

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**NO. 578 MD 2019**

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**LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; AND LORRAINE  
HAW, et. al,**

**Petitioners,**

**v.**

**KATHY BOOCKVAR, ACTING SECRETARY OF THE  
COMMONWEALTH,**

**Respondent.**

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**BRIEF OF *AMICUS CURIAE* PENNSYLVANIA NEWSMEDIA  
ASSOCIATION IN SUPPORT OF LEAGUE OF WOMEN VOTERS AND  
LORRAINE HAW**

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## **INTEREST OF AMICUS CURIAE**

The Pennsylvania NewsMedia Association (“PNA”) is a Pennsylvania nonprofit corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of over three hundred (300) daily and weekly newspapers, print, digital and other media organizations across the Commonwealth, in ensuring that the press can gather information and report to the public. A significant part of the Association’s mission is to defend the media’s statutory and constitutional rights of access to records and proceedings in Pennsylvania. No party, person or entity other than the Amicus Curiae financed or authored this brief.

The present case raises important issues regarding public access to judicial records and proceedings under the United States and Pennsylvania Constitutions, including the requirements for open courts and the applicable standards governing closure. If this Court were to adopt the position of the Commonwealth in this case, it would directly affect the public’s ability to access judicial records and proceedings pursuant to constitutional open court guarantees.

PNA seeks to participate pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure to stress the legal and policy considerations that mandate an interpretation of the United States and Pennsylvania constitutional requirements in favor of open courts and meaningful public access.

## SUMMARY OF THE ARGUMENT

The creation of a constitutional privacy right for crime victims under the Marsy's Law amendment raises concerns for the public and for media organizations that routinely attend and report on criminal court records and proceedings. The United States and Pennsylvania Constitutions, as well as common law<sup>1</sup>, provide presumptive public access to judicial records and proceedings, many of which include information that implicates victim privacy. The new constitutional privacy right to be enshrined under Marsy's Law fundamentally affects the constitutional requirements for open courts, including public access to judicial records and proceedings, and as a result, the Marsy's Law amendment directly affects Article I, § 11 of the Pennsylvania Constitution and the First Amendment of the United States Constitution, which is mirrored in Article I, § 7<sup>2</sup> of the Pennsylvania Constitution. The newly created privacy right could fundamentally impact the public's right to

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<sup>1</sup> *Amicus curiae* limits the focus of this brief to the Constitutional issues before this Court but notes that this Court has recognized a common law right to access public judicial records in addition to the rights afforded under the Constitution. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (Pa. 1987). The existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1066 (C.A.Pa.1984) quoting *United States v. Criden*, 648 F.2d 814, 819 (3d Cir.1981). Adopting the reasoning of the United States Supreme Court, this Court explained that "members of the public have an interest in observing criminal justice processes to be assured that offenses perpetrated against them are dealt with in a manner that is fair to their interests and fair to the interests of the accused. *Fenstermaker*, 530 A.2d at 417.

<sup>2</sup> Pennsylvania jurisprudence governing the constitutional right to access court records and proceedings focuses on Article I, § 11 and the First Amendment of the United States, and as such, this brief will not address the rights afforded the press under Article I, § 7 other than to note the Marsy's Law victim privacy right could affect the press' Article I, § 7 right to gather and report information about crime victims.

access and understand the workings of the criminal justice system and the public access rights enshrined in Article I, § 11 and the First Amendment.

Because the proposed amendment affects constitutional rights enshrined in separate provisions of the Constitution, the amendment runs afoul of Article XI, § 1 of the Pennsylvania Constitution, which governs the amendment process and requires amendments to be voted on separately.

### **ARGUMENT**

Since the nation's inception, the public has enjoyed a right to observe the functioning of the judicial system. In fact, the tradition of public access to criminal trials pre-dates the United States' Constitution, and this tradition helped shape the First Amendment rights that form the cornerstone of our democracy. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 596 (1980). These rights serve many important interests, not least of which are promoting fairness and equality in the judicial process and fostering trust in the judicial system. The right of public access, and the important public policy interests that underlie it, are directly affected by the Marsy's Law amendment.

#### **I. The Marsy's Law amendment runs afoul of Article XI, § 1.**

As the League of Women Voters correctly notes, the Marsy's Law amendment raises issues under Article XI, § 1 of the Pennsylvania Constitution

because it affects more than one provision of the Pennsylvania Constitution, both on its face and in its application. 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. Article XI, § 1’s separate vote requirement must be strictly applied. *Bergdoll v. Kane*, 731 A.2d 1261, 1270 (Pa. 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)).

This Court has interpreted Article XI, § 1 to require specific analysis of an amendment’s “substantive effect” on the Constitution by examining its “content, purpose, and effect”. *Grimaud v. Commonwealth*, 865 A.2d 835, 842 (Pa. 2005). This Court in *Grimaud* further reasoned that “[t]he 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. . . .”. *Grimaud* at 842. This Court further held that when evaluating the ballot question “[T]he question is whether the single ballot question patently affects other constitutional provisions”. *Id.*

The evidence in this case shows that the Marsy’s Law amendment, the ballot question and the Attorney General’s plain English statement do, in fact, affect other constitutional provisions. The most relevant to *Amicus Curiae* is Article I, § 11 and



the press' First Amendment rights enshrined under the United States Constitution. *Amicus Curiae* does not take a position on the potential interplay of the competing constitutional rights under Article I, § 11 and Marsy's Law or a standard to address their apparent conflict, *Amicus* limits its analysis to the fact that the newly created Marsy's Law privacy right directly affects the public and press' right to access judicial records and proceedings guaranteed under separate provisions of the Pennsylvania and United States Constitutions, thus triggering Article XI, § 1.

**II. The Marsy's Law right to privacy affects Article I, § 11 and the Constitutional right to open courts.**

The Marsy's Law amendment will add numerous new rights to the Pennsylvania Constitution, at least one of which directly affects the rights guaranteed by Article I, § 11 of the Pennsylvania Constitution and the First Amendment to the United States Constitution. The Marsy's Law amendment states:

“§ 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 . . . .

...to be treated with fairness and respect for the victim's safety, dignity and *privacy*”.

Joint Resolution No. 2019-1(a), *emphasis added*.

Further, the Attorney General's Plain English Statement explaining the ballot question states:

“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...*”

Attorney General’s Plain English Statement, *emphasis added*.

This privacy right directly affects the public’s right to access judicial records and proceedings that involve victims. The right, as written, is amorphous, and the Resolution vests with the General Assembly the right to “further provide[d] and ... define[d]” the enumerated rights. *Id.* It remains to be seen how the General Assembly would flesh out this newly created privacy right, but when considering its practical application it is not difficult to imagine the right being cited as a basis to limit or prohibit public access to victim information appearing in court records, to object to public testimony during court proceedings like preliminary hearings and criminal trials, and to exclude the public from some or all criminal proceedings where victim information is involved. Judicial records and proceedings, including those that involve victim information, are subject to presumptive public access under Article I, § 11 and the First Amendment, and as such, the privacy right created under Marsy’s Law directly affects the rights guaranteed under these separate constitutional provisions.

Further complicating the issue is the fact that the ballot question did not address the newly created victim privacy right at all. The ballot question stated:

“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?”

#### Ballot Question for Joint Resolution 2019-1

There was no mention in the ballot question about creating a victim right to privacy other than a generic reference to “certain rights” to be granted to crime victims. The fact that the ballot question did not contain a reference to a victim right of privacy indicates that the Pennsylvania electorate did not have a chance to consider the question of privacy and public access and therefore did not actually vote upon that question. Article XI, § 1 requires the electorate to be given the opportunity to understand the newly created privacy right and its effect on the rights afforded under Article I, § 11 and the First Amendment.

The interplay between the constitutional provisions guaranteeing open courts and the newly created victim privacy right could significantly impact the public’s ability to access judicial records and proceedings and undermine the critical and constitutionally protected role that public access plays in the proper administration of justice. In light of the language of the proposed amendment, plain English statement and the ballot question, it is clear that the amendment does not comply with the Article XI, § 1 single subject rule.

### **III. The United States and Pennsylvania Constitutions guarantee open courts.**

The United States and Pennsylvania Constitutions recognize the important role public access plays in the proper function of the criminal justice system, and accordingly, both guarantee public access to judicial records and proceedings. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (Pa. 1987); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

Media organizations are the eyes and ears of the public, and they routinely access criminal court records and attend criminal court proceedings pursuant to these constitutional rights, and many of these records and proceedings include information about crime victims. The constitutional right to privacy created under Marsy's Law could fundamentally affect the public nature of judicial records and proceedings by enshrining a privacy right in the Pennsylvania Constitution in conflict with the constitutional rights to open courts under the United States and Pennsylvania Constitutions. This newly-created constitutional right to privacy could prevent the public and the press from accessing court records and attending criminal proceedings. The result would be a lack of information about crimes and criminals in our communities, which is contrary to centuries of a basic tenet of Anglo-American law.

**A. The First Amendment guarantees open courts.**

The United States Supreme Court held that the First Amendment provides the public and the press with a right of access to criminal trials. U.S. Const. amend. I; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980). The court’s analysis focused on the historical right to attend criminal trials, with the court noting that “throughout its evolution, the trial has been open to all who cared to observe.” *Id.* at 564. Two years after *Richmond Newspapers*, the Supreme Court decided *Globe Newspaper*, striking down a state statute that mandated closure during the testimony of minor victims in criminal trials involving certain sexual offenses. *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Adopting the two-part analysis in *Richmond Newspapers*, the Court confirmed that the public and the press have a First Amendment right of access to criminal trials rooted in the historically open nature of such proceedings and the benefits derived from openness. *Id.* at 605-06. A few years later, the court extended the right of access beyond criminal trials to include the right to attend preliminary hearings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“Press-Enterprise II”).

**B. Article I, § 11 of the Pennsylvania Constitution guarantees open courts.**

Pennsylvania courts analyzing limits on the constitutional presumption of access to judicial records and proceedings must consider the First Amendment as

well as the rights afforded under Article I, § 11 of the Pennsylvania Constitution, which provides:

“All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.”

Pa. Const. Art. I, § 11.

This Court has held that the public has a constitutional right to observe criminal proceedings under Article I, § 11. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (Pa. 1987); see also *Commonwealth v. Contakos*, 499 Pa. 340, 344, 453 A.2d 578, 580 (1982)(noting “our virtually unbroken history of public trials and openness in criminal trials” in holding trial court erred in excluding public from courtroom during portions of criminal trial proceedings). This Court has not reached the exact issue of whether the Pennsylvania constitutional access rights are “co-extensive” with the rights guaranteed by the First Amendment, but there is no question that both the Pennsylvania and United States Constitutions provide the public and the press with a presumptive constitutional right to access judicial records and proceedings, many of which include information about victims. *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d, n. 15, (Pa. 2007). And while this Court has also indicated that Article 1, § 11 does not provide “a greater right of access to the public in criminal trials than the public trial provision of the federal constitution,” the

Pennsylvania Constitution does not provide a lesser right of access. *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, 322 (Pa. 1980).

**C. Pennsylvania courts analyzing access questions consider the First Amendment constitutional analysis.**

When evaluating limits on access to judicial records and proceedings, Pennsylvania courts consider the test enunciated by the United States Supreme Court in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“Press Enterprise II”). In that case, the United States Supreme Court held that courts must determine whether the First Amendment right of access applies to a record or proceeding using the “experience and logic” test, and if so, whether closure is the least restrictive means of accomplishing a compelling interest. *Id.* The “experience” prong of the test requires the court to consider whether there has been a “tradition of accessibility” to the record or proceeding at issue. *Id.* The “logic” inquiry focuses on “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* Finally, the Court also required that “[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 510.

Pennsylvania courts apply this constitutional framework when adjudicating limits on public access to court records and proceedings under Pennsylvania law, including Article I, § 11. *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d (Pa. 2007).

Pennsylvania law is rife with examples of this constitutional analysis in action, with courts repeatedly recognizing the public's right to access judicial records and proceedings that may involve victim information and implicate the privacy right created by Marsy's Law. In Commonwealth v. Fenstermaker, 515 Pa. 501, 530 A.2d 414 (Pa. 1987), this Court recognized a presumptive right to access arrest warrant affidavits, which must contain information sufficient to make a showing of probable cause and may include information about victims. *See also* Pa.R.Crim.P. 513, 513.1, governing public access to arrest warrant and supporting documentation.

Further, in Commonwealth v. Upshur, 592 Pa. 273, 924 A.2d 642 (Pa. 2007), this Court held the presumption of access applied to an audio recording played during a preliminary hearing. It is important to note that the audio recording at issue in the Upshur case captured conversations between the defendant and one of her alleged victims and similar factual cases could implicate the Marsy's law victim privacy right.

This Court also held the presumption of access applies to search warrants and supporting documentation which, like arrest warrant applications, must make a showing of probable cause and could include victim information. In P.G. Publishing Co. v. Commonwealth, 532 Pa. 1, 614 A.2d 1106 (Pa. 1990); *see also* Pa.R.Crim.P.



212, providing for public dissemination of arrest warrants and supporting documentation.

These cases were the result of litigation where it was unclear whether the constitutional presumption of access applied, but the Marsy's Law privacy right also affects court records and proceedings where the constitutional presumption of access is undisputed. Such records and proceedings include criminal complaints, victim direct testimony and cross examination during trial, evidence admitted by the court, victim impact statements, and countless other presumptively public records and proceedings that could trigger a victim privacy right.

The constitutional analysis and the rights guaranteed by both Article I, § 11 and the First Amendment are affected by the Marsy's Law amendment because it would insert a competing right into the constitutional analysis. There are, of course, numerous other constitutional rights and considerations that courts weigh as part of the First Amendment analysis, including the Sixth Amendment right to a fair trial and concerns about juror privacy, both of which were considered by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"). In that case, the Supreme Court found neither interest outweighed the constitutional requirement for open courts. *Id.* The Marsy's law privacy right would have to be similarly inserted into the constitutional analysis,

illustrating its direct impact on the constitutional rights guaranteed by the First Amendment and Article I, § 11.

#### **IV. Public policy supports open courts.**

When considering the rights enshrined in the First Amendment and Article I, § 11, it is critical to understand the public policy interests that form their basis because the Marsy's Law privacy right affects their continued application.

In analyzing First Amendment rights, the United States Supreme Court has articulated several significant public policy interests served by public access to judicial records and proceedings. First, public access allows the public to “participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.” *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Public scrutiny of a criminal trial also “enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and society as a whole.” *Id.* The Supreme Court also recognized that public scrutiny promotes fairness by operating as a restraint on possible abuses of judicial power, as well as providing a safeguard against “any attempt to employ our courts as instruments of persecution.” *In re Oliver*, 333 U.S. 257, 270 (1984).

Moreover, the Supreme Court recognized that public access is guaranteed by the First Amendment because “...the sure knowledge that anyone is free to attend

gives assurance that established procedures are being followed and that deviations will become known.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (“Press Enterprise I”). Public access “thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.*

In addition to important public policy interests, First Amendment rights also carry with them concurrent rights, including the right to “receive information and ideas.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The United States Constitution prohibits government from closing the courtroom doors, which were open to the public when the First Amendment was adopted and long before. *Id.* The Supreme Court in *Richmond Newspapers* recognized that a right to “observe” proceedings only goes so far, stating that “[i]nstead of acquiring information about trials by firsthand observation . . . people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public.” *Id.* at 572-73.

Acting as the eyes and ears of the public or “surrogates,” the media attend criminal proceedings “so that they may report what people in attendance have seen and heard,” furthering “public understanding of the rule of law and . . . comprehension of the functioning of the entire criminal justice system.” *Id.* at 572

(citation omitted). In this manner, the constitutional right of public access fosters public acceptance of "both the process and its results." *Id.* at 570-71.

The First Amendment of the United States Constitution and Article I, § 11 of the Pennsylvania Constitution, and the public policy interests that underpin both, are directly affected by the Marsy's Law victim privacy right because these rights conflict in their substance and application. The Marsy's Law amendment fundamentally affects the constitutional rights guaranteed by Article I, § 11 and the First Amendment, and as such, the Marsy's Law amendments should have been submitted to voters separately. Pa. Const. art. XI, § 1; *Grimaud v. Commonwealth*, 865 A.2d 835, 842 (Pa. 2005).

## **CONCLUSION**

For all the foregoing reasons, *Amicus Curiae* respectfully requests this Honorable Court to grant the relief sought by Petitioners, League of Women Voters and Lorraine Haw.

December 13, 2019

Respectfully submitted,

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## **CERTIFICATATION**

I hereby certify that the content of the foregoing *amicus* brief falls within the word limits enumerated in Pa.R.A.P. 531(b)(3).

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

Dated: December 13, 2019

*/s/ Melissa Bevan Melewsky*