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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, LORRAINE HAW, v. VERONICA DEGRAFFENREID, THE ACTING SECRETARY OF THE COMMONWEALTH, APPEAL OF: SHAMEEKAH MOORE, MARTIN VICKLESS, KRISTIN JUNE IRWIN AND KELLY WILLIAMS	:	No. 4 MAP 2021

BRIEF OF APPELLEES LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, LORRAINE HAW, AND RONALD GREENBLATT

Direct Appeal from the Order of the Commonwealth Court,
Entered January 7, 2021, at No. 578 M.D. 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules, and Constitutional Provisions

INTRODUCTION

In the 2019 general election, Pennsylvania's General Assembly presented the electorate with a 490-word Proposed Constitutional Amendment that creates a lengthy victims' bill of rights, with at least fifteen new rights ranging from safety to participation in parole hearings to the return of property. The Proposed Amendment would affect each and every step of the criminal-justice process from bail to post-conviction and habeas proceedings, changing the existing constitutional framework for criminal discovery, compulsory process, pardons, and more. By the Proposed Amendment's terms, these wide-ranging victims' rights would have equal status with the time-honored constitutional rights of criminal defendants, enforced by victims or the prosecution alike.

The Proposed Amendment plainly violates the Pennsylvania Constitution by cramming a multitude of amendments into one measure. The Constitution explicitly requires that "two or more amendments . . . shall be voted upon separately." PA. CONST. art. XI, § 1. As this Court has held, the Pennsylvania Constitution thus forbids the Legislature from combining two "substantive change[s]" into a single amendment proposal, voted on as a single question. *Grimaud v. Commonwealth*, 865 A.2d 835, 845 (Pa. 2005). Such a proposal, the Court held, would render Article XI, § 1 a nullity. But that is exactly what the Proposed Amendment would do by creating at least fifteen new rights that patently affect multiple constitutional

provisions, curtailing the rights of defendants and wresting longstanding powers from both the Governor and this Supreme Court.

Compounding that problem, the full Proposed Amendment was never actually submitted to the electorate in November 2019. Instead of receiving the actual, 490-word Proposed Amendment, Pennsylvania voters received a ballot with a terse, 73-word question that did not even list all of the fifteen new rights in the Proposed Amendment. Yet, again, the Pennsylvania Constitution requires that any proposed "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. That plain text requires that any amendment *itself* be submitted to the electorate—not that a summary of the amendment be submitted. And, at the very least, the Pennsylvania electorate had the right to know *all* of the at least fifteen new rights they were being asked to approve, and that those rights would be given equal force as the existing and longstanding rights of criminal defendants.

Any one of those constitutional defects is fatal to the Proposed Amendment, and together they are untenable. The Pennsylvania Constitution deliberately sets forth specific procedures for amendments to ensure that the voters are fully informed of what they are voting for and are not faced with the Hobson's choice of voting for disfavored amendments in order to pass amendments they want. Those procedures and Pennsylvanians' constitutional right to a proper amendment process were

violated here. Thus, the Proposed Amendment must not be allowed to proceed, and this Court should affirm.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

The questions presented for review are:

1. Whether Article XI, Section 1 of the Pennsylvania Constitution, which requires that "two or more amendments . . . shall be voted upon separately," allows for the Proposed Amendment, which provides no less than fifteen new rights and which affects multiple other constitutional provisions?

Suggested Answer: No, the Proposed Amendment is really multiple amendments that needed to be submitted separately to the voters.

2. Whether Article XI, Section 1 of the Pennsylvania Constitution, which requires that "such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner . . . as the General Assembly shall prescribe," requires that the amendment's full text be submitted to the voters?

Suggested Answer: Yes, the plain text and history of Article XI, Section 1 require that the Proposed Amendment's full text be submitted to the voters.

3. Whether the ballot question regarding the Proposed Amendment to Article I of the Pennsylvania Constitution failed to "fairly, accurately, and clearly apprize" the electorate of the questions to be voted upon by failing to include all of

the fifteen new rights enumerated in the Proposed Amendment? *See Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969).

Suggested Answer: Yes, the terse ballot question omitted key rights and did not accurately and fairly apprise the voters of the Proposed Amendment.

STATEMENT OF THE CASE

During the 2019 Legislative Session, the Pennsylvania General Assembly passed Joint Resolution 2019-1 ("Joint Resolution" or the "Proposed Amendment"). (R.304a-05a.) That Joint Resolution proposed a new amendment to Article I of the Pennsylvania Constitution, for the first time enumerating a crime victim's bill of rights. *Id.* Containing more than 490 words, the Proposed Amendment provides a non-exhaustive list of rights that extend to any victim, a term broadly defined as "any person against whom the criminal offense or delinquent act is committed or who is directly harmed" by the alleged crime. *Id.* This list, "as further provided and as defined by the General Assembly," includes the rights:

- "to be treated with fairness and respect for the victim's safety, dignity, and privacy";
- "to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the accused";
- "to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct";
- "to be notified of any pretrial disposition of the case";

- "to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole, and pardon";
- "to be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender";
- "to reasonable protection from the accused or any person acting on behalf of the accused";
- "to reasonable notice of any release or escape of the accused";
- "to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused";
- "full and timely restitution from the person or entity convicted for the unlawful conduct";
- "to the prompt return of property when no longer needed as evidence";
- "to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related post-conviction proceedings";
- "to confer with the attorney for the government"; and
- "to be informed of all rights enumerated in this section."

Id. Additionally, the Proposed Amendment specifies that these rights "shall be protected in a manner no less vigorous than the rights afforded to the accused." *Id.* And either the victim or the government can enforce those rights in court. *Id.*

Once passed by the General Assembly, the Attorney General of the Commonwealth prepared a Plain English statement pursuant to 25 PA. STAT. ANN. § 2621.1. *Id.* The Department of State subsequently published that Plain English statement on its website.

Even though the Proposed Amendment contains more than 490 words, Pennsylvania statutory law limits all ballot questions to 75 words. 25 P.S. § 3010(b). Thus, on November 5, 2019, the voters received ballots with the following single, 73-word question:

> Shall the Pennsylvania Constitution be amended to grant certain rights to crime victims, including to be treated with fairness, respect and dignity; considering their safety in bail proceedings; timely notice and opportunity to take part in public proceedings; reasonable protection from the accused; right to refuse discovery requests made by the accused; restitution and return of property; proceedings free from delay; and to be informed of these rights, so they can enforce them?

(R.309a.) The ballot question thus not only did not contain the text of the Proposed Amendment, it omitted certain of its provisions and rights entirely, such as the right to be notified of and participate in parole proceedings.

Petitioners the League of Women Voters of Pennsylvania and Lorraine Haw commenced this action on October 10, 2019. Petitioner League of Women Voters of Pennsylvania ("League") is a nationwide, nonpartisan grassroots organization of women and men that often takes positions on voting and election reforms. Petitioner Lorraine Haw ("Haw") is a resident and registered voter in Pennsylvania, who has lost both her brother and son to crime. (R.306a & n.2.) Ms. Haw brought this suit both because she is seeking a pardon from the Governor of Pennsylvania, and because she wanted to vote for only certain parts of the Proposed Amendment but was unable to do so. *Id.* Petitioners filed a verified Petition for Review under the

Commonwealth Court's original jurisdiction on October 10, 2019. (R. 33a-65a). On October 22, 2019, the Commonwealth Court allowed Petitioner Ronald Greenblatt and Respondents Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams to intervene. (R.157a-58a.)

Petitioners immediately moved for a preliminary injunction to prevent the Secretary from tabulating and certifying the votes of the November 2019 general election on the ballot question. (R.159a-301a.) The Commonwealth Court granted that preliminary injunction on October 30, 2019, and the Supreme Court affirmed on November 4, 2019. (R.306a-44a; 345a-46a.) Accordingly, the Pennsylvania electorate voted on the Proposed Amendment, but the Secretary was at the time and remains today barred from tabulating those votes or certifying those election results.

After remand, the parties filed cross-motions for summary relief before the Commonwealth Court. (R.408a-26a; R.427a-42a; R.443a-60a.) The Commonwealth Court granted Petitioners' motion on January 7, 2021, finding the Proposed Amendment unconstitutional. *See League of Women Voters v. Boockvar*, No. 578 M.D. 2019, 2021 WL 62268, at *9 (Pa. Commw. Ct. Jan. 7, 2021). Judge Ceisler, joined by Judge Wojcik, and Judge McCullough both filed Unreported Memorandum Opinions in Support of Order Announcing the Judgment of the Court, and Judge Leavitt, joined by Judge Cannon, filed an Unreported Memorandum Opinion in Opposition to Order Announcing the Judgment of the Court. Appellants

Moore, Vickless, Irwin, and Williams then filed a notice of appeal on January 22, 2021. The Secretary did not appeal.

SUMMARY OF ARGUMENT

The Proposed Amendment violates the Pennsylvania Constitution twice over. *First*, the Proposed Amendment plainly contains multiple amendments that affect multiple existing constitutional provisions, in flat violation of the Pennsylvania Constitution's separate-vote requirement for separate amendments. PA. CONST. art. XI, § 1. This Court has held that the separate-vote requirement is governed by a "subject matter test," which requires that any single amendment *both* encompass only a "single subject" *and* not patently affect other constitutional provisions. *Grimaud*, 865 A.2d at 842. And, this Court has held, an amendment can affect multiple constitutional provisions even if it does not explicitly alter the text of those provisions. *Bergdoll v. Kane*, 731 A.2d 1261, 1270 (Pa. 1999). The Proposed Amendment fails at both steps of that test. It plainly encompasses multiple subjects from bail to parole and patently affects other constitutional provisions from compulsory process to pardons.

Second, the Proposed Amendment was never *itself* submitted to the voters, in plain violation of the Pennsylvania Constitution's requirement that an amendment be "submitted to the qualified electors of the State." PA. CONST. art. XI, § 1. Instead, the voters were presented with an incomplete summary of the Proposed Amendment.

But while the Pennsylvania Constitution allows the General Assembly to establish the "manner" of submitting the amendment, it never allows the General Assembly to submit anything other than the "proposed amendment" itself to the voters. *See id.* In the alternative, if a summary is to be given to the electorate, this Court has required that ballot questions for constitutional amendments must "fairly, accurately, and clearly apprize the voter" of the amendment. *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). Yet, the ballot question here wholly omitted key rights contained in the Proposed Amendment, as Appellants concede.

Against all this, Appellants offer no meaningful response beyond attacks on straw men and distortions of case law. In particular, Appellants treat this Court's opinion in *Grimaud* as if it were written on a blank slate, unmoored from any of the cases that preceded it. They then cherry-pick the word "facially" from *Grimaud* as if that single word were a talisman, untethered from context or this Court's wider analysis. And in a rerun of those errors, they then selectively quote this Court's opinion in *Stander*, ignoring the backdrop facts of that case and the key issues at stake. But this Court's opinions as a whole, along with the governing text of Article XI, § 1, dictate that the Proposed Amendment violated the Pennsylvania Constitution twice over, both wrongly combining multiple amendments into one and seeking to obtain passage without submitting the Proposed Amendment, or even an adequate summary of it, to the voters. This Court should thus affirm.

ARGUMENT

I. The Proposed Amendment Violates The Separate-Vote Requirement In Article XI, Section 1.

The Proposed Amendment's more than fifteen new rights in the criminal context is a combination of multiple amendments masquerading as one. Yet, as this Court held in *Bergdoll* and reaffirmed in *Grimaud*, Article XI, § 1's separate-vote requirement cannot be circumvented so easily. *Bergdoll*, 731 A.2d at 1270; *Grimaud*, 865 A.2d at 840-42. Instead, this Court has held that a "subject matter test" governs whether a single ballot question contains multiple amendments. *Grimaud*, 865 A.2d at 841. That "subject matter test" consists of two sub-parts: *First*, the Proposed Amendment must encompass only a "single subject," with all its provisions "sufficiently interrelated . . . to justify inclusion in a single question." *Id.* *Second*, the Proposed Amendment must not "patently affect[] other constitutional provisions," looking to the "content, purpose, and effect" of the Proposed Amendment. *Id.* at 842. At both of those steps, the Proposed Amendment fails.[1]

[1] Notably, Appellants correctly do not attempt to rely on any presumption of constitutionality, which is inapplicable here. Though typical legislative enactments enjoy a presumption of constitutionality, *see Commonwealth v. Davidson*, 938 A.2d 198, 221 (Pa. 2007) (Cappy, J., concurring and dissenting), that presumption does not apply when dealing with amendments to the Constitution. Instead, this Court has long held that "[n]othing short of literal compliance" with Article XI, § 1's "mandate will suffice." *See Pennsylvania Prison Soc'y v. Commonwealth*, 776 A.2d 971, 978 (Pa. 2001) (quoting *Kremer v. Grant*, 606 A.2d 436, 438 (Pa. 1992); *see also Commonwealth v. Beamish*, 164 A. 615, 617 (Pa. 1932)).

A. The Proposed Amendment Encompasses Multiple Subjects.

First, the Proposed Amendment plainly encompasses multiple subjects. By its very terms, the Proposed Amendment enumerates at least fifteen *different* rights, to be defined and expanded by the General Assembly. Those different rights touch on numerous areas of criminal procedure, from bail to pardons and every procedural stage in between. In response to all this, Appellants claim that those many rights fall under the generic umbrella of "victims' rights"—a subject so expansive and vague that it would gut the Constitution's separate-vote requirement. The subject-matter test is not so toothless to allow for such generic labels to overcome its constitutional demands.

As detailed above, the Proposed Amendment's fifteen-plus new rights are expansive, encompassing numerous areas of criminal law. And many of those rights are themselves vague and capacious. To repeat *just a few* of the enumerated new rights, the Proposed Amendment would establish a victim's right: (1) to privacy, safety, and dignity; (2) to be heard in any proceedings implicating a right of the victim, ranging from pretrial proceedings to pardons; (3) to participate in the parole process and provide information that the parole board must consider; (4) to reasonable protection from the accused; (5) to refuse interviews or discovery requests from the accused; (6) to full and timely restitution; (7) to the prompt return of property; and (8) to proceedings free from unreasonable delay.

Put simply, the Proposed Amendment's new rights span the entire range of the criminal process, touching procedures and rights that normally occupy multiple casebooks, let alone constitutional provisions. Indeed, the new rights encompass subjects including bail, parole, pardons, discovery, privacy, safety, sentencing, restitution, and speedy proceedings. Many of these topics often are reserved for entirely different courses in law school, and separately have generated volumes of caselaw and scholarship. Others, like the novel right to protection from the accused, have yet to be defined. To allow them to be lumped together as a generic single-subject would hollow out the Pennsylvania Constitution's existing criminal-defense safeguards and substantially rewrite its complex criminal justice system.

In response to all this, Appellants breezily gesture at the label "victims' rights" as if that umbrella term can justify including at least fifteen new rights in a single amendment. *See* Appellant Br. at 15-16. But the Constitution's requirements cannot be evaded by facile word-games. Under Appellants' own description, the Proposed Amendment will enshrine "a panoply" of victims' rights, confirming the existence of multiple, distinct rights. *Id.* And to put all these rights under the sweeping mantra of "justice and due process" for victims' rights, with the claim that the whole "is greater than the sum of its parts" would allow for almost any variety of constitutional amendments to be combined. *See id.*; R.304a. Future proposed amendments simply could claim that they are designed to promote "liberty," "equity," "the rule of law,"

"constitutional governance," or other broad labels to effect sweeping changes to the judiciary, the General Assembly, or the fundamental rights held by all Pennsylvanians. *See* Judge McCullough Slip Op. at 4-5. Such a result would render Article XI, § 1 a nullity, leaving no meaningful guardrails against overly broad constitutional amendments.

Appellants also invoke *Grimaud*, but that case only confirms that the Proposed Amendment unconstitutionally encompasses multiple subjects. As the Court explained in *Grimaud*, the proposed amendment there expanded the capital-offenses exception to bail to include crimes that face life imprisonment, while also allowing preventative detention in other cases under certain circumstances. 865 A.2d at 841. Those proposed changes, the Court held, "were related to a single subject, bail." *Id.* But if "bail" is a "single subject," then the Proposed Amendment plainly encompasses multiple subjects—as it embraces not only bail, but also parole, pardons, discovery, restitution, and more. The Proposed Amendment is far more sweeping than the narrow changes in *Grimaud* to a single constitutional provision on the narrow subject of bail.[2]

[2] Indeed, if Appellants are correct that "victims' rights" is a single subject, then there was no need to have separate ballot questions for the bail amendment and jury-trial amendment at issue in *Grimaud*. 865 A.2d at 840-42, 845. The ballot questions could easily have been combined under an umbrella term "Commonwealth rights" or "criminal justice procedures," with both amendments designed to ensure the safety of Pennsylvanians, either through bail or jury trials.

Moreover, *Grimaud* was not written on a blank slate. Instead, it built on two earlier cases, neither of which Appellants discuss.[3] As relevant here, in *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971 (Pa. 2001),[4] this Court was faced with a proposed amendment that both changed the approval process for the Board of Pardons and also increased the requirements for the Board to recommend a pardon. *Id.* at 974. Those appellants argued that "all of the changes pertain specifically to the Board of Pardons," and were all "directed toward the single objective of making" pardons "more difficult"—just as the Appellants here argue that all of the Proposed Amendment's new rights are directed toward "justice and due process" for victims. *Id.* at 981. This Court rejected that argument, explaining that the "proposed amendment had two purposes": "first, to restructure the pardoning power of the Board and, second, to alter the confirmation process" of the Board. *Id.* at 981. The same is true here, many times over. The Proposed

[3] Appellants' omission of any discussion of the merits of *Pennsylvania Prison Society* is confounding. This Court's decision in *Pennsylvania Prison Society* remains good law. Indeed, *Grimaud* explicitly relies on and cites *Pennsylvania Prison Society* and never hints at any intention to overrule or limit it. *See Grimaud*, 865 A.2d at 842 (citing *Pennsylvania Prison Soc'y*, 776 A.2d at 980). And *Grimaud* explicitly adopted Justice Saylor's *concurrence* in *Pennsylvania Prison Soc'y*, only underscoring that the two cases are not in tension.

[4] Contrary to Appellants' citation, *Pennsylvania Prison Society* did not produce a plurality opinion—it produced only an opinion and a concurrence. (Appellant Br. at 10.)

Amendment serves multiple purposes, through multiple rights, which cannot be tied together with the sweeping label of victims' rights.[5]

Nor are the Proposed Amendment's over fifteen new rights somehow "interrelated" enough to justify inclusion in a single question. *See* Appellant Br. at 15-16; *Grimaud,* 865 A.2d at 841. Without citation or explanation, Appellants proclaim that "[i]t is undisputed that each of the 15 rights has a mutual relationship with the other 14 rights." *Id.* But nothing could be farther from the truth. Instead, it should be undisputed that many of the over fifteen new rights can stand independently, and have no relationship to the other fourteen. *See* Judge McCullough Slip Op. at 5. For example, a victim's right to "privacy" has little to do with her right to be heard in proceedings—if anything, the two rights stand in tension. Similarly, a victim's right to have her safety considered before bail is granted easily could be separated from her right to refuse discovery requests from

[5] For its part, the Attorney General's *amicus* brief notes the 1993 Amendment that created the Judicial Conduct Board, citing two cases that did not mention Article XI, § 1, let alone hold that the 1993 Amendment was constitutional under that requirement. *See* Brief for *Amicus Curiae* Attorney General for the Commonwealth of Pennsylvania, at 13-14 ("AG Br."). Even then, there plainly is a difference between an amendment that wholly replaces one self-contained scheme of regulation of judicial conduct with another, and an amendment that affects processes in multiple levels of the judiciary, as well as proceedings before multiple administrative agencies.

the accused. And a victim's right to have her property returned can stand independently from her right to provide information during parole hearings.

As noted, Appellants ignore the law that gave rise to *Grimaud*. Appellants turn to Webster's Dictionary to define "interrelated," never mentioning that Justice Saylor carefully explained the term in *Bergdoll*. In that case, the Court addressed a proposed amendment that would both "expand the permissible manner for presenting trial testimony of child witnesses in criminal proceedings" and also eliminate the "face-to-face" requirement from the Pennsylvania Constitution's Confrontation Clause. *Bergdoll*, 731 A.2d at 1271 (Saylor, J., concurring). As Justice Saylor explained, those two changes were "separate, non-interdependent." *Id.* One would specifically alter how prosecutors could present a child witness's testimony; the other "would affect a broader segment of rights than the category connected with the confrontation of a child witness." *Id.* Thus, Justice Saylor concluded, the two changes "lacked the interdependence necessary to justify their presentation to voters within the framework of a single question." *Id.*; *see also Grimaud*, 865 A.2d at 841-42.

That logic controls here. The Proposed Amendment enumerates several distinct rights on different topics, confirming they are not interrelated. The right to participate in parole proceedings, for example, is specifically targeted at and relates only to the parole process. Conversely, the right to privacy is a broader right

affecting all stages of the criminal process (and, perhaps, far beyond). Similarly, the Proposed Amendment generically says that a victim has the right "to be heard in any proceeding where a right of the victim is implicated," and then separately provides a right "to provide information to be considered before the parole of the offender." (R.308a). That structure mirrors the amendment that Justice Saylor found problematic in *Bergdoll*: a specific, targeted right alongside a separate, more general right. And just as in *Bergdoll*, the Proposed Amendment plainly serves dual purposes—both to allow victims to participate in criminal proceedings *and* to shield them from those proceedings—confirming that the Proposed Amendment really consists of separate amendments.

To find that these numerous provisions are one subject therefore would completely contravene the subject-matter test of Article XI, § 1, rendering it a nullity. As this Court explained in *Grimaud*, the question is whether the Proposed Amendment's changes are all "sufficiently interrelated . . . *to justify inclusion in a single question*." 865 A.2d at 841 (emphasis added). That test thus reflects the principal concern that animated Article XI, § 1's separate-vote requirement: to ensure that voters were not forced to approve disfavored amendments alongside favored ones, or to reject favored amendments that are attached to disfavored ones. Indeed, at the time of Article XI, § 1's enactment, the provision's advocates explicitly said that the requirement was intended to "prevent the legislature from

connecting two dissimilar amendments," "one of which may be acceptable to the people, and the other not so." 12 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania To Propose Amendments to the Constitution, Commenced at Harrisburg, May 2, 1837 50, 100-01 (1839). To prevent the voters from being forced to take the bad with the good, or reject the good due to the bad, the delegates explained that the voters should be given the chance "to take the one and reject the other." *Id.* at 50.

As explained above, many of the Proposed Amendment's new rights can stand independently and could have been submitted as separate amendments. Thus, some voters might well have wanted to vote for victim safety, for example, but might not also have wanted to enshrine a constitutional right for victims to refuse interviews or discovery requests. Voters might have wanted to ensure that victims could get their property back, but might not have agreed to a constitutional right for victims to have special rights to prompt and final proceedings. Whatever the voters' specific preferences with respect to the various rights included in the Proposed Amendment, the point is that they were forced to cast a single vote on separate rights and provisions, some of which might have been "acceptable to the people" and others less so. *Id.* at 50; Judge McCullough Slip Op. at 1-2. At bottom, the Proposed Amendment's rights are not "sufficiently interrelated . . . to justify inclusion in a single question." *Grimaud*, 865 A.2d at 841.

B. The Proposed Amendment Patently Affects Multiple Existing Constitutional Provisions.

Additionally, the Proposed Amendment fails the second step of the subject-matter test because it "patently affects other constitutional provisions." *Grimaud*, 865 A.2d at 842. By enacting over fifteen new rights on topics from bail to parole, the Proposed Amendment plainly affects and thus effectively amends several other pre-existing constitutional rights and provisions that would be inexorably changed when read together with the additions from the Proposed Amendment—proving that it is really multiple amendments disguised as one.

i. The subject-matter test turns on the substantive effects of the Proposed Amendment on existing constitutional provisions, not empty formalisms.

Under the second step of *Grimaud*'s framework, the question is whether the Proposed Amendment contains more than "one substantive change" to the Pennsylvania Constitution. 865 A.2d at 845. That question turns on the "content, purpose, and effect" of the Proposed Amendment, and looks to "whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect." *Id.* at 842. The test thus is plainly focused on the "substantive affect[s]" of the Proposed Amendment, not empty formalisms. *Id.*; Judge McCullough Slip Op. at 5.[6]

[6] The Governor prefers his own nomenclature: he posits the question as whether the Proposed Amendment "functionally impacts" other provisions of the Constitution,

Yet empty formalisms are exactly what Appellants rely on. Plucking the word "facially" out of context and blowing it out of proportion, Appellants assert that the subject-matter test is violated only when a new amendment would explicitly change the text of a preexisting constitutional provision. Appellant Br. at 16-18. But that is not what *Grimaud* held. Instead, *Grimaud* explained that "[t]he question is whether the single ballot question patently affects other constitutional provisions"—not whether the ballot question *explicitly* changes the text of those provisions. 865 A.2d at 842. By asking "whether the amendments *facially* affect other parts of the Constitution," the Court meant only that it is not enough for the amendment to "possibly impact other provisions." *Id.* Indeed, the majority used the terms "facially" three times, "patently" twice, and "substantive" or "substantively" five times—all apparently interchangeably—to explain that indirect changes to an

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and particularly those that govern the powers of other branches of the government. As explained below, the Proposed Amendment "functionally impacts" the powers and the role of this Court, the Governor and the Board of Pardons, among others. Appellees do not agree with the Governor's assertion that the Court needs to announce a new standard in this regard or remand the case to the Commonwealth Court. The Governor has proposed no change to the first prong of the subject matter test—whether the Proposed Amendment is "sufficiently interrelated . . . to justify inclusion in a single question," and under that independent standard, the Proposed Amendment fails. For that reason, there is no need to remand this case to the Commonwealth Court, even if this Court were to accept the Governor's invitation to announce a new formulation of the second prong of the subject matter test, or a bright line that the Article XI amendment process cannot be used to make "complex or sweeping changes" to the Constitution.

existing constitutional provisions could not state a violation of the separate vote requirement. *Id.* If the Court meant to draw an explicit, text-changed rule, there would have been no need to look at the "content, purpose, and effect" of the amendment, or whether the amendments "substantive[ly] affect" other constitutional provisions. *Id.*[7]

And once again, *Grimaud* was not written on a blank slate. This Court also dealt with Article XI, § 1's separate-vote requirement in *Bergdoll*, which (again) Appellants do not even cite. In *Bergdoll*, this Court dealt with a proposed amendment that would have allowed the General Assembly to "provide for the manner of testimony of child victims" in criminal cases. 731 A.2d at 1265 (emphasis omitted). Crucially, the Court held that the proposed amendment would "amount to an amendment of Article 5, § 10(c)['s]" grant of exclusive judicial-rulemaking powers to the Supreme Court—even though the proposed amendment did not explicitly alter or repeal any of Article V, § 10(c)'s text. *Id.* at 1270.

Nothing in *Grimaud* suggests that *Bergdoll* was overruled on that point. To the contrary, the opinions are in harmony: The proposed amendment in *Bergdoll*

[7] Although *Grimaud* did observe that the proposed amendment there did not explicitly alter the "presumption' language" in Article I, § 14, it surely did not mean that such an explicit change of text was *required*—as shown by the Court's focus on the "context, purpose, and effect" of whether the proposed amendment had "substantive[ly] affected other constitutional sections."

would have "patently affected" Article V, § 10(c) by taking some rulemaking powers held only by the Supreme Court and vesting them in the General Assembly. *Id.* Although the text was not changed, Article V, § 10(c) was "patently affected." Indeed, Justice Saylor concurred in *Bergdoll*, and *Bergdoll*'s focus on the "content, purpose, and effect" of a proposed amendment was cited approvingly in *Pennsylvania Prison Society*, and then again in *Grimaud*. *Grimaud*, 865 A.2d at 842 (citing *Pennsylvania Prison Soc'y*, 776 A.2d at 980). *Bergdoll* only further confirms that a new amendment can "substantive[ly] affect" other constitutional provisions even if the new amendment does "not specifically refer to [other] constitutional provision[s]" or explicitly alter their text. *See Pennsylvania Prison Soc'y*, 776 A.2d at 980.

Thus, the question is not, as Appellants would argue, whether the Proposed Amendment takes a literal red pencil to other constitutional provisions. Indeed, such a requirement would be nonsensical, ignoring obviously substantive changes based on empty formalisms, and thus allowing impermissible amendments to succeed merely by obscuring their true effect from the voters. In Appellants' view, amendment proponents could lump together changes to lawmaking processes, fundamental rights held by all, and the powers of the judiciary itself so long as they took care not to phrase the amendments as explicitly changing the text of the Constitution. But that is not how the law works, either here or elsewhere. As this

Court has long held, the Pennsylvania "Constitution regards substance, not mere form." *Commonwealth ex rel. Underwood v. Shrontz*, 62 A. 910, 911 (Pa. 1906); *see Wolf v. Scarnati*, 233 A.3d 679, 689 (Pa. 2020). Whether dealing with the legitimacy of legislative acts or the protection of fundamental rights, this Court has consistently said that it "will not exalt form over substance." *Commonwealth v. Kunish*, 602 A.2d 849, 851 n.2 (Pa. 1992); *Commonwealth ex rel. Smith v. Patterson*, 187 A.2d 278, 279 (Pa. 1963); *In re Petition of City of Philadelphia*, 16 A.2d 32, 36 (Pa. 1940). The same is true here, contrary to Appellants' illogical and arbitrary test.

Instead, the actual test is the one this Court articulated in *Bergdoll* and applied in *Grimaud*: whether the Proposed Amendment "patently affects other constitutional provisions," as determined by the "content, purpose, and effect" of the Proposed Amendment. *Grimaud*, 865 A.2d at 842; *see Bergdoll*, 731 A.2d at 1270. Although "arguable" or "implicit effects" do not count, it is enough that the Proposed Amendment has an obviously "substantive affect" on several other existing provisions. *Grimaud*, 865 A.2d at 842.

The Proposed Amendment here plainly meets that test because it "substantive[ly] affect[s]" numerous other constitutional provisions. As enumerated above, the Proposed Amendment plainly affects multiple constitutional provisions ranging from criminal defendants' speedy trial rights, *see* Proposed Amendment (victims' right to be heard in proceedings), to criminal defendants' right to know the

accusations against them, *see id.* (victims' right to privacy). Though there are many such provisions affected, Appellees focus on just a few constitutional provisions that are most obviously affected by the Proposed Amendment: the exclusive grant of judicial rulemaking power in the Supreme Court, a defendant's right to compulsory process, the constitutional provisions on bail, and the constitutional provisions on pardons.

ii. The Proposed Amendment patently affects Article V, § 10(c)'s exclusive grant of judicial rulemaking power to this Supreme Court.

Article V, § 10 grants the Pennsylvania Supreme Court the "exclusive" power to create rules of procedure for Pennsylvania courts. *Bergdoll*, 731 A.2d at 1270 (quoting *In re 42 Pa.C.S. § 1703*, 394 A.2d 444, 451 (Pa. 1978)); PA. CONST. art. V, § 10(c). Under that provision, the General Assembly has the power to alter substantive law, but the Supreme Court alone has the power to "prescribe general rules governing practice, procedure and the conduct of all courts." *See Bergdoll*, 731 A.2d at 1270 (quoting PA. CONST. art. V, § 10(c)). Yet, the Proposed Amendment would allow the General Assembly to "further provide[]" for "due process" for victims, "define" their procedural rights, and establish how a victim may "assert" and "have enforced" their rights in court. This clearly shifts rulemaking power from the Supreme Court to the General Assembly. As *Bergdoll*

recognized, that shift patently affects Article V, § 10(c) and reveals that the Proposed Amendment is really at least several amendments. *Id.*

Indeed, that shift of rulemaking power is apparent by the nature of several of the rights in the Proposed Amendment. Under the Proposed Amendment, victims have the right to *participate* in judicial proceedings; the right to *notice* of judicial proceedings; the right to *be treated with fairness and respect* during judicial proceedings; and the right to "assert" and "have enforced" their rights "*in any trial or appellate court*." Whatever the relative merits of those rights, they will plainly affect court procedures, and the General Assembly would have the power both to define and to add to those rights. Under the Proposed Amendment, the General Assembly seemingly could pass a law specifying that victims may testify remotely via video, or that victims have the right to testify at their time of choosing.

Those are exactly the effects that *Bergdoll* found to be a patent amendment of Article V, § 10(c). 731 A.2d at 1270. Just as in *Bergdoll*, the Proposed Amendment would infringe the Supreme Court's exclusive power to set court procedures—because the Proposed Amendment would also grant those powers to the General Assembly, at least when it comes to victims. And contrary to Appellants' blanket assertions, there are no inferences or speculations involved in that logic. Instead, it is facially apparent from the Proposed Amendment that some rulemaking powers

are being transferred to the General Assembly, which patently, facially, and substantively affects Article V, § 10(c). *Grimaud*, 865 A.2d at 842.

iii. The Proposed Amendment patently affects the compulsory process rights in Article I, § 9.

The Proposed Amendment also patently affects Article I, § 9's right to compulsory process for defendants. Under Article I, § 9, every criminal defendant has the right "to have compulsory process for obtaining witnesses in his favor." PA. CONST. art. I, § 9. Yet the Proposed Amendment gives victims the rights to privacy, to reasonable protection from the accused, and to refuse discovery requests from the accused. Those new rights plainly affect, and interfere with, the compulsory-process right enumerated in Article I, § 9. *See* Judge McCullough Slip Op. at 5-6.

Indeed, as this Court held in *Commonwealth v. Lloyd*, 567 A.2d 1357, 1359 (Pa. 1989), a defendant's compulsory-process right is denied if the defendant is not given "access to the contents of the victim's psychotherapeutic records," and the "right to inspect these records." Although the compulsory-process right already involves certain privileges, *e.g.*, *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999),[8] the Proposed Amendment would plainly affect these rights and cases like *Lloyd* by

[8] For example, in *Ben*, this Court explained that a subpoena might be quashed if it seeks material "protected by executive privilege or other asserted statutory privileges." 729 A.2d at 552-53. Yet the Court there rejected the Bureau of Professional and Occupational Affairs' assertion of privilege, because there was no statutory privilege or executive privilege to be invoked. *Id.*

establishing a constitutional limit on a defendant's ability to confront victims or obtain materials from them. Appellants' only response is to again insist that any such effects are implicit, because the text of Article I, § 9 remains unchanged. *See* Appellant Br. at 16, 23.[9] But the new limits on Article I, § 9 are obvious and patent—victims henceforth would plainly be able to invoke their rights to privacy and to refuse discovery requests as new constitutional shields against the right to compulsory process.

iv. The Proposed Amendment patently affects the right to bail in Article I, § 14.

The Proposed Amendment also patently affects the Pennsylvania Constitution's provisions governing bail in PA. CONST. art. I, § 14. The

[9] For its part, the Attorney General's *amicus* brief argues that the right to confrontation will require victims to testify anyway, and that this Court always balances "the rights of the accused and the victim." AG Br. at 18. But plainly the introduction of at least fifteen new constitutional rights for victims will "substantive[ly] affect" that balance, creating new limits on defendants' constitutional rights. *See Grimaud*, 865 A.2d at 842. And the Attorney General's brief blithely brushes away concerns about compulsory process, asserting that "no criminal defendant can compel a victim or witness to give the defense an interview or submit to a deposition"—ignoring the Proposed Amendment's right to refuse even discovery requests for documents or other materials, such a security footage in the possession of the victim or another person who wishes to resist producing it in the ground that they are "directly harmed" by the alleged crime. AG Br. at 17. Nor does it help that a defendant will still have access to *Brady* material. There is a reason defendants have both the right to *Brady* material *and* the right to compulsory process—the government may not have relevant information that other witnesses, including alleged victims, do.

Pennsylvania Constitution provides that "[a]ll prisoners shall be bailable for sufficient sureties." *Id.* Article I, § 14 provides three limited exceptions to the requirement of bail: capital cases, offenses with a maximum sentence of life imprisonment, and situations where no condition other than imprisonment will assure the safety of the community. *See also Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972). Article I, § 14, however, currently dictates only the considerations that govern *whether* to grant or deny bail in the first place, not how much bail is set. Yet the Proposed Amendment plainly modifies that provision by adding an additional requirement that courts would have to consider in setting the *amount* of bail: the right to have their safety and their family's safety "considered in fixing the amount of bail and release conditions for the accused." In addition, victims would also have the right to notice of any bail hearing that are public or implicate their rights, and to participate in those hearings.[10]

The Proposed Amendment thus patently affects the way that courts impose bail conditions. The Proposed Amendment, for the first time, creates a constitutional dimension regarding how courts set the *amount* of bail. Again, Appellants' only response is that the actual text of Article I, § 14 is the same—another empty

[10] Though victims may already have a statutory right to notice of bail hearings under the Crime Victims Act, they do not have a corresponding right to participate in those bail hearings. And regardless, a statutory provision cannot override or alter constitutional procedures—yet a constitutional amendment does precisely that.

formalism that would allow amendment proponents to get around the Pennsylvania Constitution's separate-vote requirement merely by the wording of their multiple amendments.

v. The Proposed Amendment patently affects the Executive's pardon powers in Article IV, § 9.

Last, the Proposed Amendment patently affects the Executive's pardon powers in Article IV, § 9. Under Article IV, § 9, the Governor has the power to issue pardons "on the recommendation . . . of a majority of the Board of Pardons . . . after full hearing in open session, upon due public notice." Pa. Const. art. VI, § 9. That power is "primarily, if not exclusively, one for the Executive, not the courts." *Commonwealth v. Banks*, 29 A.3d 1129, 1147 (Pa. 2011).

Yet, the Proposed Amendment explicitly gives victims the right to be heard at pardon hearings, the right to notice of those hearings, and the right to protection from the accused. Those rights obviously affect both the powers and processes set forth in Article VI, § 9: It would no longer be enough that the Board of Pardons holds a full hearing upon due public notice; they could now hold a hearing only after giving notice to the victim(s)—including persons who were harmed but not identified in any criminal complaint. It would no longer be enough for the Board to recommend a pardon; the Board could recommend pardons only after giving the victim(s) an opportunity to be heard. And it would no longer be enough for the Governor to have the recommendation of the Board; the Governor would have to ensure that any

pardon does not threaten the safety of the victim(s). Regardless of the merits of these proposals, they are plainly amendments to existing constitutional provisions, and should have been submitted separately to the voters.

Indeed, in *Pennsylvania Prison Society*, this Court held that a proposed amendment "had two purposes" by both aiming "to restructure the pardoning power of the Board and, second, to alter the confirmation process" of the Board. 776 A.2d at 981. It would be completely incongruous with that holding to say here that the Proposed Amendment's pardon provisions somehow serve the same purpose as its bail, parole, or restitution provisions—or that its changes to pardons are anything less than a "substantive affect" on Article IV, § 9. *Grimaud*, 865 A.2d at 842. And again, to ignore these obviously substantive effects because the text of Article IV, § 9 would not change would be to "exalt form over substance," in direct contravention of this Court's normal practices. *See Kunish*, 602 A.2d at 851 n.2.

* * *

In short, the Proposed Amendment fails both steps of *Grimaud*'s subject-matter test. At step one, the Proposed Amendment plainly encompasses multiple subjects, changing the run of criminal procedure from bail and discovery to parole and pardons. *Grimaud* itself only confirms this by holding that the amendment in that case encompassed "a single subject, bail," whereas the Proposed Amendment here involves bail, discovery, sentencing, parole, pardons, restitution, and much

more. *See Grimaud*, 865 A.2d at 841. At the same time, the multiple rights in the Proposed Amendment are far from interrelated—they could easily have been broken up and submitted to the electorate separately, allowing the voters to pick which rights to accept and which to reject. Appellants' efforts to avoid that constitutionally mandated approach only confirms that the Proposed Amendment is unlawful.

At step two, the Proposed Amendment patently affects multiple other constitutional provisions. Contrary to Appellants' distortion of *Grimaud*, the question is not whether the Proposed Amendment *explicitly* alters the text of other provisions by red-lining those provisions, which would render the Constitution's mandate nothing more than an artful pleading requirement. Instead, the question is whether the Proposed Amendment "patently affects" other provisions, as determined by the Proposed Amendment's "content, purpose, and effect." *Id.* at 841. The Proposed Amendment does just that by patently affecting multiple provisions, including the exclusive grant of judicial rulemaking powers to the Supreme Court, the right to compulsory process, the imposition of bail, and the pardon process.

At bottom, the Proposed Amendment is several different amendments thrown together into one measure and dressed up with the label of victims' rights. But our Constitution painstakingly sets forth a complex scheme of criminal rights and procedures across multiple provisions, taking care to balance the various interests at stake in a criminal case. It would do a disservice both to our Constitution and to the

electorate to require voters to decide on the Proposed Amendment's multitude of changes to that complex scheme in one swoop. This Court should thus affirm the decision below.

II. The Proposed Amendment Violates The Submission Requirement In Article XI, Section 1.

On top of that error, the Proposed Amendment also violates Article XI, § 1's requirement that "such proposed amendment or amendments shall be submitted to the qualified electors of the State." PA. CONST. art. XI, § 1. The plain language of that provision requires that the actual text of the amendment itself be submitted to the electorate on the ballot, not a summary of the amendment. This Court has not directly addressed this issue, and thus Appellees submit that it may do so here. But regardless, in its only binding opinion that dealt with the constitutionality of a ballot question on a change to the Constitution, this Court held that the question must "fairly, accurately and clearly apprize the voter of the question or issue to be voted on"—a standard that arose in circumstances where every voter had access to the full amendment's text to take into the voting booth. *Stander*, 250 A.2d at 480. Here, because the Pennsylvania electorate was forced to vote on the Proposed Amendment without receiving its full text or being fairly apprised of *all* of its many changes to the Constitution, the Proposed Amendment does not adhere to Article XI, § 1.

A. The Plain Text and Original Understanding of Article XI, § 1 Require that the Proposed Amendment Itself Be Submitted to the Electorate.

The plain text of Article XI, § 1 requires that "*such proposed amendment* . . . be submitted" to the voters—not that a summary be submitted to the voters. PA. CONST. art. XI, § 1 (emphasis added). Although Article XI, § 1 also allows the General Assembly to set the "manner" of submission, the "amendment" itself must be submitted to the voters. *Id.* Indeed, the Kentucky Supreme Court recently held as much when dealing with the same proposed victims' rights amendment and a materially identical provision in the Kentucky Constitution.[11] *Westerfield v. Ward*, 599 S.W.3d 739, 748 (Ky. 2019). As the Kentucky Supreme Court explained, "[a] plain reading of this text suggests that the Framers intended to impose a mandatory requirement that *the amendment* be submitted to the voters, and that they intended

[11] The Kentucky Constitution provides that "***such proposed amendment or amendments shall be submitted to the voters of the State*** for their ratification 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 (emphasis added).

Similarly, the Pennsylvania Constitution provides that "***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 (emphasis added). Both provisions give the legislature the power to determine the "manner" of the vote, but Pennsylvania's legislature has additional power to set the date of the vote.

to leave only the *way the vote was to be taken* to the General Assembly's discretion." *Id.*

The same is true here: the Pennsylvania Constitution evidences an intent that the amendment itself be submitted to the voters, and that the General Assembly decides the manner of the vote itself. This is, of course, an issue of first impression in Pennsylvania, as this issue has apparently never been presented to this Court. It is also of fundamental importance: the Constitution has, in "clear, specific language determined [sic] what must be done to change or amend the fundamental law. Nothing short of a literal compliance with this mandate will suffice." *Tausig v. Lawrence*, 197 A. 235, 238 (Pa. 1938).

The Kentucky Supreme Court's decision in *Westerfield* is helpful to understand the goals underpinning the requirement that the full amendment be presented to voters. That court reasoned that 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*, 599 S.W.3d at 748. 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.[12] *Id*. at 749.

The same concerns animated the delegates to Pennsylvania's 1837 constitutional convention, who viewed Article XI, § 1 as ensuring that the people are best "able to vote understandingly upon" those amendments. 12 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania of 1837, at 50. As this Court itself has noted, "[n]o method of amendment can be tolerated which does not provide the electorate adequate opportunity to be fully advised of

[12] There is little case law directly on point from other states with similar constitutions, but several state Supreme Courts have pointed to very different constitutional language in approving summary ballot questions for proposed constitutional amendments. For instance, the Supreme Court of Ohio's ruling in *State ex rel. Voters First v. Ohio Ballot Board*, 978 N.E.2d 119 (Oh. 2012), is 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). Similarly, 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). *See also Young v. Byrne*, 364 A.2d 47, 52 (N.J. Super. Ct. Law Div. 1976) (The ballot is not "intended to be the place where the entire text of the amendment is printed."). Pennsylvania's Article XI, § 1, of course, does not empower our legislature to decide the "form" of the ballot question. *Cf. Ex Parte Tipton*, 93 S.E.2d 640, 643 (S.C. 1956) (although the state constitution says that the proposed amendment "must be submitted to the qualified electors of the State," the court concluded 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.").

proposed changes." *Commonwealth ex rel. Schnader v. Beamish*, 164 A. 615, 617 (Pa. 1932) (explaining the vital role newspaper publication serves in helping educate voters). This Court should follow the same path to ensure that the voters are fully aware of what they are voting on when they step into the ballot booth, even if they have never before heard or read anything about the proposed amendment. That is, after all, the ultimate purpose of Article XI: to ensure that the electorate is informed of what it is voting on and that it is the voters, not the legislature, who decide how and when to amend the Constitution.

Appellants have no real arguments to the contrary and instead misapply this Court's decision in *Stander*, where the amendments at issue "were, we repeat, not adopted pursuant to Article [XI] but were adopted in and by a different Lawful manner." *Stander*, 250 A.2d at 480.[13] While *Stander* articulates a workable standard to determine whether the electorate understands a summary ballot question (discussed in more detail in the next section), it has nothing to do with whether Article XI requires that the text of the proposed amendment be put to the voters directly. *Stander* addressed the legality of modifying the Constitution by *constitutional convention*, not amendment pursuant to Article XI, as the Court repeatedly noted. *Stander*, 250 A.2d at 479 ("These new amendments to or revision

[13] *Stander* referred at times to Article XVIII of the 1874 Constitution, which today is Article XI of the Pennsylvania Constitution.

of the Constitution were not adopted pursuant to the provisions of Article XI of the Constitution of 1874, but were adopted pursuant to and through a different manner of amendment—the Constitutional Convention."). Thus, *Stander* is of no use in trying to determine what Article XI means, and what it requires, when it says that "such amendment" shall be submitted to the voters.[14]

The question now before the Court for the first time is whether the legislature's authority to dictate the "manner" of the vote means that it can also determine whether voters are presented with something other than the actual language that they are being asked to approve. This Court has never suggested that "such proposed amendment" means anything other than the text itself. Here, too, the Kentucky Supreme Court offers guidance, as it explains that the power of the legislature to set "the manner" in which the amendment is presented to voters is "separate and apart" from a description of what constitutes "such proposed amendment." *Westerfield*, 599 S.W.3d at 748. The outcome should be the same here as in *Westerfield*: the phrase "in such manner" is most naturally read as a

[14] Nor does the split opinion in *Sprague* offer any guidance on this matter. *Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016) (mem.). There, the Court addressed whether the ballot question must contain the existing constitutional language that would be amended, and the Court was evenly divided on that issue without a controlling, precedential opinion. The parties in that case simply did not argue that the full text of the proposed amendment must appear on the ballot, so the issue was unaddressed by the Court.

reference to 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 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."

Here, the Proposed Amendment was concededly *not* submitted to the voters at the time of voting. Instead, the voters received only a terse, 73-word statement that paraphrased only some parts of the amendment—while omitting other parts. Having the full text of the Proposed Amendment on the ballot would have ensured that voters were "fully advised" of all of the changes contained within. 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. As a result, this Court should find that the failure to do so violated Article XI, § 1.

B. The Ballot Question Did Not "Fairly, Accurately and Clearly Apprize" the Pennsylvania Electorate of the Proposed Amendment.

If Article XI does not require that the Proposed Amendment itself be submitted to the voters, there remains the separate problem that the ballot question

did not "fairly, accurately and clearly apprize" the voters of the changes they were voting for or against. *Stander*, 250 A.2d at 480. As Appellants concede, the ballot question included only "9 of the 15" new rights for victims. Appellants Br. at 28. That omission is fatal—surely the ballot question could not have fairly or accurately informed voters of the Proposed Amendment by wholly omitting 40% of its new rights. Nor did the ballot question mention that the General Assembly can further provide for new rights, or that these new rights "shall be protected in a manner no less vigorous than the rights afforded to the accused." (R.308a). At every step, the ballot question was lacking.

In response, Appellants maintain that "[t]he voters clearly knew that the Proposed Amendment was intended to enshrine numerous rights for crime victims," and that the "mere fact that some of the victims' rights protections were omitted" would not mislead anyone. Appellants Br. at 28-29. But Appellants' argument proves too much. It cannot be that the voters do not need to know all of the new rights they are voting on, or that a ballot question can simply gesture at a list of "enhanced rights" for crime victims without informing voters of the actual rights. *See id.* That argument, if accepted, would undermine the central import of the Constitution's requirements: under Appellants' reasoning, the ballot question need not have listed *any* rights—it would be sufficient to have a ballot question that simply asks whether victims should have rights, period. The Constitution requires

the voters of Pennsylvania to be clearly presented with an explanation of what they are voting on in full, so that they can decide whether to accept or reject these new constitutional rights.

Stander itself provides substantial insight into the context of what is required to "fairly, accurately and clearly apprize" the voters. Following a constitutional convention, all of Article V was submitted to the voters. Certainly the ballot question was exceptionally brief in light of the scope of the constitutional provision being adopted.[15] Yet the *Stander* Court was *explicit* that the reason the "tiny and minuscular statement" on the ballot was sufficient to inform voters of what they were voting on was because of the *other* information provided to *each and every voter for use in the voting booth*:

> In recognition of this right of the electorate to be clearly and more fully informed of the question to be voted on, the Legislature by Act No. 2 of 1967 required the Secretary of the Commonwealth to 'also publish the Constitution showing the changes proposed by the convention in convenient form and send a copy thereof to each elector requesting it, and ten copies thereof through the County Board of Elections to each polling place ***for the use of the voters during the election***.' The Secretary of the Commonwealth complied with this mandate.

[15] As this Court noted in its opinion: "The ballot question relating to the Judiciary Article amendment read as follows: 'JUDICIARY—Ballot Question V: Shall Proposal 7 on the JUDICIARY, adopted by the Constitutional Convention, establishing a unified judicial system, providing directly or through Supreme Court rules, for the qualifications, selection, tenure, removal, discipline and retirement of, and prohibiting certain activities by justices, judges, and justices of the peace, and related matters, be approved?'" *Stander*, 250 A.2d at 480.

Stander, 250 A.2d at 480 (emphasis added).

As that passage explains, voters had the option of having the *actual text* of the proposed amendment mailed to them *and* they had access to the *actual text* of the amendment at the polling place, even if they did not plan ahead. Ten copies would be sufficient for every voter to carry the text into the actual voting booth, then return it for use by the next voter. This is all *in addition* to a newspaper publication requirement prior to the election. *Stander*, 250 A.2d at 479. Publication before the election serves an important purpose, but it cannot substitute for telling the voter in the booth what they are voting on.

It is true that voters for the Proposed Amendment could review the Attorney General's Plain English statement before entering the voting booth. *See* 25 P.S. § 2621.1 (requiring that the statement be posted "in or about the voting room outside the enclosed space with the specimen ballots"). But, by statute, the statement was not *inside* the voting booth and would require that the voter know that there was a ballot question and know to read the statement ahead of time; it would be too late to see the question for the first time when actually mid-vote. Thus, the type of notice available here, and the type of explanation, was a far cry short of what was available to voters in *Stander*.[16]

[16] Appellants also rely on this Court's equally divided decision in *Sprague*, 145 A.3d 1136, which resulted in nonbinding opinions from Justice Baer, Justice Todd, and Justice Wecht. Respectfully, Appellees suggest that Justice Todd's opinion most

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The best interpretation of Article XI is that the entire Proposed Amendment should have been submitted to the voters. But it was not. Alternatively, under this Court's binding precedent, the ballot question must have "fairly, accurately and clearly apprize[d]" the voters of the 490-word Proposed Amendment's full contents. But instead, voters received a terse ballot question, which concededly omitted six of the fifteen new victims' rights. That failure is fatal to the Proposed Amendment, which was not submitted in a way for the Pennsylvania electorate to vote on the Proposed Amendment with full knowledge of its contents.

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closely hews to *Stander*. As Justice Todd explained in her opinion, the pre-*Stander* decision in *Oncken v. Ewing*, 8 A.2d 402 (Pa. 1939), did not address the constitutional requirements for ballot questions related to constitutional amendments—it instead involved a vote on whether a borough should become a city—while *Stander* is on-point. *Sprague*, 145 A.3d at 1149 n.8. And, under *Stander*'s clear standard, the 73-word ballot question here plainly fails to "fairly, accurately and clearly apprize the voter" of the 490-word Proposed Amendment's full contents. *Stander*, 250 A.2d at 418.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court affirm the Commonwealth Court.

Dated: April 12, 2021

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CERTIFICATE OF SERVICE

I, Steven Bizar, hereby certify that on April 12, 2021, I caused a true and correct copy of the foregoing document titled Brief of Appellees League of Women Voters of Pennsylvania, Lorraine Haw, and Ronald Greenblatt to be served via electronic filing upon all counsel of record.

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The undersigned hereby certifies that no confidential information is included in this filed document and the filing complies with the Public Access Policy of the Unified Judicial System of Pennsylvania.

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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, Appellee's Brief contains 8,935 words, excluding the parts exempted by Pa. R.A.P. 2135(b).

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Respectfully submitted,

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