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LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and LORRAINE HAW, Petitioners, v. KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH, Respondent.	COMMONWEALTH COURT OF PENNSYLVANIA ORIGINAL JURISDICTION No. 578 MD 2019

PETITIONERS' BRIEF IN SUPPORT OF APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532

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INTRODUCTION

The Legislature writes laws, but generally 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. "This is commonly referred to as logrolling." *Pa. Prison Soc'y v. Commonwealth*, 776 A.2d 971, 981 (Pa. 2001) (internal citations omitted). "Logrolling" takes away the voters' decision about what our Constitution should say and gives it to the Legislature.

Petitioners seek to enjoin a ballot question, scheduled to be placed before the voters on the November 5, 2019 Pennsylvania general-election ballot, that violates Article XI, § 1's constitutional mandate that "[w]hen two or more amendments shall be submitted they shall be voted upon separately." Pa. Const. art. XI, § 1. The challenged ballot question asks voters to adopt or reject the proposed constitutional amendment known as Joint Resolution 2019-1, or Marsy's Law, which would add a new Section 9.1 to Article I of the Pennsylvania Constitution.

The new section would create fifteen new constitutional rights for crime victims that must be enforced to the same degree as the constitutional rights of the accused in criminal court proceedings. The amendment would allow victims or prosecutors to seek a court order to enforce these constitutional rights and would empower the General Assembly to pass laws to define and implement these new rights.

These new rights would also significantly change the constitutional rights now provided to the accused in Article I, § 9 ("Rights of accused in criminal prosecutions"); Article I, § 6 ("Trial by jury"); Article I, § 10 ("No person shall, for the same offense, be twice put in jeopardy of life or limb"); Article I, § 14 ("Prisoners to be bailable; habeas corpus"); and Article V, § 9 ("Right of appeal"). Further, they would affect the public's right of access to court proceedings set forth in Article I, § 11; the governor's power to pardon set forth in Article IV, § 9; and the Supreme Court's authority over court proceedings set forth in Article V, § 10 ("Judicial administration") and jurisdiction over appeals set forth in the Schedule to the Judiciary.

Because the November 2019 ballot question proposes multiple amendments to Pennsylvania's Constitution, but allows voters only a single "yes" or "no" vote, it violates Article XI, § 1's separate-vote requirement and infringes upon the electorate's right to vote. 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.

This Court should enjoin this illegal amendment process, not only because it violates the rights of the voters, but also because once enacted (even if ultimately struck down), the new constitutional dictates would wreak havoc on our criminal justice system; impose enormous financial and administrative burdens on courts, counties, and law enforcement without providing the additional resources needed to meet those mandates; and mire in uncertainty every current and new criminal proceeding until the amendment is voided. This is not speculation: it is the experience in many other states that have adopted similar versions of Marsy's Law.

Simply put, the right to amend the Constitution belongs to the voters, not the Legislature. For these reasons, and as more fully explained below, the proposed ballot question violates that fundamental right of voters and should be enjoined.

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:

1. the right "to be treated with fairness and respect for the victim's safety, dignity and privacy";

2. 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";

3. the right "to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct";

4. the right "to be notified of any pretrial disposition of the case";

5. 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";

6. 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";

7. the right "to reasonable protection from the accused or any person acting on behalf of the accused";

8. the right "to reasonable notice of any release or escape of the accused";

9. the right "to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused";

10. the right to "full and timely restitution from the person or entity convicted for the unlawful conduct";

11. the right to "full and timely restitution as determined by the court in a juvenile delinquency proceeding";

12. the right "to the prompt return of property when no longer needed as evidence";

13. the right "to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings";

14. the right "to confer with the attorney for the government"; and

15. 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.

ARGUMENT

Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary injunction or special injunction "in the interest of justice and consistent with the usages and principles of law." The purpose of a preliminary injunction is to "put and keep matters in the position in which they were before the improper conduct of the defendant commenced." *Hill v. Dep't of Corr.*, 992 A.2d 933, 936 (Pa. Commw. Ct. 2010) (quoting *Little Britain Twp. Appeal*, 651 A.2d 606, 611 (Pa. Commw. Ct. 1994)).[1]

A preliminary injunction is warranted if: (1) relief is necessary to prevent immediate and irreparable harm; (2) greater injury will occur from refusing to

[1] The standard for obtaining a preliminary injunction under Rule 1532(a) is the same as that for obtaining a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *See Shenango Valley Ostepathic Hosp. v. Dep't of Health*, 451 A.2d 434, 441 (Pa. 1982).

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). Pennsylvania courts have granted preliminary injunctions enjoining placement of a question on a ballot in an upcoming election. *See, e.g., Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1262 (Pa. 2007).[2] While an amendment can also be declared void after going into effect, *see Bergdoll v. Kane*, 694 A.2d 1155, 1159 (Pa. Commw. Ct. 1997), *aff'd*, 731 A.2d 1261 (1999), that option would cause extreme disruption

[2] The fact that some ballots may have already been printed and distributed (such as absentee ballots) is not a practical bar to the relief Petitioners seek, as the Secretary will not tabulate votes designated to a question that has been ordered removed from the ballot. *See Costa v. Cortes*, 143 A.3d 430, 440 (Pa. Commw. Ct. 2016). In the alternative, the Court could simply enjoin the Secretary from certifying the result of the vote pursuant to 25 Pa. Stat. § 3159 during the pendency of the litigation and any appeals. That is what the courts of Kentucky did 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 potentially irreversible harms here, given the breadth of the Marsy's Law ballot question and the widespread impact it will have on the Pennsylvania Constitution and all criminal proceedings. Petitioners satisfy each of the preliminary injunction elements here and therefore the Court should issue the requested injunction.

I. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IMMEDIATE AND IRREPARABLE HARM.

A preliminary injunction is necessary to prevent immediate and irreparable harm to the "bedrock" right to vote, the state's financial resources, law enforcement's limited resources, and public safety. An injunction will ensure that the electorate is given the opportunity to vote on each proposed change to the Constitution and not forced to allow the General Assembly to usurp that right by impermissibly packaging multiple changes as one. Thus, Petitioners request that the Court prevent these harms by enjoining the Secretary from proposing the offending ballot question.

First, an injunction will prevent the November 2019 ballot from infringing on the Pennsylvania electorate's right to vote into law the specific right or rights they wish to afford to victims of crime, with full understanding of the impact that those new rights will have on existing constitutional provisions. 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 1269 (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. Commw. Ct. 2009) (granting a preliminary injunction to prevent public disclosure of employees' 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'y*, 776 A.2d at 976 (quoting *Pa. Prison Soc'y 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 Soc'y*, 776 A.2d at, 985-98 (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.* at 978 (quoting *Taylor v. King*, 130 A. 407, 409-10 (Pa. 1925)). 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.

Second, an injunction will prevent victims, defendants, and the courts from entering into a period of extreme uncertainty as to what rights they have under the Pennsylvania Constitution. As explained more fully below, the Marsy's Law amendment to the Pennsylvania Constitution will impact multiple existing constitutional rights of the accused in criminal prosecutions, including the right to trial by jury, right to confront witnesses, right against double jeopardy, and right to pretrial release, among many other foundational rights afforded to the accused. If the Marsy's Law amendment goes into effect before this Court decides whether the ballot question violates Article XI, § 1, courts will immediately begin applying entirely different legal standards at multiple stages of the criminal prosecution process. *See Commonwealth v. Tharp*, 754 A.2d 1251, 1254 (Pa. 2000) (explaining that a "constitutional amendment becomes effective upon approval by the electorate, unless some other date is fixed by the constitution or the amendment itself"). If the Marsy's Law amendment is later declared invalid, those changes to the criminal process will then need to be undone, causing chaos in Pennsylvania courts and confusion to all participants in criminal proceedings.

Third, an injunction will prevent Marsy's Law from imposing unrecoverable financial costs on Pennsylvania courts and counties burdened with compliance initiatives, only for those costs to be wasted if the amendment is later declared invalid. Other states that have passed nearly verbatim Marsy's Law amendments

have incurred significant expenditures and strains on judicial resources developing systems for notifying crime victims of the many new opportunities for them to participate in criminal proceedings and hiring more public employees to oversee and facilitate the notification process.[3] *See, e.g.*, Sophie Quinton, *'Marsy's Law' Protections for Crime Victims Sound Great, but Could Cause Problems*, Pew Stateline (Oct. 12, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems (attached hereto as Exhibit C) (reporting that North Dakota spent more than $800,000 to update its notification systems); Matthew Clarke, *California Billionaire Pushes States to Adopt "Marsy's Law,"* Prison Legal News (Feb. 2018), https://www.prisonlegalnews.org/news/2018/jan/31/california-billionaire-pushes-states-adopt-marsys-law (attached hereto as Exhibit D) (reporting that Marsy's Law would require Montana to spend $90,000 annually on additional prosecutors); Kelley Smith, *Marsy's Law Passed in 6 States, South Dakota on Track to Repeal It*, KSFY (Jan. 26, 2018), https://www.ksfy.com/content/news/Marsys-Law-passed-in-6-states-South-Dakota-on-track-to-

[3] It makes no difference to the Court's legal analysis that some states have enacted similar versions of Marsy's Law. Those states may have complied with the constitutional amendment process in their respective constitutions. Here, the Secretary's ballot question violates Pennsylvania's constitutional requirement that amendments to multiple constitutional provisions must be voted through separately. Thus, a subsequent decision that declares Marsy's Law null and void in Pennsylvania will render compliance costs wasted.

repeal-it-471383263.html (attached hereto as Exhibit E) (reporting that Mary's Law cost South Dakota "upwards of $5 million"); Seaborn Larson, *Montana Supreme Court: Marsy's Law Initiative Was Unconstitutional*, Great Falls Trib. (Nov. 1, 2017), https://www.greatfallstribune.com/story/news/2017/11/01/montana-supreme-court-marsys-law-initiative-unconstitutional-victims-rights/822077001 (attached hereto as Exhibit F) (reporting that Marsy's Law forced agencies in Montana to hire extra help to comply with its requirements). Therefore, a preliminary injunction will prevent a drain on scarce public resources.

Fourth, an injunction will prevent the ballot question from imposing a burden on the limited resources available to law enforcement and prosecutors, who otherwise would have to ensure that victims of crimes are notified and given meaningful opportunities to participate at various stages of criminal proceedings, including at bail hearings, trial, sentencing, appeals, and in postconviction and habeas proceedings. In states where Marsy's Law has passed, public employees have often been unable to take on these new responsibilities to all victims without compromising existing ones. *See* James Nord, *South Dakota Could Be the First State to Tweak 'Marsy's Law,'* PBS Newshour (May 14, 2018), https://www.pbs.org/newshour/nation/south-dakota-could-be-the-first-state-to-tweak-marsys-law (attached hereto as Exhibit G) (reporting that Marsy's law reduced the amount

of time that victim assistants and witness assistants in a state's attorney's office had available to spend with the most high-risk victims).[4]

Accordingly, a preliminary injunction is necessary here to prevent immediate and irreparable harm.

II. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS.

To warrant relief, the party seeking an injunction is not required to "establish his or her claim absolutely," but need only "demonstrate that substantial legal questions must be resolved to determine the rights of the parties." *Costa*, 143 A.3d at 437 (quoting *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 506 (Pa. 2014)); *see also, e.g.*, *Ambrogi v. Reber*, 932 A.2d 969, 976 (Pa. Super. Ct. 2007) ("[T]he party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the parties."). The Pennsylvania

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[4] These are just some of the many ways that Marsy's Law will affect law enforcement and criminal proceedings throughout Pennsylvania. As another example, in states that have passed Marsy's Law, some victims have invoked their privacy rights in ways that restrain police departments from releasing information about crimes and criminal suspects, potentially threatening public safety. *See Inconsistent Marsy's Law interpretations by police jeopardize public knowledge and safety*, Orlando Sentinel (June 14, 2019), http://www.orlandosentinel.com/opinion/editorials/os-op-marsys-law-victims-police-withhold-information-20190614-5c2fu7q66fh5fkhdkladldhiva-story.html (attached hereto as Exhibit H) (describing how Marsy's law restricts information reported to the public about dangerous crimes).

Supreme Court has recognized that constitutional challenges to legislative enactments may "raise 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). This case involves several substantial constitutional challenges to the November 2019 ballot question. First, the ballot question violates the separate-vote requirement contained in Article XI, § 1 of the Pennsylvania Constitution, because it creates multiple independent substantive rights and changes multiple existing provisions of the Constitution.[5] Second, the form of the ballot question fails to comply with

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[5] Other state courts have invalidated substantially similar initiatives that provided new rights to crime victims. For example, the Supreme Court of Oregon invalidated a proposed amendment that added to its constitution new rights for crime victims and, consequently, changed existing sections of its constitution, because the proposed amendment violated the constitution's requirement that two or more amendments be voted on separately. *See Armatta v. Kitzhaber*, 959 P.2d 49, 67 (Or. 1998) (explaining that "even those provisions that are [broadly related to criminal investigations or prosecutions] are not related closely enough to satisfy the separate-vote requirement"). Relying on Oregon case law, the Supreme Court of Montana invalidated a Marsy's Law submitted to voters that was nearly identical to Pennsylvania's proposed amendment. *Montana Ass'n of Ctys. v. State of Montana*, 404 P.3d 733, 742-43 (Mont. 2017). It held that the proposal violated the state constitution's separate-vote requirement because the proposal "substantively change[d] two or more parts of the [c]onstitution that are not closely related." *Id.*at 748. The Supreme Court of Kentucky also invalidated a similar proposal because the ballot question did not contain the proposed amendment's text, as required by its Constitution. *Westerfield*, 2019 WL 2463046, at *9-10; *see also infra* at II. B.

Article XI, § 1 because it does not set forth the text of the proposed amendment. Finally, the form of the ballot question violates the electorate's right to be fully informed because it does not fairly, accurately, and clearly apprise voters of the issue to be voted on.

A. The Substance Of The November 2019 Ballot Question Violates Article XI, § 1's Separate Vote Requirement.

Article XI, § 1 of the Pennsylvania Constitution permits the General Assembly to propose Constitutional amendments to the electorate, but requires that "[w]hen two or more amendments shall be submitted they shall be voted upon separately." Pa. Const. art. XI, § 1. This separate-vote requirement is violated when a ballot question proposes changes related to different subject matters. *Grimaud v. Commonwealth*, 865 A.2d 835, 841 (Pa. 2005) (adopting Justice Saylor's concurrence in *Pa. Prison Soc'y*, 776 A.2d at 984). The subject-matter test requires that Pennsylvania courts "analyze the ballot question's substantive affect [*sic*] on the Constitution, examining the content, purpose, and effect." *Id.* at 842. If the proposed change "facially [or] . . . patently affects other constitutional provisions," separate ballot questions are required. *Id.* at 841-42. Even if a ballot question purports to make amendments to a single article, as here, the separate-vote requirement applies. *See Pa. Prison Soc'y*, 776 A.2d at 982.

Article XI, § 1's separate vote requirement must be strictly applied. *Bergdoll*, 731 A.2d at 1270. 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)).

The Pennsylvania Supreme 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'y*, 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.*

The Supreme Court also held that a November 1997 ballot question violated the separate vote-requirement in *Pennsylvania Prison Society v. Commonwealth*. 776 A.2d at 981-82. In that case, the challenged ballot question proposed amending Article IV, § 9, relating to pardons:

> Shall the Pennsylvania Constitution be amended to require a unanimous recommendation of the Board of Pardons before the Governor can pardon or commute the sentence of an individual sentenced in a criminal case to death or life imprisonment, to require only a majority vote of the Senate to approve the Governor's appointments to the Board, and to substitute a crime victim for an attorney and a corrections expert for a penologist as Board members?

Id. at 974. The Court identified two purposes of the amendments: restructuring the pardoning power of the Board and altering the confirmation process. *Id.* at 981. The Court concluded the ballot question presented two separate amendments and thus violated the separate-vote requirement.[6] *Id.*

Although some ballot questions have survived Article XI, § 1 challenges, those questions proposed amendments that involved a single substantive change to

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[6] Even though the question violated Article XI's separate-vote requirement, the Court declined to invalidate the question because the proposed amendment did not actually change the Senate's confirmation process. It noted, however, that Article XI, § 1 "will require that a ballot question be declared null and void, except in the [unusual] circumstances presented [t]here." *Id.* at 982.

a single article of the Constitution—not multiple changes to multiple provisions, as here. For example, an amendment adopted by the electorate in May 2001 survived an Article XI, § 1 challenge because it resulted in only one substantive change. The amendment reapportioned senatorial districts, affecting term limits under Article 2, § 3, and reapportionment under Article 2, § 7. *Mellow v. Pizzingrilli*, 800 A.2d 350, 352, 357-58 (Pa. Commw. Ct. 2002). But this amendment made only one change: it cut short the term of a state senator who no longer lived in his district after reapportionment. *Id.* Because voting on the same change twice would subject the Constitution to the possibility of inconsistent provisions, the Court concluded that the ballot question "constitute[d] a single question" for Article XI, § 1 purposes. *Id.* at 358.

In addition, two amendments adopted by electorate in November 1998 survived Article XI, § 1 challenges because they did not patently affect other parts of the Constitution. One ballot question proposed amending Article I, § 14 by expanding to pretrial release:

> Shall the Pennsylvania Constitution be amended to disallow bail when the proof is evident or presumption great that the accused committed an offense for which the maximum penalty is life imprisonment or that no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community?

Grimaud, 865 A.2d at 841. Because disallowing bail related to only a single subject—bail—the question did not violate Article XI, § 1. *Id.* at 842 (rejecting

arguments that the amendment substantively affected other rights such as the right to defend oneself or the right to be free from excessive fines). The other ballot question proposed amending Article I, § 6 by providing the Commonwealth a right to trial by jury in criminal cases:

> Shall the Pennsylvania Constitution be amended to provide that the Commonwealth shall have the same right to trial by jury in criminal cases as does the accused?

*Id.*at 845. Because the Commonwealth's jury-trial right does not affect other parts of the Constitution, such as judicial rulemaking power, the Court found the question did not violate Article XI, § 1. *Id.* at 845. In short, ballot questions that survive Article XI, § 1 challenges merely touch other constitutional provisions, if at all.

Here, the constitutional amendment presented by the November 2019 ballot question (1) itself contains multiple changes to the Constitution because it provides a whole series of new and mutually independent rights to victims of crimes, and (2) would amend multiple existing constitutional articles and sections across multiple subject matters. In specific, it proposes changes to multiple enumerated constitutional rights of 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, 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. These amendments encompass multiple subject matters that affect at least three articles, eight sections, and a schedule of the Pennsylvania Constitution.

1. The Text Of The Constitutional Amendment Presented By The Ballot Question, As Well As The Official Interpretations Of That Text, Make Clear That It Provides Many New Rights To Victims Of Crime Across Multiple Subject Matters.

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 . . . .***

Ex. B, 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?

Ex. B, Ballot Question.

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.

Ex. B, Plain English Statement of the Office of Attorney General (emphasis added).

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 multifaceted 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 is commonly referred to as 'logrolling.'" *Pa. Prison Soc'y*, 776 A.2d at 981. It is inconsistent with Article XI, § 1's mandate and the

will of the electorate. *See* Decl. of Jill Greene on behalf of the League of Women Voters of Pa. (attached Exhibit A to Pet'rs' Appl. For Special Relief); Decl. of Lorraine Haw (attached as Exhibit B to Pet'rs' Appl. For Special Relief).

2. The Ballot Question Also Amends Multiple Sections In the Pennsylvania Constitution's Existing Text.

Beyond adding "new . . . rights" to Article I, the ballot question will amend multiple other existing provisions of the Pennsylvania Constitution, which provide important rights to the criminally accused and to the public, and exclusive powers to the Governor and the judiciary. Indeed, despite the existence of a single "yes or no" space on the ballot, the extensive language of the Marsy's Law ballot question amends at least the following sections of the Constitution:

Article I, § 6

Article I, § 6 provides the right to a jury trial to the defendant in criminal cases. Pa. Const. art. I, § 6. It guarantees to criminal defendants a jury-trial right to the extent that right existed when the Constitution was created. *See Byers v. Commonwealth*, 42 Pa. 89, 94 (Pa. 1862). And it guarantees that right "free[ ] from substantial impairment." *Commonwealth v. Eckhart*, 242 A.2d 271, 273 (Pa. 1968).

Marsy's Law would amend Article I, § 6 by conditioning the defendant's jury-trial right on respect for the dignity, privacy, and other rights of victims set

forth in Section 9.1. If those changes were presented honestly, Section 6 would be amended to read as follows:

> Trial by jury shall be as heretofore, and the right thereof remain inviolate, *so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim's safety, dignity and privacy*. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. Furthermore, in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused, *But no criminal trial may occur until after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard*.

This is an unprecedented change to the common understanding of a defendant's jury-trial right. Pennsylvanians are entitled to a separate vote on this amendment of Article I, § 6.

Article I, § 9

Article I, § 9 provides several independent and fundamental rights to the criminally accused, each of which is enforced separately and defined by its own body of law. Despite amendments over time, Article I, § 9 "has consistently maintained the same ***range of rights and privileges*** to individuals accused of committing crimes." Ken Gormley, *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 329 (2004) (emphasis added). The rights in Article I, § 9 are treated separately by Pennsylvania courts. In *Commonwealth v. Arroyo*, for example, a defendant contended violations of the right against self-incrimination

and the right to counsel. 723 A.2d 162, 165-67 (Pa. 1999). The Court addressed each constitutional right on its own merits and held that the rights attached at different points in time. *Id.* at 167-70.

The ballot question patently affects several of the individual rights afforded by Article I, § 9. Each affected right in Article I, § 9 constitutes a separate constitutional amendment that entitles Pennsylvanians to a separate vote.

a. ***The Proposed Ballot Amends An Accused's Right To Demand The Nature And Cause Of The Accusation Against The Accused.***

Article I, § 9 provides that "[i]n all criminal prosecutions, the accused hath a right . . . to demand the nature and cause of the accusation against him . . . ." Pa. Const. art. I, § 9. This clause reaffirms the common law rule that the accused must be afforded adequate notice of the criminal charges he or she is facing. Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 101 (1907). The right to formal notice of the charges is considered "so basic to the fairness of subsequent proceedings" that it cannot be even voluntarily waived by the defendant. *Commonwealth v. Little*, 314 A.2d 270, 273 (Pa. 1974). The federal counterpart to this right is found in the Sixth Amendment to the U.S. Constitution, and the federal and Pennsylvania constitutional rights are generally considered indistinguishable. *Commonwealth v. Alston*, 651 A.2d 1092, 1094-95 (Pa. 1994).

The proposed amendment's protections for the dignity and privacy of victims, among other changes, would impose substantive conditions on the right to know the nature and cause of the accusation. If those changes were presented honestly, this right in Section 9 would be amended to read as follows:

> In all criminal prosecutions the accused hath a right . . . to demand the nature and cause of the accusation against him, *so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim's safety, dignity and privacy*.

This is an unprecedented change to the common understanding of the formal notice to which the accused is guaranteed, because certain important information about the nature and cause of the accusation may be withheld from the defendant owing to the victim's safety, dignity, and privacy concerns. Pennsylvanians are entitled to a separate vote on this amendment of Article I, § 9.

b. *The Proposed Ballot Amends An Accused's Right To Be Confronted With The Witnesses Against Him.*

Under Article I, § 9, an accused person has the right to be confronted with the witnesses against him. Pa. Const. art. I, § 9. This right offers "the same protection as the Sixth Amendment" of the U.S. Constitution. *Commonwealth v. Atkinson*, 987 A.2d 743, 745 (Pa. 2009). "[T]he right guaranteed by the Confrontation Clause includes not only a personal examination, but also . . . forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth." *Id.* (quotations and citation omitted). And the right

overrides competing interests such as confidentiality. *See Davis v. Alaska*, 415 U.S. 308, 319-20 (U.S. 1974) (holding that Alaska's "policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness"). The Sixth Amendment may also implicate an accused's pretrial discovery rights. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 61-72 (1987) (three justices concluded that the Sixth Amendment governs a defendant's pretrial discovery rights).

The proposed amendment's protections for the dignity and privacy of victims, among other changes, would impose substantive conditions on the right of confrontation. If those changes were presented honestly, the Confrontation Clause in Section 9 would be amended to read as follows:

> In all criminal prosecutions the accused hath a right to . . . be confronted with the witnesses against him *so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim's safety, dignity and privacy, and with the exception that he may not compel any person who has been directly harmed by the conduct of which the defendant is accused to provide an interview or deposition or respond to any other discovery request*.

This amendment significantly reduces the scope of an accused's confrontation rights because it establishes a legal basis for victims to withhold critical information from the accused. Because the proposed change establishes broad privacy rights to victims, victims—meaning not only the complaining

witness but also anyone who claims to have been directly harmed by the accused's alleged conduct—may refuse to disclose vast swaths of information, such as medical diagnoses or personal messages on social media platforms. Indeed, victims may even invoke the right not to participate at all in criminal proceedings. Pennsylvanians are entitled to a separate vote on this amendment to a critical right in Article I, § 9.

c. *The Proposed Ballot Amends An Accused's Right To Use Compulsory Process To Present His Defense.*

Article I, § 9 also guarantees the accused the right to have compulsory process for obtaining witnesses in his favor. Pa. Const. Art. I, § 9. "[I]n practice the guarantee of compulsory process . . . insures the right to the issuance of subpoenas to insure appearance by 'such witnesses as the defendant may call for,' service to be had without compensation." Gormley, *The Pennsylvania Constitution* at 354. Under Marsy's Law, however, not only the complainant, but also any person who claims to have been directly harmed by the conduct that is the subject of the criminal charge may refuse to respond to a subpoena from the accused. By way of example, if a defendant were charged with assault after a fight in a bar but contended that he had hidden in the restroom during the fight, he could not compel the bar owner (who suffered economic damages as a result of the fight) to come to court and testify as to what that person saw that night, or even compel the owner to respond to a subpoena for footage from the bar's security cameras.

Nor could he compel the testimony of the bar patrons—also direct victims—who got hit trying to break up the fight, who could say whether he was involved or not.

If this change to the defendant's right to compel testimony in his defense were presented honestly, the compulsory process clause in Section 9 would be amended to read as follows:

> In all criminal prosecutions, the accused hath a right to . . . have compulsory process for obtaining witnesses in his favor *so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim's safety, dignity and privacy, and with the exception that he may not compel any person who has been directly harmed by the conduct of which the defendant is accused to provide an interview or deposition or respond to any other discovery request.*

Thus, the accused's right to present relevant testimony is made conditional to the extent that it would implicate any victim's safety, dignity, or privacy. "To the extent that [the proposed change] operates to prevent a criminal defendant from presenting relevant evidence," it "unquestionably implicates the Sixth Amendment." *See Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (evaluating Michigan's rape-shield statute).[7] The proposed change also limits a judge's

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[7] It is true that this "right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process.'" *Michigan*, 500 U.S. at 149 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)). But the issue before the Court is not whether the ballot question proposes changes below the federal "constitutional floor." *Kansas v. Carr*, 136 S. Ct. 633, 648 (2016) (Sotomayor, J., dissenting). Instead, as it relates to the separate-vote

authority to direct disclosure of "private" information and to order a pretrial deposition or interview. *See* Pa. R. Crim. P. 500 (permitting court orders to take and preserve when witnesses may be unavailable or when justice requires it). Pennsylvanians are entitled to a separate vote on this amendment to Article I, § 9.

d. *The Proposed Ballot Amends An Accused's Right To A Speedy And Public Trial.*

Additionally, Article I, § 9 guarantees the accused the right to a "speedy public trial." Pa. Const. art I, § 9. Pennsylvania's speedy trial right is coextensive with the right in the Sixth Amendment to the United States Constitution. *Commonwealth v. DeBlase*, 665 A.2d 427, 432 (Pa. 1995). To decide whether a defendant's speedy-trial right is violated, courts evaluate four factors: "(1) whether the pretrial delay was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice because of the delay." *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

If the change to the defendant's right to a speedy and public trial were presented honestly, this clause in Section 9 would be amended to read as follows:

> In all criminal prosecutions, the accused hath a right to . . . a speedy public trial by an impartial jury of the vicinage, *except that no trial may*

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requirement, the Court need only determine whether the proposed change *substantively affects* another amendment.

occur until after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard.

Thus, this proposed change will create an additional factor that conditions, the accused's right to a speedy trial by creating victims' rights that must be "protected . . . no less vigorous[ly]" than the defendant's right. The analysis of whether a delay has violated the defendant's right to a speedy trial would include a fifth new factor: whether the proceedings were delayed to satisfy any victim's right to notice, right to be present, or right to be heard. A trial may be delayed if someone "directly harmed" by the alleged criminal conduct fails to receive adequate notice or requests delays so that she or he may be present at the trial. The resulting delay may be viewed as "excused," and therefore weigh against the accused's existing speedy trial right. Pennsylvanians are entitled to a separate vote on this amendment to Article I, § 9.

Article I, § 10

Article I, § 10 provides a right against double jeopardy. Pa. Const. art. I, § 10. That right "protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction and multiple punishments for the same offense." *Commonwealth v. McCord*, 700 A.2d 938, 941 (Pa. Super. Ct. 1997).

If the change to a defendant's right against double jeopardy were presented honestly, the proposed amendment Article I, § 9 would read as follows:

> No person shall, for the same offense, be twice put in jeopardy of life or limb *unless the first proceeding proceeded without reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, at which each such person had a right to be present and be heard*; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

The proposed change facially affects Article I, § 11 because a victim's right to notice and participation in all proceedings must be enforced to the same degree as an accused's right against double jeopardy. If someone "directly harmed" by the criminal conduct is unable to participate in the first trial, he or she may claim a violation of his or her rights under the proposed amendment. Without a claim for damages against the government,[8] the victim's only remedy is an appeal for re-

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[8] *See* Ex. B, Joint Resolution 2019-1 ("This section does not . . . create any cause of action for compensation or damages against the Commonwealth or any political subdivision, nor any officer, employee or agent of the Commonwealth or any political subdivision, or any officer or employee of the court."); *see also Miller v. Nelson*, 768 A.2d 858, 861 (Pa. Super. Ct. 2001) ("A prosecutor enjoys absolute immunity from liability for civil damages for actions related to prosecution of a criminal case." (citing *Imbler v. Pacthman*, 424 U.S. 409, 430-31 (1976))); *Langella v. Cercone*, 34 A.3d 835, 838 (Pa. Super. Ct. 2011) ("[J]udges are absolutely immune from liability for damages when performing judicial acts, even if their actions are in error or performed with malice, provided there is not a clear absence of all jurisdiction over subject matter and person." (quoting *Feingold v. Hill*, 521 A.2d 33, 36 (Pa. Super. Ct. 1987))).

prosecution. That request for a new trial will pit the victim's right against the accused's right against double jeopardy, thus making the latter conditional, regardless of how the courts resolve that conflict of rights in any given case. Pennsylvanians are entitled to a separate vote on this amendment to Article I, § 10.

Article I, § 11

Article I, § 11 provides a right to open courts and full remedy. Pa. Const. art. I, § 11. "[T]his article prohibits secret or closed hearings and trials." *Commonwealth v. Hayes*, 414 A.2d 318, 328 (Pa. 1980) (Larsen, J., concurring). Our Supreme Court has affirmed the common law right of access to criminal court proceedings in the strongest terms:

> The importance of the public having an opportunity to observe the functioning of the criminal justice system has long been recognized in our courts. Criminal trials in the United States have, by historical tradition, and under the First Amendment, been deemed presumptively open to public scrutiny and this "***presumption of openness inheres in the very nature of the criminal trial under our system of justice***." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). As stated by Justice Hugo Black in *In re Oliver*, 333 U.S. 257, 266 (1948), "[t]his nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial."

Commonwealth v. Fenstermaker, 530 A.2d 414, 417 (Pa. 1987) (emphasis added).

The proposed amendment would condition the public's access to criminal proceedings on the protection of all of the "new rights" created by Section 9.1. If those changes were presented honestly, Section 11 would be amended to read:

> All courts shall be open *so long as that does not infringe on the rights of any person who has been directly harmed by the conduct that is the subject of a criminal charge to be treated with fairness and respect for the victim's safety, dignity and privacy*; 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, *except that no public criminal proceeding may occur until after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard.* Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

In sum, the public's established right to open courts will compete with an expansive "right to dignity and privacy" for victims that will impose conditions on public access to those proceedings. Pennsylvanians are entitled to a separate vote on this amendment.

Article I, § 14

Article I, § 14 "mandates all persons have a right to be released on bail prior to trial in all cases," with certain limited exceptions. Pa. Const. art. I, § 14; *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972). This bedrock constitutional provision reflects "(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to

prepare his defense." *Truesdale,* 296 A.2d at 834-35. Reaffirming that "the fundamental purpose of bail is to secure the presence of the accused at trial," the *Truesdale* court stated that "[i]n the absence of evidence the accused will flee, certain basic principles of our criminal law indicate bail should be granted." *Id.* at at 834. "[U]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* at 835 n.13 (quoting *Stack v. Boyle,* 342 U.S. 1, 4-5 (1951)).

Except where the defendant faces a capital offense or life imprisonment or if no conditions would ensure attendance at trial, a court may not refuse to release a person facing criminal charges unless "no condition or combination of conditions other than imprisonment will reasonably assure safety of any person and the community" and the "proof is evident or presumption great." Pa. Const. art. I, § 14. Therefore, in all cases except for homicide, the bail authority must start with the presumption that a defendant is entitled to pretrial release.

Article I, § 14 also provides the privilege of the writ of habeas corpus and protects against its suspension. Habeas corpus is used to "test the legality of the restraints upon an accused's liberty." *Commonwealth v. Hess*, 414 A.2d 1043, 1045 (Pa. 1980).

If the change to the accused's right to pretrial release were presented honestly, Article I, § 13 would read as follows:

> All prisoners shall be bailable by sufficient sureties, *after consideration of the safety of every person who has been directly harmed by the conduct of which the defendant is accused and the families of all such persons in fixing the amount of bail and release conditions, and after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard, and with notice to every person who has been directly harmed by the conduct of which the defendant is accused of the prisoner's release*, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it, *but such writ will only be available after reasonable and timely notice to any person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard, and to be notified of the release. Such writ shall not be available after unreasonable delay or after a prompt and final conclusion of post-conviction proceedings*.

Under the proposed amendment, the presumption of pretrial release embodied in § 14 would be, at the least, delayed by the need to provide notice and an opportunity to appear at the preliminary arraignment. In most counties, preliminary arraignments happen around the clock, via video link while the defendant is still in the custody of law enforcement, without any witnesses or even counsel for the accused. And the interests of the victims and their families would have to be weighed equally with the defendant's right to release, thus compromising the presumption of innocence embodied in § 14.

The amendment will also affect habeas corpus relief because the writ will not be available until all persons "directly harmed" by the alleged criminal conduct receive adequate notice and the right to be heard. As a result, the amendment may delay habeas corpus relief.

Pennsylvanians are entitled to a separate vote on both of these amendments to Article I, § 14.

Article IV, § 9

Article IV, § 9 grants the Governor the power to pardon or commute individuals' sentences upon unanimous recommendation by the Board of Pardons. Pa. Const. art. IV, § 9; *Commonwealth v. Sutley*, 378 A.2d 780, 793 n.9 (Pa. 1977). "The question of clemency is primarily, if not exclusively, one for the Executive." *Commonwealth v. Banks*, 29 A.3d 1129, 1147 (Pa. 2011).

If the proposed change to the Governor's pardoning power were presented honestly, Article IV, § 9 would read as follows:

> (a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, *after reasonable and timely notice to every person who has been directly harmed by the offense, who shall have a right to be present and be heard,* upon due public notice.

Thus, the proposed amendment would alter this provision so that victims must be given individual notice and a right to be present and heard, which could delay or otherwise burden individuals' potential receipt of pardon and infringes upon the Executive's exclusive pardon power.

The extraordinary effect of this change is illustrated by Petitioner Haw's situation: she is seeking pardons for thirty-year-old convictions for trafficking in illegal drugs. Who is to identify the "victims" of her offenses? Who will find those people? How long will her pardon request be delayed while the Pardon Board attempts to comply with the directive to give all victims notice and an opportunity to be heard? Many pardon requests are filed decades after the sentence has been served, so this is not a problem unique to Ms. Haw. Pennsylvanians—including Ms. Haw—are entitled to a separate vote on this amendment to the Constitution.

Article V, § 9

Article V, § 9 grants accused persons "an absolute right to appeal," *Commonwealth v. Wilkerson*, 416 A.2d 477, 479 (Pa. 1980), so long as the accused follows the procedures established by the Pennsylvania Supreme Court. *Commonwealth v. Adams*, 200 A.3d 944, 953 (Pa. 2019). This right extends to direct appeals for all cases originally in a court not of record as well as to

controversies originating in administrative agencies. *Id.* (quoting Pa. Const. art. V, § 9).

If the changes to a criminal defendant's right to appeal were presented honestly, Article V, § 9 would read as follows:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law. *But no appeal shall infringe on the right of any person who has been directly harmed by the conduct of which the defendant is accused to a prompt and final conclusion of the case and any related postconviction proceedings.*

Under the proposed amendment, a defendant's right to appeal may be curtailed if the defendant's filing of or the court's consideration of the appeal would infringe on a victim's right to a prompt and final conclusion of the case. Pennsylvanians are entitled to a separate vote on this amendment to the Constitution.

Article V, § 10

Article V, § 10 grants the Pennsylvania Supreme Court the "exclusive" power to create rules of procedure for state courts. Pa. Const. art. V, § 10; *Commonwealth v. McMullen*, 961 A.2d 842, 847 (Pa. 2008). While the state legislature holds the power to create substantive law, Article V, § 10 reserves the power to create procedural law in the Pennsylvania Supreme Court. *Id.*

If the change to the judiciary's rulemaking authority was presented honestly, Article V, § 10 would read as follows:

> The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television. *In addition, the General Assembly may provide for and define the rights of persons who have been directly harmed by the conduct of which the defendant is accused in criminal proceedings.*

The proposed amendment enlarges the powers of the General Assembly and curtails those of the Pennsylvania Supreme Court. Previously, the Pennsylvania Supreme Court held that an increased grant of rulemaking authority to the General Assembly in Article V, § 10 amounted to an amendment. *See Bergdoll*, 731 A.2d at 1270. Because this proposed amendment increases the General Assembly's powers in a similar manner, it also amends Article V, § 10. Pennsylvanians are entitled to a separate vote on this amendment.

Schedule To The Judiciary Article, § 1

Section 1 of the Schedule to the Judiciary in Article V addresses the Pennsylvania Supreme Court's power and jurisdiction. *In re Bruno*, 101 A.3d 635, 676-77 (Pa. 2014) ("[T]he Constitution provides that the Supreme Court exercises all jurisdiction vested in the Court at the time of the adoption of the 1968 Constitution, until otherwise provided by law.").

If the change to the Supreme Court's power and jurisdiction were presented honestly, the Schedule to the Judiciary, § 1 would read as follows:

> The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the present Supreme Court and, until otherwise provided by law, the accused in all cases of felonious homicide shall have the right of appeal to the Supreme Court, *except that no appeal shall infringe on the right of any person who has been directly harmed by the conduct of which the defendant is accused to a prompt and final conclusion of the case and any related postconviction proceedings.*

The proposed amendment will restrict the Supreme Court's power to hear appeals in felonious homicide cases, as well as other types of criminal appeals and petitions for post-conviction relief, to the extent that considering such appeals or petitions would infringe on a victim's right to a prompt and final conclusion of their case. Accordingly, the proposed amendment limits the Supreme Court's jurisdiction. Pennsylvanians are entitled to a separate vote on this amendment.

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In sum, the proposed amendment presented in the November 2019 ballot question affords a series of new rights to crime victims and affects at least three existing articles, eight existing sections, and an existing schedule to the Pennsylvania Constitution, which provide multiple fundamental rights to the accused and powers to the Governor and judiciary. The proposed amendment plainly violates Article XI, § 1's separate vote requirement.

B. The Form Of The November 2019 Ballot Question Is Unconstitutional Because The Pennsylvania Constitution Requires That The Electorate Vote On The Actual Text Of The Constitutional Amendment.

The November 2019 ballot question is also unconstitutional, because it is does not contain the actual text of the constitutional amendment. Pennsylvania's Constitution requires that the entire text of a proposed amendment be printed on a ballot question: "[S]uch proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe." Pa. Const. art. XI, § 1.

Earlier this year, the Supreme Court of Kentucky held that nearly identical language in the Kentucky Constitution required that a ballot question contain the entire text of an amendment. *See Westerfield*, 2019 WL 2463046, at *9-10 (concluding that the proposed Marsy's Law was void based on ballot question deficiencies). The Kentucky Supreme Court focused on the constitution's express

language: "[S]uch proposed amendment or amendments shall be submitted to the voters of the State for their ratification or rejection at the next general election for members of the House of Representatives, the vote to be taken thereon in such manner as the General Assembly may provide." *Id.* at *7 (quoting Ky. Const. § 257). It concluded that the phrase "such proposed amendment or amendments shall be submitted to the voters" has only one meaning: "the amendment is to be presented to the people for a vote." *Id.* at *9. The other phrase—"in such a manner as the General Assembly may provide"—is a separate statement that only modifies "the vote to be taken." *Id.* at *8. Thus, a proposed question with anything less than the full text is unconstitutional. *Id.* at *10.

Article XI, § 1 of the Pennsylvania Constitution also requires that proposed amendments submitted to the electorate include the full text. Although the Pennsylvania Supreme Court has implicitly permitted ballot questions that did not include the entire text, *see, e.g.*, *Grimaud*, 865 A.2d at 843-44, it has never directly addressed the meaning of the phrase "such proposed amendment or amendments shall be submitted to the qualified electors of the State." Consistent with the plain text of the Constitution, the Court should establish that the phrase "in such a manner" modifies only the method of submission and does not modify the content of submission. The text is clear that the form is "such proposed amendment or amendments shall be submitted." Pa. Const. art. XI, § 1. Because the November

2019 ballot question does not include the proposed amendment's text, it is unconstitutional.

C. The November 2019 Ballot 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.

In the alternative, 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).[9]

[9] 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 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).

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 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.[10]

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 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.

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[10] "[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).

III. GREATER INJURY WOULD RESULT FROM REFUSING AN INJUNCTION THAN FROM GRANTING ONE, AND GRANTING AN INJUNCTION WILL NOT SUBSTANTIALLY HARM OTHER INTERESTED PARTIES NOR ADVERSELY AFFECT THE PUBLIC INTEREST.

Absent an injunction, as detailed above, the ballot question will compromise the rights of all Pennsylvanians by depriving them of the ability to vote separately on distinct and weighty proposed changes to the foundational law of the Commonwealth. In Pennsylvania, amendment by popular initiative "was not designed to effectuate sweeping, complex changes to the Constitution" and "was never intended as a substitute for, or a circumvention of, the process of a constitutional convention for making complex changes to the Constitution." *Pa. Prison Soc'y*, 776 A.2d at 976 (summarizing the Commonwealth Court's reasoning). Thus, without an injunction, the Secretary will present a ballot question that violates the separate-vote requirement, as well as the constitutional requirement that the entire ballot question be presented to the electorate (or at the very least, the standard established by the Pennsylvania Supreme Court that the question fairly, accurately, and clearly apprise voters of the issue).

By granting the requested injunction, the Court will affirm the clear intent of the people of Pennsylvania that constitutional amendments be voted upon separately and that the people be afforded the opportunity to have a full understanding of the changes being made to the Constitution. *See Berman v. City*

of Philadelphia, 228 A.2d 189, 191 (1967) (finding that "the interest to be protected here . . . extends beyond the instant [petitioner] to the community at large"). An injunction will ensure that voters are not compelled to vote on a bundled amendment and not compelled to vote on a question that does not fairly represent the changes being made to the Constitution.

Given that an injunction will do nothing more than preserve the Constitution in its current form, it will not adversely affect the public interest. The balance of the injuries thus overwhelmingly favors granting Petitioners' injunction.

IV. A PRELIMINARY INJUNCTION WILL MAINTAIN THE STATUS QUO.

Petitioners' requested injunction seeks only to preserve the status quo. *See City of Philadelphia v. Commonwealth*, 837 A.2d 591, 604 (Pa. Commw. Ct. 2003) (granting preliminary injunctive relief and noting that "the public interest lies in favor of maintaining the status quo" pending determination of the merits in the case). "The status quo to be maintained is the last actual and lawful uncontested status, which preceded the pending controversy." *Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009).

Here, Petitioners ask the Court to prevent any proposed constitutional amendments—in other words, maintain the status quo—until the Court determines whether the challenged ballot question complies with Article XI, § 1's separate-vote requirement.

V. A PRELIMINARY INJUNCTION IS REASONABLY SUITED TO ABATE THE OFFENDING ACTIVITY.

The requested injunctive relief is reasonably suited to abate the offending activity at issue. The offending activity is a November 2019 ballot question that violates Article XI, § 1's fundamental requirements for amending the Constitution by electorate vote. Simply put, no violation will occur if the Court enjoins the Secretary from proposing the offending ballot question to the electorate in November or, in the alternative, enjoins certification of the election results on this question.

CONCLUSION

For the reasons herein, Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction should be granted.

Respectfully submitted,

Date: October 10, 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' Brief contains 13,157 words, excluding the parts exempted by Pa. R.A.P. 2135(b).

Date: October 10, 2019

/s/ Tiffany E. Engsell
Tiffany E. Engsell (Pa. 320711)

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: October 10, 2019

/s/ Tiffany E. Engsell
Tiffany E. Engsell (Pa. 320711)

CERTIFICATE OF SERVICE

I, Tiffany E. Engsell, hereby certify that on October 10, 2019, I caused a true and correct copy of the foregoing document titled Petitioners' Brief in Support of Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532, together with all supporting exhibits thereto, be served via hand delivery to Respondent Kathy Boockvar, Acting Secretary of the Commonwealth, at the following addresses:

Office of the Secretary of the Commonwealth
302 North Office Building, 401 North Street
Harrisburg, PA 17120

Pennsylvania Office of the Attorney General
Strawberry Square Fl. 16
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Date: October 10, 2019

/s/ Tiffany E. Engsell
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EXHIBIT A

Ballot Question

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?

Plain English Statement of the Office of Attorney General

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.

Joint Resolution NO. 2019-1

Proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, providing for rights of victims of crime.

The General Assembly of the Commonwealth of Pennsylvania hereby resolves as follows:

Section 1. The following amendment to the Constitution of Pennsylvania is proposed in accordance with Article XI:

That Article I be amended by adding a section to read:

§ 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; to have the safety of the victim and the victim's family considered in fixing the amount of bail and releaseconditions 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 anyrelated postconviction proceedings; to confer with the attorney for the government; and to be informed of all rights enumerated in this section.

(b) The victim or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with jurisdiction over the case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law. This section does not grant the victim party status or create any cause of action for compensation or damages against the Commonwealth or any political subdivision, nor any officer, employee or agent ofthe Commonwealth or any political subdivision, or any officer or employee of the court.

(c) As used in this section and as further defined by the General Assembly, the term "victim" includes 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. Theterm "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

Section 2. (a) Upon the first passage by the General Assembly of this proposed constitutional amendment, the Secretary of the Commonwealth shall proceed immediately to comply with the advertising requirements of section 1 of Article XI of the Constitution of Pennsylvania and shall transmit the required advertisements to two newspapers in every county in which such newspapers are published in sufficient time after passage of this proposed constitutional amendment.

(b) Upon the second passage by the General Assembly of this proposed constitutional amendment, the Secretary of the Commonwealth shall proceed immediately to comply with the advertising requirements of section 1 of Article XI of the Constitution of Pennsylvania and shall transmit the required advertisements to two newspapers in every county in which such newspapers are published in sufficient time after passage of this proposed constitutional amendment. The Secretary of the Commonwealth shall submit this proposed constitutional amendment to the qualified electors of this Commonwealth at the first primary, general or municipal election which meets the requirements of and is in conformance with section 1 of Article XI of the Constitution of Pennsylvania and which occurs at least three months after the proposed constitutional amendment is passed by the General Assembly.

EXHIBIT B

Stateline

'Marsy's Law' Protections for Crime Victims Sound Great, but Could Cause Problems

STATELINE ARTICLE October 12, 2018 By: Sophie Quinton Topics: Justice Read time: 8 min

A woman holds a photo of Marsy Nicholas, whom Marsy's Law was named for, during a 2013 victims' rights march and rally in Santa Ana, California. In 2008, California became the first of six states to add a Marsy's Law victims' rights amendment to its constitution.

Bret Hartman/The Associated Press

Voters in six states soon will face a ballot initiative that for some seems like a no-brainer: whether to grant crime victims certain rights under the state constitution, such as the right to be treated with fairness, the right to confer with the prosecution and the right to attend key court proceedings.

But even as a coordinated, billionaire-backed campaign spreads across the country, some lawyers and civil rights experts say the push to give crime victims constitutional rights equal to those of criminal defendants could set up a clash over core aspects of the U.S. legal system, such as the accused person's Sixth Amendment right to due process and the right to be presumed innocent until proven guilty.

"It undermines our system of justice as we know it," said Holly Welborn, policy director for the American Civil Liberties Union of Nevada.

Since 2008, voters have approved "Marsy's Law" amendments in California, Illinois, North Dakota, Ohio, South Dakota and Montana (Montana's amendment later was struck down on procedural grounds). This year, voters in Florida, Georgia, Kentucky, Nevada, North Carolina and Oklahoma will consider versions of the amendment.

All versions of Marsy's Law on the ballot this year would make it a state constitutional right for people directly harmed by a crime to request and receive notification when the alleged perpetrator is released from jail or prison, for instance.

The initiatives also list — among other rights — victims' right to be told about and to attend public proceedings involving the criminal; to be heard in any public proceeding involving sentencing, release or a plea; and in the case of the Nevada and Oklahoma proposals, to refuse interviews or other requests made by the accused person unless ordered to do so by a subpoena or court order.

The Florida, Kentucky and Oklahoma initiatives all say that victims' rights shall be protected "in a manner no less vigorous" than rights given to the accused.

> "Does this take victims' rights to the next level? Yes, it does. That is by design."
>
> **Paul Cassell, law professor** UNIVERSITY OF UTAH

Under Marsy's Law, victims generally must assert their rights. For instance, they must ask to be notified of upcoming court dates, rather than be automatically notified. Eventually, the campaign hopes to get rights for victims written into the U.S. Constitution.

All six states with a November ballot measure already have a victims' rights law or constitutional amendment on the books, but supporters of the initiatives say existing protections aren't strong enough.

In Nevada, for example, the Republican governor, attorney general, key law enforcement officers and advocates for domestic violence victims all back the initiative.

"As a law enforcement officer, I've seen too many innocent people devastated by crime. And when the victims are denied equal rights, they're victimized again by the criminal justice system," Clark County Sheriff Joe Lombardo said in a commercial — set to melancholy orchestral music — that the Nevada campaign released in January. By changing the state constitution, he said, "We can fix this and stand up for Nevada crime victims."

The overall impact of Marsy's Law has been hard to gauge because so many variables play into the outcome of criminal cases, legal experts say. Such amendments have led to some legal confusion, and in South Dakota, a deluge of paperwork. In California, some victims' rights advocates say a decade-old amendment was a good idea, but could be better implemented and enforced.

Giving Victims a Voice in Criminal Cases

Henry Nicholas, the billionaire founder of semiconductor company Broadcom, has almost single-handedly bankrolled victims' rights amendments in a dozen states through a campaign called Marsy's Law for All, named for his sister, Marsy, who was murdered in 1983.

Days after the murder, their mother ran into the accused killer, the girl's ex-boyfriend, at a grocery store, unaware that he had been released on bail, according to the Marsy's Law for All campaign. He was later convicted of second-degree murder.

Through the end of 2017, Henry Nicholas had spent about $27 million on the campaign to get the six amendments onto the ballot and approved by voters, according to Ballotpedia, an online encyclopedia of American elections.

Henry Nicholas speaks, as Orange County District Attorney Tony Rackauckas gestures next to him during a 2013 victims' rights march and rally in Santa Ana, California. Nicholas has spent millions of dollars on a campaign to get a victims' rights amendment known as Marsy's Law included in state constitutions.

Bret Hartman/The Associated Press

For much of American history, victims have not had much of a voice in criminal cases beyond answering questions on the witness stand, according to the American Bar Association. That's because criminal cases pit an accused person not against the victim, but against a prosecutor acting on behalf of the state.

But over the past 40 years, the federal government and every state have enacted laws to help victims, including laws that instruct judges to consider victims' safety before releasing defendants from custody, and that give victims the right to be notified when a defendant gets out of jail. Heartfelt statements from suffering victims have become a courtroom norm.

Yet in many states, current law isn't good enough, said University of Utah law professor Paul Cassell, a victims' rights expert who has advocated in favor of Marsy's Law. Statutes can be more easily ignored than constitutional amendments, he said, and even some amendments to state constitutions aren't comprehensive enough.

"Does this take victims' rights to the next level? Yes, it does," he said of Marsy's Law. "That is by design."

There are countless examples of victims who slip through the cracks of existing law, said Henry Goodwin, communications adviser for the Marsy's Law for All campaign. For instance, the Oklahoma campaign has highlighted the story of Leesa Sparks, who says she was never told about her abusive ex-boyfriend's court dates, sentence or release after he spent four years in prison. Sparks disagreed with his sentence, according to a testimonial on the Marsy's Law for All website, but never had a chance to share her views in court.

Legal Concerns

The American Civil Liberties Union, defense attorneys and some prosecutors say states already are doing plenty to protect victims, and that the proposed amendments could make it harder for the accused to get a fair trial.

Drew Findling, the Atlanta-based president of the National Association of Criminal Defense Lawyers, said he's practiced all over Georgia and never come across a prosecutor who's not sensitive to the needs of victims. "I don't even know what this is doing in this state," he said of the Marsy's Law proposal.

Lawmakers in Idaho and New Hampshire declined to put Marsy's Law measures before voters this year, arguing in each case that the state was already well served by existing law, and that amendments to the constitution are hard to roll back.

Marsy's Law would interfere with a defendant's due process rights, said John Piro, the chief deputy public defender for Nevada's Clark County, by giving people harmed by a crime the right to be present and heard before the alleged perpetrator has pleaded innocent or guilty.

That inserts people who are hurt, angry or grieving into what's supposed to be a dispassionate process, he said. "Now the prosecutor is going to be unduly influenced by a passionate person who wants to see vengeance — they'll call it justice — handed out."

Researchers have found that emotional statements from victims in court can make jurors angry and more eager to punish defendants — particularly when a victim is white, DePaul University law professor Susan Bandes wrote in *The Atlantic*.

But Cassell, the law professor, said he hasn't heard Marsy's Law leading to any systemic problems with increased litigation or paperwork in most states. California, for instance, has had a Marsy's Law in its constitution for a decade. "The sky did not fall," he said.

He also questions the assertion that allowing the victim to share more information will create bias in the system. "Instead, the criminal justice system simply gets more information."

Still, the California amendment led to litigation and a state Supreme Court case over a portion of the law that lengthened the time between parole hearings for prisoners serving life sentences. In 2013 the state Supreme Court ruled against an inmate's claim that the new parole hearing schedule guaranteed him a longer sentence, arguing that he hadn't proven that Marsy's Law had kept him locked up for longer.

The California amendment also gives victims the right to refuse requests for interviews and information made by defendants and their legal team, which "is a very serious problem," said Robert Weisberg, law professor and co-director of the Stanford Criminal Justice Center, in an email to *Stateline*. Victims' silence could prevent information from coming to light that could prove the defendant innocent or cast doubt on his guilt.

Cassell said that Marsy's Law doesn't compromise a defendant's interests in preparing for a trial, but it does protect victims from having to share information that could put them in danger, such as their home address. "I'm interested (once again) to see the objection made by the opponents without pointing to a specific example — much less, a systemic problem that exists in the big states that currently have Marsy's Law," he said in an email to *Stateline*.

The biggest problems have occurred in South Dakota, where a version of Marsy's Law approved by voters in 2016 led to longer jail stays while courts waited for victims to be notified and swamped county staff with notification paperwork — even for minor crimes such as vandalism, local officials say.

"It overwhelmed some of our systems, and I think some of the true victims this was intended for sort of got lost," said Minnehaha County Sheriff Mike Milstead.

Interpreting the Amendments

Milstead's department and other law enforcement agencies also interpreted the law's privacy protections to mean they couldn't share information about unsolved crimes with the public, Milstead said. "We use the eyes and ears of the public to help us solve crimes," he said.

The problem was that the amendment made victims' rights compulsory unless victims opted out of exercising them, said House Speaker Mark Mickelson, a Republican, in an email to *Stateline*. Mickelson initially proposed repealing the amendment, then teamed up with the Marsy's Law for All campaign to write a ballot initiative that changed the language to make the rights "opt-in" rather than "opt-out." The fix easily passed this summer.

Across the border in North Dakota, where victims must "opt in" to exercise their rights under a 2016 Marsy's Law amendment, the criminal justice system has experienced no such crisis. But it has caused some confusion, additional litigation and expense, said Aaron Birst, the

executive director of the North Dakota State Attorneys' Association. Counties and the state have spent more than $800,000 updating automatic victim notification systems to cover more criminal proceedings, he said.

Several North Dakota police officers who have shot and killed civilians have claimed they are victims and have invoked Marsy's Law rights, which has prevented their names from being released — even though North Dakota Attorney General Wayne Stenehjem has said Marsy's Law doesn't shield victims' names unless they're victims of domestic violence, human trafficking, a sex crime or are a minor.

It's also unclear whether courts must change their schedules to accommodate victims. Birst said he recently spoke to a prosecutor working on a rape case that had an out-of-state victim. The victim couldn't make it back to North Dakota for the scheduled plea hearing, but the court went ahead anyway.

Sometimes a person accused of a minor crime can plead guilty the day after they're arrested, he said. "Most courts have just taken the plea and hoped that notice was provided to the victim."

In California, courts have reportedly erred on the side of giving victims more of a voice in some cases than others. For instance, some California prosecutors recently told the news website *The Marshall Project* that they don't promptly reach out to victims and their families unless the victim was killed or seriously injured.

It's important for victims to have the opportunity to have their voices heard, said Mariam Elmenshawi, director of the Victims of Crime Resource Center at the University of the Pacific's law school. But awareness and enforcement of Marsy's Law rights can be spotty in California, she said. Her recommendation is that courts implement a system for checking in with victims to make sure they are aware of their rights and options.

While some victims' rights advocates have argued that victims would be better served not by a constitutional amendment but by more funding for victims' services, such as programs that help victims of sexual violence, supporters of Marsy's Law say the amendments not only give victims greater ability to participate in the criminal justice system, but also lead to investments in notification systems and victim services staff that will pay off.

"My belief is that today in South Dakota, there are more resources for victims than before Marsy's Law was implemented," Sheriff Milstead said.

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EXHIBIT C

(/subscribe/digital/) California Billionaire Pushes States to Adopt “Marsy’s Law”

Loaded on JAN. 31, 2018 by Matthew Clarke (/news/author/matthew-clarke/) published in Prison Legal News February, 2018 (/news/issue/29/2/), page 52
Filed under: Criminal Prosecution (/search/?selected_facets=tags:Criminal%20Prosecution), Escapes (/search/?selected_facets=tags:Escapes), Victims (/search/?selected_facets=tags:Victims), Criminal Procedure (/search/?selected_facets=tags:Criminal%20Procedure). Location: California (/search/?selected_facets=locations:1476).

by Matt Clarke

California billionaire Dr. Henry T. Nicholas and his mother entered a grocery store in 1983, a few days after his sister, Marsalee, was murdered. There they ran into her boyfriend, who had been arrested for the crime. They were surprised, shocked. Just coming from a visit to “Marsy’s” grave, they didn’t know he had been granted bail and released.

Nicholas, who founded Broadcom, which manufactures semiconductors for the communications industry, spent the next 25 years – and $4.9 million of his own money – to get California voters to pass Proposition 9, a victims’ bill of rights known as Marsy’s Law that was approved in 2008. The law enshrines a number of victims’ rights in the state constitution, including:

• A right to be notified of court proceedings and to be heard at them

• A right to be notified if the accused is released or escapes

• A right to be treated with fairness and with respect for the safety, dignity and privacy of the victim

• A right to reasonable protection from the accused or any person acting on the accused’s behalf

• A right to know the status of the investigation or case

• A right to be informed of these rights

Following the success of Proposition 9 on the California ballot, Nicholas set up and financed Marsy’s Law for All, an organization dedicated to amending the U.S. Constitution and the constitutions in other states to incorporate similar victims’ rights laws. So far, at a cost of about $2 million each, five more states have adopted some version of Marsy’s Law – Ohio, Illinois, Montana and both Dakotas. According to an April 2017 article by *Oklahoma Watch*, similar initiatives are being considered in Georgia, Hawaii, Kentucky, Nevada, Oklahoma and Wisconsin.

Critics note that Marsy’s Law has led to delays in trials and larger case backlogs, driving up costs in states that have adopted it. State’s Attorney Mark Vargo in Pennington County, South Dakota said his 100,000-resident county had to hire four additional employees – at an annual cost of $161,000 –

just to notify victims of their rights and keep them apprised of their case status.

Aaron Birst, head of the North Dakota State’s Attorneys Association, said the passage of Marsy’s Law in his state resulted in criminal cases being delayed.

“It has slowed things up,” he stated. “It didn’t stop things altogether, but it has definitely put a little pause on a number of cases. As of right now, our current staffs have absorbed the extra workload, but there is potential for increased costs to beef up the system.”

The city attorney’s office in Great Falls, Montana announced Marsy’s Law would require it to spend $90,000 annually on additional prosecutors.

Victims’ rights advocates often stress the need to balance the government’s respect for the rights of accused criminals with the rights of their victims. But critics note that a defendant’s constitutional rights serve mainly to prevent the government from abusing its power – power that is not wielded against victims.

Additionally, the law can sometimes overstep other constitutional limitations. After Ohio voters passed a version of Marsy’s Law in November 2017, the director of the state’s ACLU chapter questioned a provision allowing victims to “refuse an interview, deposition or other discovery request made by the accused.”

“There are perfectly logical and reasonable reasons why somebody might seek information from a crime victim when they are being accused of a crime,” said Ohio ACLU lobbyist Gary Daniels. “That’s just part of the everyday give and take of the justice system.”

After Montana voters approved – by a margin of 2-to-1 – a version of Marsy’s Law in November 2016, the state ACLU chapter was joined by the Montana Association of Counties and the Montana Association of Criminal Defense Lawyers in a lawsuit claiming the aggregation of victims’ rights in one ballot measure violated the state’s single-issue ballot requirement. The Montana Supreme Court agreed and voided the law in November 2017.

In South Dakota, state Rep. Mark Mickelson intends to introduce legislation in 2018 that would require victims to “opt in” to their Marsy’s Law rights, which voters added to the state constitution in November 2016. He said the law’s extension of rights to victims – and their families – cost nearly $5 million in 2017 alone.

“The concepts behind Marsy’s Law are unobjectionable,” Rep. Mickelson remarked, but he added the law as it currently stands is “costing the counties money they don’t have, for a purpose they probably don’t need to be doing.”

He proposed a system like the one currently used across the state line in North Dakota. There, victims receive a card outlining their Marsy’s Law rights during their first contact with law enforcement. It is then left up to them to exercise those rights. In a report to state lawmakers in October 2017, Bismark Deputy Police Chief Randy Ziegler said just 11 victims had opted to exercise their rights since the law went into effect – a rate of one per month, an impact he called “very, very minimal.”

However, Rozanna Larson, a prosecutor in Ward County, North Dakota, testified at a legislative hearing that some of her limited time must now be spent redacting victims’ names from documents. She also said that if a defendant cannot confront a victim whose identity is concealed, the case would likely be dismissed – a result of Marsy’s Law she especially lamented because the victims’ rights it established were redundant to protections already provided under pre-existing laws.

Just before Marsy’s Law was voided in Montana, another prosecutor there – Cascade County Attorney Josh Racki – called it “a troubling thing” that the law may actually make it “easier on defendants to commit crimes, especially when victims won’t cooperate.”

But others insist laws establishing victims’ rights are needed, including Cheryl Cole-Candelaresi, whose husband, a Cincinnati police officer, was murdered in 1974. She and her family learned that one of his killers was freed from prison in 1994 after reading a newspaper report – too late to weigh in on his release.

“For him to be walking out freely, it was just so horrifying,” she said.

Meanwhile, Wisconsin’s state senate approved its version of Marsy’s Law in November 2017. Senate Joint Resolution 53 now moves to the state Assembly. If it passes there – and if it is then approved again by both houses of the legislature in two years – it will be placed on a statewide ballot for a voter referendum. Wisconsin passed the first victims’ rights bill in the U.S. in 1980, and thirteen years later adopted constitutional protections for victim privacy and notification about their cases.

A sponsor of the resolution, state Senator Van H. Wanggaard, said Marsy’s Law “levels the playing field” for victims.

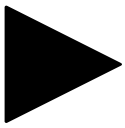
Others, however, question whether the playing field was unlevel, and whether the law does more harm than good.

Sources: *www.usnews.com, www.jsonline.com, www.oklahomawatch.org, www.cleveland.com, www.wcpo.com, www.missoulian.com, www.ksfy.com, Great Falls Tribune, Madison Capital Times*

EXHIBIT D

Marsy's Law passed in 6 states, South Dakota on track to repeal it

Repealing Marsy's Law



By Kelley Smith | Posted: Fri 10:30 PM, Jan 26, 2018 | Updated: Fri 11:01 PM, Jan 26, 2018

PIERRE, S.D. - South Dakota could be the first state to repeal Marsy's Law.
Lawmakers say the voter approved constitutional amendment has unintended financial consequences and they hope to fix these issues during the legislative session.

Speaker of the House Mark Mickelson says lawmakers are seeking to strengthen victims' rights provisions already in state law before asking voters to repeal the Marsy's Law constitutional amendment they passed in 2016.

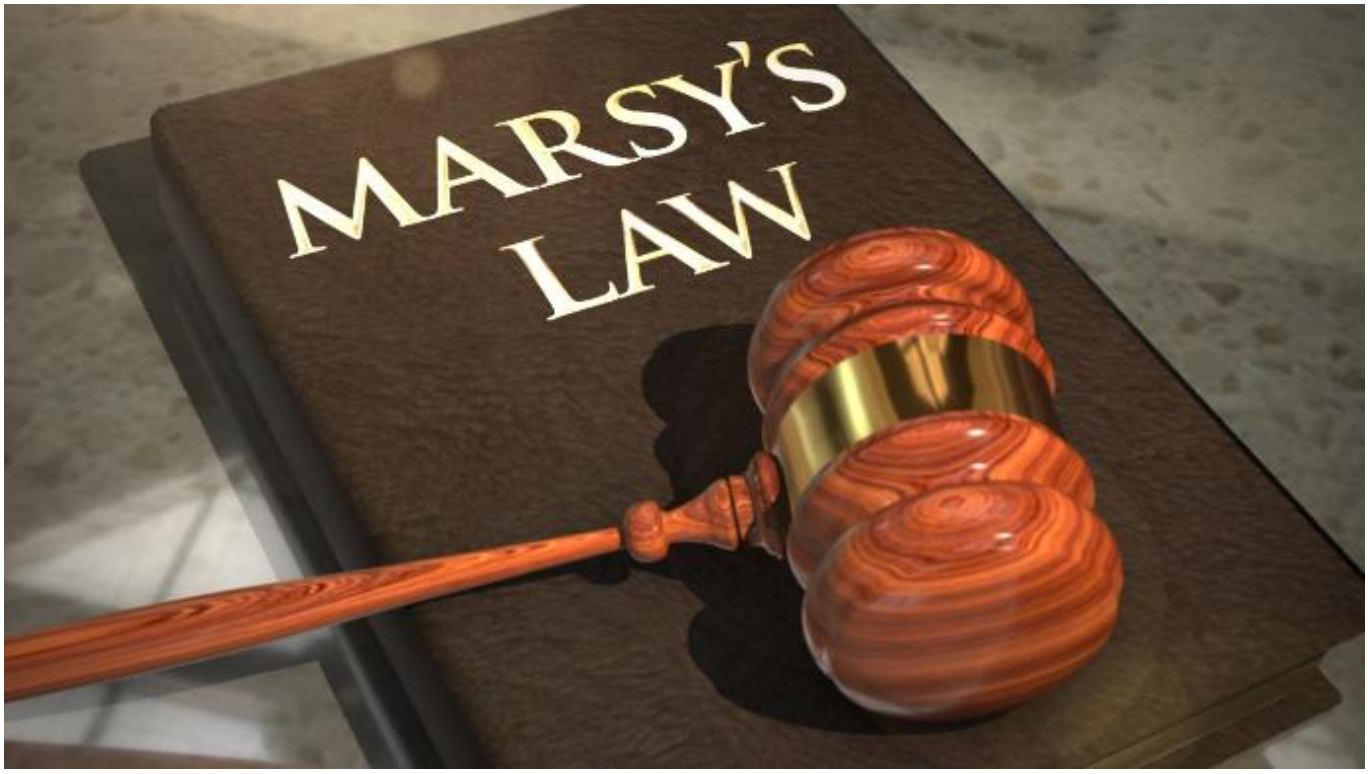
This is the second year in a row lawmakers have used the legislative process to change a voter approved initiative. South Dakota lawmakers says Marsy's Law laid the ground work for a costly victims notification system, with a price tag of more than $100,000 dollars for Minnehaha County. It's costing the state upwards of $5 million.

Speaker of the House Mark Mickelson says the bill is also vague and unclear about what kind of information about crimes can be released to the public or the media.

"They're not reporting rapes and sexual assaults to the campus community at Augustana as a result of Marsy's Law and that's certainly not the intent and I just had a woman email me this last week from Watertown who can't get the accident report of her husband who was killed in an accident," Mickelson said.

Marsy's Law For All say six states have passed similar measures.
KSFY News reached out to several to see if they have had similar issues.
An official in Winnebego County Illinois says she hasn't noticed a change in how police release information.

"Our police department continued to state where crimes occurred and where sexual assaults occurred when



necessary. We don't identify or name the victim, but we would say where the crimes occurred and what types of crimes occurred," Assistant Deputy County State's Attorney Jenny Clifford said.

But Montana officials have similar concerns about the vagueness of the amendment.

"Somebody steals a hair brush from Target department store, well is the corporation the victim? Does that mean that my office is obligated not to just talk to the clerk at Target who is victimized and the store manager, but do I have to talk to corporate council at wherever that corporation is headquartered," Yellowstone County State's Attorney Scott Twito said.

Even though voters approved the Marsy's Law constitutional amendment, it was never implemented in Montana. The state's Supreme Court challenged it due to issues with the initiative process.
The initiated measure process is something one South Dakota group is working to protect.

"The legislature is starting to take away the democracy part of the voters and this is not the first one that they've worked with this seems to be setting a precedent," Darrell Solberg from Represent South Dakota said.

Last year lawmakers repealed Imitated Measure 22, a voter approved ethics reform law.
They then replaced it with several other laws including a lobbyist gift ban and created a government accountability board.
As well as introducing legislation to change Marsy's Law, Representative Mickelson has introduced a bill that would require a majority vote from the legislature to amend the state's constitution.
"I do think the constitution is a foundational document, it should be held to a very sacred standard similar to the US Constitution," Mickelson said.

EXHIBIT E

Montana Supreme Court: Marsy's Law initiative was unconstitutional

Seaborn Larson, slarson@greatfallstribune.com Published 12:28 p.m. MT Nov. 1, 2017 | **Updated 4:49 p.m. MT Nov. 1, 2017**

Marsy's Law, the constitutional initiative overwhelmingly approved by voters last November to outline rights for crime victims, is unconstitutional, the Montana Supreme Court wrote in a ruling issued on Wednesday.

The Montana Association of Counties, The ACLU of Montana, Association of Criminal Defense Lawyers and several others joined in a petition filed in June to void the enactment of Marsy's Law, which voters passed by a 2-to-1 vote in November. Those opposed to Montana's version of the victims' rights initiative argued that it violates the separate-vote rule of Montana's Constitution and that the electorate would have had to vote on each amendment to the constitution individually, rather than the package deal presented in CI-116.

MORE: More groups join both sides of Marsy's Law challenge (/story/news/2017/07/28/more-groups-join-both-sides-marsys-law-challenge/520159001/)

"Because voters were asked to cast a single vote on multiple substantive and unrelated changes to the Constitution, the Court held that CI-116 was unconstitutionally submitted to Montana voters and void in its entirety," justices wrote.

Additionally, the high court found the initiative affected existing constitutional provisions related to the right to know, right to participate, the right to bail, the Supreme Court's authority to regulate attorney conduct and other criminal-trial related rights.

Two justices dissented from the decision.

The petition was filed June 20 against Attorney General Tim Fox and Secretary of State Corey Stapleton. Eventually, parties on both sides of the Supreme Court case gained fellowship, with several newspapers, including the Great Falls Tribune, joining the case in support of the petition to find the initiative void, while Marsy's Law for Montana, the organization that campaigned the initiative into passage, and the National Crime Victim Law Institute, joined against the petition.

MORE: Court delays implementation of Marsy's Law (/story/news/2017/06/30/court-delays-implementation-marsys-law/443735001/)

The initiative's roll out was stalled in June, shortly after the ACLU and adjoining parties filed the petition with the Supreme Court to have the vote declared void. After the petition was filed, both sides requested the Supreme Court impose a stay on the implementation of Marsy's Law. The initiative never went into full effect.

/

“The Supreme Court’s ruling today is an important victory for Montana’s declaration of rights and vindicates the original principles of the state’s constitutional convention,” said ACLU of Montana legal director Alex Rate. “The Supreme Court ruled on the side of these constitutionally enshrined rights.”

"Although well intentioned, the process leading to CI-116's passage deprived Montana voters of the ability to consider the many, separate ways it changed Montana's constitution or explain the significant administrative, financial, and compliance burdens its unfunded mandates imposed upon state, county and local governments while jeopardizing the existing rights of everyone involved with the criminal justice system," wrote Lewis and Clark County Attorney Leo Gallagher, one of those initially named on the petition to void Marsy's Law, in a press release.

The initiative sought to give victims of crime 18 new constitutionally mandated rights, including the right to due process, right to privacy, right to refuse facing the accused and several others.

"The decision to strip Montana's citizens of the crime victim rights they approved is disappointing, especially given the technical legal grounds employed by a few to the detriment of many," Marsy's Law for Montana spokesman Chuck Denowh wrote in an emailed statement. "We will continue to to work to see that crime victims receive the equal rights they deserve... Montana voters should expect those in key roles in the criminal justice process to follow the will of the voters despite this decision."

Both prosecutors and defense attorneys told the Tribune in June that the law would bog down the criminal justice system and could actually hurt victims.

MORE: County, city officials brace for Marsy's Law impacts (/story/news/crime/2017/06/02/county-city-officials-brace-marsys-law-impacts/364271001/)

"It's really kind of a troubling thing for a prosecutor," Cascade County Attorney Josh Racki said in June. "The unfortunate side effect of this could be making it harder on victims or easier on defendants to commit crimes, especially when the victims won't cooperate."

Regional Deputy Public Defender Matt McKittrick said in June he believes officially designating a victim at the outset of the case throws further presumption of guilt on his clients.

Additionally, the initiative — passed by 66 percent of voters — forced agencies to hire on extra help to comply with the requirements. Both Cascade County and the city of Great Falls hired positions specifically to do work related to Marsy's Law. At the county level, the Marsy's Law clerk had moved up to a legal secretary; the position related to Marsy's Law was being re-advertised when the Supreme Court handed down its decision.

Racki said early Wednesday afternoon he had not yet read the decision and couldn't comment on its comments. He did say, however, that his office res ing.

MO (/story/news/2017/06/20/aclu-challenges-marsys-law-implementation/413570001/)

Everyone previously interviewed by the Tribune in reporting on Marsy's Law indicated a similar thought: the concept of providing victims with more information in their related case was a just one, and alleged victims should not be left to navigate the criminal justice system along without an involved party mapping the judicial landscape for them.

But most agencies already do that kind of work, said Nicole Griffith, director of the Victim Witness Assistance Services in Great Falls, in June. To comply with the requirements set out in Marsy's Law, the victim witness center would have had to seek out more funding, she said.

"Now that the overbroad constitutional initiative has been thrown out, we must redouble our efforts to protect victims' rights in Montana," Adrian Miller, another petitioner and victims' rights advocate, wrote in a press release. "We need to call on our legislators to amend laws as necessary to protect victims and provide vital resources to enact this goal. We also need to ensure that the current victims' rights laws are adequately enforced."

The law has been passed so far in North Dakota, South Dakota, Illinois and California, where Henry Nicholas first launched the victims' rights campaign. Nicholas' sister, Marsy, was previously stalked and killed by an ex-boyfriend who later confronted Nicholas and his mother, who were unaware he had been released on bail, according to the Marsy's Law website.

In October, at least one state representative in North Dakota voiced his intent to have Marsy's Law repealed, saying the initiative duplicates several existing state laws, reported the Rapid City Journal (http://rapidcityjournal.com/news/mickelson-wants-repeal-of-marsy-s-law/article_e8ca2d57-c5fd-5d40-9fec-404c5cfb6142.html).

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EXHIBIT F

PBS NEWS HOUR

South Dakota could be the first state to tweak 'Marsy's Law'

Nation May 14, 2018 10:07 AM EDT

SIOUX FALLS, S.D. — South Dakota voters enthusiastically passed "Marsy's Law" in 2016, joining several states that embraced the constitutional amendments giving crime victims such rights as being notified of developments in their cases. Now voters are being asked to support changes to the amendment to help police and prosecutors cut down on unforeseen bureaucratic problems it has created.

The proposed changes — which the Marsy's Law campaign supports — would require victims to opt in to many of their rights and specifically allow authorities to share information with the public to help solve crimes. The changes will go before South Dakota voters during the state's June 5 primary election, months before voters in at least five other states decide whether to adopt their own versions of Marsy's Law.

Kelli Peterson, a victim and witness assistant in the Minnehaha County State's Attorney's Office, used to spend her workdays focused almost exclusively on helping victims of violent crime navigate the criminal justice system. Since the state's Marsy's Law took effect, though, she's had to spend more time calling and mailing victims, including businesses, to let them know about court proceedings in their cases, even for petty theft or trespassing. For example, she says she spent nearly an entire day last year trying to notify an out-of-state bank that someone had been arrested for trespassing in a Sioux Falls home it owned. She ended up sending a letter but never heard back.

"It means that we get to spend less time with our really high-risk ... victims," Peterson said.

Five states — California, Ohio, Illinois, North Dakota and South Dakota — have a Marsy's Law on their books. South Dakota would be the first to alter its law, though Montana voters passed a Marsy's Law in 2016 that the state Supreme Court later overturned, citing flaws in how it was written.

They're named after Marsalee "Marsy" Nicholas, a California college student who was stalked and killed in 1983 by an ex-boyfriend. Her brother, billionaire Henry Nicholas, has bankrolled the ballot measures. Voters are set to decide on Marsy's Law measures in November in Florida, Georgia, Kentucky, Nevada and Oklahoma.

After it passed in South Dakota, at least three large counties hired new people to work with victims. Privacy provisions in the amendment have curtailed the information that some law enforcement agencies release to the public to help solve crimes, and officials say prosecutors' offices must now track down and notify a broader swath of victims about their cases.

House Speaker Mark Mickelson initially proposed getting rid of the amendment but instead reached a deal with the Marsy's Law campaign during this year's legislative session. The group is contributing financial support to promote the passage of the proposed changes to the law.

"People voted for it the first time, and we're fixing some of the unintended consequences," Mickelson said. "It strengthens victims' rights. If you were for it before, you're for it again, and if you had some concerns about it before, it's better now."

Minnehaha County Sheriff Mike Milstead said the amended measure would specifically allow authorities to publicly release the locations or business names where crimes occur, which his office has generally stopped doing since Marsy's Law took effect.

"Every armed robbery where a business name was not able to be put out, it impacted," Milstead said. "If we're not able to say that it was this business, and people remember that they saw someone come out of that business, it's made it more difficult to get tips and solve that crime."

Pennington County State’s Attorney Mark Vargo, whose office added four employees at an annual cost of more than $200,000 because of Marsy’s Law, supports the changes. He said he thinks they’ll help as fewer people opt in to the measure’s coverage.

Supporters of the new amendment are educating voters through grassroots work and digital and direct mail advertising, with the potential for television and radio, said Ryan Erwin, a strategy consultant for the Marsy’s Law for All campaign.

“This is a group of people that haven’t always seen eye-to-eye on everything, and really do now,” Erwin said. “I know there’s a genuine desire to get this passed to help law enforcement and continue to protect victims’ rights.”

By – **James Nord, Associated Press**

EXHIBIT G

EDITORIALS OPINION

Inconsistent Marsy's Law interpretations by police jeopardize public knowledge and safety | Editorial

By ORLANDO SENTINEL EDITORIAL BOARD
ORLANDO SENTINEL | JUN 14, 2019

In early May, a man broke into a Fort Myers house and attacked a woman who was sleeping inside.

The woman, however, invoked her privacy rights as a victim under a new Florida constitutional amendment, so the Fort Myers Police Department refused to reveal important details about the crime, keeping under wraps a sketch of a suspect who was on the loose.

That was a bridge too far even for the group that advocated for the **victim rights amendment** known as Marsy's Law. After reading about a local TV station's

failed attempts to get information to the public about the home invasion, Marsy's Law for Florida fired off a press release.

"This is an overly extreme interpretation of the law," wrote Paul Hawkes, a lawyer for Marsy's Law for Florida. "While crime victims' rights should never be compromised, and the ability for victims to prevent the release of information that could be used to locate or harass them is critical, law enforcement agencies should continue to provide information that is in the best interest of public safety."

Glad that's settled. Except it's not.

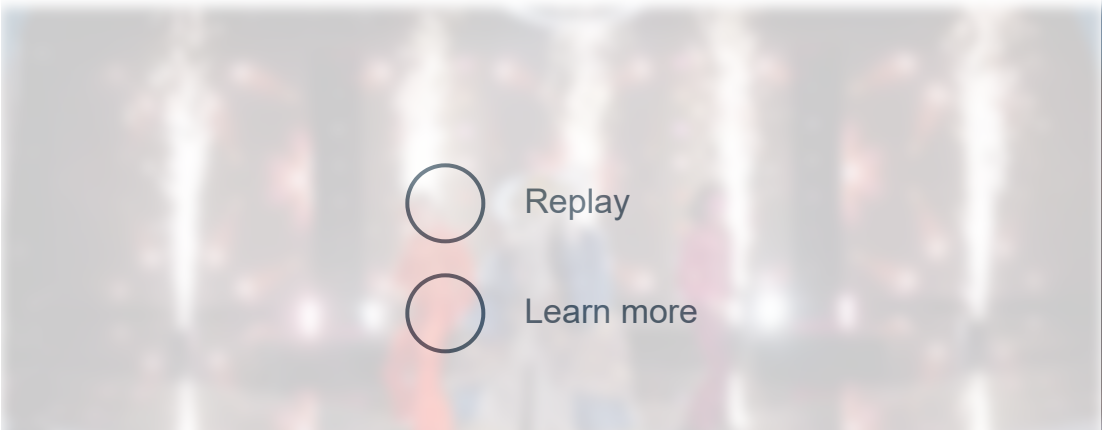
Law enforcement agencies across the state are each interpreting the amendment as they see fit. It's the wild West, with some agencies asking crime victims or relatives if they want to remain unnamed, while others leave it to the victims to bring it up. Some agencies are releasing the very information that others are withholding.

Here are some examples — many of them tracked by the **First Amendment Foundation** — of how law enforcement is using Marsy's Law to deny information:

In January, after five people were shot to death in Sebring, police refused to identify the victims, citing the new constitutional protections for crime victims.

Earlier this month, Altamonte Springs police refused to identify a young girl who died after being struck by a car. The girl was riding in a trailer behind a bicycle her father was riding.

In New Smyrna Beach, police wouldn't name a clerk who was robbed at a convenience store.



In Brevard County, the sheriff's office refused to name a deputy who shot into a car, saying the deputy was the victim of an assault and didn't want to be identified.

The Tallahassee Police Department refused to name the victim *or* the suspect in a DUI homicide case.

In Volusia County, the medical examiner isn't naming any homicide victims it examines.

After a woman was charged with neglecting her children, the Sarasota County Sheriff's Office refused to reveal the name of a day-care center where she worked.

Martin County wouldn't reveal where a man was arrested because it was "too close" to the victim's address.

Hillsborough County won't release the name of a 17-year-old shot in the head by a deputy.

Many of these and other examples are in direct conflict with the state's **Sunshine Law** and the **constitutional right of access to public records**.

Police, however, are often deferring to Marsy's Law, at the expense of the public's right to know.

The state Legislature had a chance this past spring to pass a law that could have brought some clarity to the victims rights amendment, and maybe preserve to some degree the public's right to information.

Didn't happen. And we're not surprised, considering the Legislature's bipartisan enthusiasm for eroding the state's Sunshine Law, which includes public records. Some lawmakers may be quite pleased law enforcement is withholding information.

We can't help but contrast lawmakers' nonchalance about the consequences of the Marsy's Law amendment with their zeal to pass a law that ensured Amendment 4 — which gave ex-felons the right to vote — was defined to the nth degree.

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OCT 5, 2019

Which brings us to another comparison: The Marsy's Law amendment came to voters courtesy of the deeply flawed Constitution Revision Commission, which bundled victim rights with two other amendments, including changing the mandatory retirement age for judges. The three unrelated amendments were presented to voters as one big, confusing question.

A bill this past spring to stop the commission from bundling unrelated amendments — a known problem — went nowhere.

But, oh, you had to stand in awe at the Legislature's determination to make changes in the way citizens put questions on the ballot to address fraudulent petition gathering — a non-existent problem in Florida. That one passed and just got signed into law by the governor.

Our best hope right now for fixing Marsy's Law is that the courts will eventually intervene and restore some order and consistency so that Floridians' right to information is a matter of law, not a matter of law enforcement's whim.

Orlando Sentinel Editorial Board
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