IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA *and* LORRAINE HAW,	:	**M.D. Appeal Dkt.**
Appellees	:	**No. _____ . 84 2019**
v.	:	
KATHY BOOCKVAR, The Acting Secretary of the Commonwealth,	:	
Appellant	:	

EMERGENCY APPLICATION TO REINSTATE THE AUTOMATIC SUPERSEDEAS

Appellant, Kathy Boockvar, Acting Secretary ("Secretary") of the Commonwealth, pursuant to Pa.R.A.P. 123, respectfully moves the Court to reinstate the automatic supersedeas under Pa.R.A.P. 1736(b) and, in support thereof, states the following:

1. This is an appeal from an unprecedented order by the Honorable Judge Ellen Ceisler, of the Commonwealth Court, preliminarily enjoining the Secretary from tabulating and certifying the vote on the ballot question proposing the Crime Victims' Rights Amendment ahead of Election Day.

2. This emergency application is necessary because the Commonwealth Court, *sua sponte* and without analysis, vacated the automatic supersedeas to which the Commonwealth is entitled pending appeal under Pa.R.A.P. 1736(b); Opinion at 48. That court never undertook a supersedeas analysis and instead relied

on its preliminary injunction analysis, in contravention of this Court's holding in *Dep't of Envtl. Res. v. Jubelirer*, 614 A.2d 199 (Pa. 1989).

3. Reinstatement of the supersedeas is critically needed. The Election is Tuesday, November 5, 2019—five days away. Restoring the status quo as ordinarily occurs by operation of law will have no adverse impact on the Appellees—their constitutional challenge can be and will be maintained, and is justiciable, regardless of what occurs on Election Day. Such an injunction is against the public interest as it necessarily suppresses voter engagement on this question. Once the election has been tainted by the injunction it cannot be remedied after the fact if the Secretary prevails on the merits.

I. Brief Statement of the Case.

4. Appellant, respondent below, is Acting Secretary of the Commonwealth Kathy Boockvar, head of the Department of State, the administrative agency charged with administering and enforcing the Election Code. *See generally,* 71 P.S. § 273.

5. On the ballot for the November 5, 2019 Municipal Election is a question that presents voters with the required opportunity to vote on an amendment to the Pennsylvania Constitution. This amendment, the "Crime Victims' Rights Amendment" ("Amendment"), provides for the consideration and inclusion of victims throughout the criminal justice process primarily through

notification and the opportunity to be heard. The Amendment does not alter offenders' existing rights under the Pennsylvania Constitution.

6. The Amendment, prior to being placed on the ballot, was introduced and passed in both houses of the General Assembly during the 2018 and the 2019 legislative sessions. In June of 2019, the Senate approved HB 276, as Joint Resolution 2019-1, directing the Secretary to submit the Amendment to the electorate at the now-imminent 2019 Municipal Election.

7. The ballot question was first published on the Department of State website on July 26, 2019.

8. Appellees, petitioners below, are the League of Women Voters, Lorraine Haw, and intervenor, criminal defense attorney, Ronald L. Greenblatt (collectively, "the League"). The League, by a Petition for Review and Application for Special Relief, sought a preliminary injunction. Though they had from July to initiate this action, the League only did so on October 11, 2019, after the ballots had been finalized, printed and programmed, and after voting had started, with over twenty-two thousand absentee votes already cast.

9. After a hearing, the Commonwealth Court issued an opinion and order, granting the League's Application and enjoining the Secretary from tabulating and certifying the vote on the ballot question. The Commonwealth Court

also *sua sponte* and preemptively lifted the automatic supersedeas that the Commonwealth, on appeal, is entitled to by operation of law.

II. The Commonwealth Court Erred by Improperly Substituting Its Preliminary Injunction Analysis for the Supersedeas Analysis.

10. By operation of law, appeal of a court order by a Commonwealth official acts as an automatic supersedeas. This supersedeas stays the court's order pending appeal. Pa.R.A.P. 1736 ("a *supersedeas* . . . shall continue through any proceedings in the United States Supreme Court").

11. This automatic supersedeas can be vacated only by application of the appellee. Pa.R.A.P. 1732. Here, the League made no such application.

12. Further, that appellee must make a "strong showing" on *each* of the following elements:

> (1) "a substantive case on the merits[;]"
>
> (2) vacating the supersedeas will prevent "irreparable injury[;]"
>
> (3) "other parties will not be harmed[;]" and
>
> (4) vacating the supersedeas "is not against the public interest."

Jubelirer, 614 A.2d at 202, 203; *Public Utility Comm'n v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983). Here, the League made no application, let alone established by a "strong showing" that each factor was met, and the Commonwealth Court did not undertake this analysis.

13. The Commonwealth Court failed to conduct this analysis before lifting the supersedeas *sua sponte*. In fact, it performed no analysis at all. Instead, the Commonwealth Court merely referenced, in one sentence, its preliminary injunction analysis. *See* October 30, 2019 Order. In so doing, the Commonwealth Court cites solely to this Court's decision in *Dep't of Envtl. Res. v. Jubelirer*, 614 A.2d 199, 203 (Pa. 1989). This is perplexing, as that decision requires the Court to conduct a *separate* analysis never undertaken here.

14. In *Jubelirer*, this Court admonished the Commonwealth Court for improperly conflating the two distinct tests: one for issuing a preliminary injunction and a second, separate test for vacating the automatic supersedeas.

> We must *not* blur the distinction between the standard required for the entry of a preliminary injunction . . . and the requirements necessary for the entry of a stay [of the automatic supersedeas] . . . .

Jubelirer, 614 A.2d at 203 (internal citations omitted) (emphasis added).

15. This Court held in *Jubelirer* that the Commonwealth Court erred when it improperly applied its preliminary injunction analysis to the supersedeas analysis, asking whether "*greater injury* [will] result by refusing the preliminary injunction than by granting it." *Id.* (emphasis added).

16. As this Court explained, "greater injury" is not the standard for vacating a supersedeas. The supersedeas standard requires a movant to demonstrate

that "other parties *will not be harmed* by the stay" *at all*. *Id.* at 203-04 (emphasis added).

17. Worse, here the Commonwealth Court did not even conflate the analyses; it ignored any supersedeas analysis entirely and replaced it with a flawed preliminary injunction analysis. *See* October 30, 2019 Order ("The criteria to lift an automatic supersedeas have been met as outlined in the foregoing [preliminary injunction] opinion"). Again, the test prohibiting the vacation of a supersedeas is not the balancing of harms, as in a preliminary injunction analysis, but the existence of any harm to any party. *Jubelirer*, 614 A.2d at 203. On this basis alone, the order vacating the automatic supersedeas should be reversed. *See Germantown Cab Co. v. Philadelphia Parking Authority*, 15 A.3d 44 (table), 609 Pa. 64, 65 (2011) (*per curiam*) (reinstating automatic supersedeas without discussion where Commonwealth Court's order vacating it was clearly deficient).

18. If left to stand, this Order will undermine the separation of the analyses required by this Court in *Jubilirer*. Relying upon this case, future courts will be able to forego any supersedeas analysis once a preliminary injunction is granted.

III. The League Failed to Make Any Showing to Vacate the Automatic Supersedeas.

19. Not only did the Commonwealth Court use the wrong analysis in vacating the supersedeas, but when the correct test is applied, the League cannot make the necessary "strong showing" on all four required factors. This is so because: (1) vacating the supersedeas substantially harms the Secretary and the citizens of Pennsylvania; (2) vacating the supersedeas is against the public interest; (3) reinstating the supersedeas will not irreparably harm the League; and (4) the League's claims lack merit. We address each in turn.

A. Vacating the supersedeas substantially harms the Secretary and the citizens of Pennsylvania, and is, thus, against the public interest.

20. To stay the supersedeas, the League must demonstrate a "strong showing" that that Secretary and the citizens of the Commonwealth will not be substantially harmed. *See Jubelirer*, 614 A.2d at 203; *Germantown Cab Co.*, 15 A.3d 44 (table), 609 Pa. at 65. They cannot.

21. Misapplying its preliminary injunction analysis, the Commonwealth Court concluded that the Secretary would not be harmed by an injunction halting tabulation and certification of the vote. Opinion at 20.

22. In doing so, the Commonwealth Court overlooked the impact the injunction will have on voter participation and turnout, indelibly affecting the

integrity of the election. The Secretary had a 20-plus year veteran election administrator from the Department of State available at the hearing who was prepared to testify about the impact of an injunction on voting behavior. The Commonwealth Court, however, discouraged such testimony because, as indicated in the opinion, the court deemed it to be "purely speculative." Opinion at p. 16.

23. If the supersedeas is not reinstated, an unprecedented injunction enjoining tabulating and certifying the vote ahead of Election Day will undermine the reliability of the result of the ballot question. The Commonwealth Court has told the electorate that their vote will not be counted in the normal course, and may never be counted.

24. Such an injunction is against the public interest as it necessarily suppresses voter engagement on this question. Once the election has been tainted by the injunction it cannot be remedied after the fact if the Secretary prevails on the merits.

25. This precise adverse effect on voter engagement and participation has been recognized by our courts. In *Costa v. Cor*, 143 A.3d 430 (Pa. Cmwlth. 2016), Judge Brobson recognized that such a disruption in the election mechanics was contrary to the public interest. "[Enjoining the Amendment] would not be in the public interest as it would only foment further uncertainty among the public as to whether they should vote on Proposed Constitutional Amendment 1 and whether,

if they do, their votes will be counted. Less than one week before the Primary Election, the voters deserve certainty and finality. Finally, the public interest is best served by adhering to the text of the Pennsylvania Constitution and respecting the power conferred by the electorate on the General Assembly..." *Id.* at 442.

26. This injunction in the midst of the voting process, after tens of thousands of people have already voted, and less than a week before Election Day will foment irreparable uncertainty among the electorate, and suppress voter engagement on this question.

B. Reinstating the supersedeas will not harm the League.

27. This Court has expressly held that a constitutional challenge to a ballot question concerning a proposed amendment remains justiciable even after a vote of the people. Thus, Pennsylvania Courts have denied preliminary injunctions in *every single analogous situation. See Bergdoll v. Kane*, 731 A.2d 1261, 1264 (Pa. 1999) (affirming denial of preliminary injunction of proposed constitutional amendment as there was no irreparable harm and the question remained justiciable); *Pennsylvania Prison Soc. v. Com.*, 776 A.2d 971, 974 (Pa. 2001) (noting that preliminary injunction was denied and ballot question was presented to the electorate); *Grimaud v. Com.*, 806 A.2d 923, 925 (Pa. Cmwlth. 2002), *aff'd*, 865 A.2d 835, fn. 4 (Pa. 2005) (same); *Mellow v. Pizzingrilli*, 800 A.2d 350, 354 (Pa. Cmwlth. 2002) (same). No Pennsylvania Court has ever ruled that a

preliminary injunction is necessary in this context, even in *Bergdoll* and *Pa. Prison* where the amendments were ultimately ruled unconstitutional.

28. The League has suffered no harm. Their challenge remains justiciable even after the ballot question is properly presented to the electorate.

C. The League's claims lack merit.

29. Although it is premature to discuss the merits in depth, some examination of the fundamental flaws of the decision granting the preliminary injunction is necessary to understand the Commonwealth Court's further flaw in its supersedeas decision.[1]

The Crime Victims' Rights Amendment is Not Self-Executing

30. In deciding that a preliminary injunction is necessary, the Commonwealth Court wrongfully determined that the Amendment is self-executing. It is not.

31. This Court has ruled that an amendment is "self-executing when it can be given effect without the aid of legislation *and* when the language does not indicate an intent to require legislation." *Com. v. Tharp*, 754 A.2d 1251, 1254 (Pa. 2000) (emphasis added). Here, the Amendment states: "To secure for victims justice and due process throughout the criminal and juvenile justice systems, a

[1] By making this abbreviated review, the Secretary does not waive her right to make a more fulsome analysis at the appropriate time.

victim shall have the following rights, *as further provided and as defined by the General Assembly...*" The Commonwealth Court ruled that the Amendment can be given effect without the aid of legislation. This is only the first element of the *Tharp* analysis. The Commonwealth Court ignored the second element, and with it the express language of the Amendment that requires further legislation to implement it.

32. That language was no accident. Between the original version of the Amendment (Printer's No. 1402) and the final version of Amendment (Printer's No. 1824), the General Assembly added, "as further provided, and defined, by the General Assembly." Thus, emphasizing that the Amendment requires further legislation for implementation.

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

33. The Commonwealth Court determined that the Amendment violates the separate vote requirement of the Constitution. This determination is at odds with this Court's precedent in *Grimaud.*

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

votes." *Grimaud v. Com.*, 865 A.2d 835, 841 (Pa. 2005). In doing so, this Court adopted a "common-purpose formulation" to inquire into whether the proposed amendments are sufficiently related to "constitute a consistent and workable whole on the general topic embraced." *Id.* The Court posits whether there is a "rational linchpin" of interdependence, or whether all of the proposed changes "are germane to the accomplishment of a single objective." *Id.* (citing *inter alia* other state supreme court decisions including *Fugina v. Donovan,* 104 N.W.2d 911, 914 (Minn. 1960) (upholding amendment containing sections that, although they could have been submitted separately, were rationally related to a single, purpose, plan, or subject)).

35. In this case, the Amendment pertains to one subject matter, serving one overarching goal—protecting victims' rights in the criminal justice process. It establishes a consistent and workable framework regarding the single topic of victims' rights in the criminal justice system.

36. In *Grimaud*, appellants there, like the League here, argued that the ballot question *effectively* amended a multitude of existing rights. *See Grimaud*, 865 A.2d at 840. In rejecting that argument, this Court noted that, "merely because an amendment 'may possibly impact other provisions' does not mean it violates the separate vote requirement." *Grimaud*, 865 A.2d at 842. It stated that, "[i]ndeed, it is hard to imagine an amendment that would not have some arguable effect on

another provision; clearly the framers knew amendments would occur and provided a means for that to happen." *Id.*

37. Thus, this Court ruled that, "[t]he test to be applied is not merely whether the amendments might touch other parts of the Constitution when applied, but rather, whether the amendments facially affect other parts of the Constitution." *Id.* In other words, and to be clear, "[t]he question is whether the single ballot question patently affects other constitutional provisions, not whether it implicitly has such an effect, as appellants suggest." *Id.*

38. Despite this Court's clear precedent, the Commonwealth Court ruled that the separate vote requirement is violated because the Amendment effectively amends existing rights in the Constitution. This is directly contrary to the holding in *Grimaud.*

39. The Amendment does not patently affect any existing provision of the Constitution. Rather, it adds a provision that solely relates to crime victims' rights, creating a consistent workable whole regarding the subject.

<u>The ballot question fairly, accurately, and clearly apprises the electorate of the Crime Victims' Rights Amendment.</u>

40. The Commonwealth Court determined, here, that the ballot question at issue did not fairly and accurately apprize the voters of the content of the Amendment. This was error.

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

42. This a high bar that the Commonwealth Court overlooks. Instead, the Commonwealth Court suggests alternatives regarding how the question could have been worded. Respectfully, this is neither the role of the court, nor does it identify a constitutional infirmity. As this Court recognized in *Sprague v. Cortes*, 145 A.3d 1136, 1142 (Pa. 2016):

> The question before us is not whether we believe one version of the ballot question is superior to another, nor is it relevant how we would phrase the ballot question if left to our own devices. Instead, our role in the constitutional amendment process is limited to a review of whether the ballot question fairly, accurately and clearly apprises the voter of the question on which the electorate must vote.

42. In this case, the ballot question sets forth the gist of the Amendment, directly quoting many of its provisions.

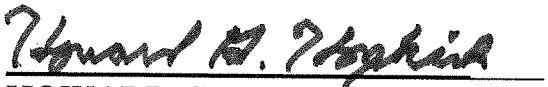
43. For these reasons, the automatic supersedeas should have never been stayed.

Conclusion

WHEREFORE, for the reasons set forth above, the Secretary respectfully requests that the Court grant this emergency application and immediately reinstate the automatic supersedeas pending disposition of this appeal.

Respectfully submitted,

JOSH SHAPIRO
Attorney General

By: 

HOWARD G. HOPKIRK
Senior Deputy Attorney General
Appellate Litigation Section
Bar No. 74264

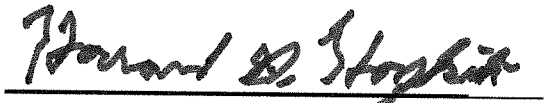
J. BART DeLONE
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
Phone: (717) 705-2331
FAX: (717) 772-4526

Date: October 31, 2019

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.



HOWARD G. HOPKIRK
Senior Deputy Attorney General

CERTIFICATE OF SERVICE

I, Howard G. Hopkirk, Senior Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on October 31, 2019, I caused to be served a true and correct copy of the foregoing document to the following via PACFile:

Steven Edward Bizar, Esquire
Tiffany Ellen Engsell, Esquire
Dechert LLP
2929 Arch Street
Philadelphia, PA 19104
Counsel for Petitioners

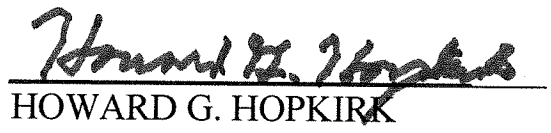
Craig Joseph Castiglia, Esqire
Dechert LLP
601 Market Street, Room 13613
Philadelphia, PA 19106
Counsel for Petitioners

William R. Christman, III, Esquire
Lamb McErlane, PC
24 East Market Street
West Chester, PA 19382
Counsel for Possible Intervenors Vickless, Williams, Moore and Irwin

Andrew C. Christy, Esquire
Mary Catherine Roper, Esquire
ACLU of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19103
Counsel for Petitioners

Michael E. Gehring, Esquire
Stephen G. Harvey, Esquire
Steve Harvey Law, LLC
1880 John F Kennedy Boulevard
Suite 1715
Philadelphia, PA 19103
Counsel for Possible Intervenor Greenblatt

Scot Russel Withers, Esquire
Lamb McErlane, PC
24 East Market Street
West Chester, PA 19381
Counsel for Possible Intervenors Vickless, Williams, Moore and Irwin



HOWARD G. HOPKIRK
Senior Deputy Attorney General