

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

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**

*Appeal From the Order of the Commonwealth Court Entered on January 7, 2021
at No. 578 MD 2019*

**BRIEF OF AMICUS CURIAE
PENNSYLVANIANS FOR MODERN COURTS
IN SUPPORT OF APPELLEES**

Dated: April 12, 2021

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Pennsylvanians for Modern Courts respectfully submits this Brief as *amicus curiae* in support of Appellees League of Women Voters and Lorraine Haw (“Appellees”) in this matter.

INTRODUCTION

The proposed constitutional amendment at issue in this appeal (“Proposed Amendment”) substantially impacts, and interferes with, this Court’s exclusive, constitutionally-mandated rulemaking power to govern procedures regarding notice and participation in court proceedings. Indeed, the Proposed Amendment is a proverbial wolf in sheep’s clothing. While strategically presented as one amendment, the Proposed Amendment legally and practically encompasses numerous material changes to the Pennsylvania Constitution regarding rights to victims of crimes.¹ The Proposed Amendment also establishes not one, but at least *fifteen* constitutional rights,² the quantity and breadth of which were not meant to be voted on in a single ballot question.

¹ The policy arguments for or against establishing these rights are not before this Court and should not influence the disposition of this appeal. Instead, the constitutional issues presented must control.

² These rights are: (1) to be treated with fairness and respect for the victim’s safety, dignity, and privacy; (2) to have the safety of the victim and the victim’s family considered in fixing the amount of bail and release conditions for the accused; (3) to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct; (4) to be notified of any pretrial disposition of the case; (5) with the exception of grand jury proceedings, to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole and pardon; (6) to be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender;

STATEMENT OF INTEREST³

Pennsylvanians for Modern Courts (“PMC”), founded in 1988, envisions a Pennsylvania judicial system in which everyone who participates is assured impartiality, fairness, accessibility, and respect. PMC is a statewide nonprofit, nonpartisan organization that was founded to improve and strengthen the justice system in Pennsylvania by, among other things, improving court administration, increasing fairness and eliminating bias, and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses. PMC has a strong interest in this matter. The Proposed Amendment threatens to create sweeping changes to the Pennsylvania Constitution, many of which involve court proceedings within Pennsylvania’s judicial system. PMC is committed to judicial integrity and the administration of justice within the Commonwealth. PMC believes

(7) to reasonable protection from the accused or any person acting on behalf of the accused; (8) to reasonable notice of any release or escape of the accused; (9) to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused; (10) full and timely restitution from the person or entity convicted for the unlawful conduct; (11) full and timely restitution as determined by the court in a juvenile delinquency proceeding; (12) to the prompt return of property when no longer needed as evidence; (13) to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related post[-] conviction proceedings; (14) to confer with the attorney for the government; and (15) to be informed of all rights enumerated in this section. Proposed Amendment, Article I, § 9.1(a).

³ Pennsylvanians for Modern Courts qualifies as a tax exempt organization under the Internal Revenue Code, Section 501(c)(3). PMC verifies that no person or entity other than PMC, its members, or counsel paid in whole or in part for the preparation of this Brief. PMC further verifies that no person or entity other than PMC, its members, or counsel authored this Brief in whole or in part.

the breadth of proposed changes, and their deleterious impact on the constitutional mandate in Article V governing the judiciary, could adversely affect Pennsylvania’s citizens’ ability to navigate the judicial system and to make an informed vote either for, or against, those changes.

ARGUMENT

Article XI, Section 1 of the Pennsylvania Constitution unambiguously requires separate ballot questions for separate amendments to the Pennsylvania Constitution. In pertinent part, Section 1 requires that “[w]hen two or more amendments shall be submitted they shall be voted upon separately.” Pa. Const. Art. XI, § 1. “It is the responsibility of this Court to insure that the provisions of the Constitution establishing the procedure for the proposal and adoption of constitutional amendments are satisfied.” *Pennsylvania Prison Soc. v. Com.*, 776 A.2d 971, 977 (Pa. 2001). As the ultimate arbiter of constitutional questions, it is this Court’s charge to abide by and protect the Constitution’s procedures in analyzing the Proposed Amendment.

A. The Proposed Amendment Patently Impacts Article V, Section 10 of the Constitution and Unconstitutionally Interferes with the Supreme Court’s Rulemaking Authority.

The Proposed Amendment in this case unconstitutionally usurps the Supreme Court’s rulemaking authority by diverting that power to the General Assembly.

1. The Proposed Amendment Grants the General Assembly Procedural Rulemaking Authority Over Procedures Regarding Notice to Non-Litigants and Participation in Court Proceedings.

Article V, Section 10(c) of the Constitution mandates that “The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts” Pa Const. Art. V, § 10(c). The Proposed Amendment, however, grants the General Assembly procedural rulemaking authority over notice to non-litigants, openness of courtroom proceedings, and the courts’ maintenance and control over its calendars. As a result, the Proposed Amendment effectively amends Article V, Section 10(c) by undermining the Court’s exclusive, constitutionally mandated power to govern the practices and procedures of all courts within the Commonwealth.

In *Grimaud v. Commonwealth*, this Court adopted the “subject matter test” to determine whether a ballot question violates Article XI, Section 1. 865 A.2d 835, 841 (Pa. 2005). To determine whether a proposed amendment is constitutional, courts must decide whether it (1) encapsulates a single subject that is sufficiently interrelated⁴ and (2) patently affects other constitutional provisions. *Id.* at 841-42.

⁴ The fifteen proposed changes also are not sufficiently interrelated to justify their presentation in a single question because they relate to a wide variety of subject matters, including bail, discovery, due process, restitution, the right to privacy, and evidence controls.

Courts consider a proposed amendment's substantive effect on the Constitution by examining its content, purpose, and effect. *Id.*

Here, the Proposed Amendment's purported grant of rulemaking power to the General Assembly in the context of victim's rights in criminal proceedings amounts to a straightforward and improper amendment of Article V, Section 10(c). *See Bergdoll v. Kane*, 731 A.2d 1261, 1270 (Pa. 1999). The majority in *Bergdoll* held that the proposed amendment facially altered more than one provision of the Constitution because it both changed the standard for confrontation of witnesses in Article I, Section 9 and granted the General Assembly a power theretofore reserved to the judiciary, stating:

“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, Section 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, Section 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. Section 1703*, 482 Pa. 522, 534, 394 A.2d 444, 451 (1978), ‘the Pennsylvania Constitution grants the judiciary – and the judiciary alone – power over rulemaking.’

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

Id. at 1270. The same result must follow here.

Action by the General Assembly is a prerequisite to the recognition of any of the rights set forth in the Proposed Amendment.⁵ Therefore, the Supreme Court’s rulemaking authority shifts to the General Assembly to the extent any of the rights within the Proposed Amendment impact rules governing practice, procedure, and conduct of courts. As explained below, the Proposed Amendment affects, at minimum, the Supreme Court’s procedural rulemaking authority over notice to non-litigants and victims’ participation in court proceedings.

a. Notice to Victims.

First, the Proposed Amendment provides victims with the right to notice of the following in relation to criminal court proceedings: (1) “. . . all public proceedings involving the criminal or delinquent conduct”; (2) “. . . any pretrial disposition of the case”; (3) “. . . all parole procedures . . . and . . . of the parole of the offender”; and (4) “. . . any release or escape of the accused.” Proposed Amendment, Article I, § 9.1(a). Procedures regarding notice, however, fall within the purview of the Supreme Court’s rulemaking authority, as is apparent from Rule 114 of the Pennsylvania Rules of Criminal Procedure.⁶ Rule 114 sets forth the

⁵ The Proposed Amendment states, in pertinent part, “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* . . .” Proposed Amendment, Article I, § 9.1(a).

⁶ The Pennsylvania Rules of Criminal Procedure are adopted by the Supreme Court under the authority of Article V § 10(c) of the Constitution of Pennsylvania. Pa.R.Crim.P. 102.

procedural requirements regarding “Orders and Court Notices⁷” with regard to filing and service. *See* Pa.R.Crim.P. 114(A)-(B). Under Rule 114, a copy of any order or court notice “shall be served on each party’s attorney, or the party if unrepresented.” Pa.R.Crim.P. 114(B)(1). There is no rule of Criminal Procedure, however, providing for notice to victims. This silence is significant, and it is solely within the Supreme Court’s constitutional rulemaking power to fill it. *See Payne v. Commonwealth Dep’t of Corr.*, 871 A.2d 795, 805 (Pa. 2005) (finding that statute containing a court procedure regarding automatic dissolution of an injunction unconstitutional for intruding on the Court’s exclusive rulemaking authority when Rule of Civil Procedure spoke generally to the subject of preliminary injunctions, but did not create a specific procedure for their automatic dissolution). Furthermore, there are no court procedures providing for a re-do of proceedings if a victim is not provided notice. Under the Proposed Amendment, the power to create those procedures would fall within the purview of the General Assembly. As such, granting the General Assembly the rulemaking power to add or define notice rules improperly undermines the Supreme Court’s power under Article V, § 10(c).

⁷ “Court notices,” as used in Rule 114, “are communications that ordinarily are issued by a judge or the court administrator concerning, for example, calendaring or scheduling, including proceedings requiring the defendant’s presence.” Comment to Pa.R.Crim.P. 114.

b. Participation in Court Proceedings

Additionally, the Proposed Amendment grants victims 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.” Proposed Amendment, Article I, § 9.1(a). As the Court recognized in *Bergdoll*, a grant of rulemaking authority to the General Assembly in the context of testimony in criminal proceedings amounts to an amendment of Article V, § 10(c). *Bergdoll*, 731 A.2d at 1270 (concluding grant of rulemaking authority to the General Assembly in the context of children’s testimony in criminal proceedings amounts to amendment of Article V, § 10(c)). The right to participate and be heard in any proceeding affects court procedures, and would give the General Assembly the power to define and add to those rights. For instance, the General Assembly would have the power to pass legislation allowing victims to testify via teleconference, which was plainly found by the Court in *Bergdoll* to be an infringement on the Supreme Court’s rulemaking authority. Moreover, no court procedures exist regarding conducting additional court proceedings if a victim is not initially heard. The power to create those rules would fall to the General Assembly under the Proposed Amendment, again shifting that rulemaking power from the Supreme Court.

The Proposed Amendment’s grant of the right to privacy to victims would also implicate court proceedings surrounding victim participation. The Proposed

Amendment provides victims the right “to be treated with fairness and respect for [their] safety, dignity, and privacy.” Proposed Amendment, Article I, § 9.1(a). As such, a victim asserting that right could demand closed court proceedings, and the General Assembly would hold the rulemaking power to define and provide for that right.

2. The Drafters of Article V Purposefully and Intentionally Placed Rulemaking Authority Within the Power of the Supreme Court.

“Article V. The Judiciary” was added to the Pennsylvania Constitution in 1968. During the debates surrounding Article V, Delegate Scranton articulated the philosophies the Judiciary Committee considered while developing it. One such philosophy was the efficiency of the administration of the judicial system, which Delegate Scranton described as follows:

The people’s access to their courts should be easy and clear and swift and the roads to justice should not be encumbered by administrative roadblocks or confusing procedural sidesteps or deceptive alternatives. Uniformity and clarity and simplicity throughout one state-wide judicial system are the objectives to be sought here, and we felt this should be instituted through the application of modern concepts of public administration and efficiency in a way that would be meaningful to the individual litigant.

Debates of the Pennsylvania Convention of 1967-68, Volume II, 835.

Following this basic philosophy, the drafters of Article V deliberately established “a unified judicial system with a central body, which is the Supreme

Court, empowered to furnish over all supervision and direction of that administration.” *Id.* (emphasis added.)

As such, the drafters of Article V clearly intended for the Supreme Court to bear full responsibility for creating and maintaining the procedural rules governing Pennsylvania’s judicial system. Any changes to the allocation of this responsibility, as is present within the Proposed Amendment, not only substantially and patently impact Article V, they also manifestly contradict the premise by which Article V was created.

B. The Proposed Amendment Would Implement Sweeping Changes to the Pennsylvania Constitution That Deprive the Electorate of Their Right to Vote.

The Proposed Amendment embraces multiple amendments that would unconstitutionally implement sweeping changes to the Pennsylvania Constitution. It establishes not one, but at least fifteen constitutional “rights” for victims, each of which constitutes a separate amendment to the Constitution.

The quantity and breadth of the changes in the Proposed Amendment were not envisioned to be voted on in a single ballot question. In interpreting a constitutional provision, a court may consider the circumstances surrounding its formation and construction. *Grimaud v. Com.*, 865 A.2d 835, 848 (Pa. 2005) (J. Cappy, concurring and dissenting). The debates surrounding the adoption of the “separate vote” requirement “disclose that the reason for this part of the amendment

provision is to ensure that our citizenry is fully informed of the proposed amendments to the Constitution, easily understands the amendments, and is able to vote on the various amendments separately.” *Id.* (citing 12 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution, 50 (1839)).

Senator John Fuller of Fayette County introduced the amendment containing the separate vote requirement at the Constitutional Convention in 1838. *See* 12 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution, 50 (1839). He argued that only one amendment should be submitted to the electorate at a time because, if multiple amendments were submitted simultaneously, “one of which may be acceptable to the people, and the other not so. In such an event, an opportunity ought to be given to them to take the one and reject the other.” *Id.* Mr. M’Cahen also spoke in support of the amendment during the debate and remarked that the object of the “separate vote” requirement was

plain, and such as, he should suppose, would receive the unanimous approbation of the convention. It would prevent the legislature from connecting two dissimilar amendments, one of which might be good and the other evil, and in consequence of which, connexion the good which was wanted might be rejected by the people rather than be taken with the evil which accompanied it.

Id. at 100-01.

The Proposed Amendment subverts this commonsense rule by abridging the ability of Pennsylvania voters to separate the good from the evil, as it were. The framers of the separate vote amendment envisioned that Pennsylvania citizens would have the right to cast a meaningful vote in elections approving, or rejecting, constitutional amendments. This right is encapsulated in the Constitution, which provides, “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. Art. I, § 5.

The Proposed Amendment impairs that right by forcing citizen to choose between voting in favor of one proposal they do not agree with as a condition of hoping to assist in the passage of another proposal entirely. Whether the provisions of the Proposed Amendment each individually amount to sound policy or grievous error is not the question before the Court today – it is instead the question that must be put to the voters in a meaningful manner, as is their right under the Pennsylvania Constitution.

CONCLUSION

For all of the reasons set forth above and by Appellees, this Court should affirm the Commonwealth Court.

Respectfully submitted,

Dated: April 12, 2021


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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 2,934 words within the meaning of Pa. R. App. P. 531. In making this certificate, I have relied on the word count of the word-processing system used to prepare the Brief.

Dated: April 12, 2021

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CERTIFICATE OF COMPLIANCE

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.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2021, the undersigned served the foregoing Brief for *Amicus Curiae* Pennsylvanians for Modern Courts upon all registered PACFile users via PACFile.

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