

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LARRY KRASNER, in his official
capacity as the District Attorney of
Philadelphia, et al.,

Petitioner,

v.

MICHELLE A. HENRY, in her
official capacity as Attorney General
of Pennsylvania,

Respondents.

Docket No. 8 MD 2024

**BRIEF OF *AMICI CURIAE* POWER INTERFAITH, PENNSYLVANIA
POLICY CENTER, ABOLITIONIST LAW CENTER, COMMON CAUSE
PENNSYLVANIA, LEAGUE OF WOMEN VOTERS OF PHILADELPHIA,
PENNSYLVANIA STATE CONFERENCE OF THE NAACP, NAACP
PHILADELPHIA BRANCH, MAKE THE ROAD PENNSYLVANIA, AND
URBAN LEAGUE OF PHILADELPHIA,
IN SUPPORT OF PETITIONER**

John A. Freedman*
Jonathan L. Stern*
Jeremy Karpatkin*
Steven Hess*
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
jonathan.stern@arnoldporter.com
jeremy.karpatkin@arnoldporter.com
steven.hess@arnoldporter.com

* Not admitted in Pennsylvania,
participating as counsel for Amici
Curiae pursuant to 204 Pa. Code
§ 81.502(a)

Mimi M. McKenzie (No. 47434)
Claudia De Palma (No. 320136)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1313
mmckenzie@pubintl.org
cdepalma@pubintl.org

Stephen Loney (No. 202535)
Marian K. Schneider (No. 50337)
Kate I. Steiker-Ginzberg (No. 332236)
AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
sloney@aclupa.org
mschneider@aclupa.org
ksteiker-ginzberg@aclupa.org

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF <i>AMICI</i>	1
BACKGROUND AND SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. Act 40’s Disparate Treatment of Philadelphia Voters Raises Serious Equal Protection Concerns Under the Pennsylvania Constitution.	8
A. Article III, § 32 reflects the framers’ commitment to protecting democracy.	9
B. Article III, Section 32 entitles Philadelphia voters to equal protection of the law.....	14
i. <i>Amici</i> have a fundamental right to have their votes translate to representation under the Pennsylvania Constitution.	14
ii. Act 40 impermissibly infringes upon Philadelphia voters’ fundamental rights.....	17
II. Act 40 Contravenes the Longstanding Principle that Prosecutorial Authority Must Be Accountable to the Electorate.	23
CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>Applewhite v. Commonwealth</i> , 54 A.3d 1 (Pa. 2012).....	15
<i>Banfield v. Cortes</i> , 110 A.3d 155 (Pa. 2015).....	15
<i>Bergdoll v. Kane</i> , 731 A.2d 1261 (Pa. 1999).....	15
<i>Chalmers v. City of Philadelphia</i> , 95 A. 427 (Pa. 1915).....	21
<i>Commonwealth ex rel. Krasner v. Attorney General</i> , slip op. (Pa. Commw. Ct. Jan. 26, 2024).....	23, 24
<i>Commonwealth v. Carsia</i> , 491 A.2d 237 (Pa. Superior Ct. 1985)	24
<i>Commonwealth v. Fudeman</i> , 152 A.2d 428 (Pa. 1959).....	24
<i>Commonwealth v. Schab</i> , 383 A.2d 819 (Pa. 1978).....	23
<i>Dep't of Agric. v. Moreno</i> , 413 U.S. 528 (1973).....	23
<i>Harrisburg Sch. Dist. v. Hickok</i> , 761 A.2d 1132 (Pa. 2000).....	11
<i>Harrisburg Sch. Dist. v. Zogby</i> , 828 A.2d 1079 (Pa. 2003).....	10, 14
<i>In re Nader</i> , 858 A.2d 1167 (Pa. 2004).....	15, 16
<i>Kuznik v. Westmoreland Cnty. Bd. of Comm'rs</i> , 902 A.2d 476 (Pa. 2006).....	15

<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	15, 16
<i>Norwood Election Contest Case</i> , 116 A.2d 552 (Pa. 1955).....	14
<i>Pa. Env't Def. Found. v. Commonwealth</i> , 161 A.3d 911 (Pa. 2017).....	10
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020).....	16
<i>Pa. Turnpike Comm'n v. Commonwealth.</i> , 899 A.2d 1085 (Pa. 2006).....	14
<i>Robinson Twp., Washington Cnty. v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013).....	10
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	22
<i>William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.</i> , 170 A.3d 414 (Pa. 2017).....	20
<i>William Penn Sch. Dist. v. Pennsylvania Dep't of Educ.</i> , 294 A.3d 537 (Pa. Commw. Ct. 2023).....	14

Rules, Statutes and Constitutional Provisions

Pa. Const. art. I, § 5.....	16
Pa. Const. art. I, § 26.....	9
Pa. Const. art. III, § 32	9, 10, 12, 13, 14
Pa. Const. art. IX, § 4	23, 24
Pa. Const. of 1874, art. III, § 7.....	9
Pa. Const. of 1874, art. XIV, § 1.....	23
Pa. R. App. P. 531(b)(2)	1
16 P.S. § 7701	23

Other Authorities

Ballotpedia, Lawrence Krasner, 2017 Election Results,
https://ballotpedia.org/Lawrence_Krasner.....7

Ballotpedia, Lawrence Krasner, 2021 Election Results,
https://ballotpedia.org/Lawrence_Krasner.....7

Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021)13

Committee of Seventy, Political Parties, <https://seventy.org/political-parties>19

Gary E. French, *Home Rule in Pennsylvania*, 81 DICK. L. REV. 265 (1977).....10

Russell Gerney, *Equal Protection under the Pennsylvania Constitution*, 42 DUQUESNE L. REV. 455 (2004)9

Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271 (2004).....11

Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 RUTGERS L. REV. 287 (2018).....9

Sen. Wayne Langerholc, Jr., Memorandum, Pa. State Senate (April 14, 2023)21

Katie Meyer, “Pa. Republicans respond to gun violence by trying to impeach Philly’s DA,” WHY.org (June 13, 2022).....22

Press conference, “District Attorney Larry Krasner files lawsuit to block Act 40,” Jan. 11, 2024.....18, 19, 20

Press release, “Ecker Named to House Select Committee on Restoring Law and Order,” Pa. House Republican Caucus, July 14, 202222

Reps. Kail, Ecker, O’Neal, Memorandum, Pa. House of Representatives (June 13, 2022)22

Joe Trinacria, “Philly FOP President Blasts DA Krasner in Letter to Police Cadets,” PHILA. MAG., March 2, 2018.....22

U.S. Census Bureau, QuickFacts, Pennsylvania.....19

U.S. Census Bureau, QuickFacts, Philadelphia County, Pennsylvania.....6, 19

Emily Widra and Benjamin Geffen, “Where people in prison come from: The geography of mass incarceration in Pennsylvania,” Prison Policy Initiative, Sept. 22, 20226

Robert E. Woodside, PENNSYLVANIA CONSTITUTIONAL LAW 321 (1985).....10

INTEREST OF *AMICI*¹

Amici are nine non-partisan organizations dedicated to safeguarding the right to vote and to ensuring civic engagement and democratic participation among their members and in traditionally disenfranchised communities. *Amici* have an interest in safeguarding Philadelphia citizens' right to have their votes counted and to be represented by elected public officials who are accountable to their local needs.

POWER Interfaith is a non-partisan faith-based community organizing network committed to building communities of opportunity that work for all. Founded in Philadelphia, POWER Interfaith represents more than 150 congregations across Southeastern and Central Pennsylvania, working to bring about justice here and now. One of its five priority areas is civic engagement and organizing communities so that the voices of all faiths, races, and income levels are counted and have a say in government. POWER engages directly with voters across Pennsylvania, and its civic engagement efforts include voter education programs, voter registration drives, information about applying for mail ballots, completing them properly and returning them on time, and "Souls to the Polls" efforts to encourage congregants to vote. On behalf of its members, POWER represents the interests of Philadelphia voters in ensuring that their voices are

¹ Pursuant to Pa. R. App. P. 531(b)(2), *amici* state that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

heard through the selection of the voters' chosen candidates. POWER Interfaith is a member of the Coalition to Defend Democracy.

The Pennsylvania Policy Center is a statewide non-partisan organization that does policy analysis, advocacy, and organizing. It creates the tools political officials, opinion leaders, grassroots organizations, and the people of Pennsylvania need to attain economic, racial and gender justice, secure our freedom and sustain the vibrant democracy in Pennsylvania. It believes that the voices of all Pennsylvanians must be heard on the issues that affect their lives and thus fights for an open and truly representative democracy.

The **Abolitionist Law Center** ("ALC") is a non-profit public interest organization led by people who have been directly impacted by the criminal punishment system. The Law Center uses advocacy, public education, and litigation to protect the rights and wellbeing of people who encounter the criminal punishment system and to dismantle Pennsylvania's racist, classist mass incarceration system. ALC's ultimate vision is to replace the current policing and carceral system with community-driven, equitable, and holistic transformative justice systems. As part of that work, ALC works to increase the political representation of marginalized communities in elected positions across the state and to build political power in Philadelphia's Black and Brown working-class neighborhoods. ALC represents the interests of Philadelphia voters in defending

their democratic rights to elect officials of their choice. ALC is a member of the Coalition to Defend Democracy.

Common Cause Pennsylvania is a non-profit, non-partisan political advocacy organization and a chapter of the national Common Cause organization. With approximately 36,000 members and supporters in Pennsylvania, Common Cause Pennsylvania works to encourage civic engagement and public participation in democracy, to ensure that public officials and public institutions are accountable to and reflective of all people, and to implement structural changes through the American democratic process. Common Cause Pennsylvania uses grassroots mobilization, community education, coalition building, legislative advocacy, and litigation to ensure that voters in communities that vote at the lowest rates can have their vote counted.

The **League of Women Voters of Philadelphia** is a non-partisan grassroots civic organization committed to fostering an informed and active citizenry in government affairs. Rooted in the suffrage movement and affiliated with the League of Women Voters, a nationwide nonprofit with over a century of dedication to empowering voters and safeguarding democracy, the Philadelphia chapter plays a pivotal role in civic engagement and serves as a catalyst for community organization across the city's diverse landscape. The organization actively works to enhance public understanding of major policy issues through

educational initiatives and advocacy and amplifies the voices of individuals from various backgrounds, focusing on fostering inclusivity and representation in civic affairs. The League also focuses on voter registration and education activities year-round. In all its efforts, the League strives to carry out its mission to promote democratic participation, empower voters, and defend democracy.

The **Pennsylvania State Conference of the NAACP** (the “State Conference”) is a non-profit, non-partisan organization that works to improve the political, educational, social, and economic status of African-Americans and other racial and ethnic minorities, to eliminate racial prejudice, and to take lawful action to secure the elimination of racial discrimination, among other objectives. The State Conference advocates for civil rights, including voting rights, for Black Americans, both nationally and in Philadelphia. Every election cycle, the State Conference engages in efforts to get out the vote, including by educating Black voters in Pennsylvania on different methods of voting, providing educational guides on local candidates to increase voter engagement, and focusing on strategies to eliminate Black voter suppression both nationally and in Pennsylvania. On behalf of its members, the State Conference represents the interests of voters in ensuring that their voices are heard through the selection of the voters’ chosen candidates. The **NAACP Philadelphia Branch**, which represents the interests of NAACP members in Philadelphia, advocates to safeguard and expand voting rights

and fights for a fair criminal justice system that eliminates racial disparities. The NAACP Philadelphia Branch is a member of the Coalition to Defend Democracy.

Make the Road Pennsylvania (“Make the Road PA”) is a not-for-profit, member-led organization formed in 2014 that builds the power of the working-class in Latine and other communities to achieve dignity and justice through organizing, policy innovation, and education services. Make the Road PA’s more than 10,000 members are primarily working-class residents of Pennsylvania, many in underserved communities. Make the Road PA’s work includes voter protection, voter advocacy and voter education. Make the Road PA has run active programs to register voters in historically underserved communities of color, including in Philadelphia County. On behalf of its members, Make the Road PA represents the interests of Philadelphia voters in ensuring that their voices are heard through the selection of the voters’ chosen candidates.

The Urban League of Philadelphia, an affiliate of the National Urban League, is a nonprofit organization whose mission focuses on empowering African-Americans and other underserved and under-resourced people to secure economic self-reliance, parity, power and civil rights. To this end, the Urban League of Philadelphia engages in advocacy, public education, programs, and partnership initiatives to ensure that every Philadelphian has an equal right to fully participate in democracy, and to increase participation in elections by educating the

community about civic engagement, the right to vote, and creating a more just and inclusive society.

BACKGROUND AND SUMMARY OF ARGUMENT

Philadelphia is the most populous and most racially and ethnically diverse county in the Commonwealth of Pennsylvania. As the only Pennsylvania county that is majority Black and Latine, with more than 20% of its residents living in poverty,² Philadelphians disproportionately experience the systemic impacts of mass incarceration and bias in policing, bail, charging decisions, and sentencing.³ At the same time, Philadelphians have a long and proud tradition of making their voices heard and demanding political change at the ballot box. Turning out to vote on criminal justice issues is no exception. That is exactly what Philadelphia voters did when they twice elected Larry Krasner to head their District Attorney's office.

In 2017, an overwhelming majority of Philadelphia voters (75%) decided to elect Mr. Krasner as District Attorney to implement reforms safeguarding the civil rights of criminal defendants and citizens who often face fraught interactions with

² U.S. Census Bureau, QuickFacts, Philadelphia County, Pennsylvania, <https://www.census.gov/quickfacts/fact/table/philadelphiacountypennsylvania/PST045223> (last accessed Feb. 29, 2024).

³ By way of example, while Philadelphia is home to 12% of the Commonwealth's population, it accounts for 26% of its statewide prison population. *See* Emily Widra and Benjamin Geffen, "Where people in prison come from: The geography of mass incarceration in Pennsylvania," Prison Policy Initiative, Sept. 22, 2022, <https://www.prisonpolicy.org/origin/pa/2020/report.html> (last accessed on Feb. 29, 2024).

law enforcement.⁴ Mr. Krasner, a longtime civil rights and defense attorney, ran on a platform that included reducing incarceration for nonviolent crimes in favor of diversionary opportunities, reducing pre-trial detention where the defendant poses no threat to public safety, reducing prosecution for marijuana possession, holding police accountable for abuses and harmful tactics, and focusing office resources on prosecuting serious, violent crimes and shootings. Despite intense political opposition and well-funded efforts to counter these policies, Philadelphia voters *again* chose Mr. Krasner as their District Attorney in 2021, when he was reelected with 72% of the general election vote.⁵ In other words, Philadelphia voters—a majority of whom are people of color—have now made clear in *two elections* that they overwhelmingly favor Mr. Krasner’s platform of criminal legal reform and the prosecutorial approach that Mr. Krasner has sought to implement.

Act 40 effectively nullifies hundreds of thousands of votes, flagrantly disregarding the majority view of Pennsylvania’s most populous city, and infringing on voters’ right to representation by stripping District Attorney Krasner of significant prosecutorial authority and assigning it to an unelected official (the “Act 40 Prosecutor”) who is not accountable to Philadelphia voters. In doing so,

⁴ See Ballotpedia, Lawrence Krasner, 2017 Election Results, https://ballotpedia.org/Lawrence_Krasner.

⁵ See Ballotpedia, Lawrence Krasner, 2021 Election Results, https://ballotpedia.org/Lawrence_Krasner.

Act 40 creates a classification that treats Philadelphia voters disparately from voters in the surrounding, less diverse, counties where SEPTA also operates, impermissibly infringing on their right to vote without any legitimate reason, let alone the compelling state interest required to justify such unequal treatment with respect to fundamental voting rights.

As a result, Act 40 effectively deprives Philadelphia voters of their ability to advance the criminal justice reforms that they believe are critical to the wellbeing of their most vulnerable citizens and to the future of their city. Instead, Act 40 supplants Philadelphia's chosen approach to law enforcement with the tactics favored by state legislators whose interests are far removed from the city's, and discourages Philadelphians exercising their right to vote by signaling that their choice of candidate may not matter in the next election, either.

In sum, Act 40 contravenes constitutional constraints designed to promote the fundamental democratic principles that *amici* fight to advance. The law should be declared unconstitutional and enjoined.

ARGUMENT

I. Act 40's Disparate Treatment of Philadelphia Voters Raises Serious Equal Protection Concerns Under the Pennsylvania Constitution.

As set forth in Mr. Krasner's Petition for Review ("Pet."), Act 40 constitutes special legislation that unlawfully discriminates against the Philadelphia District Attorney's Office and deprives District Attorney Krasner of his right to equal

protection under the Pennsylvania Constitution. Pet. at ¶¶ 34-40. Act 40 also raises serious equal protection concerns for *amici* and the Philadelphia voters they serve, encroaching on their representational rights and violating the core principles of democracy that motivated the ratification of the equal protection guarantee in Article III, Section 32 of the Pennsylvania Constitution.⁶

A. Article III, § 32 reflects the framers’ commitment to protecting democracy.

Enacted as part of the 1874 Constitution, Article III, Section 32 provides, in relevant part, that “the General Assembly shall pass no local or special law in any case which has been or can be provided for by general law.”⁷

⁶ Equal protection is embodied in multiple sections of the Pennsylvania Constitution. Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 RUTGERS L. REV. 287, 335 (2018); Russell Gerney, *Equal Protection under the Pennsylvania Constitution*, 42 DUQUESNE L. REV. 455, 458 (2004). Although *amici* focus their analysis on the language and history of Article III, Section 32, Act 40 also raises equal protection issues under Article I, Section 26 (providing that the Commonwealth may not “discriminate against any person in the exercise of any civil right”), for the reasons stated herein and in Mr. Krasner’s Petition for Review. See Pet. at ¶¶ 140-148.

⁷ Section 32 was originally ratified as Section 7 of Article III. See Pa. Const. of 1874, art. III, § 7. In 1968, the provision underwent revisions and took its current form. See Pa. Const. of 1968, art. III, § 32; see also Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71 RUTGERS L. REV. 287, 303 (2018) (“The 1874 Constitution had prohibited the adoption of ‘special laws’ regarding twenty-six specified subjects. The new provision, article III, section 32, reduced the number of specified subjects to eight, but prefaced the list with a command applicable to all statutes adopted by the Pennsylvania Legislature: ‘The General Assembly shall

The Pennsylvania Supreme Court has observed that “the overarching purpose of Article III of our Constitution is to place restraints on the legislative process and encourage an open, deliberative, and accountable government.” *Robinson Twp., Washington Cnty. v. Commonwealth.*, 83 A.3d 901, 987 (Pa. 2013) (internal quotation and citation omitted). And history demonstrates that Article III, Section 32’s prohibition against special laws was specifically motivated by a desire to stop anti-democratic efforts by the legislature to advance minority views.⁸

“In the seven years before the Constitution of 1874 was adopted, the General Assembly enacted 8,755 local or special acts and only 475 general laws,” leaving the legislature “so occupied with dispensing special favors that there was little time left to deal with problems of state-wide concern.” *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1088 & n.13 (Pa. 2003) (citing Robert E. Woodside, PENNSYLVANIA CONSTITUTIONAL LAW 321 (1985), and Gary E. French, *Home Rule in Pennsylvania*, 81 DICK. L. REV. 265, 267 n. 20 (1977)) (internal quotation marks omitted). The delegates who assembled at the 1872-73 Constitutional Convention

pass no local or special law in any case which has been or can be provided for by general law. . . .”).

⁸ The Pennsylvania Supreme Court has held that the interpretation of a constitutional provision may be informed by “the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous legislative history.” *Pa. Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 929-30 (Pa. 2017) (quotation omitted).

to debate amendments to the Constitution decried these special laws as “grant[ing] privileges to which all persons are not equally entitled under general law” and “impair[ing] the efficiency of legislation for good to the whole people.” Pennsylvania Debates of 1873, Vol. 2:591-92. Accordingly, a “proscription against special laws was adopted for a very simple and understandable purpose—to put an end to the flood of privileged legislation for particular localities and for private purposes which was common in 1873.” *Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132, 1135-36 (Pa. 2000) (citation and quotation marks omitted).

At the root of delegates’ concern about special legislation was the fact that the legislature’s unencumbered power to pass laws that elevated the interests of a few individuals over the greater public ultimately interfered with the right to democratic representation. As one delegate declared, “It is not democratic to give one man special privileges which are denied to all others” See Pennsylvania Debates of 1873, Vol. 2:592. Special and local laws often robbed members of the electorate of the ability to participate in the legislative process, and legislation was often passed without any notice to those affected. One delegate recounted that “there are a few persons who go to Harrisburg every winter, and before anybody is aware that they have left us, a special bill of some sort is passed. An act was passed in that way two years ago, abolishing our judicial district in two hours.” *Id.* Vol. 2:622; see also Robert M. Ireland, *The Problem of Local, Private, and Special*

Legislation in the Nineteenth-Century United States, 46 AM. J. LEGAL HIST. 271, 275-76 (2004) (observing that “the process of special legislation was basically undemocratic”). Delegates also recounted instances in which special legislation was used to alter, without notice, the jurisdiction of courts and even the rules of evidence. *See, e.g.*, Pennsylvania Debates of 1873, Vol. 2:604-05 (describing legislation that enabled a county official to obtain judgments against parties without opportunity to be heard by a justice of the peace).

The consensus among the 1874 delegates was thus that special legislation “has been used to wrest from whole communities their common rights, and to bestow them on corporations and on individuals,” *id.* Vol. 5:265, and that if the practice continued, “we shall find that our political rights will be swallowed up by granting special privileges.” *Id.* Vol. 2:592. Indeed, delegates expressed concerns about the impact of the practice on the very survival of the democratic republic, then still in its infancy: “when you permit, through a Constitution, a legislative body to assemble, and allow them—with hardly a restraint—to pass any act they may choose . . . the people will sooner or later see and feel such oppression, and for a thorough contention for their rights may seek a different form of political revolution.” *Id.* Vol. 2:591.

At its core, the purpose of Section 32 was to enshrine the notion that representative government must be responsive to the electorate as a whole, rather

than a select few: as one delegate proclaimed, “‘equal privileges for all, exclusive privileges for none,’ should be the sentiment of every citizen of this Commonwealth. If we depart from this principle we are at sea without a chart or compass.” *Id.* Vol 2:590. And, in fact, Pennsylvania’s decision to prohibit special laws was part of a larger movement in state constitutions to use these restrictions to ensure political equality. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 892 (2021) (“The idea that members of the political community have an equal say in governance has been closely linked to the idea that government must work for the people as a whole”).

Act 40 is directly at odds with the representational rights that the prohibition on local and special legislation was created to safeguard. Like many of the laws that motivated Section 32, Act 40 privileges the political agendas of certain state lawmakers over Philadelphians’ right to be represented by a locally elected official who is responsive and accountable to the needs of their community. Instead, Act 40 installs an appointed official whose mandate is to implement the will of political opponents whose policies were rejected at the polls, and then divests the judiciary from reviewing the authority of that official. As set forth below, this constitutes a violation of equal protection of the law.

B. Article III, Section 32 entitles Philadelphia voters to equal protection of the law.

Pennsylvania courts have consistently recognized that Section 32’s prohibition against special laws implicates principles of equal protection. *See, e.g., Pa. Turnpike Comm’n v. Commonwealth*, 899 A.2d 1085 (Pa. 2006) (“The common constitutional principle at the heart of the special legislation proscription and the equal protection clause is that like persons in like circumstances should be treated similarly by the sovereign.”); *see also Harrisburg School Dist. v. Zogby*, 828 A.2d at 1088 (“This prohibition . . . [has] been understood to include principles of equal protection”).

Under Article III, Section 32, a law that creates a classification that burdens a fundamental right will be struck down as a violation of equal protection unless there is a compelling justification for the disparities created by the classification. *William Penn Sch. Dist. v. Pa. Dep’t. of Educ.*, 294 A.3d 537, 959-60 (Pa. Commw. Ct. 2023). As set forth below, Act 40 creates a classification that impermissibly infringes upon the fundamental voting rights of *amici* and other Philadelphia voters.

i. *Amici* have a fundamental right to have their votes translate to representation under the Pennsylvania Constitution.

Pennsylvania courts have long recognized that “the right of suffrage is the most treasured prerogative of citizenship.” *Appeal of Norwood*, 116 A.2d 552, 553

(Pa. 1955). As the Pennsylvania Supreme Court has repeatedly acknowledged, the right to vote is fundamental and “pervasive of other basic civil and political rights,” *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)). See also *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) (recognizing the right to vote as “that most central of democratic rights”); *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012) (acknowledging that “the right to vote in Pennsylvania, as vested in eligible, qualified voters, is a fundamental one”); *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 488 (Pa. 2006) (“the right to vote is a cornerstone of our democracy, the basic and most essential expression of citizenship”) (citation omitted); *In re Nader*, 858 A.2d 1167, 1177 (Pa. 2004), *abrogated on other grounds*, 140 A.3d 639 (Pa. 2016) (“the longstanding and overriding policy in our Commonwealth to protect the elective franchise”).

The framers of the Pennsylvania Constitution forcefully proclaimed that “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. Accordingly, the Free and Equal Elections clause “should be given the broadest interpretation, one which . . . provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.” *League of Women Voters*, 178 A.3d at 814. Thus, “where the fundamental

right to vote is at issue, a strong state interest must be demonstrated” to justify any infringement on that right. *In re Nader*, 858 A.2d at 1181.

It follows, too, that the fundamental right to vote encompasses a right of the people to have their chosen representatives seated and empowered to do the jobs for which they were elected. The Pennsylvania Supreme Court has affirmed that the Free and Equal Elections Clause “guarantee[s] our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation.” *League of Women Voters*, 178 A.3d at 804; *see also Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 356 (Pa. 2020) (reiterating that the protections of the Free and Equal Elections Clause are “specifically intended to *equalize* the power of voters in our Commonwealth’s election process.”) (emphasis added). The origins of the Clause demonstrate that it was intended to “preserve[] the principle cherished most by the Constitutionalists—namely, popular elections in which the people’s right to elect their representatives in government [must] be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on . . . geography of his residence.” *League of Women Voters*, 178 A.3d at 808.

ii. Act 40 impermissibly infringes upon Philadelphia voters' fundamental rights.

Act 40 creates a classification that treats Philadelphia voters disparately from voters in the surrounding, less diverse counties where SEPTA operates (Montgomery, Delaware, and Bucks County), and from every other county in the state, where voters remain entitled to choose their district attorney and to be represented by an elected local official who is accountable to them. The text of Act 40 makes clear that it is explicitly targeting Philadelphia: the Special Prosecutor's "preemptive prosecutorial jurisdiction" applies only to the "county of the first class," (i.e., Philadelphia), but may not be invoked in the neighboring counties in which SEPTA operates without written permission from the district attorneys in those jurisdictions. Act 40 § 1786(a)(4). That Act 40 targets Mr. Krasner specifically—and, by extension, the policy choices of the Philadelphia voters who overwhelmingly elected him as their chosen representative—is further evidenced by the fact that the special prosecutor's authority expires a year after Mr. Krasner leaves office. *See* Act 40 § 1786(a)(8) (no new action may be initiated after December 31, 2026).

Act 40's disparate treatment of the Philadelphia District Attorney's office infringes on Philadelphians' right to vote in several related ways.

First, Act 40 retroactively nullifies the votes Philadelphians cast for District Attorney by significantly limiting the scope of Mr. Krasner's prosecutorial

authority. *See* Act 40 § 1786(a)(4)(ii) (empowering the Special Prosecutor to “assert preemptive prosecutorial jurisdiction” over crimes within SEPTA in Philadelphia and providing that in such cases, “no other prosecuting entity for the Commonwealth shall have authority to act, except as authorized by the special prosecutor”). In doing so, Act 40 invalidates the votes of the diverse electorate that twice elected Krasner in high numbers to serve as their District Attorney. As Reverend Mark Tyler of *amicus* POWER Interfaith stated when Act 40 was passed over the vehement opposition of Philadelphia voters, “It appears my vote was stolen.”⁹

Second, Act 40 deprives Philadelphia voters of their ability to translate their votes into representation by stymieing the policy reforms upon which Mr. Krasner was elected, many of which are aimed at addressing the institutionalized racism in the criminal legal system and its disproportionate impact on Philadelphians of color. As *amicus* POWER Interfaith’s Executive Director Bishop Dwayne Royster pointed out in reaction to Act 40’s passage, the legislature has “essentially said to every Philadelphian” that “you’re not smart enough to make the right decisions about criminal prosecution in the City of Philadelphia.”¹⁰ There is a fundamental

⁹ Press conference, “District Attorney Larry Krasner files lawsuit to block Act 40,” Jan. 11, 2024, <https://www.youtube.com/watch?v=CTMTDV5M9I4> (last accessed Feb. 29, 2024).

¹⁰ Press conference, “District Attorney Larry Krasner files lawsuit to block Act 40,” Jan. 11, 2024, <https://www.youtube.com/watch?v=CTMTDV5M9I4>.

disconnect—demographically and politically—between the population of Philadelphia (which is 44% white, 43% Black, 16% Latine, and 8% AAPI,¹¹ and where Democrats outnumber Republicans seven to one¹²) and the statewide population (which is 81% white, 12% Black, 8% Latine, and 4% AAPI,¹³ and is evenly split between Democrats and Republicans).¹⁴ Act 40 replaces the local electorate’s policies with those favored by voters outside of Philadelphia, leading Rev. Tyler to ask, “Why is it that the people who always get sacrificed [in the legislative process] are Black and Brown voters?”¹⁵

Third, Act 40 strips Philadelphia voters from having a prosecutor who is accountable to the people of Philadelphia. Instead, Act 40 brings in a special prosecutor who is unaccountable not only to the Philadelphia electorate, but to *any* electorate. Act 40 calls for the appointment, not election, of a special prosecutor, made by the Acting Attorney General. Act 40 § 1786(a)(1). The actions of this special prosecutor are unreviewable: Act 40 prohibits individuals charged by the

¹¹ U.S. Census Bureau, QuickFacts, Philadelphia County, Pennsylvania, <https://www.census.gov/quickfacts/fact/table/philadelphiacountypennsylvania/PST045223>.

¹² Committee of Seventy, Political Parties, <https://seventy.org/political-parties>.

¹³ U.S. Census Bureau, QuickFacts, Pennsylvania, <https://www.census.gov/quickfacts/fact/table/PA/PST045223>.

¹⁴ Committee of Seventy, Political Parties, <https://seventy.org/political-parties>.

¹⁵ Press conference, “District Attorney Larry Krasner files lawsuit to block Act 40,” Jan. 11, 2024, <https://www.youtube.com/watch?v=CTMTDV5M9I4>.

special prosecutor from challenging his or her authority in a court of law. *Id.* § 1786(a)(5).

Fourth, Act 40 discourages Philadelphia voters from going back to the ballot box by sending a message to the voters in Pennsylvania’s most diverse county that their votes may not matter in future elections. This chilling effect on the exercise of the franchise disproportionately impacts voters of color. As Bishop Royster explained, through the passage of Act 40, legislators on the other side of the state told Philadelphians “you don’t matter . . . by making a statement that ‘we don’t want your votes, we don’t need your votes.’”¹⁶

Because voting is a fundamental right, Act 40 is subject to strict scrutiny, under which Act 40’s disparate treatment of Philadelphian voters must be “necessary to advance a compelling state interest.” *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 458 (Pa. 2017). No such justification exists. And indeed, Act 40’s disparate treatment of Philadelphia voters fails to pass *any* level of scrutiny, because there is no legitimate reason to treat the will of the people of Philadelphia differently than others’. Where “no substantial difference in conditions exists which affords a genuine basis for classification along such lines

¹⁶ Press conference, “District Attorney Larry Krasner files lawsuit to block Act 40,” Jan. 11, 2024, <https://www.youtube.com/watch?v=CTMTDV5M9I4>.

. . . classification is not permitted.” *Chalmers v. City of Phila.*, 95 A. 427, 428 (Pa. 1915).

Rather, the larger context in which Act 40 was passed underscores the fact that the statute was motivated by a desire to override the policy choices of Philadelphia voters who voted in favor of Mr. Krasner and his criminal-legal-reform platform. This is clear from the legislative debate, including the statements of legislative sponsors. For example, upon introduction of the bill, Senator Langerholc claimed that Act 40 was intended to “ensure that those that break the law will answer for their crime” in the face of “the inaction of the current DA.”¹⁷ But actual statistics demonstrate that there has been no such “inaction” and the effort to curtail Mr. Krasner’s authority is pretextual. *See* Krasner App. for Special Relief ¶¶ 6-9 (showing charging rate of SEPTA arrests over time).

In reality, Act 40 is simply the latest in a series of efforts seeking to nullify Philadelphia voters’ decision to elect a prosecutor who has taken actions that Mr. Krasner’s opponents, primarily outside Philadelphia, dislike, including implementing policies to address over-policing in Black and Brown neighborhoods, deprioritizing prosecutions of certain low-level offenses, and reducing jail times. This barrage has been continual since the Fraternal Order of

¹⁷ Sen. Wayne Langerholc, Jr., Memorandum, Pa. State Senate (April 14, 2023), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=S&SPick=20230&cosponId=40490> (last accessed Feb. 29, 2024).

Police union president referred in 2018 to Krasner supporters as “the parasites of the city.”¹⁸ Most notably, in 2021, five state lawmakers formed a “House Select Committee on Restoring Law and Order” to scrutinize the city’s chosen approach to criminal justice, seeking to “investigate every aspect of law enforcement in Philadelphia, including prosecution, sentencing, the rights of crime victims and the city’s use of funding intended for law enforcement” and to evaluate how well Krasner’s policies were “performing.”¹⁹ The inquiry led to a failed impeachment attempt in 2022 that lawmakers claimed was “for the sake of Philadelphians”²⁰ despite the fact that the city’s elected officials opposed it.²¹

Such patent animus can never be a legitimate state interest. *See, e.g., Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[A] bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”)

¹⁸ Joe Trinacria, “Philly FOP President Blasts DA Krasner in Letter to Police Cadets,” PHILA. MAG., March 2, 2018, <https://www.phillymag.com/news/2018/03/02/mcnesby-krasner-police-cadets/> (last accessed Feb. 29, 2024).

¹⁹ Press release, “Ecker Named to House Select Committee on Restoring Law and Order,” Pa. House Republican Caucus, July 14, 2022, <https://www.pahousegop.com/News/31124/Latest-News/Ecker-Named-to-House-Select-Committee-on-Restoring-Law-and-Order> (last accessed Feb.29, 2024).

²⁰ Reps. Kail, Ecker, O’Neal, Memorandum, Pa. House of Representatives (June 13, 2022), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20210&cosponId=37457> (last accessed Feb. 29, 2024).

²¹ Katie Meyer, “Pa. Republicans respond to gun violence by trying to impeach Philly’s DA,” WHYY.org (June 13, 2022), <https://whyy.org/articles/pennsylvania-house-larry-krasner-impeachment-proceedings/> (last accessed Feb. 29, 2024).

(quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original)). State officials' disagreement with the Philadelphia citizens who gave DA Krasner his mandate is not a legitimate reason to disenfranchise Philadelphia's voters. Act 40 should be invalidated on that basis alone.

II. Act 40 Contravenes the Longstanding Principle that Prosecutorial Authority Must Be Accountable to the Electorate.

Act 40 also contravenes the principle that prosecutors be elected representatives accountable to the people. Since the Commonwealth first established the position of the district attorney in 1850, the Philadelphia district attorney was elected by, and accountable to, Philadelphia voters. *See* 16 P.S. § 7701. And the 1874 Constitution reflects a decentralization of certain powers to local officials directly accountable to the citizenry. Pa. Const. art. IX, § 4 in particular established ten county officers, including district attorneys, who would be “elected at the municipal elections and shall hold their offices for a term of four years.”²² The role of the district attorney, in turn, would be to “perform the function of local prosecutor previously performed by the [d]eputy Attorney General.” *Commonwealth ex rel. Krasner v. Attorney General*, slip op. at 15 (Pa. Commw. Ct. Jan. 26 2024) (quoting *Commonwealth v. Schab*, 383 A.2d 819, 821

²² Section 4 was originally ratified as Section 1 of Article XIV. *See* Pa. Const. of 1874, art. XIV, § 1. In 1968, the provision underwent revisions and took its current form. *See* Pa. Const. of 1968, art. IX, § 4.

(Pa. 1978)). These reforms engraved in law the right of the people to participate directly in local governance and undergird the inherently American belief that government must rest on the consent of the governed. *See, e.g., Commonwealth v. Carsia*, 491 A.2d 237, 243-44 (Pa. Superior Ct. 1985), *aff'd*, 517 A.2d 956 (Pa. 1986).

Summarizing the import of Section 4, the Superior Court in *Carsia* noted that “the absurdity that an appointed official with his office in Harrisburg, may at his pleasure take over the offices of district attorneys . . . runs counter to every principle of American democracy where the power to govern stems from the people, and the people alone.” *Id.* at 245 (quoting *Commonwealth v. Fudeman*, 152 A.2d 428 (Pa. 1959)). *See also Krasner, supra*, slip op. at 16 (there is a “broad delegation of authority to the district attorneys,” with only “limited circumstances” justifying “interference” by the Attorney General).

In contravention of the principles undergirding Section 4, Act 40 replaces the Philadelphia District Attorney with an appointed prosecutor who, unlike every other prosecutor in the state, will have no electoral accountability to the voters whose interests they are supposed to protect. The Constitution is clear that local prosecutorial decisions must be made by an elected official accountable through elections.

CONCLUSION

For the foregoing reasons, the Court should enter relief in favor of the
Petitioner.

Dated: March 1, 2024

Respectfully submitted,

John A. Freedman*
Jonathan L. Stern*
Jeremy Karpatkin*
Steven Hess*
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
john.freedman@arnoldporter.com
jonathan.stern@arnoldporter.com
jeremy.karpatkin@arnoldporter.com
steven.hess@arnoldporter.com

* Not admitted in Pennsylvania,
participating as counsel for Amici
Curiae pursuant to 204 Pa. Code
§ 81.502(a)

/s/ Claudia De Palma
Mimi M. McKenzie (No. 47434)
Claudia De Palma (No. 320136)
PUBLIC INTEREST LAW CENTER
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102
(267) 546-1313
mmckenzie@pubintlaw.org
cdepalma@pubintlaw.org

Stephen Loney (No. 202535)
Marian K. Schneider (No. 50337)
Kate I. Steiker-Ginzberg (No. 332236)
AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
sloney@aclupa.org
mschneider@aclupa.org
ksteiker-ginzberg@aclupa.org

Attorneys for Amici Curiae

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the United 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.

I further certify that the foregoing brief contains 5,617 words, in compliance with the 7,000-word limit established by Pa.R.A.P. 531(b)(3).

Dated: March 1, 2024

/s/ Claudia De Palma
Claudia De Palma, Esq.