IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Docket No. 4 MAP 2021

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA
AND LORRAINE HAW

v.

VERONICA DEGRAFFENREID
AS ACTING SECRETARY OF THE COMMONWEALTH

Appeal of: Shameekah Moore, Martin Vickless,
Kristin June Irwin and Kelly Williams

BRIEF FOR AMICUS CURIAE OF THE GOVERNOR

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Governor Wolf's Statement of Interests[1]

Governor Wolf fully supports Marsy's Law and enshrining victims' rights in the Pennsylvania Constitution. The legal dispute presented in this litigation, however, is not (and has never been) about that policy choice. This case is about the process used to amend the Pennsylvania Constitution and the transparency that government needs to provide voters when the General Assembly passes resolutions to amend our organic charter. Requiring absolute adherence to the constitutional requirements and clarity at every step of the process will fully apprise voters of attempts to change the Pennsylvania Constitution and what is at stake through such proposed amendment. This clarity will allow voters to intelligibly decide whether or not to amend our Constitution.

This Court, therefore, should use this appeal to set a clear and definitive standard against which this (and future) proposed constitutional amendments must be judged. The Governor is constitutionally vested with the Commonwealth's "supreme executive power" (Pa. Const., Art. IV, § 2) and the Department of State (an executive agency under the Governor's jurisdiction) has a statutory and constitutional role in election matters and the constitutional amendment process (Pa. Const., Art. XI, § 1, 25 P.S. §§ 2621, 2621(c), 2621.1, 2755, 2963(g), 3010).

[1] No person or entity, other than the parties to this brief and their counsel, was paid in whole or in part for the preparation of this brief, and no person or entity, other than the parties to this brief and their counsel, authored in whole or in part this brief.

As such, Governor Wolf has a significant interest in the ultimate ruling of, and test announced by, this Court. Governor Wolf asks this Court to set forth clear rules and standards for determining the legality of proposed constitutional amendment so that all branches of government—the Legislature, the Executive, and the Judiciary—will have a definitive test against which to measure the legality of any constitutional amendment proposed now or in the future.[2]

[2] Before the lower court, then-Secretary Boockvar was sued by Petitioners. Pursuant to the Commonwealth Attorneys Act, representation was referred to the Office of Attorney General and that office accepted the referral. *See* 71 P.S. 732-204(c); 71 P.S. § 732-201(a); *Commonwealth v. Carsia*, 517 A.2d 956, 958-59 (Pa. 1986) (Office of Attorney General's powers are strictly a matter of legislative designation and enumeration through the Commonwealth Attorneys Act); *Synthes United States HQ, Inc. v. Commonwealth*, 236 A.3d 1190, 1194-95 & n.8, n.12 (Pa. Cmwlth. 2020) (making clear that the Office of Attorney General, in tax cases, represents its client—the Department of Revenue—and not "the Commonwealth"); *Trometter v. Pa. Labor Relations Board*, 147 A.3d 601, 608 (Pa. Cmwlth. 2016) (making clear that the Office of Attorney General's role, in civil litigation, is as a lawyer for its agency client and is not the client). Current-Acting Secretary Degraffenreid filed no appeal of Commonwealth Court's judgment/order. On March 2, 2021, the Office of Attorney General ceased its representation of Acting Secretary Degraffenreid so that it could file an amicus brief that seeks to reverse Commonwealth Court.

Summary of the Argument

The text of Article XI, Section 1, decisions of this Court going back over 80 years, and the General Assembly's enactment of the Election Code, have made clear that Article XI, Section 1 cannot be used to make complex or sweeping changes to the Pennsylvania Constitution. This body of law also establishes that, when invoked, Article XI, Section 1 mandates clarity at every point in the process so that voters are able to fully understand the impacts of any proposed constitutional amendment and so that voters are able to cast an informed vote (up or down) on any attempt to amend any provision of our organic charter.

In 2001, however, this Court issued a plurality opinion in *Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971 (Pa. 2001) and, subsequently, this Court issued its 4-3 decision in *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005). While the cases did not overrule (or even undermine) the decades of law that preceded them, the phrasing of the *Grimaud* Court—looking to the "content, purpose, and effect" of the proposed amendment on another provision of the Constitution when determining whether a proposed amendment "substantive[ly] affects" more than one provision of the Constitution—resulted in the trio of Commonwealth Court's opinions that support and oppose the order under review here. Accordingly, Governor Wolf asks this Court to use this opportunity to make crystal clear: (1) that Article XI, Section 1 cannot be used for complex or

sweeping changes to the Pennsylvania Constitution; and (2) that, when Article XI, Section 1 is invoked, the law requires not only strict adherence with the processes established by the Constitution and Election Code but also the utmost clarity at every stage of the process so that voters know how their representatives voted on each proposed amendment, voters understand all of the impacts to the Pennsylvania Constitution of each proposed amendment, and voters can, therefore, intelligibly cast a vote for/against each proposed amendment.

Commonwealth Court's Judgment/Order should be vacated and this case remanded for further consideration consistent with the Court's resolution of this appeal.

Argument

I. A Constitutional Convention is required for complex and sweeping changes to the Pennsylvania Constitution.

"Amendments to the Constitution should not be taken lightly or made easily. The process described in Article XI, Section 1 is reserved for simple, straightforward changes to the Constitution, easily described in a ballot question and easily understood by the voters. This process should not be used to circumvent a constitutional convention, the process for making complex changes to the Constitution." *Pennsylvania Prison Society v. Commonwealth*, 727 A.2d 632, 634-35 (Pa. Cmwlth. 1999). Indeed, if "multiple changes are so interrelated that they must be made together, as a unit, then they are too complex to be made by the process described in Article XI, Section 1. Those changes should be made by constitutional convention, where they can be more adequately debated and understood." *Id.*[3]

[3] Governor Wolf acknowledges the subsequent appellate history of the *Pennsylvania Prison Society* case. *See Pennsylvania Prison Society v. Commonwealth*, 776 A.2d 971 (Pa. 2001). Contrary to the position of the Office of Attorney General, however, the subsequent appellate history of *Pennsylvania Prison Society* did not overrule this Court's long-standing precedent or undermine Commonwealth Court's reasoning in that case, which was fundamentally rooted in that precedent. First, appeals are taken of orders and not the underlying reasoning. *See* Pa.R.A.P. 341(a) ("an appeal may be taken as of right from any final order of a government unit or trial court"). Commonwealth Court's order in *Pennsylvania Prison Society* granted the Prison Society's motion for judgment on the pleadings, denied the Respondents' cross-motion for judgment on the pleadings, and invalidated the ballot question as violating Article XI, Sec. 1. *See* 727 A.2d at 636. And it was only that order that this Court reversed. *See* 776 A.2d at 973 ("we reverse the order of the Commonwealth Court"). Indeed, this Court agreed with Commonwealth Court's legal conclusion that the ballot question at issue violated Article

II. Strict compliance with the constitutional and statutory process, and the utmost clarity in every step of that process, are required when Article XI, Section 1 is invoked to amend the Pennsylvania Constitution.

Any assessment of the legality of a proposed constitutional amendment produced through the Article XI, Section 1 process necessarily begins with the bedrock principle that "all the clear and mandated provisions of the Constitution must be strictly followed and obeyed and no departures from or circumventions or violations of existing mandatory Constitutional amendment requirements will be permitted." *Stander v. Kelley*, 250 A.2d 474, 479 (Pa. 1969). Put simply, "nothing short of literal compliance with the mandate [of Article XI, Section 1] will

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XI, Section 1 because the proposal "encompassed two separate amendments" to the Constitution but "did not permit the electorate to vote separately upon each amendment." *Id*. at 981. Nonetheless this Court—in a fractured opinion and because of the unique factual circumstances of the case—concluded that the ballot question "should not be declared null and void" because the proposed amendment did not actually effectuate a substantive change to the confirmation process since, both before and after the amendment, gubernatorial appointees to the Board of Pardons could be confirmed by a majority of the Senate and, thus, there was no change to the Senate's power. *Id*. at 982. Functionally, then, there was only one amendment that was being presented to the electorate and separate votes were not required. Additionally, this Court cited, with no disagreement whatsoever, Commonwealth Court's conclusion that "Article XI, Section 1 was not designed to effectuate sweeping, complex changes to the Constitution" and that "[a]mendment of the Constitution by proposal to the General Assembly and submission for vote by the electorate was never intended as a substitute for, or a circumvention of, the process of a constitutional convention for making complex changes to the Constitution." *Pennsylvania Prison Society*, 776 A.2d at 976. In the end, what saved the constitutional amendment at issue in this case (and why Commonwealth Court's order was reversed) was not a disagreement with Commonwealth Court's reasoning but the unique circumstances of the case. In fact, this Court went so far as to make clear that, but for the unusual circumstances presented, the proposed amendment at issue (which violated Article XI, Section 1) would have been declared null and void. *Id*. at 982. Any suggestion, therefore, that this Court disagreed with and reversed Commonwealth Court's legal reasoning in *Pennsylvania Prison Society* misses the mark.

suffice." *Kremer v. Grant*, 606 A.2d 433, 436 (Pa. 1992) (quoting *Tausig v. Lawrence*, 197 A. 235, 238 (Pa. 1938)).

Turning to the Article XI, Section 1 process, an amendment to the Constitution "may be proposed in the Senate or House of Representatives" and if the proposed amendment is agreed to by a majority of the members elected to each House then the proposed amendment "shall be entered on their journals with the yeas and nays taken thereon." Pa. Const., Art. XI, Sec. 1.[4] If this happens, then the Secretary of the Commonwealth causes the proposed amendment "to be

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[4] The full text of the applicable provision states:

> Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and 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; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted, they shall be voted upon separately.

Pa. Const., Art. XI, Sec. 1.

published three months before the next general election, in at least two newspapers in every county in which such newspapers" are published. *Id*.

The purpose of the initial vote, the recordation, and the publication requirements is to afford Pennsylvania voters the "opportunity to ascertain their representative's position on the amendment prior to the next general election" so that, if the voters so decide, they can make a change "as to the representative who would next vote on the amendments." *Tausing v. Lawrence*, 197 A. 235, 238 (Pa. 1938). Put simply, these requirements are intended to provide specific notice to voters of how their representative voted so that if the voters disagree with the proposed amendment, they have the opportunity to vote their representative out of office and replace their representative with somebody who will vote oppositely the next time the proposed amendment is considered.

The proposed amendment then is considered again in the next legislative session and, if the proposed amendment is again approved by each chamber of the General Assembly, the proposed amendment is again published and advertised (three times in newspapers throughout the Commonwealth) and then presented to the electorate for a vote. Pa. Const., Art. XI, Sec. 1.

Along with these constitutional requirements, the General Assembly has specifically delegated to the Secretary of the Commonwealth the authority to draft "the form and wording of constitutional amendments or other questions to be

submitted to the electors of the State at large." 25 P.S. § 2621(c). *See also* 25 P.S. § 3010(b) (providing that questions to be voted on "*shall appear on the ballot labels, in brief form, of not more than seventy-five words, to be determined by the Secretary of the Commonwealth in the case of constitutional amendments or other questions to be voted on by the electors of the State at large*") (emphasis added); 25 P.S. § 2755 (again providing that proposed constitutional amendment "*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*") (emphasis added); *Sprague v. Cortes*, 145 A.3d 1136, 1142 (Pa. 2016) ("[t]he General Assembly, in its wisdom, delegated to the Secretary of the Commonwealth the task of formulating the ballot question, which informs the voters of the legislature's proposed constitutional language").

The General Assembly has also specifically delegated to the Attorney General the obligation to draft a "statement in plain English which indicates the purpose, limitations and effects of the ballot question on the people of the Commonwealth." 25 P.S. § 2621.1. The proposed amendment, the ballot question, and the plain English statement are published three times before the election and throughout the Commonwealth, and are also posted at every polling place on election day. Pa. Const., Art. XI, Section 1; 25 P.S. § 2621.1.

Consistent with the requirements of notice and clarity, a "ballot question must fairly, accurately, and clearly apprise the voter of the question or issue on which the electorate must vote." *Id*. at 1141-42 (citing *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969)). Indeed, as this Court has previously made clear, "[n]o method of amendment can be tolerated which does not provide the electorate adequate opportunity to be fully advised of proposed changes." *Commonwealth ex rel. Attorney General v. Beamish*, 164 A. 615, 616-17 (Pa. 1932). Critically, then, "[w]hen two or more amendments" are "submitted, they shall be voted upon separately." Pa. Const., Art. XI, Sec. 1. This is because the "voters must be able to express their will as to each substantive constitutional change separately, especially if these changes are not so interrelated that they must be made together." *Pennsylvania Prison Society v. Commonwealth*, 727 A.2d 632, 634-35 (Pa. Cmwlth. 1999).[5]

What emerges from the plain text of Article XI, Section 1, the relevant provisions of the Election Code, and this Court's precedent, then, is the rule that Article XI, Section 1 cannot be invoked to make complex or sweeping changes to the Pennsylvania Constitution. Indeed, making such complex and sweeping

[5] It is this concern that animated constitutional debate on what became Article XI, Sec. 1. *See* 12 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, 50 (1839) (comments of Senator John Fuller noting that only one amendment should be submitted to the people at one time because voters must be given an opportunity to "take the one and reject the other").

changes is wholly inconsistent with the requirement for clarity and transparency when changing our organic charter because lumping together complex and sweeping changes obscures all of the provisions that are being changed by any given amendment. What also emerges from this body of law is that, when invoked, strict compliance with Article XI, Section 1 is required in every step of the process and, further, absolute clarity is required at every point in the process so that voters are able to understand each proposed amendment(s) and the impacts of each proposed amendment and, thereby, separately cast an informed vote (up or down) on each proposed amendment.

In the end, "[t]he right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner" and is "the bed-rock of our free political system." *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999). As such, "it is the right of every elector to vote on amendments to our Constitution in accordance with its provisions. This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted" and since "the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional

government, and must be carefully and meticulously scrutinized." *Id*. at 1269 (further citations and quotations omitted.[6]

This call for separate and clear amendments and ballot questions is highlighted by this Court's more recent caselaw and is further amplified when the proposed amendment at issue impacts a branch of government. Thus, in *Bergdoll v. Kane*, 731 A.2d 1261 (Pa. 1999), the proposal specifically sought to amend Article I, Section 9—proposing to change a criminal defendant's right to "meet the witnesses face to face" to guaranteeing the right to "confront witnesses"—but it also further provided that the General Assembly could 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.

The challengers argued that allowing the General Assembly, in the future, to enact such laws constituted a separate amendment to Article V, Section 10(c) of the Pennsylvania Constitution, which grants to the Supreme Court the power to prescribe general rules governing practice, procedure, and the conduct of all courts. According to the challengers, the single amendment, in reality, constituted two amendments to the Pennsylvania Constitution. Accordingly, the electorate had to

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[6] So, for example, when a proposed constitutional amendment seeks to functionally alter an existing provision of the Constitution, the General Assembly should be clear in its resolution and in its vote and the Secretary's ballot question and the Attorney General's plain English statement should be equally clear, for example by pointing out the current state of the law and the impact of the proposed change.

be given two questions—one for each possible amendment—so that a voter could vote (up or down) on each proposed amendment. This Court agreed and concluded that the proposed amendment had two purposes—amending the right to confrontation and authorizing the General Assembly to enact laws regarding the manner by which children may testify in criminal proceedings "but did not permit the electorate to vote separately upon each of the amendments in violation of Article XI, Section 1." *Id*. at 1270.[7]

In *Pennsylvania Prison Society*, the amendment at issue sought to amend Article IV, Section 9 (relating to pardons) by changing the composition of the Board of Pardons, requiring a majority, rather than a two-thirds vote of the senate to confirm the gubernatorial appointees, and requiring a unanimous, rather than a

[7] In *Bergdoll*, the proposed amendment did not add to or strike any language in Article V; nevertheless, this Court held that the proposed amendment amended this other provision of the Constitution. Thus, the Office of Attorney General's position that Article XI, Section 1 is satisfied so long as the language of a constitutional provision remains the same after an amendment misses the point. *See* OAG Brief at 4 (arguing that there is no violation of Article XI, Section 1 so long as the amendment does not "rewrite the language of another constitutional provision"); OAG Brief at 8-9 (to violate Article XI, Section 1, the "proposed amendment must change the language of another amendment"). In fact, as shown below, the Office of Attorney General's position is odds with the rationale of *Grimaud*, which is that courts must assess whether the proposed amendment "substantive[ly] affects" more than one provision of the Pennsylvania Constitution and that this assessment requires courts to look at the "content, purpose, and effect" of the proposed amendment on other constitutional provision. Certainly, using words/phrases like "substantive[ly] affects" and "content, purpose, and effect" means more than looking to see if particular words have been stricken or added. Indeed, the Office of Attorney General's standard would allow the General Assembly enact, or change, any law through this non-legislative process even if another constitutional provision is impacted—so long as the words on the page don't change. This Court should not endorse such a standard but, instead, should hue to its assessment of whether a proposed constitutional amendment functionally affects other provisions of the Constitution.

majority, recommendation of the Board as a prerequisite to a gubernatorial pardon or commutation of an individual sentenced to death or life imprisonment. 776 A.2d at 974.

Ultimately, this Court concluded that the amendment constituted two separate amendments: (1) the restructuring of the Board of Pardons to change the composition of its members and require that its members be unanimous in their recommendation of a pardon was one amendment that could properly be submitted in a single question; but (2) the change in the confirmation process for gubernatorial appointees presented a separate constitutional amendment that needed to be presented in a separate question for a separate vote because it sought to alter the Senate's exclusive authority to confirm appointees. *Id*. at 981. Notwithstanding this conclusion, however, this Court did not nullify the amendment because while it technically amended multiple constitutional provisions, the fact was that both before and after the amendment, the Senate had the authority to confirm gubernatorial appointments by a mere majority vote. *Id*. at 982. Put another way, since the amendment's deletion of the two-thirds language did not change the Senate's authority, there was no functional amendment to that constitutional provision so only one question needed to be posed. *Id*.[8]

[8] In other words, even though language was stricken, the proposed amendment was not nullified because this Court looked to the functional impact of the proposed amendment. This

What these cases further tell us is that even where a proposed amendment to one section or provision of the Pennsylvania Constitution doesn't specifically mention another constitutional provision—but impacts another provision of the Constitution like those committed to a separate branch of government—such amendments—if not separately presented as to each impacted part of the Constitution—violate Article XI, Section 1. *Bergdoll* invalidated a proposed amendment because the impact to the constitutionally established powers of this Court was not set forth in a separate question while the amendment in *Pennsylvania Prison Society* was not nullified because the Senate's constitutional powers were not, functionally, altered.

And that brings us to *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005). At issue in *Grimaud*, were two proposed constitutional amendments and two ballot questions. As to the first, the proposed amendment sought to change the existing Article I, Section 14 relating to bail. The question presented to the electorate was whether the Pennsylvania Constitution should 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

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conclusion demonstrates that the Office of Attorney General's "words on the page" standard is not the governing standard.

assure the safety of any person and the community. *Id*. at 841. The second proposed amendment sought to change the existing Article I, Section 6 to allow the Commonwealth to waive the right to a jury trial in criminal matters and that was the question posed to the electorate. *Id*. at 839-40, 845. Significantly, neither the proposed amendment nor the question presented functionally impacted any other constitutional provision or the constitutionally enshrined powers of any branch of government.

The nature of the proposed amendment and ballot question and the functional assessment of them, therefore, make *Grimaud* readily distinguishable from *Bergdoll* and *Pennsylvania Prison Society*. In fact, the *Grimaud* Court did not overrule or even undermine these prior cases. *See, e.g.*, *Grimaud*, 865 A.2d at 842 (citing, with approval, *Pennsylvania Prison Society* for the proposition that the analysis to be used must be of the ballot question's "substantive affect on the Constitution, examining the content, purpose, and effect"). Put simply, in *Grimaud*, neither the proposed amendment nor the ballot question functionally impacted another provision of the Constitution or the constitutionally established powers of a branch of government and, as such, *Grimaud* is distinguishable from cases like *Bergdoll* and *Pennsylvania Prison Society*.

In fact, despite using different monikers, the reasoning of *Grimaud* is fully consistent with *Bergdoll* and *Pennsylvania Prison Society*. In that regard, looking

at the proposed amendments and questions presented to the electorate in both *Bergdoll* and *Pennsylvania Prison Society* through the lens of the *Grimaud* "subject matter test"—which looks at the proposed amendment's "substantive affect on the Constitution, examining the content, purpose, and effect"—it is clear that the decisions in *Bergdoll* and *Pennsylvania Prison Society* would be the same post-*Grimaud*.

In *Bergdoll*, the amendment at issue sought not only to change the Pennsylvania Constitution's confrontation clause but also to vest in the General Assembly the authority to pass laws that would impact this Court's constitutional power to prescribe general rules governing practice, procedure, and the conduct of all courts. In *Pennsylvania Prison Society*, the proposed amendment not only restructured the Board of Pardons and required unanimity for certain recommendations but also sought to change the Senate's power over confirmation of gubernatorial appointments. In both cases, application of the *Grimaud* test produces the same result—a violation of Article XI, Section 1—because the "content, purpose, and effect" of each proposed constitutional amendment "substantive[ly] affects" more than one part of the Constitutions and, indeed, another part of the Constitution that grounds power in another branch of government.

III. Commonwealth Court's Order should be vacated and this matter remanded for further consideration.

Commonwealth Court, in a fractured series of opinions, entered an order invalidating Marsy's Law as being violative of Article XI, Section 1. As noted, four of the commissioned judges—Judges Cohn Jubelirer, Brobson, Covey, and Crompton—did not participate in the matter. Judge Ceisler filed an Opinion in Support of the Order Announcing the Judgment of the Court and was joined by Judge Wojcik. President Judge Leavitt filed an Opinion in Opposition to the Order Announcing the Judgment of the Court and was joined by Judge Fizzano Cannon.

Judge McCullough broke this tie with her Opinion in Support of the Order Announcing the Judgment of the Court. In her Opinion, Judge McCullough specifically agreed (and disagreed) with parts of Judge Ceisler's Opinion and specifically agreed (and disagreed) with parts of President Judge Leavitt's Opinion. As relevant here, Judge McCullough reviewed Article I, Section 9 of the Pennsylvania Constitution, which provides criminal defendants with the rights to "demand the nature and cause of the accusation against him" and to be "confronted with the witnesses against him" and to have "compulsory process for obtaining witnesses in his favor." *League of Women Voters of Pa. v. Degraffenreid*, 2021 Pa. Commw. Unpub. LEXIS 19, *49-*50 (Pa. Cmwlth., Jan. 7, 2021) (quoting Pa. Const., Art. I, § 9). Judge McCullough next reviewed the part of Marsy's Law that provides victims of crimes with 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*. at *50.

In Judge McCullough's view, this provision of Marsy's Law "imposes a clear limitation upon a criminal defendant's right to obtain potentially favorable witnesses, testimony, and materials, and, thus, would serve as a direct barrier to the accused's ability to gather exculpatory evidence." *Id*. Because of what she viewed as the "manifest tension" between this part of Marsy's Law and Article I, Section 9, Judge McCullough concluded that this was "precisely the sort of 'patent' effect upon another constitutional provision that *Grimaud* envisioned." *Id*. And, as a result, Judge McCullough concluded that, because this provision of Marsy's Law's "direct[ly] conflict[ed]" with Article I, Section 9, the "voters of Pennsylvania were entitled to separately consider whether they desired to limit these rights alongside the adoption of the new positive rights contained within" Marsy's Law. *Id*. at *53-*54.[9]

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[9] "In cases where a concurring opinion enumerates the portions of the plurality's opinion in which the author joins or []agrees, those portions of agreement gain precedential value." *Commonwealth v. Lippencott*, 208 A.3d 143, 148 n.7 (Pa. Super. 2019 (quoting *Commonwealth v. Brown*, 23 A.2d 544, 556 (Pa. Super. 2011)). *See also Commonwealth v. Perez*, 760 A.2d 873, 877 (Pa. Super. 2000), *affirmed*, 845 A.2d 779 (Pa, 2004) (same). Thus, the Office of Attorney General's anointment of Judge Ceisler's Opinion as the "lead opinion"—used 19 times in its 18-page substantive discussion—only to then argue that "Commonwealth Court relied on bad law" and "cast *Grimaud* aside" and applied the "discredited implicit effects test" and "adopted a test that [the Supreme Court] has specifically rejected" (*see* OAG Brief at 3-5, 11-18) is a classic straw-man argument. *See Interests of OA*, 717 A.2d 490, 496 n.4 (1988) (while the ultimate order of a plurality opinion is binding on the parties in the particular case, "legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority"—put

The fractured series of Commonwealth Court opinions highlights the differing conclusions that can be reached in the wake of the *Pennsylvania Prison Society* plurality and the 4-3 decision in *Grimaud*.[10] Governor Wolf, therefore, asks this Court to vacate the Order of Commonwealth Court and remand this matter for further consideration in light of the decision of this Court. This Court should make clear, on remand, the following: (1) that Article XI, Section 1 cannot be used for complex or sweeping changes[11] to the Pennsylvania Constitution; and (2) that, when Article XI, Section is invoked, the law requires strict adherence to each step of the process and the utmost clarity at every stage of the process so that

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another way, a plurality opinion announcing the judgment of the court has no precedential value on its own because it did not command the joinder of a majority of the judges/justices participating in the case). In short, since Judge McCullough's Opinion forms the narrowest basis for the Court's judgment/order, the question before this Court is whether Judge McCullough correctly concluded that this provision of Marsy's Law patently affected Article I, Section 9 of the Pennsylvania Constitution. Indeed, whether the other impacts noted by Judge Ceisler patently affect other provisions of the Constitution (as she and Judge Wojcik maintain) or implicitly affect other parts of the Constitution (as President Judge Leavitt and Judges McCullough and Fizzano Cannon maintain) need not be addressed by this Court.

[10] *Grimaud* was a 4-3 decision with Chief Justice Saylor in the majority and Justice Baer in the dissent. No other current Justice served on the Court at the time of the *Grimaud* decision.

[11] While not exhaustive, such complex and sweeping changes certainly would include a proposed amendment that functionally affects the constitutionally established separation-of-powers framework (through, for example, changing the presentment requirement) on which our government is based. *See Wolf v. Scarnati*, 233 A.3d 679, 707 (Pa. 2020) (holding that a concurrent resolution that purported to direct the Governor to take an action was subject to the presentment requirement in our Constitution); *see also* 233 A.3d at 694 ("there is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided by characterizing the [Emergency Management Services Code] as a delegation of emergency powers" and a "legislative veto in the context of a statute delegating emergency powers might be a good idea" and it "might be a bad idea" but "it is not a *constitutional* idea under our current Charter") (emphasis in original citations and quotations omitted).

voters know how their representatives voted on each proposed amendment, voters understand all of the impacts to the Pennsylvania Constitution of each proposed amendment, and voters can, therefore, intelligibly cast a vote for/against each proposed amendment. Commonwealth Court should be allowed the opportunity to first apply this clarified test. Additionally, since Commonwealth Court granted relief only as to Count I, and in so doing, denied all other bases for declaratory relief as moot, this matter must be remanded to Commonwealth Court so it can assess, in the first instance, whether the petitioners are entitled to relief under either Count II or Count III of their Petition for Review. *See League of Women Voters*, 2021 Pa. Commw. Unpub. LEXIS 19, *1-*2, *36.

Conclusion

To reiterate, Governor Wolf fully supports Marsy's Law and the Governor has publicly supported this constitutional amendment. This appeal, however, is not about that policy; it is about the proper processes for amending the Pennsylvania Constitution. For the reasons advanced above, Governor Wolf respectfully requests that this Court vacate the Judgment/Order of Commonwealth Court and remand this case for further proceedings.

Respectfully submitted,
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Date: April 5, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,725 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

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

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