

APPENDIX “B”

**IN THE
COMMONWEALTH COURT OF PENNSYLVANIA**

LEAGUE OF WOMEN VOTERS OF : No. 578 M.D. 2019
PENNSYLVANIA and LORRAINE :
HAW, :

Petitioners :

v. :

KATHY BOOCKVAR, THE :
ACTING SECRETARY OF THE :
COMMONWEALTH, :

Respondent :

**MEMORANDUM OF LAW OF INTERVENORS, SHAMEEKAH MOORE,
MARTIN VICKLESS, KRISTIN JUNE IRWIN AND KELLY WILLIAMS,
IN OPPOSITION TO PETITIONERS' APPLICATION FOR SPECIAL
RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION**

On October 10, 2019, a mere twenty six days before the general election wherein the voters of Pennsylvania will have the opportunity to vote on a ballot question amending the Pennsylvania Constitution to create a crime victims “Bill of Rights”, Petitioners filed an Original Jurisdiction Petition for Review, as well as an

Application for Special Relief in the Form of a Preliminary Injunction under Pa.R.A.P. 1532, requesting that this Court enjoin Respondent, the Secretary of the Commonwealth, from submitting the ballot question to the electorate or, in the alternative, from certifying the results of the election until this matter is resolved.

The Legislature of Pennsylvania has proposed amendments to the Constitution of the Commonwealth of Pennsylvania to provide crime victims certain rights (hereinafter “Marsy’s Law”). The proposed language for an amendment to the Constitution is as follows:

§ 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 defined by the General Assembly, which shall be protected in a manner no less vigorous than the rights afforded to the accused: [1] to be treated with fairness and respect for the victim’s safety, dignity and privacy; to reasonable and timely notice of and to be present at all proceedings involving the criminal or delinquent conduct; [2] 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; [3] to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct; [4] to be notified of any pretrial disposition of the case; [5] 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; [6] 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; [7] to reasonable protection from the accused or any person acting on behalf of the accused; [8] to reasonable notice of any release or escape of the accused; [9] to refuse an interview, deposition or other discovery

request made by the accused or any person acting on behalf of the accused; [10] full and timely restitution from the person or entity convicted for the unlawful conduct; [11] full and timely restitution as determined by the court in a juvenile delinquency proceeding; [12] to the prompt return of property when no longer needed as evidence; [13] to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings; [14] to confer with the attorney for the government; [15] 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.

Pa. S.B. No. 1011 of 2018 (bracketed numbers supplied for ease of analysis).

The proposed amendment is comprised of three different sections that can be summarized as follows: Section (a) is a list of rights to be given to victims of a crime, Section (b) authorizes Pennsylvania Courts to enforce the rights enumerated in Section (a) and disclaims any liability on behalf of the government or its officers

based on enforcement of this amendment; and Section (c) defines the word “victim” as it is used within the amendment.

Importantly, Pennsylvania already has a Crime Victims Act that, while not part of the Constitution, provides for almost all of the rights that are proposed by the Legislature for inclusion in the Pennsylvania Constitution. *See* 18 P.S. §§ 11.101 *et seq.*¹ (A copy of the current Crime Victims Bill of Rights, set forth at 18 P.S. § 11.201, is attached as Appendix “A” hereto for the Court’s convenience.)

I. Preliminary Injunction Standard

The purpose of a preliminary injunction is to preserve the status quo and prevent imminent and irreparable harm which might occur before the merits of the case can be heard and determined. *Soja v. Factoryville Sportsmen's Club*, 522 A.2d 1129, 1131 (Pa. Super. 1987). Preliminary injunctive relief is also appropriate where necessary to restore the parties to their status immediately prior to the wrongful conduct of which the movant complains. *Commonwealth v. Coward*, 414 A.2d 91, 99 (Pa. 1980). “The status quo to be maintained by a preliminary injunction is the last, actual, peaceable and lawful uncontested status which preceded the pending controversy.” *Valley Forge Historical Soc’y v. Washington Mem’l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981). A preliminary injunction is usually restrictive and prohibitory, but in unusual cases, it may go beyond restraint

¹ Act of November 24, 1998, P.L. 882, No. 111, §§ 101 *et seq.*

and command action. *Soja*, 522 A.2d at 1131. In either instance, the purpose of a preliminary injunction is to restore the parties to the last peaceable, uncontested status which preceded the controversy. *Id.*

Under Pennsylvania law, the essential prerequisites for a preliminary injunction are:

First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Towne Centre, Inc. v Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003) (citations omitted).

Petitioners cannot meet their lofty burden of proving the elements listed above.

II. **Concise Statement of Reasons In Opposition to Petitioners’ Request for Preliminary Injunctive Relief**

A. **Petitioners’ request for preliminary injunctive relief is barred by the doctrine of laches**

Preliminarily, Petitioners’ Application for Special Relief should be denied because it violates the equitable principal of laches.² In essences, laches requires that “[h]e who seeks equity must do equity.” *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (citing *Mazer v. Sargent Electric Co.*, 180 A.2d 63 (Pa. 1962); *Hartman v. Cohn*, 38 A.2d 22 (Pa. 1944)).

In a press release dated October 10, 2019, Petitioner, the League of Women Voters of Pennsylvania, stated: “The American Civil Liberties Union of Pennsylvania and the law firm Dechert LLP filed a lawsuit today on behalf of the League of Women Voters of Pennsylvania and an individual, Lorraine Haw of Philadelphia.” (See *Intervenors’ Answer in Opposition to Petitioner’s Application for Special Relief at ¶ 20 thereto.*³) Petitioners and the American Civil Liberties Union of Pennsylvania (“ACLU”) have long been aware of the proposed

² The “‘Doctrine of Latches,’ is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity.” BLACK’S LAW DICTIONARY 875 (6th ed. 1991) (citation omitted).

³ Citing *Press Release: Pennsylvania Good Government Group and a Voter File Lawsuit to Block “Logrolled” Constitutional Amendment*, <https://www.palwv.org/news/press-release-pennsylvania-good-government-group-and-a-voter-file-lawsuit-to-block-logrolled-constitutional-amendment>.

constitutional amendment at issue here, as evidenced by the ACLU's June 12, 2018 Memorandum to the Pennsylvania House of Representatives, in which the ACLU opposed Senate Bill 1011, (*see* Intervenor's Answer in Opposition to Petitioner's Application for Special Relief at ¶ 21 thereto⁴), and also as evidenced by the ACLU's April 8, 2019 Statement criticizing the passage of Marsy's Law, (*see* Intervenor's Answer in Opposition to Petitioner's Application for Special Relief at ¶ 21 thereto⁵).

Notwithstanding the ability of Petitioners and the ACLU to have filed an Original Jurisdiction Petition for Review well in advance of October 10, 2019, upon information and belief, Petitioners and the ACLU purposely waited until the eleventh hour on the eve of the scheduled general election to file this action, so as to preclude Respondents and any prospective intervenors from having the normal fourteen days from service thereof to answer Petitioners' Application for Special Relief in the Form of a Preliminary Injunction. (*See* Intervenor's Answer in Opposition to Petitioner's Application for Special Relief at ¶ 22 thereto.) Instead, Petitioners and the ACLU have initiated an action in this Court that can only

⁴ *Citing* Memorandum from Elizabeth Randol, Legislative Director of the ACLU, to the Pennsylvania House of Representatives, dated June 12, 2018, https://www.aclupa.org/files/7615/3382/6322/ACLU-PA_Memo_SB_1011_House_of_Representatives_2018-06-12.pdf.

⁵ *Citing* ACLU-PA Statement on State House Passage of Marsy's Law, dated April 8, 2019, <https://www.aclupa.org/news/2019/04/08/aclu-pa-statement-state-house-passage-marsys-law>.

accurately be characterized as a self-created emergency, requiring the unnecessary last-minute expenditure of significant judicial resources by this Court, as well as the resources of Respondents and the prospective intervenors. The doctrine of laches bars Petitioners' request for a preliminary injunction.

B. Because Petitioners cannot, and will not, succeed on the merits of their claims, their request for a preliminary injunction must be denied⁶

The Pennsylvania Constitution, at Article XI, Section 1, delineates the procedure for the Legislature's proposals for, and the electorate's adoption of, constitutional amendments. The "single-subject" requirement, as referenced by Petitioners, is contained within the Constitution by requiring that "when two or more amendments shall be submitted they shall be voted upon separately." PA. CONST. art. XI, § 1.

To determine whether a ballot question violates the Article XI, Section 1 single-subject requirement, the Pennsylvania Supreme Court adopted the "subject

⁶ Pursuant to Pa.R.A.P. 106 and Pa.R.C.P. No. 2328, in Intervenors' Answer in Opposition to the Application for Special Relief in the Form of a Preliminary Injunction, Intervenors adopted by reference in whole Respondent's Answer to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction, filed by Respondent in this Court on October 16, 2019. (*See* Intervenors' Answer in Opposition to Petitioner's Application for Special Relief at ¶ 19 thereto.) Therein, Respondent preliminarily responded to Petitioners' request for a preliminary injunction, while also noting that Respondent would thereafter be filing a supporting brief. As a result, Intervenors hereby rely on, and adopt by reference in whole, Respondent's arguments regarding the remaining essential prerequisites for issuance of a preliminary injunction, and Respondents arguments in opposition to Petitioners' claims that the ballot question does not fairly and accurately reflect the proposed amendment, and that the entire text of the proposed amendment must be set forth in the ballot question itself, as set forth in Respondent's already filed Answer and to be filed Brief.

matter test” in the seminal case *Grimaud v. Commonwealth of Pennsylvania*, 865 A.2d 835, 841 (Pa. 2005). The subject matter test contains two prongs: (1) whether the subject matter is *sufficiently interrelated* so as to justify inclusion in a single question, and (2) whether the proposed amendment does not *facially affect* other parts of the Constitution.

In *Grimaud*, two separate constitutional amendments were challenged for allegedly violating the single-subject requirement. *Id.* The first amendment that was challenged in *Grimaud* related to bail procedures and was stated as follows:

Shall the Pennsylvania Constitution be amended to disallow bail when the proof is evident or presumption great that the accused committed an offense for which the maximum penalty is life imprisonment or that no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community?

Id.

The appellants in *Grimaud* argued that the proposal twice amended Article I, Section 14 of the Constitution by “(1) expanding the capital offenses bail exception to include life in prison and (2) adding preventative detention to the purpose of bail.” *Id.* at 841. The Court analyzed case law from other jurisdictions and prior Pennsylvania cases, which failed to reach a majority on the standard to apply in situations such as these. *Id.* In doing so, the Court was persuaded by Justice Saylor’s concurring opinion in *Pennsylvania Prison Society v. Commonwealth* that suggested “a subject-matter focus to their presentation to the electorate in a single

question.” *Grimaud*, 865 A.2d at 841 (quoting *Pennsylvania Prison Society*, 776 A.2d 971, 984 (Pa. 2001) (plurality)). The Court also quoted various opinions from other jurisdictions in order to explain its test:

See, e.g., Korte v. Bayless, [16 P.3d 200, 203–05] (Ariz. 2001) (explaining 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”); *Clark v. State Canvassing Bd.*, [888 P.2d 458, 462] (N.M. 1995) (applying a “rational linchpin” of interdependence test); *Sears v. State*, [208 S.E.2d 93, 100] (Ga. 1974) (inquiring into whether all of the proposed changes “are germane to the accomplishment of a single objective”) (quotations and citations omitted); *Fugina v. Donovan*, [104 N.W.2d 911, 914] (Minn. 1960) (upholding separate propositions that, although they could have been submitted separately, were rationally related to a single, purpose, plan, or subject); *Manduley v. Superior Court*, 27 Cal.4th 537, 117 Cal.Rptr.2d 168, 41 P.3d 3, 28 (2002) (various provisions must be reasonably related to common theme or purpose); *Fine v. Firestone*, 448 So.2d 984, 990 (Fla. 1984) (amendment must manifest “a logical and natural oneness of purpose ...”).

Grimaud, 865 A.2d at 841.

In adopting the “subject matter test” described above, the Court determined that the ballot question regarding the constitutional amendment to the bail provision was “sufficiently interrelated (all concerned disallowance of bail to reinforce public safety) to justify inclusion in a single question.” *Id.*

The appellants in *Grimaud* further argued that the single ballot question above implicitly amended multiple other provisions of the Pennsylvania Constitution and, therefore, violated the second prong of the single-subject rule. *Id.*

at 842. This argument was rejected by the Court. The Court determined that the test to be applied is not “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 in original). The fact that an amendment to one provision of the Constitution may possibly affect other provisions of the Constitution does not, of itself, violate the single-subject requirement. *Id*. In so holding, the Court determined that the ballot question regarding bail procedures, while implicitly having an effect on other provisions of the Constitution, *patently* affected only Article I, Section 14 and, therefore, the single-subject rule was not violated when this question was submitted to the electorate. *Id*.

The second ballot question that was challenged in *Grimaud* asked “shall the Pennsylvania Constitution be amended to provide that the Commonwealth shall have the same right to trial by jury in criminal cases as does the accused?” 865 A.2d at 845. The appellants argued that this provision, in addition to amending Article I, Section 6 (trial by jury), also amended Article V, Section 10(c) (judicial administration) because the authority to govern jury waiver was taken from the Courts, and Article I, Section 25 (reservation of rights in people) because the original purpose of a jury trial was to prevent oppression by the government, but the amendment had changed this purpose by giving the Commonwealth the right to

a jury trial. *Id.* In applying the *Grimaud* test detailed above, the Court determined that only one substantive change was made—to give the Commonwealth the right to a trial by jury—and thus the ballot question did not violate the single-subject requirement of Article XI, Section 1. *Id.*

An example of an amendment that was found to violate the single-subject requirement can be found in *Pennsylvania Prison Society*. There, a single ballot question was presented to the electorate, which asked:

Shall the Pennsylvania Constitution be amended [1] to require a unanimous recommendation of the Board of Pardons before the Governor can pardon or commute the sentence of an individual sentenced in a criminal case to death or life imprisonment, [2] to require only a majority vote of the Senate to approve the Governor's appointments to the Board, and [3] to substitute a crime victim for an attorney and a corrections expert for a penologist as Board members?

Pennsylvania Prison Society, 776 A.2d at 974 (numbering added for ease of analysis).

Although the proposed amendment in that case amended only one section of the Constitution (Article IV, Section 9), the Court determined that it did, in fact, violate the single-subject requirement because the amendment had more than one purpose. *Id.* at 981. First, the Court found that the amendment restructured the pardoning power of the Board of Pardons by requiring a unanimous recommendation (part 1) and changed the composition of the Board itself (part 3). *Id.* Although this was, in effect, two changes, they could be properly submitted as

one single question because they both had the purpose of altering the function of the Board. *Id.* The Court did, however, take issue with the fact that the amendment also attempted to change the confirmation process for gubernatorial appointees (part 2). *Id.* In so holding, the Court determined that this amendment violated the single-subject requirement and should have been presented as two separate ballot questions.

Another example of a ballot question that violated the single subject requirement can be found in *Bergdoll v. Kane*, 731 A.2d 1264 (Pa. 1999). There, a single ballot question asked:

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.

Once again, the Court determined that it was clear that this single question facially amended two separate portions of the Constitution: the right to meet a witness face to face was changed *and* the General Assembly was authorized to enact laws regarding the manner in which a child may testify in a criminal proceeding. *Id.* at 1270.

Therefore, the test to determine whether a ballot question meets the single-subject requirement of Article XI, Section 1 is whether the subject matter is sufficiently interrelated so as to justify inclusion in a single question *and* whether the proposed amendment does not facially affect other parts of the Constitution.

i. The proposed amendment is sufficiently interrelated so as to justify inclusion in a single question

It is clear that the proposed amendment satisfies the first prong of the single-subject test; that is, whether the proposed amendment is sufficiently interrelated to as to justify inclusion in a single question.

On the surface, the proposed amendment grants additional rights to victims of a crime. As previously stated, Section (a) details the rights to be afforded to victims, Section (b) details the mechanism for enforcing the rights enumerated in Section (a), as well as clarifying that there can be no cause of action against the government or its employees/agents for compensation or damages as a result of this amendment, and Section (c) defines “victim” as it relates to this proposed amendment.

All three provisions are interrelated so as to ensure that victims’ rights are protected throughout the legal process. Furthermore, there can be no doubt that the objectives contained within the amendment are “rationally related to a single purpose, plan, or subject,” are sufficiently related to “constitute a consistent and workable whole on the general topic embraced,” are “reasonably related to a

common theme or purpose,” and would “manifest ‘a logical and natural oneness of purpose,’” so as to meet the various “subject matter tests” from around the United States that the Pennsylvania Supreme Court cited in *Grimaud*.

Additionally, to require each section of the proposed amendment to be voted on individually could defeat the purpose of the entire amendment. For example, if the people approve Sections (b) or (c), but do not approve Section (a), the effect would be that a victim has a mechanism to enforce certain rights that do not exist within the Constitution because the list of rights in Subsection (a) was disapproved. Similarly, Subsection (c) would define the word victim “as used within this section,” but it is possible that there would be no other use of the word “victim” because the language of Section (c) may be the only portion of the proposal that passed. This outcome would frustrate the entire purpose of the proposal and would result in an amendment to the Constitution that, at best, does nothing, and, at worst, makes no sense.

The individual rights that would be given to a victim, as found in Section (a) of the proposed amendment, are also so interrelated so as to constitute a single purpose, plan or subject and manifests a “logical and natural oneness of purpose,” namely memorializing certain rights, which are already largely granted by statute, in the Pennsylvania Constitution. Significantly, the proposed amendment seeks to add these rights by the addition of a new section to the Constitution, instead of

changing provisions that already exist. Accordingly, this Court must hold that the proposed amendment is sufficiently interrelated so as to justify inclusion in a single question.

ii. The proposed amendment does not facially affect other parts of the Constitution

An analysis of each clause (reproduced in bold font, *infra*) of the proposed amendment, to determine whether any other provisions of the Pennsylvania Constitution would be patently/facially affected by its adoption, follows.

“(a) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, as defined by the General Assembly, which shall be protected in a manner no less vigorous than the rights afforded to the accused:”

This clause is merely an introduction to the rights enumerated below and provides the intent for enacting this amendment. The language in the proposal is nearly identical to the language within the Pennsylvania Crime Victims Act’s legislative intent section, which states that “the rights extended to the victims of crime in [the Crime Victims Act] are to be honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.” 18 P.S. § 11.102(2).

As a practical matter, the similarities to the Crime Victims Act enumerated herein means that the proposed constitutional amendment does not violate the

Pennsylvania Constitution. That is because, as a matter of law, this language is presumed to be constitutional since it was passed by the legislature before and it has not as of yet been challenged. *See Pennsylvania State Ass'n of Jury Com'rs v. Commonwealth*, 64 A.3d 611, 618 (Pa. 2013) (stating that “acts passed by the General Assembly are strongly presumed to be constitutional, including the manner in which they were passed”).

“[1] to be treated with fairness and respect for the victim’s safety, dignity and privacy;”

Once again, this language is very similar to language contained in the Crime Victims Act, which states that “all victims of crime are to be treated with dignity, respect, courtesy and sensitivity.” 18 P.S. § 11.102(1). The only addition in the proposed amendment is the “privacy” provision.

This “privacy” language was challenged in legal proceedings in Montana because, according to the petitioners there, it “effectively” amends the right-to-know provision of the Montana Constitution. *See Montana Ass'n of Counties v. State by and through Fox*, 389 Mont. 183 (2017). Pennsylvania’s Right-to-Know Law, however, derives from various acts of the Legislature, and is not contained within the text of the state’s Constitution.

In fact, there are no explicit privacy clauses anywhere within the Pennsylvania Constitution. The right to privacy for Pennsylvania citizens

originates from the United States Constitution and case law interpreting Article I, Section 1 of the Pennsylvania Constitution, which grants certain inherent rights of mankind. PA. CONST. art. I, § 1 (“All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”).⁷ Because there are no specific references to privacy elsewhere within the Constitution, and this language does not change the common law right to privacy, this Court must hold that this provision would not facially affect any other provisions of the Constitution.

“[2] 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;”

Petitioners incorrectly and misleadingly state that this provision will change the current language of the Pennsylvania Constitution. That is not the case. Instead, like many of the other provisions proposed by this constitutional amendment, this new “right” perfectly complements the plain language of the Constitution. In

⁷ The right to privacy in Pennsylvania is older than either the federal or state constitution. *Commonwealth v. Palms*, 15 A.2d 481 (Pa. Super. 1940); *Commonwealth v. Beauford*, 475 A.2d 783 (Pa. Super. 1984); see also *Shelby v. Second National Bank of Uniontown*, 19 Pa. D. & C. 202, 209 (C.C.P. Fayette Cty. 1933) (“The right to privacy in the conduct of one’s personal and private affairs is a right derived from natural law. . . . The right to privacy in one’s affairs is a right guaranteed to all its citizens by the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania.”).

support of their argument, Petitioners cite to Article I, Section 14, stating that “all persons have a right to be released on bail prior to trial in all cases.” (Petitioners Brief in Support of Application for Special Relief, at 37 (citing PA. CONST. art. I, § 14; *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972))). Had Petitioners provided the actual language contained within the Pennsylvania Constitution, however, it would be clear that their argument is fatally flawed:

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.

PA. CONST. art. I, § 14 (emphasis added).

As is clear from the language of the Constitution, the safety of any person and the community *must already be considered* when bail is set. So, to now argue that this facially changes a provision within the Pennsylvania Constitution is misleading and simply untrue.

“[3] to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct;

and

[4] to be notified of any pretrial disposition of the case;”

These provisions would simply have the effect of requiring notice to the victim of any proceeding involving the accused, providing the right to be present at all such proceedings, and to be notified of certain dispositions. None of these rights would facially change any other portion of the Pennsylvania Constitution.

Once again, these rights have already been granted to victims in Pennsylvania through the Crime Victims Act. Specifically, the Crime Victims Act requires that victims “be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case,” and gives victims the right “to be accompanied at all criminal and all juvenile proceedings in accordance with 42 Pa.C.S. § 6336 (relating to conduct of hearings) by a family member, a victim advocate or other person providing assistance or support.” 18 P.S. § 11.201(2) and (3). These provisions were already passed by the General Assembly and have not been challenged as to their constitutionality. As previously discussed, the Crime Victims Act is presumed to be constitutional.

There is nothing contained within the Pennsylvania Constitution that prohibits notice to a victim of an upcoming proceeding or of the disposition of the

case, or allowing a victim's presence at such a proceeding. In fact, the United States Supreme Court has held that people have a First Amendment right to attend criminal trials, *Richmond Newspapers, Inc. v. Virginia*, 48 U.S. 555, 581 (1980), and the Pennsylvania Supreme Court has interpreted Article I, Section 11 of the Pennsylvania Constitution, which provides that "all courts shall be open," to mean that the public should be allowed in a courtroom during criminal trial proceedings. *Commonwealth v. Fenstermaker*, 530 A.2d 414, 417 (Pa. 1987). Furthermore, the General Assembly has passed legislation allowing victims of crimes by juveniles to be present at such proceedings, even when the general public is not allowed to attend.

Thus, giving a victim of a crime the right to notice and presence at a criminal proceeding, as well as notice of a pretrial disposition, would not facially affect another portion of the Pennsylvania Constitution, and does not violate the single-subject requirement.

"[5] 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;"

Giving a victim the right to be heard in a proceeding regarding release, plea, sentencing, disposition, parole, or any other proceeding that might impact the

victim, does not facially alter any other provisions within the Pennsylvania Constitution.

The Pennsylvania Constitution is wholly silent on who may speak at certain proceedings in a criminal trial; instead these proceedings are regulated by the Pennsylvania Rules of Criminal Procedure and, once again, the Crime Victims Act. In fact, this provision is supported by Article I, Section 9 of the Pennsylvania Constitution, which allows for an accused person “to be confronted with the witnesses against him.” PA. CONST. art. I, § 9.

The Crime Victims Act currently allows for a victim to provide prior written comments to the prosecution and to the court in the following circumstances: prior to the potential reduction or dropping of any charge or change of a plea, prior to sentencing of a defendant or disposition of a delinquent child, prior to a judicial recommendation that a defendant participate in a motivational boot camp, prior to a juvenile’s dispositional review hearing, and prior to post-sentencing release decisions for defendants of personal injury crimes where the adult is sentenced to a State correctional facility. 18 P.S. § 11.201(4)-(5.2), (7). Once again, none of these provisions have been challenged or deemed to be unconstitutional.

The petitioners in the Montana challenge to the adoption of Marsy’s Law, *Montana Ass’n of Counties v. State by and through Fox*, 389 Mont. 183 (2017), asserted that this provision would violate the right of an accused to a speedy trial,

as granted in both the Montana Constitution at Article II, § 24, and the Pennsylvania Constitution at Article I, Section 9, because a trial may be delayed if “the rights of victims cannot be accommodated in a speedy manner.” (Petition for Declaratory and Injunctive Relief, *Montana Ass’n of Counties v. State by and through Fox*, Case No. OP 17-0358, at 14 (MT Supreme Ct. 2017)). This argument, however, cannot hold in Pennsylvania because, while the proposed amendment may have an impact on this provision, it does not patently or facially amend the right as granted by the Constitution, as is required to violate the single-subject requirement for an amendment.

Therefore, this Court must find that this provision does not facially amend any other portion of the Pennsylvania Constitution.

“[6] 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;”

Once again, the rights that are memorialized in this provision are rights that are, by statute, already afforded victims of crime in Pennsylvania. Specifically, the Crime Victims Act states that victims of a crime are to be “given the opportunity to provide prior comment on and to receive ... postsentencing release decisions, including work release, furlough, parole, pardon or community treatment center

placement.” 18 P.S. § 11.201(7)(i) & (8)(i). Moreover, the Crime Victims Act also requires that:

No later than 90 days prior to the parole date of an offender, the victim advocate shall notify the victim of the offense for which the offender was sentenced, the parent or legal guardian of a victim who is a minor or a member of the family if the victim is incapable of communicating or has died and shall provide the appropriate person with an opportunity to submit a preparole statement expressing concerns or recommendations regarding the parole or parole supervision of the offender.

18 P.S. § 11.501(a).

None of this statutory language contained in the Crime Victims Act has been held to violate any currently-existing provisions of the Pennsylvania Constitution, and the inclusion of this provision in the proposed amendment simply memorializes these pre-existing rights in the Constitution so that these rights cannot be easily eroded by the whim of the legislature. Moreover, the plain language of the proposed amendment does not come close to facially amending any other section of the Pennsylvania Constitution. Accordingly, this provision, too, passes the single-subject test.

“[7] to reasonable protection from the accused or any person acting on behalf of the accused;”

All Pennsylvania citizens are given certain “inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own

happiness.” PA. CONST. art. I, § 1. Furthermore, the government is created for the “peace, safety and happiness” of the people. PA. CONST. art. I, § 2. These two provisions provide the right to safety for the citizens of Pennsylvania.

The creation of an explicit right to be protected from another person, as would be created here, could not be found to change any other provision of the Constitution. Nowhere in the Constitution is a proposition that a person should not be protected from harm, nor, obviously, is there a provision that gives a criminal defendant a right to inflict further harm on a victim.

Therefore, this provision cannot be found to patently amend any other portion of the Constitution and, therefore, would pass the single-subject requirement.

“[8] to reasonable notice of any release or escape of the accused;”

There is nothing contained within the Pennsylvania Constitution that addresses the release or escape of an accused, or the notice to a victim thereof. Various provisions of the Crime Victims Act, however, require notice to a victim in the case of release or escape of a defendant in almost all situations. *See* 18 P.S. § 11.201(2), (7)-(9).

The Crime Victims Act also delineates the responsibilities of state and local law enforcement agencies, prosecutor’s offices, Pennsylvania Department of Corrections, local correctional facilities, Pennsylvania Board of Probation and

Parole, Department of Public Welfare, mental health institutions, and juvenile probation offices, with regard to notification of victims in the case of an escape or release of an accused.

Because the Constitution is silent on notice of a release or escape, this provision does not patently amend any other section of the Constitution, and does not violate the single-subject requirement.

“[9] to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused;”

Pennsylvania’s Constitution contains a provision that states that an accused in a criminal prosecution has the right “to be confronted with the witnesses against him, [and] to have compulsory process for obtaining witnesses in his favor.” PA. CONST. art. I, § 9. The Confrontation Clause of the United States Constitution has been interpreted to mean that a criminal defendant has the right to confront the witnesses against him *at trial*, not necessarily in pretrial discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). While Pennsylvania Courts have interpreted the Pennsylvania Constitution’s confrontation clause to allow for certain pretrial discovery based on the right of confrontation and compulsory process, the plain language of the Constitution does not contain this qualifier. *See Commonwealth v. Kennedy*, 604 A.2d 1036 (Pa. Super. 1992) (defendant was entitled to subpoena non-privileged therapeutic records of a child victim in possession of a hospital in

effort to prepare for a defense); *Commonwealth v. French*, 611 A.2d 175 (Pa. 1992) (defense could inspect pretrial statements of prosecution witnesses in order to prepare for cross-examination). Moreover, none of the cases referencing pretrial discovery have extended the right of confrontation or compulsory process to interviews, depositions, or other discovery requests directed at the victim of a crime. The proposed amendment is consistent with current law.

Therefore, this provision does not facially amend any other section of the Constitution and, therefore, can be submitted to the electorate as a single amendment and still comply with the single-subject requirement of Article XI, Section 1.

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

and

[11] full and timely restitution as determined by the court in a juvenile delinquency proceeding;”

Nothing within the Pennsylvania Constitution specifically touches on the restitution of a victim from a defendant in a criminal proceeding or a juvenile delinquency proceeding. A victim does, however, have the inherent right to acquire, possess, and protect their own property, based on Article I, Section 1 of the Pennsylvania Constitution. Accordingly, the full and timely restitution of a

victim is a way for the State to protect that inherent right. This does not alter or amend that provision, however, it merely provides a means to fulfill that right.

Additionally, the Crime Victims Act already provides that a victim has the right “to be restored, to the extent possible, to the precrime economic status through the provision of restitution, compensation and the expeditious return of property which is seized as evidence in the case when in the judgment of the prosecutor the evidence is no longer needed for prosecution of the case.” 18 P.S. § 11.201(6).

Furthermore, the Pennsylvania Crimes Code’s sentencing provisions require a court to order full restitution “upon conviction for any crime wherein property has been stolen, converted or otherwise unlawfully obtained, or its value substantially decreased as a direct result of the crime, or wherein the victim suffered personal injury directly resulting from the crime.” 18 Pa.C.S. § 1106(a). This statute has been challenged repeatedly and has been upheld each time. *See, Commonwealth v. Atanasio*, 997 A.2d 1181 (Pa. Super. 2010); *Commonwealth v. Burwell*, 58 A.3d 790 (Pa. Super. 2012). While there have been claims that requiring full restitution could be a violation of a defendant’s due process rights, this argument has been rejected because the *amount* of “full restitution” must still “be determined under the adversarial system with considerations of due process.” *Commonwealth v. Ortiz*, 854 A.2d 1280, 1282 (Pa. Super. 2004).

Because nothing within the Constitution touches on this subject, and statutory authority already requires full restitution, this provision cannot be found to facially alter the Pennsylvania Constitution. Therefore, it does not violate the single-subject requirement.

“[12] to the prompt return of property when no longer needed as evidence;”

As evidenced repeatedly previously, the vast majority of the provisions of the proposed amendment are already the law within the Commonwealth. This provision is no exception. The Crime Victims Act explicitly states that “[t]he appropriate law enforcement agency shall return to the victim property seized as evidence if the prosecutor's office determines that the evidence is no longer needed for prosecution.” 18 P.S. § 11.212(g). No constitutional rights exist in Pennsylvania wherein the property of a victim could be held by the Commonwealth in perpetuity if that property is no longer needed as evidence. To hold otherwise would be absurd. Similar to the restitution provisions above, this provision does not affect, in any way, other provisions contained within the Pennsylvania Constitution and, therefore, it satisfies the single-subject test.

“[13] to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings;”

An accused in a criminal proceeding has a right to “a speedy public trial by an impartial jury.” PA. CONST. art. I, § 9. Nothing within the Constitution contemplates a right for a victim to have proceedings that are free from unreasonable delay, thus resulting in a prompt conclusion of the case. The provision proposed here does not facially alter any other provisions, but instead is consistent with Article I, Section 9, as quoted above. The two provisions clearly go hand-in-hand and provide both an accused *and* a victim the right to a speedy trial.

Therefore, because this provision does not patently alter any other provisions within the Constitution, its inclusion does not violate the single-subject requirement.

“[14] to confer with the attorney for the government;”

The right to confer with an attorney for the government regarding an ongoing criminal case is one that, in practice, is already present in Pennsylvania. Although the Constitution does not touch on the right of a victim to confer with a prosecutor, the Crime Victims Act details various responsibilities of a prosecutor’s office. Under the Crime Victims Act, a prosecutor’s office is required to provide an opportunity for a victim to submit prior comment on: (1) the potential reduction or dropping of any charge or change in a plea, (2) the sentencing of an adult or

disposition of a juvenile, and (3) State correctional facility release decisions. 18 P.S. § 11.213(b)-(d). Furthermore, a prosecutor's office is required to provide assistance to victims of a crime in preparing the comments detailed above, as well as in submission and follow-up on financial assistance claims filed with the Office of Victim Services.

This provision within the proposed amendment does not require the prosecutor to act in any certain way, nor does it impose any duties on behalf of the prosecutor other than to talk to a victim of a crime. Because this subject does not facially amend any other portion of the Constitution, it's inclusion in a single ballot question does not violate the single-subject requirement as set forth in Article XI, Section 1.

“[15] and to be informed of all rights enumerated in this section.”

If adopted, this provision would only apply to this particular section of the Constitution. Therefore, an analysis of whether it would patently amend another portion of the Constitution is unnecessary. Furthermore, a similar provision is already enacted in the Crime Victims Act, which states that a victim of a crime has the right “to receive basic information concerning the services available for victims of crime.” 18 P.S. § 11.201(1).

“(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.”

As detailed above, requiring a separate vote for this provision could result in an amendment to the Constitution that is completely and utterly pointless. If separate votes are required, and the list of rights as enumerated in Section (a) does not pass, then this section would be describing a mechanism to achieve a remedy that is not attainable because the rights on which it is predicated would not be part of the Constitution. For this reason alone, that inclusion of this provision within one amendment cannot violate the single-subject requirement.

Moreover, nothing within this provision patently amends any other provision of the Constitution. First, the right to assert the enumerated rights in a court with jurisdiction over the case is permissive, not compulsory. This simply gives the ability to sue to enforce a victim’s right, but does not require anyone to do so. Second, the provision stating that the court or authority “shall act promptly on such

a request” does not facially amend any other portion of the Constitution. In fact, Article I, Section 11 states that every person whom has been injured “shall have remedy by due course of law, and right and justice administered without sale, denial *or delay*.” PA. CONST. art. I, § 11 (emphasis added). Therefore this proposal is in conformity with another section of the Constitution, as opposed to altering it. Finally, the final clause of this section cannot be found to facially alter any other portion of the Constitution because it applies only to this section. By saying that “*this section* does not create any cause of action for compensation or damages,” it is clear that the purpose of this section is not to affect any portion of the Constitution, but only to modify the rights that have been enumerated herein.

Furthermore, the Crime Victims Act has a similar provision that states that nothing within the Act “creates a cause of action or defense in favor of any person arising out of the failure to comply with any of these chapters.” 18 P.S. § 11.5101.

Therefore, because submitting this section as a separate amendment to the Constitution would frustrate the purpose of the entire amendment, and because it does not patently affect any other portions of the Constitution, its inclusion in a single amendment does not violate the single-subject requirement.

“(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.”

This provision cannot be found to violate the single-subject requirement because, as previously discussed, the potential result of this portion of the amendment passing, while there is a chance that the list of rights does not pass, would create an outcome that would make no sense whatsoever. Furthermore, the introductory phrase “as used in this section” clearly shows that the definition of “victim” as used here would not alter any other sections of the Constitution.

It should be noted that the Crime Victims Act currently has a fairly broad definition of “victim”:

“Victim.” The term means the following:

- (1) A direct victim.
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.
- (3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:
 - Chapter 25 (relating to criminal homicide).
 - Section 2702 (relating to aggravated assault).
 - Section 3121 (relating to rape).

(4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé, one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.

18 P.S. § 11.103.

In *Montana Ass'n of Counties v. State by and through Fox*, 389 Mont. 183 (2017), the definition of “victim” was much broader than the definition that is proposed here. The definition of “victim” in Montana explicitly included kinship relationships, such as spouses, parents, children, etc., which was challenged by the petitioners there.

Because the proposed language here is much narrower, the General Assembly has already adopted a definition of “victim” that includes more than just a “direct victim,” and the definition would apply only to the victim’s rights section of the Constitution, this Court must hold that this provision does not violate the single-subject requirement and, thus, does not require a separate vote.

III. Conclusion

WHEREFORE, for the foregoing reasons—and also for the reasons argued in opposition by Respondent—Intervenors, Shameekah Moore, Martin Vickless, Kristin June Irwin and Kelly Williams, respectfully request that this Honorable Court DENY Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction under Pa.R.A.P. 1532.

Respectfully submitted,

LAMB McERLANE PC

Dated: October 17, 2019

By: /s/ Scot R. Withers

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PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned 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.

LAMB McERLANE PC

Dated: October 17, 2019

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APPENDIX “A”

§ 11.201 Rights.

Pennsylvania Statutes

18 P.S. CRIMES AND OFFENSES

Chapter 2 CRIME VICTIMS ACT

Chapter 2 CRIME VICTIMS

Subchapter A Bill of Rights

Current through P.A. Acts 2019-13

§ 11.201 Rights

Victims of crime have the following rights:

- (1) To receive basic information concerning the services available for victims of crime.
- (2) To be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case. This paragraph includes all of the following:
 - (i) Access to information regarding whether the juvenile was detained or released following arrest and whether a petition alleging delinquency has been filed.
 - (ii) Immediate notification of a juvenile's preadjudication escape from a detention center or shelter facility and of the juvenile's subsequent apprehension.
 - (iii) Access to information regarding the grant or denial of bail to an adult.
 - (iv) Immediate notification of an adult offender's pretrial escape from a local correctional facility and of the offender's subsequent apprehension.
- (3) To be accompanied at all criminal and all juvenile proceedings in accordance with 42 Pa.C.S. § 6336 (relating to conduct of hearings) by a family member, a victim advocate or other person providing assistance or support.
- (4) In cases involving a personal injury crime or burglary, to submit prior comment to the prosecutor's office or juvenile probation office, as appropriate to the circumstances of the case, on the potential reduction or dropping of any charge or changing of a plea in a criminal or delinquency proceeding, or, diversion of any case, including an informal adjustment or consent decree.
- (5) To have opportunity to offer prior comment on the sentencing of a defendant or the disposition of a delinquent child, to include the submission of a written and oral victim impact statement detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. The written statement shall be included in any predisposition or presentence report submitted to the court. Victim-impact statements shall be considered by a court when determining the disposition of a juvenile or sentence of an adult.
- (5.1) To have notice and to provide prior comment on a judicial recommendation that the defendant participate in a motivational boot camp pursuant to the act of December 19,

1990 (P.L. 1391, No. 215), known as the Motivational Boot Camp Act.

- (5.2) Upon request of the victim of a personal injury crime, to have the opportunity to submit written comment or present oral testimony at a disposition review hearing, which comment or testimony shall be considered by the court when reviewing the disposition of the juvenile.
- (6) To be restored, to the extent possible, to the precrime economic status through the provision of restitution, compensation and the expeditious return of property which is seized as evidence in the case when in the judgment of the prosecutor the evidence is no longer needed for prosecution of the case.
- (7) In personal injury crimes where the adult is sentenced to a State correctional facility, to be:
 - (i) given the opportunity to provide prior comment on and to receive State postsentencing release decisions, including work release, furlough, parole, pardon or community treatment center placement;
 - (ii) provided immediate notice of an escape of the adult and of subsequent apprehension; and
 - (iii) given the opportunity to receive notice of and to provide prior comment on a recommendation sought by the Department of Corrections that the offender participate in a motivational boot camp pursuant to the Motivational Boot Camp Act.
- (8) In personal injury crimes where the adult is sentenced to a local correctional facility, to:
 - (i) receive notice of the date of the release of the adult, including work release, furlough, parole, release from a boot camp or community treatment center placement; and
 - (ii) be provided with immediate notice of an escape of the adult and of subsequent apprehension.
- (8.1) If, upon the request of the victim of a personal injury crime committed by a juvenile, the juvenile is ordered to residential placement, a shelter facility or a detention center, to:
 - (i) Receive prior notice of the date of the release of the juvenile, including temporary leave or home pass.
 - (ii) Be provided with:
 - (A) immediate notice of an escape of the juvenile, including failure to return from temporary leave or home pass; and
 - (B) immediate notice of reapprehension of the juvenile.

- (iii) Be provided with notice of transfer of a juvenile who has been adjudicated delinquent from a placement facility that is contrary to a previous court order or placement plan approved at a disposition review hearing and to have the opportunity to express a written objection prior to the release or transfer of the juvenile.

- (9) If the adult is subject to an order under 23 Pa.C.S. Ch. 61 (relating to protection from abuse) and is committed to a local correctional facility for a violation of the order or for a personal injury crime against a victim protected by the order, to receive immediate notice of the release of the adult on bail.

- (10) To receive notice if an adult is committed to a mental health facility from a State correctional institution and notice of the discharge, transfer or escape of the adult from the mental health facility.

- (11) To have assistance in the preparation of, submission of and follow-up on financial assistance claims to the bureau.

- (12) To be notified of the details of the final disposition of the case of a juvenile consistent with 42 Pa.C.S. § 6336(f) (relating to conduct of hearings).

- (13) Upon the request of the victim of a personal injury crime, to be notified of the termination of the courts' jurisdiction.

Cite as 18 P.S. § 11.201

History. 1998, Nov. 24, P.L. 882, No. 111, § 201, imd. effective. Amended 2000, Oct. 30, P.L. 641, No. 86, § 2, effective in 60 days; 2002, June 28, P.L. 496, No. 85, § 1, effective in 60 days.