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IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 4 MAP 2021

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA
and LORRAINE HAW,

v.

VERONICA DEGRAFFENREID, Acting Secretary of the Commonwealth,

APPEAL OF: SHAMEEKA MOORE, MARTIN VICKLESS,
KRISTIN JUNE IRWIN and KELLY WILLIAMS,

BRIEF FOR PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

On Appeal from Order of the Commonwealth Court after Remand
Entered January 27, 2021, at No. 578 MD 2019

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE* PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Pennsylvania Association of Criminal Defense Lawyers (PACDL) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized Pennsylvania affiliate of the National Association of Criminal Defense Lawyers. As *Amicus Curiae*, PACDL presents the experiences and perspective of this Commonwealth's professional criminal defense attorneys – including private practitioners, public defenders, and academics – who seek to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants and thus for all citizens and residents of this Commonwealth. PACDL membership currently includes more than 900 private criminal defense practitioners and public defenders throughout the Commonwealth. PACDL regularly files *amicus curiae* briefs in this Court and occasionally in the Commonwealth and Superior Courts in matters of particular importance (including in this case on remand from this Court's grant of preliminary relief), as well as in the Supreme Court of the United States.

PACDL and its members have a direct interest in the outcome of this case, as part of PACDL's mission is to ensure the fairness and workings of the

criminal justice system in Pennsylvania; to ensure the fair administration of justice; and to advocate for the rights of persons charged with, and those convicted of and imprisoned for, crimes. The proposed constitutional amendments, however, infringe upon and substantially dilute a bedrock principle of the criminal justice system, to wit: the presumption of innocence, and directly conflict with and effectively amend several provisions of the Constitution that seek to protect the rights of individuals accused of wrongdoing. These protections have for good reason been enshrined in the Declaration of Rights of the Constitution of this Commonwealth for more than two centuries and should not be lightly abrogated or diluted.

Pursuant to Pa.R.App.P. 531(b)(2), PACDL states that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

II. ARGUMENT FOR AMICUS PACDL

The Pennsylvania Association of Criminal Defense Lawyers supports the appellees in their defense of the final order of the Commonwealth Court granting declaratory and permanent equitable relief against the formal tallying and certification of the November 5, 2019, popular vote on the "Victims' Rights" or "Marsy's Law" amendments to the Constitution of the Commonwealth of Pennsylvania. The reasons for this position go to the heart of our mission to defend the fundamental rights of all Pennsylvanians that for 245 years have been protected as "inviolate" aspects of the traditional "law of the

land" under our Constitution, whenever the State accuses an individual (or entity) of a criminal offense.

A. Statement of the Case and Summary of Argument

On October 30, 2019, following a hearing, the Commonwealth Court (Ceisler, J.), sitting in its original jurisdiction, filed a memorandum and order (not reported) granting preliminary relief to the League of Women Voters of Pennsylvania and Lorraine Haw, and to their intervenor Ronald L. Greenblatt, Esq. (collectively, the appellees). Judge Ceisler found the ballot question, which would extensively amend the 1776 Declaration of Rights that is at the heart of our Commonwealth's Constitution, to be apparently invalid. This Court affirmed the preliminary injunction and remanded for consideration of final relief. *League of Women Voters v. Boockvar*, 219 A.3d 594 (Pa., Nov. 4, 2019) (per curiam). On remand, by 2–1–2 vote, with four judges recused or otherwise not participating, a splintered majority of the *en banc* Commonwealth Court upheld the appellees' challenge. 2021 WL 62268 (Jan. 7, 2021). The court below declared that "Marsy's Law" would violate the "one amendment" restriction of Pa. Const. Art. XI, § 1. It therefore enjoined the Secretary of the Commonwealth from formally tallying and finally certifying the vote. Several intervenors, claiming to represent the interests of crime victims, but not the Secretary, have appealed to this Court.

Article XI of Pennsylvania's Constitution describes the procedures by which the people, through their Legislature and then with the approval of the

voters, may amend the Constitution. In particular, section 1 of that Article provides that "When two or more amendments shall be submitted they shall be voted upon separately." This provision is designed to ensure that the voters are fully informed and thus rationally empowered to decide on each suggested change. In determining whether a ballot measure involves "two or more amendments," "[t]he test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments *facially* affect other parts of the Constitution. … The question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect …." *Grimaud v. Commonwealth*, 581 Pa. 398, 409, 865 A.2d 835, 842 (2005) (emphasis original). The Court in *Grimaud* adopted a "single subject" test for whether a package of constitutional changes was sufficiently interrelated or interdependent to be considered as one "amendment" under Article XI.

Like any constitutional requirement, the "single subject" rule cannot be evaded by deft wording. See *Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261 (1999) (invalidating amendment that necessarily even though not facially affected Article V as well as Article I). Nor can the "single subject" be so broadly defined as to defeat any meaningful relation to the "one amendment" provision or to negate the "interdependence" test. *See* Opinion of McCullough, J., 2021 WL 62268, at *19. Moreover, a proposal may "facially affect" or "patently affect[]," and thus amend, a constitutional provision without *expressly*

or *literally* changing its wording. For example, a new provision may "facially" amend an existing clause by creating an exception to it, or by establishing a new rule that inherently contradicts the pre-existing clause, requiring that the two be "balanced" or newly re-interpreted in circumstances where they conflict.

In light of Article XI as explicated by this Court, any amendment or set of amendments that is complex, multi-faceted, inter-related, inter-dependent, fundamental or far-reaching can be adopted only by Constitutional Convention. *Bergdoll*, 557 Pa. at 87, 731 A.2d at 1270; see *Pennsylvania Prison Society v. Commonwealth*, 565 Pa. 526, 538, 776 A.2d 971, 978 (2001), quoting *Stander v. Kelley*, 433 Pa. 406, 408, 414–15, 250 A.2d 474, 478–79 (1969).

As demonstrated in Judge Ceisler's memorandum in support of the Commonwealth Court's final order, as well as on the narrower rationale of Judge McCullough's memorandum, the "Crime Victim Rights Amendment" (hereinafter, the "Proposed Amendments") would not merely touch upon or implicitly affect, but would necessarily and essentially alter and amend multiple sections of the Pennsylvania Constitution. The resulting harms include the direct undermining of several of the rights that PACDL exists to protect for the accused. Also inevitable would be a substantial interference with the effective performance of the defense function (which is itself constitutionally guaranteed) that PACDL likewise exists to support and facilitate for its members. These harms will be compounded by uncertainty, confusion and needlessly increased costs to all actors and institutions that make up the criminal justice system,

including prosecutors, police, correctional officials, and the courts themselves.[1] And as Judge McCullough incisively reasoned in her concurrence, given that the Proposed Amendments would themselves make a substantial *addition* to the Constitution (and even assuming that this addition amounts to only one amendment) then if the Proposed Amendments *also* effect even a single change to an *existing* provision, then the proposal must fail. 2021 WL 62268, at *19. Judge McCullough found that the proposal's impact on defendants' compulsory process rights was patently clear and direct, thus invalidating the ballot measure regardless of any other question. *Id*.

In addition to those sections of the Pennsylvania Constitution that the appellees and Judges Ceisler's and McCullough's opinions identify as being amended by the challenged ballot measure, the Proposed Amendments directly infringe upon and undermine – and thus effectively amend – critical "inviolate" rights held by all citizens of (and other persons within) this Commonwealth, without informing the electorate of these consequences. The Proposed Amendments effectively strip any person within this Commonwealth who is accused of a crime of the presumption of innocence, and amend – without notice or warning to the voters – provisions of the Pennsylvania Constitution which act as a shield against wrongful convictions.

[1] The latter harms are documented in the amicus brief filed on behalf of the National Association of Criminal Defense Lawyers.

The voters were also presented with a ballot question and summary statement that briefly mentioned select portions of the Proposed Amendments and failed to identify all provisions of the Pennsylvania Constitution that would be altered if the Proposed Amendments were to be approved. Accordingly, the Court should affirm the order that granted final relief invalidating this pernicious and ill-advised measure.

B. Among their other effects, the Proposed Amendments contradict and thus amend the presumption of innocence that is part of "the law of the land."

Judge Ceisler's opinion mentions but does not elaborate the impact of the Proposed Amendments on the presumption of innocence. 2021 WL 62268, at *4. This central aspect deserves fuller attention. The presumption of innocence is a fundamental right – recognized since long before the Founding and thus a critical component of "the law of the land," Pa. Const., Art. I, § 9 – that protects every person charged with a criminal offense.

The presumption of innocence applies equally to the pre-trial process as it does at trial. The Proposed Amendments, however, define "victim" 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." But no judge, consistent with the presumption of innocence, could find that any crime has in fact been "committed," much less that the accused is the person who committed it, at the pre-verdict stages of the case where these Proposed Amendments are principally to be enforced. In requiring, by their terms, that judges act

from the first moments of the criminal process as if guilt were presumed, the Proposed Amendments strip an accused of this most fundamental of rights. Instead, the Proposed Amendments attempt to create an apparently irrebuttable presumption that every complainant (among others deemed in some undefined way to be "directly harmed") in every criminal case is, in fact, a "victim," that is, a person against whom "the crime" was in fact committed.[2] This result cannot stand – at least not without being approved by a fully-informed citizenry as the single subject of a narrow proposal to amend our Constitution.

The right to enjoy a presumption of innocence in any criminal case has been recognized as an essential and "basic component of a fair trial under our system of criminal justice." *Taylor v. Kentucky*, 436 U.S. 478, 479 (1978) (quoting *Estelle v. Williams*, 425 U.S. 501, 503 (1976)). See *Commonwealth v. Allshouse*, 614 Pa. 229, 268, 36 A.3d 163, 186 (2012) (referencing "the fundamental rule that the state, as a condition of its authority to take the life [or liberty] of an accused, must overcome the presumption of his innocence"), quoting *Thompson v. Missouri*, 171 U.S. 380, 387 (1898). Its history as a foundation of due process and the "law of the land" predates the Revolution and the Constitution itself. *See* William Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND, bk. IV ("Of Public Wrongs"), ch. 27, *358 (1753) ("the law holds

[2] This effect is both direct and new. It is thus entirely unlike the amendment to Article I, § 14's bail clause that this Court sustained against a presumption-of-innocence challenge in *Grimaud*, finding that amendment's effect on the presumption to be neither patent nor materially different from how the Bail Clause already operates. *See* 581 Pa. at 409; 865 A.2d at 842.

that it is better that ten guilty persons escape than that one innocent suffer"); John Adams, *Defense Opening Statement at the Boston Massacre Trial* (1770) (explaining why public safety demands that "[i]t is more important that innocence be protected than it is that guilt be punished").

The citizens of this Commonwealth, since 1776, have recognized as "inherent rights of mankind" "certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty …." Pa. Const., Art. I, § 1. As the first great treatise on the Pennsylvania Constitution explained, explicating "the law of the land," as enshrined in Article I, § 9: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Thomas Raeburn White, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 115 (1907) (quoting Daniel Webster).

The presumption of innocence underpins all of the more specific constitutional rights of the accused. Thus, this bedrock right is "axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor*, 436 U.S. at 483 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). More than sixty years ago, this Court declared:

> The presumption of innocence grew up as a policy of law and is not based upon probabilities at all. It represents the law's humane approach to the solution of a dispute which may result in the loss of life or liberty. Because of this concern the law has ordained that any government which seeks to take from any person his life or liberty has the burden of proving justification for doing so. It is the

> continuing presumption of innocence which is the basis for the requirement that the state has a never-shifting burden to prove guilt beyond a reasonable doubt. Since this presumption is with the defendant not only at the beginning of the trial but throughout all its stages, and even while the jury is considering its verdict, it is obvious that no contrary presumption can be indulged.

Commonwealth v. Bonomo, 396 Pa. 222, 229, 151 A.2d 441, 445 (1959) (footnote and internal citation omitted).

This same, heretofore unconstitutional presumption of guilt as is embodied in the Proposed Amendments' definition of "victim" is even more clearly revealed in some of their particular, more narrow provisions, including those which would purport to guarantee a right "to reasonable protection from the accused." Built on the premise that every complainant – along with a broad and undefined class of additional persons deemed to be "directly harmed" – is actually a "victim," the Proposed Amendments would turn the accused's right to the presumption of innocence on its head, if not eradicate that rule entirely.

The proposed Amendments state that these newly articulated, conflicting rights are to be given equal weight (to be enforced in a "manner no less vigorous than the rights afforded to the accused"). Necessarily, this means that the formerly protected rights of the accused will sometimes be subordinated when they would not otherwise have been.

In this core regard, the Proposed Amendments upend the Enlightenment political philosophy that gave rise to the American experiment two centuries ago: the historic understanding that when criminal charges are filed, the accused is confronted with a potential deprivation of inherent human rights that

the Constitution of the Commonwealth of Pennsylvania protects, to wit: life, liberty and property. Pa. Const., Art. I, § 1. Protection of these rights is so fundamental to our definition of a free society that of the fifty or so distinct rights of persons mentioned in the twenty-eight sections of the Declaration of Rights, more than twenty are rights specific to those accused or suspected of criminal conduct. Although an actual victim of a crime also suffers a deprivation, that harm is categorically different; it is not a deprivation of "rights," because it is not *the State* that has deprived or seeks to deprive the crime victim of life, liberty or property. Constitutional rights are enumerated in the charter that establishes our form of government, because they represent what it means to enjoy liberty in one's relation to State power. The Constitution does not define what it means to enjoy safety and dignity in our interactions with our fellow citizens, which is the proper subject of civil law and of legislation.

For these reasons, the "law of the land" clause, including its protection for the presumption of innocence, is among the provisions of the existing Constitution that would be "facially" and "patently" affected by the Proposed Amendments. Moreover, as discussed under Point D below, nothing in either the ballot question or the "Plain English Statement" accompanying the ballot question begins to explain these consequences to voters. A right that is bestowed on all citizens and serves as part of the essential foundation upon which our liberty (and our criminal justice system) is built, such as the presumption of innocence, must not be constitutionally undermined or abro-

gated without informing voters of this impact in the plainest language and allowing them to exercise an informed vote on that issue. The ballot question fails to achieve that goal.

C. The Proposed Amendments facially alter the provision of the Pennsylvania Constitution that ensures relief from wrongful convictions.

Regrettably, wrongful convictions occur in the United States, and innocent individuals have been incarcerated, sometimes for decades, for crimes that they did not commit. *See* Samuel R. Gross, *What We Think, What We Know and What We Think We Know about False Convictions*, 14 OHIO ST. J. CRIM. L. 753 (2017), available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2882&context=articles (last accessed 4/9/21). Pennsylvania is not immune from this travesty. *See* Pennsylvania Innocence Project, "About: Our Impact" (20 exonerations in Project's first 12 years), available at https://painnocence.org/about (last accessed 4/9/21). The Proposed Amendments' creation of a new constitutional right to "a prompt and final conclusion of the case and any related postconviction proceedings" jeopardizes the existing constitutional rights which attempt to provide some protection against such miscarriages of justice.

Criminal defendants enjoy a protected right under Article I, Section 14 of the Pennsylvania Constitution to pursue *habeas corpus* relief, even after their convictions have otherwise "become final." Chapter 65 of the Judicial Code, 42

Pa.C.S. §§ 6501–6505, echoes this constitutional right and addresses the process for obtaining habeas corpus relief. Section 6503 provides:

> **(a) General rule.--**Except as provided in subsection (b), an application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.
>
> **(b) Exception.--**Where a person is restrained by virtue of sentence *after* conviction for a criminal offense, the writ of habeas corpus shall not be available *if a remedy may be had by post-conviction hearing proceedings authorized by law*.

42 Pa.C.S. § 6503 (emphasis added).

Through the Post Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq.* (the "PCRA"), the Legislature has provided a process and remedy for an individual to secure relief after a conviction for a criminal offense, as assured by the Constitution's habeas corpus clause and referenced in § 6503. *Commonwealth v. Peterkin*, 554 Pa. 547, 553, 722 A.2d 638, 641 (1998). One of the PCRA's central missions is to act as a failsafe against wrongful convictions. The Act states, in part, that "[t]his subchapter provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief …." 42 Pa.C.S. § 9542. The Proposed Amendments inherently amend, and thus threaten, this fundamental constitutional right and

protection by creating a new and conflicting right of victims to a "prompt and final" conclusion to criminal cases, including appeals and PCRA proceedings.[3] The PCRA sets forth certain time parameters pursuant to which a petition seeking PCRA relief must be filed. First, a petition must ordinarily be initiated within one year after the defendant's conviction has become final by the expiration of the direct appellate process (including the time allowed for filing a petition for certiorari at the Supreme Court of the United States, or the time during which such petition is pending, if timely filed). 42 Pa.C.S. § 9545(b)(1). But there are three exceptions to this limitation, including a cognizable claim based on newly discovered facts. *Id*.(b)(1)(i)-(iii). In that event, a new year opens up for filing a PCRA petition. *Id*.(b)(2).

Accordingly, an individual who is convicted of a crime and who remains in custody has at least one year from the date that the conviction "becomes final" – which itself may be many years after the crime was allegedly committed – to exercise the constitutional right of access to habeas corpus by initiating an application for PCRA relief. That one-year period can be extended significantly if any of the exceptions under subsection (b)(1) are triggered.

[3] Access to a meaningful appeal is also constitutionally protected in Pennsylvania. Pa. Const., Art. V, § 9. Much of what is discussed in this part of this amicus brief is also applicable to the Proposed Amendments' unacknowledged impact on the fair administration of criminal appeals, which sometimes cannot be complete within a time frame that crime victims would consider "prompt." Even the existence of an opportunity to seek allocatur relief following the affirmance of a conviction by the Superior Court could be viewed as inconsistent with a constitutional "right" to finality in appellate dispositions.

The Proposed Amendments, however, provide any and all "victims" with the right to be heard in any proceeding where a right of the victim is implicated, including a new and unexplained "right" to "proceedings free from unreasonable delay and *a prompt and final conclusion of the case and any related post-conviction proceedings*" (emphasis added). Victims will undoubtedly demand a broad interpretation of the Proposed Amendments, and judges will be obligated to consider denying access to PCRA relief for this reason alone. This provision invites "victims" to contend that the mere exploration of new and troubling questions about guilt violates the right to a prompt and final conclusion of the case – a right that is often in conflict with the right of the accused to (and the public interest in) a reliable and just result.

Experience teaches that exonerations can often take a decade of digging and litigation. For example, in *Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012), the defendant was convicted of first degree murder and arson in Monroe County in 1990. His direct appeal rights (and then PCRA) were subsequently exhausted without success, against his consistent claim that the fire that took his teenage daughter's life was an accident, not arson. Over twenty years later, in 2012, the U.S. Court of Appeals held that Lee was entitled under a writ of habeas corpus to discovery to pursue his claim that the "admission of the Commonwealth's fire expert testimony undermined the fundamental fairness of Lee's entire trial." New evidence showed that critical testimony was premised on since-debunked

"junk science" forensics "and was therefore itself unreliable." *Id.* 407. The Third Circuit observed that:

> These factual allegations are not contradicted by the existing record, not least because the Commonwealth has not offered any evidence supporting the validity of the old methodology and does not challenge the accuracy of the [petitioner's expert] affidavit, which describes the developments in fire science since Lee's trial and explains that many of the scientific theories relied upon by the Commonwealth's experts have been refuted.

Id. It took another three years of litigation before the Third Circuit, in *Lee v. Sup't, Houtzdale SCI*, 798 F.3d 159 (3d Cir. 2015), was able to affirm the federal court's eventual grant of final habeas relief to Lee.

The appellate court concluded that Lee "was convicted of murdering his daughter based primarily on scientific evidence that, as the Commonwealth now concedes, is discredited by subsequent scientific developments" and that "the Commonwealth has not pointed to 'ample evidence' sufficient to prove guilt beyond reasonable doubt." *Id*. 161, 169. After 24 years of wrongful imprisonment, Lee was released, and the Commonwealth determined that Lee would not be re-prosecuted. *See* National Registry of Exonerations, Univ. of Michigan, "Other Arson Cases: Han Tak Lee" (added 12/28/15), available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4820 (last accessed 4/9/21).

Lee was imprisoned for decades for a crime he did not commit following a conviction that was premised on faulty science.[4] Indeed, as it turned out, there was never any crime at all, and therefore no "victim" of any "offense"; the deadly fire was actually an accident. Yet under the Proposed Amendments, a court would have been obligated to presume otherwise. Regrettably, many other cases like Lee's exist. *See, e.g.*, National Registry of Exonerations, home page, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last accessed, 4/9/21). A defined "victim" (such as Lee's ex-wife, mother of the deceased), asserting a "right" to "prompt" and "final resolution" of the case, might prevent such belated exercises of justice from being obtained under our PCRA. The Proposed Amendments thus facially also amend the anti-suspension clause of Article I, § 14, which protects the right to habeas corpus.

The problem of belated exoneration is not limited to murder prosecutions. In *Commonwealth v. Williams*, 215 A.3d 1019 (Pa.Super. 2019), for example, the appellate court reversed the denial of PCRA relief in a ten-year

[4] *Lee* was not a capital case, but lengthy proceedings are even more common in that context. One of several exonerations of death-sentenced prisoners in Pennsylvania resulted from a *third round* of DNA testing, which occurred during a *second* habeas corpus proceeding and after *two* prior unsuccessful PCRA filings. The truth was not uncovered until more than twenty years after the brutal rape-murder for which Nicholas Yarris was wrongly convicted in Delaware County. See https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3771 Enforcement in the *Yarris* case of a victim family's "constitutional right" to a "prompt and final" resolution of the case could have resulted in a horrific travesty and miscarriage of justice.

old drug case in which a jail sentence had been served.[5] Nearly all the testimony presented at trial was entirely discredited by newly-discovered evidence, uncovered while the defendant (a popular rapper who performs as "Meek Mill") was in custody for an alleged probation violation. One of the false charges in that case was a count of "aggravated assault" alleging under 18 Pa.C.S. § 2702(a)(6) that Willliams had pointed a firearm at the arresting officer. That corrupt policeman – the very person later shown to have presented false testimony – would be classed as a "victim" under the Proposed Amendments and granted rights (expressly made equal in weight to the defendant's) to "a prompt and final resolution" of the case. Again, in the far-from-unique circumstances of that case, enforcement of the Proposed Amendments could have prevented exoneration of an innocent person under the guise of protecting the "rights" of a false accuser.

Promptness and finality are important interests in our system of justice, but elevating them to the level of a constitutional right enjoyed by an open-ended class of "victims" threatens the innocent with a permanently locked prison cell. And again, as with the presumption of innocence, nothing in the official summary or ballot statement even alludes to this direct impact of passing the Proposed Amendments.

[5] *See also* No. 31 EM 2018 (4/24/18) (order of this Court directing grant of bail pending appeal in same case).

D. Without notice to the voters, the single ballot question seeks impermissibly to amend several provisions of the Declaration of Rights at once.

Expressing a fundamental political and philosophical premise of a free Commonwealth, the Pennsylvania Constitution provides:

> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const., Art. I, § 25 ("Reservation of Powers in People"). In this provision, the expression "this article" refers to Article I, known as the Declaration of Rights, largely drafted in 1776 for the newly independent former colony. It has been in force in its present form, with few changes, since 1790 for this Commonwealth, as a State within the United States of America.

PACDL would respectfully remind this Court that it is no coincidence that nearly half of the many rights that the Framers saw fit to include in the Declaration were rights for those accused of crimes. The Founding Generation was well aware that all governments, both tyrannical and democratic, must be restrained from abusing the awesome power of the criminal process to oppress the poor, the unpopular, the disadvantaged, the dissident, and the troublesome. No matter that most of the accused may be guilty of at least some of what they are charged with. The only way to defend against abuses is to protect the presumption of innocence, the right to habeas corpus, and the many procedural rights of *every* accused person at every stage of every case.

With respect to Section 25, this Court has observed, "We agree with the general proposition that those rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government." *Gondelman v. Commonwealth*, 520 Pa. 451, 467, 554 A.2d 896, 904 (1989). Of course, the right of the "people" to amend their Constitution nevertheless includes authority to refine its Declaration of Rights. *Id*. ("It is absurd to suggest that the rights enumerated in Article I were intended to restrain the power of the people themselves."). But PACDL urges that it would be appropriate for this Court in the present case to insist that special care and restraint be exercised whenever a proposed amendment – much less a package of multiple amendments – appears to trench on one or more of these most fundamental of rights. At the very least, the terms of Article XI, § 1 (and its implementing statutes) should be most vigorously and meticulously enforced in any such case. "Nothing short of a literal compliance with this mandate will suffice." *Penna. Prison Society*, 565 Pa. at 538, 776 A.2d at 978; accord, *Bergdoll*, 557 Pa. at 87, 731 A.2d at 1270, both quoting *Kremer v. Grant*, 529 Pa. 602, 611, 606 A.2d 433, 438 (1992).

Of course, for the "people" of Pennsylvania to be in a position to take the extraordinary step of amending their Declaration of Rights, they must understand what actually is being amended. Any argument to the contrary is an affront to the foundational philosophy embedded in Article I, §25. To this end,

as directed by Article XI, § 1 itself,[6] the Legislature has articulated certain implementing requirements. First, the Secretary of the Commonwealth must draft a ballot question, within a stated limitation of 75 words. 25 Pa.Stat. § 3010(b) ("Each question to be voted on shall appear on the ballot labels, in brief form, of not more than seventy-five words...."). The appellees argue at their Point II.A. that this provision, even if valid as an *aid* to voter understanding, cannot *substitute* for Article XI's requirement that the "proposed amendment or amendments" *themselves* "be submitted to" the voters. (PACDL takes no position on the latter point.) Second, the Attorney General must draft and make available a "plain English" statement that explicates "the purpose, limitations and effects of the ballot question on the people of the Commonwealth." 25 Pa.Stat. § 2621.1.

In the case of "Marsy's Law," the Court below recognized that the "people" were asked whether to substantially amend several provisions of the Declaration of Rights in a single 73-word ballot question. That question stated:

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

[6] "[S]uch proposed amendment or amendments *shall be submitted* to the qualified electors of the State *in such manner ... as the General Assembly shall prescribe* …." Pa. Const., Art. XI, § 1 (emphasis added).

(emphasis added). The italicized "including" makes explicit that the official question is incomplete and therefore inaccurate and unacceptable. Precisely because the Proposed Amendments directly affect so many different provisions of the Constitution, it would be virtually impossible to summarize them accurately and completely in a 75-word ballot statement. Both the official 75-word ballot question and the Plain English Statement drafted by the Attorney General, while longer, were necessarily incomplete, given the forbidden complexity of the Proposed Amendments.[7]

As argued by the appellees at their Point II.B., this incompleteness in the official statements provides a potentially separate but related basis to invalidate the measure, which the Court below did not reach. See *Grimaud*, 581 Pa. at 409–12, 865 A.2d at 842–44; *Sprague* v. *Cortes*, 636 Pa. 542, 145 A.3d 1136, 1141 (2016) (equally divided Court; opinion of Baer, J., for 3 Justices); *Stander* v. *Kelley*, 433 Pa. 406, 250 A.2d 474, 480 (1969).

[7] While the "Plain English Statement of the Office of Attorney General" provides a fuller recitation of the provisions of the Proposed Amendments, even that document is incomplete. Under the Election Code, the Attorney General is to "prepare a statement in plain English which indicates the purpose, *limitations and effects* of the ballot question on the people of the Commonwealth…" 25 Pa.Stat. § 2621.1 (emphasis added). The "Plain English Statement" in this case certainly does not address either the limitations or the many effects of the ballot question. The proposal's central definition of "victim," for example, is incomplete by its terms: it states what the term "victim" "*includes*" but not what it "means." No reference is made to that fact (a good example of a "limitation") in the "plain English statement."

First, the ballot question, as presented to the voters, ignores the irreconcilable conflict that the Proposed Amendments would create with the core constitutional rights of an accused, most if not all of which rest on the presumption of innocence. Similarly, the "plain English" statement ignores that the Proposed Amendments concern the "rights" of a person who has not been – and consistent with due process for the accused cannot be – established factually from the moment of arrest or before as a true "victim." For example, the stated ballot question wholly disregards the untenable situation lower courts will face when, for example, hearing a motion for bail by an arrested individual against whom the evidence may be slight, the court must consider the claims of the accuser and/or their family, and others, that bail must be set at a high level because of a feeling, however unwarranted, that they need protection.

The failure to provide to "the people" a full and accurate summary of the Proposed Amendments is significant. By way of example only, nothing in the ballot question reflects that for a person to be classified as a "victim" within the meaning of the Proposed Amendments, they need only *accuse* somebody of a crime. No determination has to be made (so far as it appears) by any judicial officer that the person has actually been victimized by the accused (or at all) before the full panoply of "victims' rights" is triggered. Nor does the ballot question mention that the Proposed Amendments expressly exclude from the definition of a "victim" the accused (among others). Yet, this would be of critical importance to some voters. As a result of this exclusion, a woman who

has been the subject of prior domestic violence and finally defends herself against the perpetrator, but is charged with a crime as a result of her actions (a not-uncommon occurrence), is not entitled to the rights of a "victim" under the Proposed Amendments. The same dilemma exists in any disputed case of self-defense, as well as in mutual accusation cases.

By way of further examples of its deficiencies, the ballot question:

- While referencing the rights of crime victims to have their safety considered in bail proceedings, failed to alert the electorate that the Proposed Amendments actually seek to provide: "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" (emphasis added), thus actually extending this rights beyond "victims," while not even defining the scope of "family" included in this right[8];
- While referencing the right of crime victims to have "reasonable protection from the accused," the electorate was not advised that the Proposed Amendments actually provide a "right … to reasonable protection from the accused *or any person acting on behalf of the accused*" (emphasis added). Some voters might disagree in particular with the suggestion that criminal defense lawyers pose a

[8] The principal sponsor of the national campaign for adoption of these amendments (referred to as "Marsy's Law") is the brother of a 1983 California murder victim. Apparently, in the sponsors' view, the "family" of a victim who is not a minor includes their non-cohabitating adult siblings. *See* Beth Schwartzapfel, "The Billionaire's Crusade," The Marshall Project (posted 5/22/18), available at https://www.themarshallproject.org/2018/05/22/nicholas-law (last accessed 4/9/21).

threat to crime victims, from whom the latter need an elevated level of legal "protection";

- While referencing the right of crime victims to "refuse discovery requests made by the accused," the electorate was not advised that the Proposed Amendments actually provide the victim with the right "to refuse an interview, deposition or other discovery request[9] made by the accused *or any person acting on behalf of the accused*" (emphasis added), thus directly interfering with and impeding the duty of defense counsel, guaranteed by Article I, § 9, to render effective assistance by investigating the case and preparing for hearings or trial;
- Nothing in the ballot question reflected that the Proposed Amendments require that the new rights to be conferred must "be protected in a manner no less vigorous than the rights afforded to the accused," thus inevitably, by its clear terms, leading to judicial

[9] PACDL understands this provision to concern only the discovery process and not the availability of subpoenas (whether or not *duces tecum*) issued for a hearing or trial under 42 Pa.C.S. §§ 5904–5905. "Depositions" are allowable under Pennsylvania criminal procedure only in extraordinary circumstances when necessary to protect the compulsory process rights (Art. I, § 9) of the accused. *See* 42 Pa.C.S. § 5919; Pa.R.Crim.P. 500–501. The "deposition" provision itself thus facially amends the Compulsory Process Clause. Otherwise, "discovery requests" are made in criminal cases by the defense *to the Commonwealth*, not to witnesses such as "victims." *See* Pa.R.Crim.P. 573(B). The proposed "right to refuse" *discovery* is thus necessarily either a right of the victim to compel the Commonwealth to violate the Rules of Criminal Procedure by denying certain discovery or a directive to judges to sustain certain Commonwealth objections to defense discovery requests without regard to their validity under the Rule. Since any witness, victim or otherwise, already has the unqualified right "to refuse an interview … request made by" either party in a criminal case, the "interview" aspect is either meaningless or unintelligible.

> "balancing" of these supposedly co-equal rights that will necessarily lead to instances in which the heretofore guaranteed rights of the accused will not be enforced at all.[10] This by itself would be a reason for many voters to vote No who otherwise might support certain aspects of "victims' rights."

The above examples are merely illustrative of the failure of the ballot question, on its face, to fully advise "the people" of the substance of the Proposed Amendments.[11] This failure derives directly from the impermissible complexity and multiplicity of the proposal itself. Critically, the ballot question and "plain English" statement did not even attempt to advise the voters that the Proposed Amendments also facially amend a multitude of other rights set forth in the Declaration of Rights. They were silent, most fundamentally, with respect to the Proposed Amendments' direct threat to the presumption of innocence and to existing protections against wrongful conviction.

PACDL suggests that the ballot question's problems cannot be separated from the proposal's inclusion of multiple constitutional amendments that are not interdependent. Many a thoughtful and informed voter would want to vote

[10] This is arguably among the Proposed Amendments' most significant provisions. Given that most of the same rights are already conferred on crime victims by statute, *see* 18 Pa.Stat. § 11.201 *et seq.*, their potential to trump an existing constitutional right of the defendant, rather than yielding when in conflict, would be the main effect of the proposal's passage.

[11] Additional questions abound. For example, if a victim's right to "reasonable and timely notice" under the Proposed Amendments was violated, and a trial ended with acquittal, must the amendment receive equal weight with the defendant's protection against retrial under the Double Jeopardy Clause of Article I, § 10?

Yes on some aspects, while voting No on many others. After all, few would vote against granting "crime victims" the right "to be treated with fairness, respect and dignity." The Proposed Amendments include dilutions of several provisions of the venerable and ostensibly "inviolate" Declaration of Rights, without fully advising voters of their multifarious and profound impacts. The proposal thus denied the voters their right to approve or disapprove some, all or none of the Proposed Amendments. The result dishonors Article I, § 25 of the Constitution, violates Article XI, § 1, and must fail. The Order of the Court below should therefore be affirmed.

CONCLUSION

For the foregoing reasons, *amicus curiae* PACDL respectfully requests that this Honorable Court affirm the order granting declaratory and permanent injunctive relief against certification of the results of the November 5, 2019, vote on the Proposed Amendments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify pursuant to Pa. R. App. P. 127 that this filing complies with the provisions of the *Public Access Policy of the United Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* (eff. 1/5/2018) that require filing of confidential information and documents differently than non-confidential information and documents.

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

I certify pursuant to Pa.R.App.P. 531(b)(3), that this Brief (including the Statement of Interest) contains no more than 6917 words, including footnotes, which is less than the allowable 7000 words.