Received 1/10/2020 6:16:37 PM Commonwealth Court of Pennsylvania

Filed 1/10/2020 6:16:00 PM Commonwealth Court of Pennsylvania
578 MD 2019

Steven E. Bizar (Pa. 68316)
Tiffany E. Engsell (Pa. 320711)
Craig J. Castiglia (Pa. 324320)
William C. Kuzma (Pa. 327814)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
215.994.4000

Mary Catherine Roper (Pa. 71107)
Andrew Christy (Pa. 322053)
ACLU OF PENNSYLVANIA
PO Box 60173
Philadelphia, PA 19102
215.592.1513

Attorneys for Petitioners League of Women Voters of PA and Lorraine Haw

---

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, LORRAINE HAW, AND RONALD L. GREENBLATT, ESQUIRE,

Petitioners,

v.

KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH, SHAMEEKAH MOORE, MARTIN VICKLESS, KRISTIN JUNE IRWIN, AND KELLY WILLIAMS,

Respondents.

COMMONWEALTH COURT OF PENNSYLVANIA

ORIGINAL JURISDICTION

No. 578 MD 2019

PETITIONERS' BRIEF IN OPPOSITION TO RESPONDENTS' APPLICATIONS FOR SUMMARY RELIEF

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE PROPOSED AMENDMENT VIOLATES ARTICLE XI, § 1'S REQUIREMENT THAT "WHEN TWO OR MORE AMENDMENTS SHALL BE SUBMITTED THEY SHALL BE VOTED UPON SEPARATELY." 5

A. The Proposed Amendment Violates The Separate Vote Requirement Because It Encompasses More Than A Single Subject. 7

1. Section (a) Of The Proposed Amendment Alone Encompasses Multiple Subject Matters. 10

2. The Facial Similarity Between Some Of The Proposed Amendment And Some Of The Crime Victims' Act Is Irrelevant, As Is The Presumption Of Constitutionality Of Statutes. 11

3. The Single-Subject Test For Legislation Is Different And Intentionally Less Rigorous Than The Single-Subject Test For Constitutional Amendments And Is Irrelevant Here. 12

4. The Proposed Amendment Creates Changes Of Substantive Law Beyond The Crime Victims' Act. 15

B. The Proposed Amendment Also Fails The Separate Vote Requirement Because It Substantively And Facially Affects, And Therefore Amends, More Than One Part Of The Constitution. 16

1. The Proposed Amendment Amends Other Sections Of The Constitution Even Though It Is Written As A Single Block of Text. 16

2. The Proposed Amendment Is Not Made Valid By Interpreting Parts Of It To Be Surplusage Or Duplicative Of Preexisting Laws. 19

TABLE OF CONTENTS
(continued)

Page

II. THE FORM OF THE BALLOT QUESTION VIOLATES ARTICLE XI, § 1, BECAUSE IT DOES NOT SET FORTH THE TEXT OF THE PROPOSED AMENDMENT. 24

III. THE FORM OF THE BALLOT QUESTION IS UNCONSTITUTIONAL, BECAUSE IT DOES NOT FAIRLY, ACCURATELY, AND CLEARLY APPRISE VOTERS OF THE ISSUE TO BE VOTED ON. 31

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Bergdoll v. Commonwealth,
858 A.2d 185 (Pa. Commw. Ct. 2004) 25

Bergdoll v. Kane,
731 A.2d 1261 (Pa. 1999) ....passim

Commonwealth ex rel. Attorney General v. Griest,
46 A. 505 (Pa. 1900) 26

Commonwealth ex rel. Schnader v. Beamish,
164 A. 615 (Pa. 1932) 31

Commonwealth v. Clemat,
218 A.3d 944 (Pa. Super. Ct. 2019) 24

Costa v. Cortes,
142 A.3d 1004 (Pa. Commw. Ct. 2016) 25

Ex Parte Tipton,
93 S.E.2d 640 (S.C. 1956) 30

Funk v. Fielder,
243 S.W.2d 474 (Ky. 1951) 26

Grimaud v. Commonwealth,
865 A.2d 835 (Pa. 2005) 7, 13, 14

Hughes v. Bailey,
195 A.2d 281 (Pa. Super. Ct. 1983) 23

League of Women Voters Minnesota v. Ritchie, 819 N.W.2d 636
(Minn. 2012) 29

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018) 6

Mellow v. Pizzingrilli,
800 A.2d 350 (Pa. Commw. Ct. 2002) 17

Nixon v. Dep't of Pub. Welfare,
839 A.2d 277 (Pa. 2003)....................20

Pa. Prison Soc'y v. Commonwealth,
776 A.2d 971 (Pa. 2001)....................9

Pa. State Educ. Ass'n ex rel. Wilson v. Com., Dep't of Cmty. & Econ. Dev., Office of Open Records,
981 A.2d 383 (Pa. Commw. Ct. 2009), *aff'd*, 606 Pa. 638, 2 A.3d 558 (2010)....................20

Robbins v. Cumberland Cty. Children & Youth Servs.,
802 A.2d 1239 (Pa. Commw. Ct. 2002)....................15

Sears v. State,
208 S.E.2d 93 (Ga. 1974)....................30

Sprague v. Cortes,
145 A.3d 1136 (Pa. 2016)....................24, 25

Stander v. Kelley,
250 A.2d 474 (Pa. 1969)....................32, 33, 35

State ex rel. Voters First v. Ohio Ballot Board,
978 N.E.2d 119 (Oh. 2012)....................29

Tausig v. Lawrence,
197 A. 235 (Pa. 1938)....................14

Washington v. Dep't of Pub. Welfare,
188 A.3d 1135 (Pa. 2018)....................12, 13

Weeks v. Dep't of Human Servs.,
No. EAP 2019, -- A.3d --, 2019 WL 6884991 (Pa. Dec. 18, 2019)....................13, 34

Westerfield v. Ward,
No. 2018-SC-000583-TG, 2019 WL 2463046 (Ky. 2019)....................26, 27, 28

Young v. Byrne,
364 A.2d 47 (N.J. Super. Ct. Law Div. 1976)....................29

PENNSYLVANIA CONSTITUTIONAL PROVISIONS

Pa. Const. art. III, § 3 12

Pa. Const. art. IV, § 9 18

Pa. Const. art. XI, § 1 .... passim

STATUTES

18 P.S. § 11.103 19

18 P.S. § 11.201 19

1 Pa.C.S. § 1921 6

OTHER AUTHORITIES

Ga. Const. art. X, § 1 30

Ky. Const. § 256 27

N.J. Const. art. IX, ¶ 4 29

Pa. R.E. 701 24

Pa. R.E. 704 24

SUMMARY OF ARGUMENT

On November 5, 2019, the Pennsylvania General Assembly asked Pennsylvanians to vote on a massive constitutional amendment ("Proposed Amendment") that would provide at least fifteen new constitutional rights for crime victims, substantially impact the rights of the accused and the administration of Pennsylvania courts, and change many aspects of the criminal justice system. Acting Secretary of the Commonwealth Kathy Boockvar (the "Secretary" or "Respondent"), as well as Respondent Party Intervenors Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams ("Intervening Respondents") (collectively, "Respondents") claim that this lawsuit is about Petitioners' "policy disagreements" with the Proposed Amendment. Not so. The Pennsylvania Constitution is clear that "[w]hen two or more amendments shall be submitted they shall be voted upon separately," Pa. Const. art. XI, § 1. The November 5 ballot question required that Pennsylvanians simply vote "yes" or "no" to the many proposed changes to the Pennsylvania Constitution encompassed by the Proposed Amendment. The requirement set forth in Article XI, § 1 prevents the Legislature from diluting the right to vote by bundling sweeping constitutional amendments in a single package, like this one. This lawsuit is about preserving the fundamental right for Pennsylvanians to vote to amend their Constitution.

Respondents claim that the Proposed Amendment satisfies Article XI, § 1 because the many rights provided to crime victims by the Proposed Amendment "relate to a common whole" or advance "one goal"—securing victims' rights. This misstates the test, and Respondents' argument belies the Pennsylvania case law interpreting Article XI, § 1's separate-vote requirement. The Proposed Amendment violates a fundamental right of voters and should be declared unconstitutional and void for four independent reasons, any one of which would be sufficient.

First, the Proposed Amendment violates Article XI, § 1's separate-vote requirement because it does not encompass a single subject. The "victims' rights" it creates are largely independent and unrelated from one another, and are accompanied, as well, by a reduction in the Judiciary's authority over court proceedings and changes to the constitutionally defined procedure for pardons. These matters cannot be connected without resort to high-level generalities. The Proposed Amendment cannot satisfy any formulation of the single-subject test without rendering that test meaningless.

Second, the Proposed Amendment violates Article XI, § 1's separate-vote requirement because it facially and patently affects other parts of the Constitution. If passed, the Proposed Amendment would amend at least three articles, eight sections, and a schedule of the existing Pennsylvania Constitution. It would alter multiple enumerated rights of the accused defined in Article I, the pardon procedure

set forth in Article IV, and the power of the Judiciary in Article V. The fact that all of these changes have been lumped into a single new section—rather than offered as amendments throughout the Constitution—does not change the substantive effect of the Proposed Amendment or cloak the disregard for the voters that this omnibus proposal represents.

Third, the ballot question presented to the electorate violates Article XI, § 1 because it did not include the full text of the Proposed Amendment. Although Pennsylvania courts have not expressly addressed whether the text of a proposed amendment must appear on the ballot question, the Constitution's text is plain and unambiguous: "[S]uch proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner . . . as the General Assembly shall prescribe . . . ." Pa. Const. art. XI, § 1. In other words, the Legislature controls the method of submission to the voters ("in such a manner") but cannot withhold the required text ("such proposed amendment or amendments").

Fourth, the Proposed Amendment violates the electorate's right to be fully informed of the question voted on because the ballot question did not fairly, accurately, and clearly apprise voters of all of the substance of the Proposed Amendment. Because the ballot question neither apprised voters of all the changes proposed nor the effects of the proposed changes on other parts of the Constitution, it violated the electorate's right. Even if the ballot question captured "the gist" of

the Proposed Amendment, as Respondents contend—and it did not—that is not enough.

For each of these reasons, and as more fully explained below, the Court should deny Respondent and Intervening Respondents' Applications for Summary Relief and grant Petitioners' Application for Summary Relief. The Court should declare the Proposed Amendment unconstitutional and void.

ARGUMENT

All parties agree that the Proposed Amendment is void if Petitioners succeed on any of their four arguments. The Proposed Amendment is unconstitutional and Respondents' Applications for Summary Relief should be denied, because none of Respondents' arguments can save the Proposed Amendment. The Proposed Amendment must fail, because (1) the Proposed Amendment encompasses more than a single subject, (2) the Proposed Amendment patently or facially affects other parts of the Constitution, (3) the ballot question presented to the electorate needed to include the text of the Proposed Amendment, and (4) the ballot question did not fairly, accurately, and clearly apprise the voters of the issue. Petitioners address each of these arguments below.

I. THE PROPOSED AMENDMENT VIOLATES ARTICLE XI, § 1'S REQUIREMENT THAT "WHEN TWO OR MORE AMENDMENTS SHALL BE SUBMITTED THEY SHALL BE VOTED UPON SEPARATELY."

Petitioners and Respondents agree that there are two tests the Proposed Amendment must meet in order to satisfy Article XI, § 1's "separate vote" requirement: (1) the Proposed Amendment must encompass a single, integrated subject and (2) the Proposed Amendment must not facially or patently affect any other part of the Constitution. The Proposed Amendment fails both tests.

Before reviewing the arguments advanced by Respondents and their *amici*—the Pennsylvania District Attorneys Association ("PDAA") and the Republican Caucus of the Pennsylvania House of Representatives—with respect to these agreed-upon standards, it is important to address a threshold question suggested by Respondents' opening briefs: can the Court ignore or treat as mere surplusage any of the terms of the Proposed Amendment? The Intervening Respondents raise this question explicitly when they argue that the first forty-five words of the Proposed Amendment are "merely an introduction to the rights enumerated below," suggesting that the paragraph—which includes a grant of authority to the General Assembly to "provide for" implementation of the enumerated rights—is a mere preamble that should not be considered in deciding whether the Proposed Amendment conforms to the requirements of Article XI, § 1. Intervening Resp'ts' Br. in Supp. of App. for Summary Relief (hereinafter, "Intervening Resp'ts' Br.") at

22. Similarly, the Secretary simply ignores this grant of authority to the General Assembly, and both Respondents and *amici* argue that several of the rights set forth in the Proposed Amendment have no substantive meaning and will not change the law. Further, Respondents' and amici's arguments on this point are unavailing because rights that emanate from legislation are wholly different than those enshrined in the Constitution.

The Court cannot read the Proposed Amendment to give effect to only some of its provisions. A fundamental tenet of interpretation requires that all words and provisions in statutes and constitutional provisions be given effect. *See* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."); *see also League of Women Voters v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018) ("[I]f, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity becomes apparent in the plain language of the provision, we follow the rules of interpretation similar to those generally applicable when construing statutes. . . ." (citing 1 Pa.C.S. §§ 1921, 1922 and Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189, 195, 200 (2002))). Therefore, in considering whether the Proposed Amendment encompasses a single subject, and whether it changes other parts of the Constitution, this Court must give effect to all

of the provisions of the Proposed Amendment, and none can be viewed as a nullity. That fundamental principle dooms the Proposed Amendment.

Having established that backdrop principle, Petitioners turn to the various arguments advanced by Respondents and their *amici* under agreed-upon standards for determining whether the Proposed Amendment satisfies Article XI, § 1's separate vote requirement. None of these arguments warrants the grant of summary relief to Respondents.

A. The Proposed Amendment Violates The Separate Vote Requirement Because It Encompasses More Than A Single Subject.

Respondents assert that the Proposed Amendment's provisions meet the "single subject" test because all of the many new economic and non-economic substantive rights, as well as all of the new procedural rights, set forth in the Proposed Amendment are designed to serve the interests of a single group: crime victims. They argue that it is sufficient if the Proposed Amendment has a "single objective." *See, e.g.*, Resp't's Br. in Supp. of App. for Summary Relief (hereinafter, "Resp't's Br.") at 2, 10-11. But Respondents have misstated the meaning of a "single objective." The Proposed Amendment's objective cannot be stated at such a level of generality as to render the test meaningless.

Properly stated, the test is "whether [the] alterations are sufficiently interrelated to justify their presentation to the electorate in a single question."

Grimaud v. Commonwealth, 865 A.2d 835, 841 (Pa. 2005). This test is derived from then-Justice Saylor's concurrence in *Bergdoll v. Kane*, 731 A.2d 1261 (Pa. 1999). As Justice Saylor explained in *Bergdoll*, when the proposed amendment creates independent substantive changes, the proposed amendment "lack[s] the interdependence necessary to justify their presentation to voters within the framework of a single question." *Id.* at 1271 (Saylor, J., concurring). He wrote:

> It is apparent from a review of the initiative that one principal aim was to confer upon the General Assembly the power to expand the permissible manner for presenting trial testimony of child witnesses in criminal proceedings. As the proposed amendment would accomplish this precise objective "notwithstanding" all other provisions of Article I, Section 9, there was no apparent need to separately alter Section 9's face-to-face clause. More fundamentally, the alteration of the face-to-face provision would affect a broader segment of rights than the category connected with the confrontation of a child witness; therefore, the changes lacked the interdependence necessary to justify their presentation to voters within the framework of a single question.

Id.

Respondents' effort to aggregate the multiple components of the Proposed Amendment under the general umbrella of "victims' rights" ignores the analysis that has doomed other "single purpose" amendments. For instance, in *Bergdoll*, the proposed amendment related entirely to the general subject of confrontation of witnesses in a criminal trial—but it pursued its overarching goal by *both* changing the constitutional standard that governed confrontation in criminal trials *and* empowering the General Assembly to create procedures to govern the confrontation

of child witnesses. These changes were independent from one another and were designed to and would accomplish different things. One change allowed for the creation of special procedures for child witnesses; the other change ensured that there was no requirement that defendants be "face to face" with *any* witness—it was not limited to child witnesses. The second change, therefore, was not in service of the same objective as the first, because it "would affect a broader segment of rights than" the first. As Justice Saylor explained, that meant that the different alterations "lacked the interdependence necessary to justify their presentation to voters within the framework of a single question." *Id.*

Similarly, in *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971 (Pa. 2001), the proposed amendment was intended to change the process for obtaining pardons. But the Supreme Court found that, in pursuit of that overall goal, the amendment would *both* restructure the pardoning power of the Board of Pardons *and* alter the process by which members are appointed to the Board. *Id.* at 981. As Justice Saylor wrote in his concurrence in that case, those changes failed the standard he had articulated in *Bergdoll*. *Id.* at 984.

Respondents contend that the Proposed Amendment serves a single overarching goal: creating new constitutional rights for victims of crime. But the Proposed Amendment pursues that goal through myriad independent mechanisms. It creates multiple procedural rights for victims, it creates multiple economic rights

for victims, and it creates multiple substantive rights for victims—all of which are independently enforceable. To paraphrase Chief Justice Saylor, if the goal of the Proposed Amendment were merely to constitutionalize victims' right to notice and an opportunity to participate in criminal proceedings that affect them, then "there was no apparent need to separately [insulate victims from discovery requests, provide victims a right to proceedings free from delay, create a right to 'protection,' provide for restitution or the return of property, or empower the General Assembly to dictate the implementation of said rights in criminal proceedings]. More fundamentally, the [additional rights] affect a broader segment of rights [and proceedings] than the category connected with [notice and participation]; therefore, the changes lacked the interdependence necessary to justify their presentation to voters within the framework of a single question." *Bergdoll*, 731 A.2d at 1271 (Saylor, J., concurring).

Unlike the Secretary, who relies almost exclusively on the "overarching goal" argument, Intervening Respondents offer more analysis and even review some of the individual components of the Proposed Amendment. None of those more detailed arguments, however, can rescue this sprawling constitutional revision.

1. Section (a) Of The Proposed Amendment Alone Encompasses Multiple Subject Matters.

Intervening Respondents argue that the Proposed Amendment is a single cohesive change because it would make little sense to vote on the three sections of

the Proposed Amendment separately: sections (b) and (c) exist only to give effect to the rights set forth in section (a). Intervening Resp't's Br. at 19-21. It is true that the enforcement and definition provisions set forth in sections (b) and (c) could be interrelated with any *one* of the new rights set forth in section (a). But this does not establish that the various rights set forth in section (a) are, amongst themselves, interrelated. It does not explain, for example, how the right to full and timely restitution relates to the right to refuse discovery requests from defendants, or the right to protection, or the other examples set forth in Petitioners' principal brief. Pet'rs' Br. in Supp. of App. for Summary Relief at 19-27.

2. The Facial Similarity Between Some Of The Proposed Amendment And Some Of The Crime Victims' Act Is Irrelevant, As Is The Presumption Of Constitutionality Of Statutes.

Intervening Respondents also offer a *non sequitur* in support of the notice provisions of the Proposed Amendment: they argue that statutes are presumed constitutional, that the analogous provisions in the Crime Victims Act ("CVA") have not been held unconstitutional, and that, therefore, the similar provisions in the Proposed Amendment are constitutional. Intervening Resp'ts' Br. at 22, 26. First, of course, the fact that *some* of the same procedural rights already exist in the form of a statute does not mean that the procedural rights set forth in the Proposed Amendment are not new: the creation of constitutional rights "to be enforced" as

other constitutional rights are enforced is an entirely different proposal than a set of statutory procedures.

And the Intervening Respondents' allusion to the presumption of constitutionality is nonsensical. Whether or not any provision of the CVA offends any part of the Constitution is a different question from whether the Proposed Amendment violates the specific requirements for amending the Constitution set out in Article XI, § 1, which do not even apply to legislation.

3. The Single-Subject Test For Legislation Is Different And Intentionally Less Rigorous Than The Single-Subject Test For Constitutional Amendments And Is Irrelevant Here.

The Intervening Respondents and the Republican Caucus of the Pennsylvania House of Representatives, as *amicus curiae*, also invite this Court to consider whether the Proposed Amendment could pass muster under the "single subject" test used to evaluate legislation under Article III, § 3 of the Constitution.[1] This invitation, however, is a red herring because this is a different test, with a substantially different level of scrutiny, than that required under Article XI, § 1. The test under Article III, § 3 is whether the provisions in a bill are sufficiently "germane" to a single subject and "have a nexus to a common purpose." *Washington*

---

[1] That provision provides: "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." Pa. Const. Art. III, § 3.

v. Dep't of Pub. Welfare, 188 A.3d 1135, 1151 (Pa. 2018).[2] In other words, the subject of a piece of legislation "must constitute 'a unifying scheme to accomplish a single purpose.'" *Id*. (citing *Commonwealth v. Neiman*, 84 A.3d 603, 612 (Pa. 2013)).

The legislative single-subject test is superficially similar to the test in *Grimaud* for constitutional amendments. However, the critical difference is that, in the case of the Article XI, § 1's constitutional "separate vote" requirement, "[n]othing short of a literal compliance with this mandate will suffice," *Bergdoll*, 731 A.2d at 1270, while for Article III, §3's legislative "single subject" test, the Supreme Court has intentionally "charted something of a middle course between overly-strict and overly-lenient enforcement of Section 3" out of deference to the legislature. *Weeks v. Dep't of Human Servs.*, No. 22 EAP 2019, -- A.3d --, 2019 WL 6884991, at *3 (Pa. Dec. 18, 2019).

There are two reasons for the Court's deference in the legislative arena. First, every piece of enacted legislation "is presumed valid—a presumption that extends to the manner in which it was passed." *Id*. Second, the Court has shown deference to the legislature to "afford[] due regard for the necessity of preserving flexibility in the legislative crafting process." *Washington*, 188 A.3d at 1151.

---

[2] *Washington* ultimately addressed Article III, § 4, but it adopted and used the Article III, § 3 test.

Constitutional amendments are different. There is *no* presumption of constitutionality for a proposed amendment, in the way that there is for a proposed piece of legislation, and there is similarly no deference shown to the legislature for the back-and-forth negotiating process that is an ordinary component of the legislative process. As the Supreme Court explained in *Tausig v. Lawrence*, 197 A. 235 (Pa. 1938)—and reiterated in *Bergdoll*, 731 A.2d at 1270—"[n]othing short of a literal compliance with this mandate will suffice. The Constitution has a more sacred position in judicial interpretation than does an act of assembly." *Tausig,* 197 A. at 238. Under the Pennsylvania precedent applicable to constitutional amendments that are put to the electorate, this Court cannot "withhold strict compliance," as that would have the effect of itself rewriting the Constitution. *Id*. To the extent that the single-subject test from Article III, § 3 is useful in this case, it is to show that every single court holding under that standard is *more liberal* than the analysis this Court and the Supreme Court have employed pursuant to *Grimaud* when analyzing constitutional amendments. The Proposed Amendment may pass muster under the test for legislative enactment, but it does not meet the more stringent requirements for a constitutional amendment.

4. *The Proposed Amendment Creates Changes Of Substantive Law Beyond The Crime Victims' Act.*

Reading the Proposed Amendment to give effect to each of its terms—as this Court must—the Proposed Amendment encompasses multiple independently enforceable substantive and procedural rights, each of which is bolstered by the definitions and enforcement provisions of sections (b) and (c) of the Proposed Amendment. The Intervening Respondents and the PDAA essentially argue that there is "nothing to see here"—that the Proposed Amendment creates no substantive law beyond that already encompassed by the CVA. But that is untrue.

As just one example, the Proposed Amendment's right "to reasonable protection from the accused or any person acting on behalf of the accused," standing alone, represents a monumental shift in the law. As this Court has held, "[i]n general, the State has no constitutional obligation to protect individuals from harm inflicted by private actors." *Robbins v. Cumberland Cty. Children & Youth Servs.*, 802 A.2d 1239, 1245 (Pa. Commw. Ct. 2002) (citing *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189 (1989), which held that a county had no constitutional duty to protect a child from the abuse of a natural parent). *See also id.* at 1251-52 (holding that the same analysis precludes any right to protection under the Pennsylvania Constitution (citing *Pa. Game Comm'n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995))). The Proposed Amendment's creation of a "right to . . . protection" from private actors is a massive change to the Constitution. Pet'r's App. Summ.

Relief Ex. A at 3. Again, borrowing from Justice Saylor's words in *Bergdoll*, "the [right to protection] would affect a broader segment of rights [and proceedings] than the category connected with [notice and participation]; therefore, the changes lacked the interdependence necessary to justify their presentation to voters within the framework of a single question." *See Bergdoll,* 731 A.2d at 1271 (Saylor, J., concurring).

B. The Proposed Amendment Also Fails The Separate Vote Requirement Because It Substantively And Facially Affects, And Therefore Amends, More Than One Part Of The Constitution.

By adding fifteen new rights for crime victims, the Proposed Amendment substantively and facially affects and functionally amends several parts of the Pennsylvania Constitution. Respondents and their *amici* rely on semantics and mischaracterizations of the Proposed Amendment in an effort to avoid this obvious fact.

1. The Proposed Amendment Amends Other Sections Of The Constitution Even Though It Is Written As A Single Block of Text.

The Secretary repeats her argument from the preliminary injunction proceedings that the Proposed Amendment does not change the text of any portion of the Constitution apart from inserting the new section 9.1. *See, e.g.*, Resp't's Br. at 9. That argument, however, is explicitly foreclosed by the decision in *Bergdoll*, where the Supreme Court voided an amendment to Article I, § 9 that both changed the standard of confrontation and added *to that same section* a grant of authority to

the General Assembly to define the manner in which child victim testimony would be heard in criminal cases. *Bergdoll*, 731 A.2d at 1270. Even though the amendment only purported to change the text of Article I, § 9, the Court's majority held that "the ballot question encompassed amendments to both Article I, § 9 and Article 5, § 10(c)." *Id.*

The Secretary also asserts that the myriad changes in the Proposed Amendment cannot offend the Constitution because there were "bulk" amendments to the Constitution in the 1960s. But the same case that the Secretary quotes in this regard acknowledges and applies the modern analysis relied upon by Petitioners. *See Mellow v. Pizzingrilli*, 800 A.2d 350, 357 (Pa. Commw. Ct. 2002).[3]

Moreover, neither the Respondents nor their *amici* can explain how the Proposed Amendment's grant of power to the General Assembly over criminal proceedings—"a victim shall have the following rights, *as further provided and as defined by the General Assembly*," Pet'r's App. Summ. Relief Ex. A at 3—does not, as was held in *Bergdoll*, impinge on the Judiciary's exclusive authority to establish

---

[3] The Secretary's reliance on *Mellow* is misplaced for additional reasons. In *Mellow*, the court merely stated in passing that the 1960s bulk amendments were never challenged in court. *Mellow*, 800 A.2d at 355. No party presented the court with a challenge to those amendments. Further, the passing of the bulk amendments is simply not analogous to the instant case. They were part of a process of revising the Constitution, which included a Constitutional Convention, and led to the 1968 Constitution. *Id.* The Proposed Amendment has none of those features.

proceedings in criminal cases. As noted above in Section I, the Intervening Respondents' argument that this language should be read as non-substantive is barred by established principles of interpretation. The Secretary does not mention this provision at all, but, perhaps in lieu of addressing the point, incorrectly describes the result in *Bergdoll* as unrelated to the analogous grant of authority to the General Assembly in the amendment at issue in that case.[4]

Respondents and their *amici* also do not address the Proposed Amendment's change to the procedure for pardons. Presently, Article IV, § 9(a) provides:

> 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, upon due public notice.

Pa. Const. art. IV, § 9. Currently, the Constitution requires a hearing only where testimony is heard before a pardon from a sentence of death or life imprisonment.

---

[4] The Secretary asserts that the amendment struck down by the Supreme Court in *Bergdoll* only failed the single subject test because it both removed language from and added language to Article I, § 9, and not, by implication, because it would have altered the Judiciary's exclusive authority over court procedures set forth in Article V. Resp't's Br. at 12. That is just not a defensible reading of the *Bergdoll* decision, in which the majority expressly and at length discussed the exclusive authority of the Judiciary over court proceedings and why any delegation of such authority to the General Assembly was an incursion on the judicial authority of Article V. *Bergdoll*, 731 A.2d at 1270.

Additionally, the CVA—not the Constitution—states that *some* victims (those who "as a direct result of the criminal act or attempt suffer[] physical or mental injury, death or the loss of earnings") of *some* crimes ("personal injury crime") have a right to "prior comment on . . . State postsentencing release decisions, including . . . pardon." 18 P.S. §§ 11.103, 11.201. But no current authority, constitutional or otherwise, requires an opportunity for *all* victims to "be heard" in any pardon proceedings. The Proposed Amendment would for the first time require either the Governor or the Board of Pardons to solicit participation from *all* victims of *all* crimes before reaching a decision on any pardon request. That is different from the procedure now set forth in Article IV, § 9(a), and constitutes an express change to that section of the Constitution that the voters have a right to consider separately.

2. The Proposed Amendment Is Not Made Valid By Interpreting Parts Of It To Be Surplusage Or Duplicative Of Preexisting Laws.

Respondents and their *amici* do discuss other aspects of the Proposed Amendment and variously characterize the rights it creates as having no substance,[5]

---

[5] The Intervening Respondents and the PDAA argue that because notice of certain court proceedings is already required by the CVA for *some* crime victims, the expanded and elevated rights to notice and an opportunity to be heard by *all* victims at virtually all criminal proceedings are not really changes. Intervening Resp'ts' Br. at 25-26; Br. of *Amicus Curiae*, PDAA as Supporting Resp't (hereinafter "PDAA Br.") at 12-13. That argument is belied by the explicit terms of the Proposed Amendment and by the experience of the Intervening Respondents, who did not receive information they were entitled to under the CVA and had no recourse for those violations. Intervening Resp'ts' Br. at 4.

merely mirroring existing rights in the Constitution,[6] or most importantly, having no

---

The Intervening Respondents also argue that certain phrases within the Proposed Amendment are "merely an introduction to the rights," that the new rights to fairness and respect are duplicative of rights in the CVA, and that "the vast majority of the provisions of the Proposed Amendment are already the law of the Commonwealth." Intervening Resp'ts' Br. at 22-23, 34. As noted above in Section I, these arguments are foreclosed by the fundamental mandate that the Court give effect to all of the separate components of the Proposed Amendment, as a constitutional provision.

[6] Intervening Respondents argue that the proposed amendment's right to restitution would simply "be a way for the State to protect" the property rights guaranteed by Article I, § 1 of the Pennsylvania Constitution. Intervening Resp'ts' Br. at 33. However, Intervening Respondents misrepresent the property rights they reference. Article I, § 1 of the Pennsylvania Constitution guarantees rights to acquire, possess, and protect property against intrusion by the *state*, not against intrusion by an individual. *See, e.g.*, *Nixon v. Dep't of Pub. Welfare*, 839 A.2d 277, 286 (Pa. 2003) (stating that Art. I, § 1, "like the due process clause in the Fourteenth Amendment of the United States Constitution, guarantees persons in this Commonwealth certain inalienable rights. While the General Assembly may, under its police power, limit those rights [guaranteed by Art. I, § 1] by enacting laws to protect the public health, safety, and welfare, any such laws are subject to judicial review and a constitutional analysis.").

Relatedly, the Secretary claims that there already exists in the Pennsylvania Constitution a right to privacy. Resp't's Br. at 15. The existing right to privacy is not absolute. It is limited to "protection against disclosure of personal matters in which a person has a legitimate expectation of privacy" and may give way to other "state interests." *Pa. State Educ. Ass'n ex rel. Wilson v. Com., Dep't of Cmty. & Econ. Dev., Office of Open Records*, 981 A.2d 383, 385-86 (Pa. Commw. Ct. 2009), *aff'd*, 606 Pa. 638, 2 A.3d 558 (2010) ("Although a person may have a legitimate expectation of privacy in a personal matter, the constitutional protection afforded the personal matter is not unqualified; privacy claims must be balanced against state interests."). Thus, the Proposed Amendment could very well expand situations where victims have a legitimate expectation of privacy and may alter the balance of state interests in accessing privacy claims.

effect on the rights afforded criminal defendants under Article I, §§ 9 and 14. These arguments misstate the effects of the Proposed Amendment.

First, the Proposed Amendment expressly states that victims' rights will be protected to the same degree as defendants' rights is a change. Pet'rs' App. Summ. Relief Ex. A at 1. It therefore explicitly conditions the rights set forth in Article I, § 9 by setting up competing rights that must be balanced against the rights of the accused where they come into conflict. That does not mean, of course, that in every instance the interests of the victim will prevail over the interests of the defendant—that will vary case by case. However, it does mean that in every criminal proceeding, the defendant's rights will be weighed against the victim's rights. That is an express alteration to the rights of the accused.

More specifically, the PDAA argues that providing crime victims a right to refuse discovery does not change anything. The PDAA says that the Rules of Criminal Procedure provide defendants with the right and the means to subpoena victims. PDAA Br. at 9. This argument ignores the legal effect of the Proposed Amendment: if victims have constitutional immunity from criminal defendants' discovery requests, then judges will not issue subpoenas over the objection of victims. And, while defendants may or may not still be able to obtain personal information about victims from third parties, they will be expressly precluded from obtaining evidence that is in the possession of the victim—such as security camera

footage or records held by a commercial “victim.” *See* Hr’g Tr. at 28 (attached to Pet’rs’ App. for Summary Relief as Exhibit D). The Proposed Amendment’s right for victims to have immunity from discovery contains no restrictions to sensitive personal information like records of treatment. The right to refuse discovery is an express limitation on the defendant’s right to compulsory process under Article I, § 9.

The PDAA’s argument ignores the legal effect of the Proposed Amendment: if victims have constitutional immunity from criminal defendants’ discovery requests, then judges will not issue subpoenas over the objection of victims. And, while defendants may or may not still be able to obtain personal information about victims from third parties, they will be expressly precluded from obtaining evidence that is in the possession of the victim—such as security camera footage or records held by a commercial “victim.” *See* Hr’g Tr. at 28 (attached to Pet’rs’ App. for Summary Relief as Exhibit D). The Proposed Amendment’s right for victims to have immunity from discovery contains no restrictions to sensitive personal information like records of treatment. The right to refuse discovery is an express limitation on the defendant’s right to compulsory process under Article I, § 9.

Intervening Respondents also argue that the new right to have the safety of the victim and the victim’s family considered in setting bail changes nothing because the safety of the victim is already considered at bail hearings. Intervening Resp’ts’

Br. at 25. But that requirement does not currently appear in Article I, § 14, which sets forth a presumption of pretrial release and only discusses the factors that affect whether a defendant will be granted bail or denied release entirely. The Proposed Amendment would create the first *constitutional* condition of release for defendants who do not fall into the existing exclusions—itself a significant change to the pretrial release process.

The PDAA also argues that victims subject to cross examination will not be empowered to refuse to answer questions on the ground that those questions conflict with the victim's right to "fairness . . . privacy and dignity." PDAA Br. at 12; Pet'r's App. Summ. Relief Ex. A at 3. That argument is purely speculative.[7] The rights set

[7] Respondents contend that Court should disregard all of Intervenor Greenblatt's testimony as speculative or improper. But Respondents' *amicus* the PDAA goes much farther in purporting to define away the impact of the Proposed Amendment.

Respondent Intervenors also erroneously claim that Intervenor Greenblatt's testimony should be discredited because he "usurp[ed] the role of this Court on deciding the ultimate legal issue in this case." Intervening Resp't's Br. at 19. Respondents waived this argument when they did not object during the preliminary injunction hearing. *See Hughes v. Bailey*, 195 A.2d 281, 283-84 (Pa. Super. Ct. 1983) (finding objection to testimony from a preliminary injunction hearing waived when the objection had not been made during the preliminary injunction hearing). Moreover, the Pennsylvania Rules of Evidence explicitly allow non-expert opinion testimony on the ultimate issue in a case particularly, as here, where it was based on the witness's perception, helpful to an understanding of the witness's testimony and a disputed fact issue, and did not reflect scientific or technical knowledge within the meaning

forth in the Proposed Amendment must be read to mean something, and the PDAA cannot predict how they will be interpreted.

* * *

In conclusion, the Proposed Amendment is unconstitutional and violates both tests prescribed by the Supreme Court for analyzing whether a proposed amendment violates the separate vote requirement in Article XI, § 1. The Proposed Amendment does not encompass a single, integrated subject, and the Proposed Amendment facially and patently affects other parts of the Constitution. Respondents' counterarguments are unavailing, and the Proposed Amendment should be declared unconstitutional and void.

II. THE FORM OF THE BALLOT QUESTION VIOLATES ARTICLE XI, § 1, BECAUSE IT DOES NOT SET FORTH THE TEXT OF THE PROPOSED AMENDMENT.

The ballot question also violates Article XI, § 1 of the Pennsylvania Constitution because it does not set forth the text of the Proposed Amendment. The question whether the full text of a proposed amendment must appear on the ballot is one of first impression in Pennsylvania. The Secretary's contention that *Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016), "resolved" this issue, Resp't's Br. at 17, is disingenuous: the quoted language is from a non-precedential, three-justice opinion

---

of Rule 702. Pa. R.E. 701, 704; *Commonwealth v. Clemat*, 218 A.3d 944, 956 (Pa. Super. Ct. 2019).

in that split decision. The Secretary, again, misrepresents precedent when she contends that *this* Court answered the question in *Bergdoll v. Commonwealth*, 858 A.2d 185, 194-95 (Pa. Commw. Ct. 2004). Resp't's Br. at 18. The quoted passage from *Bergdoll* addressed a different question: whether the General Assembly was permitted to delegate to the Secretary the power to draft the ballot question or whether the General Assembly had to draft the ballot question itself.

It is true that this Court has at least twice implicitly blessed the practice of presenting a ballot question that differs from the wording of the amendment. *See Bergdoll*, 858 A.2d at 194-95 (explaining that the General Assembly, through the Election Code, delegates to the Secretary the power to draft ballot questions); *Costa v. Cortes*, 142 A.3d 1004, 1017 (Pa. Commw. Ct. 2016) (declining to reach the question of who creates the ballot language). Yet none of the parties in *Bergdoll*, *Costa*, or *Sprague* actually advanced the argument that Petitioners now advance here.

It seems an obvious proposition that a person who is to vote on changing the text of a document should see the text that the voter will approve or disapprove. It is also a proposition supported and required by our Constitution. Article XI, § 1 requires that the legislature vote on "such proposed amendment or amendments . . . and such 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." The question then is whether the Constitution means what it says: must "such proposed amendment" actually be submitted to the voters?[8] Or does the ability of the legislature to dictate the "manner" of the vote mean that it can also determine whether voters are presented with the actual language they are being asked to approve? Our Supreme Court has never suggested that "such proposed amendment" means anything other than the text itself. *See Commonwealth ex rel. Attorney General v. Griest*, 46 A. 505, 506 (Pa. 1900) (describing the non-discretionary obligation of the Secretary to publish the text of the proposed amendment in newspapers).

Last year, in a case addressing its own version of Marsy's Law, the Kentucky Supreme Court ruled that the text of the amendment must appear on the ballot in full. *See Westerfield v. Ward*, No. 2018-SC-000583-TG, 2019 WL 2463046, at *10 (Ky. 2019). While the Kentucky Supreme Court had previously explicitly ruled that the legislature had the authority to decide the ballot language, it reversed itself in *Westerfield*.[9]

---

[8] The legislature, of course, votes on the actual text of the amendment. Given that legislature only has the power to propose amendments, while the power to amend rests with the voters, failing to provide the same information to the voter in the booth as is given the legislature upends this balance of authority.

[9] The prior decision in *Funk v. Fielder*, 243 S.W.2d 474 (Ky. 1951), was decided by the Court of Appeals, which was Kentucky's sole appellate court

The Secretary dismisses this persuasive decision, writing that "the Kentucky Constitution differs due to the placement of a comma." Resp't's Br. at 18-19. The constitutional provisions, however, do not support this distinction. Kentucky's Constitution, § 256, provides:

> Then such 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 . . .

Pennsylvania's Article XI, § 1 provides:

> [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;

The Kentucky court focused on the meaning of "in such manner." The court reasoned that the phrase "such proposed amendment shall be submitted" to the voters was "separate and apart" from the phrase "in such manner." *Westerfield*, 2019 WL 2463046 at *8. While the Pennsylvania Constitution has a slightly different structure, the outcome is the same: the phrase "in such manner" is most naturally read as part of the procedure—such as the date of the referendum or whether the question is submitted to the electorate as part of a general election or in a special

---

until its Supreme Court was created in 1975. The Kentucky Supreme Court in *Westerfield* made it clear that the *Funk* case was a decision that "we," e.g. the terminal appellate court, decided. *Westerfield*, 2019 WL 2463046, at *7.

election—that is to be determined by the legislature. It follows that the General Assembly has the authority to set things such as the time, place, and manner of the election, but it is powerless to submit to the voters anything other than "such proposed amendment."

As the Kentucky Supreme Court explained, there are important policy rationales that underscore this textual requirement. It would be "unimaginable" that the framers of the constitution "intended to grant such broad authority over the process of modifying our organic document solely to the General Assembly" such that the legislature could "encompass not only the logistical details of the voting process but also the form of the amendment to be submitted for a vote." *Westerfield,* 2019 WL 2463046, at *8. Otherwise the legislature would be able to create any summary it wanted, which would "yield an absurd result" by giving the legislature "absolute authority' to choose what the voters see when they vote and have the effect of allowing the legislature alone to amend the constitution.[10] *Id*. The fact that in Pennsylvania the General Assembly has delegated the formulation of the ballot question to the Secretary, but then limited the Secretary to a mere 75 words, does

---

[10] This is what *Amicus* Republican Caucus of the Pennsylvania House of Representatives calls "an appropriate recognition of the interrelationship between the branches of government." Br. of *Amicus Curiae*, Republican Caucus of the Pa. House of Representatives at 15.

not mitigate the transfer of authority away from the voters. It just rests that authority with the executive instead of the General Assembly.

There is little case law directly on point from other states with similar constitutions. While a dissenting judge in *League of Women Voters Minnesota v. Ritchie*, argued that the entire text of an amendment should appear on the ballot in that state, the majority explicitly declined to reach the constitutional issue. 819 N.W.2d 636, 644 n.5 (Minn. 2012). Other states have different language in the constitutional provisions setting out the requirements for amending the constitution by electorate vote, which appear to give more power to the legislature than Pennsylvania's Constitution. For example, a New Jersey trial court ruled in *Young v. Byrne*, 364 A.2d 47 (N.J. Super. Ct. Law Div. 1976), that the "only requirement is that the ballot not be misleading," and that the ballot is not "intended to be the place where the entire text of the amendment is printed." *Id.* at 52. Yet the New Jersey Constitution differs from Pennsylvania's because it empowers the legislature to submit an amendment to the voters "in the manner and *form* provided by the Legislature." N.J. Const. art. IX, ¶ 4 (emphasis added). Pennsylvania's Article XI, § 1, of course, does not empower our legislature to decide the "form" of the ballot question. An Ohio court's similar ruling in *State ex rel. Voters First v. Ohio Ballot Board*, 978 N.E.2d 119 (Oh. 2012), is also easily distinguishable because the Ohio Constitution itself expressly states that the ballot "need not contain the full text" of

the amendment. In Georgia, the state constitution explicitly empowers the legislature to "submit[] a proposed amendment . . . in such words as the General Assembly may provide." Ga. Const. art. X, § 1. *See Sears v. State*, 208 S.E.2d 93, 99-100 (Ga. 1974) (describing the legislature's power over ballot language). On the other hand, although the South Carolina constitution simply says that the proposed amendment "must be submitted to the qualified electors of the State" at the next general election, its Supreme Court has held—without analysis—that it is "not necessary that the question on the ballot include the full text of the proposed amendment; it is sufficient that it describe the amendment plainly, fairly, and in such words that the average voter may understand its character and purpose." *Ex Parte Tipton*, 93 S.E.2d 640, 643 (S.C. 1956). Thus, there is little to glean from the limited decisions arising from other states.

Certainly, the Pennsylvania Constitution's Article XI, § 1 does not explicitly empower the legislature (or the executive) to determine the ballot text in the way that some other states' constitutions do. Ultimately, this Court should keep in mind the goal of Article XI's requirements, which is to ensure that the electorate is informed of what it is voting on and to enable it to vote in a fair and equitable manner. As the Supreme Court has explained, "[n]o method of amendment can be tolerated which does not provide the electorate adequate opportunity to be fully

advised of proposed changes." *Commonwealth ex rel. Schnader v. Beamish*, 164 A. 615, 617 (Pa. 1932).

At the least, providing the voters with the text of the amendment will ensure they are "fully advised" of such changes. While the Pennsylvania Supreme Court has not previously ruled on this issue, the language of the Constitution itself, other states' interpretations of similar language in their respective constitutions, and Pennsylvanians' overall interest in fair and informed elections all weigh in favor of including the whole text of the Proposed Amendment on the ballot. In light of this, the appropriate construction of Article XI is that the language that must be on the ballot is the language upon which the voters are actually voting.

III. THE FORM OF THE BALLOT QUESTION IS UNCONSTITUTIONAL, BECAUSE IT DOES NOT FAIRLY, ACCURATELY, AND CLEARLY APPRISE VOTERS OF THE ISSUE TO BE VOTED ON.

Even if this Court concludes that the full text of the Proposed Amendment need not appear on the ballot, the ballot question employed here did not adequately inform the voters of what they were voting on. The Secretary and the Republican Caucus concede, as they must, that the 73-word ballot question presented to the voters did not describe all of the components of the Proposed Amendment. The Secretary argues that the ballot question described enough of the Proposed Amendment because it conveyed the "gist" of the many components of the Proposed Amendment. Resp't's Br. at 24. But that argument means that the Secretary gets to

decide which components of the Proposed Amendment are material to voters and which are not. That argument is offensive to the fundamental premise that it is the voters, and not the executive, who have the power to amend the Constitution.

A ballot question must "fairly, accurately and clearly apprize the voter of the question or issue to be voted on." *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). The Secretary argues for an altogether different standard: she suggests it is sufficient that voters are not "misled" about the nature of the Proposed Amendment. Resp't's Br. at 19. The case cited by the Secretary for this proposition, however, is not about amending the Constitution. *Oncken v. Ewing* dealt with a municipal referendum. 8 A.2d 402, 402-03 (Pa. 1939). The standard applied there was whether the voters could "intelligently express their intentions" when voting and whether any irregularity in the question could have "misled the voters" and "result in the question at issue being presented to them unintelligibly." *Id.* at 404. And the court wrote that "the election cannot be judicially overturned because of some innocuous deviation from a statutory requirement." *Id.* But that is not the standard the Pennsylvania Supreme Court has required for constitutional amendments.

Next, the Secretary argues that the ballot question that partially described the Proposed Amendment was sufficient because it let the voters know that "crime victims would be provided an array of rights." Resp't's Br. at 19. The problem with this argument is that it would justify an even less complete ballot question—why not

simply ask voters if they want to provide rights for crime victims, without even including what some of those rights would entail?

The Secretary and the Republican Caucus also argue that publication of the full text of the Proposed Amendment prior to the election was good enough notice to the voters in *Stander* and should be good enough today. The Republican Caucus argues that relying upon the legislative process to inform voters shows "deference" and "an appropriate recognition of the interrelationship between the branches of government." Br. of *Amicus Curiae*, Republican Caucus of the Pa. House of Representatives at 15. The problem is that our Supreme Court has adopted a different standard, holding that the electorate has a right "to be clearly and more fully informed of the question to be voted on." *Stander*, 250 A.2d at 480.

And there is good reason for a different standard. When it comes to the passage of legislation, the "interrelationship between the branches of government" is that the executive branch provides the chief check and balance to the legislature. But when it comes to amending the Constitution, the executive has no role and the only check on the legislature is the electorate's exclusive authority over that document. In this "interrelationship," it is the courts that must safeguard the prerogative of the electorate. That is why, as stated above, "[n]othing short of a literal compliance with this mandate [of Article XI, § 1] will suffice," *Bergdoll*, 731 A.2d at 1270, while for legislative action, the Supreme Court has intentionally

"charted something of a middle course between overly-strict and overly-lenient enforcement of [Article 3,] Section 3" out of deference to the legislature. *Weeks*, 2019 WL 6884991, at *3.

Finally, the Republican Caucus argues in this case that, in addition to the prior publication of the Proposed Amendment, the heightened press attention generated by this lawsuit has given voters all the information they need. The problem with this argument is the same problem embodied by the ballot question itself: none of the articles attached to the Republicans' *amicus* brief set forth *all* of the changes contained in the Proposed Amendment. The perverse effect of the heightened media attention may well have been to make voters think that they *had* seen all of the substance of the Proposed Amendment, when all they saw were multiple partial descriptions of its provisions. And the Pennsylvania Constitution's process for amendment does not contemplate any role for the media in ensuring that voters are given fair and accurate information about the amendment they are voting into their Constitution.

At bottom, the mandate of the Supreme Court's jurisprudence is not satisfied by stating the "gist" of the Proposed Amendment, nor by telling voters some of what they are being asked to approve, nor by relying on the media to "inform" voters of the content of the 500-word Proposed Amendment. At a minimum, the ballot

question set before the voters must fully inform them of what they are being asked to approve or reject.

All ballot questions in Pennsylvania need to "fairly, accurately and clearly apprize the voter of the question or issue to be voted on." *Stander*, 250 A.2d at 480. It is for the voters alone to decide when and how to alter the Constitution. Neither the Secretary, nor the General Assembly, nor even the media, may decide for the voters which parts of the Proposed Amendment deserve their attention and which do not. As conceded by Respondents, Resp't's Br. at 19, 24, the ballot question did not apprise the voters of all of the changes made on the face of the Proposed Amendment, nor did it inform the electorate of the many effects the Proposed Amendment would have on other parts of the constitution. For these reasons, it should be voided.

CONCLUSION

For the reasons herein, Petitioners respectfully request that the Court deny Respondents' Applications for Summary Relief. The Proposed Amendment should be declared unconstitutional and void.

Respectfully submitted,

Date: January 10, 2020

/s/ Steven E. Bizar
Steven E. Bizar (Pa. 68316)
Tiffany E. Engsell (Pa. 320711)
Craig J. Castiglia (Pa. 324320)
William C. Kuzma (Pa. 327814)
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
215.994.4000

/s/ Mary Catherine Roper
Mary Catherine Roper (Pa. 71107)
Andrew Christy (Pa. 322053)
ACLU OF PENNSYLVANIA
PO Box 60173
Philadelphia, PA 19102
215.592.1513

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the 14,000 word limit set forth in Pa. R.A.P. 2135. According to the Word Count feature in Microsoft Office Word 2013, Petitioners' Opposition Brief contains 8,699 words, excluding the parts exempted by Pa. R.A.P. 2135(b).

Date: January 10, 2020

/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: January 10, 2020

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