

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 578 MD 2019

LEAGUE OF WOMEN VOTERS, *et al.*,
Petitioners,

v.

KATHY BOOCKVAR, Acting Secretary of State, *etc.*,
Respondent.

**BRIEF FOR NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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Other Authorities

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Andrew Wolfson, <i>Marsy's Law could have unintended consequences for crime victims</i> , Louisville Courier Journal (Nov. 4, 2018), <i>available at</i> : https://www.kentuckynewera.com/news/ap/article_4f586d42-df07-11e8-a2e5-57ed0bc7ebfb.html	20
April Baumgarten, <i>Marsy's Law often invoked to withhold officers' names</i> , Grand Forks Herald (Jul. 22, 2018), <i>available at</i> : https://www.grandforksherald.com/news/crime-and-courts/4475423-marsys-law-often-invoked-withhold-officers-names	21
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Carter Coudriet, <i>Billionaire-Backed "Marsy's Law" Ballot Measures Pass in Six States, Thanks to \$72 Million</i> , Forbes (Nov. 7, 2018), <i>available at</i> : https://www.forbes.com/sites/cartercoudriet/2018/11/07/billionaire-sponsored-marsys-law-for-victims-rights-passes-in-six-states-thanks-to-72-million-push/#7d913a305b7c	4
Editorial Board, <i>Inconsistent Marsy's Law interpretations by police jeopardize public knowledge and safety</i> , Orlando Sentinel (Jun. 14, 2019), <i>available at</i> : https://www.orlandosentinel.com/opinion/editorials/os-op-marsys-law-victims-police-withhold-information-20190614-5c2fu7q66fh5fkhdkladldhiva-story.html	19

Editorial: Problematic Marsy’s Law Amendment Is Not the Solution, Valley News (Feb. 17, 2018), available at: <https://www.vnews.com/Editorial-Marsy-s-Law-15499390> 3

Holly K. Michels, *Challenge to Marsy’s Law*, Montana Newspapers Association (Jun. 21, 2017), available at: <https://www.mtnewspapers.com/challenge-to-marsys-law/>..... 10

Jonathan Peters, *Unintended consequences of new crime victims’ bill of rights*, Columbia Journalism Review (Dec. 12, 2016), available at: https://www.cjr.org/united_states_project/marsys_law_public_records.php 20

Judicial Budget Request 2018-2019, available at: <http://www.pacourts.us/judicial-administration/budget/judicial-budget-request-2018> 17, 18

Kelly Smith, *Marsy’s Law passed in 6 states, South Dakota on track to repeal it*, KSFY.com (Jan. 26, 2018), available at: <https://www.ksfy.com/content/news/Marsys-Law-passed-in-6-states-South-Dakota-on-track-to-repeal-it-471383263.html> 9

Kim Burrows, *Marsy’s Law: Good Intentions but court concerns*, MyNews4.com (Dec. 20, 2018), available at: <https://mynews4.com/news/local/marsys-law-good-intentions-but-court-concerns> 16, 18

Mark Walker, *Lawyers say Marsy’s Law is forcing clients to sit in jail*, Argus Leader (Nov. 29, 2016), available at: <https://www.argusleader.com/story/news/2016/11/29/lawyers-say-marsys-law-forcing-clients-sit-jail/94554106/> 13

Marsy’s Law For All, About Marsy’s Law, https://www.marsyslaw.us/about_marsys_law 4

Matthew Harwood, *Marsy’s Law Is a Gift to Bad Cops*, Reason (Mar. 18, 2019), available at: <https://reason.com/2019/03/18/marsys-law-is-a-gift-to-bad-cops/> 21

Michael Lyle, *Marsy’s Law: Sounds good, but is it?*, Nevada Current (Aug. 31, 2018), available at: <https://www.nevadacurrent.com/2018/08/31/marsys-law-sounds-good-but-is-it/>..... 9

Michael Rothfeld, *Prop. 9 Would Give Crime Victims a Stronger Voice*, L.A. Times (Oct. 23, 2008), available at: <https://www.latimes.com/archives/la-xpm-2008-oct-23-me-victims23-story.html> 3

North Carolina Administrative Office of the Courts, *Judicial Branch Fiscal Note* (Feb. 8, 2017), available at: <http://pulse.ncpolicywatch.org/wp-content/uploads/2018/06/Confidential-AOC-fiscal-note.pdf>..... 8

PA Crime Victims, Registration for Offender Release Notification, <https://pcv.pccd.pa.gov/available-services/Pages/Register-for-Offender-Release-Notification.aspx>..... 12

Seth Tupper, *Marsy’s Law shields name of deputy who shot suspect*, Rapid City Journal (Dec. 7, 2018), *available at:* https://rapidcityjournal.com/news/local/marsy-s-law-shields-name-of-deputy-who-shot-suspect/article_789f446f-c936-51fd-ad39-75f1e8d601a3.html 20

Staff, *Lawsuit challenges constitutionality of Montana’s new Marsy’s Law*, Bozeman Daily Chronicle (Jun. 20, 2017), *available at:* https://www.bozemandailychronicle.com/news/crime/lawsuit-challenges-constitutionality-of-montana-s-new-marsy-s-law/article_b9f4b9b4-600c-5227-842f-55a336c9d849.html..... 11

Staff, *Venice daycare worker charged with child abuse*, Sarasota Herald Tribune (Feb. 1, 2019), *available at:* <https://www.heraldtribune.com/news/20190201/venice-daycare-worker-accused-of-child-abuse>..... 18

U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018, *available at:* <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#> 12

U.S. Census Bureau, Quick Facts, Carbon County, Pennsylvania, *available at:* <https://www.census.gov/quickfacts/carboncountypennsylvania> (last visited Dec. 11, 2019). Carbon County ranks 40th out of 67 Pennsylvania counties in total population. *See* Population of Counties in Pennsylvania (2019), *available at:* <http://worldpopulationreview.com/us-counties/pa/> 10

U.S. Census Bureau, Quick Facts, Lewis and Clark County, Montana, *available at:* <https://www.census.gov/quickfacts/lewisandclarkcountymontana> 10

I. THE INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in the scope and implementation of Marsy’s Law and related victims’ rights constitutional amendments. NACDL has members in each state in which Marsy’s Law currently operates, and affiliate organizations in all but one of those states. As explained herein, Marsy’s Law threatens the even-handed and efficient administration of criminal justice. It also undermines longstanding constitutional protections for persons accused of crimes. Thus, it

directly affects NACDL members, the system within which they work, and the clients they serve.

II. SUMMARY OF ARGUMENT

In November 2019, Pennsylvania residents voted on a ballot question that would add a sprawling Victim’s Bill of Rights known as Marsy’s Law to the Commonwealth’s Constitution. Voters were confronted with a vague and misleading ballot question that asked them whether they wanted to treat victims with “fairness, respect, and dignity,” and told them only that the amendment would “grant certain rights to crime victims.” In the absence of concrete information about what the amendment would do, voters could not evaluate the burdens it would impose on the administration of justice, criminal defendants, and law enforcement.¹

The dramatic impact that Marsy’s Law would have on Pennsylvania’s criminal justice system is not mere speculation. Other states have adopted nearly identically vague and broad constitutional amendments, which have resulted in substantial harm not only to criminal defendants, but also to the administration of the criminal justice system. Bail and parole hearings are delayed or canceled. Courts have to spend hundreds of thousands or millions of dollars to hire additional staff.

¹ Even had voters received that information, they could not have chosen to enact rights that would impose lesser burdens while rejecting those that would impose greater ones; the ballot question conglomerated distinct rights into a single question.

Law enforcement has been hampered in its ability to investigate crime. To better inform this Court about the impact that Marsy's Law would have in Pennsylvania, this amicus brief summarizes the substantial burdens that Marsy's Law has imposed in other states where it has gone into effect. Indeed, the myriad impacts show that Marsy's Law has a substantive effect on more than one part of the Pennsylvania Constitution.

III. ARGUMENT FOR AMICUS CURIAE

A. Introduction

Marsy's Law was born from a moment of intense, almost cinematic, trauma. In 1983, then-graduate student Henry Nicholas's younger sister, Marsalee, or "Marsy," was shot and killed² by a jealous ex-boyfriend, who was subsequently arrested and jailed.³ On the way home from Marsy's funeral, her mother stopped at a local market. To her horror, she came eye-to-eye with her daughter's killer at the checkout counter.⁴ The authorities had not told the family he had bonded out of jail pending disposition of the case.

² Marsalee Nicholas's ex-boyfriend, Kelly Connolly, was convicted of second-degree murder for the shooting in 1985. *Editorial: Problematic Marsy's Law Amendment Is Not the Solution*, Valley News (Feb. 17, 2018), available at: <https://www.vnews.com/Editorial-Marsy-s-Law-15499390> (last visited Dec. 5, 2019).

³ Michael Rothfeld, *Prop. 9 Would Give Crime Victims a Stronger Voice*, L.A. Times (Oct. 23, 2008), available at: <https://www.latimes.com/archives/la-xpm-2008-oct-23-me-victims23-story.html> (last visited Dec. 7, 2019).

⁴ Marsy's Law For All, About Marsy's Law, https://www.marsyslaw.us/about_marsys_law (last visited Dec. 7, 2019).

Thirty-six years later, Nicholas has spent more than a decade and substantial personal wealth⁵ on efforts to enshrine Marsy’s Law in jurisdictions across the country. The law, versions of which are currently part of ten state Constitutions,⁶ does far more than ensure that victims or their families are notified when their alleged assailants are released from custody. Instead, it establishes a comprehensive – and vaguely worded – “victim’s bill of rights,” which adds to state constitutions nebulous concepts like victims’ due process; respect for victims’ safety, dignity and privacy; and reasonable protection from the accused. It also gives victims the rights: (1) to refuse discovery requests from or made on behalf of the accused; and (2) to participate in practically any criminal proceeding aside from – at least in some states – those held before the grand jury. These rights generally apply no matter the severity or type of crime, and to any “victim,” whether natural person, business entity, or otherwise.

If enacted, Marsy’s Law would add the following section to the Pennsylvania Constitution:

⁵ See, e.g., Carter Coudriet, *Billionaire-Backed “Marsy’s Law” Ballot Measures Pass in Six States, Thanks to \$72 Million*, *Forbes* (Nov. 7, 2018), available at: <https://www.forbes.com/sites/cartercoudriet/2018/11/07/billionaire-sponsored-marsys-law-for-victims-rights-passes-in-six-states-thanks-to-72-million-push/#7d913a305b7c> (last visited Dec. 12, 2019).

⁶ The states are California, Florida, Georgia, Illinois, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, and South Dakota.

§ 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;

[to] full and timely restitution from the person or entity convicted for the unlawful conduct;

[to] 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.

A Joint Resolution Proposing an Amendment to the Constitution of the Commonwealth of Pennsylvania, Providing for Rights of Victims of Crime, H.B. 276 (2019-20).

These sweeping amendments, most of which are unmoored to the trauma that befell the Nicholas family almost four decades ago, have wreaked havoc on the administration of justice in states where the law has been enacted. Here in Pennsylvania, voters lacked fair notice of the consequences likely to affect the Commonwealth, as they have other Marsy's Law jurisdictions, because the ballot

question posed to the electorate did not contain the text of the law.⁷ Instead, it presented a vague and incomplete description of the law and its effects. For that reason and for those stated in Petitioner’s brief as well as the *amicus* brief filed by the Pennsylvania Association of Criminal Defense Lawyers, the Court should declare Marsy’s Law unconstitutional. By so holding, the Court would spare Pennsylvania the fallout that has hampered the administration of justice in other Marsy’s Law jurisdictions.

B. The right “to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct” has cost counties and states millions of dollars and impaired the administration of justice.

1. Marsy’s Law states have struggled to deal with the financial impact of the notice provision.

The primary cost driver of Marsy’s Law is the requirement that all “victims,”⁸ whether individuals, businesses, or other entities, be given timely notice of criminal proceedings. The Administrative Office of the Courts of North Carolina, where the

⁷ The ballot question read:

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?

⁸ Problematically, Marsy’s Law refers to “victims” even in a pre-trial posture where no defendant has been convicted of a crime. This means that its provisions arguably apply from the time police receive a report of wrongdoing. That broad applicability further drives the financial and other burdens it imposes.

amendment was passed in 2018, estimated that compliance would cost the state courts \$16.4 million in fiscal year 2018-19 and \$30.5 million annually in subsequent years just to hire additional district attorney staff to give the required notice to alleged victims.⁹

The State of South Dakota, where the law was enacted in 2016, had to implement a \$5 million notification system to comply with the notice provision. The unexpectedly high price tag compelled legislators to seek repeal of the law through the state's constitutional amendment process.¹⁰

North Dakota, which also passed a Marsy's Law amendment in 2016, spent \$800,000 to update its own victims' notification system, according to Aaron Birst, the Executive Director of the North Dakota State's Attorneys Association. The state expected to spend additional money to hire personnel to notify alleged victims and their families of court appearances.¹¹

⁹ North Carolina Administrative Office of the Courts, Judicial Branch Fiscal Note (Feb. 8, 2017), *available at*: <http://pulse.ncpolicywatch.org/wp-content/uploads/2018/06/Confidential-AOC-fiscal-note.pdf> (last visited Dec. 11, 2019).

¹⁰ Kelly Smith, *Marsy's Law passed in 6 states, South Dakota on track to repeal it*, KSFY.com (Jan. 26, 2018), *available at*: <https://www.ksfy.com/content/news/Marsys-Law-passed-in-6-states-South-Dakota-on-track-to-repeal-it-471383263.html> (last visited Dec. 6, 2019).

¹¹ Michael Lyle, *Marsy's Law: Sounds good, but is it?*, Nevada Current (Aug. 31, 2018), *available at*: <https://www.nevadacurrent.com/2018/08/31/marsys-law-sounds-good-but-is-it/> (last visited Dec. 7, 2019).

Enactment in Montana, whose Supreme Court invalidated the law in 2017 before implementation, was slated to cost much as \$95,000 in more populous counties such as Lewis and Clark County.¹² Of course, what is “populous” in Montana is not so in Pennsylvania. Lewis and Clark County, where the state capital Helena sits, had an estimated population of 68,700 in 2018.¹³ The number of residents there is comparable to that in smaller Pennsylvania counties, such as Carbon County, with its 64,277 residents.¹⁴ Montana counties were prepared to hire victim-support staff and additional prosecutors and print Marsy’s Law cards to hand out to victims, and, consequently, to push for tax increases to deal with the law’s burdens.¹⁵

The \$95,000 price tag was enough to compel the lead prosecutor of Lewis and Clark County to lead a lawsuit that successfully overturned the law. As County

¹² Holly K. Michels, *Challenge to Marsy’s Law*, Montana Newspapers Association (Jun. 21, 2017), available at: <https://www.mtnewspapers.com/challenge-to-marsys-law/> (last visited Dec. 7, 2019).

¹³ U.S. Census Bureau, Quick Facts, Lewis and Clark County, Montana, available at: <https://www.census.gov/quickfacts/lewisandclarkcountymontana> (last visited Dec. 11, 2019).

¹⁴ U.S. Census Bureau, Quick Facts, Carbon County, Pennsylvania, available at: <https://www.census.gov/quickfacts/carboncountypennsylvania> (last visited Dec. 11, 2019). Carbon County ranks 40th out of 67 Pennsylvania counties in total population. See Population of Counties in Pennsylvania (2019), available at: <http://worldpopulationreview.com/us-counties/pa/> (last visited Dec. 12, 2019).

¹⁵ Staff, *Lawsuit challenges constitutionality of Montana’s new Marsy’s Law*, Bozeman Daily Chronicle (Jun. 20, 2017), available at: https://www.bozemandailychronicle.com/news/crime/lawsuit-challenges-constitutionality-of-montana-s-new-marsy-s-law/article_b9f4b9b4-600c-5227-842f-55a336c9d849.html (last visited Dec. 4, 2019).

Attorney Leo Gallagher explained, the cost of compliance with Marsy’s Law would force him “to make the impossible choice between seeking justice for all Montanans and enforcing long-standing constitutional protections or serving the narrow, competing interests of Marsy’s Law’s newly expanded pool of victims harmed or allegedly harmed by even the most petty of offenders.”¹⁶

Pennsylvania has 12.81 million residents — nearly five times the population of North Dakota (760,077), Montana (1.062 million), and South Dakota (882,235) combined.¹⁷ Thus Pennsylvania’s costs of compliance should be expected to dwarf the costs in those states.

Moreover, Pennsylvania presently lacks the systems that implementing Marsy’s Law would require. For example, the automated victim notification system currently in place, PA SAVIN, informs victims — identified as such upon the conviction of an offender — only of an offender’s release, transfer, or escape.¹⁸

¹⁶ Michels, *Challenge to Marsy’s Law*.

¹⁷ U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018, *available at: <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#>* (last visited Dec. 11, 2019).

¹⁸ *See* PA Crime Victims, Registration for Offender Release Notification, <https://pcv.pccd.pa.gov/available-services/Pages/Register-for-Offender-Release-Notification.aspx> (last visited Dec. 12, 2019).

Pennsylvania has no system for tracking *alleged* victims and notifying them of pertinent proceedings. *See* n.8, above.

2. The docket congestion caused by the notice provision has caused intolerable delays in proceedings to the profound detriment of criminal defendants.

Notifying *all* alleged victims, including business entities and victims of petty offenses, of *all* proceedings costs not only money but also time. Marsy's Law states report that hearings are routinely delayed because of the time it takes to notify alleged victims. The issue is particularly acute in the context of bail hearings, where defendants are forced to sit in jail for additional days, or even weeks, while prosecutors' offices attempt to fulfill the law's onerous notification requirements.¹⁹ This burden is shared among defendants, prosecutors, and the courts.

A NACDL member reports waiting five-to-six weeks for hearings on bond motions in Bay County, Florida, where Marsy's Law was implemented in 2018. When the hearings finally commence, and the court asks whether the alleged victim has received notice, the prosecution often says it does not know, triggering a continuance of the hearing.

California was the first state to codify Marsy's Law, in 2008. There, in large municipalities like Los Angeles and San Diego, prosecutors address the burden by

¹⁹ Mark Walker, *Lawyers say Marsy's Law is forcing clients to sit in jail*, Argus Leader (Nov. 29, 2016), available at: <https://www.argusleader.com/story/news/2016/11/29/lawyers-say-marsys-law-forcing-clients-sit-jail/94554106/> (last visited Dec. 7, 2019).

prioritizing seriously injured alleged victims and the family members of those killed. In other cases, they go to the formality of mailing information to alleged victims, but concede it is unlikely that the information provides “timely notice” of initial appearances.²⁰ Picking and choosing victims creates a state-imposed hierarchy, where residents are treated disparately based on criteria determined by individual prosecutors’ offices. And victims who did not receive notice may seek a rehearing of proceedings they missed, a remedy to which they would be entitled under the amendment.

Marsy’s Law also raises questions that states, and even individual counties, have not answered consistently. As noted by one Florida publication, those questions include: “What will courts do if the victims are not available for the court date? . . . Will Marsy’s Law force the courts to coordinate their proceedings with the victims’ schedules? What if a victim doesn’t have the ability to take time off from work to appear for a case” or the resources to travel to court proceedings?²¹ The result has been inconsistent and haphazard implementation from court to court.

²⁰ Beth Schwartzpfel, *The Billionaire’s Crusade*, The Marshall Project (May 22, 2018), available at: <https://www.themarshallproject.org/2018/05/22/nicholas-law> (last visited Dec. 9, 2019).

²¹ C.D. Davidson-Hiers, *What is going on in Amendment 6’s “Marsy’s Law?”*, Florida Phoenix (Sept. 14, 2018), available at: <https://www.floridaphoenix.com/2018/09/14/what-is-going-on-in-amendment-6s-marsys-law/> (last visited Dec. 8, 2019).

In Pennsylvania, the answers – which cannot be intuited from the vaguely worded constitutional amendment – will help determine how heavily Marsy’s Law burdens the judicial system and criminal defendants. In any event, the effect will be felt. Last year saw 156,546 criminal cases and 17,984 juvenile delinquency cases filed in Courts of Common Pleas; 208,138 criminal cases, 38,379 private summary complaints, and 1.57 million traffic cases filed in Magisterial District Courts; and 32,296 felony or misdemeanor cases and 9,732 summary offense cases filed in Philadelphia Municipal Court. In total, that makes for 2 more than million cases with potential victims, and Marsy’s Law does not distinguish among them.²² With such a large volume of cases impacted by the notice provisions, it is certain that defendants and the courts will experience justice delayed in even minor criminal matters.

C. The right “to reasonable protection from the accused or any person acting on behalf of the accused” has led to absurd results in pretrial release decisions.

As with most provisions in Marsy’s Law, the vagueness of the right at issue – to “reasonable protection” from the accused or his agents – leaves a wide berth for interpretation. In Nevada, where voters approved Marsy’s Law in 2018, one court read the law to require the displacement of a releasee. The court found that an accused burglar, Will Kernan, posed so little danger to the community or risk of

²²2018 Caseload Statistics of the Unified Judicial System of Pennsylvania, *available at*: <http://www.pacourts.us/assets/files/setting-768/file-8222.pdf?cb=2e094c> (last visited Dec. 8, 2019).

flight that it released him on his own recognizance. However, the court would not let Keenan return to his home because it was next door to that of the alleged victim. Kernan was instead required to live with his son.²³ It is inherently inconsistent to find, in essence, that the community does not need protection from a defendant but an individual community member does. Moreover, such a finding could profoundly disadvantage an accused person — presumed innocent — whose work or school may be close to his residence but far from an alternative residence deemed “safer” for the alleged victim. Indeed, had Kernan not had family in the same jurisdiction, or somewhere else to stay, he may not have been released at all.

The right to “reasonable protection” raises additional questions, such as whether courthouses must be reconfigured to separate alleged victims from defendants and, if so, how the renovations will be funded. If, for example, courts must have separate waiting rooms for the accused and their accusers, Marsy’s Law could create additional unforeseen economic impact.²⁴

²³ Kim Burrows, Marsy’s Law: Good Intentions but court concerns, MyNews4.com (Dec. 20, 2018), *available at*: <https://mynews4.com/news/local/marsys-law-good-intentions-but-court-concerns> (last visited Dec. 8, 2019).

²⁴ *Id.*

D. The right to “full and timely restitution” will take money from the courts.

Because crime victims are already entitled to full restitution under various statutes, Marsy’s Law does not create a right to restitution. Instead, it arguably prioritizes the victim’s right to restitution over the government’s access to fines and the court’s access to costs.

California’s version of Marsy’s Law specifies, for example, that “all monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim.” Cal. Const. Art. I, § 28(b)(13)(C). The result is that payment of court costs is deferred, perhaps indefinitely, as many defendants struggle to meet their financial obligations. In Pennsylvania, fee revenue has funded a portion of the judiciary’s annual budget since 2009. Presently, fees and costs account for approximately 12.4% of the total.²⁵

A reduction in resources necessarily affects court-funded programs.²⁶ Here in Pennsylvania, a reduction in fines and costs received could impact the administration

²⁵ Judicial Budget Request 2018-2019, *available at*: <http://www.pacourts.us/judicial-administration/budget/judicial-budget-request-2018> (last visited Dec. 9, 2019).

²⁶ Kim Burrows, Marsy’s Law: Good Intentions but court concerns, MyNews4.com (Dec. 20, 2018), *available at*: <https://mynews4.com/news/local/marsys-law-good-intentions-but-court-concerns> (last visited Dec. 8, 2019).

of Pennsylvania’s problem-solving courts, or, ironically, leave less money for programs designed to benefit crime victims.²⁷

E. The codification of “respect for the victim’s . . . privacy” and the right “to reasonable protection from the accused” has made it more difficult for law enforcement to solve crime and left the public lacking critical information about criminal activity.

Under Marsy’s Law, as implemented in other states, alleged victims can keep any potentially identifying details from the public domain. This right extends well beyond the individual’s name and includes information about the location of the offense. In Sarasota County, Florida, Marsy’s Law prevented the Sheriff’s Office from releasing the name of a daycare where a worker was arrested on charges of child abuse.²⁸ In Fort Myers, Florida, a woman who had been attacked in her home while sleeping, invoked her right to privacy under Marsy’s Law. As a result, police could not publicize a sketch of the offender, who was still at large, or other details of the offense.²⁹ The withholding of critical information left residents of the victim’s

²⁷ Judicial Budget Request 2018-2019, *available at*: <http://www.pacourts.us/judicial-administration/budget/judicial-budget-request-2018> (last visited Dec. 9, 2019).

²⁸ Staff, *Venice daycare worker charged with child abuse*, Sarasota Herald Tribune (Feb. 1, 2019), *available at*: <https://www.heraldtribune.com/news/20190201/venice-daycare-worker-accused-of-child-abuse> (last visited Dec. 8, 2019).

²⁹ Editorial Board, *Inconsistent Marsy’s Law interpretations by police jeopardize public knowledge and safety*, Orlando Sentinel (Jun. 14, 2019), *available at*: <https://www.orlandosentinel.com/opinion/editorials/os-op-marsys-law-victims-police-withhold-information-20190614-5c2fu7q66fh5fkhdkladldhiva-story.html> (last visited Dec. 7, 2019).

neighborhood – wherever it was – vulnerable to further offenses and hampered law enforcement’s investigation of a violent crime.

States have struggled to balance the privacy provisions of Marsy’s Law with the public’s right to know and law enforcement’s need to function effectively. In Florida, state and local agencies interpret the law inconsistently. “It’s the wild West, with some agencies asking crime victims or relatives if they want to remain unnamed, while others leave it to the victims to bring it up. Some agencies are releasing the very information that others are withholding.”³⁰

In Sioux Falls, South Dakota, police no longer identify crime locations by address, instead stating that offenses occurred in one of 17 “beats.” Moreover, the South Dakota Department of Public Safety no longer publishes state motor vehicle accident reports, based on the mere possibility that a crime may be charged.³¹ Perhaps most troublingly, South Dakota sheriffs’ offices have stopped asking for the public’s help in solving crimes to avoid the disclosure of information that could be used to identify alleged victims.³²

³⁰ *Id.*

³¹ Jonathan Peters, *Unintended consequences of new crime victims’ bill of rights*, Columbia Journalism Review (Dec. 12, 2016), available at: https://www.cjr.org/united_states_project/marsys_law_public_records.php (last visited Dec. 8, 2019).

³² Andrew Wolfson, *Marsy’s Law could have unintended consequences for crime victims*, Louisville Courier Journal (Nov. 4, 2018), available at: https://www.kentuckynewera.com/news/ap/article_4f586d42-df07-11e8-a2e5-57ed0bc7ebfb.html (last visited Dec. 9, 2019).

Marsy's Law has also provided cover for law enforcement officers who use lethal force in the line of duty. In South Dakota, at least two officers who discharged their weapons at citizens invoked their right to privacy under Marsy's Law, claiming that they were attacked first.³³ An investigation conducted by the *Grand Folks Herald* revealed that at least eight North Dakota officers claimed the privacy protections of Marsy's Law between November 2016 and July 2018.³⁴

Contrary to the ostensible purpose of Marsy's Law, protecting the identities of law enforcement officers who kill or wound on duty undermines public safety and infringes on the rights of the individuals killed or wounded. The Cato Institute's Jonathan Blanks, a research associate specializing in criminal justice, race, and policing, worries that conferring victims' rights upon law enforcement officers will exacerbate the secrecy of police departments and unions that try to shield their operations from the public, "particularly when [those operations are] controversial or potentially illegal." As officers act in the name of the public when on duty,

³³ Seth Tupper, *Marsy's Law shields name of deputy who shot suspect*, Rapid City Journal (Dec. 7, 2018), available at: https://rapidcityjournal.com/news/local/marsy-s-law-shields-name-of-deputy-who-shot-suspect/article_789f446f-c936-51fd-ad39-75f1e8d601a3.html (last visited Dec. 9, 2019).

³⁴ April Baumgarten, *Marsy's Law often invoked to withhold officers' names*, Grand Forks Herald (Jul. 22, 2018), available at: <https://www.grandforksherald.com/news/crime-and-courts/4475423-marsys-law-often-invoked-withhold-officers-names> (last visited Dec. 9, 2019).

information concerning incidents where officers use lethal force “must be public,” Blanks opines.³⁵

IV. CONCLUSION

Marsy’s Law arose from the understandable despair of the family members of a homicide victim. Instead of addressing the narrow circumstance that traumatized the Nicholas family, it enacts a sprawling litany of victims’ rights that, unsurprisingly, produce grave unintended consequences in the states where Marsy’s Law stands. For the reasons stated in Petitioner’s brief and the amicus curiae brief of the Pennsylvania Association of Criminal Defense Lawyers, the Court should decline to permit the same outcomes to upset the administration of justice in Pennsylvania.

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³⁵ Matthew Harwood, *Marsy’s Law Is a Gift to Bad Cops*, Reason (Mar. 18, 2019), available at: <https://reason.com/2019/03/18/marsys-law-is-a-gift-to-bad-cops/> (last visited Dec. 7, 2019).

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify pursuant to Pa. R. App. P. 127 that this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* (eff. 1/5/2018) that require filing of confidential information and documents differently than non-confidential information and documents.



**CERTIFICATE OF COMPLIANCE
WITH WORK-COUNT LIMIT**

I certify pursuant to Pa. R. App. P. 531(b)(3), that this Brief contains no more than 4326 words, including footnotes, which is less than the allowable 7000 words.

