

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 84 MAP 2019

**LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA and
LORRAINE HAW,**
Appellee

v.

**KATHY BOOCKVAR, The Acting Secretary of the
Commonwealth,**
Appellant

BRIEF FOR APPELLANT

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT
ENTERED ON OCTOBER 30, 2019 AT NO. 578 MD 2019

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STATEMENT OF JURISDICTION

This is an appeal authorized by Pa. R. App. Proc. 311, from an interlocutory order granting an injunction, entered by the Commonwealth Court in a matter which was originally commenced in that court. This Court has jurisdiction pursuant to 42 Pa.C.S. § 723(a).

ORDER IN QUESTION

AND NOW, this 30th day of October, 2019, Petitioners' Application for Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 is GRANTED. The Acting Secretary of the Commonwealth, and her agents, servants and officers, are enjoined from tabulating and certifying the votes in the November 2019 General Election relating to the ballot question asking voters whether the Pennsylvania Constitution should be amended to include a new section providing for victims' rights until final disposition of the Petition for Review, including appeals.

Petitioners' Application for Relief for a Nominal preliminary Injunction Bond under Pa.R.C.P. N. 1531(b) is GRANTED. Petitioners' shall deposit with the Prothonotary of the Commonwealth Court a bond of \$500.00 within five (5) days of the date of this Order.

In the interest of judicial economy and expeditious resolution of the matter, upon the filing of any appeal resulting in an automatic supersedeas pursuant to Pa.R.A.P. 1736(b), the automatic supersedeas is lifted without further application to this Court. The criteria to lift an automatic supersedeas have been met as outlined in the foregoing opinion. *Dep't of Env'tl. Res. v. Jubelirer*, 614 A.2d 199 (Pa. 1989).

s/ Ellen Ceisler
ELLEN CEISLER, Judge

PROPOSED CONSTITUTIONAL AMENDMENT AT ISSUE

Article I § 9.1. Rights of victims of crime.

(a) 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 afforded to the accused: 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; with the exception of grand jury proceedings, 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; full and timely restitution as

determined by the court in a juvenile delinquency proceeding; 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 postconviction proceedings; to confer with the attorney for the government; and to be informed of all rights enumerated in this section.

(b) The victim or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with jurisdiction over the case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law. This section does not grant the victim party status or create any cause of action for compensation or damages against the Commonwealth or any political subdivision, nor any officer, employee or agent of the Commonwealth or any political subdivision, or any officer or employee of the court.

(c) As used in this section and as further defined by the General Assembly, the term “victim” includes any person against whom the criminal offense or delinquent act is committed or who is directly harmed by the commission of the offense or act. The term “victim” does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

STATEMENT OF STANDARD AND SCOPE OF REVIEW

Scope of review. This Court's scope of review in preliminary injunction matters is plenary. *Warehime v. Warehime*, 860 A.2d 41, 46 n. 7 (Pa. 2004).

Standard of review. An appellate court reviews an order granting or denying a preliminary injunction for an abuse of discretion. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (Pa. 2003). To vacate the automatic supersedeas, the appellee must (1) make a "substantive case on the merits," (2) demonstrate that 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." *Public Utility Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983).

STATEMENT OF THE QUESTION INVOLVED

I. Did the Commonwealth Court err in granting Appellees' eleventh-hour application and enjoining the Secretary of the Commonwealth from tabulating and certifying votes on the ballot question mere days before the election?

II. Did the Commonwealth Court err in *sua sponte* and preemptively lifting the automatic supersedeas?

STATEMENT OF THE CASE

Procedural History.

This is an appeal from an unprecedented order by the Commonwealth Court preliminarily enjoining the Secretary of the Commonwealth from tabulating and certifying the vote on the ballot question proposing the Crime Victims' Rights Amendment a mere six days ahead of the election and after tens of thousands of voters have already voted on this question. Appellant, respondent below, is Acting Secretary of the Commonwealth Kathy Boockvar (the Secretary), head of the Department of State (the Department), which is charged with administering and enforcing the Election Code. *See generally*, 71 P.S. § 273. Appellees, Petitioners below, are the League of Women Voters, Lorraine Haw, and criminal defense attorney Ronald Greenblatt (collectively, the League). Intervenors Martin Vickless, Kelly Williams, Shameekah Moore and Kirstin Irwin are crime victims.¹

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

¹ Intervenors filed their own appeal of the Commonwealth Court's Order, which is docketed at 83 MAP 2019.

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

Even though the Amendment was introduced and passed in both houses of the General Assembly during the 2018 and the 2019 legislative sessions, and even though the ballot question was first published on the Department's website in July 2019, the League waited until October 11, 2019 to challenge the question—after ballots had been finalized, printed and programmed, and after voting had started, with over 22,000 absentee votes already cast. The League filed an Application for Special Relief in the Form of a Preliminary Injunction enjoining the Secretary from tabulating and certifying the November 5, 2019, votes on the ballot question.

After a hearing, the Commonwealth Court issued an opinion and order granting the League's application and enjoining the Secretary. The Commonwealth Court also *sua sponte* and preemptively lifted the automatic supersedeas that the Commonwealth, on appeal, is entitled to by operation of law.

This appeal followed the next day. At the same time, the Secretary filed an Emergency Application to Reinstate the Automatic Supersedeas with this Court.

Names of the Judges Whose Decision Is To Be Reviewed.

The Order granting the League's Application and enjoining the Secretary from tabulating and certifying the November 5, 2019, votes on the Ballot Question was written by the Honorable Ellen Ceisler of the Commonwealth Court of

Pennsylvania. The trial court's Opinion is not published, but is attached to the Secretary's brief.

Statement of Facts

The Crime Victims' Rights Amendment was introduced in the Pennsylvania General Assembly as Senate Bill 1011 (SB 1011) during the 2018 legislative session. The Senate approved SB 1011 in a unanimous vote of 50-0, and an amended version of the bill passed both houses. The Amendment was introduced for the second time during the 2019 legislative session, as House Bill 276 (HB 276) where it, again, resoundingly passed the House and Senate. In June 2019, the Senate approved HB 276, as Joint Resolution 2019-1, and directed the Secretary to submit the Amendment to the electorate at the 2019 Municipal Election, which is the next election at least three months after final passage of the Amendment by the two houses of the General Assembly. The 2019 Municipal Election is scheduled for November 5, 2019.

A. Background of victims' rights in Pennsylvania

The Crime Victims' Rights Amendment will secure in our Constitution basic rights for the victims of crimes. Particularly, it provides for the inclusion and consideration of victims throughout the criminal justice process, largely effectuating its purpose through notification and an opportunity to be heard in relation to non-confidential public proceedings. These concepts are not new to Pennsylvania.

In 1998, the Pennsylvania Crime Victims Act (the Victims Act) was enacted in Pennsylvania. For over twenty years, the Victims Act has provided for a Victims' Bill of Rights and sets forth rights that mirror those in the Amendment. Rights contained in the Victims Act's Bill of Rights include the right "[t]o be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case," and the right "[t]o not be excluded from any criminal proceeding" 18 P.S. § 11.201. Additionally, the Victims Act allows a victim to take actions that may negatively impact an offender's criminal case. For example, it provides victims with the opportunity to submit prior comment before pre-trial disposition in cases involving bodily injury or burglary; and, the chance to submit a victim-impact statement that "shall" be considered by the court in fashioning a sentence. *Id.* § 11.201(5).

B. The Amendment to the Pennsylvania Constitution

The Amendment secures—and constitutionally enshrines—rights that have largely been made available to Pennsylvanians in the Victims Act. The Amendment neither deletes rights from the Constitution nor alters any existing language in other provisions of the Constitution. Rather, the Amendment adds a provision to Article 1 of the Constitution, creating a new Section "9.1." entitled "Rights of victims of crime."

The Amendment states that its purpose is to secure rights for victims in the “criminal and juvenile justice systems.” It then goes on to enumerate those rights, which are principally composed of rights to be notified of public proceedings. The Amendment requires that victims receive notification of: public proceedings, pre-trial dispositions, parole and escape. It states that victims have a right to be heard, *if* their rights are implicated, in proceedings such as sentencing, parole hearings and pardon hearings. Lastly, the amendment provides for basic protections as part of the process, including consideration of the safety of the victim when bail is set.

The Amendment tasks the courts with enforcement responsibility. Victims are not able to pursue monetary damages under the Amendment, however, nor does the Amendment make the victim a party to a criminal proceeding. Moreover, victims are limited to those against whom a criminal offense is committed or who is directly harmed by a crime.

C. Advertising of the Amendment

The Department advertised the proposed Amendment, in its joint resolution form (Joint Resolution 2018-1; Senate Bill 1011), during the months of August, September, and October of 2018. The advertisements appeared in newspapers across the Commonwealth. The cost of this first round of advertising was \$714,218.71, with payment being made from the general fund as required under Section 1201.2 of the Election Code, 25 P.S. § 3041.2.

In August, September, and October of this year (2019), the Department again published the constitutional amendment in its joint resolution form (Joint Resolution 2019-1; House Bill 276). This year's round of advertising also included the text of the ballot question, developed by the Department, in the form it is to appear on the ballot, as well as the Plain English Statement prepared by the Office of the Attorney General. This second round of advertising cost the Department \$1,374,597.12, bringing the total cost of advertising to \$2,088,815.83.

The Department also created a page on its website with the text of the Joint Resolution, the ballot question, and the Plain English Statement. This page went live on July 26, 2019 and a link was added to the Department's homepage on August 8, 2019.

D. The Ballot Question

Article XI, Section 1 of the Pennsylvania Constitution sets forth the procedure by which the General Assembly may amend the Constitution. A "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.

The General Assembly directed the Secretary of the Commonwealth, through the Pennsylvania Election Code, to print proposed constitutional amendments on the ballots in a "brief form" that has been approved by the Attorney General. 25 P.S. §

2755. And, in at least one section of the Election Code, the General Assembly defined “brief form” as “not more than seventy-five words” and authorized the Secretary of the Commonwealth to draft the brief form for constitutional amendments. 25 P.S. § 3010(b). Ballot questions for proposed constitutional amendments have historically adhered to this 75-word standard.

In accordance with her statutory mandate, the Secretary drafted the ballot question for the Amendment and submitted it to the Attorney General on July 5, 2019. The Attorney General approved the ballot question on July 12, 2019. The ballot question as it appears on the ballot states:

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?

To aid voters in voting on the ballot question, information is made available at each polling place. Pursuant to law, the Attorney General’s Plain English Statement and the full text of the proposed Amendment must be posted for voters. *See* 25 P.S. § 2621.1. Additionally, as noted, the ballot question has been advertised and made available to the electorate in advance of the election.

E. Ballots mailed & votes cast

According to the most up-to-date data available within the Statewide Uniform Registry of Electors system, 67 county boards of elections have printed and mailed 92,955 absentee ballots to electors. 61,965 absentee ballots have already been returned and this number grows every day. All these absentee ballots contain the ballot question for the Amendment.

Statement of the Determination Under Review.

The Commonwealth Court granted the League's Application to enjoin the Secretary from tabulating and certifying the votes on the Amendment. That court also preemptively and *sua sponte* lifted the automatic supersedeas. In granting the preliminary injunction, that court employed an analysis contrary to Pennsylvania law, which resulted in that court's erroneous conclusion that the League was likely to prevail on the merits because: the Amendment is self-executing; violates the separate vote rule; impacts other constitutional provisions; and is unclear. These errors of law then caused that court to find that purely speculative harms would result. Finally, instead of applying a separate supersedeas analysis, as Pennsylvania precedent requires, that court simply substituted its preliminary injunction analysis and so lifted the automatic supersedeas that should have remained in place.

Statement of Place of Raising or Preservation of Issues.

The Secretary raised all the objections and defenses discussed below in her Opposition to League' Application for Special Relief in the Nature of a Preliminary Injunction.

SUMMARY OF ARGUMENT

There are good reasons why no Pennsylvania court has ever before enjoined a ballot question on the eve of the election. The Commonwealth Court's unprecedented order sows confusion and uncertainty into the election process and will suppress voter engagement on the ballot question, jeopardizing the integrity of this election. In so doing, the Commonwealth Court ignored this Court's binding caselaw, focusing instead on the public policy harms it sees in the Amendment itself. Respectfully, it is for the citizens of the Commonwealth to determine what constitution they should adopt.

First, the League had since July 2019 to file an action challenging this ballot question. Instead, they waited until approximately 50,000 absentee ballots were mailed and 22,000 votes were already cast to rush into court. For this reason alone, the injunction should have been denied.

Second, the Commonwealth Court erred in finding that the League met the requirements for a preliminary injunction. The League is not likely to succeed on the merits. The Commonwealth Court incorrectly applied this Court's analysis in *Com. v. Tharp*, 754 A.2d 1251 (Pa. 2000), ignoring that the Amendment's clear language indicating the General Assembly's intent to require implementing legislation. That court also erred in concluding that the Amendment does not relate to a single subject matter—victims' rights—because it is bulky and contains a number of subparts

under a single subject. This is not the correct standard. Similarly, the Commonwealth Court misapplied this Court's analysis in *Grimaud v. Com.*, 865 A.2d 835 (Pa. 2005), to determine that the Amendment cannot *effect* any other constitutional provision, rather than whether the Amendment *facially alters* those provisions. It is hard to imagine an amendment that would not have some arguable effect on another provision. Under the correct *Grimaud* standard, the Amendment passes constitutional scrutiny. Additionally, the ballot question fairly apprises the electorate about the Amendment in plain English and the full text of the Amendment is posted at every polling place. There exists no requirement that constitutional amendments be printed in full on the ballot.

The Commonwealth Court further erred in finding irreparable harm to the League and no harm to the public. The injunction's adverse effects on certainty and finality cannot be overstated in this case, as voters are being asked to vote on a ballot question they know the courts have prohibited the Secretary from tabulating and certifying. In contrast, immediate harm will not occur to the League because these matters remain justiciable after the election. Should the voters even pass this amendment, any legal challenges will be resolved well before the General Assembly can enact legislation implementing it.

Finally, determined to overturn the *status quo* on the eve of the election, the Commonwealth Court, without application from the League, preemptively and *sua*

sponte stayed the automatic supersedeas. The Commonwealth Court underwent no analysis for this extraordinary ruling, relying entirely upon its faulty injunctive relief analysis. This failure to even engage in the supersedeas analysis is in direct conflict with this Court's holding in *Dep't of Env'tl. Res. v. Jubelirer*, 614 A.2d 199 (Pa. 1989), which admonished the Commonwealth Court for improperly conflating the two distinct tests.

ARGUMENT

I. Given the League’s Unreasonable Delay, the Equities Foreclose the Extraordinary Relief Granted by the Commonwealth Court.

The League unreasonably delayed filing their Petition and Application until after votes were cast, which should weigh decidedly against granting the extraordinary relief they seek. The delay is particularly relevant where, as here, an election is looming. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). “[U]nder certain circumstances, such as where an impending election is imminent and a State’s election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). There is good reason to avoid last-minute intervention in a state’s election process. Any intervention at this point risks practical concerns including disruption, confusion or other unforeseen deleterious effects. *See Purcell*, 549 U.S. at 5; *see also Republican Party of Pa. v. Cortés*, 218 F.Supp.3d 396, 405, (E.D. Pa. 2016) (admonishing Plaintiffs for their “judicial fire drill” only 18 days before the election and for “offer[ing] no reasonable explanation or justification for the harried process *they* created.” (emphasis added)).

In this case, the League had ample opportunity to file for an injunction. They were aware of the text of the Amendment for the past two years and have had notice of the ballot question since July 26, 2019. Yet, they waited until three weeks after the ballot was finalized and printed, and less than three weeks before the municipal

election to bring this action. They waited until approximately 50,000 absentee ballots were mailed, and 22,000 votes cast. The League does not come to this Court with clean hands. *Terraciano v. Com., Dep't of Transp., Bureau of Driver Licensing*, 753 A.2d 233, 236 (Pa. 2000). For this reason alone, the injunction should have been denied.

II. The Commonwealth Court Erred in Granting the Preliminary Injunction.

“A preliminary injunction is an extraordinary, interim remedy that should not be issued unless the moving party’s right to relief is clear and the wrong to be remedied is manifest.” *Anchel v. Shea*, 762 A.2d 346, 351 (Pa. Super. 2000); *see also Pennsylvania AFL-CIO v. Commonwealth of Pennsylvania*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (because a “preliminary injunction is a harsh and extraordinary remedy, it is to be granted only when and if *each* criteria has been fully and completely established”). The League “must show the need for immediate relief, and the preliminary injunction, if issued, should be no broader than is necessary for the petitioner's interim protection.” *Three Cty. Servs., Inc. v. Philadelphia Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985); *see also Credit Alliance Corp. v. Philadelphia Minit-Man Car Wash Corp.*, 301 A.2d 816, 818 (Pa. 1973) (denial of a preliminary injunction affirmed where no showing of urgent necessity to avoid immediate and irreparable harm that could not be compensated); *Herman v. Dixon*, 141 A.2d 576

(Pa. 1958) (preliminary injunction dissolved where no showing of urgent necessity to prevent irreparable harm).

“The purpose of a preliminary injunction is to preserve the status quo as it exists *or previously existed before the acts complained of*, thereby preventing irreparable injury or gross injustice.” *Anchel*, 762 A.2d at 351 (citing *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992)) (emphasis in original). To obtain a preliminary injunction, the League bears the burden of establishing each of the following elements: (1) the right to relief is clear and the wrong is manifest (*i.e.*, petitioners are likely to prevail on the merits); (2) the injunction is necessary to prevent immediate and irreparable harm; (3) greater injury would result from refusing an injunction than from granting it and that issuance of the injunction would not substantially harm other interested parties; (4) the injunction would not adversely affect the public; and (5) the injunction would restore the status quo. *Summit Towne Centre, Inc., v. Sole Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

A. The Commonwealth Court erred in finding that the League is likely to prevail on the merits.

1. The Amendment is not self-executing.

In deciding that the League was likely to prevail on the merits, the Commonwealth Court wrongfully determined that the Amendment is self-executing.

It is not.

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 indicates an intent to require legislation, stating in pertinent part, that “a victim shall have the following rights, *as further provided and as defined by the General Assembly....*” (emphasis added). That language was no accident. The General Assembly added the “as further provided, and defined, by the General Assembly” language between the original version of the Amendment (Printer’s No. 1402) and the final version of Amendment (Printer’s No. 1824), thus specifying that the Amendment requires further legislation for implementation.

Despite this clear language, the Commonwealth Court ruled that the Amendment can be given effect without the aid of legislation. The Commonwealth Court, however, ignored the second element of the *Tharp* analysis, and with it the express language of the Amendment. Accordingly, the Amendment is not self-executing.

2. *The Amendment relates to a single subject matter and does not facially alter any existing provisions of the Constitution.*

The Commonwealth Court determined that the Amendment violates the separate vote requirement of the Constitution. Opinion at 34a. This determination is at odds with this Court’s decision in *Grimaud v. Com.*, 865 A.2d 835, 841 (Pa. 2005).

Our 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*, 865 A.2d at 841. 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)).

The Amendment here relates to a single subject, and its length and form do not alter that fact. Nowhere in the Constitution, or caselaw, is there a proscription against subparts. Indeed, our courts have specifically acknowledged that amendments may be “bulky” in nature. In *Mellow v. Pizzingrilli*, 800 A.2d 350 (Pa. Cmwlth. 2002), that court noted that six articles of the Constitution of 1873 were amended by way of “‘bulk’ amendments, submitted to the electorate with the

opportunity to vote in favor or against amendment of an entire article, containing numerous substantive changes.” *Id.* at 355. Nevertheless, that court noted the absence of any “challenges to the ‘bulk’ amendments of the 1960’s.” *Id.*

In this case, the Amendment pertains to one subject, serving one overarching goal—protecting victims’ interests in the criminal justice system. It establishes a consistent and workable framework regarding that general topic. The Commonwealth Court does not identify any other subject matter to which the Amendment relates.

Rather, that court held that the Amendment violates the separate vote rule because numerous rights are created for victims. It held that the Amendment “appears to contain multiple changes to the Constitution because it provides a whole series of new and mutually independent rights to victims of crimes....” Opinion at 29. The proper test is not concerned with the number of parts of a proposed amendment. Rather, the court must look to the purpose of each part to confirm that they advance a single goal. The Commonwealth Court acknowledged that the parts making the whole of the Amendment relate to “new rights to victims of crimes and those directly impacted by crimes.” Opinion at 2 (emphasis omitted). Nevertheless, the court held that this Amendment, encompassed within that single subject, violates the separate vote rule. This was error.

The Amendment also does not facially affect existing constitutional provisions. The Commonwealth Court ignored the clear separate vote rule standard that was adopted by *Grimaud* and created its own. In *Grimaud*, in addition to arguing that the ballot question at issue proposed multiple amendments, appellants also argued that the question effectively amended a multitude of existing rights. *See Grimaud*, 865 A.2d at 840. This Court found that argument unavailing, noting 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. This Court emphasized 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.*

Thus, the 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, “[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.*

The Commonwealth Court misapplied *Grimaud*, creating its own different standard that “courts must [] consider the proposed amendment’s *substantive* effect on the Constitution by examining its *content, purpose and effect*.” Opinion at 28

(emphasis added). Put simply, the Commonwealth Court’s analysis—focused on effect—is precisely what *Grimaud* rejected. None of the Constitution’s existing rights will be facially altered by the Amendment. Thus, the Amendment satisfies the *Grimaud* standard.

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

The Commonwealth Court determined that the ballot question did not fairly and accurately apprise voters of the content of the Amendment. This was also error.

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

This a high bar that the Commonwealth Court overlooks. The ballot question sets forth, in plain English, the purpose and effect of the Amendment, directly quoting many of its provisions. Instead of applying the high bar enunciated in *Stander*, 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), “[t]he 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, the courts’ “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.” *Id.* The ballot question fairly, accurately, and clearly does that here.

B. The Commonwealth Court erred in finding harm to the League.

A petitioner seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages. *Summit Towne Centre*, 828 A.2d at 1001-1002. In order to meet this burden, there must be concrete evidence demonstrating actual proof of irreparable harm. *Id.* The claimed irreparable harm cannot be based on speculation and hypothesis. *Id.* at 1002.

In this case, the Commonwealth Court’s findings about harm are built upon its own errors. As discussed above, the Amendment is not self-executing. Because the Amendment is not self-executing, the harms relied upon by the Court are

speculative, which cannot support a preliminary injunction. *See Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987).²

Moreover, immediate harm will not occur because these matters remain justiciable after the election. Should the voters even pass this amendment, since the Amendment is not self-executing, any legal challenges will be resolved well before the General Assembly can pass legislation implementing it. That is why this Court has universally held that preliminary injunctions are not appropriate in this context.

In *Bergdoll v. Kane*, 731 A.2d 1261 (Pa. 1999), the Commonwealth Court denied a preliminary injunction related to a ballot question that it later held to be unconstitutional. That decision was upheld by this Court, which affirmed in part on the fact that “the denial [of preliminary injunction] did not preclude ultimate relief on the merits, if necessary, after the election.” *Bergdoll*, 731 A.2d at 1264. *See also, Grimaud.*, 806 A.2d at 923, fn. 4 (Pa. Cmwlth. 2002), *aff’d*, 865 A.2d 835 (Pa. 2005).

Rather than engage in an analysis of the harm discussed by the parties, the Commonwealth Court improperly concerns itself with the public policy harms it sees in the Amendment itself. Opinion at 15a-16a. Respectfully, this is not the role of the

² In actuality, it is worse than speculation, because many of the provisions of the Amendment are in the law as provided by the Crime Victims’ Rights Act and are not in conflict with the rights of criminal defendants. *See e.g.* 18 P.S. § 11.201 (the Act includes the right of victims “[t]o be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case,” and the right “[t]o not be excluded from any criminal proceeding ...”).

courts. Courts generally defer to legislative judgment as to the necessity and reasonableness of a particular measure, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 505 (1987), lest they “usurp the legislative role and . . . strike down laws merely because they are imperfect [or] unwise . . .” *Shoul v. Commonwealth, Dep’t of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 693 (Pa. 2017) (Wecht, J. concurring).³ This deference is warranted even more so here where the citizens are being directly asked to amend their own Constitution. Whether this amendment to the Constitution is wise or foolish is for the citizens to determine, not the Commonwealth Court, lest the judiciary usurp the citizens’ role as the ultimate sovereign over themselves.

C. The Commonwealth Court erred in not determining that harm will result to the Secretary and the public if an injunction is issued.

The issuance of an injunction on the eve of election will suppress voter engagement on the ballot question, jeopardize the integrity of the election, and sow confusion and uncertainty. The nature of this type of harm has been recognized by our courts. In *Costa v. Cortes*, 143 A.3d 430 (Pa. Cmwlth. 2016), Judge Brobson acknowledged that such a disruption in the election mechanics “would only foment further uncertainty among the public as to whether they should vote on [the proposed

³ “Surely, some very large proportion of legislative work could fall within one or more of these categories. But republican democracy is a messy business.” *Id.*

constitutional amendment] and whether, if they do, their votes will be counted.” Judge Brobson stated that on the eve of an election, the “voters deserve certainty and finality.” *Id.* at 442.

The injunction’s adverse effects on certainty and finality cannot be overstated in this case. Voters are being asked to vote on a ballot question that they know the courts have prohibited the Secretary from tabulating and certifying. Additionally, in the event that the election results are challenged due to their lack of reliability, the entire process may have to start anew with the commensurate loss of time and great expense. Thus, the harm of the granting of this injunction so close to the election is as great to the process as it is irreparable.

D. The Commonwealth Court erred in determining that the injunction maintains, rather than disrupts, the status quo.

A preliminary injunction is designed to preserve the subject of the controversy in the condition in which it is when the order is made; it is not to subvert, but to maintain, the existing status quo until the legality of the challenged conduct can be determined on the merits. *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981).

The status quo here is the election process is underway. The ballots have been finalized, printed, and programmed, and over 22,000 people have already cast their vote. The Commonwealth Court upended this status quo by granting the preliminary injunction and, *sua sponte*, staying the automatic supersedes.

The League had the burden of establishing each of the elements in seeking the extraordinary relief of a preliminary injunction. For these reasons, they failed to establish any—let alone all—of the elements discussed above. The Commonwealth Court erred in granting them such extraordinary relief on the eve of election.

III. The Commonwealth Court Erred in Preemptively and *Sua Sponte* Lifting the Automatic Supersedeas.

By operation of law, an 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”).

This automatic supersedeas can be vacated only by application of the appellee. Pa.R.A.P. 1732. The appellee must also 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.

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 *Jubelirer*, 614 A.2d at 203. This is perplexing, as that decision requires the Court to conduct a *separate* analysis never undertaken here.

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). This Court held in *Jubelirer* that the Commonwealth Court erred when it improperly asked whether “*greater injury* [will] result by refusing the preliminary injunction than by granting it.” *Id.* (emphasis added). 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).

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* Order at 39a (“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). If left to stand, this Order will undermine the separation of the analyses required by this Court in *Jubelirer*. Relying upon this case, future courts will be able to forego any supersedeas analysis once a preliminary injunction is granted.

A. The League failed to make any showing to vacate the automatic supersedeas.

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.

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

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. 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. 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.

If the supersedeas is not reinstated, an unprecedented injunction enjoining tabulating and certifying the vote on the eve the election 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. 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.

This precise adverse effect on voter engagement and participation has been recognized by our courts. In *Costa*, 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.

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.

2. *Reinstating the Supersedeas will not harm the League.*

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, 731 A.2d at 1264 (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.*, 806 A.2d at 925, *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 Soc.* where the amendments were ultimately ruled unconstitutional.

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

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

Finally, for all of the reasons discussed above, the League's claims lack merit. For these reasons, the automatic supersedeas should not have been lifted.

CONCLUSION

The Court should reverse and vacate the preliminary injunction order by the Commonwealth Court. In the alternative, the Court should reinstate the automatic supersedeas.

Respectfully submitted,

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Date: November 1, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 7,418 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

I further 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.

/s/ Howard G. Hopkirk _____

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(collectively, Petitioners) seek to enjoin Kathy Boockvar, Acting Secretary of the Commonwealth (Secretary), from presenting a ballot question to the electorate during the November 2019 General Election.³ The ballot question asks the electorate to decide whether a new amendment (Section 9.1) should be added to Article I, Section 9 of the Pennsylvania Constitution. This proposed amendment, which has been called The Victims' Rights Amendment, creates a number of new rights for **victims** of crime and those **directly impacted** by crimes.

Background

On June 19, 2019, the Senate passed House Bill 276, which now is known as Joint Resolution 2019-1 (Proposed Amendment). It states at length in relevant part:

Proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, providing for rights of victims of crime.

The General Assembly of the Commonwealth of Pennsylvania hereby resolves as follows:

Section 1. The following amendment to the Constitution of Pennsylvania is proposed in accordance with Article XI:
That Article I be amended by adding a section to read:

§9.1. Rights of victims of crime.

³ On October 22, 2019, the Court granted the unopposed Application for Leave To Intervene filed on behalf of Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams (collectively, Moore Intervenors), who are aligned with the Secretary. The Court further granted the unopposed Application for Leave to Intervene Pursuant to Pa.R.A.P. 1531 filed by Ronald L. Greenblatt, Esq., (Greenblatt Intervenor), who is aligned with Petitioners. The Court accepted for filing the answer and briefs in support of Intervenors' respective positions.

Also on October 22, 2019, the Court granted the Republican Caucus of the House of Representatives' Application for Leave To File *Amicus Curiae* Brief. The Court denied the Application for Relief to File *Amicus Curiae* Brief filed by the Pennsylvania Association of Criminal Defense Lawyers (PACDL) on October 24, 2019. We denied the PACDL's Application because it was filed after the Preliminary Injunction proceedings concluded.

(a) 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 afforded to the accused: 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; with the exception of grand jury proceedings, 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; full and timely restitution as determined by the court in a juvenile delinquency proceeding; 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.

(b) The victim or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with jurisdiction over the case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law. This section does not grant the victim party status or create any cause of action for compensation or damages against the Commonwealth or any political subdivision, nor any officer, employee or agent of the Commonwealth or any political subdivision, or any officer or employee of the court.

(c) As used in this section and as further defined by the General Assembly, the term "victim" includes any person against whom the

criminal offense or delinquent act is committed or who is directly harmed by the commission of the offense or act. The term “victim” does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.

Pet. for Review, Ex. A (some underline and bold emphasis deleted); HB 276, 2019-2020 Gen. Assemb., 203d Reg. Sess. (Pa. 2019); Pet’rs’ Ex. P-1.

As required, the Secretary then prepared the text of the ballot question to be posed to the electorate for a vote as to whether the Constitution should be amended. Pet. for Review, ¶ 30. The ballot question is as follows:

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?

Pet. for Review, Ex. A; Pet’rs’ Ex. P-1.

In response to this Proposed Amendment and the ballot question, on October 10, 2019, Petitioners filed an original jurisdiction, three-count Petition for Review (Petition) and the Application.

Count I of the Petition for Review

Petitioners assert that the ballot question violates Article XI, Section 1 of the Pennsylvania Constitution, which states, in relevant part, that “[w]hen two or more amendments shall be submitted they shall be voted upon separately.” PA. CONST. art. XI, § 1 (emphasis added).

Petitioners aver that the Proposed Amendment imposes multiple and significant changes to the Constitution by mandating a wide range of new and mutually independent rights to victims of crime and anyone who is directly impacted by a crime. Petitioners assert that the Proposed Amendment impermissibly extends new powers to the General Assembly in violation of the Constitution and patently and substantially amends multiple existing constitutional articles and sections pertaining to multiple subject matters, including:

Article I, Section 9 (an accused’s right to be confronted with witnesses against him; the right to compulsory process for obtaining witnesses in the accused’s favor; and the right to be free from being placed in jeopardy for the same offense twice); Pet. for Review, ¶ 43.

Article I, Section 14 (the general right of the accused to bail); *id.*

Article IV, Section 9 (Governor’s power to, among other things, commute sentences and grant pardons); *id.*

Article V (Supreme Court of Pennsylvania’s power to prescribe general rules governing practice, procedure and the conduct of all courts). *Id.*

For these reasons, Petitioners argue that the Proposed Amendment does not encompass a single subject and thus prevents Haw, and the electorate in general, from voting “yes” to the Proposed Amendment provisions they approve and “no” to the Proposed Amendment provisions they oppose.

Count II of the Petition for Review

Petitioners assert that the ballot question also violates Article XI, Section 1 because the question does not contain the actual text of the Proposed Amendment. *Id.* ¶ 46. Article XI, Section 1 provides that “such proposed amendment or

amendments shall be submitted to the qualified electors of the State in such a 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. Petitioners interpret this Section to require publication of the entire text of the Proposed Amendment. Pet. for Review, ¶ 46.

Count III of the Petition for Review

Petitioners allege that the ballot question does not fairly, accurately, and clearly apprise the electorate of the issues because it fails to enumerate all the rights set forth in the Proposed Amendment and omits many of the changes that the Proposed Amendment would have on existing constitutional rights of the accused. *See Sprague v. Cortes*, 145 A.3d 1136, 1141 (Pa. 2016); *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969).

Application for Preliminary Injunction

Concomitantly with their Petition for Review, Petitioners filed this Application and a brief in support thereof seeking a preliminary injunction. As relief, Petitioners seek to enjoin certification of the votes on the Proposed Amendment pending disposition of the Petition on the merits.⁴

A hearing on the injunction request 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

⁴ Petitioners initially sought an order enjoining the Secretary, and her agents, servants and officers, from submitting the ballot question to the electorate in the November 2019 General Election, but subsequently withdrew that request for relief during the hearing.

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.

The focus of the October 23, 2019 hearing was on whether Petitioners met their burden of proving they met the criteria for obtaining a preliminary injunction.⁵

Criteria to Obtain a Preliminary Injunction

A party seeking a preliminary injunction must meet all of the following criteria: 1) an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by money damages; 2) greater injury would result from refusing the injunction than from granting it, and concomitantly, that issuance of an injunction will not substantially harm other interested parties; 3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) the activity is actionable, that the right to relief is clear, and that the wrong is manifest (meaning that the applicant is likely to prevail on the merits); 5) an injunction is reasonably suited to abate the offending activity; and 6) the injunction will not adversely affect the public interest. *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995 (Pa. 2003); *Pa. State Educ. Ass'n v. Dep't of Cmty. and Econ. Dev.*, 981 A.3d 383 (Pa. Cmwlth. 2009) (Friedman, J., single judge op.), *aff'd*, 2 A.3d 558 (Pa. 2010). The party

⁵ The Secretary and Moore Intervenors raise laches as a defense to the Application. The Supreme Court has declared, "laches cannot be invoked to prevent the determination of the propriety of the submission of an amendment." *Tausig v. Lawrence*, 197 A. 235, 239 (Pa. 1938).

seeking a preliminary injunction must satisfy all of the above criteria. *Pa. AFL-CIO v. Commonwealth*, 683 A.2d 691 (Pa. Cmwlth. 1996).

Immediate and Irreparable Harm

Petitioners must first demonstrate that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495 (Pa. 2014); *see also Summit Towne Ctr., Inc.*, 828 A.2d at 1001. To meet this burden, Petitioners must present “concrete evidence” demonstrating “actual proof of irreparable harm.” *Greenmoor, Inc. v. Burchick Constr. Co., Inc.*, 908 A.2d 310, 314 (Pa. Super. 2006). A claim of irreparable harm cannot be based on speculation and hypothesis, and for purposes of a preliminary injunction, the harm must be irreversible before it is deemed irreparable. *Id.* at 314.

Petitioners’ Arguments

To prove immediate and irreparable harm, Petitioners presented the testimony of Ronald L. Greenblatt, Esq., an attorney with nearly 30 years’ practical experience working within the criminal justice system in Pennsylvania representing individuals accused of committing crimes.

Citing to the plain language of the Proposed Amendment, Mr. Greenblatt testified that pursuant to the new rights, 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.**” Pet. for

Review, Ex. A; Pet'rs' Ex. P-1 (some emphasis deleted). Hearing Transcript (H.T.) at 24-25. Mr. Greenblatt asserts that these new constitutional provisions will essentially eviscerate his ability to effectively represent his clients and throw the criminal justice system into turmoil.

First, Mr. Greenblatt stated that he will be stymied in his ability to obtain discoverable material, which is part of the compulsory process guaranteed under the Article I, Section 9 of the Pennsylvania Constitution.⁶ H.T. at 30.

Mr. Greenblatt explained that as counsel for an accused, he takes immediate steps to preserve crucial evidence as part of his investigations.⁷ H.T. at 26, 32. Such evidence could include text messages, e-mails, Facebook posts, evidence from other social media platforms, medical and financial records, cell phone data, and security videos. Such evidence can be critical to building a defense and proving innocence. H.T. at 27-29, 32, 56-57, 65. If not obtained as soon as possible, such evidence can easily be lost forever. H.T. at 27.

⁶ Article I, Section 9, titled Rights of Accused in Criminal Prosecutions, provides:

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, **to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor,** and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

PA. CONST. art. I, § 9 (emphasis added).

⁷ Mr. Greenblatt correctly asserts that defense counsel cannot simply rely upon the good faith efforts of the Commonwealth to conduct comprehensive investigations on behalf of the accused. Prosecutors have no obligation to do such investigations. The Commonwealth is only mandated to provide the defense with evidence that the Commonwealth has obtained.

According to Mr. Greenblatt, once the Proposed Amendment is enacted, victims of crimes, and anyone else who has been directly impacted by the crimes, will immediately have the absolute right **“to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused.”** Pet. for Review, Ex. A; Pet’rs’ Ex. P-1 (some emphasis deleted); H.T. 31-32, 76. Furthermore, victims of crimes, and anyone else who has been directly impacted by the crimes, will have the right to refuse to produce requested evidence citing their absolute constitutional right to privacy, that is **“to be treated with fairness and respect for the victim’s safety, dignity and privacy.”** Pet. for Review, Ex. A; Pet’rs’ Ex. P-1 (some emphasis deleted).

Acknowledging that he will try to obtain court orders compelling the production of such evidence, Mr. Greenblatt testified that if a victim of a crime, or anybody that is impacted by a crime, asserts a constitutional right to privacy, even relevant evidence could not be obtained because a court cannot issue an order, including a subpoena, that violates the Constitution. H.T. at 59, 66, 70, 81.

Mr. Greenblatt further testified that if the Proposed Amendment went into effect prior to a final disposition on the merits of the Petition, he and defense attorneys around the state will be forced to immediately file pretrial motions and appeals setting forth the nature of the case, the relevance of the requested discovery, and the reason why the discovery request was denied in order to protect the accused, and the record, for future appeals. H.T. at 45-46, 51. This will clog the courts’ dockets, delaying dispositions and trials to the detriment of those accused of crimes *and* victims alike.

Furthermore, according to Mr. Greenblatt, victims of crimes, and anyone directly impacted by those crimes that have the absolute right to be treated with

fairness and with dignity and privacy, will directly implicate any accused's ability to conduct effective cross-examination. Where the accused seeks to examine a crime victim, or anyone who is impacted by a crime (which could oftentimes include witnesses) on delicate, personal matters, which are completely germane to the case, the victim, and 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.

Mr. Greenblatt further testified that without compulsory discovery as mandated by Article I, Section 9 of the Constitution, the Proposed Amendment would hamstring defense attorneys' efforts to negotiate reasonable and informed plea agreements because neither defense counsel, nor the accused, would have a complete understanding of the case. H.T. at 41-42. It is axiomatic that a guilty plea is not knowing, intentional, or voluntary if the accused does not know the full extent of the evidence that would be available at trial. Despite this, if the Proposed Amendment is later determined to be unconstitutional, those who pled guilty under duress⁸ would be unable to withdraw their guilty pleas and thus be tarnished for life with a criminal conviction that carries with it profoundly negative implications in one's life. H.T. at 42-43, 50.

Additionally, the increase in pretrial motions, the delays in obtaining discovery, the uncertainty of who, and how, to identify and notify victims of crimes and those directly impacted by the crimes, will all impede the right to a speedy trial, another constitutional protection. H.T. at 44-45. Such delays will harm both the accused and victims as prosecutions are dismissed or withdrawn because of the Commonwealth's inability to bring trials with the time frame of Pennsylvania Rule of Criminal Procedure 600, Pa.R.Crim.P. 600. H.T. 40-41.

⁸ Fear of the unknown and the desire to get out of jail are just two well-known reasons that defendants plead guilty to crimes they may not have committed.

Mr. Greenblatt and Petitioners argue that these harms would be immediate. If the Proposed Amendment is passed, it immediately becomes part of the Constitution.⁹

Petitioners also claim that an injunction is necessary to protect the electorate's fundamental right to vote by failing to provide the citizens with an opportunity to vote on each proposed change to the Constitution and preventing the General Assembly from usurping that right by impermissibly packaging multiple changes to the Constitution in one amendment. Appl. ¶ 11.

Secretary's Response

Counsel for the Secretary argued that if the injunction is granted, this could potentially impact voter behavior. Counsel for the Secretary suggested that if voters know that the results of the ballot question may not be certified, and they have no other reason to vote, they may stay away from the polls on Election Day. As a result, the election results cannot be dependably relied upon.

Counsel for the Secretary also suggested that if the Proposed Amendment is passed, the effects on the rights of the accused or the functioning of the criminal justice system would not be immediate since there was no evidence that the Proposed Amendment would be effective upon a favorable majority vote. In support of this argument, Counsel relies upon subsection (a) of the Proposed Amendment, which states that a victim "shall have the following rights, as further provided and as defined by the General Assembly" *See* H.T. at 59 ("In this case, the proposed amendment says that it shall be further provided and as defined by the General

⁹ 1 Pa.C.S § 903 provides that after certification of the results of the ballot question, the Governor shall issue a proclamation as to whether a majority of the electorate passed the proposed amendment. This section does not address the date upon which a proposed amendment becomes part of the Constitution.

Assembly. So in this case, it's not clear that the amendment would immediately go into effect."); *see also* H.T. at 61-62.

Analysis

This Court finds that Petitioners have met their burden of proving immediate and irreparable harm for purposes of the preliminary injunction.

Article I of the Pennsylvania Constitution is the Commonwealth's Declaration of Rights, which delineates the terms of the social contract between government and the people that are of such "general, great and essential" quality as to be ensconced as "inviolable." PA. CONST. art. I, Preamble & § 25; *see also* PA. CONST. art. I, § 2; *Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 947 (Pa. 2013).

"In considering the text of the provisions, we first look to their placement in the larger charter. The structure of the Pennsylvania Constitution highlights the primacy of Pennsylvania's protection of individual rights: 'The very first Article of the Pennsylvania Constitution consists of the Pennsylvania Declaration of Rights, and the first section of that Article affirms, among other things, that all citizens 'have certain inherent and inalienable rights.'" *Commonwealth v. Molina*, 104 A.3d 430, 442 (Pa. 2014) (quoting *Pap's A.M. v. City of Erie*, 812 A.2d 591, 603 (Pa. 2002)). Moreover, our charter further protects the rights detailed in Article I, in Section 25, providing, "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." *Id.* (quoting PA. CONST. art. I, § 25). "Unlike the Bill of Rights of the United States Constitution which emerged as a later addendum in 1791, the Declaration of Rights in the Pennsylvania Constitution was an organic part of the state's original constitution of

1776, and appeared (not coincidentally) first in that document.” *Id.* (quoting *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991)).

“Under our system, one accused of a crime is presumed innocent until the prosecuting attorney has demonstrated beyond a reasonable doubt to an impartial jury of the vicinage that he and the malefactor are identical, or that his actions match the definition or conform to the elements of the malefaction of which he stands accused.” *Commonwealth v. Raffensberger*, 435 A.2d 864, 865 (Pa. Super. 1981). “*This* presumption of innocence is but one of the many aspects of the fundamental law of our land. Like its counterparts, it emanates from the core concept which seeks to restrain governmental excess and prevent abuse by those exercising state power.” *Id.* (Emphasis added.) “As it pursues justice the Commonwealth is thus committed not only to the principle that one is innocent until proven guilty, but also to the principle of fairness in criminal prosecutions. Indeed, these principles are complementary, one without the other would frustrate the ends and objectives of justice.” *Id.*

“The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.” *In re Winship*, 397 U.S. 358, 363 (1970). The presumption of innocence is a bedrock, axiomatic and elementary principle, the enforcement of which lies at the foundation of the administration of our criminal law. *Id.*; *Coffin v. United States*, 156 U.S. 432, 453 (1895).

“Our state Constitution, by various sections of [A]rticle I, provides that all men ‘have certain inherent and inalienable rights,’ among others to address by petition those invested with the powers of government, and that this ‘shall forever

remain inviolate.” *Spayd v. Ringing Rock Lodge No. 665, Bhd. of R.R. Trainmen of Pottstown*, 113 A. 70, 72 (Pa. 1921)

Moreover, “[t]he right in question is a fundamental one, expressly recognized in the organic law of our state as belonging to ‘citizens.’” *Id.* “In other words, it is possessed by members of the state, or ‘citizens’ to work out the public weal, rather than by individuals, to protect their persons or property or to serve private ends. The Constitution does not confer the right, but guarantees its free exercise, without let or hindrance from those in authority, at all times, under any and all circumstances; and, when this is kept in view, it is apparent that such a prerogative can neither be denied by others nor surrendered by the citizen himself.” *Id.* (Citation omitted.)

Applying these basic precepts of our Constitution, and our democracy, to the matter at hand, it is clear that the Proposed Amendment, by its plain language, will immediately, profoundly, and irreparably impact individuals who are accused of crimes, the criminal justice system as a whole, and most likely victims as well.

If approved by a majority of the electorate, every stage of the criminal proceedings, including bail hearings, pretrial proceedings, trials, guilty pleas, sentencing proceedings, and parole and pardon reviews, will be put into doubt. The absolute rights afforded victims, and all persons directly impacted by these crimes, will effectively require all such proceedings to be re-evaluated and possibly rescheduled if the court is not satisfied that the victims of crime, and those who are directly impacted by the crimes, received proper notice and an opportunity to be heard. Moreover, confusion will occur as the stakeholders in the criminal justice system, from bail commissioners to probation and parole officers, will need to determine all others persons who are “directly harmed by the commission of the offense or act.” Pet. for Review, Ex. A; Pet’rs’ Ex. P-1 (emphasis deleted).

Passage of the Proposed Amendment immediately interrupts matters within the Department of Corrections and local county jails. Release of inmates, by either parole, probation, or completion of a term of incarceration, would be delayed because the victim, and anyone directly impacted by the crime, would have the right to be heard in “any proceeding where the right of the victim is implicated, including, but not limited to, release” Pet. for Review, Ex. A; Pet’rs’ Ex. P-1 (emphasis deleted). Agencies responsible for the release of inmates would need to verify whether victims and anyone directly impacted by the crime were provided notice and opportunity to be heard on the inmate’s release. This is particularly harmful to those inmates who have completed the term of their sentences and can lawfully be released.

If passed, the Proposed Amendment would immediately and irreparably hamstring defendants’ rights to have full and effective investigations carried out on their behalf. By invoking their absolute right “**to be treated with fairness and respect for the victim’s safety, dignity and privacy,**” victims and witnesses (in the likely scenario they are directly impacted by the crime) would stymie the accused’s constitutional rights to confront witnesses through cross-examination or to enforce subpoenas compelling their cooperation in criminal proceedings.

The inevitability of these harms is assured by the plain language of the Proposed Amendment.

The Secretary presented no evidence whatsoever to verify the theory that voter behavior would be impacted if the Proposed Amendment vote was not immediately certified. This Court finds that argument purely speculative.

Additionally, this Court rejects the Secretary’s argument that it is unclear whether the Proposed Amendment would be effective immediately. Pursuant to

Commonwealth v. Tharp, 754 A.2d 1251, 1254 (Pa. 2000), a constitutional amendment is self-executing and becomes effective upon approval of the electorate, unless the Constitution or the amendment specifies a different date; it can be given effect without the aid of legislation and when the language does not indicate the intent to require legislation. The Proposed Amendment can be implemented without further legislation and would therefore become part of the Constitution immediately.

Furthermore, the Proposed Amendment specifically states that the rights stated therein “shall be protected in a manner no less vigorous than the rights afforded to the accused.” Pet. for Review, Ex. A; Pet’rs’ Ex. P-1 (emphasis deleted).

Petitioners further argue that the proposed question on the November 2019 General Election ballot will result in irreparable harm to the electorate’s fundamental right to vote.

Article I, Section 5 of the Constitution provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, § 5. The Constitution is the fundamental law of our Commonwealth, *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971 (Pa. 2001) (plurality), and, therefore, there is a fundamental right to vote. *Bergdoll v. Kane*, 731 A.2d 1261, 1268 (Pa. 1999) (recognizing that challenge to ballot question regarding amendment to Confrontation Clause was in fact a challenge brought to protect the fundamental right to vote).

In particular, Petitioners maintain that the electorate must be given the opportunity to vote on *each* proposed right, because each is a separate amendment to the Constitution. Pursuant to Article XI, Section 1 of the Constitution, separate

votes are required when two or more amendments are submitted to the electorate. PA. CONST. art. XI, § 1.¹⁰

As will be more fully discussed below, it appears that the Proposed Amendment violates the single subject-matter rule of Article XI, Section 1. Where the Constitution mandates that there be separate votes on each proposed constitutional amendment, and the Proposed Amendment appears not to satisfy this mandate, disenfranchisement occurs. Our goal is to protect the right to vote and not to disenfranchise voters. *Appeal of Weiskerger*, 290 A.2d 108 (Pa. 1972).

Greater Injury by Refusing the Injunction, Maintaining the Status Quo, Injunction Reasonably Suited to Abate Activity, Public Interest

As stated earlier, in order to grant a preliminary injunction, Petitioners must also prove each of the following:

2) That greater injury would result from refusing the injunction than from granting it, and concomitantly, that issuance of an injunction will not substantially harm other interested parties;

3) That a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

....

¹⁰ The Secretary suggests that the Department advertised the Proposed Amendment, the plain English statement, and the ballot question as required by statute in August, September and October 2018, as well as in August, September, and October 2019. In addition, the documents are available on the Department's website. Thus, the electorate was provided many opportunities to inform itself of the Proposed Amendment.

Neither Petitioners nor the Court suggests that the General Assembly, Office of Attorney General, or the Secretary failed to follow the law in getting the ballot question on the ballots. That is not the issue. The issue is whether the ballot question violates the single subject matter rule of Article XI, Section 1, requiring separate votes by the electorate on each proposed right.

5) That an injunction is reasonably suited to abate the offending activity; and

6) That the injunction will not adversely affect the public interest.

SEIU Healthcare Pa., 104 A.3d at 582.

As these four prongs are closely interrelated and involve similar issues and analysis, they will be addressed together.

The remedy proposed by Petitioners satisfies these four prongs and effectively addresses the concerns raised by the parties to this action. In light of the preceding discussion regarding Petitioners' claim of immediate and irreparable harm, it is clear that greater harm would result if the injunction is refused. Furthermore, granting this preliminary injunction with the remedy provided herein will maintain the status quo, is reasonably suited to abate the alleged offending conduct, and will not adversely affect the public interest.

As it relates to the status quo¹¹ and an adverse effect on the public interest, it is important to note that the Pennsylvania Constitution does not currently contain an article or amendment guaranteeing constitutional rights to victims, and those directly impacted by crimes. *Thus, no rights are being taken away.* Furthermore, many of the rights to be afforded under the Proposed Amendment are currently available in the Crime Victims Act, Act of November 24, 1998, P.L. 882, 18 P.S. §§11.101-11.5102. *See* Sections 201 of the Crime Victims Act, 18 P.S. § 11.201 (rights of victims); Section 212 and 214, 18 P.S §§ 11.212-.214 (responsibilities of state and local law enforcement agencies and Department of Corrections; local correctional

¹¹ The status quo for a preliminary injunction is “the last peaceable and lawful uncontested status preceding the underlying controversy.” *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Cmwlth. 2011) (quoting *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 333 (Pa. Cmwlth. 2002)). One purpose of a preliminary injunction is to keep the parties in the same positions they had when the case began in order to preserve the court’s ability to decide the issues before it.

facilities and Pennsylvania Board of Probation and Parole, respectively); Section 215, 18 P.S. § 11.215 (responsibilities of Department of Human Services and mental health institutions under basic bill of rights); Section 216, 18 P.S. § 11.216 (responsibilities of juvenile probation officers); Section 501, 18 P.S. § 11.501 (pre-parole notification to victim); Section 502, 18 P.S. § 11.502 (petitions to deny parole upon expiration of minimum sentence); and Section 701, 18 P.S. § 11.701 (persons eligible for compensation from the Crime Victims Fund).¹² Victims may continue to assert these rights under the Crime Victims Act, and the myriad of protections and services provided by other statutes, while the courts resolve the compelling constitutional issue presented in the Petition for Review.

This Court has carefully considered the Secretary's arguments about the costs incurred and the speculative concerns about the impact the delay would have on absentee ballots and voting behavior.

The remedy provided will *temporarily* enjoin the Secretary from tabulating and certifying the votes on the Proposed Amendment. Upon final resolution of the Petition for Review, the Proposed Amendment will be declared either constitutional or unconstitutional. If deemed constitutional, the Secretary will tabulate and certify the votes. If the Proposed Amendment is approved by the majority of the electorate, the Proposed Amendment will immediately become part of our Constitution. No vote would go uncounted. If the Proposed Amendment is declared unconstitutional, the Secretary would have been mandated to incur the costs regardless. This remedy does not summarily dismiss the Secretary's arguments regarding the financial resources used to publish the required documents or voter turnout. Nor are the rights of victims of crime being disregarded.

¹² In their well-written brief, Moore Intervenors identify certain rights within the Crime Victims Act that have been upheld as constitutional.

When balancing the efforts and costs expended to pass Joint Resolution 2019-1 and get the ballot question before the electorate, compared to the profound implications that this Proposed Amendment may have on other fundamental constitutional rights, and the efficient functioning of the criminal justice system, it is clearly prudent to first determine whether the Proposed Amendment passes constitutional muster *before* attachment of the proposed rights, *before* additional and scarce resources are used to protect those rights, and *before* assertions of those rights adversely affects other constitutional rights.

**Activity is Actionable and Petitioners are Likely to Prevail on the Merits
Separate Vote Requirement**

This Court will now address the final prong to obtain a preliminary injunction, specifically that the activity is actionable, that the right to relief is clear, and that the wrong is manifest (meaning that the applicant is likely to prevail on the merits).

Petitioners assert that the Proposed Amendment violates Article XI, Section 1 of the Constitution, which provides in relevant part, that “[w]hen two or more amendments shall be submitted they shall be voted upon separately.” PA. CONST. art. XI, § 1. Petitioners argue that nearly every right provided in the Crime Victims’ Rights Amendment constitutes a separate amendment to the Constitution. Petitioners maintain that despite the numerous changes proposed to the Constitution, voters only have one option: to either vote “yes” or “no” to the entirety of the Proposed Amendment, which is constitutionally prohibited. *Pa. Prison Society v. Commonwealth*, 776 A.2d 971, 981. Compounding this problem, the full text (or even a fair summary) of the Proposed Amendment will not be on the ballot.

The Secretary responds by arguing that the new rights afforded to victims are related to the single subject of “victim’s rights.” In particular, the Secretary

maintains that the single subject matter relates to securing victims' rights in the criminal cases in which they suffer direct harm. Every component of the Proposed Amendment, according to the Secretary, advances this goal. The Secretary further contends that the ballot question fairly and accurately reflects the Proposed Amendment. She asserts that merely because the Proposed Amendment contains subparts does not mean that it is unconstitutional.

Our Supreme Court has considered the separate vote requirement in a number of cases, three of which provide guidance in this matter. The Pennsylvania Supreme Court has held that ballot questions far less wide-ranging than the November 2019 ballot question violated Article XI, Section 1.

First, in *Bergdoll*, the General Assembly, by joint resolution, drafted a proposed amendment that would have deleted the Confrontation Clause's face-to-face requirement and would have given the General Assembly the authority to establish by statute the manner in which child testimony could be taken. The Court ruled that a November 1995 ballot question violated the separate-vote requirement. The ballot question at issue was as follows:

Shall the Pennsylvania Constitution be amended to provide (1) that a person accused of a crime has the right to be "confronted with the witnesses against him," instead of the right to "meet the witnesses face to face," and (2) that the General Assembly may enact laws regarding the manner by which children may testify in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television?

Bergdoll, 731 A.2d at 1265-66.

Procedurally, the *Bergdoll* petitioners filed an action in the Supreme Court seeking to enjoin the secretary from placing on the ballot the proposed amendment.

The Supreme Court transferred the matter to this Court, which denied the petitioners' application for preliminary injunctive relief. On the merits, this Court determined that this ballot question violated Article XI, Section 1 since the question amended **both** Article I, Section 9's Confrontation Clause and Article V, which grants the Supreme Court the power to prescribe the general rules governing practice, procedure and the conduct of the courts, and thus the electorate had to vote on these two amendments separately.

On appeal, the Supreme Court affirmed. It found that the proposed amendment violated Article XI, Section 1 because it contained two proposals: amendments to Article I, Section 9, and Article V, but did not permit the electorate to vote separately on each amendment. Notably, in then Justice, now Chief Justice, Saylor's concurring opinion, he would have affirmed on the basis that the proposed amendment encompassed two separate, and non-interdependent, changes to the Constitution. He opined that the change to the Confrontation Clause "lacked the interdependence necessary to justify their presentation to voters within the framework of a single question." *Id.* at 1271 (Saylor, J. concurring).

Pennsylvania Prison Society, 776 A.2d 971, ended with a different result. The Pennsylvania Prison Society filed an action against the secretary, challenging a proposed constitutional amendment to Article IV, Section 9, relating to the Governor's power to remit fines and forfeitures and to grant reprieves to commutation of sentences and pardons. At the time, Article IV also mandated that no pardon or commutation be granted except upon the written recommendation of either two-thirds of or a majority of the Board of Pardons after a full public hearing. Article IV also addressed, in subsection (b), members of the Board and how their appointment and confirmation was made. The proposed amendment would have

required the Board's pardon recommendation to be unanimous, would have changed those who could be appointed to the Board, and would have changed the requirement that Board members be confirmed by two-thirds or a majority of the Senate to the requirement that a majority of the Senate confirm the nominees. The ballot question reflected these proposed changes.

The Commonwealth Court denied the Pennsylvania Prison Society's claim for injunctive relief but ultimately determined that the proposed amendment violated Article XI, Section 1, because it constituted five amendments to the Constitution and each amendment required a separate vote. In deciding the issue, this Court observed that it must "favor a natural reading [of constitutional provisions that] avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter." *Id.* at 976.

The Supreme Court reversed. It observed that the *Bergdoll* Court considered the content, purpose, and effect of the proposed amendment even though the ballot question itself did not specifically refer to each constitutional provision that would have been effectively amended by its adoption. It distinguished *Bergdoll* on the basis that the proposed amendment in that case would have amended only one section of one article of the Constitution. The ballot question and the text of the proposed amendment in *Pennsylvania Prison Society*, however, encompassed two separate amendments (as opposed to the five amendments the Commonwealth Court discerned) to Article IV, Section 9, and did not permit the electorate to vote separately upon each proposed amendment. The Court determined that the proposed amendment restructured the pardoning power of the Board and altered the confirmation process for Board members. The Court further determined that the proposed amendment relating to the Board's composition and unanimous vote

requirement constituted a single question. The change in the process for confirmation of gubernatorial nominees, however, presented a separate amendment that a required a separate vote.¹³

In his concurring opinion, Justice Saylor opined that a single subject-matter focus should be used to determine whether alterations of the Constitution are sufficiently interrelated to justify their presentation to the electorate in a single question. *Id.* at 984 (Saylor, J., concurring opinion, joined by Justices Castille and Newman).

In *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005), a majority of the electorate approved amendments to Article I, Section 6 of the Constitution (relating

¹³ Even though the question violated Article XI, Section 1's separate vote requirement, the Court declined to invalidate the question because the proposed amendment did not actually change the Senate's confirmation process. Rather, both Article IV, Section 9 and the proposed amendment provided that a majority of the Senate must confirm the Governor's Board nominees. The proposed amendment only deleted the "two-thirds" language but retained the "majority" language for confirmation. *Pa. Prison Soc'y*, 776 A.2d at 982. The Court determined that because the proposed amendment did not change the confirmation process, there was really only one issue to be presented to the electorate. Separate votes were therefore not required.

It noted, however, that Article XI, Section 1 "will require that a ballot question be declared null and void, except in the [unusual] circumstances presented [t]here." *Id.* at 982.

to trial by jury)¹⁴ and Article I, Section 14 (relating to bail and habeas corpus).¹⁵ The *Grimaud* petitioners filed an action in this Court, seeking a declaration that, among

¹⁴ Prior to amendment, Article I, Section 6 provided:

Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in a civil case.

Section 6, as approved by a majority of the electorate, now provides:

Trial by jury shall be as heretofore, and the right thereof remain inviolate. The General Assembly may provide, however, by law that a verdict may be rendered by not less than five-sixths of the jury in a civil case. **Furthermore, in criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.**

Grimaud, 865 A.2d at 839, 840; *see also* PA. CONST. art. I, § 6.

¹⁵ Prior to amendment, Article I, Section 14 provided:

All prisoners shall be bailable by sufficient sureties, unless for capital offense when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion the public safety may require it.

Section 14, as approved by a majority of the electorate, now provides:

All prisoners shall be bailable by sufficient sureties, unless for capital offense **or for offenses which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community** when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in the case of rebellion or invasion the public safety may require it.

Grimaud, 865 A.2d at 839; *see also* PA. CONST. art. I, § 14.

other things, the amendments were invalid because each ballot question proposed multiple amendments in violation of Article XI, Section 1. In part, this Court held that the jury trial and bail questions constituted a single amendment because they served one core purpose and effectuated one substantive change. *Id.* at 840.

The first issue the Supreme Court decided on appeal was the applicable standard used to determine whether the changes were properly presented as a single question. Noting that its decision in *Pennsylvania Prison Society* resulted in no clear majority on the standard to apply, the Court was persuaded by Justice Saylor's concurring opinion in that case suggesting the test should have a **“subject-matter focus to determine whether [the] alterations are sufficiently interrelated to justify their presentation to the electorate in a single question.”** *Grimaud*, 865 A.2d at 841 (quoting *Pennsylvania Prison Society*, 776 A.2d at 984 (Saylor, J. concurring, joined by Castille and Newman, JJ.)) (emphasis added).

The Supreme Court also found persuasive authority from other jurisdictions that have utilized a single subject test and examined the interdependence of the proposed constitutional changes in determining the necessity of separate votes. The Supreme Court expressly adopted the “subject-matter test” for determining whether a ballot question violates Article XI, Section 1 of the Pennsylvania Constitution. In *Grimaud*, the Court determined that the ballot questions related to a single subject to justify inclusion in a single question: bail.

The petitioners in *Grimaud* advanced similar arguments to those made here. In *Grimaud*, the petitioners asserted that the single ballot question amended four other amendments found in Article I of the Constitution. The Court analyzed the ballot question's substantive effect on the Constitution, examining its content, purpose and effect. *Id.* at 842. The Supreme Court agreed with this Court's

conclusion that “merely because an amendment ‘may possibly impact other provisions’ does not mean it violates the separate vote requirement.” *Id.* Rather, the **“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.* (Emphasis added.)

Bergdoll, *Pennsylvania Prison Society*, and *Grimaud* are readily distinguishable from the instant matter. These three Supreme Court opinions involved amendments to existing constitutional provisions, not adoption of an entirely new section that may conflict with other provisions of the Constitution. A exhaustive search of Pennsylvania case law reveals no other amendment to a section of the Constitution that was as sweeping in scope as the Proposed Amendment.

But we learn from *Bergdoll*, *Pennsylvania Prison Society*, and *Grimaud* that when determining whether a proposed amendment is constitutional, the courts must determine whether the proposed amendment encompasses a single subject that is sufficiently interrelated, and the courts also must consider the proposed amendment’s substantive effect on the Constitution by examining its content, purpose and effect.

Specifically, “[i]t is the responsibility of [the courts] to insure that the provisions of the Constitution establishing the procedure for the proposal and adoption of constitutional amendments are satisfied.” *Pa. Prison Soc’y*, 776 A.2d at 977. “The Constitution is the fundamental law of our Commonwealth, and in matters relating to alterations or changes in its provisions, the courts must exercise the most rigid care to preserve to the people the right assured to them by that instrument.” *Id.* (quoting *Commonwealth ex rel. Schnader v. Beamish*, 164 A. 615, 616-17 (Pa. 1932)).

Moreover, the process outlined in Article XI, Section 1 “was not designed to effectuate sweeping, complex changes to the Constitution,” *id.* at 976,¹⁶ and

voters should be given free opportunity to modify the fundamental law as may seem to them fit, but this must be done in the way they themselves have provided, if stability, in the carrying on of government, is to be preserved. It is the duty of the courts to follow the rules fixed by the Constitution. If believed to be unwise, in the provisions expressed, it should be rewritten, or modified, but as long as plain words are used, directing what shall be permitted, it is imperative on the courts to restrain any actions that are forbidden.

Id. (quoting *Taylor v. King*, 130 A. 407, 409-10 (Pa. 1925), *overruled in part by Stander*)).

Applying the Supreme Court’s decisions here, the Proposed Amendment appears to implement sweeping and complex changes to the Constitution.

Here, the Proposed constitutional Amendment presented by the November 2019 ballot question (1) appears to contain multiple changes to the Constitution because it provides a whole series of new and mutually independent rights to victims of crimes, and (2) may amend multiple existing constitutional articles and sections across multiple subject matters. In specific, it proposes changes to multiple enumerated constitutional rights of the accused—including the right to a speedy trial, the right to confront witnesses, the right against double jeopardy, the right to pretrial release, the right to post-conviction relief, and the right to appeal—as well as changes to the public’s right of access to court proceedings. *See* Pet’rs’ Brief at 20.

First, Article I of our Constitution establishes rights that pertain to the relationship between the Commonwealth and its citizens. The majority of Article I

¹⁶ *See Pa. Prison Soc’y v. Commonwealth*, 727 A.2d 632, 634-35 (Pa. Cmwlth. 1999), *rev’d*, 776 A.2d 971 (Pa. 2001).

rights proscribe certain conduct by the Commonwealth. The Proposed Amendment appears to turn Article I on its head, enabling victims, and possibly witnesses, to prevent individuals accused of crimes from asserting their fundamental constitutional rights to defend themselves.

While the Proposed Amendment guarantees rights to victims, the substantive effect on the Constitution may be an infringement on the rights found in several articles of the Constitution particularly Article I, Sections 9¹⁷ and 14,¹⁸ which directly relate to Commonwealth's ability to take away an individual's freedom.

Petitioners' brief identifies the constitutional rights purportedly impacted by the Proposed Amendment, sets forth the right, and then inserts into the right the effect the Proposed Amendment would have on that right. The following are a few examples provided in the brief that bear repeating here.

¹⁷ Article I, Section 9, PA. CONST. art I, § 9, provides:

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

¹⁸ Article I, Section 14, PA. CONST. art. I, § 14, provides:

All prisoners shall beailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

Petitioners propose that the Confrontation Clause of Article I, Section 9¹⁹ would be amended effectively to read as follows:

In all criminal prosecutions the accused hath a right to . . . be confronted with the witnesses against him so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim's safety, dignity and privacy, and with the exception that he may not compel any person who has been directly harmed by the conduct of which the defendant is accused to provide an interview or deposition or respond to any other discovery request.

Pet'rs' Br. at 30.

Petitioners propose that the Compulsory Clause of Article I, Section 9 would be amended effectively to read as follows:

In all criminal prosecutions, the accused hath a right to . . . have compulsory process for obtaining witnesses in his favor so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim's safety, dignity and privacy, and with the exception that he may not compel any person who has been directly harmed by the conduct of which the defendant is accused to provide an interview or deposition or respond to any other discovery request.

Pet'rs' Br. at 32.

¹⁹ Article I, Section 9 provides several independent and fundamental rights to the criminally accused, each of which is enforced separately and defined by its own body of law. Despite amendments over time, Article I, Section 9 “has consistently maintained the same **range of rights and privileges** to individuals accused of committing crimes.” Ken Gormley, *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 329 (2004) (emphasis added). The rights in Article I, Section 9 are treated separately by Pennsylvania courts. Pet'rs' Br. at 27.

Petitioners propose that the right to a speedy trial of Article I, Section 9 would be amended effectively to read as follows:

In all criminal prosecutions, the accused hath a right to . . . a speedy public trial by an impartial jury of the vicinage, except that no trial may occur until after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard.

Pet'rs' Br. at 33-34.

Petitioners propose that the Right to Open Courts and Full Remedy, found in Article I, Section 11, would be amended effectively to read as follows:

All courts shall be open so long as that does not infringe on the rights of any person who has been directly harmed by the conduct that is the subject of a criminal charge to be treated with fairness and respect for the victim's safety, dignity and privacy; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay, except that no public criminal proceeding may occur until after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pet'rs' Br. at 37.

Petitioners' claim that the Proposed Amendment infringes on the Court's powers to prescribe rules governing the practice, procedure and conduct of all courts, is also well taken. The first sentence of subsection (b) of the Proposed Amendment provides: "The victim or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with

jurisdiction over the case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law.” Pet. for Review, Ex. A; Pet’rs’ Ex. P-1 (emphasis deleted).

On the merits, it would be reasonable for this Court to conclude that the Proposed Amendment affects the courts in two ways. First, a victim asserting the constitutional privacy right could demand closed proceedings, contrary to Article I, Section 11’s requirement that the courts be open to all. Second, the Proposed Amendment gives victims the right to participate and be heard at all stages of the criminal justice process. This Court previously identified the issues that the Proposed Amendment would have on the day it becomes part of the Constitution. As the courts may not abridge, enlarge or modify the substantive rights of any litigant, the Proposed Amendment could impose on the courts’ ability to maintain its calendar in an efficient and expeditious manner.

For these reasons, Petitioners present a compelling argument that the Proposed Amendment does not merely “touch” other parts of the Constitution when applied, but rather, that the Proposed Amendment *facially, patently, and substantially* affects other parts of the Constitution.

Moreover, contrary to the Secretary’s assertions, the competing rights established in the Proposed Amendment are clearly **not so interrelated as to justify inclusion into a single subject**. The Proposed Amendment addresses a wide range of subject matters including bail, discovery, due process, restitution, the right to privacy, and evidence control, all under the auspices of connecting them to victims’ rights. However, it is not clear how the right to restitution is related to the right to be notified and participate in all public hearings or the right to curb the accused’s right to confront the witnesses against him. It not clear how the proposed right to

participate in bail hearings is related to the right to notification of (and participation in) release of the offender or commutation of his sentence.

This Court concludes that Petitioners have raised substantial questions as to the constitutionality of the Proposed Amendment in terms of both a violation of Article XI, Section 1's separate vote requirement, and its facial impact on other articles and sections of the Constitution. As a result, the electorate's right to vote separately on each right to be afforded may result in disenfranchisement. As stated earlier, in a democratic society, there is no greater adverse effect on the public interest if the electors are deprived of their constitutional right to vote.

Finally, Petitioners argue that the Proposed Amendment does not "fairly, accurately, and clearly" apprise the electorate of the question upon which it is asked to vote. This Court finds arguable merit to Petitioners' claim. As stated earlier, the Proposed Amendment. The ballot question provides:

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?

Pet. for Review, Ex. A; Pet'rs' Ex. P-1 (emphasis deleted).

In *Stander*, the plaintiffs initiated an action seeking to enjoin a vote by the electorate on a proposed constitutional amendment, initiated by a Constitutional Convention, that would completely revise Article V of the Constitution relating to the Judiciary. The Dauphin County Court of Common Pleas (common pleas court) denied the plaintiffs' preliminary injunction request to enjoin the secretary from

printing the ballots, which the Supreme Court affirmed. The plaintiffs then filed an amended complaint seeking permanent equitable relief. The common pleas court denied the request. One of the issues the plaintiffs raised on appeal to the Supreme Court challenged the form of the notice of the proposed amendment as it appeared on the ballot. To resolve the issue, the Court considered whether “the question as stated on the ballot fairly, accurately and clearly [apprised] the voter of the question or issue to be voted on?” *Id.* at 480. This standard continues to apply. *See Sprague*, 145 A.3d at 1139 (the only limit on the Secretary’s powers under the Election Code is that the language of the ballot question must fairly, accurately, and clearly apprise the voters of the question or issue on which the electorate must vote).

To the extent the ballot question sets forth certain rights the Proposed Amendment would guarantee, the ballot question is accurate. However, the Court may reasonably conclude that the Proposed Amendment is not accurate or clear as to certain other victims’ rights. In particular, the Proposed Amendment establishes a victim’s right to, among other things, (1) be heard in any proceeding where a right of the victim, or anyone directly impacted by a crime, is implicated, including release, plea, sentencing, disposition, parole, and pardon, (2) be reasonably notified of the release or escape of the accused, and (3) to participate in the parole process.

Neither the ballot question, the plain English statement, nor the Proposed Amendment addresses those circumstances where charges are dismissed or nolle prossed, or where there is an adjudication by a consent decree. The Court may therefore conclude that the ballot question appears inaccurate in that it affords a victim to be heard in **any** proceeding implicating the victims’ rights but fails to acknowledge those circumstances where victims’ rights may be affected but there are no proceedings.

The Court may also conclude that the ballot question does not fairly and adequately apprise voters of a victim's right to participate in the parole process or to be advised of an escape or release of the inmate because the ballot question does not inform the voter of these rights specifically. Conversely, it could be concluded that the ballot question's general statement that a victim has the right to reasonable protection from the accused is sufficient to encompass these two rights. More may be needed to determine whether the ballot question adequately apprises the electorate that the right to reasonable protection encompasses the right to notification of release or escape and the right to participate in the parole process (which are typically not a public proceeding).

For the purposes of this preliminary injunction only, Petitioners have persuaded the Court that the ballot question fails to fairly, adequately and clearly inform the electorate of the Proposed Amendment. *Sprague; Stander*.

Conclusion

No doubt the remedy is rare; as it appears that delaying certification of the votes to a constitutional amendment has never occurred. The Court recognizes the seriousness of memorializing victims' rights, Petitioners' claims, and the potential consequences of the Proposed Amendment. We also recognize Secretary's claim that an adequate remedy exists because the courts could declare the Proposed Amendment unconstitutional at some later point in time. This position, however, fails to acknowledge that the Proposed Amendment will have an immediate, profound, and in some instances, irreversible, consequences on the constitutional rights of accused and in the criminal justice system.

After careful review of the pleadings, evidence, and relevant law, the Application is granted in part. The Secretary is enjoined from tabulating and certifying the election results for the ballot question.

Bond

Pursuant to Pennsylvania Rule of Civil Procedure No. 1531(b), a preliminary injunction may only be granted if the plaintiff files a bond or deposits with the prothonotary United States legal tender in an amount fixed by the court. The purposes of the bond is to protect the Secretary in the event she succeeds in having the injunction dissolved because it was improperly granted. Pa.R.C.P. No. 1531(b); *The Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co., Inc.*, 893 A.2d 196 (Pa. Cmwlth. 2006).

Petitioners filed an Application for Relief for a Nominal Preliminary Injunction Bond Under Pa.R.C.P. No. 1531(b), wherein they allege that Haw is indigent and that the League is a non-profit organization that finances its activities largely through donations. Assertions aside, we agree that the Secretary's harm resulting from the injunction, if any, is minimal. The Secretary cannot recover the costs of publication and preparing for the election in general because those costs were not incurred because of issuance of the injunction. Accordingly, we grant Petitioners' Application and will impose a nominal bond.



ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	

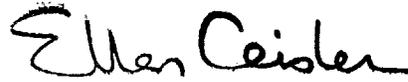
ORDER

AND NOW, this 30th day of October, 2019, Petitioners' Application for Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 is **GRANTED**. The Acting Secretary of the Commonwealth, and her agents, servants and officers, are enjoined from tabulating and certifying the votes in the November 2019 General Election relating to the ballot question asking voters whether the Pennsylvania Constitution should be amended to include a new section providing for victims' rights until final disposition of the Petition for Review, including appeals.

Petitioners' Application for Relief for a Nominal Preliminary Injunction Bond Under Pa.R.C.P. No. 1531(b) is **GRANTED**. Petitioners shall deposit with the Prothonotary of the Commonwealth Court a bond of \$500.00 within five (5) days of the date of this Order.

In the interest of judicial economy and expeditious resolution of the matter, upon the filing of any appeal resulting in an automatic supersedeas pursuant to Pa.R.A.P. 1736(b), the automatic supersedeas is lifted without further application to

this Court. The criteria to lift an automatic supersedeas have been met as outlined in the foregoing opinion. *Dep't of Env'tl. Res. v. Jubelirer*, 614 A.2d 199 (Pa. 1989).



ELLEN CEISLER, Judge

Certified from the Record

OCT 30 2019

And Order Exit

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CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Appellant by electronic service to the following:

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Date: November 1, 2019