

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
CASE NO: 20-CI-00471

*Electronically Filed*

DAVID M. WARD, et al.

PLAINTIFFS

V.

SECRETARY OF STATE *ex rel. Michael G. Adams, et al.*  
DEFENDANTS

SENATOR WHITNEY WESTERFIELD, in both his  
official and personal capacities,  
MARSY'S LAW FOR KENTUCKY, LLC and  
COMMONWEALTH OF KENTUCKY *ex rel.*  
Attorney General Daniel Cameron

INTERVENING  
DEFENDANTS

**SENATOR WHITNEY WESTERFIELD AND MARSY'S LAW FOR  
KENTUCKY, LLC'S RESPONSE IN OPPOSITION TO PLAINTIFFS' JOINT  
MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR  
SUMMARY JUDGMENT**

Come Senator Whitney Westerfield, in both his official and personal capacities ("Senator Westerfield") and Marsy's Law for Kentucky, LLC ("Marsy's Law for Kentucky"; Senator Westerfield and Marsy's Law for Kentucky collectively, the "Intervening Defendants"), by counsel, respectfully move the Court to enter summary judgment in favor of the Defendants and Intervening Defendants and deny Plaintiffs' motion for summary judgment.

**INTRODUCTION**

Intervening Defendants adopt and incorporate Attorney General Daniel Cameron's Response in Opposition to Plaintiffs' Joint Motion for Summary Judgment

and Cross-Motion for Summary Judgment (the “Attorney General’s Response”). *It is suggested that the Attorney General’s Response be read before this memorandum is reviewed.*

## ARGUMENT

### **I. The General Assembly complied with the requirements established of Sections 256 and 257 of the Kentucky Constitution.**

#### **A. The full text of Marsy’s Law will be presented to the voters.**

Plaintiffs argue that Senate Bill 15 (“Marsy’s Law”) does not comply with Ky. Const. § 256. Plaintiffs contend that since Marsy’s Law assigns the General Assembly the duty to define a victim under Marsy’s Law that this delegation necessarily means that Marsy’s Law does not contain the full text of the amendment. As noted by the Attorney General, Plaintiffs’ position is contrary to clear holding of *Westerfield v. Ward*, 599 S.W.3d 738 (Ky. 2019) (hereinafter, “*Ward I*”) (holding that the entire text of the *amendment* is required to appear on the ballot).

Plaintiffs’ position is not only inconsistent with *Ward I* and the plain text of Ky. Const. § 256 but Plaintiffs also ignore the long history of many other amendments to the Kentucky Constitution that delegate authority to the General Assembly to define terms and enact legislation. For example, the amendment that permitted the state lottery delegated numerous responsibilities to the General Assembly. In addition to granting the General Assembly the power to determine whether to establish a lottery, the lottery amendment delegated to the General Assembly the power to “[d]efine what constitutes a charity or charitable organization” and to “[d]efine the types of charitable lotteries and charitable gift enterprises which may be

engaged in.” Ky. Const. § 226 (adopted in 1992) (emphasis added). This approach to an amendment was not an outlier. This practice has occurred numerous times for the past one hundred years. See e.g., Ky. Const. § 171 (“The *General Assembly shall have power* to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.”) (adopted in 1915) (emphasis added); Ky. Const. § 244A (“*The General Assembly shall prescribe such laws as may be necessary* for the granting and paying of old persons an annuity or pension.”) (emphasis added) (adopted in 1934) (emphasis added); Ky. Const. § 172A (“The General Assembly shall provide by general law for the assessment for ad valorem tax purposes of agricultural and horticultural land according to the land’s value for agricultural or horticultural use. The *General Assembly may provide* that any change in land use from agricultural or horticultural to another use shall require the levy of an additional tax not to exceed the additional amount that would have been owing had the land been assessed under Section 172 of this Constitution for the current year and the two next preceding years.”) (adopted in 1969) (emphasis added); Ky. Const. § 156a (“The *General Assembly may provide* for the creation, alteration of boundaries, consolidation, merger, dissolution, government, functions, and officers of cities.”) (adopted in 1994) (emphasis added).

As noted by Justice Breyer, “the longstanding practice of the government can inform our determination of what the law is.” *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525, 134 S. Ct. 2550, 2560, (2014) (citations and internal quotation marks omitted).

After citing to numerous United States Supreme Court precedents, Justice Breyer explained that “[t]hese precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.” *Id.* (citation omitted). The delegation of the power to define a victim within Marsy’s Law is consistent with *Ward I*, the text of Ky. Const. § 256 and over one hundred years of practice by the General Assembly and the citizens of this Commonwealth. Plaintiffs’ argument should be rejected.

**B. Marsy’s Law did not have to be presented to the Governor for signature.**

The critical attribute of Plaintiffs’ argument necessarily means that the General Assembly does not have the power to ensure that the Secretary of State of Kentucky follows Ky. Const. §§ 256 and 257 as these provisions were interpreted by the Kentucky Supreme Court in *Ward I*. This is contrary to the text of the Kentucky Constitution and common sense for the reasons set forth in the Attorney General’s Response. One additional point needs to be emphasized. Ky. Const. § 256 states: “The approval of the Governor shall not be necessary to any bill, order, resolution or vote of the General Assembly, proposing an amendment or amendments to this Constitution.” Obviously, Marsy’s Law (Senate Bill 15 (2020 Ky. Acts Ch. 85)) is a bill that proposed an amendment to the Kentucky Constitution. Its subject matter is exclusively devoted to an amendment to the Kentucky Constitution and the process for its publication and being placed on the ballot. Ky. Const. § 256 explicitly removes the Governor from the constitutional amendment process. Plaintiffs’ position would

turn the General Assembly's exclusive power into a shared power with the Governor, which would result in an explicit provision of the Kentucky Constitution becoming dead letter and Kentucky's constitutionally enshrined separation of powers being violated. *See* Ky. Const. § § 27 and 28.

**C. Marsy's Law does not violate Section 256 of the Kentucky Constitution because the proposed amendment clearly relates to one subject—crime victims' rights**

The Attorney General's Response makes clear that Marsy's Law satisfies the heightened one subject standards of Ky. Const. § 256 before it was amended in 1978. *See Hatcher v. Meredith*, 173 S.W.2d 685, 667 (Ky. 1943) (explaining that in order to violate Ky. Const. § 256 the amendment must contain provisions that are "so foreign to it as to have no bearing upon the general subject matter"). The applicable provision of Ky. Const. § 256 now states: "but an amendment may relate to a single subject or to related subject matters and may amend or modify as many articles and as many sections of the Constitution as may be necessary and appropriate in order to accomplish the objectives of the amendment." There is no reason to spill much ink on this issue. This Court quickly disposed of this very same argument in its October 15, 2018 Opinion and Order (the "2018 Opinion and Order") the last time these Plaintiffs were before this Court. This Court explained:

Plaintiffs argue that SB 3 [Marsy's Law (2018)] contains multiple unrelated subjects in violation of the "single subject or related subject" rule found in Section 256. In 1979 the stricter single subject rule was removed from Section 256 and replaced with the allowance of multiple related subjects. The Court agrees with Intervening Defendants that though SB 3 contains multiple subjects, the subjects are related. To make a determination of "relatedness," the Court must inquire "whether the whole matter found in the amendment is so related to the general

subject of the amendment as to have a natural connection with it, or is so foreign to it as to have no bearing upon the general subject matter and the object sought to be accomplished.” *Hatcher v. Meredith*, 173 S.W.2d 665, 667-68 (Ky. 1943). It is clear that the contents of SB 3 “are not distinct or essentially unrelated.” *Funk*, 243 S.W.2d at 478. **SB 3 concerns the rights of crime victims in the criminal and juvenile justice systems, and thus all clauses of the amendment are “related to the general subject of the amendment.”** *Hatcher*, 173 S.W.2d at 667.

2018 Opinion and Order at 13 (emphasis added). Nothing has occurred in the development of Kentucky constitutional law since this Court issued the 2018 Opinion and Order that would suggest that the Plaintiffs’ argument has any more merit than it did two years ago.

**D. The General Assembly is not required to assign a section number to a constitutional amendment prior to its approval.**

There is very little that can be added to the Attorney General’s arguments that clearly demonstrate that the General Assembly is not required to assign a section number to a constitutional amendment prior to its approval by the voters. One additional point deserves emphasis. In contrast to the United States Constitution, the drafters of the Kentucky Constitution did not hesitate to include specific procedures and prohibitions that applied to the General Assembly. *See e.g.*, Ky. Const. § 46 (“Every bill shall be read at length on three different days in each House . . . .”); Ky. Const. § 59 (“The General Assembly shall not pass local or special acts concerning any of the following subjects . . . .”). In similar vein, the founders set forth the requirements for the General Assembly to propose amendments to the Kentucky Constitution in Ky. Const. § 256. Quite simply, had the founders wanted to require that a section number be assigned prior to a constitutional amendment’s approval,

such a provision would have been included in the Kentucky Constitution. No such provision exists and that fact solely disposes of Plaintiffs' argument.

**II. Plaintiffs' arguments concerning the implementation of Marsy's Law are not ripe for judicial review.**

As was the case two years ago, Plaintiffs attack the merits of Marsy's Law. This argument goes on for almost ten pages. *See* Plaintiffs' Joint Motion for Summary Judgment at 25-35. These arguments are not ripe for dispute. *See W.B. v. Com., Cabinet for Health & Family Servs.*, 388 S.W.3d 108, 114 (Ky. 2012) ("Ripeness accordingly prevents courts from interfering with legislative enactments until it is necessary to do so, and thus enhances the quality of judicial decision-making by ensuring that cases present courts an adequate record to permit effective review and decision-making"). The 2018 Opinion and Order declined to address similar arguments from the Plaintiffs. This Court explained:

Additionally, Plaintiffs raise a variety of challenges concerning the impact that SB 3 [Marsy's Law] could have on the Commonwealth's legal system and the omission of these various impacts from the question posed to the electorate. . . . **At this time, these challenges to SB 3 are premature.** The possible future impact of SB 3 is not something for the Court to determine before the proposed constitutional amendment has been properly placed on the ballot and passed by the electorate. . . . Thus, the Court declines to address Plaintiffs arguments concerning the impact that SB 3 could have on the Commonwealth's legal system.

2018 Opinion and Order at 14-15 (emphasis added). This Court's conclusion applies with equal force the second time around.<sup>1</sup>

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<sup>1</sup> Plaintiffs' first two merits-based arguments deserve special mention. Clearly, a person can have standing without being a party. Under Marsy's Law, victims are not full-fledged parties to the criminal case. However, at specifically defined points in the criminal case process, victims can have rights to assert. This is analogous to a news organization (who is not a party to a criminal case) having the

### III. Senate Bill 80, the enabling legislation to Marsy's Law, is validly enacted.

The Attorney General is correct that this claim is not ripe for review.<sup>2</sup> To the extent that this Court disagrees with that conclusion, the Attorney General clearly demonstrates that Senate Bill 80 (2020 Ky. Acts Ch. 101) complies with Ky. Const. § 51 and that the Plaintiffs are not entitled to facial relief.

As to the merits of Plaintiffs' argument, one additional observation should be made. Plaintiffs contend that Chapter 101 "presents an irreconcilable internal conflict that makes it impossible for the Court to determine what the General Assembly intended to do." See Plaintiffs' Joint Motion for Summary Judgment at 10. Quite simply, no conflict exists in Chapter 101. In fact, the text of the statute is straightforward and is easily understood. Section 2 states: "The rights established by KRS 421.500 to 421.575 shall apply in all felony and misdemeanor proceedings in a District or Circuit Court of the Commonwealth." Chapter 101 subsequently defines

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right to be heard when a judge improperly tries to seal a courtroom and exclude all reporters from a criminal trial. The Utah Supreme Court has explained that while the "traditional parties to a criminal proceeding are the prosecution and the defense, and a crime victim is not that kind of party; a victim is not entitled to participate at all stages of the proceedings or for all purposes. But that does not eliminate the possibility that a victim may qualify as a limited-purpose party—with standing to assert a claim for restitution. And we conclude that crime victims possess that status under our law." *State v. Brown*, 2014 UT 48, ¶¶ 16-19, 342 P.3d 239, 242. Contrary to Plaintiffs' protestations, Marsy's Law does not alter the presumption of innocence. This issue was easily dealt with by the Arizona Court of Appeals in *State ex rel. Romley v. Dairman*, 208 Ariz. 484, 490, 95 P.3d 548, 554 (Ariz. Ct. App. 2004). The court concluded that "victims' rights neither trump, nor are trumped by, a defendant's presumption of innocence. Each set of rights is independent. A defendant is presumed innocent of all charges and is entitled to all rights and duties owed him or her. A victim, on the other hand, is presumed to have been violated for purposes of obtaining victims' rights and is entitled to those rights as provided under our constitution and laws."

<sup>2</sup> See Section 8 of Senate Bill 80 (2020 Ky. Acts Ch. 101) ("This Act shall take effect only upon the ratification, in the general election of November 3, 2020, of a Constitutional amendment providing for the protection of crime victims' rights. If such an amendment is not ratified, this Act shall be void.").

a victim as “an individual directly and proximately harmed as result of: the commission of a crime classified as a felony”, certain misdemeanors and certain juvenile offenses. No conflict exists because the text of Chapter 101 applies to all felony and misdemeanor proceedings where an individual satisfies the definition of victim.<sup>3</sup> Plaintiffs’ straw man construction of Chapter 101 should be rejected.

**IV. 2020 Kentucky Acts Chapter 89 does nothing to prevent voters from casting their ballots in the November 3, 2020 election.**

As the Attorney General makes clear, the Plaintiffs do not have standing to challenge the photo identification requirements of Chapter 89. Furthermore, since these requirements have been altered by the Governor and Secretary of State for the upcoming election, the claim is not ripe for review and it is moot as well. *See Bevin v. Beshear*, 526 S.W.3d 89, 90 (Ky. 2017).

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<sup>3</sup> Plaintiffs’ construction defies common sense. *See Matheney v. Commonwealth*, 191 S.W.3d 599, 603 (Ky. 2006). On the other hand, Intervening Defendants’ interpretation is consistent with fundamental principles of statutory construction that include the presumption against ineffectiveness, the presumption of validity, the whole-text canon and the general/specific canon. *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts* 63, 66, 167 (2012). The Kentucky Supreme Court has utilized this textbook in statutory construction. *See Commonwealth ex rel. Beshear v. Commonwealth Office of the Governor ex rel. Bevin*, 498 S.W.3d 355, 372 (Ky. 2016).

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the Attorney General's Response, the Intervening Defendants' respectfully request that this Court deny Plaintiffs' Joint Motion for Summary Judgment and enter judgment in favor of the Defendants and Intervening Defendants dismissing Plaintiffs' claims with prejudice.

Respectfully submitted,

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