of the Commonwealth of Pennsylvania,

Petitioners,

v.

GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITIONERS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF AND IN OPPOSITION TO PRELIMINARY OBJECTIONS

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I. INTRODUCTION[1]

At its core, the General Assembly's position boils down to this: its attempt to amend the Constitution through SB 106 is not subject to challenge or review. The General Assembly claims absolute unreviewable discretion to declare what Article XI, § 1 requires with respect to recording votes on first passage, insists that it can preclude the judiciary from deciding that the Constitution protects reproductive freedom and arrogate to itself exclusive power to dictate whether abortion care will be available in the Commonwealth, and maintains that it can use the amendment process to alter the constitutional balance of powers and other constitutional provisions without affording voters the chance to approve each change. And the General Assembly implores this Court to find that the extreme positions it is advancing are not subject to judicial review.

The General Assembly's arguments are overheated and without merit. Article XI, § 1 mandates a specific procedure for amending the Constitution that was not followed here and the amendments in SB 106 themselves violate the Constitution. As a matter of law, SB 106 is incurably defective and cannot form the basis for changing the Constitution. This Court is duty bound to ensure scrupulous adherence to Article XI, § 1 and, pursuant to this duty, should enjoin further pursuit of SB 106.

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[1] Petitioners address herein the arguments in their Application for Summary Relief. Their opposition to the various Preliminary Objections is set forth in their first brief.

II. ARGUMENT

A. The General Assembly Violated Article XI, § 1 by Failing To Record Lawmakers' Votes on the Various Amendments in SB 106.

Petitioners' opening brief discredited the General Assembly's interpretation of the "yea and nay" vote requirement and demonstrated that the plain text of Article XI, § 1, the historical circumstances that gave rise to the provision, the purpose of the two-passage procedure, and the different language used elsewhere in the Constitution require the conclusion that "yea and nay" votes must be taken and recorded on each proposed constitutional change in SB 106. *See* Pet'rs' Opening Br. at 30-38. Lacking any credible basis for rejoinder, the General Assembly abandons its original arguments and advances two new theories of constitutional construction in its second brief. Its new theories are likewise without merit.

First, parroting the Senate Republican Caucus's brief, the General Assembly claims that "every state court"—it mentions five—"has rejected" the argument that "a separate, individual vote is required for every proposed amendment." Br. at 18-19.[2] The amendment provisions in the other state constitutions that it cites, however,

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[2] The General Assembly cites the dissent in *Commonwealth v. Johnson* as support for the proposition that it is "essential" to review "related case-law from other states." Br. at 19-20. The quoted language appears in a discussion of the *Edmunds* test which is applied in determining whether a Pennsylvania constitutional provision confers greater protections than a federal counterpart. The *Edmunds* test is not applicable here.

are materially different than Article XI, § 1. Unlike Pennsylvania, the constitutions of Iowa, Nebraska, Ohio and Rhode Island do not use both the singular ***and*** plural—"amendment or amendments"—in relation to the "yea and nay" vote requirement.[3] Three of the states—Idaho, Nebraska and Ohio[4]—do not have a second passage requirement like Pennsylvania's Constitution, which is specifically intended to enable voters to replace representatives who do not share their views. *See* Pet'rs' Opening Br. at 33-34. And, dispositively, the issue here was not presented or decided in any of the other state cases cited by the General Assembly (pp. 19-20) or Senate Republican Caucus (pp. 4-6). Those cases involved use of a single joint resolution to propose multiple amendments but did not even address Petitioners' claim that failure to take and record "yea and nay" votes on each proposed constitutional change on first passage deprives voters of a guaranteed right to replace their representatives with others who share their views prior to consideration on

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[3] *See* Iowa Const. Art. X, § 1 ("such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon . . ."); Neb. Rev. St. Const. Art. XVI, § 1 ("such proposed amendments shall be entered on the journal, with yeas and nays. . .); Ohio Const. Art. XVI, § 1 ("such proposed amendments shall be entered on the journals, with the yeas and nays . . ."); R.I. Const. Art. VIII (1909) ("Such propositions for amendment shall be published . . . with the names of all the members who shall have voted thereon, with the yeas and nays. . .").

[4] The General Assembly repeatedly urges the Court to follow the decision from Ohio's intermediate appellate court in *Slemmer*, Br. at 19 n.30, 22, 23, but the issue here was not presented in *Slemmer* and, unlike Article XI, § 1, the Ohio Constitution has no second passage requirement.

second passage. The decisions interpreting other state constitutions are not helpful or persuasive in resolving this dispute concerning Article XI, § 1.

Second, the General Assembly now tries to buttress its reading of Article XI, § 1 through use of the "series-qualifier canon" which instructs that "a modifier at the end of a series of nouns applies to the entire series." Br. at 21 (quoting *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1165 (2021)). As its name suggests, the series-qualifier canon is an "interpretative rule" that assists in determining whether a modifying clause applies to "all nouns or verbs in a series" or only the immediately preceding noun or verb (*i.e.*, the last antecedent). *See generally Facebook, Inc.*, 141 S. Ct. at 1169-70. The canon has no application here because "amendment or amendments" is not a "series" of nouns, but rather a ***single*** noun purposefully expressed in both the singular and plural form. Because there is no "series," there is no role for the series-qualifier canon and it would be error to apply it when interpreting Article XI, § 1. The General Assembly's resort to the canon exposes the fundamental error in its tortuous interpretation. By urging the Court to read "amendment or amendments" as if it were two different nouns and to then "tease[] out" from the same word "two separate phrases," Br. at 21, the General Assembly violates the basic rule of construction that a constitutional provision must be interpreted according to its ordinary meaning and not in a strained or unnatural manner. *See Scarnati v. Wolf*, 173 A.3d 1110, 1118 (Pa. 2017).

The General Assembly's other contentions are equally without merit. It blithely accuses Petitioners of "go[ing] with an old saw" by identifying this as a case of "first-impression," Br. at 17, but then concedes just two sentences later that the issue here has never before "been advanced" or "decided," *id.* Definitionally, it is indeed a case of first impression. Despite this admission, the General Assembly (again) asserts that *Grimaud* and *Mellow* foreclose any challenge under Article XI, § 1 to its vote procedure. Br. at 25.[5] Interpretation of the constitutional "yea and nay" recording requirement was not at issue in *Grimaud* or *Mellow* and neither case alters the "bedrock principle" that the judiciary is duty-bound to enforce Article XI, § 1. *League of Women Voters of Pa. v. DeGraffenreid*, 265 A.3d 207, 226 (Pa. 2021) (citation omitted). The General Assembly glosses over the purpose of the two-passage requirement and offers the irrelevant observation that public newspaper notices announcing SB 106 did not include vote totals. Br. at 25-26 & n.34. Article XI, § 1 requires publication of the amendments, not the votes thereon. The votes must, however, be available to electors to exercise the right guaranteed by Article XI, § 1 to replace their representatives at the next election. *Kremer v. Grant*, 606 A.2d 433, 438 (Pa. 1992) ("[I]f an informed electorate disagrees with the proposed

[5] Petitioners did not "ignore" *Grimaud* or *Mellow* in their first brief as the General Assembly claims. Br. at 25. Petitioners explained on page 28 why neither case forecloses judicial review here.

amendments, they will have an opportunity to indicate their pleasure at the ballot box and elect individuals to the next General Assembly with different attitudes.").

As a final scare tactic, the Republican Caucus Intervenors posit that a finding that Article XI, § 1 requires votes on each proposed change to the Constitution will "impliedly" invalidate several previous amendments. Br. at 1-2. This doomsday scenario is not real or serious. This Court may properly interpret the "yeas and nays" requirement and design an appropriate remedy in this matter of first impression that involves only a challenge to SB 106. *See Dana Holding Corp. v. Workers' Comp. Appeal Bd.*, 232 A.3d 629 (Pa. 2020) (describing considerations applicable in deciding effect to be given to judicial decision).

Put simply, the General Assembly and Republican Caucus Intervenors offer nothing to rebut Petitioners' clear showing that Article XI, § 1 requires individual "yea and nay" votes by lawmakers on each change to the Constitution. The General Assembly's failure to record individual votes renders SB 106 incurably invalid.

B. The General Assembly Violated Article XI, § 1 by Combining Two Questions in Article I, § 30.

For decades in this Commonwealth, the right to abortion operated independently of the right to funding for abortion. History thus proves that abortion care and funding for abortion care do not "stand[] or fall[] as a whole" and are not "interdependent" and, as a result, Article XI, § 1 requires that the General Assembly's proposals to annul any right to abortion and any right to funding for

abortion must be "presented separately to the voters so that they may individually vote on those changes." *League of Women Voters*, 265 A.3d at 240 (where constitutional changes are "independent" and "could operate independently . . . they are not functionally interrelated" and voters must be "given the opportunity to vote separately" on each change). The General Assembly's efforts to avoid straightforward application of Article XI, § 1 and this controlling precedent do not withstand scrutiny.

Having conceded in its first brief that "Article I, section 30 disclaims a ***constitutional*** right to an abortion," Resp't Opening Br. at 38 (emphasis in original), the General Assembly takes a mulligan and now claims that the same amendment "does not affect *constitutional* rights," Resp't Second Br. at 29 (emphasis in original). This is sophistry. The General Assembly cannot seriously defend a proposed amendment to the Constitution by denying that the amendment affects the Constitution. This is especially true given that SB 106 is specifically designed to avert a judicial interpretation that the Constitution includes a right to funding for abortion care. The General Assembly references the 1985 ruling in *Fischer* in its brief at page 29 but fails to acknowledge that the continued vitality of *Fischer* and the issue of whether or not the Constitution requires funding for abortion are presently before the Supreme Court in *Allegheny Reproductive Health Ctr. v. Pennsylvania Dep't of Human Servs.*, No. 26 MAP 2021. The legislative record

relating to SB 106 confirms that Article I, § 30 is intended to prevent the Supreme Court from recognizing an existing right to funding for abortion care in that case. *See, e.g.*, Pa. S. Jour., 2022 Reg. Sess. No. 34, 827 (July 8, 2022) (Sen. Martin: explaining that SB 106 "is going through a constitutional amendment process and not the Abortion Control Act" to avert a ruling in *Allegheny Reproductive Health* because "we have a history of courts reinterpreting constitutions"). Having acted with express intent to take the constitutional abortion funding issue away from the courts, the General Assembly strains credulity by arguing that SB 106 "does not affect *constitutional* rights."

The General Assembly also walks back its earlier argument that the two parts of Article I, § 30 "define the limits of any current and future statutory rights to abortion granted by the General Assembly," Resp't Opening Br. at 38, and now claims that the two parts are "interrelated" because a constitutional right to abortion "may include" a corresponding funding requirement, Br. at 30. Mere "interrelatedness," however, is not enough. Multiple changes must be "interdependent" or "functionally interrelated" such that they "form an interlocking package" and "stand[] or fall[] as a whole" in order to be presented together to voters. *League of Women Voters*, 265 A.3d at 237 (citations omitted). The two changes in Article I, § 30 do not meet this standard. The General Assembly cites *Kuren* as support for its new assertion that a constitutional right "may include" a funding

requirement, Br. at 30, but that case has no application here. *Kuren* involved a challenge by indigent defendants to the level of funding provided by a county public defender. *Kuren v. Luzerne Cnty.*, 146 A.3d 725 (Pa. 2016). *Kuren* does not address abortion or funding for abortion care, does not reference or purport to overrule *Fischer*, and does not change the fact that abortion rights and public funding for abortion have operated and continue to operate independently. Under *League of Women Voters*, voters must be given the opportunity to vote separately on each of the two independent proposals in Article I, § 30.

The General Assembly urges the Court not to follow *League of Women Voters* and to find instead that *Grimaud* is "a far more suitable comparison" because Article I, § 30 "comes in at seventeen words" and the amendments at issue in *League of Women Voters* and *Grimaud* contained 482 words and 21 words, respectively. Br. at 31. This is superficial and nonsensical. There is no word count test in Article XI, § 1 and no court has ever suggested that the number of words in an amendment is a relevant consideration in applying the subject matter test. The General Assembly also cites the right to be free from excessive bail in Article I, § 13 as support for the notion that "several rights" may be "confer[ed]" by "a single amendment." Br. at 31. The protection against excessive bail (later renumbered Article I, § 13) was added to the Constitution following the Convention in 1790, nearly 50 years before Article XI, § 1 was ratified. *See The Pennsylvania Constitution: A Treatise on Rights*

and Liberties, 592 (Ken Gormley and Joy G. McNally, eds., 2020). Its structure is of no help in interpreting the single subject requirement in Article XI, § 1.

Hoping to avoid critical analysis of Article XI, § 1, the General Assembly declares that the prohibition against logrolling does not apply now because ballot questions have not yet been drafted. Br. at 28. But there is no way to draft a ballot question that can salvage the compound and disjunctive Article I, § 30. The Supreme Court made clear in *Kremer* that a defect in the amendment process makes "literal compliance with the rest of the section impossible." *Kremer*, 606 A.2d at 438-39. Before a ballot question was drafted, the petitioners in *Kremer* sought and obtained a preliminary injunction barring further action to place a proposed constitutional amendment on the ballot based on violation of the mandatory publication requirement in Article XI, § 1. The Supreme Court affirmed this Court's order granting a preliminary injunction and held that "the failure to accomplish what is prescribed by Article XI infects the amendment process with an incurable defect and under such circumstances further proceedings in this matter will be unnecessary." *Id.* at 439. *Kremer* controls and requires that the insidious logrolled initiatives in SB 106 be properly enjoined now.

Again, the General Assembly[6] offers nothing to rebut Petitioners' demonstration that Article I, § 30 would improperly alter the Constitution in two discrete and independent ways without affording the required opportunity to vote separately on each change. Petitioners are entitled to summary relief in their favor on Count II of the Petition for Review.

C. Article I, § 30 Is Invalid Because It Purports To Defease Inherent and Indefeasible Rights.

The General Assembly declines to debate the nature of the protections guaranteed by Article I, § 1 and instead argues that there is no constitutional right to abortion because no such right has yet been recognized. Br. at 31-32. This defense of SB 106 is misguided and wrong.

Since *Roe* was decided in 1973, there has been no need to litigate the existence of a separate right to abortion under the Pennsylvania Constitution. But the right still exists. As demonstrated in Petitioners' opening brief, Article I, § 1 of the Pennsylvania Constitution guarantees as "inherent and indefeasible" the right to privacy which has been interpreted to include freedom to make personal decisions about one's body and one's personal relationships and must necessarily also include

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[6] Aside from a few footnotes, the House Republican Intervenors offer no specific response to Petitioners' arguments in their second brief, the body of which repeats word-for-word their first brief. The Senate Republican Intervenors also largely stand on their opening brief with respect to issues raised in Petitioners' Application for Summary Relief.

the right to reproductive freedom. *See* Pet'rs' Opening Br. at pp. 46-48.

Rather than engage on this point, the General Assembly cites *Driscoll* as ostensible support for the remarkable proposition that the ***only*** inviolable rights in the Pennsylvania Constitution are rights recognized under federal law. Br. at 32. This argument ignores Article I, § 1 which declares the rights referenced in ***that provision*** to be "inherent and indefeasible," Pa. Const. art. I, § 1, and also misreads *Driscoll*.

Driscoll involved a challenge to Article V, § 16(b) of the Constitution which emanated from the 1967-68 constitutional convention and mandates a retirement age for Pennsylvania judges. *Driscoll v. Corbett*, 69 A.3d 197, 201-02 (Pa. 2013). The petitioners in *Driscoll* alleged that the amendment was unconstitutional because it violated property, equal protection rights and due process rights guaranteed by Article I. *Id.* The Court acknowledged that the petitioners' argument was "colorable" but declined to reach the issue of whether an amendment can retract a right guaranteed by Article I, observing that it was "far less problematic to resolve" the issue of whether the petitioners actually had an "inherent" right to hold judicial office. *Id.* at 209. The Court observed in passing that federal constitutional rights "must be vindicated over" inconsistent state actions, *id.*, but did ***not*** hold that state constitutional rights are inviolate ***only*** if those same rights are guaranteed by the U.S. Constitution. Rather, the Court repeated that "there is colorable merit" to the

"position that . . . a constitutional amendment might impinge on inherent, inalienable rights otherwise recognized in the Constitution itself," but found that the right to hold judicial office claimed by the petitioners in *Driscoll* was not one of "the inherent rights of mankind." *Id.* at 214-15.

This case is markedly different than *Driscoll*. The right to reproductive freedom at issue in this case, unlike the right claimed in *Driscoll*, is inherent and indefeasible and cannot be infringed by constitutional amendment. *See* Pet'rs' Opening Br. at 46-52.

The General Assembly likewise misapprehends the significance of *Gondelman* which predated *Driscoll* by more than a decade. *Gondelman* resolved equal protection and due process challenges to the same amendment that established a retirement age for judges. *Gondelman v. Commonwealth*, 554 A.2d 896, 896-97 (Pa. 1989).[7] After finding that the amendment does not offend any federally

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[7] The General Assembly denies that *Gondelman* is distinguishable because the amendment in that case originated at a constitutional convention and maintains that SB 106 is not a "legislative act" but rather an "exercise of the power of a people." Br. at 33-34. At the same time, the General Assembly is arguing that amending the Constitution is beyond judicial review because the act is "exclusively committed to the legislature." *Id.* at 13. Notwithstanding its about-face, as detailed in Petitioners' opening brief at pages 24-29, whether the General Assembly complied with Article XI, § 1 is not a political question. The General Assembly also takes issue with Petitioners' observation that this Court's decision in *Gondelman* is a plurality opinion. Br. at 34 n.40. The *per curiam* Order by this Court denied summary relief because "the court [was] equally divided." *Gondelman v. Commonwealth*, 550 A.2d 814, 824 (Pa. Cmwlth. 1988). The opinion in support of denying summary relief

protected right, the Supreme Court in *Gondelman* considered and rejected the petitioners' argument that the amendment violated the right to equal protection in the Pennsylvania Constitution on the grounds that the right of the people to "alter, reform or abolish their government" guaranteed by Article I, § 2 includes the power "to determine the conditions under which those entrusted with dispensing the judicial power of the Commonwealth shall serve." *Id.* at 904-05. *Gondelman* does not address or resolve the first impression question presented here—whether a fundamental right unrelated to government formation that is declared "inherent and indefeasible" in Article I, § 1 can be nullified by a constitutional amendment initiated by the General Assembly.[8]

Petitioners' position is simple and flows straight from the natural rights doctrine recognized in *Driscoll* and the other cases cited in Petitioners' opening brief: if the right to reproductive freedom is "inherent and indefeasible," as we claim

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which the General Assembly quoted on page 41 of its first brief was authored by one judge and joined by two others. The concurring opinion which the General Assembly cited in its second brief at footnote 40 was not joined by any other judge. The portions quoted by the General Assembly represent minority views.

[8] The General Assembly mischaracterizes *Pa. Prison Soc'y* and *Mellow* in arguing that those cases "rejected" Petitioners' argument that SB 106 is government action. Br. at 33-34. Those cases merely acknowledge that the process of amending the Constitution is not subject to the constitutional limitations in Article III relating to enactment of legislation. *Pa. Prison Soc'y v. Commonwealth*, 776 A.2d 971, 979 (Pa. 2001); *Mellow v. Pizzingrilli*, 800 A.2d 350, 359 (Pa. Cmwlth. 2002). That point is not in dispute here.

it is, then the General Assembly cannot lawfully propose to defease that right through a joint resolution to amend the Constitution. As the Supreme Court declared, "[a] vote of the people cannot validate and Constitutionalize anything which violates a provision of the Constitution." *Stander v. Kelley*, 250 A.2d 474, 477 (Pa. 1969) (citations omitted). SB 106 purports to do just that. Summary relief should be entered in favor of Petitioners declaring SB 106 invalid.

D. The General Assembly's Proposal To Nullify Constitutional Rights Relating to Reproductive Freedom Is Unconstitutionally Vague.

According to the General Assembly, Article I, § 30 is intended to "clarify[y] what should not be *constitutional* rights." Br. at 37. The General Assembly points to no support or precedent for its reductive amendment and affords voters no opportunity to vote separately on "what should not be constitutional rights" and instead proposes that Pennsylvania women should look to "existing and future" abortion statutes to understand the scope and extent of their reproductive freedoms. *Id.* at 36-37. Its position is absolute anathema to Article XI, § 1. Pennsylvanians have an absolute, unqualified and inexorable right to be fully informed of exactly what each proposed change to the constitution entails and cannot be made to wait for the General Assembly to amend or repeal the Abortion Control Act to understand how Article I, § 30 will affect reproductive rights. *See* Pet'rs' Opening Br. at 52-

54.[9] Summary relief should be entered in favor of Petitioners declaring Article I, § 30 unconstitutionally vague and therefore invalid.

E. SB 106 Violates Federal Law by Restating and Reaffirming Unconstitutional Voter Age and Residency Requirements.

The General Assembly refuses to concede that the voter age and residency requirements in SB 106 conflict with federal law. Br. at 39. It trivializes as a "minor edit" its prior version of SB 106 which would have made "the text" of SB 106 "conform to the actual, enforceable requirements" for voting and claims that judicial review is inappropriate because its amendment to Article VII, § 1 merely repeats the existing language in the Constitution. *Id.* at 38-39. This is not accurate. The amendment restates the unconstitutional voter requirements in newly named subsection (A) and proposes an identification requirement in new subsection (B) that is "***in addition to the qualifications under subsection (A)***." *See* SB 106 (attached as Ex. A to Pet'rs' Opening Br.) at 4 (emphasis added).

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[9] In yet another example of hair-splitting, the General Assembly challenges Petitioners' reference to the Supreme Court's admonition in *Commonwealth ex rel. Schnader v. Beamish* that the electorate must be "fully advised of proposed changes" to the Constitution on the grounds that *Schnader* involved failure to properly publish amendments in the newspapers and there is no such allegation here. Br. at 37. The General Assembly then goes on to "accept[]" that "a proposed amendment must 'fully inform the voters' of the proposed changes." *Id.* Of course it must. As the Supreme Court declared in *Schnader*, "[n]o method of amendment can be tolerated which does not provide the electorate adequate opportunity to be fully advised of proposed changes." 164 A. 615, 617 (Pa. 1932). This principle—which the General Assembly does not at the end of the day dispute—applies to all amendments and is not limited to truth in publication.

It is no answer that Acting Secretary Chapman can draft a ballot question that informs voters that they are not being asked "to change the voting age and residency requirements." Br. at 40. While the statutory responsibility for drafting ballot questions establishes Acting Secretary Chapman's standing, *see* Pet'rs' Opening Br. at 12-13,[10] drafting cannot remedy the defective amendment which purports to impose a voter identification requirement "in addition to" unconstitutional age and residency requirements. And plainly this Court has not "already rejected" Petitioners' challenge to the amendment to Article VII, § 1 as the General Assembly suggests. Br. at 39 n.45. Denying intervention by the League of Women Voters is not a decision on the merits.

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[10] Although it is a central pillar of Petitioners' argument, *see* Pet'rs' Opening Br. at 12, the General Assembly's challenge to standing ignores Acting Secretary Chapman's role in certifying "the form and wording of constitutional amendments." Just as the official duties of a member of a county board of elections provided standing to challenge the constitutionality of a statute allowing mail-in voting in *McLinko*, Acting Secretary Chapman's official duties confer standing to challenge the constitutionality of SB 106. *McLinko v. Dep't of State*, 270 A.3d 1243, 1266-67 (Pa. Cmwlth. 2022) ("Given [the county board of elections member's] responsibilities under the Election Code, it is difficult to posit a petitioner with a more substantial or direct interest in the constitutionality of Act 77's amendments to the Election Code [allowing mail-in voting]."), *rev'd on other grounds*, 279 A.3d 539 (Pa. 2022), *petition for cert. filed*, No. 22-414 (Nov. 2, 2022); *see also* Petitioners' opening brief at pages 10-16.

Petitioners are entitled to summary relief declaring SB 106 unconstitutional under federal law.[11]

F. The Amendments in SB 106 Themselves Violate Article XI, § 1 by Advancing Multiple Changes to the Constitution.

Any one of the defects above renders SB 106 incapable of amending the Constitution and warrants an order enjoining further action on SB 106. The multiple constitutional changes wrought by the various amendments provide additional reasons for invaliding SB 106.

1. Article I, § 30 which denies any constitutional right relating to abortion substantively alters Article I, §§ 1, 25, 26 and 28.

The General Assembly proposes that Article I, § 30 cannot affect any constitutional right relating to abortion because no such right has yet been recognized. Br. at 41. This argument misapprehends the subject matter test. The Supreme Court explained in *League of Women Voters* that a proposed amendment need not "facially change the actual text" of other constitutional provisions "or specifically refer to them" in order to have a substantive effect on those provisions. 265 A.3d at 236 n.29. Rather, the relevant question is "whether the changes to other constitutional provisions made by a proposed amendment are 'substantive' or

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[11] Contrary to the argument advanced by the Senate Republican Intervenors (on pages 14-15 of its second brief) and House Republican Intervenors (in footnote 12 of its second brief), Petitioners' reference to the confusion surrounding the impact of SB 106 is no bar to summary relief. That Pennsylvanians already expressed confusion is not necessary to the relief sought.

'substantial'" and "whether the amendment, if implemented, would materially alter the manner in which an existing constitutional provision functions." *Id.* It is of no moment to this inquiry that there is not yet a precedent recognizing a right to abortion in Article I, § 1. A constitutional right need not have been previously specifically recognized in a judicial decision to be found to exist. *See, e.g., Griswold v. Connecticut*, 85 S. Ct. 1678 (1965) (reversing conviction for violating state law banning use or sale of contraception based on finding that statute violated "penumbral rights of privacy and repose") (citations and internal quotation marks omitted). Even without a prior ruling, as detailed in Petitioners' opening brief, the new Article I, § 30 would materially change Article I, §§ 1, 25, 26 and 28 and therefore each of those changes must be separately presented to voters.[12]

2. The proposed amendment to the rulemaking process on Article III, § 9 substantively alters Article IV, § 2 and the constitutional separation and balance of powers.

The General Assembly indeed concedes the substantive impact of Article III, § 9 on other provisions in the Constitution in advocating that the amendment

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[12] The General Assembly reads into Petitioners' brief a "recognition that statutory rights to abortion will not be impacted," Br. at 42 n.47, but that is not Petitioners' view. The concern expressed in Petitioners' filings is that, unless the right to reproductive freedom is recognized as an inalienable and indefeasible fundamental right, a future legislature may at its whim deny Pennsylvanians this basic right. While statutory rights are certainly important, Pennsylvania women should not be placed in fear that a new legislative session will result in denial of indefeasible reproductive freedom.

"correct[s] an imbalance in the separation of powers." Br. at 45. In this regard, the General Assembly touts its effort to curtail executive regulation through the Regulatory Review Act and grouses at the Governor's exercise of the constitutional right to veto concurrent resolutions disapproving of proposed regulations, *id.* at 41-44, and admits that SB 106 is intended to address what it perceives as "this constitutional power imbalance," *id.* at 44. But it is not up to the General Assembly to declare the proper balance of power and the General Assembly cannot substantively alter the constitutional balance through a proposed amendment that conceals its true impact. The proposed amendment to Article III, § 9 makes multiple constitutional changes without affording an opportunity to vote separately on the changes and as a result violates Article XI, § 1.

3. The amendment to Article VII, § 3 to impose a voter identification requirement substantively alters the constitutional right to "free and equal" elections and the requirement that election laws be uniform.

Again declining to address the constitutional guarantees in Article I, § 5 and Article VII, § 6, the General Assembly asserts that its voter identification requirement in Article VII, § 3 is not defective under Article XI, § 1 because no photograph is needed and "any government issued identification (federal, state, or local) will do" and therefore the proposal "do[es] not sweep so broadly" as the

identification provision struck down in *Applewhite*. Br. at 46-47.[13] This distinction, however, does not solve the problem that imposing a burden on some electors to make a "request" for "valid identification" and provide "confirmation of identity" pursuant to an unspecified process before receiving "valid identification" infringes on the right to free and equal elections guaranteed by Article I, § 5 and the mandate in Article VII, § 6 that all election laws shall be uniform. Voters must be afforded the opportunity to vote separately on whether either of these provisions should be altered to allow for an additional voter qualification that imposes unequal requirements on voters.

4. Requiring election audits by the Auditor General or an Independent Auditor in Article VII, § 15 substantively alters the Court's constitutional authority to decide election contests.

Once again announcing its own unlimited view of legislative power, the General Assembly claims that its proposal to authorize election audits by the Auditor General or an Independent Auditor does not substantively alter the judiciary's authority over election contests conferred by Article VII, § 13 because the General Assembly "is the ultimate decision-maker" in deciding election contests. Br. at 48.

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[13] Article VII, § 1 is not as permissive as the General Assembly suggests on page 47 of its second brief. The amendment defines "valid identification" as "an unexpired government-issued identification, ***unless otherwise provided for by law***." Ex A at 4-5 (emphasis added). The final clause opens the door to additional legislative-imposed burdens on the right to vote which further substantively diminishes the sacrosanct guarantees in Article I, § 5 and Article VII, § 6.

That is not correct. As noted in Petitioners' opening brief at pages 67-69, while Article VII, § 13 authorizes the General Assembly to designate the courts where election contests will be tried and to direct the manner in which contests will be conducted, that same provision mandates that "[t]he trial and determination of contested elections," including contests involving the General Assembly,[14] "shall be by the courts of law." Pa. Const. art. VII, § 13. The General Assembly's proposal to grant to itself unreviewable constitutional authority to dictate how elections and election results will be audited would substantively alter this constitutional grant of authority to the courts in violation of Article XI, § 1.

The General Assembly offers that the Election Code already permits election audits, Br. at 49, but the provision it cites, 25 P.S. § 3031.17, relates only to "a statistical recount of a random sample of ballots," not an audit capable of changing election outcomes. Its proposed audit amendment goes much further and purports to grant *carte blanche* to the General Assembly to "by statute provide for the auditing of elections and election results" which the General Assembly will no doubt later

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[14] The General Assembly claims that it has "the power to make the final determination" and "the final say" in election contests involving its members, Br. at 48 n.50 & n.51, but the statute it cites confers this authority on the courts of common pleas in accordance with the constitutional delegation of authority to the Courts in Article VII, § 13. *See* 25 P.S. § 3401 ("Contested nominations and elections for Senators and Representatives in the General Assembly of this Commonwealth . . . shall be tried and determined by the court of common pleas of the county where the person returned as such shall reside. . . ").

claim is not subject to the gubernatorial veto. The General Assembly's attempt to insulate its prospective legislation from the veto by cloaking it in a constitutional amendment substantively alters the separation of powers, as well as the election contest provision in Article VII, § 13. Article XI, § 1 requires that these changes must be separately presented.

III. CONCLUSION

For the reasons set forth above and in Petitioners' opening brief, the Court should declare SB 106 constitutionally invalid and enjoin further action on the incurably defective amendments in SB 106. All Preliminary Objections should be overruled in their entirety and summary relief should be entered in favor of Petitioners on Counts I through V of the Petition for Review.

Respectfully submitted:

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Date: December 5, 2022

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 requires filing confidential information and documents differently than non-confidential information and documents.

/s/ Daniel T. Brier
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Date: December 5, 2022

WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limit of Pa.R.A.P. 2135(a)(1). Based upon the word count feature of Microsoft Word this document contains 5915 words.

/s/ Daniel T. Brier
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Date: December 5, 2022

PROOF OF SERVICE

I, Daniel T. Brier, hereby certify that I served the forgoing Reply Brief upon all counsel of record via the Court's PACFile eService system, which service satisfies the requirements of Pa.R.A.P. 121.

/s/ Daniel T. Brier
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Date: December 5, 2022