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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

TOM WOLF, *et al.*, Petitioners, v. GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA *et al.*, Respondents.	:	No. 482 M.D. 2022

INTERVENOR-PETITIONERS LEADER JOANNA E. MCCLINTON AND THE DEMOCRATIC CAUCUS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES' REPLY BRIEF IN FURTHER SUPPORT OF PETITIONERS' APPLICATION FOR SUMMARY RELIEF

TABLE OF CONTENTS

I. INTRODUCTION ... 1

II. ARGUMENT ... 4

A. Respondents Concede That Leader McClinton and the House Democratic Caucus Have Standing ... 4

B. Because Leader McClinton and Members of the House Democratic Caucus Have Already Suffered Harm, Their Claims Are Ripe for Judicial Review ... 5

C. The Court is the Sole Arbitrator of Whether the Process the General Assembly Employed to Amend the Pennsylvania Constitution Complied with Article XI, § 1 ... 8

D. In Requiring a Singular Vote of the Five Separate and Distinct Amendatory Provisions Contained in SB 106, the General Assembly Violated Article XI, § 1 ... 10

1. Respondents and Respondent-Intervenors' Arguments that Any Challenge to Logrolling Has Been Waived is Nonsensical ... 12

2. The General Assembly's Interpretation of the Plain Language of Article XI, § 1 Is Incorrect ... 15

3. Respondents' Reliance upon the Interpretation of Other States' Constitutions Should Be Rejected ... 19

E. SB 106's Proposed Amendment Regarding Abortion and Voter Identification are Unconstitutional ... 22

III. CONCLUSION ... 24

TABLE OF AUTHORITIES

Page(s)

Cases

Bergdoll v. Commonwealth,
858 A.2d 185 (Pa. Commw. Ct. 2004), *aff'd*, 874 A.2d 1148 (Pa. 2005) 6

Common Cause/Pennsylvania v. Commonwealth,
710 A.2d 108 (Pa. Commw. Ct. 1998) 8, 9

Costa v. Cortes,
143 A.3d 430 (Pa. Commw. Ct. 2016) 11

In re Estate of Schram,
696 A.2d 1206 (Pa. Commw. Ct. 1997) 4

Fumo v. City of Philadelphia,
972 A.2d 487 (Pa. 2009) 5

Grimaud v. Commonwealth,
865 A.2d 835 (Pa. 2005) 9

Jones v. McClaughry
151 N.W. 210 (Iowa 1915) 22

Kerby v. Luhrs,
36 P.2d 549, 554 (1934) 23

League of Women Voters v. Degraffenreid,
265 A.3d 207 (Pa. 2021) ....*passim*

Mellow v. Pizzingrilli.
800 A.2d 350 (Pa. Commw. Ct. 2002) 9

Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals,
44 A.3d 3 (Pa. 2012) 9

Pennsylvania Prison Soc. v. Commonwealth,
776 A.2d 971, 978 (Pa. 2001) 6, 18

Sprague v. Casey,
550 A.2d 184 (Pa. 1988) 13

Stander v. Kelley
250 A.2d 474 (Pa. 1969 14

Stilp v. Commonwealth,
905 A.2d 918, 948 (Pa. 2006) 9

Tausig v. Lawrence,
197 A. 235 (Pa. 1937) 21

William Penn Sch. Dist. v. Pa. Dep't of Educ.,
170 A.3d 414 (Pa. 2017) 9

Wilson v. Sch. Dist.,
195 A. 90 (Pa. 1937) 13

Commonwealth ex rel. Woodruff v. King,
122 A. 279 (Pa. 1923) 2, 19, 21

Constitutional Provisions

IOWA CONST. art. X, § 1 .... 18, 20

NE. REV. ST. CONST. art. VXI, § 1 .... 18, 20, 21

OHIO CONST. art. XVI, § 1 .... 18, 20, 21

R.I. CONST. art. VIII 18, 20

Pennsylvania Constitution .... *passim*

Other Authorities

S.B. 106, Regular Session 2021-2022, Printer No. 1857 (Pa. 2021) 24, 25

I. **INTRODUCTION**

The General Assembly, Senator Kim Ward and the Senate Republican Caucus (the "Senate Republicans"), and Representative Kerry A. Benninghoff and the Republican House Caucus (the "House Republicans") (collectively, "Respondents") ask this Court to disregard their failure to follow the Pennsylvania Constitution. Instead, Respondents request that this Court accord deference to the General Assembly's actions even as it attempts to ride roughshod over the constitutionally-mandated process required to amend the fundamental law of this Commonwealth. However, the Pennsylvania Supreme Court has been clear: it is the duty of the courts "to ensure scrupulous adherence to the provisions of Article XI, § 1," which is "of utmost importance as these provisions are indispensable for the stability of our peaceful, democratic system of governance." *League of Women Voters v. Degraffenreid*, 265 A.3d 207, 227 (Pa. 2021) (citation omitted). Thus, this Court should reject Respondents' efforts to shield their constitutional violations from judicial review.

In July 2022, the General Assembly violated the clear mandates of Article XI, § 1 when it only permitted Members of the Democratic Caucus of the Pennsylvania House of Representatives (the "House Democratic Caucus") and House Democratic Leader, State Representative Joanna E. McClinton ("Leader McClinton") to cast singular votes on SB 106, a bill that contained five separate

and distinct amendatory provisions to the Pennsylvania Constitution. However, as demonstrated in Leader McClinton and the House Democratic Caucus' opening brief, the plain language of Article XI, § 1 guarantees legislators the right to vote on each of the five amendatory provisions separately. Therefore, this Court should declare that the General Assembly violated the Pennsylvania Constitution and render its action on SB 106 void.

The standing of Leader McClinton and the House Democratic Caucus to assert that their rights as legislators to cast constitutionally guaranteed votes were violated is not in dispute. Indeed, Respondents either concede or do not dispute the standing of Leader McClinton and the House Democratic Caucus. Moreover, because the constitutional violation occurred on July 8, 2022 – the day on which the General Assembly passed SB 106 – the General Assembly caused Leader McClinton and the House Democratic Caucus harm by denying them the opportunity to present the electorate with their voting record on each amendment, their claims are ripe for review. The Pennsylvania Supreme Court has been unequivocal regarding the purpose of Article XI, § 1's two-vote requirement: to provide electors "an abundant opportunity" to determine whether to return their elected officials to office prior to a second vote on the proposed constitutional amendments. *See Commonwealth ex rel. Woodruff v. King*, 122 A. 279, 282–83 (Pa. 1923). Lacking any response concerning the purpose of the two-vote

requirement, Respondents have chosen to ignore this authority in their submissions to this Court.

Respondents' arguments on their strained interpretation of Article XI, §1 fare no better. Respondents seek to invoke the practice of the Legislature when passing constitutional amendments. While practice is beside the point (as how could the adoption of an unconstitutional practice ever make the practice constitutional?), the practice in the overwhelming number of instances is to present a single amendment in a bill and not logroll multiple amendments together. Nor does Respondents' attempt to invoke the interpretation of other states' constitutional provisions fare any better. None of the constitutional provisions to which Respondents cite are identical to Article XI, § 1. Rather, they all differ in fundamental ways. At bottom, the language and intent behind Pennsylvania's provisions are clear, and this Court should enforce them.

SB 106 is further constitutionally infirm as the amendatory provisions contained therein are unconstitutional in their own right. Specifically, the proposed amendments concerning abortion and voter identification also violate Article XI, § 1's prohibition on logrolling. These amendatory provisions should be declared unconstitutional, and thus void, *ab initio*. For these reasons, this Court should grant Petitioners' Application for Summary Relief.

II. ARGUMENT

A. Respondents Concede That Leader McClinton and the House Democratic Caucus Have Standing

Respondents have failed to assert any challenge to Leader McClinton and the House Democratic Caucus' standing to bring the claims contained in the Petition for Relief.[1] None of the Preliminary Objections assert that the Petition for Relief should be dismissed due to a lack of standing on the part of Leader McClinton and the House Democratic Caucus. In fact, the Senate Republicans expressly concede that Leader McClinton and the House Democratic Caucus have standing to bring Count I.[2] *See* Senate Repub. Reply Br. at pp. 8-9.

The reason why Respondents fail to object to Leader McClinton and the House Democratic Caucus' standing is plain: Respondents know that such an argument would not hold water. Here, Leader McClinton and the House Democratic Caucus ask this Court to uphold their right as legislators to cast a vote

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[1] For the reasons stated herein, as well as in Leader McClinton and the House Democratic Caucus' Brief in Support of the Petition for Review and in Opposition to the Preliminary Objections Filed by Respondent and Intervenor-Respondents filed on November 10, 2022, Respondents' Preliminary Objections should likewise be overruled.

[2] Although the Senate Republicans assert that their failure to object to Leader McClinton and the House Democratic Caucus' Petition for Intervention does not waive their ability to contest standing, it is undeniable that Respondents have not challenged Leader McClinton and the House Democratic Caucus' standing in any responsive pleading to date. Indeed, Respondents' Preliminary Objections are completely silent with regard to Intervenor-Petitioners' standing. As such, Respondents have waived their ability to contest Leader McClinton and the House Democratic Caucus' standing. *In re Estate of Schram*, 696 A.2d 1206, 1209 n. 4 (Pa. Commw. Ct. 1997) ("[A] party may waive its opportunity to contest the standing of another party by not raising the issue in a timely manner.").

on each amendatory provision contained in SB 106, as Article XI, § 1 mandates. In fact, this Court has acknowledged that "[t]he instant matter concerns. . . [the] legislative power to propose and vote on constitutional amendments, which is set forth in article XI, section 1." October 26, 2022 Opinion on Petitions for Intervention (hereinafter the "Opinion") at 20. This is the exact type of situation in which the Pennsylvania Supreme Court has found legislative standing to exist. *See Fumo v. City of Philadelphia*, 972 A.2d 487, 502 (Pa. 2009) (finding legislative standing where the legislators brought suit to "uphold their right as legislators to cast a vote"); *see also* Opinion at 20-21 (noting that "*Fumo* and *Markham* . . . stand for the proposition that legislative standing is recognized in cases in which the voting process at issue or a diminution or deprivation, or even usurpation of a legislator's power or authority to act is alleged."). Thus, Leader McClinton and the House Democratic Caucus have standing because their claims relate to the voting process and assert that the General Assembly denied them of the right guaranteed in Article XI, § 1 to cast a vote on each individual amendatory provision contained in SB 106.

B. Because Leader McClinton and Members of the House Democratic Caucus Have Already Suffered Harm, Their Claims Are Ripe for Judicial Review

Respondents essentially argue that any constitutional infirmity in the process that the General Assembly followed is immune from judicial review unless and

until an amendatory provision is reduced to a ballot question or becomes part of the Pennsylvania Constitution. *See* Gen. Assembly Reply Br. at pp. 10-12; Senate Repub. Reply Br. at pp. 9-10; House Repub. Reply Br. at p. 16. Yet, Respondents are not entitled to have their actions insulated from review. Rather, as the Pennsylvania Supreme Court "has repeatedly stated . . . 'nothing short of literal compliance'" with the detailed process contained in Article XI, § 1 "for the amendment of the fundamental law of our Commonwealth will suffice." *Bergdoll v. Commonwealth*, 858 A.2d 185, 193 (Pa. Commw. Ct. 2004), *aff'd*, 874 A.2d 1148 (Pa. 2005) (quoting *Pennsylvania Prison Soc. v. Commonwealth*, 776 A.2d 971, 978 (Pa. 2001) (plurality)). Thus, the Pennsylvania Supreme Court has been clear: ***courts must carefully scrutinize the process employed by the General Assembly to ensure its strict compliance with Article XI, § 1.***

Critically, in asserting that Leader McClinton and the House Democratic Caucus' claims are not ripe, Respondents choose to simply ignore the fact that the General Assembly's actions ***have already caused them harm*** – and are likely to imminently cause further harm absent resolution of this dispute.[3] Instead, Respondents ask this Court to turn a blind eye to a constitutional violation that

[3] The General Assembly boldly asserts that "Petitioners allege no harm to their own legal interest. Instead they allege harm only to *voters*." Gen. Assembly Reply Br. at 10 (emphasis in original). This is simply not true. Leader McClinton and the House Democratic Caucus have been clear that they have suffered harm directly, as discussed *supra*.

occurred on July 8, 2022, the day that the General Assembly forced Leader McClinton and the House Democratic Caucus to cast singular votes on SB 106 in violation of Article XI, § 1. The constitutionally-mandated process calls for the yeas and nays to be recorded on each amendment and then for the electorate to have the decision, based on that voting record, to return or not return each of the legislators running for re-election to office, at which point the elected legislators can carry out the will of the people by voting on each amendment for a second time. On November 8, 2022, Leader McClinton and members of the House Democratic Caucus were on the ballot for re-election. The General Assembly's actions prohibited Leader McClinton and members of the House Democratic Caucus from making their "yeas" and "nays" on each of the separate and distinct amendatory provisions contained in SB 106, thereby preventing them from making their stances known on these issues to their constituencies.[4] Moreover, if this dispute between the parties is not resolved, another logrolled bill with these amendments is likely to arise in the next legislative session and Leader McClinton and the House Democratic Caucus could once again suffer harm by being unable to vote on the amendments individually. Therefore, because Leader McClinton and

[4] That separate amendatory provisions cannot be logrolled into a single bill makes sense because the voters may have differing viewpoints on each of the amendments and may attach differing levels of importance to the amendments, and thus may decide whether to return their legislators to office based on how they voted on a particular amendment.

the House Democratic Caucus have suffered, continue to suffer, and are likely to suffer again, harm as a result of the General Assembly's violation of Article XI, § 1, the claims are ripe for judicial review.[5]

C. The Court is the Sole Arbitrator of Whether the Process the General Assembly Employed to Amend the Pennsylvania Constitution Complied with Article XI, § 1

Shockingly, the General Assembly asserts that "the procedure of proposing constitutional amendments is exclusively committed to the legislature under Article XI," and therefore, the claims in the Petition for Review "lie outside the reach of the judiciary as non-justiciable political questions." Gen. Assembly Reply Br. at 13. However, this Court has been clear: while the General Assembly "has exclusive power over its internal affairs and proceedings," that power "does not give the General Assembly the right to usurp the judiciary's function as ultimate interpreter of the Constitution." *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 118 (Pa. Commw. Ct. 1998) (citations omitted). "In fact, it is the duty of the courts to invalidate legislative action that is repugnant to the

[5] Indeed, Respondents' repeated assertions that Petitioners seek an "advisory opinion" are a red herring. Leader McClinton and the House Democratic Caucus ask this Court to invalidate as unconstitutional the process that the General Assembly employed in passing SB 106 because that process violated the express provisions in Article XI, § 1. And, with regard to the proposed amendments concerning abortion and voter identification contained within SB 106, Leader McClinton and the House Democratic Caucus assert that the provisions further violate Article XI, § 1 in that they further impermissibly logroll amendatory provisions.

Constitution." *Id.* (citations omitted). Thus, the ultimate power and authority to interpret the Pennsylvania Constitution, including the mandates of Article XI, § 1 concerning the procedures the General Assembly must follow, lies with the Judiciary.[6] *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 7 (Pa. 2012) (quoting *Stilp v. Commonwealth*, 905 A.2d 918, 948 (Pa. 2006)) ("The General Assembly cannot displace our interpretation of the Constitution because 'the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court.'").

In support of their untenable position that the Petition for Review should be dismissed as a nonjusticiable political question, Respondents rely upon *Mellow v. Pizzingrilli*. 800 A.2d 350, 359 (Pa. Commw. Ct. 2002). However, in *Mellow*, this Court recognized that whether the General Assembly complied with the "express requirements" contained in Article XI, § 1 is subject to judicial review.[7] *Id.* at 359

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[6] The Pennsylvania Supreme Court has been wary of the use of the political question doctrine, noting "[r]esponsive litigation rhetoric raising the specter of judicial interference with legislative policy does not remove a legitimate legal claim from the Court's consideration; the political question doctrine is a shield and not a sword to deflect judicial review." *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 438 (Pa. 2017).

[7] Respondents reliance upon *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005) is further misplaced. *Grimaud*, which relied upon this very same language from *Mellow*, recognizes that Article XI, § 1 contains express requirements. *Id.* at 847. Here, the question before the Court does not invoke the General Assembly's "internal procedures"; rather, Leader McClinton and the House Democratic Caucus ask the Court to determine whether the General Assembly strictly complied with the process that Article XI, § 1 mandates.

(emphasis added) ("***Other than the express requirements set forth in Article XI***, the procedure to be used in proposing such amendments is exclusively committed to the legislature."). This is exactly what Leader McClinton and the House Democratic Caucus ask this Court to do: declare that the General Assembly failed to comply with the "express requirements set forth in Article XI" by mandating a singular vote on SB 106. Thus, this Court should reject Respondents' attempts to strip it of its authority to interpret the Pennsylvania Constitution and its obligation to ensure strict compliance with Article XI, § 1's mandated process.

D. In Requiring a Singular Vote of the Five Separate and Distinct Amendatory Provisions Contained in SB 106, the General Assembly Violated Article XI, § 1

As Leader McClinton and the House Democratic Caucus articulated in their opening brief, Article XI, § 1 mandates the process that the General Assembly must follow to amend the Constitution. *See* House Democrats Br. at pp. 15-29. Specifically, Article XI, §1 provides that "[a]mendments to this Constitution may be proposed in the Senate or 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***." Article XI, § 1 (emphasis added). This language, coupled by Article XI, § 1's requirement that "[w]hen two or more amendments shall be submitted they shall be voted upon separately" mandates exactly what it says—

separate votes on each amendment. A singular vote on a bill with multiple amendments contained therein does not comport with the requirements of Article XI, § 1 and is, therefore, unconstitutional.[8]

Respondents' response is to cite a few instances where the Legislature has in the past put more than one amendment in a bill and argue that this supposed practice of the Legislature somehow estops Leader McClinton and the House Democratic Caucus from complaining about it, listing a parade of horribles that would happen if the Court were to insist now on compliance with the Constitution. Not only are Respondents wrong about the practice of the Legislature (which has been to overwhelmingly pass bills with a single amendment), but no party is asking this Court to decide the constitutionality of the process followed with respect to other bills. What is more, the argument has no legal merit. The failure to follow the Pennsylvania Constitution in the past does not excuse the present failure. In short, this Court should reject Respondents' arguments that any challenge to this process has been somehow excused. The lack of a prior challenge to the

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[8] The House Republicans cite *Costa v. Cortes*, 143 A.3d 430 (Pa. Commw. Ct. 2016), for the proposition that "Article XI, section 1 of the Pennsylvania Constitution vests within the General Assembly the *exclusive* authority to determine the 'time' and 'manner' amendments are to be submitted to qualified electors for approval." *Id.*at 436 (emphasis in original). However, the *Costa* court said no such thing. The court stated: "[t]his case does not concern [the] legal validity of the processes and procedures followed by the General Assembly, the Secretary, and the Attorney General of Pennsylvania in securing Proposed Constitutional Amendment 1's place on the [] Ballot." *Id.* at 433. Thus, it is not controlling of the question here, to wit, whether the General Assembly complied with the process Article XI, § 1 mandates.

constitutionality of legislative action is not a defense.

Further, Respondents' arguments that Article XI, § 1's plain language permits their actions relies upon a strained and improper reading of the Article. Rather, the plain language of the Article provides that where separate amendatory provisions are contained in a singular bill, votes on each individual provision may be recorded separately but contemporaneously. And although Respondents choose to ignore the historical significance of this provision, this interpretation is consistent with the Article's spirit and intent. Lastly, this Court should not rely upon other states' interpretations of constitutional provisions that are fundamentally distinct from Article XI, § 1.

1. Respondents and Respondent-Intervenors' Arguments that Any Challenge to Logrolling Has Been Waived is Nonsensical

The Senate Republicans brazenly argue that simply because the General Assembly has on three prior occasions approved joint resolutions that proposed multiple amendments to the Pennsylvania Constitution, its actions are immune from review here. *See* Senate Repub. Reply Br. at p. 3. However, this argument makes no sense, as illustrated by an everyday example: Drivers violate the law every day when they speed down the Pennsylvania Turnpike. Yet, no one would ever argue that they should be excused from receiving a ticket simply because they had previously gotten away with speeding. (Even more absurdly, no one would

fear that enforcing the law would necessitate looking back at prior instances that had gone undetected.) Put another way, that one broke the law before without any repercussion does not somehow render that same conduct legal in the future. The Pennsylvania Supreme Court has firmly rejected this type of an argument with regard to constitutional violations. *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (permitting a delayed challenge to the constitutionality of an election, holding that "laches and prejudice can never be permitted to amend the Constitution."); *see also Wilson v. Sch. Dist*., 195 A. 90, 99 (Pa. 1937) ("We have not been able to discover any case which holds that laches will bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives. To so hold would establish a dangerous precedent, the evil effect of which might reach far beyond present expectations."). Thus, this Court should reject the Senate Republicans' argument that review of their actions with regard to SB 106 is foreclosed by past practice.

Moreover, contrary to Respondents' assertions, past practice overwhelmingly supports Leader McClinton and the House Democratic Caucus' claims. Indeed, although the Pennsylvania Constitution has been amended 43 times since 1968, the Senate Republicans point to only six amendments that

resulted from three bills that contained more than one amendatory provision. Because the vast majority of amendments have been passed in standalone bills, past practice does not support Respondents' argument that the process followed here can be excused by past practice. Rather, past practice supports Leader McClinton and the House Democratic Caucus' claims that the General Assembly's actions were unconstitutional.

In a further attempt to bolster their argument that "historical practice" supports the General Assembly's actions, the Senate Republicans rely upon *Stander v. Kelley* to argue that the Pennsylvania Constitution is "silent" on the separate vote requirement and, thus, past practice demonstrates that the manner of voting on proposed amendments to the Pennsylvania Constitution should be left to the discretion of the legislature. 250 A.2d 474 (Pa. 1969); *see* Senate Repub. Reply Br. at pp. 6-7. In *Stander*, however, the Court addressed whether the use of a constitutional convention to amend the Pennsylvania Constitution was permissible, as the Pennsylvania Constitution is silent on their use. The Court, however, did not address legislatively-advanced amendments. 250 A.2d at 479. In finding that the Pennsylvania Constitution permits the use of constitutional conventions, the Court held that "so long as a Constitutional Convention is not expressly prohibited by the then existing Constitution, it represents a proper manner and method in which the citizens of Pennsylvania *may initiate* an

amendment of their Constitution." *Id.* (emphasis in original). Here, however, Article XI, § 1 is not silent. Rather, it explicitly instructs the legislature to record the votes of the individual legislators on individual amendments.

The Senate Republicans also try to seize upon the relief that Petitioners seek in the Petition for Relief to assert that should this Court grant the Petition, "this Court will also impliedly hold that [five] popularly approved, current provisions of the Constitution are unlawful." *See* Senate Repub. Reply Br. at pp. 1-2; *see also id.* at pp. 2-3 (arguing, without basis, that petitioners "are asking this Court to diagnose a fatal illness in multiple provisions of the current Constitution"). This, however, is a strawman. Those provisions are not at issue in this case. Moreover, Petitioners solely seek prospective relief here with regard to SB 106. No other constitutional amendments or bills are at issue. Thus, Respondents' hyperbole should be rejected.

2. The General Assembly's Interpretation of the Plain Language of Article XI, § 1 Is Incorrect

The General Assembly's statutory construction argument adopts an incorrect reading of this language in Article XI § 1: "[a]mendments to this Constitution may be proposed in the Senate or 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." *See* Gen. Assembly Reply Br. at pp. 20-23. Contrary to the plain reading of Article XI, the General Assembly argues that the phrase "amendment or amendments" functions as two separate nouns to which the modifier "shall be entered on their journals with the yeas and nays taken thereon" applies. *Id.* From there, the General Assembly jumps to the conclusion that Article XI contemplates and permits the legislature to cast a single vote on multiple "amendments." *Id.* This interpretation lacks merit. Rather, the plain language of Article XI, § 1 provides that the legislature may record the votes on one or more amendments contemporaneously.

The phrase "amendment or amendments" is used at numerous points throughout Article XI — including in reference to the submission of such to the electorate. Namely, Article XI states that, once "amendment or amendments" have passed the legislature twice and been properly recorded, "such proposed amendment or amendments shall be submitted to the qualified electors of the State." If the General Assembly's interpretation were to apply throughout Article XI, it would stand to reason that multiple amendments may be submitted to electors for a single vote thereon. But, of course, the General Assembly acknowledges that that would not be constitutional. Gen. Assembly Reply Br. at p. 26, n. 35. Thus, that phrase "such proposed amendment or amendments shall be submitted to the qualified electors of the State" must mean that multiple

amendments may be presented as different ballot questions to the electorate contemporaneously. Therefore, in order to adopt a reading that is consistent throughout the provision, the phrase "such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon" must be read as meaning that multiple votes on different amendments may be recorded separately but contemporaneously. Interpreting Article XI, § 1 to require a separate vote on each "amendment or amendments" is the only interpretation that is consistent with the use of the phrase "amendment or amendments" throughout Article XI.

Moreover, the General Assembly fails to address the point aptly made by Governor Wolf and Acting Secretary Chapman ("Petitioners"): that Article XI § 1 requires the recording of yea and nay votes for "amendments or amendments," not bills or resolutions. Petitioners Br. at pp. 32-33. The use of the word "amendment" as opposed to "bill" is meaningful – particularly as the word "bill" is used elsewhere in the Pennsylvania Constitution and the drafters opted not to use it in Article XI. *See, e.g.*, Article XI § 3 (Form of bills). If the drafters intended to allow for the legislature to be able to vote on a single bill containing multiple amendments, they could have used the word "bill" – their use of the word

"amendment" thus clarifies that was not their intent.[9]

Lastly, Petitioners' interpretation of Article XI, § 1 is the only interpretation that is consistent with the "spirit behind [the words]'" and "historical circumstances that gave rise to the constitutional provision[.]" *League of Women Voters*, 265 A.3d at 228 (citation omitted); *see also* House Democrats Br. at pp.23-25. Although the Senate Republicans would give the spirit and intent behind Article XI, § 1 short shrift, the Pennsylvania Supreme Court has long recognized that in interpreting the Pennsylvania Constitution's words as an average person would understand them, a court must look to "the spirit behind them." *League of Women Voters*, 265 A.3d at 228 (quoting *Prison Soc'y*, 776 A.2d at 978). Here, Article XI, § 1's purpose was to give electors "an abundant opportunity to be advised concerning the proposed amendment and to ascertain the policy of candidates for the general assembly to be 'next afterwards chosen,' because they would have to pass upon the proposed amendment when it came before the general

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[9] Notably, the "amendment or amendments" language to which Respondents point distinguishes the Pennsylvania Constitution from other states' constitutions to which Respondents point. *See* IOWA CONST. art. X, § 1 ("such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon . . ."); NE. REV. ST. CONST. art. VXI, § 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 ("Such propositions for amendment shall be published in the newspapers . . . with the names of all the members who shall have voted thereon, with the yeas and nays. . ."). This difference is yet another reason why Pennsylvania is notably different from the states Respondents argue do not require the legislature to vote on amendments separately. *See infra* Section II.D.3.

assembly a second time." *Commonwealth ex rel. Woodruff v. King*, 122 A. 279, 282–83 (Pa. 1923). It is only the recording of votes on each proposed amendment that would give the electorate a full view of how a candidate would vote thereon, as opposed to how the candidate would vote on a logrolled bill containing both popular and unpopular provisions. Not only do Respondents ignore Article XI, § 1's plain language, but their proposed interpretation of the Article would frustrate its purpose – ensuring that the electorate is informed on how its representatives voted on the proposed amendments. Therefore, this Court should reject Respondents' interpretation of Article XI, § 1 and find that the General Assembly violated the Pennsylvania Constitution when it failed to hold individual votes on each separate and distinct amendatory provision.

3. Respondents' Reliance upon the Interpretation of Other States' Constitutions Should Be Rejected

In an attempt to bolster their position, the General Assembly and the Senate Republicans ask this Court to rely upon authority from up to five other jurisdictions[10] where courts have permitted the practice of logrolling. *See* Gen. Assembly Reply Br. at pp. 18-20; Senate Repub. Reply Br. at pp. 4-6. However, in doing so, they gloss over the fact that the constitutional provisions upon which

[10] The Senate Republicans urge this Court to find persuasive decisions from Iowa, Rhode Island, Idaho, and Ohio, Senate Repub. Reply Br. at pp. 4-5, whereas the General Assembly asks that the Court consider cases from these states as well as Nebraska. Gen. Assembly Reply Br. at p. 19.

these courts have relied differ from Article XI, § 1 in significant ways.

This Court should reject the General Assembly and the Senate Republicans' reliance upon decisions permitting logrolling elsewhere because the separate voting requirements contained in these states' constitutions are distinctly different from the requirement contained in Article XI, § 1. Indeed, the Rhode Island Constitution, to which the Senate Republicans direct this Court, does not even contain a separate vote requirement. *See* Senate Repub. Reply Br. at p. 5. And, where the states do have a separate voting requirement, these states all explicitly reference the separate voting requirement solely in the context of the submission of ballot questions to the electorate. IOWA CONST. art. X, § 2 ("If two or more amendments shall be submitted at the same time, they shall be submitted in such manner ***that the electors shall vote for or against each of such amendments separately***.") (emphasis added); IDAHO CONST. art. XVI, § 1 ("If two or more amendments are proposed, they shall be submitted in such manner ***that the electors shall vote for or against each of them separately.***") (same); NE. CONST. art. XVI, § 1 ("When two or more amendments are submitted at the same election, they shall be so submitted as ***to enable the electors to vote on each amendment separately***.") (same); OHIO CONST. art. XVI, § 1 ("When more than one amendment shall be submitted at the same time, they shall be so submitted ***as to enable the electors to vote on each amendment, separately.***") (same). These provisions lie in stark

contrast to the language of Article XI, §1 of the Pennsylvania Constitution. Article XI, § 1 plainly does not specify that only the electors' votes on constitutional amendments should be separate. Rather, Article XI, § 1 both provides, as discussed *supra*, that the "amendment or amendments" must be voted upon separately and then generally states that "[w]hen two or more amendments shall be submitted they shall be voted upon separately" without directly linking this requirement to the electorate. PA. CONST. art. XI, § 1.

Moreover, several of the states to which Respondents refer do not even have a process wherein the legislature must vote on proposed amendments twice. *See* IDAHO CONST. art. XVI, § 1; NE. CONST. art. XVI, § 1; OHIO CONST. art. XVI, § 1. This is obviously distinguishable from our Commonwealth, where the process for our legislature having to approve proposed amendments twice is designed specifically to give electors "an abundant opportunity to be advised concerning the proposed amendment and to ascertain the policy of candidates for the general assembly to be 'next afterwards chosen,' because they would have to pass upon the proposed amendment when it came before the general assembly a second time." *Commonwealth ex rel. Woodruff v. King*, 122 A. 279, 282–83 (Pa. 1923); *see also Tausig v. Lawrence*, 197 A. 235, 238 (Pa. 1937) ("[T]he intention of [the Article] was to afford the electorate abundant opportunity to be advised of proposed amendments and ascertain the attitude of the candidates for election to the General

Assembly 'next afterwards chosen' to the amendments.").

The only case that Respondents rely on from a jurisdiction that observes a two-session amendment procedure, *Jones v. McClaughry*, also misses the mark. 151 N.W. 210 (Iowa 1915); *see* Gen. Assembly Br. p. 19 n.26; Senate Repub. Br. pp. 5 n.3, 12. There, legislators' objections to specific resolutions in the joint resolution *had* been duly recorded in the legislative journals. *See, e.g.*, *id.* at 212 (quoting legislative journal) ("Senator Russell of Jones moved to strike out all except the two first resolutions, which motion was lost."). Thus, the case is inapposite.

Therefore, given the crucial distinctions between these constitutional provisions, this Court should reject the General Assembly and the Senate Republicans' reliance on authority from these jurisdictions.

E. SB 106's Proposed Amendment Regarding Abortion and Voter Identification are Unconstitutional

As a threshold matter, because Leader McClinton and the House Democratic Caucus have established that the General Assembly violated Article XI, § 1 by mandating a singular vote on SB 106, the Court need not even reach Petitioners' arguments regarding the individual amendatory provisions contained therein. However, even if the Court were to reach these arguments, Petitioners have established that the amendatory provisions concerning abortion and voter identification are unconstitutional on their face as they, too, impermissibly logroll

multiple changes to the Pennsylvania Constitution.[11]

The General Assembly asserts that the "components" of the proposed amendment concerning abortion, Article I, § 30, "work towards one singular objective – to solidify that any right to abortion is purely statutory and does not emanate from the Constitution." Gen. Assembly Reply Br. at p. 30. The General Assembly further boldly argues that there is an "obvious interrelatedness between the rights to abortion and taxpayer-funded abortion[.]" Gen. Assembly Reply Br. at p. 31. However, interrelatedness alone is not sufficient. Rather, the test is whether the "proposed amendment . . . when viewed together, ***form[s] an interlocking package necessary to accomplish one overarching objective, such that the amendment 'stand[s] or falls[s] as a whole***.'" *League of Women Voters*, 265 A.3d at 237 (emphasis added) (quoting *Kerby v. Luhrs*, 36 P.2d 549, 554 (1934)). "If any of the multiple changes in a proposed amendment are independent of others and could stand alone" they must be voted on separately. *Id.*

Here, whether an individual has a right to a taxpayer funded abortion is separate and distinct from whether an individual has a more general right to abortion. These two changes to the Pennsylvania Constitution could clearly

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[11] To be clear, even if the proposed amendments concerning abortion and voter identification had been proposed in individual bills, Petitioners arguments would remain the same—these amendatory provisions violate Article XI, § 1 as they impermissibly logroll separate and distinct amendments into one.

standalone, and need not "stand or fall as a whole," as *League of Women Voters* requires.

Equally as problematic are the proposed changes regarding voter identification. This provision contains as a qualification to vote that every voter "provide a valid identification at each election. . . ." S.B. 106, Regular Session 2021-2022, Printer No. 1857 (Pa. 2021). In separate subsections, it also requires: (1) an elector voting in person to "present a valid identification"; (2) an elector voting via mail-in ballot to "provide proof of a valid identification with his or her ballot"; (3) a voter without a valid identification shall be provided one "upon request and confirmation of identity"; and (4) that a valid identification "means an unexpired government-issued identification, unless otherwise provided for by law." *Id*. Each and every one of these provisions could rise or fall on its own, and therefore, fail to pass the test articulated in *League of Women Voters*. Therefore, Count V of the Petitioners' Application for Summary Relief should be granted and these provisions contained within SB 106 should be declared void.

III. CONCLUSION

For the foregoing reasons, Leader McClinton and the House Democratic Caucus request that the Court grant the Petitioners' Application for Summary Relief, and render any further action on the amendatory provisions contained in SB 106 void.

Dated: December 5, 2022

/s/ Leslie E. John

Leslie E. John
john@ballardspahr.com
Emilia McKee Vassallo
mckeevassalloe@ballardspahr.com
Elizabeth V. Wingfield
wingfielde@ballardspahr.com
Erin Fischer
fischere@ballardspahr.com
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: 215.665.8500
Facsimile: 215.864.8999

Attorneys for Intervenor-Petitioners, Representative Joanna McClinton and the Democratic Caucus of the Pennsylvania General Assembly

WORD COUNT CERTIFICATION

I hereby certify that the above brief complies with the word count limit of Pa.R.A.P. 2135. Based on the word count feature of the word processing system used to prepare this brief, this document contains 6,028 words, exclusive of the cover page, certificates, and the signature block. *Id.* at 2135(b).

Date: December 5, 2022

/s/ Elizabeth V. Wingfield
Elizabeth V. Wingfield
BALLARD SPAHR, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: 215.665.8500
Facsimile: 215.864.8999
WingfieldE@ballardspahr.com

Counsel for Representative Joanna McClinton and the Democratic Caucus of the Pennsylvania General Assembly

ATTORNEY VERIFICATION

I, Leslie E. John, verify and affirm that I am counsel to the Pennsylvania House Democratic Caucus in the within action, that as such, I am hereby authorized to execute this Verification, and that the statements made in the foregoing Reply are true and correct to the best of my knowledge, information and belief. I understand that any false statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904, relating to unsworn falsification to authorities. I am making this verification because Leader Joanna E. McClinton is presently unavailable. Appropriate substitute verification, signed by Leader Joanna E. McClinton in her capacity as a Representative and as Leader of the House Democratic Caucus, will be provided promptly.

Dated: December 5, 2022

/s/ Leslie E. John

Leslie E. John
BALLARD SPAHR, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: 215.665.8500
Facsimile: 215.864.8999
johnl@ballardspahr.com

Counsel for Representative Joanna McClinton and the Democratic Caucus of the Pennsylvania General Assembly

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.

Date: December 5, 2022

/s/ Elizabeth V. Wingfield
Elizabeth V. Wingfield
BALLARD SPAHR, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
T: (215) 864-8128
F: (215) 864–8999
WingfieldE@ballardspahr.com

Counsel for Representative Joanna McClinton and the Democratic Caucus of the Pennsylvania General Assembly