

IN THE SUPREME COURT OF PENNSYLVANIA

No. 69 EM 2025

**MICHAEL SMERCONISH, JEFF DOTY, RACHEL SHANOK,
DAVID THORNBURGH,**
Petitioners

v.

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT
OF STATE, AL SCHMIDT, SECRETARY OF THE
COMMONWEALTH,**
Respondents

ANSWER TO KING'S BENCH PETITION

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INTRODUCTION

For nearly a century, Pennsylvania law has established a “closed primary” system, whereby voters must register with a political party to vote in that party’s primary. 25 P.S. § 2812. The General Assembly is considering legislation that would enable self-described “independent” voters to participate in a partisan primary without formally associating with that party. H.B. 280 of 2025. But rather than allow the legislative process to run its course, Petitioners invite this Court to disturb a 100-year status quo and impose their preferred policy. They offer little more than the same tenuous arguments that have been rejected by every court to consider them for the past 50 years. *In re Barkman*, 726 A.2d 440, 443 (Pa. Cmwlth. 1999) (Section 2812 does not violate the equal protection rights of non-affiliated voters); *Cal. Dem. Party v. Jones*, 530 U.S. 567, 583-84 (2000) (rejecting argument that an open primary is necessary to protect the right to vote); *Rosario v. Rockefeller*, 410 U.S. 752, 756-62 (1973) (upholding closed-primary statute).

In addition to short-circuiting the democratic process, Petitioners have short-circuited the judicial process by invoking this Court’s sparingly-used King’s Bench jurisdiction. They do so without providing any reason why the “ordinary process of law” is “inadequate for the exigencies of the moment.” *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Petitioners’ failure is no mere oversight. There are no exigencies, and the ordinary judicial process is entirely sufficient to address their claims. Section

2812 has been a part of the Election Code since 1937. No imminent primary election necessitates this Court's immediate intervention. And any remedy Petitioners could obtain in this Court could also be obtained in a lower court in the first instance.

The King's Bench standard is far from the only issue Petitioners fail to address clearly. It is ambiguous whether Petitioners truly seek modest, as-applied relief, or a sweeping remedy for all independent voters. *Compare* Petition at 33, 38 (seeking relief as applied to Petitioners), *with id.* at 38, 41 (seeking relief for all independent voters). If Petitioners do, in fact, seek relief for all "independent voters" (a class they never define), then it is unclear what would guide the county election officials (none of whom are parties here) who would apply this new system. Their filing raises far more questions than answers.

What would be the procedure for unaffiliated voters to cast their votes in the primary? Would unaffiliated voters be entitled to vote for party officers who also appear on primary ballots? Precisely which "independent" voters would be permitted to vote in the major parties' primary elections? Would it only be voters registered as "no affiliation"? Or would it also be voters like Petitioner Rachel Shanok, who is registered with a minor political party, but nonetheless self-describes as "independent?" Petitioners' failure to grapple with the vast and complex practicalities of implementing their requested regime, or name the county officials

who would implement that regime, weighs heavily against granting the ill-defined relief they seek.

Petitioners also failed to alert this Court to glaring First Amendment issues that would complicate any effort to open party primaries to unaffiliated voters. Laws forcing political parties to accept unaffiliated voters against their wishes violate the First Amendment. *Jones*, 530 U.S. 572-86. Judicial resolution of this question without consideration of well-established associational rights risks a federal challenge. Petitioners nonetheless ask this Court to upend the current system without mentioning the federal constitutional tripwires.

States may certainly experiment with different primary systems within constitutional bounds. *E.g.*, Cal. Elec. Code § 2151(c) (establishing a modified-closed primary giving political parties the option to permit unaffiliated voters to participate). But *legislatures* are best suited to balance the competing interests involved, not courts. Indeed, the legislation currently being considered by the General Assembly would account for the complex tapestry of Pennsylvania's Election Code and establish a procedure for unaffiliated voters to cast primary ballots. H.B. 280, Section 902.1. That is what the legislature is for; wrestling with the detailed policy choices needed to maintain a coherent electoral process. This Court, by contrast, "plainly stands at a disadvantage in the substantive law making

process, which ... is often steeped in difficult political judgments, including choices among vital competing interests.” *Villani v. Seibert*, 159 A.3d 478, 492 (Pa. 2017).

The Court should deny this petition, which is a request for judicial legislation under the guise of a King’s Bench petition.

ARGUMENT

I. PETITIONERS FAIL TO SATISFY THIS COURT’S KING’S BENCH CRITERIA

The present petition fails to acknowledge the high standard required for this Court’s King’s Bench jurisdiction, and thus unsurprisingly fails to satisfy it. It is beyond cavil that this Court has broad authority to assume King’s Bench jurisdiction over legal disputes, even when there is no case pending before a lower court. *In re Bruno*, 101 A.3d at 665-670; *In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997). But this Court has chosen to exercise that awesome power sparingly.

King’s Bench authority is properly invoked only where necessary “to supplement existing procedural processes that had proven inadequate to carry out the judicial, administrative, or supervisory obligations of the Court in a manner that is expeditious and determinate.” *In re Bruno*, 101 A.3d at 670. The “purpose of its exercise is *not* to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court.” *Ibid.* (emphasis added). Instead, the purpose of King’s Bench is to address exigent circumstances in which “there is no other specific remedy.” *Ibid.* (citation omitted).

For example, in recent years this Court has invoked its King’s Bench powers to determine the scope of the Governor’s authority to combat the COVID-19 pandemic, *see Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020); *Wolf v. Scarnati*, 233 A.3d 679 (Pa. 2020), and to resolve time-sensitive questions concerning mail-in ballots in the run-up to the 2020 Election, *see In re Nov. 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020).

King’s Bench is a break from regular order, not the norm. This Court has therefore emphasized that it must use “extreme caution” when exercising that power to ensure that it is not abused. *In re Bruno*, 101 A.3d at 670 (quoting *Com. v. Balph*, 3 A. 220, 230 (Pa. 1886)) (cleaned up).

Petitioners, however, treat King’s Bench as a matter of routine entitlement, addressing the standard in a terse section at the end of their petition. Petition at 45-48. Petitioners apparently believe that they need only invoke the Free and Equal Elections Clause and incant the phrase “immediate public importance” to secure King’s Bench jurisdiction. But if that were enough, *any* colorable constitutional challenge would qualify. Petitioners’ failure to present any exigency justifying their effort to bypass the lower courts, or identify any remedy that would not also be available in a lower court, is fatal to their request.

Petitioners rely heavily on *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010) (“BRT”). *See* Petition at 45-48. But

that decision only serves to undermine their petition. There, the City of Philadelphia adopted an ordinance abolishing its Board of Revision of Taxes (created by statute in 1939) and replacing it with two newly-created bodies appointed by the mayor. *BRT*, 4 A.3d at 615. The Board members faced imminent elimination of their roles, and the question of which city entity had the authority to perform an important government function required swift resolution. *Id.* at 620. No similar exigency exists here, given that Section 2812 has been in place since 1937 and the next primary election is 10 months away.

Also, the city ordinance in *BRT* upended a 70-year status quo and was of dubious legality. Indeed, the petitioners there established a “clear right to relief,” entitling them to permanent injunction. *Id.* at 621, 627-28. Here, by contrast, party registration requirements—including the specific law at issue—have routinely survived constitutional challenges. *In re Barkman*, 726 A.2d at 443 (Section 2812 does not violate the associational or equal protection rights of non-affiliated voters); *Rosario*, 410 U.S. at 756-62 (upholding closed-primary statute with a reasonable registration deadline). And it is Petitioners who seek to upend the status quo and create the very chaos that this Court typically seeks to *avoid* in exercising its King’s Bench powers.

As already noted, a sweeping declaration that Section 2812 is unconstitutional as applied to “independent voters”—a class Petitioners never define—would create

major logistical hurdles for the state and local election officials who will be required to divert significant resources into creating a process for accommodating unaffiliated voters into party primaries. The Commonwealth would need to create a system for tracking ballots cast by unaffiliated voters to ensure that they do not vote in multiple primaries at the same time. An entirely new style of ballot would need to be created and printed. The Statewide Uniform Registry of Electors (SURE) database (which is already in the midst of a major modernization project) would need to be updated.¹

Further, local election officials would need to reconcile Petitioners' broad request for relief with 25 P.S. § 3524, which makes it a crime for election officials to give an unaffiliated voter "the ballot for any party in which he is not enrolled"—just one of several Election Code provisions implicated by the Petition which Petitioners do not mention.

The ordinary procedural avenues were—and remain—available to Petitioners; they simply decline to avail themselves of those avenues because they find them inconvenient. That Petitioners regard Pennsylvania's ordinary judicial process to be inconvenient does not render it inadequate.

¹ See *Shapiro Administration Begins Process of Implementing Modern, Streamlined Elections Management System to Keep Pennsylvania Elections Safe and Secure, Joining Bipartisan Group of States*, PA. DEP'T. OF STATE (Mar. 5, 2025), available at <https://www.pa.gov/agencies/dos/newsroom/shapiro-administration-begins-implementing-modern-elections-mana>.

II. PETITIONERS FAIL TO RAISE A MERITORIOUS QUESTION

A. Granting Petitioners' Relief Risks Creating a First Amendment Violation

As noted *supra*, Petitioners' filing is unclear and inconsistent regarding the scope of relief they seek. *Compare* Petition at 33, 38 (seeking relief as applied to Petitioners), *with id.* at 38, 41 (seeking relief for all independent voters). But Petitioners have claimed publicly that a ruling in their favor would instantly allow all “independents” to vote in primaries, without the need for any legislative action at all.² In addition to the many Election Code provisions Petitioners ignore, Petitioners also ignore an even larger obstacle: the United States Constitution. That obstacle can be navigated only through careful legislative crafting, not by the blunt force of the judicial fiat Petitioners seek.

Section 2812 of the Election Code provides that a primary voter must be “registered and enrolled as a member of a political party” in order to “vote the ballot

² “If we are successful in the Pennsylvania Supreme Court, then the current statute will be declared unconstitutional, and therefore it will be non-functional. And that will mean immediately that independents can vote in party primaries: Republican, Democratic, Green, Constitution, Libertarian, whatever. ... The legislature would be free to fashion other potential schemes with respect to voting. ... But if we win this case in the Pennsylvania Supreme Court, independents will be able to vote in party primaries. Immediately.” *See* Petitioners' Press Conference, *Independent Voters Petition Pa. Supreme Court to Allow Them to Vote in Primaries* at 27:20-28:55, KLINE & SPECTER (Jul. 18, 2025), available at <https://www.youtube.com/watch?v=MMmeivrLbI8>.

of such party ... at any primary.” 25 P.S. § 2812. It is well-established that the federal Constitution protects “the freedom to join together in furtherance of common beliefs” and thus gives a political party the inherent right to determine the “boundaries of its own association[.]” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 224 (1986). A necessary “corollary of the right to associate is the right not to associate.” *Jones*, 530 U.S. at 574. “In no area is the political association’s right to exclude more important than in the process of selecting its nominee.” *Ibid.* This foundational principle looms large over Petitioners’ substantive arguments, which more or less seek to remedy a purported state constitutional violation by creating a potential federal one. Petitioners conspicuously fail to forewarn the Court of this quandary at all.

Petitioners attempt to ground their challenge in state constitutional provisions that—as this Court has recognized—have no federal counterparts.³ Still, the federal Constitution is “the supreme Law of the Land” by which all courts are bound, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI. And on the question of partisan primaries, the United States

³ See Petition at 23–29 (discussing PA. CONST. art. I, § 5); *id.* at 33–35 (discussing PA. CONST. art. I, § 26); *Allegheny Reproductive Health Ctr. v. Pa. Dep’t of Hum. Servs.*, 309 A.3d 808, 943 (Pa. 2024) (“Article I, Section 26 requires unique meaning.”); *League of Women Voters v. Com.*, 178 A.3d 737, 802 (Pa. 2018) (“[T]he Free and Equal Elections Clause has no federal counterpart.”).

Supreme Court has been unambiguous: a state may not choose which voters are permitted to participate in a political party’s primary over a party’s First Amendment objections.

In *Jones*, political parties challenged a “blanket primary” law that allowed all voters—regardless of partisan affiliation or lack thereof—to vote for any candidate in the primary. 530 U.S. at 570 (citation omitted). Four parties, all of which prohibited nonmembers from voting in their respective primaries, claimed a violation of their First Amendment right to associate. *Id.* at 571. The Supreme Court agreed and struck down the “blanket primary” law as unconstitutional, rejecting the notion that a state may force a political party to “adulterate [its] candidate-selection process ... by opening it up to persons wholly unaffiliated with the party,” if the party objects to their inclusion. *Id.* at 581, 586; *see also id.* at 582 (“We can think of no heavier burden on a political party’s associational freedom”).⁴

Thus, while Petitioners invoke principles of equality, neutrality, and non-discrimination, *see* Petition at 32-35, the indiscriminate relief they seek could

⁴ The *Jones* Court reasoned in part from *Tashjian*. There, a Connecticut law *prohibited* the state Republican Party from *allowing* independent voters to participate in its primary. 479 U.S. at 210–11. The High Court held it to be unconstitutional as applied, because the state had “deprive[d] the Party of its First Amendment right to enter into political association with individuals *of its own choosing*.” *Id.* (emphasis added); *see also id.* at 224 (rejecting the notion that a state or court could “constitutionally substitute its own judgment for that of the Party”).

actually violate established constitutional freedoms. Of course, in certain contexts, the Pennsylvania Constitution affords broader protections than the federal Constitution. *See Pap's A.M. v. City of Erie*, 812 A.2d 591, 611 (Pa. 2002). But it does not follow that courts may wield the judicial power of this Commonwealth in a way that violates the First Amendment. Mandating open primaries by court order—without consent of the parties themselves—risks this exact result. For all Petitioners' creative interpretation of state constitutional history,⁵ they never attempt to square this jurisprudential circle.

To be clear, Respondents do not deny that an open primary system, if carefully constructed, can comport with the First Amendment. But the many policy choices required to achieve that result must be left to the legislative process, not the judicial process.

⁵ Curiously, Petitioners reason in part from the spirit of Pennsylvania's 1776 Constitution. Petition at 1–2, 26. But in doing so, they cite a passage of this Court's opinion in *League of Women Voters* that traces the origin of the Free and Equal Elections Clause to the 1790 Constitution. *Id.* at 1–2 (citing 178 A.3d 737, 808–09); *see also* Brett Graham, “Free and Equal”: James Wilson's Elections Clause and its Implications for Fighting Partisan Gerrymandering in State Courts, 85 ALB. L. REV. 799, 805–10 (2022).

B. The Election Code Enables Independents to Run and Win

As Petitioners concede at the very start, their chosen moniker, “independent,” is a colloquial term. Petition at 2 n.1.⁶ Strictly speaking, “Pennsylvania voters register as ‘not affiliated’ or ‘other’ if they eschew party affiliation.” *Id.*⁷ Far from impeding these unaffiliated voters’ access to the political process or threatening their proportional representation, the Election Code expressly provides these voters with the same tools as partisan voters: an infrastructure for nominating candidates and the

⁶ Research shows that most “independents” are, functionally, not particularly independent. Self-described independent voters tend to (i) lean strongly towards one party or another, and (ii) vote accordingly. *See, e.g.*, Bruce E. Keith, et al., *THE MYTH OF THE INDEPENDENT VOTER* 4 (1992); Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 *ADV. POL. PSYCH.* 119 (2018); John Richard Petrocik, *Measuring Party Support: Leaners are not Independents*, 28 *ELECTORAL STUD.* 562 (2009) (“Our largely unchanged high levels of party voting and the willingness of most ‘independents’ to acknowledge a party preference after a bit of probing indicates that independence is more a matter of self-presentation than an accurate statement about our approach to elections[.]”).

⁷ At present, Pennsylvania voters are registered with dozens, if not hundreds of political parties, the vast majority of them classified as political bodies under the Election Code. 25 P.S. § 2831. County voter registration commissions record voters’ registrations as submitted by the voters, leading to a large array of names, including those self-identifying as “independent”—which is recorded separately from those registered under “no affiliation” or “none” (to say nothing of those registered with minor political parties such as the Libertarian Party, or organized political bodies such as the Constitution Party or Forward Party). Petitioners’ arguments collapse all of these distinct categories under the simple heading of “independent.”

power to cast general election ballots on equal terms with others. That is all the Free and Equal Elections Clause requires in this context.⁸

Petitioners attempt to obscure the line between what is formally true and what is—in their opinion—“functionally” true. *See* Petition at 30. But Petitioners omit much of what is both formally true and functionally true for independent voters. Section 2812 does not “exclud[e] independent voters from *meaningful* participation in the *electoral process*,” *id.* at 29 (emphasis added)—it simply bars them from participation (at least as “independents”) in the *nominating processes* of parties to which they do not belong.⁹

Furthermore, Section 2812 does not “dilute” or “diminish” the political power of independent voters, which, by Petitioners’ own account, is not insubstantial.¹⁰ It simply locates that power elsewhere, in the provisions that afford independents the

⁸ *Cf.* Graham, *James Wilson’s Elections Clause*, 85 ALB. L. REV. at 807–09 (discussing genesis of the Clause).

⁹ As Petitioners acknowledge, any eligible voter, even if she considers herself an “independent” philosophically, is free to register with any party in time to vote in that party’s primary, and then, if she wishes, to unregister, or reregister with a different party, before future primaries. The process requires only minimal effort, and Petitioners claim no undue burden in doing so beyond supposed discomfort in associating themselves with political views they do not share. But they cannot explain why they should then have a right, indeed a constitutional right, to choose the candidate of a party they want nothing to do with.

¹⁰ *See* Petition at 9–10 (asserting that independent voters represent “roughly 15.9% of the electorate” and constitute “the fastest growing voter segment in Pennsylvania politics”).

opportunity to nominate and vote for independent candidates. At the nominating stage, Petitioners may select any candidate they wish. And in the general election, their votes count the same as everyone else's.

Regarding nominations, the Election Code provides more than one path to getting a candidate's name on the ballot. The Election Code: (i) provides for "major" political parties to use primaries to nominate their candidates, 25 P.S. §§ 2861–2883; and, separately, (ii) provides for minor political parties and any other "political body" to do the same by collecting signatures and filing nomination papers, *id.* §§ 2872.2(a), 2911–2914; *In re De la Cruz*, 324 A.3d 632, 634–35 (Pa. Cmwlth. 2024).¹¹ Thus, to the extent individual voters believe the dominant political parties do not reflect their views, or if such voters seek non-partisan reform, they are fully empowered to organize, support, and nominate candidates who share those views.

¹¹ The Pennsylvania Election Code classifies political organizations as either (1) political parties (if in the last election they have fielded candidates who received at least two percent of the vote of the winning candidate), or as (2) "political bodies" if they have not. 25 P.S. § 2831. So, any grouping of voters who choose to come together, for a single election or for several, can qualify as a political body. Political parties are further recognized as (a) "major" political parties if their statewide voter registration is at least 15 percent, or as (b) minor political parties if under that threshold. 25 P.S. § 2872.2. At present, the Democratic and Republican Parties are the only "major" political parties, the Libertarian Party is a statewide minor political party, and in several counties the Green Party (Lehigh and Philadelphia) and Working Families Party (Philadelphia) have qualified as minor political parties; all other groups are classified as political bodies.

And regarding proportionality, it goes without saying that ballots cast for independent and third-party candidates are counted on equal terms with ballots cast for Republicans and Democrats.

Petitioners' claim is not that the Election Code *structurally* disadvantages independent voters or candidates,¹² but that independent voters' political activity "often comes too late to matter." Petition at 33.¹³ The central fault in this argument is that a given race is only "over as a practical matter" after the primaries, *id.* at 21, if there are not enough independent voters to swing the result in the general election. But precisely because independent voters *can* "swing" the results of the general election, campaigns pay them special attention.

As a result, independents and minor parties are able to shift the political dynamics of a given race both on and beyond primary day. The universe of candidates nominated by the "major" political parties is certainly narrowed at the conclusion of the primary election, but "independents" (both true "no affiliation"

¹² *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 790 (1983) (invalidating filing deadline that disadvantaged independent voters relative to partisan voters); *In re Nader*, 858 A.2d 1167, 1185 (Pa. 2004) (reviewing exclusion of candidates from ballot as independent political body "merely because they have been nominated by the Reform Party in other states"), *abrogated on other grounds*, *In re Vodvarka*, 140 A.3d 639, 650 (Pa. 2016).

¹³ *See* Petition at 19 (implicitly conceding that Petitioners have the ability to "turn their support for ... an *independent* candidate into an actual nomination," and ultimately cast a vote for that independent candidate) (emphasis added).

voters, as well as those with other affiliations) can submit nomination papers to have candidates added to the November ballot. And they have done so in every even-year statewide general election since 2016. Indeed, independent voters could have nominated their own candidate when a Democratic district attorney won a write-in campaign for the Republican nomination in Allegheny County in 2023. *Id.* at 20–21. And they may do so in future elections whenever candidates “cross-file for positions like school director.” *Id.*

Candidates nominated in this fashion appear alongside the Democrats and Republicans. And each November, Pennsylvania voters may support any candidate they choose—Republican, Democrat, independent, or otherwise. Petitioners’ inability to cast a *primary* ballot to help decide who *one party’s* nominee will be does not deprive them of the opportunity to determine the ultimate officeholder.¹⁴

¹⁴ It also bears mention that nothing prevents Petitioners from *influencing* who wins a political party’s primary, only *voting in* that primary. They can phone bank, knock on doors, contribute funds, plant lawn signs, attend rallies, and communicate with their neighbors who belong to that party.

Petitioners bemoan that “independent voters have no ability to turn their support for any candidate except an independent candidate into an actual nomination.” Petition at 19. But Section 2812 applies across the board. In other words, *Democratic* voters have no ability to turn their support for any candidate except a *Democratic* candidate into an actual nomination.

Accordingly, Petitioners’ claim that they are “functionally irrelevant” and deprived of the right to “meaningfully” participate in elections, *see* Petition at 30, is simply false. More fundamentally, it is not constitutionally cognizable.

It is well-established that the Constitution “leaves the task of effectuating [the Free and Equal Elections Clause’s] mandate” to the General Assembly. *Pa. Dem. Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020); *see also McClinko v. Dep’t of State*, 279 A.3d 539, 543 (Pa. 2022) (“the power to regulate elections is a legislative one”) (quoting *Winston v. Moore*, 91 A. 520, 522–23 (Pa. 1914)). The Clause shields the voting public against truly antidemocratic election practices; it is not a sword individual voters may use to insert themselves into any and all processes they deem “critical” or “crucial” for effective political activity. Petition at 37, 45. Petitioners plainly understand the logic of the closed primary system. *Id.* at 38–43 (discussing anti-party raiding interest).¹⁵ They simply wish to see the General Assembly revisit that logic, discerning only “meager potential for disruption.” *Id.* at 39–40.¹⁶

¹⁵ Petitioners misrepresent the Supreme Court’s interest-balancing analysis in *Tashjian*. *See* Petition at 39. They suggest that “a state’s interest in preventing party raiding is ‘insubstantial’ as [it] pertains to independent voters.” *Id.* But that was the *state’s* interest in preventing cross-party voting when the *party itself* did not object. *Tashjian*, 479 U.S. at 225.

¹⁶ Petitioners also overlook the specific constitutional grant of authority to the General Assembly in the realm of voter registration. PA. CONST. art. VII, § 1 (“Every citizen twenty-one years of age, possessing the following qualifications, shall be

Rather than persuade the General Assembly to revise the Election Code¹⁷ or organically build support for candidates they prefer, Petitioners turn to this Court. Both because their dissatisfaction with the legislature’s judgment does not amount to a theory of constitutional injury, and because the Election Code affords independent voters the same political opportunities as everyone else,¹⁸ this Court should reject their demand for a rushed judicial process.

C. The Pennsylvania Constitution Cannot Shield Voters From the Need to Make Choices

The essence of the democratic political process is that voters must make choices. By choosing to support one thing, they necessarily choose not to support something else.

Petitioners nonetheless propose that the Pennsylvania Constitution empowers them to select a party’s nominee without having to affiliate with that party. They contend that the price of affiliation is too high because of professional credibility

entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.”).

¹⁷ See Carter Walker, *What to know about the push for open primaries in Pennsylvania*, PENNSYLVANIA CAPITAL-STAR (July 7, 2025), available at <https://penncapital-star.com/election-2025/what-to-know-about-the-push-for-open-primaries-in-pennsylvania/> (detailing legislative proposals for reform).

¹⁸ These political opportunities include the opportunity to register or re-register for the purpose of voting in a primary election—which is exactly how the currently-enrolled members of the major parties came to be entitled to vote in primaries.

considerations, fear of social pressure, and an ideological opposition to hyper-partisanship. *See* Petition at 4-7. For instance, Petitioner Smerconish represents that radio and television audiences may question his reputation for independence if he were to register with a political party. *Id.* at 4. Petitioner Doty prefers to identify as an independent to avoid derision or aspersions from partisan customers and neighbors. *Id.* at 5, 37. Petitioner Shanok objects to party registration requirements and feels that her affiliation with any party “may be an obstacle to serving her community, whether elected or appointed.” *Id.* at 6.¹⁹

Even if Petitioners’ concerns are valid, they lack constitutional dimension. One way or another, voters must make choices. “One may wish to have one’s cake and eat it, too, but the law need not bring [that] wish to fruition.” *In re Robbins*, 826 F.2d 293, 295 (4th Cir. 1987). The Free and Equal Elections Clause does not empower voters to make crucial decisions for political organizations with which they are loath to associate. There is no constitutional right to control a club you would never join.

Moreover, it is not clear that a constitutional ruling in Petitioners’ favor would address their stated desire to avoid the specter of political bias. Petition at 4-7. Many

¹⁹ In the same breath, Petitioner Shanok represents that she is a member of “Forward, a political organization.” Petition at 6; *but see* Paul A. Diller, *Toward Fairer Representation in State Legislatures*, 33 STAN. L. & POL’Y REV. 135, 185 n.279 (2022) (acknowledging formation of the Forward *Party*).

states with open primaries nonetheless make some public recording of the independent voter's chosen primary each cycle. *See, e.g.*, Idaho Code § 34–904A; Or. Rev. Stat. § 254.370; IC 3-7-26.3-29; Iowa Code 43.42; Mass. Gen. Laws Ann. ch. 53, § 37; Ala. Code § 17–13–7 et seq.; Ark. Stat. Ann. § 7–7–308. Indeed, H.B. 280 of 2025 likewise would require recording an “unenrolled” voter's primary election choice. Independents would be subject to the same personal and professional derisions from which they claim constitutional protection.

D. Policy Changes Should be Made by the Legislature, not the Judiciary.

Petitioners believe that they do not have to outline any specific remedy for their concerns; all they need is a declaration that “independents” can vote in party primaries. *See* Petition at 48. But, of course, it is not that simple.

Under the new constitutional right Petitioners seek to create, it is unclear whether they would be empowered to vote in just one party's primary, or can instead vote in several primaries. *Cf.* Petitioners' Press Conference, 2:29-2:45 (suggesting that the Free and Equal Elections Clause guarantees the “right to vote in every single election”). If the answer is several, surely that right must extend equally to Democratic and Republican voters, too. What would be the basis for giving “independent” voters the *exclusive* privilege of participating in multiple primaries?

Under Petitioners' proposed system, party identification would cease to mean very much at all as Pennsylvania's primaries devolve into something like

California’s “jungle” primaries. *See* Cal. Elec. Code § 2151. But the risk of partisan majorities suffocating dissent by “hijack[ing]” opposition parties in such a scheme is apparent. *Jones*, 530 U.S. at 584. And it is far from obvious that such a system produces the political moderation that Petitioners claim to seek. *See, e.g.*, Petition at 7.²⁰

Petitioners’ core analytical error is that they treat political parties as institutions of government. They are not; they expand and contract *as a function of voter behavior*. Political parties emerged “almost concurrent[ly] with the formation of the Republic itself,” *id.* at 574 (citation omitted), and have since channeled political activity by aggregating interests, fostering discourse, and framing debates. *Accord* Akhil Amar, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 156 (2006 ed.) (linking the emergence of political parties and “energetic electoral spectacles” to “broad citizen participation” and increased engagement by “[o]rdinary Americans”). Over time, old parties have disappeared, new parties have arisen, and minor parties have become major. But the current party system is neither immortal

²⁰ *Cf.* Eric McGhee & Boris Shor, *Has the Top Two Primary Elected More Moderates?*, 15 *PERSPECTIVES ON POLITICS* 1053, 1056 (2017) (surveying academic studies and finding that “neither the competitiveness of the primary election, the extremeness of the primary electorate, nor most critically, *the type of primary system*, seems to have much effect on the ideology of those who are ultimately elected”) (emphasis added).

nor inevitable precisely because it is not sewn into constitutions. A party will only endure so long as its supporters find it useful.

There may well be solutions to the dilemmas Petitioners raise. But any solution should come from the People's representatives in the legislature, not through litigation. There has never been—nor will there ever be—a substitute for the democratic task of convincing one's fellow citizens that change is necessary.

CONCLUSION

The King's Bench petition should be denied.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer contains 5,369 words. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

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

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CERTIFICATE OF SERVICE

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