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LEAGUE OF WOMEN VOTERS OF
PENNSYLVANIA, LORRAINE HAW, AND
RONALD L. GREENBLATT, ESQUIRE,

Petitioners,

v.

KATHY BOOCKVAR, THE ACTING
SECRETARY OF THE COMMONWEALTH,
SHAMEEKAH MOORE, MARTIN
VICKLESS, KRISTIN JUNE IRWIN, AND
KELLY WILLIAMS,

Respondents.

COMMONWEALTH COURT
OF PENNSYLVANIA

ORIGINAL JURISDICTION

No. 578 MD 2019

**PETITIONERS' BRIEF IN SUPPORT OF
APPLICATION FOR SUMMARY RELIEF**

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INTRODUCTION

Only the voters can rewrite the Pennsylvania Constitution. Here, the Pennsylvania Legislature has attempted to take that power for itself by asking the voters of the Commonwealth to vote “all or nothing” on a massive constitutional amendment. The proposed amendment, commonly called “Marsy’s Law,” presented to Pennsylvania voters in the November 5, 2019 election (the “Proposed Amendment”), would create a plethora of substantive rights for victims of crime and will change virtually every aspect of our criminal justice system. In total, the Proposed Amendment contains nearly 500 words, three subsections, enumerates at least fifteen new rights, and specifically references the content of at least three other provisions of the Constitution. In addition, it amends at least three articles, eight sections, and a schedule of the existing Pennsylvania Constitution. Despite the many changes that the Proposed Amendment will make to the Constitution, the voters faced with the question on November 5 had only one option available to them: vote “yes” or “no” to all these changes together. The Proposed Amendment thus disenfranchised voters and is unconstitutional. As Judge Ceisler wrote in finding that Petitioners had raised substantial questions as to the constitutionality of the proposed amendment and granting a preliminary injunction barring Respondent, the Secretary of the Commonwealth, from tabulating and certifying the results on the ballot question, “there is no greater adverse effect on the public interest [than] if the

electors are deprived of their constitutional right to vote.” Oct. 30, 2019 Order & Mem. at 34. The Proposed Amendment should be declared unconstitutional and therefore void.

QUESTIONS PRESENTED FOR REVIEW

1. Does the Proposed Amendment violate Article 11, § 1 of the Constitution because it encompasses more than one subject?

Suggested Answer: Yes.

2. Does the Proposed Amendment violate Article 11, § 1 of the Constitution because it substantively and facially affects, and therefore amends, more than one part of the Constitution?

Suggested Answer: Yes.

3. Does the form of the ballot question violate Article XI, § 1 of the Pennsylvania Constitution because it does not set forth the text of the proposed amendment?

Suggested Answer: Yes.

4. Does the form of the ballot question violate Article XI, § 1 of the Pennsylvania Constitution because it does not fairly, accurately, and clearly apprise voters of the issue to be voted on?

Suggested Answer: Yes.

STATEMENT OF UNCONTESTED FACTS

On November 5, 2019, the Secretary of the Commonwealth included on the election ballot a single-spaced, 73-word proposal to amend the Pennsylvania Constitution:

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?

Pa. Dept. of State website (attached to Application for Summary Relief as Exhibit A).

Petitioners the League of Women Voters of Pennsylvania (the “League”) and Lorraine Haw challenge this ballot question. The League is a nationwide, nonpartisan grassroots organization of women and men who believe that through informed action, people can make profound changes in their communities. Pet. for Review ¶ 5. The League encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy; the League is not strictly aligned with any one political party. *Id.* ¶ 6. The League often takes positions on voting and election reforms and criminal justice reform, among other issues. *Id.* ¶ 7.

Ms. Haw is a resident and registered voter in the Commonwealth. *Id.* ¶ 10. Ms. Haw lost both her brother and her son to crime. Ms. Haw also has her own criminal past and is seeking a pardon from the Governor. *Id.* ¶¶ 14-15. Agreeing with some of the amendment’s additions to the Constitution, Ms. Haw wanted to vote for certain parts of the amendment but not others, and she was unable to do so because the amendment was presented as one single question. *Id.* ¶ 17.

During the 2019 legislative session, SB 1011 was introduced under the name House Bill 276 (H.B. 276) and passed by the House in April 2019. H.B. 276 (2019) (attached to Application for Summary Relief as Exhibit B). In June 2019, the Senate passed H.B. 276 under the name Senate Bill 149, also known as Joint Resolution 2019-1 (the “Joint Resolution” or the “Proposed Amendment”). S.B. 149 (attached to Application for Summary Relief as Exhibit C). Joint Resolution 2019-1 directed the Secretary of the Commonwealth to submit the proposed amendment to electorate. *Id.* § 2(a).

The Attorney General of the Commonwealth prepared a Plain English statement pursuant to 25 Pa. Stat. Ann. § 2621.1. Ex. A. The Secretary of the Commonwealth drafted the text of the single ballot question that presented the Proposed Amendment to the voters. *Id.* The Secretary published the ballot question, the Attorney General’s Plain English Statement, and Joint Resolution 2019-1 together on the Department of State website. *Id.* In accordance with the

Pennsylvania Election Code, the Department of State advertised the existence of the amendment in various newspapers across the Commonwealth in both 2018 and 2019.

Joint Resolution 2019-1 proposes amending Article I of the Pennsylvania Constitution to create a bill of rights for crime victims. *Id.* It defines victims broadly to “include[] 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.” *Id.*

The many new victims’ rights that will be added to the Constitution include:

- the right “to be treated with fairness and respect for the victim’s safety, dignity and privacy”;
- the right “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”;
- the right “to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct”;
- the right “to be notified of any pretrial disposition of the case”;
- the right “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”;
- the right “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”;
- the right “to reasonable protection from the accused or any person acting on behalf of the accused”;
- the right “to reasonable notice of any release or escape of the accused”;

- the right “to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused”;
- the right to “full and timely restitution from the person or entity convicted for the unlawful conduct”;
- the right to “full and timely restitution as determined by the court in a juvenile delinquency proceeding”;
- the right “to the prompt return of property when no longer needed as evidence”;
- the right “to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings”;
- the right “to confer with the attorney for the government”; and
- the right “to be informed of all rights enumerated in this section.”

Id.

Those new rights must be “protected in a manner no less vigorous than the rights afforded to the accused.” *Id.* Either the victim or the government’s attorney can then enforce any of the newly created rights “in any trial or appellate court, or before any other authority.” *Id.*

On November 5, 2019, Pennsylvania voters were asked to give a single “yes” or “no” answer to the Proposed Amendment. Voters were not, however, presented with the language of the actual amendment to the Pennsylvania Constitution. Instead, they voted on the condensed ballot question prepared by the Secretary of the Commonwealth, which did not include the actual text of the amendment. Ex. A, Ballot Question.

PROCEDURAL HISTORY

The League and Ms. Haw commenced this action on October 10, 2019 by filing a verified Petition for Review under this Court's original jurisdiction. Oct. 10, 2019 Pet. for Review. Petitioner Ronald Greenblatt ("Greenblatt"), a veteran Pennsylvania criminal defense attorney, and Respondents Shameekah Moore, Martin Vickless, Kristin June Irwin, and Kelly Williams ("Intervening Respondents") filed applications to intervene, which were granted by the Court. Oct. 22, 2019 Order.

Petitioners immediately moved for a preliminary injunction. Oct. 10, 2019 Pet. for Review. Judge Ceisler ordered expedited briefing and held a hearing on the preliminary injunction application. Greenblatt and Respondent Intervenors submitted briefing and participated in the hearing on the preliminary injunction. During the hearing, the Court heard testimony from Greenblatt concerning the ways in which the accused's constitutional rights and judicial administration would be impacted if the Proposed Amendment became part of the Pennsylvania Constitution. Greenblatt testified, based on his extensive experience as a criminal defense attorney in Pennsylvania, as to the Proposed Amendment's impact on criminal defendants and the criminal courts. Among other things, he testified that under the Proposed Amendment's plain language:

- Victims of crime and anyone directly impacted by those crimes will have the absolute constitutional right "to reasonable protection from

the accused or any person acting on behalf of the accused.” Hr’g Tr. (H.T.) at 24 (attached to Application for Summary Relief as Exhibit D).

- Victims of crime and anyone directly impacted will have the right “to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused.” *Id.*
- Defense attorneys would be stymied in their ability to obtain discoverable material pursuant to Article I, § 9 of the Pennsylvania Constitution. *Id.* at 30.
- Where the accused seeks to examine a crime victim, or anyone who is impacted by a crime (often including witnesses), on delicate, personal matters that are germane to the case, the victim or anyone who is impacted by the crime, could invoke the right to dignity and privacy established in the Proposed Amendment. *Id.* at 36-37.
- Without compulsory discovery as mandated by Article I, § 9 of the Constitution, the Proposed Amendment would hamstring defense attorneys’ efforts to negotiate plea agreements. *Id.* at 41-42.

The Court issued a Memorandum Opinion and Order on October 30, 2019, granting a preliminary injunction enjoining the Secretary from tabulating and certifying the votes of the November 2019 general election on the ballot question, conditioned on the Petitioners’ posting of a \$500 bond. Oct. 30, 2019 Order & Mem. The Court found that all requirements for a preliminary injunction had been met, including that, if approved by the electorate, the amendment will “immediately, profoundly, and irreparably impact” accused individuals, victims, and the criminal justice system as a whole. Oct. 30, 2019 Mem. Op. at 15. Specifically, it reasoned that approval by the electorate would “put into doubt” virtually “every stage of the

criminal proceedings.” *Id.* The Court found that “[t]he inevitability of these harms is assured by the plain language of the Proposed Amendment.” *Id.* at 16.

The Court also held that Petitioners “raised substantial questions” as to the constitutionality of the Proposed Amendment and “are likely to prevail on the merits” with respect to their various claims. *Id.* at 21. First, the Court held that Petitioners raised substantial questions as to the “constitutionality of the Proposed Amendment in terms of both a violation of Article XI, Section 1’s separate vote requirement, and its facial impact on other articles and sections of the Constitution.” *Id.* at 34. The Court held that “it appears that the Proposed Amendment violates the single subject-matter rule of Article XI, Section I.” *Id.* at 18. The Court’s “exhaustive search of Pennsylvania case law reveal[ed] no other amendment to a section of the Constitution that was as sweeping in scope as the Proposed Amendment.” *Id.* at 28. The Court concluded that “the Proposed constitutional Amendment presented by the November 2019 ballot question (1) appears to contain multiple changes to the Constitution because it provides a whole series of new and mutually independent rights to victims of crimes, and (2) may amend multiple existing constitutional articles and sections across multiple subject matters.” *Id.* at 29. Further, the Court held that the “competing rights established in the Proposed Amendment are clearly not so interrelated as to justify inclusion into a single subject.” *Id.* at 33. The Court held that the Proposed Amendment addresses a “wide

range of subject matters including bail, discovery, due process, restitution, the right to privacy, and evidence control, all under the auspices of connecting them to victims' rights," but it that it is "not clear" how these rights are "related to" each other. *Id.*

Second, the Court found arguable merit to Petitioners' claim that the Proposed Amendment "fails to fairly, adequately and clearly inform the electorate of the Proposed Amendment," rendering the ballot question constitutionally defective under Pennsylvania Supreme Court jurisprudence. *Id.* at 33, 36. Specifically with regards to certain victims' rights, the Court found that it would be reasonable ultimately to conclude "that the Proposed Amendment is not accurate or clear." *Id.* at 35.

The Secretary and the Intervening Respondents appealed the entry of the preliminary injunction to the Pennsylvania Supreme Court. After expedited briefing, the Pennsylvania Supreme Court on November 4, 2019, affirmed the Commonwealth Court's entry of a preliminary injunction against Respondent. Accordingly, the Pennsylvania electorate voted on the Proposed Amendment but the Secretary was and remains barred from tabulating those votes or certifying the election results on the Proposed Amendment until the Court makes its final merits determination.

Upon remand of the case to the Commonwealth Court, the Secretary and Intervening Respondents filed Answers and New Matter. Petitioners responded with their Replies to New Matter, and the pleadings are now closed. As this case presents questions that are purely matters of law, the parties submitted a joint briefing schedule, which this Court approved on December 4, 2019. Dec. 3, 2019 Joint App. for Approval of Scheduling Order; Dec. 4, 2019 Order. The case is ripe for disposition on the merits.

STANDARD OF REVIEW

After an original or appellate jurisdiction petition for review is filed, a party may apply for summary relief. Pa. R.A.P. 1532(b). Applications for summary relief are evaluated under the same standard as applications for summary judgment. *Costa v. Cortes*, 142 A.3d 1004, 1009 (Pa. Commw. Ct. 2016), *aff'd*, 145 A.3d 721 (2016). Thus, summary relief is appropriate if, when viewing the evidence in the light most favorable to the non-moving party, “there are no genuine issues of material fact” and “the right to relief is clear as a matter of law.” *Flagg v. Int’l Union, Sec., Police, Fire Prof’l of Am., Local 506*, 146 A.3d 300, 305 (Pa. Commw. Ct. 2016). Where, as here, the parties file “cross-motions for summary relief, the Court must determine whether it is clear from the undisputed facts that one of the parties has established a clear right to the relief requested.” *Iseley v. Beard*, 841 A.2d 168, 169 n.1 (Pa. Commw. Ct. 2004).

ARGUMENT

Article XI, § 1 of the Pennsylvania Constitution permits the General Assembly to draft proposed constitutional amendments to be presented to the electorate, but requires that “[w]hen two or more amendments shall be submitted they shall be voted upon separately.” Pa. Const. art. XI, § 1. Article XI, § 1’s separate vote requirement must be strictly applied. *Bergdoll*, 731 A.2d at 1270. Because Article XI, § 1 “provid[es] a complete and detailed process for the amendment of th[e Constitution] . . . [n]othing short of a literal compliance with this mandate will suffice.” *Id.* at 1270 (quoting *Kremer v. Grant*, 606 A.2d 433, 436, 438 (Pa. 1992)). In order to ensure that the voters, and not the Legislature, retain the sole power to amend the Constitution, the voters are entitled to read and understand the change or changes they are being asked to approve. *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). The Proposed Amendment in Joint Resolution 2019-1 fails these requirements.

I. THE PROPOSED AMENDMENT VIOLATES ARTICLE XI, § 1’S REQUIREMENT THAT “WHEN TWO OR MORE AMENDMENTS SHALL BE SUBMITTED THEY SHALL BE VOTED UPON SEPARATELY.”

A. Pennsylvania Courts Have Developed A Modern Standard for Applying Article XI, § 1’s Separate Vote Requirement.

There are two ways that a proposed constitutional amendment can violate Article XI § 1’s separate-vote requirement. The Proposed Amendment fails on both

fronts. First, a proposed amendment violates Article XI, § 1 if it encompasses multiple subject matters. *Grimaud v. Commonwealth*, 865 A.2d 835, 841 (Pa. 2005) (adopting Justice Saylor’s concurrence in *Pa. Prison Soc’y*, 776 A.2d 971, 984 (Pa. 2001)). Second, a proposed amendment violates Article XI, § 1 if it amends more than one provision of the Constitution. *Id.* at 841-42. Three cases from the Pennsylvania Supreme Court develop these core principles.¹

First, in *Bergdoll v. Kane*, 731 A.2d 1261 (1999), the Court ruled that a November 1995 ballot question containing a proposed amendment that would have deleted the Confrontation Clause’s face-to-face requirement and given the General Assembly authority to establish by statute the manner in which child testimony could be taken violated the separate-vote requirement. The question included two proposals:

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?

¹ Judge Ceisler aptly summarized these three cases in her opinion on Petitioners’ preliminary injunction application. Oct. 30, 2019 Order & Mem. at 22-29.

Bergdoll, 731 A.2d at 1265-66. Although the question did not specifically refer to multiple constitutional provisions, the Court reviewed the content, purpose, and effect of the proposed amendment. *Id.* at 1270. The Court determined that the proposed amendment would amend both Article I, Section 9's Confrontation Clause and Article V, which grants the Supreme Court the power to prescribe the general rules governing the practice, procedure, and conduct of the court. *Id.* Because the ballot question prevented the electorate from separately voting on the amendments, the Court affirmed the Commonwealth Court's order that declared the vote on the ballot question null and void. *Id.* Notably, the Court reached this conclusion even though the proposed changes would appear in a single section of the Constitution.

Next, the Supreme Court held that a November 1997 ballot question violated the separate-vote requirement in *Pennsylvania Prison Society v. Commonwealth*. 776 A.2d at 981-82. In that case, the challenged ballot question proposed amending Article IV, § 9, relating to the Governor's power to remit fines and forfeitures and to grant reprieves to commutation of sentences and pardons. At the time, Article IV also mandated that no pardon or commutation be granted except upon the written recommendation of either two-thirds of or a majority of the Board of Pardons after a full public hearing. Article IV also addressed members of the Board and how their appointment and confirmation was made. The proposed amendment would have required the Board's pardon recommendation to be unanimous, would

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

Shall the Pennsylvania Constitution be amended 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, to require only a majority vote of the Senate to approve the Governor's appointments to the Board, and to substitute a crime victim for an attorney and a corrections expert for a penologist as Board members?

Id. at 974.

The Court identified two purposes of the amendments: restructuring the pardoning power of the Board and altering the confirmation process. *Id.* at 981. It observed that the *Bergdoll* Court considered the content, purpose, and effect of the proposed amendment even though the ballot question itself did not specifically refer to each constitutional provision that would have been effectively amended by its adoption. *Id.* at 980. The Court concluded the ballot question presented two separate amendments and thus violated the separate-vote requirement.² *Id.* at 973. The Court determined that the proposed amendment restructured the pardoning power of the

² Even though the question violated Article XI's separate-vote requirement, the Court declined to invalidate the question because the proposed amendment did not actually change the Senate's confirmation process. It noted, however, that Article XI, § 1 "will require that a ballot question be declared null and void, except in the [unusual] circumstances presented [t]here." *Id.* at 982.

Board and altered the confirmation process for Board members. The Court further determined that the proposed amendment relating to the Board's composition and unanimous vote requirement constituted a single question. *Id.* The change in the process for confirmation of gubernatorial nominees, however, presented a separate amendment that a required a separate vote. *Id.*

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

Most recently, in *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005), a majority of the electorate approved amendments to Article I, § 6 (relating to trial by jury) and Article I, § 14 (relating to bail and habeas corpus). One ballot question proposed amending Article I, § 14 by expanding exceptions to the right to pretrial release:

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?

Grimaud, 865 A.2d at 841. The other ballot question proposed amending Article I, § 6 by providing the Commonwealth a right to trial by jury in criminal cases:

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?

Id. at 845. Petitioners challenged the amendments' validity on the grounds that the ballot questions proposing the amendments violated Article XI, § 1's separate vote requirement. The Commonwealth Court held that the jury trial and bail questions each constituted a single amendment because each amendment served one core purpose and effectuated one substantive change. *Id.* at 840.

On appeal, the Supreme Court began by deciding the standard used to determine whether the changes were properly presented as a single question. Noting that its decision in *Pennsylvania Prison Society* resulted in no clear majority on the standard to apply, the Court was persuaded by Justice Saylor's concurring opinion in that case suggesting the test should have a "subject-matter focus to determine whether [the] alterations are sufficiently interrelated to justify their presentation to the electorate in a single question." *Grimaud*, 865 A.2d at 841 (quoting *Pa. Prison Soc'y*, 776 A.2d at 984 (Saylor, J. concurring, joined by Castille and Newman, JJ.)). The Supreme Court also found persuasive authority from other jurisdictions that have utilized a single subject test and examined the interdependence of the proposed constitutional changes in determining the necessity of separate votes. The Court therefore expressly adopted the "subject-matter test" for determining whether a ballot question violates Article XI, § 1 of the Pennsylvania Constitution.

The *Grimaud* Court then turned to the ballot question regarding Article I, § 14 and determined that the ballot question related to a single subject to justify inclusion in a single question: bail. The Court analyzed the ballot question’s substantive effect on the Constitution, examining its content, purpose and effect. *Id.* at 842. The Supreme Court concluded that “merely because an amendment may possibly impact other provisions does not mean it violates the separate vote requirement.” *Id.* Rather, the “test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution.” *Id.* As the Supreme Court explained, “[t]he question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect” *Id.* The two amendments adopted by the electorate in November 1998 thus survived Article XI, § 1 challenges because they did not *facially* affect other parts of the Constitution. As to the proposed amendment to Article I, § 14, the Court held that because different ways of disallowing bail related to only a single subject—bail—the question did not violate Article XI, § 1. *Id.* at 842 (rejecting arguments that the amendment substantively affected other rights such as the right to defend oneself or the right to be free from excessive fines). With respect to the proposed amendment to Article I, § 6, the Court held that because the Commonwealth’s jury-trial right

does not affect other parts of the Constitution, such as judicial rulemaking power, the question did not violate Article XI, § 1. *Id.* at 845.

Post-*Grimaud*, then, there are two ways that a proposed amendment can fail the separate vote requirement of Article XI, § 1. The Proposed Amendment presented by the November 2019 ballot question fails both because it (1) contains multiple subject matters in that it provides a whole series of new and mutually independent rights to victims of crimes, and (2) amends multiple existing constitutional articles and sections. In specific, it proposes changes to multiple enumerated constitutional rights of the accused—including the right to a speedy trial, the right to confront witnesses, the right against double jeopardy, the right to pretrial release, the right to post-conviction relief, and the right to appeal—as well as changes to the public’s right of access to court proceedings.

B. The Proposed Amendment Violates The Separate Vote Requirement Because It Encompasses More Than A Single Subject.

The Proposed Amendment would establish an array of new substantive and procedural constitutional rights for those who are harmed by criminal conduct. The substantive rights include property rights (including the right to full and timely restitution, and right to the return of property) and non-economic rights (such as the right to “fairness” and to “dignity and privacy,” as well as a separate right to “reasonable protection from the accused or any person acting on behalf of the

accused”). The procedural rights include the right to notice (of proceedings that affect victims, of any proceeding concerning release, and of release), right to consult with counsel for the Commonwealth, right to be present, right to be heard, right to proceedings without undue delay, right to refuse discovery, and standing to seek relief in criminal proceedings to assert their rights. These substantive and procedural rights must be enforced with “vigor” at every stage of a criminal proceeding and affect every aspect of such proceedings.

As Judge Ceisler wrote in her preliminary injunction opinion, “the competing rights established in the Proposed Amendment are clearly *not so interrelated as to justify inclusion into a single subject.*” Oct. 30, 2019 Order & Mem. at 33 (emphasis in original). Instead, she found that “[t]he Proposed Amendment addresses a wide range of subject matters including bail, discovery, due process, restitution, the right to privacy, and evidence control, all under the auspices of connecting them to victims’ rights.” *Id.* Review of the content, purpose, and effect of the Proposed Amendment confirms Judge Ceisler’s conclusion.

The content of the Proposed Amendment: Analysis of the text of the Proposed Amendment, the form of the ballot question drafted by the Secretary, and the Plain English Statement of the Office of Attorney General demonstrate that Judge Ceisler was correct. The Proposed Amendment cannot be said to encompass a single subject.

As an initial matter, the text of the Proposed Amendment, the form of the ballot question drafted by the Secretary, and the Plain English Statement of the Office of Attorney General each make clear that the amendment concerns multiple subject matters.

The text of the constitutional amendment: By its plain language, the constitutional amendment proposed by the ballot question would grant numerous “*rights*” to crime victims:

§ 9.1. *Rights* of victims of crime.

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

Ex. A, Joint Resolution No. 2019-1 (emphasis added). The constitutional amendment proceeds with a lengthy list of the proposed rights, separated by seven semicolons. That list includes subject matters far more wide ranging than the questions proposed in *Bergdoll*, *Pennsylvania Prison Society*, or *Grimaud*. These matters cannot be said to encompass one subject without rendering the Supreme Court’s test meaningless. Unlike the first ballot question in *Grimaud* that proposed changes to “bail” alone, the November 2019 ballot question proposes changes to bail *and* discovery, *and* restitution and return of property, *and* notice requirements, *and* participation in public proceedings, *and* due process, *and* other matters. Thus, any

argument that the ballot question contains only one subject matter is “belied by the ballot question itself.” *Bergdoll*, 731 A.2d at 1269.

The text of the ballot question as formulated by the Secretary: The Secretary’s formulation of the question to be presented to the voters also makes clear that their votes will effect a series of substantive changes, described with the plural “rights,” which are marked off by semicolons and prefaced by the preposition “including”:

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?

Ex. A, Ballot Question (emphasis added).

The plain English statement of the Office of Attorney General: Similarly, the Attorney General could not describe the constitutional amendment proposed by the ballot question without using plurals, multiple paragraphs, and even bullet points to set off the separate and distinct “several . . . new constitutional rights” the amendment would establish:

The proposed amendment, if approved by the electorate, will add a new section to Article I of the Pennsylvania Constitution. That amendment will provide victims of crimes with certain, *new constitutional rights* that must be protected in the same way as the rights afforded to individuals accused of committing a crime.

The proposed amendment defines “victim” as both a person against whom the criminal act was committed and any person who was directly harmed by it. The accused or any person a court decides is not acting in the best interest of a victim cannot be a victim.

Generally, the proposed amendment would grant victims the constitutional right to receive notice and be present and speak at public proceedings involving the alleged criminal conduct. ***It would also*** grant victims the constitutional right to receive notice of any escape or release of the accused ***and the right*** to have their safety and the safety of their family considered in setting the amount of bail and other release conditions. ***It would also create several other new constitutional rights***, such as the right to timely restitution and return of property, the right to refuse to answer questions asked by the accused, and the right to speak with a government attorney.

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

- To be treated with fairness and respect for the victim’s safety, dignity and privacy
- To have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the accused
- To reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct
- To be notified of any pretrial disposition of the case
- With the exception of grand jury proceedings, to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole and pardon
- To be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender

- To reasonable protection from the accused or any person acting on behalf of the accused
- To reasonable notice of any release or escape of the accused
- To refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused
- Full and timely restitution from the person or entity convicted for the unlawful conduct
- Full and timely restitution as determined by the court in a juvenile delinquency proceeding
- To the prompt return of property when no longer needed as evidence
- To proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings
- To confer with the attorney for the government
- To be informed of all rights enumerated in this section

The proposed amendment would allow a victim or prosecutor to ask a court to enforce *these constitutional rights* but would not allow a victim to become a legal party to the criminal proceeding or sue the Commonwealth or any political subdivision, such as a county or municipality, for monetary damages.

Once added to the Pennsylvania Constitution, these *specific rights of victims* cannot be eliminated, except by a judicial decision finding all or part of the amendment unconstitutional or the approval of a subsequent constitutional amendment. If approved, the General Assembly may pass a law to implement these *new, constitutional rights*, but it may not pass a law eliminating them. If approved, State and local governments will need to create new procedures to ensure that victims receive the *rights* provided for by the amendment.

Ex. A, Plain English Statement of the Office of Attorney General (emphasis added).

The purpose and effect of the Proposed Amendment: The Proposed Amendment creates multiple brand new rights—both substantive and procedural for victims, rights that will come into play at all stages of criminal proceedings—addresses multiple existing provisions of the Constitution, and grants the General Assembly the power to define at a later date the “due process” to be accorded victims.³ The proposed Section 9.1 is no more a “single subject” than existing Section 9, which sets forth the rights of the accused. That section also governs an overarching category—rights of defendants in criminal proceedings—but it enumerates several independently enforceable rights: the right to be heard, the right of confrontation, a right to compulsory process, the right to a speedy trial, a right against self-incrimination, and the right to trial by jury, among others.

Respondent will likely argue, as she did at the preliminary injunction stage, that an amendment has a “single subject” when its provisions have a single objective. And certainly, several of the provisions in the proposed amendment support a common objective: the procedural right to notice of and an opportunity to participate in every phase of a criminal proceeding that affects them. That objective can fairly be said to encompass, in addition to the provisions about notice and participation,

³ During the preliminary injunction hearing, Respondent argued that the General Assembly will have to enact additional legislation before unspecified portions of the proposed amendment can go into effect. H.T. at 58-62.

the definition of victim and the enforcement provision, and perhaps even the right to speak with the prosecutor.

But the proposed amendment does much more than that. It creates additional rights—both substantive and procedural—that exist and are enforceable independently of the right to participate. Victims will have new property rights (restitution and prompt return of property); new substantive rights to “fairness,” “dignity,” and “privacy” and “protection from the accused”; and multiple procedural rights that are not encompassed by the right to participate, such as a constitutional right to have their safety and that of their families considered in the setting of bail; a right to refuse to respond to discovery or subpoenas from the defense, and a constitutional right to speed and finality in proceedings. These additional rights are independent from one another. For example, the right 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 has nothing to do with the victim’s right to the return of property. And the right to reasonable notice of any release or escape of the accused is entirely distinct from those rights, or the right to full and timely restitution, as well as the right to refuse a pre-trial discovery request made by the accused or his lawyer. The Constitution could, and should, be amended to separately add some or all of these rights.

Even if a basket of independently enforceable substantive and procedural rights could be considered a single subject—which it cannot—the Proposed Amendment does more than create rights for victims. It also grants the General Assembly power over judicial proceedings—indeed, the Secretary has argued that action by the General Assembly is needed to effectuate *any* of the rights set forth in the amendment. H.T. at 58-62. That concession is most relevant to the second way in which the Proposed Amendment violates the separate vote requirement, but it also identifies an additional “subject” of the Proposed Amendment.

C. The Proposed Amendment Fails The Separate Vote Requirement Because It Substantively And Facially Affects, And Therefore Amends, More Than One Part Of The Constitution.

The Proposed Amendment also violates Article XI, § 1 because it facially affects more than one section of the Constitution. Beyond adding “new . . . rights” to Article I that conflict and compete with the existing rights of the accused, the ballot question will amend multiple other existing provisions of the Pennsylvania Constitution, which provide important rights to the criminally accused and to the public, and exclusive powers to the Governor and the judiciary. As Judge Ceisler noted in finding Petitioners are likely to succeed on the merits, the Proposed Amendment “proposes changes to multiple enumerating constitutional rights of the accused—including the right to a speedy trial, the right to confront witnesses, the right against double jeopardy, the right to pretrial release, the right to post-conviction

relief, and the right to appeal—as well as changes to the public’s right of access to court proceedings.” Oct. 30, 2019 Order & Mem. at 29. She found that “[f]or these reasons, Petitioners presented a compelling argument [at the preliminary injunction stage] that the Proposed Amendment does not merely ‘touch’ upon other parts of the Constitution when applied, but rather, that the Proposed Amendment *facially, patently, and substantially* affects other parts of the Constitution.” *Id.* at 33 (emphasis in original). The many changes to the Pennsylvania Constitution are explained more fully below.

1. The Content of the Proposed Amendment Expressly Alters Multiple Sections of the Constitution.

The content of the proposed amendment expressly alters multiple sections of the Constitution. The sections expressly affected include the Judiciary’s exclusive authority over court procedure, an accused’s right to compulsory process, and an accused’s right to pretrial release.

a. The Proposed Amendment Creates an Express Exception to the Judiciary’s Exclusive Authority Over Court Procedure

Article V, § 10 grants the Pennsylvania Supreme Court the “exclusive” power to create rules of procedure for state courts. Pa. Const. art. V, § 10; *Commonwealth v. McMullen*, 961 A.2d 842, 847 (Pa. 2008). While the state legislature holds the power to create substantive law, Article V, § 10 reserves the power to create procedural law in the Pennsylvania Supreme Court. *Id.*

If the change to the judiciary's rulemaking authority were presented honestly,

Article V, § 10 would read as follows:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the Judicial Branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions. Notwithstanding the provisions of this section, the General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television. *In addition, the General Assembly may provide for and define the rights of persons who have been directly harmed by the conduct of which the defendant is accused in criminal proceedings.*

At the preliminary injunction stage, Judge Ceisler found that the Petitioners' contention that the Proposed Amendment would "infringe upon the Court's powers to prescribe rules governing the practice, procedure and conduct of all courts" was "well taken." Oct. 30, 2019 Order & Mem. at 32. Specifically, she stated:

On the merits, it would be reasonable for this Court to conclude that the Proposed Amendment affects the courts in two ways. First, a victim asserting the constitutional privacy right could demand closed proceedings, contrary to Article I, Section 11's requirement that the courts be open to all. Second, the Proposed Amendment gives victims the right to participate and be heard at all stages of the criminal justice

process. This Court previously identified the issues that the Proposed Amendment would have on the day it becomes part of the Constitution. As the courts may not abridge, enlarge or modify the substantive rights of any litigant, the Proposed Amendment could impose on the courts' ability to maintain its calendar in an efficient and expeditious manner.

Id.

The proposed amendment enlarges the powers of the General Assembly and curtails those of the Pennsylvania Supreme Court. Previously, the Pennsylvania Supreme Court held that an increased grant of rulemaking authority to the General Assembly in Article V, § 10 amounted to an amendment. *See Bergdoll*, 731 A.2d at 1270.

Because this proposed amendment increases the General Assembly's powers in a similar manner, it also amends Article V, § 10. Consequently, Pennsylvanians are entitled to a separate vote on this amendment.

b. The Proposed Ballot Expressly Amends An Accused's Right To Use Compulsory Process To Present His Defense.

Article I, § 9 guarantees the accused the right to have compulsory process for obtaining evidence in his favor. Pa. Const. art. I, § 9. "[I]n practice the guarantee of compulsory process . . . insures the right to the issuance of subpoenas to insure appearance by 'such witnesses as the defendant may call for,' service to be had without compensation." Ken Gormley, *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 354 (2004). Under the Proposed Amendment, however, not

only the complainant, but also any person who claims to have been directly harmed by the conduct that is the subject of the criminal charge may refuse to respond to a subpoena from the accused. By way of example, if a defendant were charged with assault after a fight in a bar but contended that he had hidden in the restroom during the fight, he could not compel the bar owner (who suffered economic damages as a result of the fight) to come to court and testify as to what that person saw that night, or even compel the owner to respond to a subpoena for footage from the bar's security cameras. Nor could he compel the testimony of the bar patrons—also direct victims—who got hit trying to break up the fight, who could say whether he was involved or not. Finally, the defendant's right to compel information from third parties—such as the alleged victim's medical records—would have to be balanced by “respect for the victim's safety, dignity and privacy.”

If this change to the defendant's right to compel testimony in his defense were presented honestly, the compulsory process clause in Section 9 would be amended to read as follows:

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

Thus, the accused’s right to present relevant testimony is made conditional to the extent that it would implicate any victim’s safety, dignity, or privacy, or require a direct response from anyone claiming to have been harmed by the alleged criminal conduct. “To the extent that [the proposed change] operates to prevent a criminal defendant from presenting relevant evidence,” it “unquestionably implicates the Sixth Amendment.” *See Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (evaluating Michigan’s rape-shield statute).⁴ The proposed change also limits a judge’s authority to direct disclosure of “private” information and to order a pretrial deposition or interview. *See Pa. R. Crim. P. 500* (permitting court orders to take and preserve when witnesses may be unavailable or when justice requires it).

Intervenor Greenblatt testified during the preliminary injunction hearing that criminal defendants’ rights under compulsory process would be gravely affected if the Proposed Amendment were enacted. If enacted, victims of crimes and anyone directly impacted by the crimes will have the absolute right to “to refuse an interview, deposition or other discovery request made by the accused or any person

⁴ It is true that this “right ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process.’” *Michigan*, 500 U.S. at 149 (quoting *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)). But the issue before the Court is not whether the ballot question proposes changes below the federal “constitutional floor.” *Kansas v. Carr*, 136 S. Ct. 633, 648 (2016) (Sotomayor, J., dissenting). Instead, as it relates to the separate-vote requirement, the Court need only determine whether the proposed change *substantively affects* an existing part of the Constitution.

acting on behalf of the accused.” H.T. 31-32; Oct. 30, 2019 Order & Mem. at 10. Defense attorneys’ ability to investigate will be curtailed: “There [are] going to be people sitting in jail who are innocent, who are going to take pleas to get out of jail without having the right to have their case fairly investigated.” H.T. at 42. Greenblatt also testified that courts may no longer be able to grant necessary discovery requests that infringe upon victims’ newly created rights. Oct. 30, 2019 Order & Mem. at 10 (citing H.T. at 59, 66, 70, 81).

c. The Proposed Amendment Alters An Accused’s Right To Pretrial Release.

Article I, § 14 “mandates all persons have a right to be released on bail prior to trial in all cases,” with certain limited exceptions. Pa. Const. art. I, § 14 (“[a]ll prisoners shall beailable by sufficient sureties”); *Commonwealth v. Truesdale*, 296 A.2d 829, 831 (Pa. 1972). This bedrock constitutional provision reflects “(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense.” *Truesdale*, 296 A.2d at 834-35. Reaffirming that “the fundamental purpose of bail is to secure the presence of the accused at trial,” the *Truesdale* court stated that “[i]n the absence of evidence the accused will flee, certain basic principles of our criminal law indicate bail should be granted.” *Id.* at 834. “[U]nless this right to bail before trial is preserved, the

presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Id.* at 835 n.13 (quoting *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951)).

Except where the defendant faces a capital offense or life imprisonment or if no conditions would ensure attendance at trial, a court may not refuse to release a person facing criminal charges unless “no condition or combination of conditions other than imprisonment will reasonably assure safety of any person and the community” and the “proof is evident or presumption great.” Pa. Const. art. I, § 14. Therefore, in all cases except for homicide, the bail authority must start with the presumption that a defendant is entitled to pretrial release. Under the Proposed Amendment, however, the mandate that “all prisoners shall be bailable by sufficient sureties” will be modified to mean that “all prisoners shall be bailable by sufficient sureties *if the bail authority deems that to be consistent with consideration of the safety of every person who has been directly harmed by the conduct of which the defendant is accused and the families of all such persons.*”

Article I, § 14 also provides the privilege of the writ of habeas corpus and protects against its suspension. Habeas corpus is used to “test the legality of the restraints upon an accused’s liberty.” *Commonwealth v. Hess*, 414 A.2d 1043, 1045 (Pa. 1980).

If the change to the accused’s right to pretrial release were presented honestly, Article I, § 13 would read as follows:

All prisoners shall be bailable by sufficient sureties, after consideration of the safety of every person who has been directly harmed by the conduct of which the defendant is accused and the families of all such persons in fixing the amount of bail and release conditions, and after reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard, and with notice to every person who has been directly harmed by the conduct of which the defendant is accused of the prisoner's release, 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, but such writ will only be available after reasonable and timely notice to any person who has been directly harmed by the conduct of which the defendant is accused, who shall have a right to be present and be heard, and to be notified of the release. Such writ shall not be available after unreasonable delay or after a prompt and final conclusion of post-conviction proceedings.

Under the proposed amendment, the presumption of pretrial release embodied in § 14 would be, at the least, conditioned upon a determination about the safety of alleged victims and their family members, and almost certainly delayed by the need to provide notice and an opportunity to appear at the preliminary arraignment to all who can claim to have been harmed by the alleged crime. In most counties, preliminary arraignments happen around the clock, via video link while the defendant is still in the custody of law enforcement, without any witnesses or even counsel for the accused. And the interests of the victims and their families would

have to be weighed equally with the defendant's right to release, thus compromising the presumption of innocence embodied in § 14.

The amendment will also affect habeas corpus relief because the writ will not be available until all persons "directly harmed" by the alleged criminal conduct receive adequate notice and the right to be heard. As a result, the amendment may delay habeas corpus relief.

2. The Purpose And Effect Of The Proposed Amendment Is To Alter Multiple Provisions Of The Constitution.

The Proposed Amendment's purpose and effect is to alter multiple other provisions of the Constitution. In *Bergdoll I*, the Supreme Court held that an amendment that changed the right of confrontation in Article IX and empowered the General Assembly to legislate court procedures related to that right did two things:

We are also unpersuaded by Secretary Kane's alternative argument that the purported grant of rulemaking authority to the General Assembly in the context of children's testimony in criminal proceedings does not amount to an amendment of Article 5, § 10(c) as that section contemplates that the Supreme Court's rulemaking authority may be affected or limited by other parts of the Constitution. Article 5, § 10(c) of the Constitution grants the power to the Supreme Court "to prescribe general rules governing practice, procedure and the conduct of all court..." As we stated in *In Re 42 Pa. C.S. § 1703*, 482 Pa. 522, 534, 394 A.2d 444, 451 (1978), "the Pennsylvania Constitution grants the judiciary—and the judiciary alone—power over rule-making."

In that decision, we rejected the notion that Article 5, § 10(c) allows the General Assembly to exercise concurrent power in the area of rule making.

Bergdoll v. Kane, 731 A.2d 1261, 1270 (1999). The same result must follow here. The purpose and effect of the Proposed Amendment alter multiple other sections of the Constitution, including those highlighted below.

a. The Proposed Amendment Alters Multiple Rights Of The Accused in Article I of the Pennsylvania Constitution.

As Judge Ceisler explained in the preliminary injunction opinion, “Article I of our Constitution establishes rights that pertain to the relationship between the Commonwealth and its citizens.” Oct. 30, 2019 Order & Mem. at 29. As she also noted, the changes that the Proposed Amendment makes to Article I appear to be massive: “The Proposed Amendment appears to turn Article I on its head, enabling victims, and possibly witnesses, to prevent individuals accused of crimes from asserting their fundamental constitutional rights to defend themselves.” *Id.*

Article I, § 9 provides several independent and fundamental rights to the criminally accused, each of which is enforced separately and defined by its own body of law. These rights, as Judge Ceisler noted, “directly relate to the Commonwealth’s ability to take away an individual’s freedom.” Oct. 30, 2019 Order & Mem. at 30. Despite amendments over time, Article I, § 9 “has consistently maintained the same *range of rights and privileges* to individuals accused of committing crimes.” Gormley, *The Pennsylvania Constitution* at 329 (emphasis added). The rights in Article I, § 9 are treated separately by Pennsylvania courts. Oct. 30, 2019 Order &

Mem. at 31 n.19. In *Commonwealth v. Arroyo*, for example, a defendant contended violations of the right against self-incrimination and the right to counsel. 723 A.2d 162, 165-67 (Pa. 1999). The Court addressed each constitutional right on its own merits and held that the rights attached at different points in time. *Id.* at 167-70.

The ballot question patently affects several of the individual rights afforded by Article I, § 9. Each affected right in Article I, § 9 constitutes a separate constitutional amendment that entitles Pennsylvanians to a separate vote.

i. The Proposed Amendment Alters An Accused's Right To Demand The Nature And Cause Of The Accusation Against The Accused.

Article I, § 9 provides that “[i]n all criminal prosecutions, the accused hath a right . . . to demand the nature and cause of the accusation against him” Pa. Const. art. I, § 9. This clause reaffirms the common law rule that the accused must be afforded adequate notice of the criminal charges he or she is facing. Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 101 (1907). The right to formal notice of the charges is considered “so basic to the fairness of subsequent proceedings” that it cannot be even voluntarily waived by the defendant. *Commonwealth v. Little*, 314 A.2d 270, 273 (Pa. 1974). The federal counterpart to this right is found in the Sixth Amendment to the U.S. Constitution, and the federal and Pennsylvania constitutional rights are generally considered indistinguishable. *Commonwealth v. Alston*, 651 A.2d 1092, 1094-95 (Pa. 1994).

The proposed amendment’s protections for the dignity and privacy of victims, among other changes, would impose substantive conditions on the right to know the nature and cause of the accusation. If those changes were presented honestly, this right in Section 9 would be amended to read as follows:

In all criminal prosecutions the accused hath a right . . . to demand the nature and cause of the accusation against him, so long as that does not infringe on the rights of any person who has been directly harmed by the conduct of which the defendant is accused to be treated with fairness and respect for the victim’s safety, dignity and privacy.

This is an unprecedented change to the common understanding of the formal notice to which the accused is guaranteed, because certain important information about the nature and cause of the accusation may be withheld from the defendant owing to the victim’s safety, dignity, and privacy concerns. Pennsylvanians are entitled to a separate vote on this amendment of Article I, § 9.

ii. The Proposed Amendment Alters An Accused’s Right To Be Confronted With The Witnesses Against Him.

Under Article I, § 9, an accused person has the right to be confronted with the witnesses against him. Pa. Const. art. I, § 9. This right offers “the same protection as the Sixth Amendment” of the U.S. Constitution. *Commonwealth v. Atkinson*, 987 A.2d 743, 745 (Pa. 2009). “[T]he right guaranteed by the Confrontation Clause includes not only a personal examination, but also . . . forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of

truth.” *Id.* (quotations and citation omitted). And the right—as currently understood—overrides competing interests such as confidentiality. *See Davis v. Alaska*, 415 U.S. 308, 319-20 (U.S. 1974) (holding that Alaska’s “policy interest in protecting the confidentiality of a juvenile offender’s record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness”).

The proposed amendment’s protections for the dignity and privacy of victims, among other changes, would impose substantive conditions on the right of confrontation. If those changes were presented honestly, the Confrontation Clause in Section 9 would be amended to read as follows:

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

This amendment significantly reduces the scope of an accused’s confrontation rights because it establishes a legal basis for victims to withhold critical information from the accused. Intervenor Greenblatt explained the unprecedented nature of this change: “The right to confrontation is still there. But under this, it can be limited for the first time.” H.T. at 63. The newly created rights in the Proposed Amendment “could be used to limit cross-examination.” H.T. at 38. Because the proposed

change establishes broad privacy rights to victims, victims—meaning not only the complaining witness but also anyone who claims to have been directly harmed by the accused’s alleged conduct—may refuse to disclose vast swaths of information, such as medical diagnoses or personal messages on social media platforms. Indeed, victims may even invoke the right not to participate at all in criminal proceedings. Pennsylvanians are entitled to a separate vote on this amendment to a critical right in Article I, § 9.

iii. The Proposed Amendment Alters An Accused’s Right To A Speedy and Public Trial.

Additionally, Article I, § 9 guarantees the accused the right to a “speedy public trial.” Pa. Const. art I, § 9. Pennsylvania’s speedy trial right is coextensive with the right in the Sixth Amendment to the United States Constitution. *Commonwealth v. DeBlase*, 665 A.2d 427, 432 (Pa. 1995). To decide whether a defendant’s speedy-trial right is violated, courts evaluate four factors: “(1) whether the pretrial delay was uncommonly long; (2) whether the government or the criminal defendant is more to blame for that delay; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice because of the delay.” *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

If the change to the defendant’s right to a speedy and public trial were presented honestly, this clause in Section 9 would be amended to read as follows:

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

Thus, this proposed change will create an additional factor that conditions, the accused's right to a speedy trial by creating victims' rights that must be "protected . . . no less vigorous[ly]" than the defendant's right. The analysis of whether a delay has violated the defendant's right to a speedy trial would include a fifth new factor: whether the proceedings were delayed to satisfy any victim's right to notice, right to be present, or right to be heard. A trial may be delayed if someone "directly harmed" by the alleged criminal conduct fails to receive adequate notice or requests delays so that she or he may be present at the trial. The resulting delay may be viewed as "excused," and therefore weigh against the accused's existing speedy trial right. Intervenor Greenblatt testified that speedy trial rights would be impacted by the Proposed Amendment: "[The Proposed Amendment] could cause delays in cases." H.T. at 40. He further testified victims would also be negatively impacted, saying there could be "a reverse effect for the crime victims because of the delay in cases." *Id.* Continuances may be needed to notify witnesses. *Id.*

Pennsylvanians are entitled to a separate vote on this amendment to Article I, § 9.

iv. The Proposed Amendment Alters An Accused’s Right Against Double Jeopardy.

Article I, § 10 provides a right against double jeopardy. Pa. Const. art. I, § 10. That right “protects against a second prosecution for the same offense after an acquittal, a second prosecution for the same offense after a conviction and multiple punishments for the same offense.” *Commonwealth v. McCord*, 700 A.2d 938, 941 (Pa. Super. Ct. 1997).

If the change to a defendant’s right against double jeopardy were presented honestly, the proposed amendment Article I, § 9 would read as follows:

No person shall, for the same offense, be twice put in jeopardy of life or limb *unless the first proceeding proceeded without reasonable and timely notice to every person who has been directly harmed by the conduct of which the defendant is accused, at which each such person had a right to be present and be heard*; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

The proposed change facially affects Article I, § 11 because a victim’s right to notice and participation in all proceedings must be enforced to the same degree as an accused’s right against double jeopardy. If someone “directly harmed” by the criminal conduct is unable to participate in the first trial, he or she may claim a violation of his or her rights under the proposed amendment. Without a claim for damages against the government,⁵ the victim’s only remedy is an appeal for re-

⁵ See Ex. A, Joint Resolution 2019-1 (“This section does not . . . create any cause of action for compensation or damages against the Commonwealth or

prosecution. That request for a new trial will pit the victim's right against the accused's right against double jeopardy, thus making the latter conditional, regardless of how the courts resolve that conflict of rights in any given case. Pennsylvanians are entitled to a separate vote on this amendment to Article I, § 10.

b. The Proposed Amendment Alters The Public's Right Of Access To Criminal Court Proceedings.

Article I, § 11 provides a right to open courts and full remedy. Pa. Const. art. I, § 11. “[T]his article prohibits secret or closed hearings and trials.” *Commonwealth v. Hayes*, 414 A.2d 318, 328 (Pa. 1980) (Larsen, J., concurring). Our Supreme Court has affirmed the common law right of access to criminal court proceedings in the strongest terms:

The importance of the public having an opportunity to observe the functioning of the criminal justice system has long been recognized in our courts. Criminal trials in the United States have, by historical tradition, and under the First Amendment, been deemed presumptively open to public scrutiny and this “*presumption of openness inheres in the very nature of the criminal trial under our system of justice.*”

any political subdivision, nor any officer, employee or agent of the Commonwealth or any political subdivision, or any officer or employee of the court.”); *see also Miller v. Nelson*, 768 A.2d 858, 861 (Pa. Super. Ct. 2001) (“A prosecutor enjoys absolute immunity from liability for civil damages for actions related to prosecution of a criminal case.” (citing *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976))); *Langella v. Cercone*, 34 A.3d 835, 838 (Pa. Super. Ct. 2011) (“[J]udges are absolutely immune from liability for damages when performing judicial acts, even if their actions are in error or performed with malice, provided there is not a clear absence of all jurisdiction over subject matter and person.” (quoting *Feingold v. Hill*, 521 A.2d 33, 36 (Pa. Super. Ct. 1987))).

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980). As stated by Justice Hugo Black in *In re Oliver*, 333 U.S. 257, 266 (1948), “[t]his nation’s accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.”

Commonwealth v. Fenstermaker, 530 A.2d 414, 417 (Pa. 1987) (emphasis added).

The proposed amendment would condition the public’s access to criminal proceedings on the protection of all of the “new rights” created by Section 9.1. If those changes were presented honestly, Section 11 would be amended to read:

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

In sum, the public’s established right to open courts will compete with an expansive “right to dignity and privacy” for victims that will impose conditions on public access to those proceedings. Pennsylvanians are entitled to a separate vote on this amendment.

c. The Proposed Amendment Alters the Executive Pardon Power

Article IV, § 9 grants the Governor the power to pardon or commute individuals' sentences upon unanimous recommendation by the Board of Pardons. Pa. Const. art. IV, § 9; *Commonwealth v. Sutley*, 378 A.2d 780, 793 n.9 (Pa. 1977). "The question of clemency is primarily, if not exclusively, one for the Executive." *Commonwealth v. Banks*, 29 A.3d 1129, 1147 (Pa. 2011).

If the proposed change to the Governor's pardoning power were presented honestly, Article IV, § 9 would read as follows:

(a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, *after reasonable and timely notice to every person who has been directly harmed by the offense, who shall have a right to be present and be heard*, upon due public notice.

Thus, the proposed amendment would alter this provision so that victims must be given individual notice and a right to be present and heard, which could delay or otherwise burden individuals' potential receipt of pardon and infringes upon the Executive's exclusive pardon power.

The extraordinary effect of this change is illustrated by Petitioner Haw's situation: she is seeking pardons for thirty-year-old convictions for trafficking in

illegal drugs. Who is to identify the “victims” of her offenses? Who will find those people? How long will her pardon request be delayed while the Pardon Board attempts to comply with the directive to give all victims notice and an opportunity to be heard? Many pardon requests are filed decades after the sentence has been served, so this is not a problem unique to Ms. Haw. Pennsylvanians—including Ms. Haw—are entitled to a separate vote on this amendment to the Constitution.

d. The Proposed Amendment Alters An Accused’s Right To Appeal.

Article V, § 9 grants accused persons “an absolute right to appeal,” *Commonwealth v. Wilkerson*, 416 A.2d 477, 479 (Pa. 1980), so long as the accused follows the procedures established by the Pennsylvania Supreme Court. *Commonwealth v. Adams*, 200 A.3d 944, 953 (Pa. 2019). This right extends to direct appeals for all cases originally in a court not of record as well as to controversies originating in administrative agencies. *Id.* (quoting Pa. Const. art. V, § 9).

If the changes to a criminal defendant’s right to appeal were presented honestly, Article V, § 9 would read as follows:

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law. *But no appeal shall infringe on the right of any person who has been directly harmed by the conduct of which the defendant is accused to a prompt and final conclusion of the case and any related postconviction proceedings.*

Under the proposed amendment, a defendant's right to appeal may be curtailed if the defendant's filing of or the court's consideration of the appeal would infringe on a victim's right to a prompt and final conclusion of the case. Pennsylvanians are entitled to a separate vote on this amendment to the Constitution.

e. The Proposed Amendment Alters The Supreme Court's Appellate Jurisdiction

Section 1 of the Schedule to the Judiciary in Article V addresses the Pennsylvania Supreme Court's power and jurisdiction. *In re Bruno*, 101 A.3d 635, 676-77 (Pa. 2014) (“[T]he Constitution provides that the Supreme Court exercises all jurisdiction vested in the Court at the time of the adoption of the 1968 Constitution, until otherwise provided by law.”).

If the change to the Supreme Court's power and jurisdiction were presented honestly, the Schedule to the Judiciary, § 1 would read as follows:

The Supreme Court shall exercise all the powers and, until otherwise provided by law, jurisdiction now vested in the present Supreme Court and, until otherwise provided by law, the accused in all cases of felonious homicide shall have the right of appeal to the Supreme Court, *except that no appeal shall infringe on the right of any person who has been directly harmed by the conduct of which the defendant is accused to a prompt and final conclusion of the case and any related postconviction proceedings.*

The proposed amendment will restrict the Supreme Court's power to hear appeals in felonious homicide cases, as well as other types of criminal appeals and petitions for post-conviction relief, to the extent that considering such appeals or

petitions would infringe on a victim's right to a prompt and final conclusion of their case. Accordingly, the proposed amendment limits the Supreme Court's jurisdiction. Pennsylvanians are entitled to a separate vote on this amendment.

In sum, the proposed amendment presented in the November 2019 ballot question affords a series of new rights to crime victims and affects multiple existing provisions of the Pennsylvania Constitution, which provide multiple fundamental rights to the accused and powers to the Governor and judiciary. The proposed amendment plainly violates Article XI, § 1's separate vote requirement.

II. THE FORM OF THE BALLOT QUESTION VIOLATES ARTICLE XI, § 1, BECAUSE IT DOES NOT SET FORTH THE TEXT OF THE PROPOSED AMENDMENT.

The November 2019 ballot question is also unconstitutional because it does not contain the actual text of the constitutional amendment. Pennsylvania's Constitution requires that the entire text of a proposed amendment be printed on a ballot question: "[S]uch proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe." Pa. Const. art. XI, § 1.

Earlier this year, the Supreme Court of Kentucky held that nearly identical language in the Kentucky Constitution required that a ballot question contain the

entire text of an amendment. *See Westerfield*, 2019 WL 2463046, at *9-10 (concluding that the proposed Marsy’s Law was void based on ballot question deficiencies). The Kentucky Supreme Court focused on the constitution’s express language: “[S]uch proposed amendment or amendments shall be submitted to the voters of the State for their ratification or rejection at the next general election for members of the House of Representatives, the vote to be taken thereon in such manner as the General Assembly may provide.” *Id.* at *7 (quoting Ky. Const. § 257). It concluded that the phrase “such proposed amendment or amendments shall be submitted to the voters” has only one meaning: “the amendment is to be presented to the people for a vote.” *Id.* at *9. The other phrase—“in such a manner as the General Assembly may provide”—is a separate statement that only modifies “the vote to be taken.” *Id.* at *8. Thus, a proposed question with anything less than the full text is unconstitutional. *Id.* at *10.

Article XI, § 1 of the Pennsylvania Constitution also requires that proposed amendments submitted to the electorate include the full text. Although 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.” Consistent with the plain text of the Constitution, the Court should establish that the phrase “in such a manner”

modifies only the method of submission and does not modify the content of submission. The text is clear that the form is “such proposed amendment or amendments shall be submitted.” Pa. Const. art. XI, § 1. Because the November 2019 ballot question does not include the proposed amendment’s text, it is unconstitutional.

III. THE FORM OF THE BALLOT QUESTION VIOLATES ARTICLE XI, § 1 BECAUSE IT DOES NOT FAIRLY, ACCURATELY, AND CLEARLY APPRISE VOTERS OF THE ISSUE TO BE VOTED ON.

In the alternative, the ballot question as currently worded does not conform to the standards established by the Pennsylvania Supreme Court. The electorate has a right “to be clearly and more fully informed of the question to be voted on.” *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969). That right is only satisfied if the form of the ballot question put to the voters “fairly, accurately and clearly apprise[s] the voter of the question or issue to be voted on.” *Id.* This standard has been described as “the fundamental requirement which every ballot question . . . must meet.” *Sprague v. Cortes*, 145 A.3d 1136, 1149 (Pa. 2016) (Todd, J., dissenting).⁶

⁶ The Pennsylvania Supreme Court assessed the wording of a constitutional amendment ballot question and reached a split 3-3 decision in *Sprague v. Cortes*, 145 A.3d 1136 (2016). Because the lower court had upheld the ballot question, the split decision did not alter the lower court’s decision. While the justices were split on the outcome of the case, five of the six justices who participated in the decision gave support to *Stander* being the applicable test for the wording of ballot questions. *Sprague*, 145 A.3d at 1142 (Baer, J., concurring); *Sprague*, 145 A.3d at 1149 (Todd, J., dissenting).

The ballot question clearly does not capture all of the components of the proposed Section 9.1:

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?

Ex. A, Ballot Question. This text omits many of the new rights afforded to crime victims and their families, including the substantive right to have the victim's family's safety considered in setting release conditions for the accused, and many procedural rights such as the right to be notified of any pretrial disposition of the case; the right to be heard at any proceeding in which the rights of the victim are implicated, including release, plea, sentencing, disposition, parole, and pardon proceedings; the right to participate in the parole process; the right to prompt and final conclusion of cases and any related postconviction proceedings; and the right to confer with attorneys for the government.

The text also omits all of the many changes to existing constitutional provisions affording rights to the accused. Those omissions include the changes due to the proposed amendment's content—including powers given to the judiciary by the Constitution, the accused's right to use compulsory process to present his defense, and the accused's right to pretrial release—as well as the changes due to

the proposed amendment’s purpose and effects—including an accused’s right to demand the nature and cause of the accusation, an accused’s right to confrontation, an accused’s right to a speedy and public trial, an accused’s right against double jeopardy, the public’s right of access to criminal court proceedings, the governor’s pardon power, an accused’s right to appeal, and the Supreme Court’s appellate jurisdiction. This omission is inherently misleading.⁷

The Secretary’s failure to encompass all of the components of the proposed amendment into 75 words does not reflect any neglect on the part of the Secretary. *See* 25 Pa. Stat. Ann. § 3010 (“Each question to be voted on shall appear on the ballot labels, in brief form, of not more than seventy-five words.”). Rather, it shows that the proposed amendment is far too complex and multi-faceted to be presented in a 75-word summary. *Pa. Prison Soc’y*, 776 A.2d at 976 (reviewing the Commonwealth Court’s reasoning that amendment by popular initiative “was not designed to effectuate sweeping, complex changes to the Constitution”). The Secretary was forced to choose between complying with the strictures of the Election Code and presenting the full scope of the changes to be made to the voters. Neither

⁷ “[T]here is a categorical difference between the act of creating something entirely new and altering something which already exists. Language which suggests the former while, in actuality, doing the latter is, at the very least, misleading, and, at its worst, constitutes a ruse.” *Sprague*, 145 A.3d at 1145 (Todd, J., dissenting).

the Secretary nor the voters should be compelled to make such a choice. The form of the ballot question does not fairly convey the substance of the proposed amendment, and cannot, in 75 words, be made to do so. It does not satisfy the test set forth by the Supreme Court.

CONCLUSION

For the reasons herein, Petitioners respectfully request that the Court grant their Application for Summary Relief. The Proposed Amendment should be declared unconstitutional and void.

Respectfully submitted,

Date: December 13, 2019

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellee has complied with the 14,000 word limit set forth in Pa. R.A.P. 2135(a)(1). According to the Word Count feature in Microsoft Office Word 2013, Petitioners' Brief contains 13,722 words, excluding the parts exempted by Pa. R.A.P. 2135(b).

Date: December 13, 2019

/s/ Tiffany E. Engsell
Tiffany E. Engsell (Pa. 320711)

CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: December 13, 2019

/s/ Tiffany E. Engsell
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CERTIFICATE OF SERVICE

I, Tiffany E. Engsell, hereby certify that on December 13, 2019, I caused a true and correct copy of the foregoing document titled Petitioners' Brief in Support of Application for Summary Relief, together with all supporting exhibits thereto, be served via electronic filing upon all counsel of record.

Date: December 13, 2019

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