

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**NO. 4 MAP 2021**

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**LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA; AND  
LORRAINE HAW**

**v.**

**VERONICA DEGRAFFENREID, ACTING SECRETARY OF THE  
COMMONWEALTH,**

**APPEAL OF: SHAMEEKAH MOORE, MARTIN VICKLESS, KRISTIN JUNE  
IRWIN AND KELLY WILLIAMS**

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**BRIEF OF *AMICUS CURIAE* PENNSYLVANIA NEWSMEDIA ASSOCIATION  
IN SUPPORT OF LEAGUE OF WOMEN VOTERS AND LORRAINE HAW**

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

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## **INTEREST OF AMICUS CURIAE**

The Pennsylvania NewsMedia Association (“PNA”) is a Pennsylvania nonprofit corporation with its headquarters located in Harrisburg, Pennsylvania. The Association represents the interests of over three hundred (300) daily and weekly newspapers, print, digital and other media organizations across the Commonwealth, in ensuring that the press can gather information and report to the public. A significant part of the Association’s mission is to defend the media’s statutory and constitutional rights of access to records and proceedings in Pennsylvania. No party, person or entity other than the Amicus Curiae financed or authored this brief.

The present case raises important issues regarding public access to judicial records and proceedings under the United States and Pennsylvania Constitutions, including the requirements for open courts and the applicable standards governing closure. If this Court were to adopt the position of the Appellants in this case, it would directly impact the press’ and public’s ability to access judicial records and proceedings pursuant to constitutional open court guarantees.

PNA seeks to participate pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure to stress the legal and policy considerations that mandate an interpretation of the Pennsylvania constitutional requirements in favor of open courts and meaningful public access.

## SUMMARY OF THE ARGUMENT

The creation of a constitutional right to privacy in court proceedings for crime victims under the Marsy's Law amendment raises concerns for the public and for media organizations that routinely attend and report on criminal court records and proceedings. The United States and Pennsylvania Constitutions, as well as common law<sup>1</sup>, provide presumptive public access to judicial records and proceedings, many of which include information that implicates victim privacy. The new constitutional privacy rights to be enshrined under Marsy's Law fundamentally affect the constitutional requirements for open courts, including public access to judicial records and proceedings, and as a result, the Marsy's Law amendment directly affects Article I, § 11 of the Pennsylvania Constitution and the First Amendment of the United States Constitution, which is mirrored in Article I, § 7<sup>2</sup> of the Pennsylvania Constitution. Based on the experience of other states that have adopted

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<sup>1</sup> *Amicus curiae* limits the focus of this brief to the Constitutional issues before this Court but notes that this Court has recognized a common law right to access public judicial records in addition to the rights afforded under the Constitution. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (Pa. 1987). The existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1066 (3<sup>rd</sup> Cir.1984) quoting *United States v. Criden*, 648 F.2d 814, 819 (3d Cir.1981). Adopting the reasoning of the United States Supreme Court, this Court explained that "members of the public have an interest in observing criminal justice processes to be assured that offenses perpetrated against them are dealt with in a manner that is fair to their interests and fair to the interests of the accused. *Fenstermaker*, 530 A.2d at 417.

<sup>2</sup> Pennsylvania jurisprudence governing the constitutional right to access court records and proceedings focuses on Article I, § 11 and the First Amendment of the United States, and as such, this brief will not address the rights afforded the press under Article I, § 7 other than to note the Marsy's Law victim privacy right could also affect the press' Article I, § 7 right to gather and report information about crime victims.

Marsy's Law, the newly created privacy right will fundamentally impact the public's right to access and understand the workings of the criminal justice system and the public access rights enshrined in Article I, § 11 and the First Amendment.

Because the proposed amendment affects constitutional rights enshrined in separate provisions of the Constitution, the amendment runs afoul of Article XI, § 1 of the Pennsylvania Constitution, which governs the amendment process and requires amendments to be voted on separately.

### **ARGUMENT**

Since the nation's inception, the public has enjoyed a right to observe the functioning of the judicial system. In fact, the tradition of public access to criminal trials pre-dates the United States' Constitution, and this tradition helped shape the First Amendment rights that form the cornerstone of our democracy. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 596 (1980). These rights serve many important interests, not least of which are promoting fairness and equality in the judicial process and fostering trust in the judicial system. The right of public access, and the important public policy interests that underlie it, are directly affected by the Marsy's Law amendment.

#### **I. The Marsy's Law amendment runs afoul of Article XI, § 1.**



As the League of Women Voters correctly notes, the Marsy’s Law amendment raises issues under Article XI, § 1 of the Pennsylvania Constitution because it affects more than one provision of the Pennsylvania Constitution, both on its face and in its application. Article XI, § 1 mandates that “[w]hen two or more amendments shall be submitted they shall be voted upon separately.” Pa. Const. art. XI, § 1. Article XI, § 1’s separate vote requirement must be strictly applied. Bergdoll v. Kane, 731 A.2d 1261, 1270 (Pa. 1999). Because Article XI, § 1 “provid[es] a complete and detailed process for the amendment of th[e Constitution] . . . [n]othing short of a literal compliance with this mandate will suffice.” *Id.* at 1270 (quoting Kremer v. Grant, 606 A.2d 433, 436, 438 (Pa. 1992)).

This Court has interpreted Article XI, § 1 to require specific analysis of an amendment’s “substantive effect” on the Constitution by examining its “content, purpose, and effect”. Grimaud v. Commonwealth, 865 A.2d 835, 842 (Pa. 2005). This Court in Grimaud further reasoned that “[t]he test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments facially affect other parts of the Constitution. . . .”. Grimaud at 842. This Court further held that when evaluating the ballot question “[T]he question is whether the single ballot question patently affects other constitutional provisions”. *Id.*

Reviewing the Marsy's Law amendment along with concomitant rights enumerated in the Pennsylvania Constitution shows that Marsy's Law does, in fact, affect other constitutional provisions. The most relevant to *Amicus Curiae* is Article I, § 11 and the press' First Amendment rights enshrined under the United States Constitution. *Amicus Curiae* does not take a position on the potential interplay of the competing constitutional rights under Article I, § 11 and Marsy's Law or a standard to address their apparent conflict. *Amicus* limits its analysis to the fact that the proposed Marsy's Law right to privacy for certain participants in criminal proceedings directly affects the public's and press' right to access judicial records and proceedings guaranteed under separate provisions of the Pennsylvania and United States Constitutions, thus triggering Article XI, § 1.

**II. The Marsy's Law right to privacy affects Article I, § 11 and the Constitutional requirement for open courts.**

The Marsy's Law amendment will add numerous new rights to the Pennsylvania Constitution, at least one of which directly affects the rights guaranteed by Article I, § 11 of the Pennsylvania Constitution and by extension, the First Amendment to the United States Constitution. The Marsy's Law amendment states:

“§ 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*.”

Joint Resolution No. 2019-1(a), *emphasis added*.

Further, the Attorney General’s Plain English Statement explaining the ballot question states:

“Specifically, the proposed amendment would establish the following *new* rights for victims:

- To be treated with fairness and respect for the victim's safety, dignity and *privacy*...”

Attorney General’s Plain English Statement, *emphasis added*.

This right to privacy in criminal proceedings directly affects the public’s right to access judicial records and proceedings that involve victims. The right, as written, is vague and amorphous, and the Resolution vests with the General Assembly the right to “further provide and ... define” the enumerated rights. *Id.* It remains to be seen how the General Assembly would flesh out this newly created privacy right, but its practical application will be to limit or prohibit public access to victim information appearing in court records, to object to or prohibit public testimony during court proceedings, and to exclude the public from some or all criminal proceedings where victim information is involved.

These effects are already happening in other states where Marsy’s Law has been enacted, and there are numerous examples that illustrate its right to privacy

negatively impacting public access rights generally. For example, a sheriff's office in Wisconsin could "no longer include the names of victims, including businesses, in its daily list of incidents sent to news outlets." Mitchell Schmidt, *Law Enforcement, Open Records Advocates Differ on Marsy's Law Interpretation*, Wisconsin State Journal (Sept. 14, 2020) [https://madison.com/wsj/news/local/govt-and-politics/law-enforcement-open-records-advocates-differ-on-marsys-law-interpretation/article\\_590db983-fbc0-52af-8398-5daae7550cef.html](https://madison.com/wsj/news/local/govt-and-politics/law-enforcement-open-records-advocates-differ-on-marsys-law-interpretation/article_590db983-fbc0-52af-8398-5daae7550cef.html). The sheriff's office also stopped including a description of the incident, location, individuals involved, and any arrests because of its concerns about victim privacy. *Id.* As a result of Marsy's Law, the press, and by extension the public, only receives a note that an incident occurred, the city where it occurred, and the responding officers. Applying this interpretation to a city in Pennsylvania reveals the significant potential impact. For example, if the Philadelphia police investigated a kidnapping, they would only report that there was a kidnapping in Philadelphia responded to by officers, without providing any other information. In a city of well over a million people, encompassing over 130 square miles, this lack of information would put the public at a distinct disadvantage in understanding crime in their community and law enforcement's response thereto. It would also interfere with the public's ability to protect themselves from ongoing threats and to help law enforcement by providing tips and relevant information. This situation could play out in municipalities large

and small across the Commonwealth as individual interpretations of Marsy's Law are applied, leading to a patchwork of access across the state.

In addition to limits on access to victim and basic criminal incident information, Marsy's Law has also been used to deny access to information about *perpetrators* of a crime. For example, a sheriff in Florida refused to provide the name of a daycare center where a daycare worker was charged with child abuse, citing Marsy's Law as justification. Sara Nealeigh, *Daycare Worker Charged with Child Abuse After Cops Say Video Shows Her Dragging Children*, Bradenton Herald (Feb. 1, 2019), <https://www.bradenton.com/news/local/crime/article225403655.html>

Similarly, another sheriff in Florida refused to release the name of the school where a teacher accused of child molestation was an instructor. Vic Micolucci, *Jacksonville Private School Teacher Denies Molesting Student*, News4Jax (Feb. 18, 2021), <https://www.news4jax.com/news/local/2021/02/18/jacksonville-private-school-teacher-denies-molesting-student/>. These interpretations illustrate how Marsy's Law is already being interpreted broadly and in a manner that reaches information tangential to victims but critical to maintaining public safety and accountability in the criminal justice system.

Marsy's Law has also been used to shield the names of law enforcement officers who injure suspects or use deadly force on the job. For example, the names of police officers who shot suspects or used force in the line of duty in Florida have

been withheld because of the Marsy's Law right to victim privacy. Tony Marrero, *Florida Cops who Use Force Keep Names Secret with Marsy's Law*, Tampa Bay Times (Feb. 6, 2020), <https://www.tampabay.com/news/2020/02/06/florida-cops-who-use-force-keep-names-secret-with-marsys-law/>; Dennis Joyce, *Tampa Police Justified in Shootings Where Two Men Were Injured, Review Finds*, Tampa Bay Times (Mar. 3, 2021), <https://www.tampabay.com/news/crime/2021/03/03/tampa-police-justified-in-shootings-where-two-men-were-injured-review-finds/>.

Similar limits on public access are playing out across states that have enacted Marsy's Law, with law enforcement agencies using the law to shield officer identities in Florida, North Dakota, and South Dakota. Kenny Jacoby & Ryan Gabrielson, *Marsy's Law Was Meant to Protect Crime Victims. It Now Hides the Identities of Cops Who Use Force*, USA Today (Oct. 29, 2020), <https://www.usatoday.com/in-depth/news/investigations/2020/10/29/police-hide-their-identities-using-victims-rights-bill-marsys-law/3734042001/>

In addition to law enforcement agencies applying Marsy's Law in this manner, a Florida appellate court recently held that Marsy's Law prohibits public access to the names of law enforcement officers who use deadly force in the line of duty in response to a threat. Scott Shackford, *Florida Cops Use a Victims' Rights Law To Conceal Their Names*, Reason (April 7, 2021) <https://reason.com/2021/04/07/florida-cops-use-a-victims-rights-law-to-conceal->

[their-names/](#); Fla. Police Benevolent Ass'n v. City of Tallahassee, No. 1D20-2193, 2021 Fla. App. LEXIS 4760 (Dist. Ct. App. Apr. 6, 2021).

These limits on public access negatively impact or outright prohibit the public's ability to access information about law enforcement actions and hold public officials accountable. Similar interpretations of Marsy's Law applied in Pennsylvania would directly conflict with official policies that require certain information to be released after officer-involved shootings. For example, a Philadelphia Police Department policy governing the use of force involving firearms is grounded in transparency and provides public access to the officer's name, years of service, assignment and duty status within 72 hours of an officer-involved shooting. Philadelphia Police Department Directive 10.1, § 9 (A), <https://www.phillypolice.com/assets/directives/D10.1.pdf>. And while the Philadelphia policy is not enshrined in statute, a Marsy's Law right to victim privacy could preclude the General Assembly from enacting such a law.

Importantly, states that have enacted Marsy's Law are also considering limits on public access to judicial records to conform with the amendment. For example, multiple stakeholders in Florida are contending with how to administer Marsy's Law while minding public access requirements that attach to judicial records. A task force of county clerks in Florida met to decide how to administer Marsy's Law and proposed, among other things, changes to court record policies authorizing clerks to

redact victim information from court documents, allow filers to use generic indicators, such as “Victim 1,” to identify victims, create more complex rules for accessing records, and enable robust redaction tools. Kathy Leigh Berkowitz, *Changes proposed in Florida for Marsy’s Law*, The Ledger (Nov. 4, 2019), <https://www.theledger.com/news/20191104/changes-proposed-in-florida-for-marsys-law>. As a result of the task force, and subsequent discussions involving the Florida Bar’s Rules of Judicial Administration Committee and Ad Hoc Joint Subcommittee, a report proposing new Florida Rule of Judicial Administration 2.423 (“Marsy’s Law’ Crime Victim Information Within Court Filing”) was submitted to the Florida Supreme Court. The proposed new rule would impose confidentiality on a broad range of information in judicial records, and it addresses the obligations of court personnel to redact such information and for record-filers to identify it prior to filing. See Proposed Florida Rule of Judicial Administration 2.423, available at <https://www-media.floridabar.org/uploads/2020/03/Rule-2.423-For-Extended-Publication.pdf>.

This proposed rule demonstrates that other states are actively considering limits and prohibitions on public access to judicial records based on Marsy’s Law, further illustrating the nexus between law enforcement records and judicial records and public access to both. This is a foreseeable consequence of the proposed right to victim privacy enshrined in Marsy’s Law.



It is reasonable to conclude that similar interpretations, limits on public access and proposed court rules would arise in the Commonwealth under Marsy's Law, further demonstrating the proposed amendment's impact on public access rights enshrined under Article I, § 11 and the First Amendment. Judicial records and proceedings, including those that involve victim information, are presumptively public under Article I, § 11 and the First Amendment, and as such, the proposed right to victim privacy under Marsy's Law directly affects the rights guaranteed under these separate constitutional provisions.

Further complicating the issue is the fact that the ballot question did not address the proposed right to victim privacy at all. The ballot question stated:

“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?”

Ballot Question for Joint Resolution 2019-1.

There was no mention in the ballot question about creating a victim right to privacy other than a generic reference to “certain rights” to be granted to crime victims. The fact that the ballot question did not contain a reference to a victim right of privacy and its potential effects on constitutional public access rights demonstrates that the Pennsylvania electorate did not have an opportunity to

consider the question of privacy as it relates to constitutional public access rights and therefore did not actually vote upon that question. Article XI, § 1 requires the electorate to be given the opportunity to understand the proposed right and its potential effect on the rights afforded under Article I, § 11 and that did not occur in this case.

The interplay between the constitutional provisions guaranteeing open courts and the proposed right to victim privacy could significantly impact the public's ability to access judicial records and proceedings and undermine the critical and constitutionally protected role that public access plays in the proper administration of justice. In light of the language of the proposed amendment, plain English statement, and the ballot question itself, it is clear that the amendment does not comply with the Article XI, § 1 single subject rule.

### **III. The United States and Pennsylvania Constitutions guarantee open courts.**

The reason this issue is so important is because of how central and fundamental access to the courts, including access to information about victims, is in our democracy. The United States and Pennsylvania Constitutions recognize the important role public access plays in the proper function of the criminal justice system, and accordingly, both guarantee public access to judicial records and

proceedings. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (Pa. 1987); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

Media organizations are the eyes and ears of the public, and they routinely access criminal court records and attend criminal court proceedings pursuant to these constitutional rights, and many of these records and proceedings include information about crime victims. The constitutional right to victim privacy proposed by Marsy's Law could fundamentally affect the public nature of judicial records and proceedings by enshrining a privacy right in the Pennsylvania Constitution in conflict with the constitutional rights to open courts under the United States and Pennsylvania Constitutions. This newly-created constitutional right to privacy could prevent the public and the press from accessing judicial records and attending criminal proceedings. The result would be a lack of information about crimes in our communities, which hampers the public's ability to address the accountability of public officials in myriad ways, including police who use deadly force – see the recent holding in Florida - or inquiring into charging and case clearing practices of law enforcement agencies and District Attorneys. Such limits on access to judicial records and proceedings and the resultant barriers to accountability are contrary to a centuries-old basic tenet of Anglo-American law.

**A. The First Amendment guarantees open courts.**

The United States Supreme Court held that the First Amendment provides the public and the press with a right of access to criminal trials. U.S. Const. amend. I; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980). The Court’s analysis focused on the historical right to attend criminal trials, with the Court noting that “throughout its evolution, the trial has been open to all who cared to observe.” *Id.* at 564. Two years after *Richmond Newspapers*, the Supreme Court decided *Globe Newspaper*, striking down a state statute that mandated closure during the testimony of minor victims in criminal trials involving certain sexual offenses. *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Adopting the two-part analysis in *Richmond Newspapers*, the Court confirmed that the public and the press have a First Amendment right of access to criminal trials rooted in the historically open nature of such proceedings and the benefits derived from openness. *Id.* at 605-06. A few years later, the Court extended the right of access beyond criminal trials to include the right to attend preliminary hearings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“Press-Enterprise II”).

**B. Article I, § 11 of the Pennsylvania Constitution guarantees open courts.**

Pennsylvania courts analyzing limits on the constitutional presumption of access to judicial records and proceedings must consider the First Amendment as well as the rights afforded under Article I, § 11 of the Pennsylvania Constitution, which provides:

“All courts shall be open; 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. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.”

Pa. Const. Art. I, § 11.

This Court has held that the public has a constitutional right to observe criminal proceedings under Article I, § 11. *Commonwealth v. Fenstermaker*, 515 Pa. 501, 530 A.2d 414 (Pa. 1987); see also *Commonwealth v. Contakos*, 499 Pa. 340, 344, 453 A.2d 578, 580 (1982)(noting “our virtually unbroken history of public trials and openness in criminal trials” in holding trial court erred in excluding public from courtroom during portions of criminal trial proceedings). This Court has not reached the exact issue of whether the Pennsylvania constitutional access rights are “co-extensive” with the rights guaranteed by the First Amendment, but there is no question that both the Pennsylvania and United States Constitutions provide the public and the press with a presumptive constitutional right to access judicial records and proceedings, many of which include information about victims. *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892, 904 n. 15, (Pa. 2007). And while this Court has also indicated that Article 1, § 11 does not provide “a greater right of access to the public in criminal trials than the public trial provision of the federal constitution,” the Pennsylvania Constitution certainly does not provide a lesser right of access. *Commonwealth v. Hayes*, 489 Pa. 419, 414 A.2d 318, 322 (Pa. 1980).

**C. Pennsylvania courts analyzing access questions consider the First Amendment constitutional analysis.**

When evaluating limits on access to judicial records and proceedings, Pennsylvania courts consider the test enunciated by the United States Supreme Court in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“Press Enterprise II”). In that case, the United States Supreme Court held that courts must determine whether the First Amendment right of access applies to a record or proceeding using the “experience and logic” test, and if so, whether closure is the least restrictive means of accomplishing a compelling interest. *Id.* The “experience” prong of the test requires the court to consider whether there has been a “tradition of accessibility” to the record or proceeding at issue. *Id.* The “logic” inquiry focuses on “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* Finally, the Court also required that “[t]he interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* at 510.

Pennsylvania courts apply this constitutional framework when adjudicating limits on public access to court records and proceedings under Pennsylvania law, including Article I, § 11. *Commonwealth v. Long*, 592 Pa. 42, 922 A.2d 892, 899-901 (Pa. 2007).

Pennsylvania law is rife with examples of this constitutional analysis in action, with courts repeatedly recognizing the public's right to access judicial records and proceedings that may involve victim information and implicate the privacy right proposed by Marsy's Law. In Commonwealth v. Fenstermaker, 515 Pa. 501, 530 A.2d 414 (Pa. 1987), this Court recognized a presumptive right to access arrest warrant affidavits, which must contain information sufficient to make a showing of probable cause and may include information about victims. *See also* Pa.R.Crim.P. 513, 513.1, governing public access to arrest warrants and supporting documentation.

Further, in Commonwealth v. Upshur, 592 Pa. 273, 924 A.2d 642 (Pa. 2007), this Court held the presumption of access applied to an audio recording played during a preliminary hearing. Importantly, the audio recording at issue in the Upshur case captured conversations between the defendant and one of her alleged victims and similar factual cases could implicate the Marsy's Law victim privacy right.

This Court also held the presumption of access applies to search warrants and supporting documentation which, like arrest warrant applications, must make a showing of probable cause and could include victim information. In P.G. Publishing Co. v. Commonwealth, 532 Pa. 1, 614 A.2d 1106 (Pa. 1990); *see also* Pa.R.Crim.P. 212, providing for public dissemination of arrest warrants and supporting documentation.

These cases arose because it was unclear whether the constitutional presumption of access applied and the Marsy's Law amendment would certainly impact the constitutional analysis in similar cases, but it is important to recognize that Marsy's Law amendment would also affect judicial records and proceedings where the constitutional presumption of access is undisputed. Such records and proceedings include criminal complaints, victim direct testimony and cross examination during trial, evidence admitted by the court, victim impact statements, and countless other presumptively public records and proceedings that could trigger a victim right to privacy.

The constitutional analysis and the rights guaranteed by both Article I, § 11 and the First Amendment are directly affected by the proposed Marsy's Law amendment because it would insert a competing right into the constitutional analysis. There are, of course, numerous other constitutional rights and considerations that courts weigh as part of the First Amendment analysis, including the Sixth Amendment right to a fair trial and concerns about juror privacy, both of which were considered by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"). In that case, the Supreme Court found neither interest outweighed the constitutional requirement for open courts. *Id.* The proposed Marsy's Law right to privacy would have to be similarly inserted into the constitutional analysis, illustrating its direct impact on the constitutional rights



guaranteed by Article I, § 11 of the Pennsylvania Constitution and the First Amendment.

#### **IV. Public policy supports open courts.**

When considering the public access rights enshrined in the Constitution, it is critical to understand their foundational public policy interests because the proposed Marsy's Law right to privacy affects their continued application.

In analyzing First Amendment rights, the United States Supreme Court has articulated several significant public policy interests served by public access to judicial records and proceedings. First, public access allows the public to “participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.” *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Public scrutiny of a criminal trial also “enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and society as a whole.” *Id.* The Supreme Court also recognized that public scrutiny promotes fairness by operating as a restraint on possible abuses of judicial power, as well as providing a safeguard against “any attempt to employ our courts as instruments of persecution.” *In re Oliver*, 333 U.S. 257, 270 (1984).

Moreover, the Supreme Court recognized that public access is guaranteed by the First Amendment because “...the sure knowledge that anyone is free to attend

gives assurance that established procedures are being followed and that deviations will become known.” *Press-Enterprise I*, 464 U.S. at 508 (1984). Public access “thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.*

In addition to critical public policy purposes, First Amendment rights also carry with them concurrent rights, including the right to “receive information and ideas.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980)(internal quotations and citation omitted). The United States Constitution prohibits government from closing the courtroom doors, which were open to the public when the First Amendment was adopted and long before. *Id.* The Supreme Court in *Richmond Newspapers* recognized that a right to “observe” proceedings only goes so far, stating that “[i]nstead of acquiring information about trials by firsthand observation . . . people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public.” *Id.* at 572-73.

Acting as the eyes and ears of the public or “surrogates,” the media attend criminal proceedings “so that they may report what people in attendance have seen and heard,” furthering “public understanding of the rule of law and . . . comprehension of the functioning of the entire criminal justice system.” *Id.* at 572

(citation omitted). In this manner, the constitutional right of public access fosters public acceptance of "both the process and its results." *Id.* at 570-71.

The First Amendment of the United States Constitution and Article I, § 11 of the Pennsylvania Constitution, and the critical public policy interests that underpin both, are directly affected by the proposed Marsy's Law right to victim privacy because these rights conflict in their substance and application. The proposed Marsy's Law amendment fundamentally affects the constitutional rights guaranteed by Article I, § 11 of the Pennsylvania Constitution and the First Amendment, and as such, the Marsy's Law amendments should have been submitted to voters separately with a description of the proposed Marsy's Law victim right to privacy and its potential impact on concomitant constitutional rights. Pa. Const. art. XI, § 1; *Grimaud v. Commonwealth*, 865 A.2d 835, 842 (Pa. 2005).

## **CONCLUSION**

For all the foregoing reasons, *Amicus Curiae* respectfully requests this Honorable Court to grant the relief sought by League of Women Voters and Lorraine Haw.

April 12, 2021

Respectfully submitted,

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## **CERTIFICATIONS**

I hereby certify that the content of the foregoing *amicus* brief falls within the word limits enumerated in Pa.R.A.P. 531(b)(3).

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.

Dated: April 12, 2021

/s/ Melissa Bevan Melewsky