IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 83 MAP 2019

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; AND LORRAINE HAW,
Petitioners-Appellees,

v.

KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH,
Respondent-Appellant.

BRIEF FOR PETITIONERS-APPELLEES

Appeal from the Order of the Commonwealth Court entered on October 30, 2019, at No. 578 MD 2019

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Dated: November 1, 2019

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INTRODUCTION

Only the voters can rewrite the Constitution. Here, the Pennsylvania Legislature has attempted to take that power for itself, by asking the voters of the Commonwealth to vote on a massive constitutional amendment. The proposed amendment, commonly called "Marsy's Law," provides a brand new bill of rights to victims of crime and will change virtually every aspect of our criminal justice system. Despite the many changes that the proposed amendment will make to the Constitution, the voters have only one option available to them: vote "yes" or "no," to all these changes together.

The Commonwealth Court, after an evidentiary hearing, issued a narrow preliminary injunction designed to protect all parties' rights and avoid interference with the vote on November 5 on the constitutional amendment. That injunction should not be disturbed unless "it is plain that no grounds exist[ed] to support the decree or that the rule of law relied upon was palpably erroneous or misapplied." *Roberts v. Bd. Of Dirs. Of Sch. Dist. Of Scranton*, 341 A.2d 475, 478 (Pa. 1975). That standard is not met here.

STATEMENT OF SCOPE AND STANDARD OF REVIEW.

Review of a trial court's order "granting or denying preliminary injunctive relief is 'highly deferential.'" *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004)

(quoting *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount Inc*., 828 A.2d 995, 1000 (Pa. 2003)). Under this highly deferential standard, "the appellate court is directed to 'examine the record to determine if there were any apparently reasonable grounds for the action of the court below.'" *Warehime*, 860 A.2d at 46 (quoting *Summit Towne Centre, Inc*., 828 A.2d at 1002)). In other words, the appellate court will not interfere with the grant or denial of a preliminary injunction unless "it is plain that no grounds exist[ed] to support the decree or that the rule of law relied upon was palpably erroneous or misapplied." *Shepherd v. Pittsburgh Glass Works*, LLC, 25 A.3d 1233, 1241 (Pa. Super. Ct. 2011) (quoting *Roberts v. Bd. Of Dirs. Of Sch. Dist. Of Scranton*, 341 A.2d 475, 478 (Pa. 1975)). That review includes "facts which were of record and before the court as of the date the decision was rendered." *Albee Homes, Inc. v. Caddie Homes*, Inc., 207 A.2d 768, 773 (Pa. 1965).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

1. Whether there are any apparently reasonable grounds to support affirmance of the Commonwealth Court's narrowly crafted preliminary injunction?

2. Whether Commonwealth Court erred in pre-emptively lifting the automatic supersedeas?

STATEMENT OF THE CASE

Statement of Facts

On November 5, 2019, Pennsylvania voters will read a ballot question that, if passed, would create a new bill of rights for crime victims and amend three articles, eight sections, and a schedule of the existing Pennsylvania Constitution.

In Pennsylvania, during the 2019 legislative session, SB 1011 was introduced under the name House Bill 276 (HB 276) and passed by the House in April 2019. Pet. for Review ¶ 19. In June 2019, the Senate passed HB 276, also known as Joint Resolution 2019-1. *Id.* Joint Resolution 2019-1 directed the Secretary of the Commonwealth to submit the proposed amendment to electorate. *Id.* ¶ 20.

The Attorney General of the Commonwealth prepared a "statement in plain English which indicates the purpose, limitations and effects of the ballot question." *Id.* ¶ 21 (quoting 25 Pa. Stat. Ann. § 2621.1). The Secretary of the Commonwealth drafted the text of the single ballot question that will present Joint Resolution 2019-1 to the voters, as required by 25 Pa. Stat. § 3010. *Id.* ¶ 24. The Secretary has published the ballot question, the Attorney General's Plain English Statement, and Joint Resolution 2019-1 together on the Department of State website. *Id.* ¶ 25.

Joint Resolution 2019-1 proposes amending Article I of the Pennsylvania Constitution to create a bill of rights for crime victims. *Id.* ¶ 20. It defines victims

broadly to "include[] any person against whom the criminal offense or delinquent act is committed or who is directly harmed by the commission of the offense or act." Joint Resolution 2019-1 (attached hereto as Exhibit B).

The many new victims' rights that will be added to the Constitution include:

- the right "to be treated with fairness and respect for the victim's safety, dignity and privacy";
- the right "to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the accused";
- the right "to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct";
- the right "to be notified of any pretrial disposition of the case";
- the right "to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole and pardon";
- the right "to be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender";
- the right "to reasonable protection from the accused or any person acting on behalf of the accused";
- the right "to reasonable notice of any release or escape of the accused";
- the right "to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused";
- the right to "full and timely restitution from the person or entity convicted for the unlawful conduct";
- the right to "full and timely restitution as determined by the court in a juvenile delinquency proceeding";

- the right "to the prompt return of property when no longer needed as evidence";
- the right "to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings";
- the right "to confer with the attorney for the government"; and
- the right "to be informed of all rights enumerated in this section."

Id.

Those new rights must be "protected in a manner no less vigorous than the rights afforded to the accused." *Id.* Either the victim or the government's attorney can then enforce any of the newly created rights "in any trial or appellate court, or before any other authority." *Id.*

The new rights afforded by Marsy's Law will also significantly change existing constitutional provisions that afford rights to the accused—including the right to a speedy trial, the right to confront witnesses, the right against double jeopardy, the right to bail, the right to post-conviction relief, and the right to appeal. And they change the public's right of access to court proceedings, the Governor's pardoning power, and powers given to the judiciary by the Constitution.

On November 5, 2019, Pennsylvania voters will be asked to give a single "yes" or "no" answer to the amendment to the Pennsylvania Constitution granting crime victims fifteen new individual rights. On Election Day, voters will not be

presented with the language of the actual amendment to the Pennsylvania Constitution. Instead, they will vote on the condensed ballot question prepared by the Secretary of the Commonwealth, which does not include the actual text of the amendment. Pet. For Review ¶ 24. If the majority of voters vote "yes" to Marsy's Law, the amendment will immediately become part of the Constitution.

Petitioner League of Women Voters of Pennsylvania and its members have a substantial, direct, and immediate interest in this case, because the challenged ballot question threatens to deprive the voters of the Commonwealth of their right to decide what amendment to make to their Constitution. Petitioner Lorraine Haw objects that she is not able to vote separately on the many changes to the Constitution the amendment would make. She would support some, but not all of the changes, brought about by Marsy's Law.

Procedural History

This action was commenced by Lorraine Haw and the League of Women Voters of Pennsylvania's Petition for Review, filed on October 10, 2019 in the Commonwealth Court under its original jurisdiction. The Petition to Review raised three counts against Kathy Boockvar, the Acting Secretary of the Commonwealth: 1) the Ballot Question violates the requirement of Article XI, § 1 of the Pennsylvania Constitution that "when two or more amendments shall be submitted they shall be voted upon separately"; 2) the Ballot Question violates

Article XI, § 1's requirement that a "proposed amendment or amendments shall be submitted to the qualified electors of the State"; and 3) in the alternative, the Ballot Question violates the electorate's right to be fully informed of the question to be voted on because it does not fairly, accurately, and clearly apprise voters of the issue. Petitioners requested the court preliminarily and permanently enjoin the Secretary of the Commonwealth from tabulating and certifying the votes on the Ballot Question.

On October 17, 2019, pursuant to Pa.R.A.P. 1531(b), Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams, victims of crimes, filed an application for intervention in opposition to the Petition for Review. On October 18, 2019, also pursuant to Pa.R.A.P. 1531(b), Ronald Greenblatt, a veteran criminal defense attorney, filed his own application for intervention in support of the Petition for Review. No party objected to the applications for intervention, and their applications were granted.

The Commonwealth Court ordered expedited briefing, and a hearing on Petitioners' requested preliminary injunction was held on October 23, 2019. Immediately prior to this hearing, counsel for the parties and Intervenors stipulated to the following: 1) Haw and Moore Intervenors are registered voters in the Commonwealth; 2) the General Assembly and Office of Attorney General properly adhered to the process by which the General Assembly and the Secretary can place

the Proposed constitutional Amendment ballot question on the November 2019 ballot; and 3) the costs incurred by the Department of State for publication of the Proposed Amendment, the plain English statement, and the ballot question throughout the Commonwealth.

During the October 23 hearing, the Commonwealth Court heard testimony only from Intervenor Greenblatt concerning the irreparable harm that would result if the Proposed Amendment became part of the Pennsylvania Constitution. Mr. Greenblatt testified that based on the plain language of the proposed amendment, victims of crime and anyone directly impacted by those crimes will have the absolute constitutional right "to reasonable protection from the accused or any person acting on behalf of the accused," as well as the right "to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused." Hr'g Tr. (H.T.) at 24-24 (see Appendix). Mr. Greenblatt explained that he would be stymied in his ability to obtain discoverable material pursuant to Article I, § 9 of the Pennsylvania Constitution. H.T. at 30. He further testified that where the accused seeks to examine a crime victim, or anyone who is impacted by a crime (often including witnesses), on delicate, personal matters that are germane to the case, the victim or anyone who is impacted by the crime, could invoke the right to dignity and privacy established in the Proposed Amendment. H.T. at 36-37. He also stated that without compulsory discovery as mandated by

Article I, § 9 of the Constitution, the Proposed Amendment would hamstring defense attorneys' efforts to negotiate plea agreements. H.T. at 41-42.

The Secretary, by contrast, presented no evidence. The Secretary argued that last minute changes to the composition of the ballot in prior elections had confused voters, but proffered no evidence—as opposed to argument—that the existence of an injunction in this case would change voter behavior. The Secretary did not object on the record to the court's decision not to hear the witness from the Department of State nor lodge any objection to the court's conduct of the hearing. Counsel for Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams also presented argument at the hearing, but again did not present evidence, nor did counsel lodge any kind of objection to the conduct of the hearing.

The Commonwealth Court issued a Memorandum Opinion and Order on October 30, 2019, granting a preliminary injunction enjoining the Secretary from tabulating and certifying the votes of the November 2019 General Election on the Ballot Question, conditioned on the Petitioners' posting of a $500 bond. The Commonwealth Court recognized that the proposed amendment, if approved by the electorate, will "immediately, profoundly, and irreparably impact" accused individuals, victims, and the criminal justice system as a whole. Oct. 30, 2019 Mem. Op. at 15. Specifically, it concluded that approval by the electorate would

"put into doubt" virtually "every stage of the criminal proceedings." *Id*. The Court found that "[t]he inevitability of these harms is assured by the plain language of the Proposed Amendment." Id. at 16.

The Court held that Petitioners are likely to succeed on the merits of their claims: "it appears that the Proposed Amendment violates the single subject-matter rule of Article XI, Section I." Oct. 30, 2019 Mem. Op. at 18. The Court held that "[w]here the Constitution mandates that there be separate votes on each proposed constitutional amendment, and the Proposed Amendment appears not to satisfy this mandate, disenfranchisement occurs." Id. at 18. The Court's "exhaustive search of Pennsylvania case law reveal[ed] no other amendment to a section of the Constitution that was as sweeping in scope as the Proposed Amendment." Oct. 30, 2019 Mem. Op. at 28.

The Commonwealth Court also lifted the automatic supersedeas under Pa.R.A.P. 1736(b), holding that the requirements for that action were satisfied on the record of the proceedings. Petitioners posted the preliminary injunction bond required under Pa.R.A.P. 1531(b) with the Prothonotary of the Commonwealth Court on October 30, 2019. The Secretary and Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams filed notice of their respective appeals to the Pennsylvania Supreme Court on October 31, 2019.

SUMMARY OF ARGUMENT

The injunction issued by the Commonwealth Court preserves the status quo without threatening harm to any party: it allows the vote to move forward, but holds the result of that vote in abeyance to allow time for full consideration of the constitutional challenge raised by Petitioners. The preliminary injunction is precisely suited to abate the harms threatened if the proposed amendment were to take effect before its constitutionality can be determined. That injunction should be affirmed.

The Secretary notes that in past challenges to other proposed constitutional amendments, the Commonwealth Court and this Court have allowed the vote on the ballot question to move forward, holding that there was no harm in doing so because the vote could be voided after the fact. Whether the denial of preliminary relief was appropriate on the record in those cases does not dictate the outcome on the record made in the Commonwealth Court. Petitioners (including Intervenor Ronald Greenblatt) presented evidence that there will be immediate consequences if the amendment takes effect after the election, and that those harms will not be remedied if the amendment is later declared void. Mr. Greenblatt's clients' cases will continue and he will have to make strategic decisions and advise clients about decisions that will not be easily undone – if they can be undone at all – in the event

that the amendment is ultimately held to be void. On this record, then, there is more than a "reasonable basis" for granting preliminary relief.

On the other side of the scale, neither the Secretary nor the Intervening Respondents have presented any evidence that the existence of the Court's injunction will deter voters – either those who favor or those who oppose the amendment. The "pro" and "con" campaigns are ongoing, including the "no" campaign of Petitioner League of Women Voters.

Instead, the Secretary argues that the proposed amendment is not "self-executing." But that is not the Secretary's call. The proposed amendment makes reference to implementing legislation, but does not state that no part of the amendment may take effect until that legislation is passed. Unless this Court holds that no part of the amendment is self-executing, trial courts will of necessity have to apply those parts of the amendment they believe are susceptible of application without implementing legislation. The provision most of issue for Mr. Greenblatt – any victim's right to refuse discovery in a criminal case – appears, on its face, to require no implementing legislation.

Moreover, even if this Court were to hold that no part of the proposed amendment may take effect without enabling legislation, that would only kick the can down the road. The General Assembly is quite capable of moving such

legislation quickly,[1] which would necessitate a second round of preliminary injunction proceedings, and require the Legislature to invest time drafting legislation that will be mooted if Petitioners ultimately prevail. That futile fire drill would be completely unnecessary, wasteful, and manifestly not in the public interest.

The futility of Respondents' position is readily apparent, as Petitioners' constitutional claims are well-founded. Article XI, § 1 mandates that "[w]hen two or more amendments shall be submitted they shall be voted upon separately." Pa. Const. art. XI, § 1. The November 2019 ballot question proposes multiple amendments to Pennsylvania's Constitution, but allows voters only a single "yes" or "no" vote, in violation of Article XI, § 1. Compounding this problem, the full text (or even a fair summary) of the proposed constitutional amendment will not be on the ballot; instead, the voters will be asked to vote "yes" or "no" to a brief and incomplete summary of the proposed changes. Petitioners have established a clear right to relief.

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[1] The House of Representatives approved Joint Resolution 2019-1 in just over 60 days and the Senate took a mere two weeks to pass it. https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2019&sind=0&body=H&type=B&bn=276. The Governor also endorsed the proposed amendment. https://www.governor.pa.gov/newsroom/governor-wolf-supports-marsys-law-crime-victims-constitutional-amendment/.

Finally, Respondents argue that the Commonwealth Court lacked authority to vacate the automatic supersedeas sua sponte. That argument is now moot, as Petitioners have filed an application to vacate the supersedeas which, in light of the Court's short deadlines for filing this response, Petitioners incorporate here by reference.

ARGUMENT

The injunction issued by the Commonwealth Court allows the vote on the proposed amendment to move forward while preventing the harms that would occur if the amendment became law but were later reversed. Contrary to the Secretary's *ipse dixit*, there is no evidence, and no reason to assume, that enjoining the Secretary from tallying and certifying the results of the election will dissuade voters from voting, either for or against, the amendment, or cause any other harm.

The only evidence presented at the hearing came from Intervenor Ronald Greenblatt, a prominent and experienced criminal defense attorney, who provided detailed testimony about how the proposed amendment would immediately and irreparably impair his ability to do his work as a criminal defense attorney. He testified that were Marsy's Law to take effect, even temporarily, it would deprive him of a vital tool in preparing his cases, potentially limit his ability to cross examine witnesses, undercut his ability to plea bargain effectively, greatly multiply the number of motions and interlocutory appeals he would need to file to protect

his clients' interests, and potentially alter the course of his clients' cases in ways that could not be reversed if the amendment were later struck down.

A. The Doctrine of Laches does not bar equitable relief for Petitioners.

Both the Secretary and the Intervening Respondents argue that equitable relief should be denied because Petitioners did not challenge the ballot question until early October. "[I]n order to prevail on an assertion of laches, respondents must establish: a) a delay arising from petitioner's failure to exercise due diligence; and, b) prejudice to the respondents resulting from the delay." *Sprague v. Casey*, 520 Pa. 38, 45, 550 A.2d 184, 187 (1988). Neither element is satisfied here.

First, Respondents concede that the earliest that Petitioners could have sought to enjoin the ballot question was after it was published on July 26, 2019. Petitioners – a nonprofit that does not have its own legal department and an individual voter who is not a lawyer – filed a detailed Petition for Review and Application for Special Relief fifty-three business days later, on October 10, 2019. There is no evidence that Petitioners dragged their feet or wasted time, nor, more importantly, is there any reason to believe that Petitioners delayed their filing for strategic reasons.[2]

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[2] In this Court, the Secretary cites *Terraciano v. Com., Dep't of Transp., Bureau of Driver Licensing*, 753 A.2d 233 (Pa. 2000), for the proposition that Petitioners have "unclean hands." *Terraciano* makes clear that "unclean

But even if Petitioners could somehow be deemed less than diligent in preparing for and filing litigation, Respondents have shown no prejudice as a result of that delay. The Secretary was obligated by statute to proceed with the advertisements she now bemoans, and to proceed with the publication and dissemination of absentee ballots. Indeed, the preparation and mailing of the ballots had to proceed regardless of the presence of the ballot question, because of the municipal races and other issues at stake. The Secretary would not – **could not** – have halted either publication or the preparation of the ballot if Petitioners had filed suit in August or September. "[T]he sort of prejudice required to raise the defense of laches is some changed condition of the parties which occurs during the period of, and in reliance on, the delay." *Sprague v. Casey*, 520 Pa. 38, 46-47, 550 A.2d 184, 188 (1988) (internal quotations and citation omitted). "The party asserting laches as a defense must present evidence demonstrating prejudice from the lapse of time." *Commonwealth ex rel. Baldwin v. Richard*, 561 Pa. 489, 496,

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hands" bar equitable relief only where the requesting party has "acted unfairly, fraudulently or deceitfully in th[e] matter." *Id*. at 237-38. There is no evidence to even suggest that the League or Ms. Haw did anything unfair, fraudulent, or deceitful. For the doctrine of unclean hands to apply, the conduct at issue must change the equitable relationship of the parties. *Shippenville-Elk Twp. Volunteer Fire Dep't v. Ladies Auxiliary of Shippenville-Elk Twp. Volunteer Fire Dep't*, 680 A.2d 923, 926 (Pa. Commw. Ct. 1996) (citing *Goebel Brewing Company v. Esslingers*, Inc., 373 Pa. 334, 95 A.2d 523 (1953)).

751 A.2d 647, 651 (2000). The Secretary cannot claim that she would have declined to advertise the proposed amendment, or declined to include it on the ballot, as soon as suit was filed, nor is there reason to believe that the Commonwealth Court would have enjoined those statutorily required actions.

Respondents' arguments about "prejudice" are particularly inapt in light of Petitioners' withdrawal of their request that the Commonwealth Court order the Secretary to keep the challenged question off the ballot. Instead, Petitioners sought – and obtained – only their more limited alternative relief, the prohibition against the certification of the vote, in order to minimize the disruption to the ongoing election process. There is simply no prejudice to any Respondent from the Petitioners' request, in October, for an order that allows the referendum to proceed but halts, temporarily, the certification of the results of the vote.

The Commonwealth Court rejected Appellees' entire laches argument in a footnote, finding that, as a matter of law, laches is not available to prevent a judicial determination on the constitutionality of an amendment to the Constitution. Oct. 30, 2019 Mem. Op. at 7 n.5. "Because of the intense importance to the people of the Commonwealth of matters affecting the amendment of their fundamental law, the doctrine of laches cannot be invoked to prevent the determination of the propriety of the submission of an amendment." *Tausig v. Lawrence*, 197 A. 235,

239 (Pa. 1937). Indeed, in the very case cited by Intervenors, *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988), , the Supreme Court held that "laches and prejudice can never be permitted to amend the Constitution." *Id.* at 188; *see also Sprague v. Cortes*, 145 A.3d 1136, 1152 n.13 (Pa. 2016) (Todd, J., dissenting) ("[O]ur Court has heretofore indicated that, because of the paramount importance of the manner in which a proposed constitutional amendment is presented to the people for consideration, the doctrine of laches was not a bar to our Court's consideration of such matters.").

B. The Commonwealth Court's preliminary injunction should be affirmed because it is not based upon "palpably erroneous or misapplied" law and is supported by "apparently reasonable grounds."

The Commonwealth Court made no error of law in considering the propriety of a preliminary injunction. The Commonwealth Court was bound by precedent to assume that the amendment, if passed, would take effect immediately and therefore trigger the irreparable harms demonstrated by the testimony at the preliminary injunction hearing. That evidence, weighed against the complete absence of harm threatened by the issuance of the injunction, and combined with the Petitioners' strong showing on the merits, fully supported the issuance of the injunction.

All of the prerequisites for a preliminary injunction are met in this case. A preliminary injunction is warranted if: (1) relief is necessary to prevent immediate

and irreparable harm; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to the status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted. *Brayman Const. Corp. v. Com., Dep't of Transp.*, 13 A.3d 925, 935 (Pa. 2011); *see also Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Petitioners established all of these elements below.

1. The balance of harms favors preserving the status quo by enjoining the Secretary from tabulating and certifying the results of the vote on the ballot question.

The overriding rationale for preliminary injunctive relief is to halt any change in the parties' legal rights, and any harm that would accompany that change in position, until the court can fully adjudicate those rights. For that reason, four of the six prerequisites for issuance of a preliminary injunction focus on the consequences of action and the consequences of inaction by the court. The Commonwealth Court properly found that there was greater harm threatened if the court did not act. The Commonwealth Court recognized that the proposed amendment, if approved by the electorate, will "immediately, profoundly, and irreparably impact" accused individuals, victims, and the criminal justice system as a whole. Oct. 30, 2019 Mem. Op. at 15. Specifically, it concluded that approval by

the electorate would "put into doubt" virtually "every stage of the criminal proceedings." Id.

The "status quo" that Petitioners seek to preserve is the Constitution as it exists today. The fact that some voters have cast ballots for and against the proposed amendment has not worked a change in that document. The change in the Constitution will come only if the Secretary certifies the results of the vote on the ballot question (and if the "yesses" outnumber the "nos").

The injunction issued by the Commonwealth Court does not change the Constitution, nor does it nullify the votes that have been cast to this point or the votes that will be cast on the ballot question on November 5. That injunction merely preserves the current form of the Constitution by preventing the certification of the vote during the pendency of this litigation. The injunction is "reasonably suited to abate" the threat to Petitioners' rights as voters, as well as the collateral harms detailed by Intervenor Greenblatt. It is the exact remedy that the courts of Kentucky ordered when faced with a challenge to that state's Marsy's Law amendment. *Westerfield v. Ward*, Civ. A. No. 18-1510, 2019 WL 2463046, at *3 (Ky. June 13, 2019) (Ky. 2019) ("Accordingly, the circuit court allowed the question to appear on the ballot at the November 6, 2018 election, but enjoined Secretary Grimes from certifying the ballots cast for or against the proposed amendment.").

And there are manifestly "reasonable grounds" for the Commonwealth Court's finding that this prohibitory injunction will prevent harm, not cause it. If the votes are collected, but not tabulated or certified, and the proposed amendment is ultimately deemed constitutional, then the vote can be certified and no voter will have suffered disenfranchisement. If the votes are collected, but not tabulated or certified, and the proposed amendment is voided and the vote never certified, then no voter will have suffered disenfranchisement because there is no right to have counted a vote on an invalid ballot question. *See Costa v. Cortes*, 143 A.3d 430, 440 (Pa. Commw. Ct. 2016).

But if the proposed amendment is approved by a majority of voters and takes effect but later is voided, all voters, including Petitioner Haw and the many members represented by the League of Women Voters, will have been deprived of the right to cast a vote on the separate changes that will take effect immediately after the election. In addition, all stakeholders in the criminal justice system – criminal defendants, defense counsel like Intervenor Greenblatt, District Attorneys, and court staff down to the magisterial district judges who conduct summary cases and preliminary proceedings in other cases will have changed procedures, changed positions, incurred costs that cannot be recovered and made decisions that may not be reversible.

The Secretary contends that the proposed amendment is not self-executing and therefore there is no risk of harm if it is allowed to go into effect after the election, but before Petitioners' challenge is resolved. The Secretary's argument stretches beyond recognition this Court's precedent:

> A constitutional amendment becomes effective upon approval by the electorate, unless some other date is fixed by the constitution or the amendment itself, and is "self-executing when it can be given effect without the aid of legislation and when the language does not indicate an intent to require legislation."
>
> Here, Appellants make no argument that the amendment cannot be given effect without the aid of legislation . . . . Moreover, the plain language of amended Article I, Section 6 contains no provision conditioning its effective date upon the passage of any court rules or legislation. Thus, contrary to Appellants' assertions, the amendment's operative date is not dependent on this Court's revised versions of Rules 1101, 1102 and 1103 taking effect.

Commonwealth v. Tharp, 562 Pa. 231, 237-38, 754 A.2d 1251, 1254-55 (2000) (internal citations omitted). The proposed amendment's grant of authority to the Legislature to "**further** provid[e] and [] **defin[e]**" the rights established in the amendment is far from the explicit prerequisite to implementation described by this Court in *Tharp*. Moreover, even if this Court were to hold that no part of the proposed amendment may take effect without enabling legislation, that would only postpone, not eliminate, the threatened harm. The General Assembly is quite

capable of passing such legislation quickly,[3] which would necessitate a second round of preliminary injunction proceedings, and require the Legislature to invest time drafting legislation that will be mooted if Petitioners ultimately prevail. That futile fire drill would be completely unnecessary, wasteful, and manifestly not in the public interest.

Granting Petitioners the more limited relief of enjoining the Secretary from tabulating and certifying votes cast for and against the ballot question costs nothing, preserves the status quo during the pendency of this litigation, and prevents irreparable harm and potential costs to the taxpayers. Because of this, and because Petitioners have satisfied all of the requirements for a preliminary injunction, the preliminary injunction requested by Petitioners should be affirmed.

2. Petitioners have established a clear right to relief.

To obtain a preliminary injunction, Petitioners need not "establish [their] claim[s] absolutely" and instead need only "demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *Costa*, 143 A.3d

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[3] The House of Representatives approved Joint Resolution 2019-1 in just over 60 days and the Senate took a mere two weeks to pass it. https://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2019&sind=0&body=H&type=B&bn=276. The Governor also endorsed the proposed amendment. https://www.governor.pa.gov/newsroom/governor-wolf-supports-marsys-law-crime-victims-constitutional-amendment/.

at 437 (quoting *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014)). Petitioners' constitutional challenge to the November 2019 question—which, if voted in, would provide an entire bill of rights to crime victims equal to those rights provided to the accused and would effectuate changes to multiple articles and sections of the Pennsylvania Constitution—"raise[s] important questions that are deserving of serious consideration and resolution" and therefore warrant a preliminary injunction. *Fischer v. Dep't Pub. Welfare*, 439 A.2d 1172, 1175 (Pa. 1982). Petitioners have more than just pled "substantial legal questions"; they have established that the Marsy's Law ballot question violates the separate-vote requirement in Article XI, § 1.

Article XI, § 1's separate vote requirement must be strictly applied. *Bergdoll v. Kane*, 731 A.2d 1261, 1270 (1999). Because Article XI, § 1 "provid[es] a complete and detailed process for the amendment of th[e Constitution] . . . [n]othing short of a literal compliance with this mandate will suffice." *Id.* at 1270 (quoting *Kremer v. Grant*, 606 A.2d 433, 436, 438 (Pa. 1992)).

Neither the constitutional amendment presented by the ballot question, nor the form of the ballot question created by the Secretary of the Commonwealth, nor the Plain English Statement of the Office of Attorney General can be read to have a

single effect. Instead, the amendment proposes an entire "bill of rights" for crime victims that affords them a multitude of new rights across multiple subject matters.

The text of the constitutional amendment: By its plain language, the constitutional amendment proposed by the ballot question would grant numerous "***rights***" to crime victims:

> § 9.1. ***Rights*** of victims of crime.
>
> (a) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following ***rights***, as further provided and as defined by the General Assembly, which shall be protected in a manner no less vigorous than the rights afforded to the accused . . . .

Joint Resolution No. 2019-1 (emphasis added). The constitutional amendment proceeds with a lengthy list of the proposed rights, separated by seven semicolons. That list includes subject matters far more wide-ranging than the questions proposed in Bergdoll, *Pennsylania Prison Society*, *Mellow*, or *Grimaud*. These matters cannot be said to encompass one subject without rendering the Supreme Court's test meaningless. Unlike the first ballot question in *Grimaud* that proposed changes to "bail" alone, the November 2019 ballot question proposes changes to bail ***and*** discovery, ***and*** restitution and return of property, ***and*** notice requirements, ***and*** participation in public proceedings, ***and*** due process, ***and*** other matters. Thus,

any argument that the ballot question contains only one subject matter is "belied by the ballot question itself." *Bergdoll*, 731 A.2d at 1269.

The text of the ballot question as formulated by the Secretary: The Secretary's formulation of the question to be presented to the voters also makes clear that their votes will effect a series of substantive changes, described with the plural "rights," which are marked off by semicolons and prefaced by the preposition "including":

> Shall the Pennsylvania Constitution be amended to grant certain ***rights*** to crime victims, ***including*** to be treated with fairness, respect and dignity***;*** considering their safety in bail proceedings***;*** timely notice and opportunity to take part in public proceedings***;*** reasonable protection from the accused***;*** right to refuse discovery requests made by the accused***;*** restitution and return of property***;*** proceedings free from delay***;*** and to be informed of these rights, so they can enforce them?

The plain English statement of the Office of Attorney General: Similarly, the Attorney General could not describe the constitutional amendment proposed by the ballot question without using plurals, multiple paragraphs, and even bullet points to set off the separate and distinct "several . . . new constitutional rights" the amendment would establish:

> The proposed amendment, if approved by the electorate, will add a new section to Article I of the Pennsylvania Constitution. That amendment will provide victims of crimes with certain, ***new constitutional rights*** that must be protected in the same way as the rights afforded to individuals accused of committing a crime.

The proposed amendment defines "victim" as both a person against whom the criminal act was committed and any person who was directly harmed by it. The accused or any person a court decides is not acting in the best interest of a victim cannot be a victim.

Generally, the proposed amendment would grant victims the constitutional right to receive notice and be present and speak at public proceedings involving the alleged criminal conduct. ***It would also*** grant victims the constitutional right to receive notice of any escape or release of the accused ***and the right*** to have their safety and the safety of their family considered in setting the amount of bail and other release conditions. ***It would also create several other new constitutional rights,*** such as the right to timely restitution and return of property, the right to refuse to answer questions asked by the accused, and the right to speak with a government attorney.

Specifically, the proposed amendment would establish the following ***new rights*** for victims:

- To be treated with fairness and respect for the victim's safety, dignity and privacy
- To have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the accused
- To reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct
- To be notified of any pretrial disposition of the case
- With the exception of grand jury proceedings, to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole and pardon
- To be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender
- To reasonable protection from the accused or any person acting on behalf of the accused
- To reasonable notice of any release or escape of the accused

- To refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused
- Full and timely restitution from the person or entity convicted for the unlawful conduct
- Full and timely restitution as determined by the court in a juvenile delinquency proceeding
- To the prompt return of property when no longer needed as evidence
- To proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings
- To confer with the attorney for the government
- To be informed of all rights enumerated in this section

> The proposed amendment would allow a victim or prosecutor to ask a court to enforce ***these constitutional rights*** but would not allow a victim to become a legal party to the criminal proceeding or sue the Commonwealth or any political subdivision, such as a county or municipality, for monetary damages.
>
> Once added to the Pennsylvania Constitution, these ***specific rights of victims*** cannot be eliminated, except by a judicial decision finding all or part of the amendment unconstitutional or the approval of a subsequent constitutional amendment. If approved, the General Assembly may pass a law to implement these ***new, constitutional rights***, but it may not pass a law eliminating them. If approved, State and local governments will need to create new procedures to ensure that victims receive the ***rights*** provided for by the amendment.

Despite proposing numerous rights that encompass several subject matters, the ballot question in its current form prevents individuals from voting on each constitutional change separately. Voters must answer a multi-faceted question creating multiple new rights with a single "yes" or "no" vote. This means that

voters are compelled to vote in favor of the amendment even if they only support some of its changes.

This Court has held that ballot questions far less wide-ranging than the November 2019 question violated Article XI, § 1. For example, in *Bergdoll v. Kane*, the Court ruled that a November 1995 ballot question violated the separate-vote requirement. The question included two proposals:

> Shall the Pennsylvania Constitution be amended to provide (1) that a person accused of a crime has the right to be "confronted with the witnesses against him," instead of the right to "meet the witnesses face to face," and (2) that the General Assembly may enact laws regarding the manner by which children may testify in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television?

Bergdoll, 731 A.2d at 1265-66. Although the question did not specifically refer to multiple constitutional provisions, the Court reviewed the content, purpose, and effect of the proposed amendments. *Id*. at 1270*; see Pa. Prison Soc*., 776 A.2d at 980 (summarizing the Court's approach in *Bergdoll*). The proposed change to defendants' "face-to-face" confrontation rights amended Article I, § 9. And the other proposed change, authorizing the General Assembly to enact laws regarding children's testimony in criminal proceedings, effectively amended the Supreme Court's rulemaking power in Article V, § 10. *Bergdoll*, 731 A.2d at 1270. Because the ballot question prevented the electorate from separately voting on the

amendments, the Court affirmed the Commonwealth Court's order that declared the vote on the ballot question null and void. *Id.*

Respondents argue that a proposed amendment satisfies the single-subject test so long as the changes it makes to the Constitution are contiguous, relate to a single broad subject, and do not alter the text of more than one section of the Constitution. But Article XI, Section 1 is not a formalistic requirement: it is a substantive protection of the exclusive right of the voters to amend the Constitution. As this Court explained in *Grimaud*,

> "We analyze the ballot question's **substantive** affect on the Constitution, examining the content, purpose, and effect. . . . The test to be applied 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. . . . **The question is whether the single ballot question patently affects other constitutional provisions**, not whether it implicitly has such an effect, as appellants suggest."

Grimaud v. Commonwealth, 865 A.2d 835, 842 (Pa. 2005) (emphasis added). The *Grimaud* court did not intend to limit violations of the single-subject test to literal instances where the amendment says that it intends to amend more than one provision of the Constitution. The analysis is instead whether there is a "patent" effect that goes beyond the text of the proposed amendment.

The proposed amendment violates Article XI, Section 1, both because it covers more than a single subject and because it would patently affect more than one part of the Constitution.

a. *The Proposed Amendment Encompasses More Than A Subject.*

The proposed Marsy's Law amendment creates multiple brand new rights for victims at various stages of criminal proceedings, affects multiple existing provisions of the Constitution, and grants the General Assembly the power to define at a later date the "due process" to be accorded victims. The Secretary's argument that the General Assembly must act before any provision of the amendment becomes effective, if correct, confirms that the amendment must be viewed as more than a single change.

The proposed Section 9.1 is no more a "single subject" than existing Section 9, which sets forth the rights of the accused. That section also governs an over-arching category – rights of defendants in criminal proceedings – but it enumerates several independently enforceable rights: the right to be heard, the right of confrontation, a right to compulsory process, right to a speedy trial, right against self-incrimination, and right to trial by jury.

Respondent correctly points out that an amendment has a "single subject" when its provisions have a single objective. And certainly, several of the

provisions in the proposed amendment support a common objective: that crime victims will have notice of and an opportunity to participate in every phase of a criminal proceeding that affects them rights. That objective can fairly be said to encompass, in addition to the provisions about notice and participation, the definition of victim and the enforcement provision, and perhaps even the right to speak with the prosecutor.

But the proposed amendment does more than that. It creates additional rights that exist and are enforceable independently of the right to participate. Victims will have a constitutional right to have their safety and that of their families considered in the setting of bail; a right refuse to respond to discovery or subpoenas from the defense; a right to full and timely restitution; a constitutional right to the return of property; and a constitutional right to speed and finality in proceedings. These additional rights are independent from one another. For example, the right to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the accused has nothing to do with the victim's right to return of property. And the right to reasonable notice of any release or escape of the accused is entirely distinct from those rights, as well as the right to refuse a pre-trial discovery request made by the accused or his lawyer. The Constitution could, and should, be amended to separately add some or all of these rights.

Even if fifteen independently enforceable rights could be considered a single subject—which they cannot not—the Marsy's Law amendment does more than create rights for victims. It also grants the General Assembly power over judicial proceedings – indeed, the Secretary argues that action by the General Assembly is a prerequisite to the recognition of *any* of the rights set forth in the amendment. In *Bergdoll I*, the Supreme Court held that an amendment that changed the right of confrontation in Article 9 and empowered the General Assembly to legislate court procedures related to that right did two things.

> We are also unpersuaded by Secretary Kane's alternative argument that the purported grant of rulemaking authority to the General Assembly in the context of children's testimony in criminal proceedings does not amount to an amendment of Article 5, § 10(c) as that section contemplates that the Supreme Court's rulemaking authority may be affected or limited by other parts of the Constitution. Article 5, § 10(c) of the Constitution grants the power to the Supreme Court "to prescribe general rules governing practice, procedure and the conduct of all court…." As we stated in *In Re 42 Pa. C.S. § 1703*, 482 Pa. 522, 534, 394 A.2d 444, 451 (1978), "the Pennsylvania Constitution grants the judiciary—and the judiciary alone—power over rule-making."
>
> In that decision, we rejected the notion that Article 5, § 10(c) allows the General Assembly to exercise concurrent power in the area of rule making.

Bergdoll v. Kane, 731 A.2d 1261, 1270 (1999). The same result must follow here.

b. ***The Proposed Amendment Facially Affects Numerous Existing Provisions of the Pennsylvania Constitution.***

The Marsy's Law Amendment violates Article XI, § 1 for a second reason: because it facially affects more than one section of the constitution. It affects, most obviously, the new section it creates. It also facially affects several different clauses in Article I, § 9. It expressly limits the right of the accused to compulsory process, because under Marsy's Law no victim must respond to a subpoena from the accused. It also facially affects the right of confrontation and cross examination, as that right would now be weighed against every victim's right to privacy and to be treated with dignity and respect.[4] In addition, of course, it facially affects Article I, § 14, as it creates a new constitutional condition to the granting of bail. It also facially affects Article V, § 10—just as the amendment addressed in *Bergdoll I* did—by creating a new exception to the judiciary's exclusive control over court proceedings, empowering the General Assembly to "provide and define" for victims' "justice and due process throughout the criminal and juvenile justice systems." And the list of affected provisions in the Constitution goes on.

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[4] It is not difficult to imagine a cross examination by defense counsel that a victim would find invasive or disrespectful.

Respondents offer no response to this analysis. Instead, Respondents argue that because the proposed amendment does not add or delete the text of any other provision of the Constitution, it does not facially affect them, citing *Grimaud*. But that is not what *Grimaud* holds, and it is not the law, as is demonstrated by the decision in *Bergdoll I.* The test is whether the proposed amendment changes the **substance** of multiple sections, not whether it changes the **text** of multiple sections.

c. ***The Ballot question does not clearly and fully inform the voters of the changes they are voting for.***

Finally, the ballot question as currently worded does not conform to the standards established by the Pennsylvania Supreme Court. The electorate has a right "to be clearly and more fully informed of the question to be voted on." *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). That right is only satisfied if the form of the ballot question put to the voters "fairly, accurately and clearly apprize[s] the voter of the question or issue to be voted on." *Id.* This standard has been described as "the fundamental requirement which every ballot question . . . must meet." *Sprague v. Cortes*, 145 A.3d 1136, 1149 (2016) (Todd, J., dissenting).[5]

[5] The Pennsylvania Supreme Court assessed the wording of a constitutional amendment ballot question and reached a split 3-3 decision in *Sprague v. Cortes*, 145 A.3d 1136 (2016). Because the lower court had upheld the

The ballot question clearly does not capture all of the components of the proposed Section 9.1:

> Shall the Pennsylvania Constitution be amended to grant certain rights to crime victims, including to be treated with fairness, respect and dignity; considering their safety in bail proceedings; timely notice and opportunity to take part in public proceedings; reasonable protection from the accused; right to refuse discovery requests made by the accused; restitution and return of property; proceedings free from delay; and to be informed of these rights, so they can enforce them?

Ex. B, Ballot Question. This text omits many of the new rights afforded to crime victims and their families, including, for example, the right to have the victim's family's safety considered in setting release conditions for the accused; the right to be notified of any pretrial disposition of the case; the right to be heard at any proceeding in which the rights of the victim are implicated, including release, plea, sentencing, disposition, parole, and pardon proceedings; the right to participate in the parole process; the right to prompt and final conclusion of cases and any

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ballot question, the split decision did not alter the lower court's decision. While the justices were split on the outcome of the case, five of the six justices who participated in the decision gave support to *Stander* being the applicable test for the wording of ballot questions. *Sprague*, 145 A.3d at 1142 (Baer, J., concurring); *Sprague*, 145 A.3d at 1149 (Todd, J., dissenting).

related postconviction proceedings; and the right to confer with attorneys for the government.

The text also omits all of the many changes to existing constitutional provisions affording rights to the accused—including the right to a speedy trial, the right to confront witnesses, the right against double jeopardy, the right to pretrial release, the right to post-conviction relief, and the right to appeal—as well as changes to the public's right of access to court proceedings, to the Governor's pardoning power, and to powers given to the judiciary by the Constitution. This omission is inherently misleading.[6]

The Secretary's failure to encompass all of the components of the proposed amendment into 75 words does not reflect any neglect on the part of the Secretary. *See* 25 Pa. Stat. Ann. § 3010 ("Each question to be voted on shall appear on the ballot labels, in brief form, of not more than seventy-five words."). Rather, it shows that the proposed amendment is far too complex and multi-faceted to be presented in a 75-word summary. *Pa. Prison Soc'y*, 776 A.2d at 976 (reviewing the Commonwealth Court's reasoning that amendment by popular initiative "was

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[6] "[T]here is a categorical difference between the act of creating something entirely new and altering something which already exists. Language which suggests the former while, in actuality, doing the latter is, at the very least, misleading, and, at its worst, constitutes a ruse." *Sprague*, 145 A.3d at 1145 (Todd, J., dissenting).

not designed to effectuate sweeping, complex changes to the Constitution"). The Secretary was forced to choose between complying with the strictures of the Election Code and presenting the full scope of the changes to be made to the voters. Neither the Secretary nor the voters should be compelled to make such a choice. The form of the ballot question does not fairly convey the substance of the proposed amendment, and cannot, in 75 words, be made to do so. It does not satisfy the test set forth by the Supreme Court.

Amicus Curiae, the Republican Caucus of the Pennsylvania House of Representatives, argues that the insufficiency of the ballot question is irrelevant because the public legislative process and Plain English statements have given the voters all the information they need. But if the legislative process obviated the need for a clear and complete ballot question, then any ballot question would automatically suffice. That is not the law.

CONCLUSION

The right to vote "is pervasive of other basic civil and political rights, and is the bedrock of our free political system." *Bergdoll*, 731 A.2d at 1268-69 (quoting *Moore v. Shanahan*, 486 P.2d 506, 511 (Kan. 1971)). Threats to fundamental rights constitute immediate and irreparable harm and warrant a preliminary injunction. *See Pa. State Educ. Ass'n ex rel. Wilson v. Commonwealth., Dep't of*

Cmty. & Econ. Dev., Office of Open Records, 981 A.2d 383, 386 (Pa. Cmwlth. Ct. 2009) (granting a preliminary injunction to prevent public disclosure of employee's home addresses, a threat to constitutionally protected privacy rights), *aff'd*, 606 2 A.3d 558 (Pa. 2010).

Article XI, § 1 is clear that "[w]hen two or more amendments shall be submitted [for electorate vote] they shall be voted upon separately." Pa. Const. art. XI, § 1. That process specifically "insures that the voters will 'be able to express their will as to each substantive constitutional change separately.'" *Pa. Prison Soc.*, 776 A.2d at 976 (quoting *Pa. Prison Soc. v. Commonwealth*, 727 A.2d 632, 634 (Pa. Commw. Ct. 1999)). This process is in place because the Constitution's framers thought "voters should be given free opportunity to modify the fundamental laws as may seem to them fit." *Pa. Prison Society*, 776 A.2d 971, 985-98 (Pa. 2001) (Cappy, J.) (dissenting). "[T]his must be done in the way [the voters] themselves provided, if stability, in carrying on of government, is to be preserved." *Id.* Because the November 2019 ballot question requires voters to singularly support or reject a multifaceted question, it violates Article XI, § 1's separate-vote requirement and the electorate's right to vote.

The injunction issued by the Commonwealth Court should be affirmed.

Respectfully submitted,

Date: November 1, 2019

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellee has complied with the 14,000 word limit set forth in Pa. R.A.P. 2135(a)(1). According to the Word Count feature in Microsoft Office Word 2013, Petitioners/Appellees' Brief contains 9888 words.

Date: November 1, 2019

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CERTIFICATION

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

Date: November 1, 2019

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