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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PA and LORRAINE HAW,	:	
Petitioner	:	**No. 578 MD 2019**
	:	
v.	:	
	:	
KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH	:	**Electronically Filed Document**
Respondent	:	
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	:	
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION

Respectfully submitted,
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I. INTRODUCTION

On the ballot for the November 5, 2019 Municipal Election is a ballot question that presents voters with the opportunity to pass an amendment to the Pennsylvania Constitution that secures rights for victims of crimes. This amendment, the "Crime Victims' Rights Amendment," provides for the consideration and inclusion of victims throughout the criminal justice process through notification and the opportunity to be heard. In creating rights for victims, the Crime Victims' Rights Amendment ("Amendment") does not alter offenders' existing rights under the Pennsylvania Constitution in any manner, expressly or otherwise. *See Grimaud v. Com.*, 865 A.2d 835, 842 (Pa. 2005) ("The test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution.").

One hundred thirteen days after the General Assembly passed the joint resolution for the second time, and almost three months after the initial advertising by the Department of State of the full text of the Crime Victims' Rights Amendment, the ballot question and the Attorney General's Plain English Statement, and nearly 10 days after the final advertisement (not to mention an intervening second advertisement), and three weeks after ballots were largely finalized and printed (with over 17,000 absentee votes already returned), and less than three weeks before the municipal election, Petitioners have come to this Court requesting the extraordinary

relief of an injunction removing the ballot question from the already-printed and programmed ballots. This action is untimely. Petitioners had ample notice and opportunity to bring their lawsuit, and by waiting until the last minute, they have jeopardized the upcoming election, and the thousands of votes already cast.

But, even ignoring that the Petitioners' request is late, and would irreparably disrupt the status quo, the Petitioners cannot prove a right to relief on the merits. The Crime Victims' Rights Amendment pertains to a single subject matter—securing victims' rights in the criminal cases in which they suffered direct harm. Every single subpart of the Amendment advances this one goal. The Amendment does not facially change any other provisions of the Constitution. And, the ballot question fairly and accurately reflects the Amendment, and its goal, for the electorate. There is no harm to be abated. Indeed, this Court has repeatedly held that preliminary injunctive relief is unnecessary in ballot question cases.

The fact that the Petitioners have obvious policy disagreements with the Crime Victims' Rights Amendment does not render the ballot question constitutionally void. Petitioners' request for an injunction should be denied.

II. STATEMENT OF THE CASE

The Crime Victims' Rights Amendment was introduced in the Pennsylvania General Assembly as Senate Bill 1011 (SB 1011) during the 2018 legislative session. The Senate approved SB 1011 in a unanimous vote of 50-0, and an amended version

of the bill passed both houses. The Amendment was introduced for the second time during the 2019 legislative session, as House Bill 276 (HB 276) where it, again, resoundingly passed the House and Senate. In June 2019, the Senate approved HB 276, as Joint Resolution 2019-1, and directed the Secretary to submit the Amendment to the electorate at the 2019 Municipal Election, which is the next election at least three months after final passage of the Amendment by the two houses of the General Assembly. The 2019 Municipal Election is scheduled for November 5, 2019.

Background of Victims' Rights in Pennsylvania

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

In 1998, the Pennsylvania Crime Victims Act (CVA) was enacted in Pennsylvania. For over twenty years, the CVA has provided for a Victims' Bill of Rights and sets forth rights that mirror those in the Amendment. Rights contained in the CVA Bill of Rights include the right "[t]o be notified of certain significant actions and proceedings within the criminal and juvenile justice systems pertaining to their case," and the right "[t]o not be excluded from any criminal proceeding …"

18 P.S. § 11.201. Additionally, the CVA allows a victim to take actions that may negatively impact an offender's criminal case. For example, it provides victims with the opportunity to submit prior comment before pre-trial disposition in cases involving bodily injury or burglary; and, the chance to submit a victim-impact statement that "shall" be considered by the court in fashioning a sentence. *Id.* § 11.201(5).

There is no evidence that the CVA has "wreaked havoc" in Pennsylvania since its enactment in the late 1990s. While the Petitioners have selectively submitted articles about the alleged impacts of Victims' Rights Amendments in other jurisdictions, the Petitioners have not submitted any reports or evidence indicating that the existence of the CVA has caused any negative impact in the Commonwealth. This is unsurprising because the basic inclusion and support of victims is not an extraordinary burden to bear.

The Amendment

The Amendment secures—and constitutionally enshrines—rights that have largely already been available to Pennsylvanians in the CVA. The Amendment *does not* delete anything from the Constitution. The Amendment *does not* change any existing language in the Constitution. Rather, the Amendment adds a provision to Article 1 of the Constitution, creating a new Section "9.1." titled "Rights of victims of crime."

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

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

Advertising of the Amendment

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

it appeared in the August 1, 2018 edition of the Philadelphia Inquirer, is attached hereto as **Exhibit A**.

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

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

Ballot Question

Article XI, Section 1 of the Pennsylvania Constitution sets forth the procedure by which the General Assembly may amend the Constitution. "[P]roposed amendment or amendments shall be submitted be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so

agreed to by the two Houses, as the General Assembly shall prescribe." Pa. Const. art. XI, § 1.

The General Assembly directed the Secretary of the Commonwealth, through the Pennsylvania Election Code, to print proposed constitutional amendments on the ballots in a "brief form" that has been approved by the Attorney General. 25 P.S. § 2755. And, in at least one section of the Election Code, the General Assembly defined "brief form" as "not more than seventy-five words" and authorized the Secretary of the Commonwealth to draft the brief form for constitutional amendments. 25 P.S. § 3010(b). Ballot questions for proposed constitutional amendments have historically adhered to this 75-word standard.

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

> Shall the Pennsylvania Constitution be amended to grant certain rights to crime victims, including to be treated with fairness, respect and dignity; considering their safety in bail proceedings; timely notice and opportunity to take part in public proceedings; reasonable protection from the accused; right to refuse discovery requests made by the accused; restitution and return of property; proceedings free from delay; and to be informed of these rights, so they can enforce them?

The question is seventy-three words in length and contains direct quotes of the Amendment.

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

Ballots Mailed & Votes Cast

As of October 20, 2019, according to data available within the Statewide Uniform Registry of Electors system, 67 county boards of elections have printed and mailed at least 65,758 absentee ballots to electors (64,622 regular and 1,136 military and overseas). The boards have already received at least 17,485 absentee ballots (17,357 regular and 128 military and overseas) in return. All these absentee ballots contain the ballot question for the Amendment.

III. ARGUMENT

"The purpose of a preliminary injunction is to preserve the status quo as it exists *or previously existed before the acts complained of*, thereby preventing irreparable injury or gross injustice." *Anchel v. Shea*, 762 A.2d 346, 351 (Pa. Super. 2000) (citing *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992)) (emphasis in original). To obtain a preliminary injunction, Petitioners bear the burden of establishing each of the following elements: (1) the injunction is necessary to prevent immediate and irreparable harm; (2) greater injury would result

from refusing an injunction than from granting it and that issuance of the injunction would not substantially harm other interested parties; (3) the injunction would restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the right to relief is clear and the wrong is manifest (*i.e.*, Petitioners are likely to prevail on the merits); (5) the injunction is reasonably suited to abate the offending activity; and (6) the injunction would not adversely affect the public. *Free Speech, LLC v. City of Philadelphia*, 884 A.2d 966, 970 (Pa. Cmwlth. 2006).

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

compensated); *Herman v. Dixon*, 141 A.2d 576 (Pa. 1958) (preliminary injunction dissolved where no showing of urgent necessity to prevent irreparable harm).

"'Furthermore, when a preliminary injunction contains mandatory provisions which will require a change in the position of the parties, it should be granted even more sparingly than one which is merely prohibitory.'" *Three Cty. Servs. Inc.*, 486 A.2d at 1000. (quoting *Zebra v. School Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972)). *See also City of Philadelphia v. District Council*, 535 A.2d 231, 236 (Pa. Cmwlth. 1987) (in the case where the preliminary injunctive relief sought is affirmative, a reviewing court must engage in even closer scrutiny, and a clear right to relief in the petitioner must be established).[1]

Petitioners cannot satisfy any of the elements requisite to obtaining injunctive relief, and their Application should be denied.

A. GREATER HARM WILL RESULT TO THE RESPONDENT AND PUBLIC IF THE PETITIONERS' UNTIMELY REQUEST FOR AN INJUNCTION IS GRANTED.

Petitioners unreasonably delayed filing their Petition and Application, until after votes were cast, which should weigh decidedly against granting the extraordinary relief they seek. The delay is particularly relevant where, as here, an

[1] "There is [] a distinction between mandatory and prohibitory injunctions. Mandatory injunctions command the performance of some positive act to preserve the status quo, and prohibitory injunctions enjoin a party from doing an act that will change it." *Chruby v. Dep't of Corr.*, 4 A.3d 764, 769 (Pa. Cmwlth. 2010).

election is looming. *United States v. City of Philadelphia*, No. 06-4592, 2006 WL 3922115, at *2 (E.D. Pa. Nov. 7, 2006) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). "[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . . ." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). There is good reason to avoid last-minute intervention in a state's election process. Any intervention at this point risks practical concerns including disruption, confusion or other unforeseen deleterious effects. *See City of Philadelphia*, 2006 WL 3922115, at *2 (citing *Purcell*, 549 U.S. at 5); *see also Republican Party of Pa. v. Cortés*, 218 F.Supp.3d 396, 405, (E.D. Pa. 2016) (admonishing Plaintiffs for their "judicial fire drill" only 18 days before the election and for "offer[ing] no reasonable explanation or justification for the harried process *they* created." (emphasis added)).

In this case, the Petitioners had ample opportunity to file for an injunction. They were aware of the text of the Amendment for the past two years and have had notice of the ballot question for almost three months. Yet, they waited until three weeks after the ballot was finalized and printed, and less than three weeks before the municipal election to bring this action. They waited until approximately 50,000 absentee ballots were mailed, and 17,000 votes cast.

The issuance of an injunction now will disenfranchise the thousands of voters who have already cast their votes. Their right to vote will be infringed upon. An injunction will also jeopardize the integrity of the election, generally. There will be confusion and uncertainty. Ballots have already been printed, and it would be a prohibitively costly and logistically impossible feat to reprint them in time for the election. Furthermore, making a late change to balloting materials will require counties to reprogram voting systems and conduct additional logic and accuracy testing. This will introduce risks to the integrity of the election by compressing the timeframe for programming and testing voting systems, increasing the likelihood of errors during programming. This is particularly true in those 36 counties who are using their new voting equipment for the first time in this November's election.

Harm will also result in the form of monetary loss to the Commonwealth if the ballot question is not placed before the electorate. The Department advertised the proposed Amendment, in its joint resolution form, during the months of August, September, and October of 2018. The advertisements appeared in newspapers across the Commonwealth. The first round of advertising cost the state $714,218.71, with payment being made from the general fund as required under section 1201.2 of the Election Code, 25 P.S. § 3041.2. In August, September, and October of this year (2019) the Department again published the constitutional amendment in its joint resolution form. This year's round of advertising also included the text of the ballot

question, developed by the Department, in the form it is to appear on the ballot, as well as the Plain English Statement prepared by the Attorney General. This second round of advertising cost $1,374,597.12, bringing the total cost of advertising to $2,088,815.83. If the electorate cannot consider the ballot question, then this money will be lost.

In sum, an injunction on the eve of the election, after votes have already been cast, will cause greater harm than good. This is especially true because the Petitioners can prove no discernible harm. Out of the four "harms" outlined in their brief, two pertain to third parties for whom they have no standing, *see* Petitioners' Brief, pp. 11-13 (arguing that an injunction is needed due to fear of "financial costs on Pennsylvania courts and counties burdened with compliance initiatives . . . " from the Amendment and due to a potential "burden on the limited resources available to law enforcement and prosecutors.");[2] one is premised on rank speculation (arguing that there will be a "period of uncertainty" following the Amendment, which, even if true, is outweighed by the guaranteed uncertainty that will result in the upcoming election should the injunction be issued); and the final, that inclusion of a ballot question will negatively impact the right to vote, is trumped

[2] Even if Petitioners had standing to advance these harms, which is denied, the harms are specious. There is already a framework in place to account for victims' rights due to the CVA. And, these considerations are not properly before the Court in the first instance. It is not for the Court to consider the policy implications of the Amendment, rather, the question before the Court is technical in nature.

by the fact that thousands of votes will actually have to be disregarded if an injunction is issued. Thus, an injunction should be denied. *See Moyerman v. Glanzberg*, 138 A.2d 681, 684–85 (Pa. 1958) (trial court properly denied preliminary injunction where greater harm would be visited on enjoined party than on party seeking injunction).[3]

B. A PRELIMINARY INJUNCTION WILL UPEND THE STATUS QUO.

"A preliminary injunction is designed to preserve the subject of the controversy in the condition in which it is when the order is made, it is not to subvert, but to maintain the existing status quo until the legality of the challenged conduct can be determined on the merits." *Sheridan Broad. Networks, Inc. v. NBN Broad., Inc.*, 693 A.2d 989, 994 (Pa. Super. 1997) (quoting *In re Appeal of Little Britain*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994).

The status quo is that the ballots have been finalized, printed and programmed, and that over 17,000 people have already cast their vote—and more people receive absentee ballots and vote every day. The ballots physically cannot be undone at this stage of the process, nor are the electronic voting machines realistically reprogrammable at this late time. The votes that have been cast cannot be retracted. This is true even if certification is halted. The votes cannot be erased. The Petitioners

[3] Also, for these reasons, the Petitioners' request should be denied on the basis of laches.

waited too long to bring this action, and the extraordinary relief that they seek will upend the status quo.

C. PETITIONERS CANNOT DEMONSTRATE A CLEAR RIGHT TO RELIEF ON THE MERITS.

Petitioners' lawsuit is really a challenge to the policies behind the Amendment; however, the claims that are actually before the Court are technical in nature. Petitioners contend that the ballot question should be stricken because it proposes not one, but many amendments, and is unsatisfactorily worded. But, the Amendment reflects one topic, crime victims' rights, and that single topic is properly reflected in the ballot question. Petitioners policy disagreements do not justify overturning the ballot question.

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

The ballot question proposes a single amendment that adds one section to the Constitution setting forth crime victims' rights. It does not delete, change or facially alter any existing provision of the Constitution.

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

interdependence of the proposed constitutional changes in determining the necessity for separate votes." *Grimaud v. Com.*, 408, 865 A.2d 835, 841 (Pa. 2005) (citing *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") *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)). Here, the parts making the whole Amendment are "sufficiently interrelated."

a. The Amendment relates to a single subject matter, and its length and form do not render it void.

Nowhere in the Constitution, or caselaw, is there a word limit as to the length of an amendment, or a proscription against subparts. Rather, this Court has specifically acknowledged that amendments may be "bulky" in nature. In *Mellow v. Pizzingrilli*, 800 A.2d 350 (Pa. Cmwlth. 2002), this Court noted that six articles of the Constitution of 1873 were amended by way of "'bulk' amendments, submitted to the electorate with the opportunity to vote in favor or against amendment of an

entire article, containing numerous substantive changes." The Court stated that it was aware "of no challenges to the 'bulk' amendments of the 1960's." *Id*. at 355.

In this case, the Crime Victims' Rights Amendment pertains to one subject matter, serving one overarching goal—protecting victims' rights in the criminal justice process. It establishes a consistent and workable framework regarding the general topic of victims' rights in the criminal justice system. Petitioners proffer little argument to the contrary on this point. In fact, they do not identify any other subject-matter implicated by the Amendment outside of victims' rights.

Instead, the Petitioners' argument rests on form and punctuation. Petitioners argue that the Amendment violates the separate vote rule because of the number of semicolons, reflecting "numerous" rights. They seize words such as the plural "rights," and a prefatory "including," as proof that the Amendment is really many Amendments disguised as one. They argue that, since there is a "lengthy list of the proposed rights, separated by seven semicolons," there must be an Article XI violation. They posit that each semicolon reflects a right that must be set forth separately, regardless of a common nucleus. But, Pennsylvania law does not compel an examination of the punctuation or length of an amendment. Rather, the question is whether the content of the amendment is related to the same subject matter. And, in this case, it is.

Petitioners attempt to wed this matter to *Bergdoll v. Kane*, 731 A.2d 1261 (Pa. 1999), a case largely supplanted by the later *Grimaud* opinion. In *Bergdoll*, the Court found that two separate votes were required for an amendment that, not only added language to the Constitution by way of a new provision, but that also *deleted* existing language from the Constitution. Particularly, the amendment, on one hand, removed an accused's right to face-to-face confrontation, while it, on the other hand, added a provision that shifted courtroom procedures regarding the manner in which children can testify from the Judiciary to the General Assembly. The Court, noting particular impropriety with regard to the shift in duties, ruled that Article XI's separate vote requirement was violated.

No similar facts are present in this case. The critical consideration in *Bergdoll* was that the amendment facially changed an existing right in the Constitution, while also adding a new provision. The amendment in *Bergdoll* literally deleted the face-to-face confrontation requirement from our organic charter. This was not an implicit or arguable change, but, rather, a patent alteration to the existing language of the Constitution. The deletion, coupled with an addition of new rights, proved fatal for the ballot question. Here, the Crime Victims' Rights Amendment does not delete, or otherwise facially change any existing language of our Constitution. It solely adds a new and stand-alone amendment regarding victims' rights. This distinction is dispositive.

This case is akin to *Grimaud*. There, an amendment proposed two changes related to bail— (1) expanding the capital offenses bail exception to include life imprisonment, and (2) adding preventive detention to the purpose of bail. *Grimaud*, 865 A.2d at 841. Under Petitioners' theory, each should have been set forth separately because they affect different "rights" related to bail. The Court did not so hold, however. Rather, the Court held, straightforwardly, that, under the same subject-matter test, the amendment survived because it had a single subject matter: bail. In this case, there is a single subject matter: victims' rights. Petitioners' case fails under *Grimaud*.

b. The Amendment does not alter any existing rights, as a matter of law.

Petitioners' alternative claim is that the Amendment violates Article XI because it "effectively" amends multiple existing constitutional articles. *See* Petition for Review, ¶ 37(b). But, this argument lacks merit under Pennsylvania Supreme Court jurisprudence.

The *Grimaud* case provides clear instruction on this point. In *Grimaud*, in addition to arguing that the ballot question related to bail actually proposed multiple amendments, appellants argued that the ballot question also effectively amended a multitude of existing rights, like those Petitioners list in their filings. *See Grimaud*, 865 A.2d at 840. While the amendment at-issue did not expressly alter any rights, appellants claimed that several constitutional rights were vitiated, including: Article

I, § 1's right to defend one's self, Article I, § 9's presumption of innocence; and, Article I, § 13's right to be free from excessive bail.

Appellants' argument was unavailing. The High Court noted that, "merely because an amendment 'may possibly impact other provisions' does not mean it violates the separate vote requirement." *Grimaud,* 865 A.2d at 842. It stated that, "[i]ndeed, it is hard to imagine an amendment that would not have some arguable effect on another provision; clearly the framers knew amendments would occur and provided a means for that to happen." *Id.* Thus, the Court ruled that, "[t]he test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution." *Id.* In other words, and to be clear, "[t]he question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect, as appellants suggest." *Id.*

Despite this clear and controlling mandate from the Supreme Court of Pennsylvania, Petitioners' argue that because the Amendment "effectively" alters other constitutional provisions, it is void. Petition for Review, ¶ 37(b). As stated above, it is not enough for it to "implicitly [have] such *an effect*." *Grimaud,* 865 A.2d at 842 (emphasis added). It needs to facially alter the existing language of the Constitution. The amendment here simply does not change any existing language in any manner whatsoever. There is no argument to be proffered under the binding case

law makes the Petitioners' claim valid as a matter of law, due to the absence of the requisite patent and facial change to the Constitution. Petitioners' speculations about the impacts of the Amendment, and creative rewritings of the Constitution, do not change this reality.

2. There is no requirement that the ballot question set forth the full text of the Crime Victims' Rights Amendment.

Petitioners next argue that the ballot question should have included the full text of the Amendment. There is no requirement under Pennsylvania law to this effect, and, indeed, the Constitution plainly states otherwise. It is, therefore, far from "clear" (as alleged by Petitioners) that they are entitled to relief based on this argument.

To this point, Petitioners state that, "[a]lthough the Pennsylvania Supreme Court has implicitly permitted ballot questions that did not include the entire text, *see, e.g., Grimaud,* 865 A.2d at 843-44, it has never directly addressed the meaning of the phrase 'such proposed amendment or amendments shall be submitted to the qualified electors of the State [in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe.]" Petitioners' Brief, p. 46. Petitioners then urge that the Court "should establish" the law in their favor. Their admissions regarding the lack of law to support their claim undermine an essential element of their request for preliminary injunctive relief—a clear right to relief on the merits.

Moreover, their claim does fail on the merits. The Supreme Court has allowed amendments to be proposed in abbreviated form, as has this Court. In *Bergdoll v. Commonwealth*, 858 A.2d 185 (Pa. Cmwlth. 2004)*, aff'd,* 874 A.2d 1148 (Pa. 2005), this Court described the amendment procedure stating that, "the General Assembly shall prescribe the manner in which the proposed amendments are to be submitted to the qualified electors. Pursuant to this authority, appearing in our Constitution as early as 1874, the General Assembly has directed, in the relevant part of Section 605 of the Election Code, [25 P.S. §§ 2600 – 3591] that 'proposed constitutional amendments shall be printed on the ballots or ballot labels in brief form to be determined by the Secretary of the Commonwealth with the approval of the Attorney General.'" *Bergdoll v. Commonwealth, 858 A.2d at 194-95.* This Court reiterated that, "[i]n light of the Constitution's grant of authority to prescribe the manner in which the amendments shall be presented to the electorate, the General Assembly quite properly directed in the Election Code that proposed amendments to the Constitution shall be presented as ballot questions composed by the Secretary." *Id.* at 195.

Under the plain language of our Constitution, and *Bergdoll*, among other authority, the Petitioners' claim fails. And, Petitioners cannot overcome the clear language of our Constitution and our cases by reference to a Kentucky case, as the

Kentucky Constitution *does not* contain identical language to the Pennsylvania Constitution.

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

The ballot question contains seventy-three words which cover almost the entirety of the Amendment. The electorate is fairly apprised of what they are voting for or against.

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

The ballot question appearing on the ballot (drafted by the Acting Secretary and approved by the Attorney General) satisfies the *Stander* requirements. The ballot question clearly and accurately provides notice to the voters that crime victims would be provided an array of rights:

> 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?

Petition for Review, Ex. A. The vote is to provide protections to crime victims. Voters are not in a situation where they are voting to provide protections to crime victims, and, for example, also considering an amendment regarding environmental laws—a true situation involving "logrolling."

A closer review of the facts of the *Stander* case provides even greater support that the ballot question here passes constitutional scrutiny. The ballot question challenged in *Stander* was "but a tiny and minuscular statement of the very *lengthy* provisions of the proposed Judiciary Article V." *Stander*, 250 A.2d at 480 (emphasis added). The amendment at issue was a *complete* revision of Article V relating to the Judiciary. For that revision, the 54-word ballot question submitted to the electorate read as follows:

> 'JUDICIARY—Ballot Question V: Shall Proposal 7 on the JUDICIARY, adopted by the Constitutional Convention, establishing a unified judicial system, providing directly or through Supreme Court rules, for the qualifications, selection, tenure, removal, discipline and retirement of, and prohibiting certain activities by justices, judges, and justices of the peace, and related matters, be approved?'

Id. Nothing in the *Stander* ballot question explained any of the several substantive changes that would result from a "yes" vote, including the adoption of 18 different sections of proposed Article V, including: the establishment of the unified judicial

system; the different appellate courts, courts of common pleas and magisterial districts; appellate rights; judicial administration; qualifications for justices, judges and others; elections and vacancies; and myriad other provisions, all consisting of over 5,000 words.

Despite this lack of information, the Pennsylvania Supreme Court upheld the ballot question and determined that it "fairly, accurately and clearly apprized the voter of the question or issue to be voted on." *Id*. The Court reached this conclusion because it determined that the ballot question was buttressed by other information—namely, the publications showing the proposed amendatory language to the Constitution and notices (like the Attorney General's Plain English Statement) available in the polling places. *Stander*, 250 A.2d at 480. Those same accompanying documents exist in the matter, *sub judice.*

As required under Article XI, Section 1 of the Pennsylvania Constitution, newspaper publications have run in every county across the Commonwealth. Additionally, notices will be present at the polling places pursuant to Section 201.1 of the Election Code, 25 P.S. § 2621.1. Between the two, voters will have the chance to examine the actual text of the changes to be wrought by their vote, along with the Attorney General's Plain English Statement explaining the effects of the change. Moreover, voters have had access to this same information as it is available on the Department of State's publicly accessible website—a fact conceded by

Petitioners. Petition for Review, ¶ 31. Thus, through the advertisements, voters will have been exposed to a combination of the Amendment, the ballot question, and the Plain English Statement a total of three times prior to the November election.

As noted above, this Plain English Statement, in addition to being published in various newspapers, will be posted in at least three distinct areas in all polling places. *See* 25 P.S. § 2621.1. Additionally, the county boards of election must include the Plain English Statement, along with the text of the proposed amendment and ballot question, in the notice of election published by the board in a newspaper in the county between three and 10 days prior to the election. *See id.* §§ 2621.1 and 3041. Voters have been given both broad and detailed opportunities to read the proposed constitutional amendment, the Plain English Statement, and the ballot question, and to associate the ballot question with this detailed additional information. Therefore, the ballot question will have been associated with the language of the Amendment numerous times prior to the November 5, 2019 election, and will allow a voter to understand the entirety of the proposed constitutional amendment envisioned by HB 276.

The holding in *Stander* is not an anomaly. In *Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016),[4] Justice Baer, writing separately to deny relief for plaintiffs, noted

[4] In *Sprague*, the Supreme Court assumed plenary jurisdiction of an action commenced in Commonwealth Court that challenged as misleading the wording of

"the *Stander* ballot did not specifically reference or explain the several substantive changes that would result from a 'yes' vote," on the question of approval of a completely new Article V for the Pennsylvania Constitution, and inasmuch as "the Secretary's framing of the ballot question [in *Sprague*] clearly conveyed the proposed constitutional amendment," the ballot question satisfied the *Stander* test, even if other language might have made the ballot question "more informative." *Sprague,* 145 A.3d at 1142 (opinion of Baer, J.).

This Honorable Court also found that the *Stander* test—again, requiring that the ballot question "fairly, accurately and clearly" inform the voter—was met in *Weiner v. Sec'y of Commonwealth,* 558 A.2d 185 (Pa. Cmwlth. 1989). In *Weiner* the Court found that the failure to include the word "classes" had no import, and that "the voters, armed with the ballot question, the Attorney General's [P]lain [E]nglish [S]tatement prepared and disseminated for publication and posting at the polls, and the abilities and reasons of common sense, are sufficiently notified of the effect of the constitutional amendment put before them." *Weiner,* 558 A.2d at 189.

Instantly, the ballot question, standing alone, satisfies the Constitution as it sets forth the gist of the Amendment. But, its constitutionality is further bolstered by

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the ballot question regarding a change in the mandatory judicial retirement age; because the Court was evenly divided on the merits, no relief could be granted, and the status quo prior to the filing of the lawsuit was maintained. *Sprague,* 145 A.3d at 1137 (per curiam order).

the fact that the electorate has access to the full text of the Amendment and the Attorney General's Plain English Statement. The Amendment and Plain English Statement have been included in three newspaper advertisements, which will be repeated by the county boards of elections, and at least three copies of the Plain English Statement explaining the proposed Amendment will be posted in the polling place, along with the specimen ballots and other instructions. *See* 25 P.S. § 2621.1. All these efforts collectively provide the voters the ability to understand these matters in relation to each other and to use "the abilities and reasons of common sense" in considering the ballot question.

In sum, the Petitioners' claim fails because the ballot question adequately informs the electorate.

D. PETITIONERS CANNOT DEMONSTRATE IRREPARABLE HARM.

A petitioner "seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages." *Greenmoor, Inc. v. Burchick Const. Co.*, 908 A.2d 310, 314 (Pa. Super. 2006). In order to meet this burden, there must be "concrete evidence" demonstrating "actual proof of irreparable harm." *Id*. The claimed "irreparable harm" cannot be based solely on speculation and hypothesis. *Id*.; *see also ECRI v. McGraw-Hill, Inc*., 809 F.2d 223, 226 (3d Cir. 1987) ("Establishing a

risk of irreparable harm is not enough. A petitioner has the burden of proving a 'clear showing of immediate irreparable injury.'").

Instantly, while the Petitioners outline four "harms" that will be "prevented" if an injunction is issued, the reality is that the Petitioners have not demonstrated any harm, let alone irreparable harm. In point of fact, two of the "harms" cited by the Petitioners are not even personal to them and are unabashedly speculative. Petitioners claim that an injunction is necessary because it "will prevent Marsy's Law from imposing unrecoverable financial costs on Pennsylvania courts and counties burdened with compliance initiatives, only for those costs to be wasted if the amendment is later declared invalid." Petitioners' Brief, p. 11. They also claim that an injunction is necessary because it "will prevent the ballot question from imposing a burden on the limited resources available to law enforcement and prosecutors . . . ." Petitioners' Brief, p. 13.

In addition to the fact that the foregoing are not "harms" that are specific to either Petitioner, and there is no standing to advance them, they are also completely speculative and unsupported. There is already a framework in place from the Crime Victims' Rights Act to support the needs of the Amendment. Even if the Petitioners could advance a loss in resources on behalf of the criminal justice system, there is absolutely no proof that the harm is real. And, any vague concern regarding third

party resources is outweighed by the actual loss of resources that will occur if an injunction is issued due to wasted advertising and printing costs.

The same goes for the Petitioners' contention that an injunction is required to "prevent victims, defendants, and the courts from entering into a period of extreme uncertainty as to what rights they have under the Pennsylvania constitution." Petitioners' Brief, p. 11. Petitioners cite no case law supporting the proposition that their speculative concerns and fears, amounting to "uncertainty" about the future, give rise to an injunction. In fact, case law indicates oppositely, the harm requisite to an injunction must be clearly defined. *See Novak v. Commonwealth,* 523 A.2d 318, 320 (Pa. 1987) (rejecting speculative considerations as legally sufficient to support preliminary injunction); *New Castle Orthopedic Assocs. v. Burns,* 392 A.2d 1383, 1387 (Pa. 1978) (plurality) (stating that "actual proof of irreparable harm" required for preliminary injunction, and concluding that injunction granted in that case was improper because record failed to indicate irreparable harm); *Credit Alliance Corp. v. Phila. Minit–Man Car Wash Corp.,* 301 A.2d 816, 818 (Pa. 1973) (trial court properly denied preliminary injunction where no showing made of necessity to avoid immediate and irreparable harm); *Sameric Corp. of Mkt. St. v. Goss,* 295 A.2d 277, 279 (Pa. 1972) (rejecting speculative considerations offered in support of preliminary injunction). This is simply not a cognizable legal harm.

Finally, Petitioners claim that an injunction is necessary because the ballot question is unconstitutional, and, thus, infringes on their "right to vote." However, as discussed, above, the Petitioners do not have a clear right to relief on this point. And, even assuming this Court would rule in Petitioners' favor at a later point, there is no harm from the electorate considering the question now. In fact, it will be much worse for the Court to enjoin the question, only to rule later that it was constitutional.

Indeed, this is why this Court has held that preliminary injunctions are not necessary in the ballot question context. In *Bergdoll*, upon which Petitioners primarily rest their case, this Honorable Court denied a preliminary injunction related to a ballot question that it later held to be unconstitutional. That decision was upheld by the Pennsylvania Supreme Court. *See Bergdoll v. Kane*, 731 A.2d 1261, 1264 (Pa. 1999) (recounting, that "[i]n his memorandum opinion dated November 3, 1995, President Judge Colins stated that the request had been denied based solely upon his conclusion that Appellees had failed to show an immediate need for relief and irreparable harm, and that the denial did not preclude ultimate relief on the merits, if necessary, after the election. We affirmed…"). A preliminary injunction was also denied in *Grimaud* at the Commonwealth Court level. *See Grimaud v. Com.*, 806 A.2d 923, fn. 4 (Pa. Cmwlth. 2002), *aff'd*, 865 A.2d 835 (Pa. 2005).

In sum, the Petitioners have failed to demonstrate any real harm at all, let alone cognizable irreparable harm. Their request for an injunction should, therefore, be denied.

E. AN INJUNCTION IS AGAINST PUBLIC INTEREST

The party seeking an injunction "must show that a preliminary injunction will not adversely affect the public interest." *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995 (Pa. 2003). Further, "[w]hen the issuance of an injunction will cause serious public inconvenience or loss without a corresponding great advantage to the complainant, no injunction will be granted even though the complainant would otherwise be entitled to its issuance." *Searfoss v. Sch. Dist. of Borough of White Haven*, 156 A.2d 841, 845 (Pa. 1959).

Here, an injunction is wholly against the public interest. The public will suffer injury in the form of disruption of the election due to Petitioners' belated request. As noted, the physical ballots have already been finalized and printed, and the machines are programmed. Last minute changes to the ballots will foreseeably cause chaos and confusion in the election. Potential disruption to the election is arguably a *per se* harm to the public interest.

Additionally, and perhaps most critically, the over 17,000 votes that have already been cast will be called into question. This is true even if the Court would direct that the certification be withheld. Those votes cannot be undone, and an

injunction will disenfranchise those voters, all before the Court has had a chance to consider the merits.

Finally, the equities weigh against the Petitioners. It is not in the public interest for litigants to wait until the last minute to seek an injunction before an election. Particularly, where, as in this case, they had ample notice of the relevant timeframes and subject matter months and months ago. This conduct should not be condoned, and weighs against issuance of an injunction.

F. AN INJUNCTION WILL NOT ABATE ANY OFFENDING ACTIVITY.

The ballot question relates to a single Amendment, having to do with victims' rights in the criminal justice system, and the ballot question fairly and accurately reflects the content of the Amendment. Therefore, an injunction will not abate any offending conduct.

In addition, in this case, the ballots have already been finalized, printed and programmed. Approximately 17,000 votes have been cast. The 2019 Municipal Election procedures and voting have long been in progress, and an injunction will be futile and disenfranchising.

IV. CONCLUSION

For the foregoing reasons, the Petitioners' Application for Special Relief in the Form of a Preliminary Injunction should be denied.

Respectfully submitted,

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Date: October 21, 2019

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

LEAGUE OF WOMEN VOTERS OF PA and LORRAINE HAW,	:	
Petitioner	:	**No. 578 MD 2019**
	:	
v.	:	
	:	
KATHY BOOCKVAR, THE ACTING SECRETARY OF THE COMMONWEALTH	:	**Electronically Filed Document**
Respondent	:	
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CERTIFICATE OF SERVICE

I, Nicole J. Boland, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on October 21, 2019, I caused to be served a true and correct copy of the foregoing document titled Brief in Opposition to Preliminary Injunction to the following:

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