

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Docket No. 482 MD 2022

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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.*

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**BRIEF OF AMICUS CURIAE,  
PENNSYLVANIA BUDGET AND POLICY CENTER,  
IN SUPPORT OF PETITIONERS**

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## INTRODUCTION

This Court should enter a judgment in the Petitioners' favor in this case, which concerns the General Assembly of Pennsylvania's anti-democratic end-run around the exacting process required to amend our founding charter through Senate Bill 106 ("SB 106"). Anything less than strict adherence to that process violates Article XI, Section 1 of the Pennsylvania Constitution. SB 106 does just that, embodying the General Assembly's hasty and unlawful attempt to attain legislative goals by way of misguided constitutional amendment.

While in its original form, SB 106 was a proposed constitutional amendment to change how the Commonwealth's Lieutenant Governor is selected. However, on the eve of passage, SB 106 was suddenly amended to include several other unrelated constitutional amendments. The proposed amendments would:

- establish new Voter ID requirements that would potentially disenfranchise tens of thousands of Pennsylvanians;
- destroy the separation of powers and checks and balances by allowing the General Assembly to reject regulations made by the governor by a bare majority vote, rather than by a two-thirds vote as currently required by the Constitution, and by limiting the effect of executive orders and proclamations to 21 days without approval of the General Assembly;
- vest power in the Auditor General to conduct an audit of each election; and
- declare that the Pennsylvania Constitution does not provide a right to abortion, generally, or to taxpayer-funded abortion, specifically.

S.B. 106, 2021-2022 Reg. Sess. (Pa. 2022).

While consolidating these amendments into a single resolution was constitutionally unsound for the reasons discussed, *infra*, the Pennsylvania Budget and Policy Center (“PBPC”) has particular concern about the proposed amendment allowing for an audit of elections by the State’s Auditor General when the political party in power is dissatisfied with the results (hereinafter the “Election Audit Amendment”).

The Election Audit Amendment proposed in SB 106 is flawed in three respects:

First, it violates Article XI, Section 1 of the Pennsylvania Constitution for reasons already set forth in the Brief filed by League of Women Voters of Pennsylvania, Sajda Adams, and Simone Roberts, insofar as it was part of a broad-sweeping resolution, which deprived voters of knowing whether their representatives supported each amendment.

Second, it violates Article XI, Section 1 because it substantially affects already existing constitutional authority granted to the courts to review and determine contested elections. Specifically, the Pennsylvania Constitution explicitly directs the “trial and determination of contested elections of electors of President and Vice-President, members of the General Assembly, and of all public officers, whether State, judicial, municipal or local, and contests involving questions submitted to the electors at any election” to “the courts of law, or by one or more of the law judges.” Article VII, §13.

Third, it violates principles of separation of powers.

For all of these reasons, as more fully explained below, this Court should and must decide this matter in favor of the Petitioners.

## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Pennsylvania Budget and Policy Center (“PBPC”) is a nonpartisan, statewide policy research project that provides independent and credible analysis on state tax, budget, and related policy matters. PBPC works towards the goal of an equitable Pennsylvania.

PBPC has a demonstrated interest in the substantive issues raised in SB 106 and the Pennsylvania General Assembly’s prior efforts to alter Pennsylvania’s current structure of government and its constitutionally established democratic structure. Evincing that interest, PBPC has issued a series of publications not only on the issues Senate Bill 106 addresses, but also on the misuse of constitutional amendments to accomplish legislative goals:

- Marc Stier, *On HB 1596: The Constitutional Amendment Grab-Bag Bill*, Oct. 19, 2021, available at [https://krc-pbpc.org/research\\_publication/on-hb1596-the-constitutional-amendment-grab-bag/](https://krc-pbpc.org/research_publication/on-hb1596-the-constitutional-amendment-grab-bag/);
- Marc Stier, *Speaker Cutler’s Attack on the Principles of the Founding Fathers*, Nov. 11, 2021, available at [https://krc-pbpc.org/research\\_publication/speaker-cutlers-attack-on-the-principles-of-the-founding-fathers/](https://krc-pbpc.org/research_publication/speaker-cutlers-attack-on-the-principles-of-the-founding-fathers/)
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- Marc Stier, *The Ten Worst PA Legislative Initiatives of 2021*, Dec. 23, 2021, available at <https://krc->

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- Marc Stier, *The GOP Design*, Feb. 10, 2022, available at [https://krc-pbpc.org/research\\_publication/the-gop-design/](https://krc-pbpc.org/research_publication/the-gop-design/).

PBPC has a strong interest in this matter. Of particular interest to PBPC is the Election Audit Amendment, which was added to SB 106 roughly six months after Governor Wolf vetoed prior legislative attempts to require voter identification and election audits. *See* House Bill 1300 of 2021 (vetoed June 30, 2021). The Election Audit Amendment has the potential to “create a division within the executive branch that could be exploited to overturn the will of the voters in future elections, including the presidential election in 2024.” Stier, *Overview: SB 106 Is Legislative Tyranny in Action*. It also directly conflicts with the constitutional authority granted to the courts to review and determine contested elections. At its core, the Election Audit Amendment violates fundamental rights provided to the people under natural law, the Pennsylvania Constitution, and fundamental tenets of separation of powers.

Beyond its substance, the manner in which the Legislature passed Senate Bill 106 flouts the processes enshrined in Article XI, Section 1 of our Constitution which are designed to ensure equal opportunity and equal participation in our democracy. When the Legislature subverts the democratic process to alter our fundamental rights, it threatens an equitable Pennsylvania.

Pursuant to Pennsylvania Rule of Appellate Procedure 531, PBPC submits this Brief in support of Petitioners.<sup>1</sup>

### **STATEMENT OF THE QUESTION PRESENTED**

Should this Court rule in favor of Petitioners and declare the enactment of Senate Bill 106 of 2021 unconstitutional?

**Suggested Answer: Yes.**

### **RELEVANT FACTUAL BACKGROUND**

PBPC incorporates by reference as if fully set forth herein Governor Wolf's Petition for Review and supplements that detailed recitation of SB 106 and the circumstances surrounding its passage with the following facts specific to the Election Audit Amendment.

This proposed amendment was added to SB 106 on December 14, 2021 during the House's second consideration of the bill, roughly six months after Governor Wolf vetoed legislative attempts to require voter identification and election audits. *See* House Bill 1300 of 2021 (vetoed June 30, 2021).<sup>2</sup> The original version of this

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<sup>1</sup> No other person or entity other than PBPC paid for the preparation of or authored, in whole or in part, this Brief.

<sup>2</sup> H.B. 1300, introduced on June 10, 2021 and vetoed June 30, 2021 would have created a Bureau of Election Audits within the Department of the Auditor General and given special standing in challenges to the Election Code. It sought to grant the Bureau the power to conduct result-confirming audits of each election, including audit of voting machines, audit of absentee ballots and mail-in ballots, among other powers.

proposed amendment included “the administration of elections, certification of election machines, the accuracy of the list of registered voters, the administration of voter registration and election results” as examples of “auditing of elections.”<sup>3</sup>

In its final version passed on July 7, 2022, the Election Audit Amendment was stripped of this detailed language, leaving only a non-detailed provision that provides for the audit of elections “by statute”:

§15. Election audits. The General Assembly shall by statute provide for the auditing of elections and election results by the Auditor General. In years when the Auditor General stands for election to any office, an Independent Auditor shall conduct the audit.

Such a process violates the fundamental rights provided to the people under natural law and the Pennsylvania Constitution. The proposed process, can and will, overrule the will of the people.

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<sup>3</sup> The original text of SB 106’s proposed amendment related to election audits stated:

The general assembly shall by statute provide for the auditing of elections, including the administration of elections, certification of election machines, the accuracy of the list of registered voters, the administration of voter registration and election results. Election audits shall be conducted by the auditor general. In years when the auditor general stands for election to any office, an independent auditor shall conduct the audit.

Senate Bill 106 of 2021, Printer No. 1279 (Dec. 14, 2021).

## ARGUMENT

### **I. SB 106 VIOLATES ARTICLE XI, SECTION 1 OF THE PENNSYLVANIA CONSTITUTION.**

Article XI, §1 of the Pennsylvania Constitution details the procedure by which the Pennsylvania Constitution can be amended. In relevant part, it provides:

Amendments 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, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately.

Pa. Const., Art. XI, §1.

These requirements are not to be cast aside for convenience, and instead must be followed meticulously. This Court has described its “duty to ensure scrupulous adherence to the provisions of Article XI, §1” to be “of utmost importance,” *League of Women Voters v. Degraffenreid*, 265 A.3d 208, 227 (Pa. Super. 2021) – and for

good reason too, “as these provisions are indispensable for the stability of our peaceful, democratic system of governance.” *Id.* Nearly a century ago, the Supreme Court of Pennsylvania explained that §1

has in clear, specific language determined what must be done to change or amend the fundamental law. *Nothing short of a literal compliance with this mandate will suffice.* The Constitution has a more sacred position in judicial interpretation than does an act of assembly, and judicial exploration should never have as its fulcrum the basic law. Otherwise, a dangerous precedent would be created, by substituting the court's own pronouncement for the fundamental law of the state.

*Tausig v. Lawrence*, 197 A. 235, 238 (Pa. Super. 1938) (emphasis added).

SB 106 fails two critical mandates of Article XI, §1: (A) the requirement that the votes in support of or against each proposed amendment be memorialized in the legislative journal; and (B) the requirement of a separate vote when two or more amendments are submitted to the voters.

**A. SB 106 Denies Voters Their Right to Know Their Representatives’ Stance on Each Amendment.**

The arguments raised in the Brief filed by the League of Women Voters of Pennsylvania, Sajda Adams, and Simone Roberts, need not be belabored here. PBPC hereby incorporates by reference Section I.C and II.A of the League of Women Voters’ Brief.

**B. The Election Audit Amendment Effectuates More than One Change to the Constitution.**

SB 106 further violates the strict mandates of Article XI, §1 because it violates the single subject test. This Court recently articulated the standard for determining whether a proposed amendment violates the single subject test:

In sum, our decision in *Grimaud* stands for the proposition that, under its single subject test, a determination of whether a proposed amendment making multiple changes to the Pennsylvania Constitution violates Article XI, §1 requires a reviewing court to examine whether the changes are "sufficiently interrelated to justify their presentation to the electorate in a single question." . . . We view this as the core holding of *Grimaud*. In addition, however, *Grimaud* also allows that a proposed amendment triggers the separate vote requirement of Article XI, §1 if it substantively effectuates more than one change to the Constitution.

*Degraffenreid*, 265 A.3d at 219 (quoting *Grimaud v. Commonwealth*, 865 A.2d 835, 841-42 (Pa. Super. 2005)).

*Grimaud*'s secondary holding is where the Election Audit Amendment runs afoul.<sup>4</sup> This secondary test assesses the impact that the proposed constitutional amendment has on existing constitutional provisions. A separate vote is required if the proposed amendment "substantively effectuates more than one change to the Constitution." *Id.* at 219 (citing *Grimaud*, 865 A.2d at 842). "The test to be applied

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<sup>4</sup> As set forth in the Governor Wolf's Petition, and echoed in the Petition For Review By The League Of Women Voters Of Pennsylvania, Sajda Adam and Simone Roberts, the amendment relating to abortion fails *Grimaud*'s core holding insofar as it includes two separate issues: public funding of abortions and any right related to abortion.

is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution.” *Grimaud*, 865 A.2d at 842.

This “facial” requirement is not to be understood literally, but instead “must be understood as requiring that the substantive changes be facially or patently *apparent*, *i.e.*, readily discernable from an examination of the language of the proposed amendment and the text of the existing Constitution.” *DeGraffenreid*, 265 A.3d at 236 n.29 (emphasis in original). Therefore, “in determining whether a proposed amendment would make substantive changes to the Constitution, a reviewing court must evaluate whether the amendment, if implemented, would materially alter the manner in which an existing constitutional provision functions.” *Id.* Applying this test, the *DeGraffenreid* Court concluded the Victim’s Rights Amendment violated section 1 of Article XI because “it substantively alters the manner in which a wide variety of existing constitutional provisions function.” *Id.* at 240.

Specifically, and particularly in its vagueness, the Election Audit Amendment, by authorizing the Legislature to empower the Auditor General to audit elections, impacts several key provisions of the Pennsylvania Constitution.<sup>5</sup> The

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<sup>5</sup> To be sure, several other amendments in SB 106 also “substantially effectuate[] more than one change to the Constitution.” *DeGraffenreid*, 865 A.2d at 236. For example, the proposed amendment relating to abortion constitutes a

Pennsylvania Constitution vests broad authority exclusively in the courts to decide election contests. The proposed amendment eviscerates these principles and works to undermine the confidence in the constitutionally established system of election review, disenfranchising the voters' will and choice.

The Pennsylvania Constitution provides the basic right of free and equal elections in the Commonwealth of Pennsylvania:

§5. Elections. Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Pa. Const. Art. I, §5. Separately, it already provides for appropriate review of elections whose results are questioned:

The trial and determination of contested elections of electors of President and Vice-President, members of the General Assembly, and of all public officers, whether State, judicial, municipal or local, and contests involving questions submitted to the electors at any election ***shall be by the courts of law***, or by one or more of the law judges thereof. The General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests shall be tried, and regulate the manner of trial and all matters incident thereto; but no such law assigning jurisdiction, or regulating its exercise, shall apply to any contest arising out of an election held before its passage.

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substantive change to a number of already existing constitutional provisions such as Article 1, Section 1 (Inherent Rights of Mankind) and Article 1, Section 25 (Reservation of Powers in People).

Pa. Const. Art. VII, §13 (emphasis added). It further explicitly provides for judicial review of contested elections for Governor, Lieutenant Governor and Attorney

General:

*The Chief Justice of the Supreme Court* shall preside upon the trial of any contested election of Governor, Lieutenant Governor or Attorney General and shall decide questions regarding the admissibility of evidence, and shall, upon request of the committee, pronounce his opinion upon other questions of law involved in the trial.

Pa. Const. Art VII, §17 (emphasis added).

The above provisions make clear that the drafters of our Constitution intended the judiciary alone to apply the rule of law and procedural requirements, and to adjudicate questions fundamental to the integrity of the “free and fair elections” guaranteed by the Commonwealth. Read together, these provisions help ensure that the guarantee of “free and fair elections” carries beyond the exercise of the franchise through the review of an election challenge by members of an independent, impartial, apolitical judiciary. *See* Pa. Code of Judicial Conduct, Canons 1, 3, 7.

The Election Audit Amendment would trample on these already existing constitutional provisions and alter the manner in which they function. “[E]lection contests are limited to questions of ‘whether or not the will of the qualified electors was correctly shown by the returns made.’” *In re Petition to Contest Primary Election of May 19, 1998*, 721 A.2d 1156, 1159 (Pa. Commw. Ct. 1998) (quoting *In re Altshuler Election*, 66 D.&C. 476, 482 (Phila. Co. 1948)). Presumably, courts are

well-equipped to handle – and do handle – precisely the type of “auditing” envisioned by the Election Audit Amendment. See *In re Altshuler Election*, 66 D.&C. at 481 (explaining court’s authority to determine whether “the election legally conducted from beginning to end”); *In re Petition to Contest Primary Election of May 19, 1998*, 721 A.2d at 1159 (explaining court’s authority to resolve “matters pertaining to the election process itself, such as the conduct of balloting according to law, the tabulation of the results, and the return thereof” (quoting *In re Bensalem Township Supervisor Election Contest*, 26 D.&C.2d 433, 435 (Bucks Co. 1961))).

By contrast, the powers and duties assigned to the Auditor General in Pennsylvania’s Auditor General Act of 1929 empower the Auditor General to fulfill comparatively limited fiscal responsibilities. The Auditor General is granted the power to approve accounts for taxes or funds due to the Commonwealth, or return them to the Department of Revenue for resettlement in the event of discrepancy. 71 P.S. §246. The Auditor General is also tasked with the creation of reports for use by the Commonwealth’s Department of Revenue in determining whether individual and entity agents of the Commonwealth have properly reported and transmitted funds to the Commonwealth, as required by law. *Id.* The Auditor General Act does not confer upon the Auditor General any duty or power to decide questions of admissibility of evidence nor questions of law. Thus, an amendment that would provide the powers of plenary election review to the Auditor General allows the executive branch to

improperly invade and usurp the province of the Court in deciding election contests, contrary to the plain meaning of the Constitution.

Arming Pennsylvania's Auditor General with yet-unspecified statutory authority crafted by the General Assembly to conduct any kind of parallel review of an election, whether that election is contested or not, will undermine the constitutional authority of the judiciary. The vagueness of the Auditor General's proposed auditing authority, and the reservation by the Legislature of the power to craft that authority *ad libitum*, risks subjecting the electorate to the whim of elected officials who are not bound by the principles of fairness, impartiality, and nonpartisanship that are embedded in the Constitution's assignment of election contest review to the judicial branch of government.

The Election Audit Amendment encroaches on and substantially alters the already existing provisions of the Constitution pertaining to contested elections in derogation of Article XI, §1.

## **II. THE ELECTION AUDIT AMENDMENT VIOLATES SEPARATION OF POWERS PRINCIPLES.**

Without altering the respective existing powers of either branch, the proposed amendment gives auditing authority and decisioning-making power over contested elections to the executive branch of government, usurping the jurisdiction of the judicial branch over such matters. Such amendment violates the plain meaning of the Constitution and the intent of the framers.

“The core tenet of the separation of powers principle is that a branch of government is prohibited from exercising the functions committed exclusively to a co-equal branch.” *Id.* (quoting *Commonwealth v. Sutley*, 474 Pa. 256 (Pa. Super. 1977)). This principle was essential to the framers of the U.S. Constitution:

[In the State of Virginia], [a]ll the powers of government, legislative, executive, and judiciary, result to the legislative body. . . . An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. . . . For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. <sup>6</sup>

The separation of powers principle is often invoked where there is “tension between some combination of the General Assembly, the executive branch, and the

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<sup>6</sup> Notably, Federalist No. 48 cites contemporaneous “flagrant[.]” violations of separation of powers principles by the Pennsylvania legislature in 1783 and 1784: “The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution. Executive powers had been usurped. The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination.” Federalist Paper No. 48 (James Madison, February 1, 1788). Significant to the instant dispute, “A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of legislature.” *Id.* The mischief of Pennsylvania’s General Assembly continues into present day.

judiciary.” *Robinson Twp., Washington Cnty. v. Com.*, 623 Pa. 564, (Pa. Super. 2013) (quoting *Bd. of Revision of Taxes v. City of Philadelphia*, 607 Pa. 104 (Pa. Super. 2010)). The Court in *Robinson Township, Washington County* described the principle as “[o]ne of the distinct and enduring qualities of our system of government,’ which has been present in our Constitution since the first convention prepared the document in 1776.’” 623 Pa. 564 (2013).

As the Framers made clear, the concept of separation of powers existed for reasons of sound governance: to reduce the potential for corruption inherent in the exercise of multiple, distinct functions by a single branch of government. See *supra*, at 15, quoting Federalist No. 48. For purposes of evaluating the separation of powers concern here, the proposed Election Audits amendment cannot be viewed in a vacuum but must be considered in the context in which it was conceived: the frustration of the losing party over the results of the 2020 Presidential Election. Those results were challenged repeatedly and – from the perspective of the legislative majority in Pennsylvania – fruitlessly throughout the Pennsylvania courts.<sup>7</sup> The grant of auditing power to the executive branch, then, where candidates

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<sup>7</sup> See, e.g., *In re Canvass of Absentee and Mail-in Ballots of November 3, 2020 Election*, 241 A.3d 1058 (Pa. 2020)(rejecting appeal of Donald J. Trump for President, Inc., and holding that county election board was not required to disqualify mail-in or absentee ballots by voters who did not handwrite their name or address on outer envelope); *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020)(rejecting position of Trump campaign and upholding Philadelphia board of elections regulations on the positioning of campaign observers during the pre-canvassing and canvassing process). See also *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 Fed. Appx. 77 (3d Cir. 2020)(finding that Trump re-election

and elected officials are free to express overt partisanship, and applying standards established by the legislature whose very elections could be impacted, must be seen as what it is: a frontal assault on the independent judicial review of elections established by the Pennsylvania Constitution. The conflict and confusion that would surely result from these dueling processes achieve exactly that which the Framers sought to avoid: a system that allows legislators to transcend the legal limits of their electoral authority and thwart the will of the voters by facilitating a partisan, rather than independent, review of election results. Moreover, the intent to cause this chaos is evinced by the General Assembly's failure to adhere to the strict procedures outlined in Article XI, §1 of the Pennsylvania Constitution, and the literal compliance required under related case law requiring that changes made to the ultimate, foundational legal document of the Commonwealth of Pennsylvania be clear, thoughtful, and precise. By failing to address the impact of the proposed amendment on existing election review provisions, the General Assembly has violated these rules and, thereby, violated separation of powers principles that are fundamental to our constitutional system of governance. Allowing elections contests

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campaign likely could not succeed on merits, and therefore was not entitled to stay pending appeal in action against Secretary of Commonwealth of Pennsylvania and county boards of elections to invalidate millions of votes cast in presidential election over election procedures, since campaign already raised and lost most of state-law issues.)

to be adjudicated by the Executive Branch undermines our system based on the “rule of law” and dismantles our long-standing history of free and fair elections.

### **CONCLUSION**

For the reasons set forth above, Amici Curiae have demonstrated that Senate Bill 106 must be declared unconstitutional and this Court must rule in favor of Petitioners.

Respectfully submitted,

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