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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and LORRAINE HAW,<br><br>Petitioners,<br>v.<br><br>KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH,<br><br>Respondents. | : | No. 578 M.D. 2019 |

**PETITONERS' EMERGENCY**
**APPLICATION TO LIFT SUPERSEDEAS**

Petitioners League of Women Voters of Pennsylvania and Lorraine Haw, for the reasons expressed herein, respectfully request that this Court order that the automatic supersedeas be lifted, thereby maintaining the injunction ordered by the Court pending final disposition of the merits of this matter.[1]

[1] The Court in its October 30, 2019 Opinion (the "Opinion") already ordered that the automatic supersedeas be lifted without further application to the Court. (October 30, 2019 Order). However, Respondents have in the subsequent proceedings in the Pennsylvania Supreme Court argued that this Court was without authority to *sua sponte* order the supersedeas lifted without an application by Petitioners and, further, that the Court used an incorrect legal analysis. Petitioners believe that the Court validly ordered the automatic supersedeas lifted; however, to avoid the procedural issues asserted by Respondents, Petitioners hereby make the instant application formally asking that the supersedeas be lifted.

## A. PROCEDURAL HISTORY

The present action was commenced by Appellees on a Petition for Review, filed on October 10, 2019 in this Court under its original jurisdiction. The Petition to Review raised three counts against Kathy Boockvar, the Acting Secretary of the Commonwealth ("Secretary"): 1) the Ballot Question violates the requirement of Article XI, § 1 of the Pennsylvania Constitution that "when two or more amendments shall be submitted they shall be voted upon separately"; 2) the Ballot Question violates Article XI, § 1's requirement that a "proposed amendment or amendments shall be submitted to the qualified electors of the State"; and 3) in the alternative, the Ballot Question violates the electorate's right to be fully informed of the question to be voted on because it does not fairly, accurately, and clearly apprise voters of the issue. Petitioners requested the court preliminarily and permanently enjoin the Secretary of the Commonwealth from tabulating and certifying the votes on the Ballot Question.

On October 17, 2019, pursuant to Pa.R.A.P. 1531(b), Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams, victims of crimes, filed an application for intervention in opposition to the Petition for Review. On October 18, 2019, also pursuant to Pa.R.A.P. 1531(b), Ronald L. Gleenblatt, a veteran criminal defense attorney, filed his own application for intervention in support of the

Petition for Review. No party objected to the applications for intervention, and their applications were granted prior to the hearing.

The Court ordered expedited briefing, and a hearing on Petitioners' requested preliminary injunction was held on October 23, 2019. Immediately prior to this hearing, counsel for the parties and Intervenors stipulated to the following: 1) Haw and Moore Intervenors are registered voters in the Commonwealth; 2) the General Assembly and Office of Attorney General properly adhered to the process by which the General Assembly and the Secretary can place the Proposed constitutional Amendment ballot question on the November 2019 ballot; and 3) the costs incurred by the Department of State for publication of the Proposed Amendment, the plain English statement, and the ballot question throughout the Commonwealth.

During the October 23 hearing, the Court heard testimony only from Intervenor Greenblatt concerning the irreparable harm that would result if the Proposed Amendment became part of the Pennsylvania Constitution. Mr. Greenblatt testified that based on the plain language of the proposed amendment, victims of crime and anyone directly impacted by those crimes will have the absolute constitutional right "to reasonable protection from the accused or any person acting on behalf of the accused," as well as the right "to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused." Hr'g Tr. (H.T.) at 24-24. Mr. Greenblatt explained that he would be

stymied in his ability to obtain discoverable material pursuant to Article I, § 9 of the Pennsylvania Constitution. H.T. at 30. He further testified that where the accused seeks to examine a crime victim, or anyone who is impacted by a crime (often including witnesses), on delicate, personal matters that are germane to the case, the victim or anyone who is impacted by the crime, could invoke the right to dignity and privacy established in the Proposed Amendment. H.T. at 36-37. He also stated that without compulsory discovery as mandated by Article I, § 9 of the Constitution, the Proposed Amendment would hamstring defense attorneys' efforts to negotiate plea agreements. H.T. at 41-42.

The Secretary, by contrast, presented no evidence of any kind of irreparable harm. Counsel for the Secretary presented speculative argument that last-minute changes to the composition of the ballot had confused voters, but proffered no evidence—as opposed to argument—that the existence of an injunction would change voter behavior. The Secretary did not object on the record to the court's decision not to hear the witness from the Department of State nor lodge any objection to the court's conduct of the hearing. Counsel for Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams (the crime victim intervenors) also presented argument at the hearing, but again did not present evidence of irreparable harm, nor did counsel lodge any kind of objection to the conduct to the hearing.

The Court issued a Memorandum Opinion and Order on October 30, 2019, granting a preliminary injunction enjoining the Secretary from tabulating and certifying the votes of the November 2019 General Election on the Ballot Question. Importantly, the preliminary injunction does not strike the question from the ballot, and Pennsylvania voters will vote on the question, and if the courts ultimately determine that the Ballot Question complies with Article XI, I's requirements, their votes will be counted. The Court also lifted the automatic supersedeas under Pa.R.A.P. 1736(b).

Petitioners posted the preliminary injunction bond required under Pa.R.A.P. 1531(b) with the Prothonotary of the Commonwealth Court on October 30, 2019. The Secretary and Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams filed notice of their respective appeals to the Pennsylvania Supreme Court on October 31, 2019.

On October 31, 2019, the Secretary filed in the Supreme Court an "Emergency Application to Reinstate the Automatic Supersedeas." ("Resp. App."). For the Court's reference, a copy of the Emergency Application is attached hereto as Exhibit A.

## B. ARGUMENT

### THE TEST FOR LIFTING OF THE AUTOMATIC SUPERSEDEAS IS READILY MET IN THIS MATTER.

The test for the lifting of an automatic supersedeas is set forth in the Supreme Court's decision in *Department of Environmental Resources v. Jubelirer*, 614 A.2d 199 (Pa. 1989): "The petitioner must make a substantive case on the merits, demonstrating the stay will prevent petitioner from suffering irreparable injury, and establishing other parties will not be harmed and the grant of the stay is not against the public interest." *Id.* at 203. *See also Solano v. Pennsylvania Bd. of Prob. & Parole*, 884 A.2d 943, 944 (Pa. Commw. Ct. 2005).

Those standards are amply well met in this matter.

#### 1. Appellees are likely to succeed on the merits.

First, Appellees have *more than* "made a substantive case on the merits." *Jubelirer*, 614 A.2d at 203. Indeed, this Court clearly found that: (a) Appellants have demonstrated a likelihood of prevailing on the merits on the substantive issues before the court (i.e., whether the Proposed Amendment violates Article XI, Section 1 of the Constitution ("[w]hen two or more amendments shall be submitted they shall be voted on separately"), and whether the ballot question fails to fairly, adequately and clearly inform the electorate of the Proposed Amendment"); and (b) Appellants established their entitlement to the ordered preliminary injunction to bar the tally

and certification of the votes on the ballot question until the matter has been finally decided on the merits.

The Court in its Opinion set forth clearly why Appellees are likely to prevail on the merits on the issue of the constitutional validity of the Proposed Amendment, as well as the misleading and incomplete nature of the ballot question in which the voters will cast their ballots. (Opinion at 21-36). Nothing in Respondent's Application in any way casts doubt on this finding. Indeed, this Court's Opinion in total is thorough, complete, and well-reasoned. It must be emphasized that Respondent presented *no testimony* at the hearing either to rebut Mr. Greenblatt's testimony, or to establish, as they now merely speculate, that the grant of the injunction will somehow "undermine the reliability of the ballot question." (Resp. App. at 8). It is clear that nothing in Respondent's Application casts any doubt on this Court's conclusion that Petitioners are likely to succeed on the merits of their suit.

**2. Vacating the supersedeas will prevent irreparable injury.**

It is also clear that vacating the supersedeas will prevent irreparable injury, both to those accused of crime and the criminal justice system, and to the voters of this Commonwealth.

Initially, it is clear that, contrary to the Secretary's claim to the contrary, the amendment is indeed self-executing, and will immediately become law upon

passage and certification of the results. *Commonwealth v. Tharp*, 754 A.2d 1251, 1254 (Pa. 2000).[2] The Secretary claims that it is not self-executing because the wording of the Proposed Amendment evinces an "intent to require legislation" for it to become effective. (Resp. App. at 10-11). This is incorrect. The Proposed Amendment states: "To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim *shall have* the following rights, as *further* provided and as defined by the General Assembly, which *shall* be protected in a manner no less vigorous than the rights of the accused." (Emphasis added). This language makes clear that, upon passage, crime victims "shall" have all of the myriad constitutional rights set forth in the Proposed Amendment. The language "as further provided and defined by the general assembly," *allows* "further" action by the legislature to "provide" and "define" rights pursuant to the amendment, but in no way *requires* any further action by the legislature. Thus, it is clear that, upon passage and certification, crime victims "shall" have the enumerated rights without any *requirement* that "further" action be taken by the legislature.

Due to its immediate effect, passage of the Proposed Amendment, as specifically found by this Court (Opinion at 8-12, 19) will cause immediate,

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[2] Even if the Secretary is correct that crime victims will have no additional rights under the Proposed Amendment until enabling legislation is passed, that may result in a delay of only several weeks until the amendment becomes effective.

irreparable harm to the rights of criminal defendants and the administration of the criminal justice system. Ronald L. Greenblatt, Esquire, a highly experienced criminal defense attorney, testified as the only witness at the preliminary injunction hearing, and set forth how the enactment of Marsy's Law will, among other harms, substantially and negatively harm the rights of criminal defendants to perform sufficient investigations to mount an effective defense; will impair the ability of defendants to effectively cross-examine accusers; will negatively affect the ability of defense counsel to knowingly and effectively negotiate plea agreements on their clients' behalf; and will necessarily cause delays in proceedings, thereby impacting defendants' right to a speedy trial and causing them to spend unnecessary time in jail. He further testified that passage of Marsy's Law would cause massive confusion in and strain to the criminal justice system due to the need for defendants to file numerous motions to preserve appealable claims stemming from Marsy's Law; due to the increased number of appeals resulting therefrom; and, if Marsy's Law is found unconstitutional, the massive number of persons who will stand wrongfully convicted and incarcerated who will have to turn to the courts for relief (H.T. at 23-81). The Court concisely summarizes Mr. Greenblatt's testimony in the Court's Opinion, and fully credited it in the Court's finding of the immediate and irreparable injury that would result if Marsy's Law becomes effective prior to its constitutionality being determined.

Mr. Greenblatt's testimony was *unrebutted* by the Secretary and crime victim intervenors. Thus, the record fully supports the Court's finding that Marsy's Law becoming effective will result in immediate and irreparable injury.

### 3. If the supersedeas is vacated, other parties will not be harmed and doing so is not against the public interest.

Finally, no harm will result to other parties or the public interest if the supersedeas is vacated.

Appellant claims that the "Commonwealth Court overlooked the impact the injunction will have on voter participation and turnout, indelibly affecting the integrity of the election." (Resp. App. at 7-8). However, there was nothing to "overlook" on this point. The Secretary presented *no evidence whatsoever* to substantiate their claims on this (or any other) point. It is mere speculation that, indeed, defies common sense. The injunction does no more than prevent tabulation of the votes on the Proposed Amendment and certifying the results, all in an effort to avoid the Proposed Amendment *automatically* going into effect before its legal validity can be finally decided by courts. It does nothing to prevent or discourage anyone from voting on the Proposed Amendment, and there is nothing about the circumstances of the injunction that would indicate that it would in any way affect "voter participation or turnout." In fact, it is apparent (especially in the absence of any countervailing evidence) that, if the injunction remains in place, the voters will still come to the polls in the ordinary course, cast their votes on the Proposed

Amendment and the other myriad issues/contests on the ballot, with the *only* result that the votes on the Proposed Amendment will not be immediately counted, or the results certified. Nor could there possibly be any effect on the "tens of thousands" of votes that already have been cast on this issue (Appellant's App. at 9). Those votes, like others cast on November 5, will be tabulated, and the results certified, if necessary, at the appropriate time.

Notably, the Secretary had the opportunity to present ostensible evidence on this point on the hearing before the Court, but failed to do so. She now complains as follows:

> The Secretary had a 20-plus year veteran election administrator from the Department of State available at the hearing who was prepared to testify about the impact of an injunction on voting behavior. The Commonwealth Court, however, discouraged such testimony because, as indicated in the opinion, the court deemed it to be "purely speculative." Opinion at p. 16.

Appellant's App. at 8. If the Secretary had a witness "available" on this issue, but chose not to call that person to give testimony at the hearing, she had the obligation to do so, whatever ostensible "discouragement" the lower court gave. The Court did not prevent the Secretary from calling this witness, nor did she even make an offer of proof about his expected testimony. The Secretary cannot be now heard to speculate about what this *available* witness may have said if he was, in fact, called,

and to somehow present such *speculation* as *proof* of the injunction's effect on "voter participation and turnout."[3]

The Secretary cites *Costa v. Cortes*, 143 A.3d 430 (Pa. Commw. 2016), as if it is an analogous case to this one that somehow supports her unsupported speculation that maintaining the injunction will have some unspecified "impact…on voter participation and turnout" (Resp. App. at 7, 8). It does no such thing. In that case, the petitioners sought an injunction to prevent the implementation of a legislative resolution, H.R. 738, which provided that a proposed constitutional amendment would be moved from the April 26, 2016 General Primary Election Ballot and placed on the November 8, 2016 General Election Ballot. *Id.* at 433. For various reasons, the court denied the requested injunction, including on the basis that, *based on evidence presented at the injunction hearing,* granting the injunction shortly before the April 26, 2016 primary election would create "further" uncertainty among the voters as to what date the amendment would actually be voted on—April 26 or November 8—and whether the votes cast on April 26 would count. *Id.* at 442.

The situation in *Costa* is not even remotely analogous to this one in terms of potential "uncertainty" resulting from the requested injunction. As noted, the court

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[3] Even now, the Secretary can only state that the unnamed witness would have testified generally "about the impact of an injunction on voting behavior." She does not set forth what the "impact" would be and, the basis for any statement about "impact," or even specify the type of injunction that would cause such alleged "impact."

in *Costa* relied on *evidence* in support of its conclusion; here, the Secretary presented no evidence in support of its speculation regarding voter participation and turnout. Equally importantly, the injunction in this case will *not* create uncertainty about *when* the Proposed Amendment will be voted on. Unlike the two possible dates in *Costa*, here the Proposed Amendment will be on the ballot on only one date—November 5, 2019, with the voters casting their votes on the Proposed Amendment in the ordinary course, but with the votes simply not tabulated or the results verified until the appropriate time. The injunction as granted herein creates no "uncertainty" about "whether" the voters should vote on the Proposed Amendment on November 5 because, unlike in *Costa*, there is no alternative date for the vote. In any event, having presented no evidence on this issue, the Secretary has no factual basis to assert her unfounded, vague claims about the "impact" of the injunction.

Very simply, despite having had an opportunity to present evidence regarding the alleged harm that will befall voters if the injunction is not granted, the Secretary failed to do so, and now bases its position on this prong on sheer speculation. The Secretary has not even *attempted* to prove that harm to others or the public interest will result from maintaining the injunction.

## C. CONCLUSION

Appellees have clearly demonstrated under the applicable analysis its entitlement to the lifting of the automatic supersedeas. Therefore, Appellants respectfully request that, for the reasons set forth herein, the automatic supersedeas be lifted in this matter, and that the preliminary injunction remain in place pending final disposition of the appeal on the merits.

Respectfully submitted,

Date: November 1, 2019

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## CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsyvlania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: November 1, 2019

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

## CERTIFICATE OF SERVICE

I, Tiffany E. Engsell, hereby certify that on November 1, 2019, I caused a true and correct copy of the foregoing document titled Petitioners' Emergency Application to Life Supersedeas to be served via electronic filing to all counsel of record.

Date: November 1, 2019

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

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and LORRAINE HAW, | : | |
| Petitioners, | : | |
| v. | : | |
| | : | No. 578 M.D. 2019 |
| KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH, | : | |
| Respondent. | : | |

**ORDER**

AND NOW, this day of , 2019, upon consideration of the Emergency Application to Lift Supersedeas filed by Petitioners League of Women Voters of Pennsylvania and Lorraine Haw, it is hereby ORDERED that the Application is GRANTED. The lift of the automatic supersedeas originally ordered in the Court's October 31, 2019 Order is, for the reasons set forth in the Emergency Application, hereby CONTINUED.

BY THE COURT:

_____

Ellen Ceisler, J.

# Exhibit A

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

| | | |
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| **LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA *and* LORRAINE HAW,** | : | **M.D. Appeal Dkt.** |
| **Appellees** | : | **No. _____ . 84 2019** |
| **v.** | : | |
| **KATHY BOOCKVAR, The Acting Secretary of the Commonwealth,** | : | |
| **Appellant** | : | |



**EMERGENCY APPLICATION TO REINSTATE THE AUTOMATIC SUPERSEDEAS**

Appellant, Kathy Boockvar, Acting Secretary ("Secretary") of the Commonwealth, pursuant to Pa.R.A.P. 123, respectfully moves the Court to reinstate the automatic supersedeas under Pa.R.A.P. 1736(b) and, in support thereof, states the following:

1. This is an appeal from an unprecedented order by the Honorable Judge Ellen Ceisler, of the Commonwealth Court, preliminarily enjoining the Secretary from tabulating and certifying the vote on the ballot question proposing the Crime Victims' Rights Amendment ahead of Election Day.

2. This emergency application is necessary because the Commonwealth Court, *sua sponte* and without analysis, vacated the automatic supersedeas to which the Commonwealth is entitled pending appeal under Pa.R.A.P. 1736(b); Opinion at 48. That court never undertook a supersedeas analysis and instead relied

on its preliminary injunction analysis, in contravention of this Court's holding in *Dep't of Envtl. Res. v. Jubelirer*, 614 A.2d 199 (Pa. 1989).

3. Reinstatement of the supersedeas is critically needed. The Election is Tuesday, November 5, 2019—five days away. Restoring the status quo as ordinarily occurs by operation of law will have no adverse impact on the Appellees—their constitutional challenge can be and will be maintained, and is justiciable, regardless of what occurs on Election Day. Such an injunction is against the public interest as it necessarily suppresses voter engagement on this question. Once the election has been tainted by the injunction it cannot be remedied after the fact if the Secretary prevails on the merits.

## I. Brief Statement of the Case.

4. Appellant, respondent below, is Acting Secretary of the Commonwealth Kathy Boockvar, head of the Department of State, the administrative agency charged with administering and enforcing the Election Code. *See generally,* 71 P.S. § 273.

5. On the ballot for the November 5, 2019 Municipal Election is a question that presents voters with the required opportunity to vote on an amendment to the Pennsylvania Constitution. This amendment, the "Crime Victims' Rights Amendment" ("Amendment"), provides for the consideration and inclusion of victims throughout the criminal justice process primarily through

notification and the opportunity to be heard. The Amendment does not alter offenders' existing rights under the Pennsylvania Constitution.

6. The Amendment, prior to being placed on the ballot, was introduced and passed in both houses of the General Assembly during the 2018 and the 2019 legislative sessions. In June of 2019, the Senate approved HB 276, as Joint Resolution 2019-1, directing the Secretary to submit the Amendment to the electorate at the now-imminent 2019 Municipal Election.

7. The ballot question was first published on the Department of State website on July 26, 2019.

8. Appellees, petitioners below, are the League of Women Voters, Lorraine Haw, and intervenor, criminal defense attorney, Ronald L. Greenblatt (collectively, "the League"). The League, by a Petition for Review and Application for Special Relief, sought a preliminary injunction. Though they had from July to initiate this action, the League only did so on October 11, 2019, after the ballots had been finalized, printed and programmed, and after voting had started, with over twenty-two thousand absentee votes already cast.

9. After a hearing, the Commonwealth Court issued an opinion and order, granting the League's Application and enjoining the Secretary from tabulating and certifying the vote on the ballot question. The Commonwealth Court

also *sua sponte* and preemptively lifted the automatic supersedeas that the Commonwealth, on appeal, is entitled to by operation of law.

## II. The Commonwealth Court Erred by Improperly Substituting Its Preliminary Injunction Analysis for the Supersedeas Analysis.

10. By operation of law, appeal of a court order by a Commonwealth official acts as an automatic supersedeas. This supersedeas stays the court's order pending appeal. Pa.R.A.P. 1736 ("a *supersedeas* . . . shall continue through any proceedings in the United States Supreme Court").

11. This automatic supersedeas can be vacated only by application of the appellee. Pa.R.A.P. 1732. Here, the League made no such application.

12. Further, that appellee must make a "strong showing" on *each* of the following elements:

> (1) "a substantive case on the merits[;]"
>
> (2) vacating the supersedeas will prevent "irreparable injury[;]"
>
> (3) "other parties will not be harmed[;]" and
>
> (4) vacating the supersedeas "is not against the public interest."

*Jubelirer*, 614 A.2d at 202, 203; *Public Utility Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983). Here, the League made no application, let alone established by a "strong showing" that each factor was met, and the Commonwealth Court did not undertake this analysis.

13. The Commonwealth Court failed to conduct this analysis before lifting the supersedeas *sua sponte*. In fact, it performed no analysis at all. Instead, the Commonwealth Court merely referenced, in one sentence, its preliminary injunction analysis. *See* October 30, 2019 Order. In so doing, the Commonwealth Court cites solely to this Court's decision in *Dep't of Envtl. Res. v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989). This is perplexing, as that decision requires the Court to conduct a *separate* analysis never undertaken here.

14. In *Jubelirer*, this Court admonished the Commonwealth Court for improperly conflating the two distinct tests: one for issuing a preliminary injunction and a second, separate test for vacating the automatic supersedeas.

> We must *not* blur the distinction between the standard required for the entry of a preliminary injunction . . . and the requirements necessary for the entry of a stay [of the automatic supersedeas] . . . .

*Jubelirer*, 614 A.2d at 203 (internal citations omitted) (emphasis added).

15. This Court held in *Jubelirer* that the Commonwealth Court erred when it improperly applied its preliminary injunction analysis to the supersedeas analysis, asking whether "*greater injury* [will] result by refusing the preliminary injunction than by granting it." *Id.* (emphasis added).

16. As this Court explained, "greater injury" is not the standard for vacating a supersedeas. The supersedeas standard requires a movant to demonstrate

that "other parties *will not be harmed* by the stay" *at all. Id.* at 203-04 (emphasis added).

17. Worse, here the Commonwealth Court did not even conflate the analyses; it ignored any supersedeas analysis entirely and replaced it with a flawed preliminary injunction analysis. *See* October 30, 2019 Order ("The criteria to lift an automatic supersedeas have been met as outlined in the foregoing [preliminary injunction] opinion"). Again, the test prohibiting the vacation of a supersedeas is not the balancing of harms, as in a preliminary injunction analysis, but the existence of any harm to any party. *Jubelirer*, 614 A.2d at 203. On this basis alone, the order vacating the automatic supersedeas should be reversed. *See Germantown Cab Co. v. Philadelphia Parking Authority*, 15 A.3d 44 (table), 609 Pa. 64, 65 (2011) (*per curiam*) (reinstating automatic supersedeas without discussion where Commonwealth Court's order vacating it was clearly deficient).

18. If left to stand, this Order will undermine the separation of the analyses required by this Court in *Jubilirer*. Relying upon this case, future courts will be able to forego any supersedeas analysis once a preliminary injunction is granted.

## III. The League Failed to Make Any Showing to Vacate the Automatic Supersedeas.

19. Not only did the Commonwealth Court use the wrong analysis in vacating the supersedeas, but when the correct test is applied, the League cannot make the necessary "strong showing" on all four required factors. This is so because: (1) vacating the supersedeas substantially harms the Secretary and the citizens of Pennsylvania; (2) vacating the supersedeas is against the public interest; (3) reinstating the supersedeas will not irreparably harm the League; and (4) the League's claims lack merit. We address each in turn.

### A. Vacating the supersedeas substantially harms the Secretary and the citizens of Pennsylvania, and is, thus, against the public interest.

20. To stay the supersedeas, the League must demonstrate a "strong showing" that that Secretary and the citizens of the Commonwealth will not be substantially harmed. *See Jubelirer*, 614 A.2d at 203; *Germantown Cab Co.*, 15 A.3d 44 (table), 609 Pa. at 65. They cannot.

21. Misapplying its preliminary injunction analysis, the Commonwealth Court concluded that the Secretary would not be harmed by an injunction halting tabulation and certification of the vote. Opinion at 20.

22. In doing so, the Commonwealth Court overlooked the impact the injunction will have on voter participation and turnout, indelibly affecting the

integrity of the election. The Secretary had a 20-plus year veteran election administrator from the Department of State available at the hearing who was prepared to testify about the impact of an injunction on voting behavior. The Commonwealth Court, however, discouraged such testimony because, as indicated in the opinion, the court deemed it to be "purely speculative." Opinion at p. 16.

23. If the supersedeas is not reinstated, an unprecedented injunction enjoining tabulating and certifying the vote ahead of Election Day will undermine the reliability of the result of the ballot question. The Commonwealth Court has told the electorate that their vote will not be counted in the normal course, and may never be counted.

24. Such an injunction is against the public interest as it necessarily suppresses voter engagement on this question. Once the election has been tainted by the injunction it cannot be remedied after the fact if the Secretary prevails on the merits.

25. This precise adverse effect on voter engagement and participation has been recognized by our courts. In *Costa v. Cor*, 143 A.3d 430 (Pa. Cmwlth. 2016), Judge Brobson recognized that such a disruption in the election mechanics was contrary to the public interest. "[Enjoining the Amendment] would not be in the public interest as it would only foment further uncertainty among the public as to whether they should vote on Proposed Constitutional Amendment 1 and whether,

if they do, their votes will be counted. Less than one week before the Primary Election, the voters deserve certainty and finality. Finally, the public interest is best served by adhering to the text of the Pennsylvania Constitution and respecting the power conferred by the electorate on the General Assembly..." *Id.* at 442.

26. This injunction in the midst of the voting process, after tens of thousands of people have already voted, and less than a week before Election Day will foment irreparable uncertainty among the electorate, and suppress voter engagement on this question.

**B. Reinstating the supersedeas will not harm the League.**

27. This Court has expressly held that a constitutional challenge to a ballot question concerning a proposed amendment remains justiciable even after a vote of the people. Thus, Pennsylvania Courts have denied preliminary injunctions in *every single analogous situation. See Bergdoll v. Kane*, 731 A.2d 1261, 1264 (Pa. 1999) (affirming denial of preliminary injunction of proposed constitutional amendment as there was no irreparable harm and the question remained justiciable); *Pennsylvania Prison Soc. v. Com.*, 776 A.2d 971, 974 (Pa. 2001) (noting that preliminary injunction was denied and ballot question was presented to the electorate); *Grimaud v. Com.*, 806 A.2d 923, 925 (Pa. Cmwlth. 2002), *aff'd*, 865 A.2d 835, fn. 4 (Pa. 2005) (same); *Mellow v. Pizzingrilli*, 800 A.2d 350, 354 (Pa. Cmwlth. 2002) (same). No Pennsylvania Court has ever ruled that a

preliminary injunction is necessary in this context, even in *Bergdoll* and *Pa. Prison* where the amendments were ultimately ruled unconstitutional.

28. The League has suffered no harm. Their challenge remains justiciable even after the ballot question is properly presented to the electorate.

**C. The League's claims lack merit.**

29. Although it is premature to discuss the merits in depth, some examination of the fundamental flaws of the decision granting the preliminary injunction is necessary to understand the Commonwealth Court's further flaw in its supersedeas decision.[1]

The Crime Victims' Rights Amendment is Not Self-Executing

30. In deciding that a preliminary injunction is necessary, the Commonwealth Court wrongfully determined that the Amendment is self-executing. It is not.

31. This Court has ruled that an amendment is "self-executing when it can be given effect without the aid of legislation *and* when the language does not indicate an intent to require legislation." *Com. v. Tharp*, 754 A.2d 1251, 1254 (Pa. 2000) (emphasis added). Here, the Amendment states: "To secure for victims justice and due process throughout the criminal and juvenile justice systems, a

[1] By making this abbreviated review, the Secretary does not waive her right to make a more fulsome analysis at the appropriate time.

victim shall have the following rights, *as further provided and as defined by the General Assembly...*" The Commonwealth Court ruled that the Amendment can be given effect without the aid of legislation. This is only the first element of the *Tharp* analysis. The Commonwealth Court ignored the second element, and with it the express language of the Amendment that requires further legislation to implement it.

32. That language was no accident. Between the original version of the Amendment (Printer's No. 1402) and the final version of Amendment (Printer's No. 1824), the General Assembly added, "as further provided, and defined, by the General Assembly." Thus, emphasizing that the Amendment requires further legislation for implementation.

The Crime Victims' Rights Amendment relates to a single subject matter and does not facially alter any existing provisions of the Pennsylvania Constitution.

33. The Commonwealth Court determined that the Amendment violates the separate vote requirement of the Constitution. This determination is at odds with this Court's precedent in *Grimaud.*

34. The Pennsylvania Constitution states that, "[w]hen two or more amendments shall be submitted they shall be voted upon separately." Pa. Const. art. XI, § 1. This Court has adopted a single subject test to determine whether separate votes are necessary. The single subject test examines "the interdependence of the proposed constitutional changes in determining the necessity for separate

votes." *Grimaud v. Com.*, 865 A.2d 835, 841 (Pa. 2005). In doing so, this Court adopted a "common-purpose formulation" to inquire into whether the proposed amendments are sufficiently related to "constitute a consistent and workable whole on the general topic embraced." *Id.* The Court posits whether there is a "rational linchpin" of interdependence, or whether all of the proposed changes "are germane to the accomplishment of a single objective." *Id.* (citing *inter alia* other state supreme court decisions including *Fugina v. Donovan,* 104 N.W.2d 911, 914 (Minn. 1960) (upholding amendment containing sections that, although they could have been submitted separately, were rationally related to a single, purpose, plan, or subject)).

35. In this case, the Amendment pertains to one subject matter, serving one overarching goal—protecting victims' rights in the criminal justice process. It establishes a consistent and workable framework regarding the single topic of victims' rights in the criminal justice system.

36. In *Grimaud*, appellants there, like the League here, argued that the ballot question *effectively* amended a multitude of existing rights. *See Grimaud*, 865 A.2d at 840. In rejecting that argument, this Court noted that, "merely because an amendment 'may possibly impact other provisions' does not mean it violates the separate vote requirement." *Grimaud*, 865 A.2d at 842. It stated that, "[i]ndeed, it is hard to imagine an amendment that would not have some arguable effect on

another provision; clearly the framers knew amendments would occur and provided a means for that to happen." *Id.*

37. Thus, this Court ruled 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." *Id.* In other words, and to be clear, "[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.*

38. Despite this Court's clear precedent, the Commonwealth Court ruled that the separate vote requirement is violated because the Amendment effectively amends existing rights in the Constitution. This is directly contrary to the holding in *Grimaud.*

39. The Amendment does not patently affect any existing provision of the Constitution. Rather, it adds a provision that solely relates to crime victims' rights, creating a consistent workable whole regarding the subject.

The ballot question fairly, accurately, and clearly apprises the electorate of the Crime Victims' Rights Amendment.

40. The Commonwealth Court determined, here, that the ballot question at issue did not fairly and accurately apprize the voters of the content of the Amendment. This was error.

41. Under the Constitution, questions on constitutional amendments must "fairly, accurately and clearly apprize the voter of the question or issue to be voted on." *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). 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).

42. This a high bar that the Commonwealth Court overlooks. Instead, the Commonwealth Court suggests alternatives regarding how the question could have been worded. Respectfully, this is neither the role of the court, nor does it identify a constitutional infirmity. As this Court recognized in *Sprague v. Cortes*, 145 A.3d 1136, 1142 (Pa. 2016):

> The question before us is not whether we believe one version of the ballot question is superior to another, nor is it relevant how we would phrase the ballot question if left to our own devices. Instead, our role in the constitutional amendment process is limited to a review of whether the ballot question fairly, accurately and clearly apprises the voter of the question on which the electorate must vote.

42. In this case, the ballot question sets forth the gist of the Amendment, directly quoting many of its provisions.

43. For these reasons, the automatic supersedeas should have never been stayed.

## Conclusion

WHEREFORE, for the reasons set forth above, the Secretary respectfully requests that the Court grant this emergency application and immediately reinstate the automatic supersedeas pending disposition of this appeal.

Respectfully submitted,

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Date: October 31, 2019

## CERTIFICATE OF COMPLIANCE

I certify 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.

HOWARD G. HOPKIRK
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## CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on October 31, 2019, I caused to be served a true and correct copy of the foregoing document to the following via PACFile:

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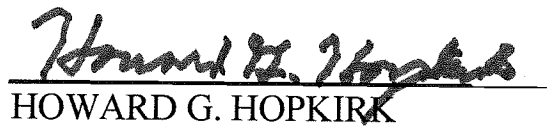

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