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578 MD 2019

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA *and* LORRAINE HAW,	:	
Petitioners	:	**No. 578 MD 2019**
v.	:	
KATHY BOOCKVAR, Secretary of the Commonwealth,	:	**Electronically Filed Document**
Respondent	:	

RESPONDENT BOOCKVAR'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR SUMMARY RELIEF

Respectfully submitted,

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Petitioners ignore binding precedent in responding to Respondent's Application for Summary Relief such that they have not demonstrated that they are entitled to relief as a matter of law. First, Petitioners disregard *Grimaud*, the binding Supreme Court precedent applicable to this matter, in opposing Respondent's Application for Summary Relief. *Grimaud v. Com.*, 865 A.2d 835 (Pa. 2005). They mention the case only fleetingly, offering no meaningful analysis of its standard, or how the standard applies to the facts. This is unsurprising because their case fails under *Grimaud*.

Petitioners, instead, respond by arguing the application of a new standard, a "modern standard," to analyze the constitutionality of a proposed amendment under Article XI, § 1's separate vote requirement. Petitioners' new standard calls for an analysis of the implicit effects of a proposed amendment. They argue that the Crime Victims' Rights Amendment ("Amendment") fails under this standard. This "modern standard" is not the standard that applies—in fact, it was rejected by our Supreme Court in *Grimaud*.

In addition to requesting that this Honorable Court supplant *Grimaud* with their own legal standard, they also ask this Court to reject well-established precedent in favor of Kentucky law to adopt a new rule with respect to the manner in which ballot questions are presented to the electorate. They argue that opinions from this Court and the Supreme Court that hold that it is proper for the General

Assembly to formulate ballot questions should be dismissed because the Kentucky Supreme Court interpreted the Kentucky Constitution, which is different, differently. Petitioners' attempt to use this lawsuit as a vehicle to upend the well-settled law surrounding proposing constitutional amendments, through Kentucky cases and policy arguments, should fail.

For these reasons, Respondent's Application for Summary Relief should be granted.

A. PETITIONERS IGNORE *GRIMAUD* AND ATTEMPT TO SUPPLANT IT WITH THEIR OWN "MODERN STANDARD"

Petitioners' case fails under *Grimaud*. This likely explains why they offer no meaningful analysis of *Grimaud*, making only a passing reference to the precedent in analyzing the single-subject test.

Indeed, Petitioners mention *Grimaud* only once in their proposed-amendment single-subject analysis. They accurately state that *Grimaud* tasks the Court with determining whether the "alterations are sufficiently interrelated to justify their presentation to the electorate in a single question." *Grimaud*, 865 A.2d at 841. Petitioners offer no discussion of the Court's explanation of this standard, or how it was applied to the facts, however. Rather, they seize upon the fact that this standard, in part, emanates from Chief Justice Saylor's (then Justice Saylor) concurrence in *Bergdoll*, and proceed to proffer the concurrence as the standard that applies.

Justice Saylor's concurrence in *Bergdoll* is not the controlling standard. While the Court acknowledged that they were *persuaded* by the concurrence, *as well as* a host of authority from other jurisdictions speaking to a common-purpose test, it did not adopt the concurrence wholesale. Petitioners treat the concurrence as the law, and instead of employing the standard as articulated in *Grimaud*, argue that the Court should examine whether any part of a proposed amendment "would affect a broader segment of rights"—language from Justice Saylor's concurrence. This not provided for in *Grimaud*, however.

Nowhere in the case is it indicated that the Court should consider whether an individual part "affects a broader segment of rights" as Petitioners suggest. Oppositely, *Grimaud* is clear in counseling that the Court is *not* to look at the implicit impacts of a proposed Amendment. *Grimaud*, 865 A.2d at 842 ("The question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect…"). Therefore, Petitioners' arguments under this new "modern standard" should be rejected. Their musings on what they perceive will be the impacts of the Amendment on other rights are irrelevant under *Grimaud*.

Respondent's Application for Summary Relief should, thus, be granted because, absent application of a creative new standard, Petitioners' case fails under *Grimaud*.

B. THE AMENDMENT RELATES TO A SINGLE SUBJECT THAT SERVES A SINGLE GOAL.

Under *Grimaud*, the Amendment passes constitutional muster because all of the parts relate to a single subject—advancing victims' rights in the criminal justice system in cases in which they are directly harmed. Each part relates to this common purpose, and works to form a practical framework on the topic.

Petitioners advance little argument in opposition to this point. They contend that "the general umbrella of victims' rights" is insufficient under their modern standard. Petitioners' argument misses the mark. Initially, and contrary to Petitioners' contention, the Amendment does not generally relate to "victims' rights"—rather, it is targeted to victims of *crimes*, and is particular to the "criminal and juvenile justice systems"—not to civil actions. The Amendment creates a framework for victims to advance rights in criminal cases in which they are directly harmed. Petitioners' characterization of the Amendment as generically relating to "victims" is misplaced.

Furthermore, the Petitioners' misstate the case-law. In, *Grimaud*, the Court found that the general topic of bail *was* sufficient to subsume an amendment that (1) expanded the capital offenses bail exception to include life imprisonment, and (2) added preventive detention to the purpose of bail. *Grimaud*, 865 A.2d at 841. The Court did not rule that the amendment was violative of the separate vote rule

because "bail" was too general of a topic, or because the amendment was composed of more than one part.

Moreover, Petitioners incorrectly state that the amendments in *Bergdoll* and *Pennsylvania Prison Society* failed because the amendments' purposes were, respectively, too broad. To the contrary, in *Bergdoll*, the Court opined that the proposed amendment had "two purposes." *Bergdoll v. Kane*, 731 A.2d 1261, 1264 (Pa. 1999). "First, it [sought] to ensure that the language of the Pennsylvania Constitution gives the accused no greater a right to confront witnesses than the right to confront witnesses given the accused under the United States Constitution, Second, it [sought] to ensure that, notwithstanding the constitutional right of the accused to confront witnesses, the General Assembly is authorized by the Pennsylvania Constitution to enact laws regarding the manner by which children may testify in criminal proceedings." *Id.* The Court did not void the Amendment under the rationale that a shared purpose was too broad.

The same goes for *Pennsylvania Prison Society*. The Court did not rule that the amendment's single purpose was too general. Rather, "[t]he proposed amendments had two purposes: first, to restructure the pardoning power of the Board and, second, to alter the confirmation process of the Senate of Pennsylvania for the three members of the Board of Pardons who are appointed by the Governor." *Pennsylvania Prison Soc. v. Com.*, 776 A.2d 971, 981 (Pa. 2001).

In this case, the Amendment serves one purpose: providing a framework for victims' rights in criminal cases in which they were directly harmed. All of the parts advance this particular goal, and are rationally related. This is sufficient under *Grimaud*.

C. THE AMENDMENT DOES NOT "FACIALLY" ALTER ANY EXISTING PROVISION OF THE CONSTITUTION.

In addition to attempting to create their own legal standard, Petitioners also seek to invent their own definitions of the words "facial" and "express." They must do so in order to have the Court consider the supposed implicit impacts of the Amendment that underpin their entire case—but which are irrelevant.

To be clear, the Supreme Court was direct in holding that a proposed amendment violates the separate vote requirement only if it "facially" alters any existing provision of the Constitution. The Court stated that, "[t]he test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution." *Grimaud*, 865 A.2d at 842. If the word facially was not clear enough, the Court reiterated that "[t]he question is whether the single ballot question *patently* affects other constitutional provisions, not whether it implicitly has such an effect, as appellants suggest." *Id.* (emphasis added). The Court used the word facially literally, as illustrated by the fact that it held that an existing right in that case was not effectively amended by the proposed

amendments because the "language is the same now as it was prior to the amendments." *Id.*

Regardless of this standard, Petitioners argue that the Amendment violates the Constitution because it "substantively and facially affects and functionally amends several parts of the Pennsylvania Constitution…" Petitioners' Opp. Brief, p. 16. They then spend eight pages of their brief analyzing the supposed implicit impacts of the amendment arguing that those implicit impacts effectively facially amend the Constitution. *See* Petitioners' Opp. Brief, pp. 15-23. This is wrong. *Grimaud* is clear that the Court is not to speculate as to the implicit impacts of an amendment on existing provisions. If the proposed amendment does not *actually* alter any organic language in the constitution—there is no claim.

The wisdom behind this rule is made clear by the Petitioners' filings. To be sure, Petitioners speculate about the implicit impacts of the Amendment. For instance, the Amendment provides that victims have the right, in the criminal justice system, "to refuse an interview, deposition or other discovery request *made by the accused or any person acting on behalf of the accused*." Joint Resolution, 2019-1 (emphasis added). Victims currently have the right to refuse such requests by an accused.[1] Yet, despite the plain language of the Amendment, and the current

[1] Defendants do not have the right to depose alleged victims in a criminal case; victims are not required to respond to such requests. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in

law, Petitioners argue that, "judges will not issue subpoenas" if the Amendment is upheld. Petitioners are no superior position to make this prediction, and have presented no evidence from judges that this is true. The Amendment is specific that the right is to requests "from the accused," not from the Court, and this is an absurd interpretation of the law.

Indeed, to accept these arguments, one must embrace a rank cynicism of the judiciary's ability to apply laws consistently, like Mr. Greenblatt, *see*, PI, tr. 63 ("Do you doubt the ability of the Court to apply these provisions consistently?" "Absolutely"), and must draw every reasonable inference against the Amendment. Petitioners assume that, at every turn, there will be an extreme and inequitable application of the law.

Curiously, however, while Petitioners, on one hand, premise their case on a complete inability of the courts to apply victims' rights coextensively with the rights of the accused, they, on the other hand, cite the ability of the courts to balance rights in attempting to refute Respondent's claims. In response to Respondent's point that the Right to Privacy already exists, and that the criminal

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a criminal case."); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) ("The opinions of this Court show that the right to confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony.") (internal citations omitted).

justice system has not crumbled, Petitioners assert that this is so because the courts "balance" privacy claims against state interests. *See Pennsylvania State Educ. Ass'n ex rel. Wilson v. Com., Dep't of Cmty. & Econ. Dev., Office of Open Records*, 981 A.2d 383, 385 (Pa. Commw. Ct. 2009), *aff'd*, 2 A.3d 558 (Pa. 2010). Yet, they do not similarly believe that courts can balance the Amendment's right to privacy against existing criminal rights. This argument is inconsistent and illogical.

In this case, the Amendment does not facially alter or delete any existing language from the Constitution. Therefore, the Amendment passes muster, regardless of Petitioners' commentary on their imagined implicit impacts of the Amendment.[2]

D. PENNSYLVANIA LAW DOES NOT REQUIRE THAT THE FULL TEXT OF A PROPOSED AMENDMENT BE SET FORTH ON THE BALLOT.

Petitioners urge this Court to abandon the plain language of the Pennsylvania Constitution, as well case law and tradition, in favor of Kentucky law with respect to the presentation of amendments to voters. This Court should dismiss the Petitioners' attempts to upend the law.

Petitioners, themselves, acknowledge that this Court *twice* "blessed the practice of presenting a ballot question that differs from the wording of the

[2] This stands true with respect to Petitioners' focus on the delegation to the General Assembly to further provide for and define the terms of the Amendment. They assume that the General Assembly will use this delegation to encroach upon the judiciary without any support beyond their own speculative concerns.

amendment." *See* Petitioners' Opp. Brief, p. 25 (citing *Bergdoll*, 858 A.2d at 194-95; *Costa v. Cortes*, 142 A.2d 1004 (Pa. Cmwlth. 2016)). They further concede that the Supreme Court has weighed in on the issue favorably, but completely dismiss the opinion because it emanates from a three-justice panel. *See Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016). Yet, they still advance what they perceive is their superior view as to how an amendment should be presented. They claim that it is "obvious proposition" that the entire text of a proposed amendment should be printed on a ballot. Petitioners' Opp. Brief, p. 25. But, it is not "obvious" at all.

The Pennsylvania Constitution differs from the Kentucky Constitution. The Kentucky Constitution states that:

> [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...

Ky. Const. § 257. The Kentucky Supreme Court, in *Westerfield*, ruled that "in such manner as the General Assembly may provide" modified "the vote to be taken." *Westerfield v. Ward*, 2019 WL 2463046, at *7 (Ky. June 13, 2019). In other words, the Kentucky Constitution charges the General Assembly with the logistics of how the vote is taken, not with how the amendment should be proposed.

The Pennsylvania Constitution does not contain identical language. The Pennsylvania Constitution states that:

> [A]nd 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...

Pa. Const. art. XI, § 1. In the Pennsylvania Constitution it is clear that the General Assembly determines the time and manner at which the Secretary submits a proposed amendment to the electorate. *See Costa v. Cortes*, 142 A.3d 1004 (Pa. Cmwlth. 2016), *aff'd*, 636 Pa. 508, 145 A.3d 721 (2016) (noting that it is the "General Assembly's exclusive power under Article XI, section 1 of the Pennsylvania Constitution to prescribe both the time at which and manner by which the Secretary is to submit [a proposed amendment] to the qualified electors of this Commonwealth for their consideration.").Unlike the Kentucky Constitution, there is no other object to modify in the sentence in light of the comma structure.

The existing law should not be changed to yield to the Kentucky Supreme Court's policy considerations. To be sure, while Petitioners claim that voters can only benefit from the full text of an amendment being on the ballot, it can be countered that some voters fare better with a concise plain language summary. And, further, in Pennsylvania, the full text of a proposed constitutional amendment is rigorously advertised to voters in the years ahead of the election, and, pursuant to law, must be posted at the polling places. The Attorney General's Plain English Statement must also be posted for voters. *See* 25 P.S. § 2621.1.

Petitioners' attempt to convince this Court to ignore the plain language of the Constitution, an opinion from the Pennsylvania Supreme Court, several of its own opinions, and long-standing tradition, in favor of Kentucky law and their policy arguments, should be denied.

E. THE BALLOT QUESTION FAIRLY, ACCURATELY AND CLEARLY APPRISES THE ELECTORATE OF THE AMENDMENT.

Petitioners contend that the ballot question is invalid because it "did not describe all of the components of the Proposed Amendment." Petitioners' Opp. Brief, p. 31. As discussed above, there is no requirement that the full text of a proposed amendment be set forth on the ballot.

Under the Pennsylvania Constitution, questions on constitutional amendments must "fairly, accurately and clearly apprise the voter of the question or issue to be voted on." *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). A ballot question is unconstitutional only if it is egregiously confusing. Where "the form of the ballot is so lacking in conformity with the law and so confusing that the voters cannot intelligently express their intentions . . . it may be proper and necessary for a court to nullify an election. But where the irregularity complained of could not reasonably have misled the voters," there is no cause for judicial relief. *Oncken v. Ewing*, 8 A.2d 402, 404 (Pa. 1939).

This result is confirmed by *Stander*, which is largely disregarded by Petitioners. The Supreme Court of Pennsylvania rejected arguments analogous to those proffered by Petitioner with respect to the abbreviated form of the ballot question in contrast to the full text of the amendment. The Court stated that, "[i]t is obvious that this question as printed on the ballots is but a tiny and minuscular statement of the very lengthy provisions of the proposed Judiciary Article V. It is equally clear and realistic beyond the peradventure of a doubt that a lengthy summary of the proposed Judiciary Article could not have been printed on an election ballot," in rejecting those arguments.

The Court ultimately ruled that the abbreviated ballot question satisfied the constitution because it apprised the voters. The Court reached this conclusion because it determined that the ballot question was buttressed by other information—namely, the publications showing the proposed amendatory language to the Constitution and notices (like the Attorney General's Plain English Statement) available in the polling places. *Stander*, 250 A.2d at 480. Those same accompanying documents exist here.

Because the ballot question fairly, accurately and clearly apprises the voters, the Respondent should be granted summary relief.

F. PETITIONERS WRONGLY STATE THAT THE AMENDMENT IS VOID IF PETITIONERS SUCCEED ON ANY OF THEIR FOUR ARGUMENTS.

Petitioners state that, "[a]ll parties agree that the Proposed Amendment is void of Petitioners succeed on any of the four arguments." Petitioners' Opp. Brief, p. 4. This is false. Respondent does not agree with, nor adopt, Petitioners' argument. Petitioners cite no precedent supporting the proposition that an improper ballot question voids a valid proposed constitutional amendment. If a ballot question is improper (which is wholly denied in this case), then an alternative remedy can be fashioned to propose the amendment, including, among other things a new ballot question in a subsequent election.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Respondent's Brief in Support of her Application for Relief, Respondent's Application for Summary Relief should be granted, and judgment should be entered in her favor.

Respectfully submitted,

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Date: January 24, 2020

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Petitioners	:	**No. 578 MD 2019**
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KATHY BOOCKVAR, The Acting Secretary of the Commonwealth,	:	**Electronically Filed Document**
Respondent	:	

CERTIFICATE OF SERVICE

I, Nicole J. Boland, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on January 24, 2020, I caused to be served a true and correct copy of the foregoing document to the following:

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