



MEMORANDUM

TO: The Pennsylvania Senate State Government Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: December 13, 2021

RE: OPPOSITION TO SB 940 P.N. 1214 (ARGALL)

Bill summary: [SB 940](#) (PN 1214) would amend [Article XI](#) of the Pennsylvania Constitution to require that the Legislative Reference Bureau, or a successor legislative agency prescribed by the General Assembly, will be responsible for:

- Advertising proposed amendments or emergency amendments to the Pennsylvania Constitution.
- Preparing the question to be included on the ballot; and
- Preparing the “accurate and factual summary of the amendment.”

Currently, advertising responsibilities are constitutionally designated to the Secretary of the Commonwealth, an appointed position within the executive branch. The Secretary of the Commonwealth has also traditionally prepared ballot questions. And under [Section 201.1](#) of the Pennsylvania Election Code, the Office of Attorney General is responsible for drafting a plain English explanation of the proposed amendment.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 940.

Delegating authority to the Legislative Research Bureau fails to check the power of the legislature.

SB 940 would reassign duties currently delegated to the Secretary of the Commonwealth and to the Office of Attorney General to the Legislative Reference Bureau (LRB) or “a successor legislative agency prescribed by the General Assembly.” While the LRB operates as a nonpartisan agency responsible for preparing bills, amendments, resolutions, and citations for members of the General Assembly, it was established by and under the authority of the legislature.¹ The director of the LRB is elected by members of the House and Senate during a joint session. As such, the LRB is not an agency independent from the legislature. There would be nothing to stop the General Assembly from electing an accommodating director, creating a “successor agency,” or even establishing a department within the LRB specifically to deal with ballot matters—all without any check on their authority from another branch of government. The LRB, despite its reputation as a professional, nonpartisan agency, would not be structurally capable of checking the power of the legislature.

SB 940 would codify the likely unconstitutional practice of drafting amendment ballot questions.

Although the Secretary of the Commonwealth currently drafts ballot questions for constitutional amendments, it is the ACLU of Pennsylvania’s position² that this practice violates the provisions of [Article XI, § 1](#) of the Pennsylvania Constitution.³ Article XI makes no mention of ballot questions; it requires that the **text of the amendment serve as the ballot question**, stating that “*such* proposed amendment or amendments,” i.e. the amendment passed by the legislature, “shall be submitted to the qualified electors of the State.” Because any ballot question that differs from the text of “such amendment” as passed by the legislature is unconstitutional, the current practice of writing a separate ballot question (regardless of who is responsible for drafting it) is also unconstitutional.

¹ [May 7, 1923 \(P.L. 158, No. 119\)](#).

² Brief of Appellee at 33, [League of Women Voters v. Degraffenreid](#), 4 MAP 2021, filed April 12, 2021.

³ [PA. CONST. art. XI, § 1](#): Proposal of amendments by the General Assembly and their adoption.

The Supreme Court of Kentucky, under its version of Article XI, recently ruled such practices unconstitutional, reasoning that “[a] plain reading of this text suggests that the Framers intended to impose a mandatory requirement that the amendment be submitted to the voters, and that they intended to leave only the way the vote was to be taken to the General Assembly’s discretion.”⁴ SB 940 would subvert this constitutional requirement by expressly authorizing a legislative agency to draft ballot questions, presented to voters, that differ from the text to be amended to the constitution.

SB 940 would upend the balance of power under Article XI, fundamentally changing what the Pennsylvania Constitution has required for nearly 200 years.⁵

The legislature has the sole responsibility for drafting constitutional amendments. Proposed amendments must pass each chamber in two consecutive legislative sessions before being presented to voters in a ballot referendum. Proposed amendments are not subject to gubernatorial veto and therefore are not constrained by traditional checks and balances between the branches of government. Those who drafted the Constitution, however, designed the amendment process to ensure that an informed electorate would serve as a counterweight to the drafting authority of the legislature. By allowing a legislative agency to draft the amendment language *and* determine what information the electorate sees about the amendment, SB 940 would give the legislature wide latitude to control public messaging on any amendment, in whatever way it may deem necessary, to persuade the electorate to support its proposals.

We raised this very scenario in our [Marsy's Law brief](#),⁶ again citing a recent Kentucky Supreme Court case:

[The Kentucky Supreme] court reasoned that it would be “unimaginable” that the framers of the constitution “intended to grant such broad authority over the process of modifying our organic document solely to the General Assembly” such that the legislature could “encompass not only the logistical details of the voting process but also the form of the amendment to be submitted for a vote.”⁷ Otherwise, the legislature would be able to create any summary it wanted, which would “yield an absurd result” by giving the legislature “absolute authority” to choose what the electorate sees when they vote with the effect of allowing the legislature alone to amend the constitution.⁸

This same reasoning applies to the provision in SB 940 that grants a legislative agency the authority to write the “actual and factual summary of the amendment.” It is unclear whether this is the same role assigned to the Attorney General to draft the plain English statement or a new role. In either case, it is troubling, because SB 940 would vest the legislature with unilateral authority to decide how the public should consider any proposed amendment to the constitution. Our current system, by contrast, ensures that the Secretary of the Commonwealth and Office of Attorney General provide at least a modest check on the legislature’s power.

As a result, SB 940 would fundamentally change what the Constitution currently requires, upending nearly two centuries of practice under Article XI.

For these reasons, we urge you to oppose Senate Bill 940.

⁴ [Westerfield v. Ward](#), 599 S.W.3d 739, 748 (Ky. 2019).

⁵ There was no amendment process until the 1838 constitution was adopted. Prior to 1838, changes were made to the Pennsylvania Constitution via constitutional conventions in 1790 and 1838.

⁶ Brief of Appellee at 34, [League of Women Voters v. Degraffenreid](#), 4 MAP 2021, filed April 12, 2021.

⁷ [Westerfield v. Ward](#), 599 S.W.3d 739, 748 (Ky. 2019).

⁸ 12 *Id.* at 749.