

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 4 MAP 2021

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League of Women Voters of Pennsylvania and Lorraine Haw,  
Appellees,

v.

Veronica Degraffenreid, Acting Secretary of the Commonwealth,  
Appellant.

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

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APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT,  
DOCKET NO. 578 MD 2019, SITTING IN ORIGINAL JURISDICTION

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## **I. THE INTERESTS OF AMICUS CURIAE**

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in the scope and implementation of Marsy’s Law and related victims’ rights constitutional amendments. NACDL has members in each state in which Marsy’s Law currently operates, and affiliate organizations in all but one of those states. As explained herein, Marsy’s Law threatens the even-handed and efficient administration of criminal justice. It also undermines longstanding constitutional protections for persons accused of crimes. Thus, it

directly affects NACDL members, the system within which they work, and the clients they serve.

No entity or individual participated in the drafting of this brief other than the individuals named on the cover of this brief and pursuant to Pa.R.A.P. 531(b)(2), no other person or entity has paid for the preparation of, or authored this brief in whole or in part.

## **II. SUMMARY OF ARGUMENT**

When Pennsylvania voters encountered the November 2019 ballot question that proposed adding a Victim’s Bill of Rights known as Marsy’s Law to the Commonwealth’s Constitution, its vague, aspirational language seemed to suggest an obvious answer. Who wouldn’t agree that crime victims should be treated with “fairness, respect and dignity” and that “certain rights be granted to them”? The ballot question, however, neither revealed the actual text of the sprawling, nearly 500-word amendment to the Constitution nor provided a plain-language explanation of what such an amendment would do. As a result, voters could not evaluate the burdens it would impose on the administration of justice, criminal defendants, and law enforcement.<sup>1</sup>

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<sup>1</sup> Even had voters received that information, they could not have chosen to enact rights that would impose lesser burdens while rejecting those that would impose greater ones; the ballot question conglomerated distinct rights into a single question.

While the wording of the ballot question obscured the changes Marsy’s Law would produce, its dramatic impact on the criminal justice system is subject to neither debate nor speculation. Other states have adopted nearly identical vague and broad constitutional amendments, which have resulted in substantial harm not only to criminal defendants, but also to the administration of the criminal justice system. Bail and parole hearings are delayed or canceled. Courts spend hundreds of thousands or millions of dollars to hire additional staff. Law enforcement is hampered in solving crimes.

To better inform this Court about the impact that Marsy’s Law would have in Pennsylvania, this amicus brief summarizes the substantial burdens Marsy’s Law has imposed in states where it has been implemented. The myriad challenges exhibit in stark terms how little the ballot question informed voters of the true impact of Marsy’s Law.

### **III. ARGUMENT FOR AMICUS CURIAE**

#### **A. Introduction**

Marsy’s Law was born from a moment of intense trauma. In 1983, then-graduate student Henry Nicholas’s younger sister, Marsalee, or “Marsy,” was shot

and killed<sup>2</sup> by a jealous ex-boyfriend, who was subsequently arrested and jailed.<sup>3</sup> On the way home from Marsy's funeral, her mother stopped at a local market. To her horror, she came eye-to-eye with her daughter's killer at the checkout counter.<sup>4</sup> The authorities had not told the family he had bonded out of jail pending disposition of the case. In response to this singular incident, Nicholas began to advocate for the rights of crime victims and, in 2008, led the successful drive to add a victim's bill of rights, called Marsy's Law, to California's constitution.

Since that time, Nicholas has spent more than a decade and substantial personal wealth<sup>5</sup> on efforts to enshrine Marsy's Law in jurisdictions across the

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<sup>2</sup> Marsalee Nicholas's ex-boyfriend, Kelly Connolly, was convicted of second-degree murder for the shooting in 1985. *See Editorial: Problematic Marsy's Law Amendment Is Not the Solution*, Valley News (Feb. 17, 2018), available at: <https://www.vnews.com/Editorial-Marsy-s-Law-15499390> (last visited Mar. 25, 2021).

<sup>3</sup> *See* Michael Rothfeld, *Prop. 9 Would Give Crime Victims a Stronger Voice*, L.A. Times (Oct. 23, 2008), available at: <https://www.latimes.com/archives/la-xpm-2008-oct-23-me-victims23-story.html> (last visited Mar. 25, 2021).

<sup>4</sup> *See About Marsy's Law*, Marsy's Law, available at: [https://www.marsyslaw.us/about\\_marsys\\_law](https://www.marsyslaw.us/about_marsys_law) (last visited Mar. 25, 2021).

<sup>5</sup> *See, e.g.,* Carter Coudriet, *Billionaire-Backed "Marsy's Law" Ballot Measures Pass in Six States, Thanks to \$72 Million*, Forbes (Nov. 7, 2018), available at: <https://www.forbes.com/sites/cartercoudriet/2018/11/07/billionaire-sponsored-marsys-law-for-victims-rights-passes-in-six-states-thanks-to-72-million-push/#7d913a305b7c> (last visited Mar. 25, 2021).

country.<sup>6</sup> The law, versions of which have been written into twelve state Constitutions, does far more than ensure that victims or their families are notified when their alleged assailants are released from custody. Instead, it creates a sprawling—and vaguely-worded—“victim’s bill of rights,” which adds to state constitutions meretricious concepts like victims’ due process; respect for the victim’s safety, dignity and privacy; and reasonable protection from the accused. It also gives victims the rights: (1) to refuse discovery requests from or made on behalf of the accused; and (2) to participate in practically any criminal proceeding aside from—at least in some states—grand jury proceedings.<sup>7</sup> These rights generally apply no matter the severity or type of crime, and to any self-identified “victim,” whether natural person, business entity, or otherwise—in many instances before the “victimhood” of a complainant has even been established through an adjudication of guilt.<sup>8</sup>

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<sup>6</sup> Those states are California, Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, and Wisconsin.

<sup>7</sup> See Brief of Pennsylvania Association of Criminal Defense Lawyers as Amicus Curiae, at Sections II.A-D (discussing provisions of Declaration of Rights and implementing statutes that Marsy’s Law undermines).

<sup>8</sup> See *id.* Section II.A. (discussing inconsistency between presumption of innocence and provision conferring rights on self-identified “victims” pre-adjudication).

Far from elucidating these matters, the ballot question merely asked voters:

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?<sup>9</sup>

Unbeknownst to voters, a “yes” vote added all of the following to the Pennsylvania Constitution:

§ 9.1. Rights of victims of crime.

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

to be treated with fairness and respect for the victim's safety, dignity and privacy;

to have the safety of the victim and the victim's family considered in fixing the amount of bail and release conditions for the accused; to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct;

to be notified of any pretrial disposition of the case; with the exception of grand jury proceedings, to be heard in any proceeding where a right of the victim is implicated, including, but not limited to, release, plea, sentencing, disposition, parole and pardon;

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<sup>9</sup> *Proposed Constitutional Amendment: Crime Victim Rights (Marsy's Law)*, Pennsylvania Department of State, available at: <https://www.dos.pa.gov/VotingElections/CandidatesCommittees/RunningforOffice/Pages/Joint-Resolution-2019-1.aspx> (last visited Apr. 8, 2021).

to be notified of all parole procedures, to participate in the parole process, to provide information to be considered before the parole of the offender, and to be notified of the parole of the offender;

to reasonable protection from the accused or any person acting on behalf of the accused; to reasonable notice of any release or escape of the accused;

to refuse an interview, deposition or other discovery request made by the accused or any person acting on behalf of the accused;

[to] full and timely restitution from the person or entity convicted for the unlawful conduct;

[to] full and timely restitution as determined by the court in a juvenile delinquency proceeding;

to the prompt return of property when no longer needed as evidence; to proceedings free from unreasonable delay and a prompt and final conclusion of the case and any related postconviction proceedings;

to confer with the attorney for the government; and to be informed of all rights enumerated in this section.

(b) The victim or the attorney for the government upon request of the victim may assert in any trial or appellate court, or before any other authority, with jurisdiction over the case, and have enforced, the rights enumerated in this section and any other right afforded to the victim by law. This section does not grant the victim party status or create any cause of action for compensation or damages against the Commonwealth or any political subdivision, nor any officer, employee or agent of the Commonwealth or any political subdivision, or any officer or employee of the court.

(c) As used in this section and as further defined by the General Assembly, the term “victim” includes 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. The term “victim” does

not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor or incapacitated victim.<sup>10</sup>

These sweeping amendments, most of which are unmoored to the trauma that befell the Nicholas family almost four decades ago, have wreaked havoc on the administration of justice in states that have enacted the law. Yet Pennsylvania voters lacked fair notice of these dangers because (among other reasons) the ballot question did not contain the full text of the law. Instead, it presented a vague and incomplete description of the law and its effects.<sup>11</sup>

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<sup>10</sup> A Joint Resolution Proposing an Amendment to the Constitution of the Commonwealth of Pennsylvania, Providing for Rights of Victims of Crime, H.B. 276 (2019-20).

<sup>11</sup> Legislative leaders themselves have criticized the ballot question. Pennsylvania House Majority Leader Kerry Benninghoff stated that the ballot language was the latest in a series of missteps by the Secretary of State. *See* J.D. Prose, *Pa. GOP Leaders Blast Wolf Administration's Ballot Question Language as 'Clearly Slanted'*, *The Times* (Feb. 24, 2021), *available at*: <https://www.timesonline.com/story/news/2021/02/24/pa-emergency-declaration-ballot-question-language/4575355001/> (last visited Apr. 7, 2021). Recent public opinion has noted that the law undermines core protections for the accused, calling on lawmakers to fix that problem. *See Marsy's Law Is Flawed; ACLU and League of Women Voters Were Right*, *Pittsburgh Post-Gazette* (Mar. 31, 2021), <https://www.post-gazette.com/opinion/editorials/2021/03/31/Marsys-Law-is-flawed-ACLU-and-League-of-Women-Voters-were-right/stories/202103180096> (last visited Apr. 11, 2021).

Declaring Marsy’s Law unconstitutional would spare Pennsylvania the fallout, described below, that has hampered the administration of justice in other Marsy’s Law jurisdictions.

**B. The right “to reasonable and timely notice of and to be present at all public proceedings involving the criminal or delinquent conduct” has impaired the administration of justice and cost counties and states millions of dollars.**

The right to “reasonable notice” has led to significant unintended consequences in Marsy’s Law jurisdictions. First and foremost, Marsy’s Law causes delays in court proceedings because of its paperwork and notification requirements. Second, Marsy’s Law places significant financial burdens on state and local governments as a result of its notification requirements. Third, Marsy’s Law impairs the administration of justice by frustrating negotiated resolutions between the government and criminal defendants—and by encouraging potentially limitless litigation about the scope of the rights it confers, who can claim them, and the remedies for their breach.

**1. The docket congestion caused by the notice provision has caused intolerable delays in proceedings to the profound detriment of criminal defendants.**

The ballot question merely requiring “timely notice” of proceedings masks a reality of bail hearings postponed, release orders deferred and court dates continued because notifying *all* alleged victims, including business entities and victims of petty offenses, of *all* proceedings requires time. Marsy’s Law states

report that hearings are routinely delayed because of the time it takes to notify alleged victims. The issue is particularly acute in the context of bail hearings, where defendants are forced to sit in jail for additional days, or even weeks, while prosecutors' offices attempt to fulfill the law's onerous notification requirements.<sup>12</sup> This burden is shared among defendants, prosecutors, and the courts.

For example, in South Dakota, Marsy's Law has led to longer jail stays because courts "waited for victims to be notified" and "swamped" county staff "with notification paperwork, even for minor crimes like vandalism."<sup>13</sup> This experience is not unique to South Dakota. A hearing on a petition for judicial release in Ohio was delayed for nine days (January 20 to January 29, 2021) due to Marsy's Law.<sup>14</sup> A NACDL member reports waiting five-to-six weeks for hearings

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<sup>12</sup> See Mark Walker, *Lawyers Say Marsy's Law Is Forcing Clients to Sit in Jail*, Argus Leader (Nov. 29, 2016), available at: <https://www.argusleader.com/story/news/2016/11/29/lawyers-say-marsys-law-forcing-clients-sit-jail/94554106/> (last visited Mar. 25, 2021).

<sup>13</sup> Sophie Quinton, *'Marsy's Law Protections for Crime Victims Sounds Great, but Could Cause Problems*, available at: <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/10/12/marsys-law-protections-for-crime-victims-sound-great-but-could-cause-problems> (last visited Mar. 22, 2021).

<sup>14</sup> See Anthony Baker, *Travis Johnson Judicial Release Hearing Postponed*, The Register-Herald (Jan. 26, 2021), available at: <https://www.registerherald.com/news/42398/travis-johnson-judicial-release-hearing-postponed> (last visited Apr. 8, 2021).

on bond motions in Bay County, Florida, where Marsy’s Law was implemented in 2018. When the hearings finally commence, and the Court asks whether the alleged victim has received notice, the State often says it does not know—triggering a continuance of the hearing.

California was the first state to codify Marsy’s Law, in 2008. There, in large municipalities like Los Angeles and San Diego, prosecutors try to mitigate the burden of mandatory notice by prioritizing notice to seriously injured alleged victims and the family members of those killed. In other cases they go through the formality of mailing information to alleged victims, but concede it is unlikely that doing so actually provides “timely notice” of initial appearances.<sup>15</sup> Moreover, picking and choosing victims like this creates a state-imposed hierarchy, where residents are treated disparately based on criteria determined by individual prosecutors’ offices. And those victims passed over can seek a rehearing of proceedings they miss,<sup>16</sup> a remedy to which they would be entitled under the

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<sup>15</sup> Beth Schwartzpfel, *The Billionaire’s Crusade*, The Marshall Project (May 22, 2018), available at: <https://www.themarshallproject.org/2018/05/22/nicholas-law> (last visited Mar. 25, 2021).

<sup>16</sup> See *OC Judge Vacates DUI Crash Sentence, Sends Back to Trial as Victim Seeks Harsher Penalty*, abc7 (Dec. 2, 2017), <https://abc7.com/oc-judge-sends-dui-case-back-to-court-amid-victim-complaints/2724559/> (last visited Apr. 7, 2021).

Pennsylvania amendment too.<sup>17</sup> California’s experience with Marsy’s Law is mirrored in other jurisdictions. In South Dakota, according to Minnehaha County Sheriff Mike Milstead, Marsy’s Law overwhelmed some county systems to such an extent that the true victims the law was intended to protect “sort of got lost.”<sup>18</sup>

Marsy’s Law also raises questions that states, and even individual counties, have not answered consistently. As noted by one Florida publication, those questions include: “What will courts do if the victims are not available for the court date? . . . Will Marsy’s Law force the courts to coordinate their proceedings with the victims’ schedules? What if a victim doesn’t have the ability to take time off from work to appear for a case?”<sup>19</sup> Or the resources to travel to court proceedings? The result has been inconsistent and haphazard implementation from court to court.

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<sup>17</sup> See Robert Moran, *ACLU Files Suit to Stop Victims’ Rights Ballot Measure*, *The Philadelphia Inquirer* (Oct. 10, 2019), <https://www.inquirer.com/news/marsys-law-crime-victim-pennsylvania-constitution-amendment-ballot-question-20191011.html> (last visited Apr. 7, 2021) (“[V]ictims could ask for reconsideration of sentences if they or their family members were not notified of a plea deal.”).

<sup>18</sup> See Quinton, *supra* note 13.

<sup>19</sup> C.D. Davidson-Hiers, *What Is Going on in Amendment 6’s “Marsy’s Law?”*, *Florida Phoenix* (Sept. 14, 2018), *available at*: <https://www.floridaphoenix.com/2018/09/14/what-is-going-on-in-amendment-6s-marsys-law/> (last visited Apr. 8, 2021).

In Pennsylvania, the answers to such questions—which cannot be intuited from the vaguely-worded constitutional amendment—will help determine how heavily Marsy’s Law’s notice requirement burdens the judicial system and criminal defendants. In any event, the effect will be felt. Last year saw 156,546 criminal cases and 17,984 juvenile delinquency cases filed in Courts of Common Pleas; 208,138 criminal cases, 38,379 private summary complaints, and 1.57 million traffic cases<sup>20</sup> filed in Magisterial District Courts; and 32,296 felony or misdemeanor cases and 9,732 summary offense cases filed in Philadelphia Municipal Court. In total, that makes for more than 2 million cases with potential victims, and Marsy’s Law does not distinguish among them.<sup>21</sup>

Moreover, the Marsy’s Law Amendment affects far more than proceedings where guilt will be adjudicated; it also applies to notice regarding parole matters and the ability to “participate in the parole process.” What that “participation” would entail—cross-examining the parolee?—is not clear. The administrative issues with “participating in the parole process” are also immense, as most

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<sup>20</sup> Traffic cases are criminal cases governed by the Rules of Criminal Procedure. Moreover, some traffic cases have victims, and nonpayment of a traffic fine could carry a risk of incarceration.

<sup>21</sup> 2018 Caseload Statistics of the Unified Judicial System of Pennsylvania, *available at*: <http://www.pacourts.us/assets/files/setting-768/file-8222.pdf?cb=2e094c> (last visited Mar. 25, 2021).

hearings occur deep within offices of state correctional institutions. The Pennsylvania parole board is already struggling against backlogs while hearing approximately 18,000 cases annually.<sup>22</sup> Marsy’s Law will further compound the problem.

The enormous volume of cases subject to the notice provisions makes it certain that Pennsylvania defendants and courts will experience backlogs in even minor criminal matters, and in administrative proceedings like parole—as the experience of current Marsy’s Law jurisdictions forewarns.

**2. Marsy’s Law states have struggled to deal with the financial impact of the notice provision.**

While no quantifiable value can be placed on an extra hour, an extra day or extra week a defendant spends in confinement due to Marsy’s Law, especially in times where the Covid-19 crisis is particularly acute in correctional facilities, Marsy’s Law’s notice requirement will place significant, verifiable monetary burdens on county governments in Pennsylvania. The primary reason is the requirement that all self-identified “victims,”<sup>23</sup> be they individuals, businesses, or

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<sup>22</sup> See Elizabeth Hardison, *Saddled with Vacancies, Parole Board Says It’s Struggling to Keep Up with Growing Backlog*, Pennsylvania Capital-Star (Feb. 20, 2020), available at: <https://www.penncapital-star.com/criminal-justice/saddled-with-vacancies-parole-board-says-its-struggling-to-keep-up-with-growing-backlog/> (last visited Apr. 8, 2021).

<sup>23</sup> Problematically, Marsy’s Law refers to “victims” even in a pre-trial posture where no defendant has been convicted of a crime. This means that its

other entities, be given timely notice of criminal proceedings, which increases administrative costs. For example, the Administrative Office of the Courts of North Carolina, where the amendment was passed in 2018, estimated that compliance would cost the state courts \$16.4 million in fiscal year 2018-19 and \$30.5 million annually in subsequent years just to hire additional district attorney staff to give the required notice to alleged victims.<sup>24</sup>

The State of South Dakota, where the law was enacted in 2016, had to implement a \$5 million notification system to comply with the notice provision. The unexpectedly high price tag compelled legislators to seek repeal of the amendment through the state's constitutional amendment process.<sup>25</sup> The law was

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provisions arguably apply from the time police receive a report of wrongdoing. That broad applicability further drives the financial and other burdens it imposes. *See also* Section III.A, at 5, *supra* (noting that Marsy's Law "rights generally apply no matter the severity or type of crime, and to any 'victim,' whether natural person, business entity, or otherwise—in many instances before the 'victimhood' of an accuser has even been established through an adjudication of guilt.").

<sup>24</sup> *See* North Carolina Administrative Office of the Courts, Judicial Branch Fiscal Note (Feb. 8, 2017), *available at*: <http://pulse.ncpolicywatch.org/wp-content/uploads/2018/06/Confidential-AOC-fiscal-note.pdf> (last visited Mar. 25, 2021).

<sup>25</sup> *See* Kelly Smith, *Marsy's Law Passed in 6 States, South Dakota on Track to Repeal It*, KSFY.com (Jan. 26, 2018), *available at*: <https://www.ksfy.com/content/news/Marsys-Law-passed-in-6-states-South-Dakota-on-track-to-repeal-it-471383263.html> (last visited Mar. 25, 2021).

ultimately amended in 2018 to make many of the rights it confers, including notice, inapplicable unless the victim affirmatively requests them.<sup>26</sup>

North Dakota, which also passed a Marsy's Law amendment in 2016, spent \$800,000 to update its own victims' notification system, according to Aaron Birst, the Executive Director of the North Dakota State's Attorneys Association. The state expected to spend additional money to hire personnel to notify alleged victims and their families of court appearances.<sup>27</sup> North Dakota's experience is not unique; Marsy's Law has strained District Attorneys' Offices in North Carolina, adding layers of responsibility to already burdened offices.<sup>28</sup>

In Montana, whose Supreme Court invalidated the law in 2017 before implementation, the county attorney for Lewis and Clark County stated in a release

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<sup>26</sup> See *South Dakota Constitutional Amendment Y, Changes to Marsy's Law Crime Victim Rights Amendment*, Ballotpedia (June 2018), available at: [https://ballotpedia.org/South\\_Dakota\\_Constitutional\\_Amendment\\_Y,\\_Changes\\_to\\_Marsy%27s\\_Law\\_Crime\\_Victim\\_Rights\\_Amendment\\_\(June\\_2018\)](https://ballotpedia.org/South_Dakota_Constitutional_Amendment_Y,_Changes_to_Marsy%27s_Law_Crime_Victim_Rights_Amendment_(June_2018)).

<sup>27</sup> See Michael Lyle, *Marsy's Law: Sounds good, but Is It?*, Nevada Current (Aug. 31, 2018), available at: <https://www.nevadacurrent.com/2018/08/31/marsys-law-sounds-good-but-is-it/> (last visited Mar. 25, 2021).

<sup>28</sup> See *N.C.'s Marsy's Law Adds Layers of Responsibility to D.A.'s Offices*, Carolina Paralegal News (Jan. 5, 2021), <https://carolinaparalegalnews.com/2021/01/05/n-c-s-marsys-law-adds-layers-of-responsibility-to-d-a-s-offices/> (last visited Mar. 19, 2021).

“that the new law is expensive to enact, in some counties costing about \$95,000.”<sup>29</sup>

Of course, what is “populous” in Montana is not so in Pennsylvania. Lewis and Clark County, where the state capital Helena sits, had an estimated population of 69,432 in 2019.<sup>30</sup> The number of residents there is comparable to that in smaller Pennsylvania counties, such as Carbon County, with its 64,182 residents.<sup>31</sup>

Montana counties were prepared to hire victim-support staff and additional prosecutors and print Marsy’s Law cards to hand out to victims, and, consequently, to push for tax increases to deal with the law’s burdens.<sup>32</sup>

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<sup>29</sup> Holly K. Michels, *Challenge to Marsy’s Law*, Montana Newspapers Association (Jun. 21, 2017), *available at*: <https://www.mtnewspapers.com/challenge-to-marsys-law/> (last visited Mar. 25, 2021).

<sup>30</sup> U.S. Census Bureau QuickFacts: Lewis and Clark County, Montana, *available at*: <https://www.census.gov/quickfacts/lewisandclarkcountymontana> (last visited Mar. 25, 2021).

<sup>31</sup> U.S. Census Bureau QuickFacts: Carbon County, Pennsylvania, *available at*: <https://www.census.gov/quickfacts/carboncountypennsylvania> (last visited Mar. 25, 2021). Carbon County ranks 39<sup>th</sup> out of 67 Pennsylvania counties in total population. *See* Population of Counties in Pennsylvania (2021), *available at*: <http://worldpopulationreview.com/us-counties/pa/> (last visited Mar. 25, 2021).

<sup>32</sup> *See* Staff, *Lawsuit Challenges Constitutionality of Montana’s New Marsy’s Law*, Bozeman Daily Chronicle (June 20, 2017), *available at*: [https://www.bozemandailychronicle.com/news/crime/lawsuit-challenges-constitutionality-of-montana-s-new-marsy-s-law/article\\_b9f4b9b4-600c-5227-842f-55a336c9d849.html](https://www.bozemandailychronicle.com/news/crime/lawsuit-challenges-constitutionality-of-montana-s-new-marsy-s-law/article_b9f4b9b4-600c-5227-842f-55a336c9d849.html) (last visited Mar. 25, 2021).

The \$95,000 price tag was enough to compel the lead prosecutor of Lewis and Clark County to spearhead a lawsuit that successfully overturned the law. As County Attorney Leo Gallagher explained, the cost of compliance with Marsy’s Law would force him “to make the impossible choice between seeking justice for all Montanans and enforcing long-standing constitutional protections or serving the narrow, competing interests of Marsy’s Law’s newly expanded pool of victims harmed or allegedly harmed by even the most petty of offenders.”<sup>33</sup>

Pennsylvania has 12.81 million residents—nearly five times the population of North Dakota (760,077), Montana (1.062 million), and South Dakota (882,235) combined.<sup>34</sup> Thus, Pennsylvania’s costs of compliance should be expected to dwarf the costs in those states, running into tens of millions of dollars, as in North Carolina.

Moreover, Pennsylvania presently lacks the systems that implementing Marsy’s Law would require. For example, the automated victim notification system currently in place, PA SAVIN, informs victims—identified as such upon

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<sup>33</sup> Michels, *supra* note 29.

<sup>34</sup> U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018, *available at*: <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk#> (last visited Dec. 11, 2019).

the conviction of an offender—only of an incarcerated offender’s release, transfer, or escape.<sup>35</sup> Pennsylvania has no system for tracking *alleged* victims and notifying them of the broad range of events Marsy’s Law covers.<sup>36</sup>

### **3. Marsy’s Law impairs the administration of justice.**

Concomitant with the delays to hearings and cases are real concerns about the system’s ability to administer justice under Marsy’s Law’s constraints. Marsy’s Law does more than create troublesome delays and holdups—it also constrains prosecutors, hinders plea agreements, forces criminal courts to litigate irrelevant collateral issues, and even congests civil dockets with injunctive demands.

As one example, a NACDL member in Florida noted how the requirements of Marsy’s Law threatened an agreed-upon disposition between the state and his client in a murder case. The prosecutor exercised her discretion to propose a favorable plea, given her assessment that a legal issue raised a threat of acquittal for a defendant the state believed factually guilty. The defendant wanted to accept, given that a conviction and harsh sentence remained a real possibility. Yet the

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<sup>35</sup> See *Register for Offender Release Notification*, Pennsylvania Office of Victim Services, <https://pcv.pccd.pa.gov/available-services/Pages/Register-for-Offender-Release-Notification.aspx> (last visited Mar. 25, 2021); see also *PA SAVIN and VINELink*, Pennsylvania Department of Corrections, <https://www.cor.pa.gov/Inmates/Pages/PA-SAVINVINELink.aspx> (last visited Apr. 8, 2021).

<sup>36</sup> See *supra* note 23.

victim’s family, all of them laypeople, objected to the prosecutor offering what they deemed an inappropriately-lenient deal. In light of Marsy’s Law, the judge instructed the prosecutor to defend her exercise of discretion to the family, and delayed the resolution of the case while she attempted to convince them of the wisdom of her approach.

Moreover, the broad definition of “victim” in the Pennsylvania Marsy’s Law amendment is bound to cause confusion and inconsistency in the lower courts— spawning litigation and appeals, both in criminal cases<sup>37</sup> and in civil challenges<sup>38</sup> to the law.

The Nevada Court of Appeals decision of *Aparicio v. State*<sup>39</sup> shows how the problem unfolds in a criminal case. A sentencing judge read Marsy’s Law to *mandate* that he consider around 50 “victim impact” letters the prosecutor had

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<sup>37</sup> See, e.g., *Aparicio v. State*, No. 80072-COA, 2020 Nev. App. Unpub. LEXIS 1006 (Nev. Ct. App. Dec. 31, 2020) (unpublished); *City of Centerville v. Knab*, No. 2019-0873, 2020 Ohio LEXIS 2496, at \*2 (Ohio Nov. 12, 2020) (“We hold that a municipality is not a victim and has no right to restitution under Marsy’s Law.”).

<sup>38</sup> See, e.g., Kelly Wiley, *JSO Says Officers Can’t Have Marsy’s Law Protections. The Union Is Suing to Change That.*, News4JAX (Sept. 25, 2020), <https://www.news4jax.com/news/local/2020/09/25/jso-says-officers-cant-have-marsys-law-protections-the-union-is-suing-to-change-that/> (last visited Mar. 31, 2021).

<sup>39</sup> No. 80072-COA, 2020 Nev. App. Unpub. LEXIS 1006 (Nev. Ct. App. Dec. 31, 2020) (unpublished).

submitted.<sup>40</sup> Yet few of the purported “victims” were “victims” as defined by Nevada statute.<sup>41</sup> Worse, most of the non-victim letters were of uncertain provenance; some included content that was statutorily barred unless submitted by a “victim.”<sup>42</sup> Nonetheless, the judge concluded that as a “victims’ rights” constitutional amendment, Marsy’s Law overrode those statutes<sup>43</sup>—which were enacted to ensure fairness and accuracy in sentencing, while preserving judicial discretion.

The similarity in the definitions of “victim” under Nevada’s sentencing statutes and its Marsy’s Law enabled the Nevada Court of Appeals to vacate the defendant’s sentence, holding that deeming Marsy’s Law to enlarge the class of “victims” guaranteed consideration at sentencing was error.<sup>44</sup> Unfortunately, an appellate court’s ability to reverse a similar analysis in Pennsylvania is less clear; the broad definition of “victim” in Pennsylvania’s Marsy’s Law provides ample

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<sup>40</sup> *Id.*, 2020 Nev. App. Unpub. LEXIS 1006, at \*12.

<sup>41</sup> *Id.*, 2020 Nev. App. Unpub. LEXIS 1006, at \*5.

<sup>42</sup> *Id.*, 2020 Nev. App. Unpub. LEXIS 1006, at \*7-8.

<sup>43</sup> *Id.*, 2020 Nev. App. Unpub. LEXIS 1006, at \*12.

<sup>44</sup> *Id.*, 2020 Nev. App. Unpub. LEXIS 1006, at \*13, \*16.

fodder for an argument that it overrides the tailored definition in our Crime Victim’s Act.<sup>45</sup>

Whether that argument would win the day is not the concern at this stage. The concern is the litigation that will surely occupy courts and counsel for years to come. The discrepancy will lead to inconsistent application; inconsistent application will lead to actual or perceived unfairness; and actual or perceived unfairness will lead to litigation—whether by people claiming rights under Marsy’s Law even though the Crime Victims Act deems them non-victims, by statutory victims whose voices are diluted when a broader class claims the rights the legislature reserved to a narrower one, or by defendants who are whipsawed

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<sup>45</sup> For example, a litigant may point out that the Pennsylvania Marsy’s Law defines “victim” in the disjunctive—conferring “victim” status on anyone “against whom the criminal offense or delinquent act is committed or who is directly harmed by the commission of the offense or act.” A Joint Resolution Proposing an Amendment to the Constitution of the Commonwealth of Pennsylvania, Providing for Rights of Victims of Crime, H.B. 276, § 9.1(c) (2019-20) (emphasis added). The Pennsylvania Crime Victims Act, in contrast, defines “victim” in the *conjunctive*, via the defined term “direct victim”—and adds concrete limitations on cognizable “harm”:

“Direct victim”: An individual against whom a crime has been committed or attempted and who as a direct result of the criminal act or attempt suffers physical or mental injury, death or the loss of earnings under this act.

18 Pa. C.S. § 11.103 (emphasis added). The statutory definition of “victim” includes other specific provisions that only raise additional potential for conflicts.

with inconsistencies that impair the process they are due. Pennsylvania voters will bear the burden—even though they made no considered decision to upset our current framework for fairness, accuracy, and judicial discretion at sentencing.

**C. The right “to reasonable protection from the accused or any person acting on behalf of the accused” has led to absurd results in pretrial release decisions**

As with most provisions in Marsy’s Law, the vagueness of the right at issue—to “reasonable protection” from the accused or his agents—leaves a wide berth for interpretation. In Nevada, where voters approved Marsy’s Law in 2018, one court read the law to require the displacement of a releasee. The court found that an accused burglar, Will Kernan, posed so little danger to the community or risk of flight that it released him on his own recognizance. However, the court would not let Keenan return to his home because it was next door to that of the alleged victim. Kernan was instead required to live with his son.<sup>46</sup> Such rulings could profoundly disadvantage an accused person—presumed innocent—whose work or school may be close to his residence but far from an alternative residence deemed “safer” for the alleged victim. Indeed, had Kernan not had family in the same jurisdiction, or somewhere else to stay, he may not have been released at all.

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<sup>46</sup> See Kim Burrows, *Marsy’s Law: Good Intentions but Court Concerns*, MyNews4.com (Dec. 20, 2018), available at: <https://mynews4.com/news/local/marsys-law-good-intentions-but-court-concerns> (last visited Mar. 25, 2021).

The right to “reasonable protection” raises additional questions, such as whether courthouses must be reconfigured to separate alleged victims from defendants and, if so, how the renovations will be funded. If, for example, courts must have separate waiting rooms for the accused and their accusers, Marsy’s Law may create additional unforeseen economic impact.<sup>47</sup>

**D. The codification of “respect for the victim’s . . . privacy” and the right “to reasonable protection from the accused” has made it more difficult for law enforcement to solve crime and left the public lacking critical information about criminal activity.**

The victim’s right to privacy under Marsy’s Law has left both the public and law enforcement in the dark about facts that are crucial to public safety and investigative work, and—of particular concern in modern times—it even shields from scrutiny law enforcement officers who have used lethal force. In states that have implemented Marsy’s Law, alleged victims can keep *any* potentially identifying details from the public domain. This right extends well beyond the individual’s name and includes information about the location of the offense. In Sarasota County, Florida, for example, Marsy’s Law prevented the Sheriff’s Office from releasing the name of a daycare facility where a worker was arrested on charges of child abuse.<sup>48</sup> In Fort Myers, Florida, a woman who had been attacked

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<sup>47</sup> *See id.*

<sup>48</sup> *See* Staff, *Venice Daycare Worker Charged with Child Abuse*, Sarasota Herald Tribune (Feb. 1, 2019), *available at*:

in her home invoked her right to privacy under Marsy’s Law. As a result, police could not publicize a sketch of the offender, who was still at large, or other details of the offense.<sup>49</sup> The withholding of critical information left residents of the victim’s neighborhood—wherever it was—vulnerable to further offenses and inhibited law enforcement’s investigation of a violent crime. The same issues have plagued South Dakota; by not sharing information with the public, law enforcement is prevented from relying on the “eyes and ears of the public” in solving crime, according to one official.<sup>50</sup>

States have struggled to balance the privacy provisions of Marsy’s Law with the public’s right to know and law enforcement’s need to function effectively. A common refrain among news organizations in Marsy’s Law jurisdictions consists of statements like this:

The Highway Patrol did not identify the two because of its interpretation of Marsy's Law, a voter-approved amendment to the state Constitution that was meant to protect crime victims but that deprives

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<https://www.heraldtribune.com/news/20190201/venice-daycare-worker-accused-of-child-abuse> (last visited Mar. 25, 2021).

<sup>49</sup> See Editorial Board, *Inconsistent Marsy’s Law Interpretations by Police Jeopardize Public Knowledge and Safety*, Orlando Sentinel (Jun. 14, 2019), available at: <https://www.orlandosentinel.com/opinion/editorials/os-op-marsys-law-victims-police-withhold-information-20190614-5c2fu7q66fh5fkhdkladldhiva-story.html> (last visited Mar. 25, 2021).

<sup>50</sup> Quinton, *supra* note 13.

the public of information long available under Florida's public records law.<sup>51</sup>

Further complicating matters, state and local agencies in Florida interpret the law inconsistently. “It’s the wild West, with some agencies asking crime victims or relatives if they want to remain unnamed, while others leave it to the victims to bring it up. Some agencies are releasing the very information that others are withholding.”<sup>52</sup>

In Sioux Falls, South Dakota, police no longer identify crime locations by address, instead stating that offenses occurred in one of 17 “beats.” Moreover, the South Dakota Department of Public Safety no longer publishes state motor vehicle accident reports, based on the mere possibility that a crime may be charged.<sup>53</sup> Perhaps most troublingly, South Dakota sheriffs’ offices have stopped asking for

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<sup>51</sup> Dennis Joyce, *Plant City House Burns After Series of Events Triggered by Car Crash*, Tampa Bay Times (Mar. 14, 2021), available at: <https://www.tampabay.com/news/breaking-news/2021/03/14/plant-city-house-burns-after-series-of-events-triggered-by-car-crash/> (last visited Mar. 19, 2021).

<sup>52</sup> Editorial Board, *supra* note 49.

<sup>53</sup> See Jonathan Peters, *Unintended Consequences of New Crime Victims’ Bill of Rights*, Columbia Journalism Review (Dec. 12, 2016), available at: [https://www.cjr.org/united\\_states\\_project/marsys\\_law\\_public\\_records.php](https://www.cjr.org/united_states_project/marsys_law_public_records.php) (last visited Mar. 25, 2021).

the public’s help in solving crimes—to avoid the disclosure of information that could be used to identify alleged victims.<sup>54</sup>

Marsy’s Law has also provided cover for law enforcement officers who use lethal force in the line of duty. In South Dakota, at least two officers who discharged their weapons at citizens invoked their right to privacy under Marsy’s Law, claiming that they were attacked first.<sup>55</sup> An investigation conducted by the *Grand Folks Herald* revealed that at least eight North Dakota officers claimed the privacy protections of Marsy’s Law between November 2016 and July 2018.<sup>56</sup> In Florida, police departments have used Marsy’s Law “to shield the names of police officers who use force against and kill suspects.”<sup>57</sup> For example, in two unrelated

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<sup>54</sup> See Andrew Wolfson, *Marsy’s Law Could Have Unintended Consequences for Crime Victims*, Louisville Courier Journal (Nov. 4, 2018), available at: [https://www.kentuckynewera.com/news/ap/article\\_4f586d42-df07-11e8-a2e5-57ed0bc7ebfb.html](https://www.kentuckynewera.com/news/ap/article_4f586d42-df07-11e8-a2e5-57ed0bc7ebfb.html) (last visited Mar. 25, 2021).

<sup>55</sup> See Seth Tupper, *Marsy’s Law Shields Name of Deputy Who Shot Suspect*, Rapid City Journal (Dec. 7, 2018), available at: [https://rapidcityjournal.com/news/local/marsy-s-law-shields-name-of-deputy-who-shot-suspect/article\\_789f446f-c936-51fd-ad39-75f1e8d601a3.html](https://rapidcityjournal.com/news/local/marsy-s-law-shields-name-of-deputy-who-shot-suspect/article_789f446f-c936-51fd-ad39-75f1e8d601a3.html) (last visited Mar. 25, 2021).

<sup>56</sup> See April Baumgarten, *Marsy’s Law Often Invoked to Withhold Officers’ Names*, Grand Forks Herald (July 22, 2018), available at: <https://www.grandforksherald.com/news/crime-and-courts/4475423-marsys-law-often-invoked-withhold-officers-names> (last visited Mar. 25, 2021).

<sup>57</sup> *Here Are the Editorial Board’s Priorities for 2021*, Orlando Sentinel (Jan. 6, 2021), available at: <https://www.orlandosentinel.com/opinion/editorials/os-op->

police shootings in Tallahassee, Florida in May, 2020 the city police department refused to release the identity of the two police officers involved, citing Marsy’s Law.<sup>58</sup> Interpreting Marsy’s Law to confer privacy rights on police officers, an appellate court in Florida recently upheld the Tallahassee police department’s decision.<sup>59</sup>

Protecting the identities of law enforcement officers who kill or wound on duty undermines public safety and infringes on the rights of the individuals killed or wounded—working against the ostensible purpose of Marsy’s Law. The Cato Institute’s Jonathan Blanks, a research associate specializing in criminal justice, race, and policing, worries that conferring victims’ rights upon law enforcement officers will exacerbate the secrecy of police departments and unions that try to shield their operations from the public, “particularly when [those operations are] controversial or potentially illegal.” As officers act in the name of the public when

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sentinel-editorial-board-priorities-2021-20210106-sod4kfxmwfa5pecpk2wd765y3q-story.html (last visited Apr. 8, 2021).

<sup>58</sup> See *Police Less Accountable After Marsy’s Law*, Orlando Sentinel (July 19, 2020), available at: <https://www.orlandosentinel.com/opinion/editorials/os-op-marsys-law-police-accountability-editorial-20200718-x22ovtjrr5hitfdhwtntxfgkerm-story.html> (last visited Mar. 19, 2021).

<sup>59</sup> See *Florida Court Rules Officers Can Protect Identity After Police Shootings* (Apr. 7, 2021), available at: <https://thehill.com/homenews/state-watch/547003-florida-court-rules-officers-can-protect-identity-after-fatal-police> (last visited Apr. 11, 2021).

on duty, information concerning incidents where officers use lethal force “must be public,” Blanks opines.<sup>60</sup>

For these reasons, no less an authority than the Department of Justice recommends releasing the names of officers involved in a shooting, a policy adopted by the Philadelphia police department in 2015.<sup>61</sup> Marsy’s Law jeopardizes those measures.

#### IV. CONCLUSION

Marsy’s Law arose from the understandable despair of the family members of a homicide victim. But instead of addressing the narrow circumstance that traumatized the Nicholas family, it enacts a sprawling litany of victims’ rights that have produced grave unintended consequences in the states where Marsy’s Law stands. Indeed, as the editorial board for the Orlando Sentinel wryly noted, Marsy’s Law, passed with the support of 62% of Florida voters, should be renamed the “Law of Unintended Consequences.”<sup>62</sup>

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<sup>60</sup> Matthew Harwood, *Marsy’s Law Is a Gift to Bad Cops*, Reason (Mar. 18, 2019), available at: <https://reason.com/2019/03/18/marsys-law-is-a-gift-to-bad-cops/> (last visited Mar. 25, 2021).

<sup>61</sup> See *Philadelphia Police to Release Names in Police Shootings*, Inquirer (July 1, 2015), available at: [https://www.inquirer.com/philly/news/20150702\\_Philly\\_police\\_to\\_release\\_names\\_in\\_police\\_shootings.html](https://www.inquirer.com/philly/news/20150702_Philly_police_to_release_names_in_police_shootings.html) (last visited Mar. 30, 2021).

<sup>62</sup> *Police Less Accountable After Marsy’s Law*, *supra* note 58.

The Court should not allow the same outcome to befall the Commonwealth of Pennsylvania—especially given that the ballot question prevented voters from weighing the risks and choosing among them. For these reasons, and those stated in the Appellees’ Brief and the Briefs of amici in support of Appellees, the Court should affirm the Order granting permanent injunctive relief.

Respectfully Submitted,

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\*\*\*This Brief is filed in the individual capacity of the author and in no way reflects, or is meant to reflect, the views of Penn State Law or Penn State University. The institution is attached for affiliation purposes only.

**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.

/s/Lisa A. Mathewson

**CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT**

I certify pursuant to Pa. R. App. P. 531(b)(3), that this Brief contains no more than 6,392 words, including footnotes, which is less than the allowable 7000 words.

/s/Lisa A. Mathewson