

**IN THE
COMMONWEALTH COURT OF PENNSYLVANIA**

LEAGUE OF WOMEN VOTERS OF : No. 578 M.D. 2019
PENNSYLVANIA and LORRAINE :
HAW, :

Petitioners :

v. :

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

Respondent :

**BRIEF OF RESPONDENT PARTY INTERVENORS,
SHAMEEKAH MOORE, MARTIN VICKLESS, KRISTIN JUNE IRWIN
AND KELLY WILLIAMS, IN OPPOSITION TO
PETITIONERS' APPLICATION FOR SUMMARY RELIEF**

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**I. CORRECTION OF MISSTATEMENTS CONTAINED IN
PETITIONERS' BRIEF IN SUPPORT OF APPLICATION FOR
SUMMARY RELIEF**

On December 13, 2019, cross applications for summary relief pursuant to Pa.R.A.P. 1532, and briefs in support, were filed by: (1) Petitioners, the League of Women Voters of Pennsylvania and Lorraine Haw; (2) Respondent, Kathy Boockvar, the Acting Secretary of the Commonwealth (the "Secretary"); and (3) Respondent Party Intervenors, Shameekah Moore, Martin Vickless, Kristin June Irwin and Kelly Williams. Petitioners' Brief in Support of Application for Summary Relief contains several misstatements.

First, Petitioners erroneously assert, without providing any basis or citation to the record whatsoever, that: "Voters were not, however, presented with the language of the actual amendment to the Pennsylvania Constitution." (Brief of Petitioners at 6.) This factual assertion is both false and misleading. As aptly pointed out in the Brief of *Amicus Curiae*, the Republican Caucus of the Pennsylvania House of Representatives, filed in this Court on December 13, 2019, the publication of a proposed amendment occurs repeatedly throughout the amendment process. The Pennsylvania Constitution itself requires that the language of the proposed amendment be published "in at least two newspapers in every county in which such newspapers shall be published" after *each time* the proposed amendment is passed by the General Assembly. PA. CONST. art. XI, § 1.

Moreover, per the Election Code, the Plain English Statement that was prepared by the Secretary and covered every aspect of the proposed amendment, was published in at least one newspaper in every county in the Commonwealth as required by 25 P.S. § 3041,¹ and three copies were posted in and around each and every polling place as required by 25 P.S. § 2621.1.² Additionally, the Department of State's website hosted a page that contained the ballot question, the Plain English Statement, and the *exact language* of the Proposed Amendment. Petitioners' claim that voters in Pennsylvania were not provided with adequate notice of the language of the Proposed Amendment is factually unsupportable.

Second, Petitioners also incorrectly assert that “[u]nder the Proposed Amendment, 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.” (Brief of Petitioners at 30-31.) Petitioners then follow with the claim that the proposed amendment would allow anyone to refuse to provide testimony at a criminal proceeding. (Brief of Petitioners at 31.) Once again, this assertion is both false and misleading. As aptly pointed out in the Brief of *Amicus Curiae*, the Pennsylvania

¹ Act of June 3, 1937, P.L. 1333, art. XII, § 1201, *as amended*.

² Act of June 3, 1937, P.L. 1333, No. 320, § 201.1, *added by* the Act of February 19, 1986, P.L. 29, No. 11, § 1.

District Attorneys Association, filed in this Court on December 13, 2019, Petitioners’ “conclusion that the Proposed Amendment would violate an accused right to confrontation and compulsory process under Article 1, Section 9, is blatantly wrong.” (Brief of Pennsylvania District Attorneys Association at 9.) Petitioners have conflated the use of a subpoena authorized by Pa.R.Crim.P. 107 as a mechanism for the accused to seek the *pre-trial* production of evidence set forth in Pa.R.Crim.P. 573(A), with the use of a subpoena authorized by Pa.R.Crim.P. 107 to compel attendance of a witness *at trial*. Nothing in the text of the Proposed Amendment excuses a “victim” as defined therein from complying with a subpoena to compel attendance at trial.

II. ARGUMENT IN OPPOSITION TO PETITIONERS' APPLICATION FOR SUMMARY RELIEF

A. The Proposed Amendment Does Not Violate The Single-Subject Requirement Of Article XI, § 1 Of The Pennsylvania Constitution

In the Brief in Support of Application for Summary Relief previously filed on December 13, 2019, Respondent Party Intervenors set forth compelling arguments soundly refuting Petitioners' claims that the proposed constitutional amendment, creating a new section containing a crime victims' bill of rights (the "Proposed Amendment"), violates the single-subject requirement.³ Therein, Respondent Party Intervenors set forth a comprehensive analysis, separately detailing how each clause of the Proposed Amendment does not patently or facially affect any other provision of the Pennsylvania Constitution. (*See* Respondent Party Intervenors' Brief in Support of Application of Summary Relief at 21-40.) In the interests of judicial economy, Respondent Party Intervenors hereby incorporate those arguments herein in lieu of recapitulating those arguments in full. *See generally* Pa.R.C.P. 1019(g) (applicable in this original jurisdiction proceeding pursuant to Pa.R.A.P. 106).

³ The "single-subject" requirement requires that "when two or more amendments shall be submitted they shall be voted upon separately." PA. CONST. art. XI, § 1. To determine whether there has been a violation of the single-subject requirement, the Supreme Court adopted the "subject matter test" in the seminal case of *Grimaud v. Commonwealth of Pa.*, 865 A.2d 835, 841 (Pa. 2005). The subject matter test contains two prongs: (1) whether the subject matter is sufficiently interrelated so as to justify inclusion in a single question; and (2) whether the proposed amendment does not facially affect other parts of the Constitution. *Id.*

As made clear by the Pennsylvania Supreme Court, and as previously briefed extensively by both the Secretary and Respondent Party Intervenors, constitutional amendments must be voted on separately if they *facially amend and patently affect* more than one section of the Pennsylvania Constitution. *Grimaud v. Commonwealth of Pa.*, 865 A.2d 835, 842 (Pa. 2005). In their Brief in Support of Application for Summary Relief, Petitioners, however, attempt to persuade this Court to ignore the requirements of *Grimaud* and adopt the exact opposite test: namely, that amendments that *may hypothetically and/or latently* touch upon other sections of the Constitution must be voted on separately. That simply is not the law of this Commonwealth.

Petitioners' Brief in Support of Application for Summary Relief, and the *Amici Curiae* Briefs in Support thereof, are replete with hypothetical supposition, conjecture and speculation as to what "potentially" "may", "might" and/or "could" occur after the Secretary tabulates and certifies the votes on the Proposed Amendment and the crime victims' bill of rights is thereafter constitutionally protected.⁴ Petitioners' rank speculation, as to the possible harms that might be

⁴ See Petitioners' Brief in Support of Application for Summary Relief at 29 ("the Proposed Amendment *could* impose on the courts' ability to maintain its calendar"); at 33 ("courts *may* no longer be able to grant necessary discovery requests"); at 36 ("the amendment *may* delay habeas corpus relief."); at 39 ("certain important information about the nature and cause of the accusation *may* be withheld"); at 41 ("victims *may* even invoke the right not to participate at all"); at 42 ("A trial *may* be delayed"), ("The resulting delay *may* be viewed as 'excused' ... and therefore weigh against the accused's existing speedy trial right."), ("Continuances *may* (continued...)

suffered by criminal defendants and convicted criminals with respect to their constitutional rights as a result of the passage of the Proposed Amendment, is just as irrelevant to the single-subject rule constitutional analysis as the speculative opinion testimony and dubious policy arguments presented by Petitioner Party Intervenor Ronald L. Greenblatt, Esquire during the October 23, 2019 preliminary injunction hearing. (*See* Respondent Party Intervenors’ Brief in Support of Application of Summary Relief at 18-19.) By relying on hypotheticals and conjecture regarding what the Proposed Amendment “potentially” “may”, “might” and/or “could” result in, Petitioners thereby implicitly concede they have no “clear right to relief”.

(...continued)_____

be needed to notify witnesses.”), (“[The Proposed Amendment] *could* cause delays in cases.”), and (“there *could* be “a reverse effect for the crime victims because of the delay in cases.”); at 46 (“which *could* delay or otherwise burden individuals’ potential receipt of pardon”); at 48 (“a defendant’s right to appeal *may* be curtailed”) (emphasis supplied).

See Amicus Curiae Brief of Pennsylvania Association of Criminal Defense Lawyers at 14 (“A defined ‘victim’ ... *might* prevent such belated exercises of justice from being obtained under our PCRA.”); at 15 (“enforcement of the Proposed Amendments *could* have prevented exoneration of an innocent person”); at 22 (“*might* the amendment not *potentially* be deemed to outweigh the defendant’s protection against retrial ...?”) (emphasis supplied).

See Amicus Curiae Brief of National Association of Criminal Defense Lawyers at 12 (“victims who did not receive notice *may* seek a rehearing of proceedings”); at 14 (“such a finding *could* profoundly disadvantage an accused person”) and (“... Marsy’s Law *could* create additional unforeseen economic impact.”); at 14-15 (“a reduction in fines and costs received *could* impact the administration of Pennsylvania’s problem-solving courts”) (emphasis supplied). Moreover, in support of these speculative arguments, the National Association of Criminal Defense Lawyers improperly relies on facts *dehors* the record and cites to various and multiple hearsay documents *dehors* the record, that cannot properly be considered by this Court. These assertions of facts and evidence *dehors* the record, and the arguments based thereon, should be stricken.

Moreover, Petitioners' speculation as to possible harms constitutes a gross misinterpretation of the Proposed Amendment. No provision of the Proposed Amendment actually infringes upon any right held by a criminal defendant or convicted criminal under the United States or Pennsylvania Constitutions. Instead, under the Proposed Amendment, a crime victim is no longer just a piece of evidence at a criminal trial. The Proposed Amendment gives victims a well-deserved participatory voice in the criminal justice system, not a veto power over the conduct of criminal proceedings. The implication that treating victims with the dignity and respect that they deserve is a burden, and not a critical part of the true administration of justice, highlights the need for these rights. The reality is that these are things that the justice system should already be doing.

And finally, in support of these dubious arguments, Petitioners cite *case law* interpreting the Pennsylvania Constitution, not the Pennsylvania Constitution itself. Petitioners have failed to provide *any* evidence or rational argument that the Proposed Amendment would alter the *actual language of the Constitution itself*. While some judicial interpretations of constitutional rights *may* be implicated—although even this is unclear since Petitioners' arguments are rife with hypotheticals and conjecture without a scintilla of proof that anything will *actually* change—any such hypothetical change does not violate the *Grimaud* test, which requires facial and patent changes to the Constitution itself. 865 A.2d at 842.

The proper test to be applied by this Court is not “whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution. The question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect, as appellants suggest.” *Grimaud*, 865 A.2d at 842 (emphasis in original). Petitioners’ speculative arguments do not satisfy the *Grimaud* test and accordingly must fail.

Because the Proposed Amendment does not facially or patently affect any other provision of the Pennsylvania Constitution, in their Brief in Support of Application for Summary Relief, Petitioners are relegated to constructing an argument wherein Petitioners repeatedly fabricate non-existent amendatory language to various constitutional provisions, each time introduced with the preface “if the change ... were presented honestly, [the Pennsylvania Constitution as amended] would read as follows:” (*See* Petitioners’ Brief at 29, 31, 34, 39, 40, 41, 43, 45, 46, 47, 48.) It is precisely because the Proposed Amendment does not facially and patently affect any other provision of the Pennsylvania Constitution that Petitioners must erroneously rely on this distorted argument construct. For if the Proposed Amendment actually did facially or patently affect any other provision of the Pennsylvania Constitution, Petitioners would be able to

cite to the actual text of the Proposed Amendment instead of fabricating non-existent amendatory language to these various constitutional provisions.

The Proposed Amendment does not violate the single-subject requirement of Article XI, Section 1 of the Pennsylvania Constitution. The Proposed Amendment is sufficiently interrelated so as to justify inclusion in a single question, and no other provisions of the Pennsylvania Constitution would be patently and facially affected by adoption of the Proposed Amendment.

B. The Proposed Amendment Does Not Violate Article XI, § 1 Of The Pennsylvania Constitution

Respondent Party Intervenors hereby join, rely on, and adopt by reference in whole, the Secretary's arguments in opposition to Petitioners' claim that the ballot question does not fairly and accurately reflect the proposed amendment, as set forth in the Secretary's Brief in Support of Application for Summary Relief, filed in this Court on December 13, 2019, and also as set forth in the Secretary's Brief in Opposition to Petitioners' Application for Summary Relief, filed in this Court on January 10, 2020. *See generally* Pa.R.A.P. 2137.

C. The Proposed Amendment Does Not Violate The Electorate's Right To Be Fully Informed On The Proposed Amendment

Respondent Party Intervenors hereby join, rely on, and adopt by reference in whole, the Secretary's arguments in opposition to Petitioners' claim that the entire text of the proposed amendment must be set forth in the ballot question itself, as

set forth in the Secretary's Brief in Support of Application for Summary Relief, filed in this Court on December 13, 2019, and also as set forth in the Secretary's Brief in Opposition to Petitioners' Application for Summary Relief, filed in this Court on January 10, 2020. *See generally* Pa.R.A.P. 2137.

III. CONCLUSION

There are no material facts in dispute. The right of the Secretary and Respondent Party Intervenors to summary relief is clear.⁵

The Proposed Amendment does not violate the single-subject requirement of Article XI, Section 1 of the Pennsylvania Constitution. The Proposed Amendment is sufficiently interrelated so as to justify inclusion in a single question, and no other provisions of the Pennsylvania Constitution would be patently or facially affected by adoption of the Proposed Amendment.

The Proposed Amendment does not violate Article XI, § 1 of the Pennsylvania Constitution. There is no requirement that the Ballot Question contain the entire text of the Proposed Amendment.

The Proposed Amendment does not violate the electorate's right to be fully informed on the Proposed Amendment. The Ballot Question fairly, accurately and clearly apprises the electorate of the question on which to be voted.

Accordingly, Petitioners' request for a declaratory judgment and permanent injunctive relief⁶ must be denied. Every day that passes with the Secretary being

⁵ See, e.g., *Hospital and Healthsystem Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 602 (Pa. 2013) (summary relief may only be granted when party's right to relief is clear and no material facts are in dispute).

⁶ The absence of a clear right to relief precludes the entry of a permanent injunction. *E.g.*, *Mazin v. Bureau of Prof'l and Occupational Affairs*, 950 A.2d 382, 389 (Pa. Cmwlth. 2008) (continued...)

enjoined from tabulating and certifying the results of the vote on the Proposed Amendment is a day in which the rights set forth in Marsy’s Law—which was overwhelmingly approved by the Commonwealth electorate⁷—are denied to crime victims and their families.

WHEREFORE, Respondent Party Intervenors, Shameekah Moore, Martin Vickless, Kristin June Irwin and Kelly Williams, respectfully request that this Honorable Court GRANT Summary Relief in favor of Respondent Party Intervenors pursuant to Pa.R.A.P. 1532(b), and DENY the requests for declaratory judgments and ancillary permanent injunctive relief of Petitioners, the League of Women Voters of Pennsylvania and Lorraine Haw.

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(party seeking a permanent injunction must establish three elements: (1) a clear right to relief; (2) that an injunction is necessary to avoid an injury that cannot be compensated by damages; and (3) that a greater injury will result from refusing the injunction).

⁷ Based on unofficial published reports, in the November 2019 General Election the electorate approved the Proposed Amendment by an overwhelming supermajority. *E.g.*, [https://ballotpedia.org/Pennsylvania_Marsy's_Law_Crime_Victims_Rights_Amendment_\(2019\)](https://ballotpedia.org/Pennsylvania_Marsy's_Law_Crime_Victims_Rights_Amendment_(2019)) (last visited December 13, 2019) (reporting that the Proposed Amendment garnered 74.01% of votes with 100% of precincts reporting (citing Pennsylvania Department of State 2019 Municipal Election Unofficial Returns at <https://www.electionreturns.pa.gov/>)).

Respectfully submitted,

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Dated: January 10, 2020

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PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: January 10, 2020

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