

## Question 1: Marsy's Law

### Executive Summary

This Voter Guide provides information on Question 1: Marsy's Law, which will be considered by voters on November 6, 2018. A "yes" vote is a vote to approve the measure, which would amend the *Nevada Constitution* to remove current provisions for victims' rights and replace them with a new "victims' bill of rights." A "no" vote is a vote to reject the ballot measure that would leave the current provisions for victims' rights in the *Nevada Constitution*.

Our intent, in the pages that follow, is to summarize the arguments for and against the measure and to answer questions voters may have. The following are the questions this Voter Guide addresses:

- 1) What is Question 1: Marsy's Law?
- 2) Why is it coming before the voters?
- 3) What happens if Question 1 passes?
- 4) What happens if it fails to pass?
- 5) What are the primary arguments for Marsy's Law?
- 6) What are the primary arguments against Marsy's Law?
- 7) Can the Nevada Legislature make changes to Question 1 after it has been approved by voters?

The Guinn Center will not take a position on Question 1: Marsy's Law.

## 1. What is Question 1: Marsy's Law?

If approved by a majority of Nevada voters, Question 1 would amend the *Nevada Constitution* to include a “victims’ bill of rights,” known as “Marsy’s Law.” Specifically, it would repeal current victims’ rights provisions contained in Article I, Section 8 of the *Nevada Constitution* and replace those provisions with new rights that would be enumerated in Article I, Section 23.<sup>1</sup>

Should the measure pass by a majority of registered voters in Nevada, some of the new victims’ rights that would be ratified in Article I, Section 23 would include, but are not limited to:

- the right to be treated with fairness and respect;
- the right to be free from intimidation, harassment and abuse;
- the right to be reasonably protected from the defendant;
- the right to refuse an interview or disposition request; and
- the right to prevent the disclosure of confidential information or records to the defendant which could be used to locate or harass the victim or the victim’s family.<sup>2</sup>

Question 1: Marsy’s Law is part of a nationwide effort led by California businessman Henry Nicholas and his group Marsy’s Law for All, which was established in 2009.<sup>3</sup> The group seeks to enshrine the rights delineated in Marsy’s Law in each state’s constitution, and ultimately, the U.S. Constitution.<sup>a, 4</sup>

Since 2008, Nicholas (individually in California in 2008) and his group (since 2009) have successfully campaigned to include versions of Marsy’s Law in the state constitutions of California, Illinois, Montana, North Dakota, Ohio, and South Dakota.<sup>5, 6</sup>

## 2. Why is it coming before the voters?

Question 1: Marsy’s Law is coming before the voters as a proposal to amend the *Nevada Constitution*. There are two primary ways to amend the *Nevada Constitution*: (1) a legislative referendum (i.e., legislatively-referred constitutional amendment; LRCA), or (2) a voter-initiated petition.<sup>7</sup> Question 1: Marsy’s Law is an LRCA, which entails a three-step process to amend the *Nevada Constitution*. First, both houses of the Nevada Legislature must pass a proposed amendment with a simple majority during a legislative session. Next, the Nevada Legislature, in the following legislative session, must pass the same proposed amendment, with identical language, in the same manner. Finally, a majority of voters must pass the amendment in the following general election.<sup>8</sup>

In the 78<sup>th</sup> (2015) legislative session, the Nevada Legislature considered Marsy’s Law. In 2015, the Legislature passed Marsy’s Law as Senate Joint Resolution (SJR) 17 with a vote of 15-6 in the Senate

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<sup>a</sup> The namesake of the bill, Marsalee (Marsy) Nicholas, Henry Nicholas’s sister, was stalked and killed by an ex-boyfriend in 1983. After Marsy was murdered, the defendant was released on bail without the family being notified, and Marsy’s mother came in contact with him in a grocery store. Since that incident, the family has advocated and campaigned for victims’ rights. Source: *About Marsy’s Law*, Marsy’s Law for All (2018), <https://marsyslaw.us/about-marsys-law/>

and 41-4 in the Assembly. In the following 79<sup>th</sup> (2017) Legislative Session, the Assembly passed SJR 17 with a vote of 41-0 (one “excused”), and the Senate passed it 21-0. Marsy’s Law will be considered by Nevada voters as Question 1 on the ballot at the November 6, 2018, General Election.

### 3. What happens if Question 1 passes?

Question 1: Marsy’s Law proposes to expand the definition of “victim” and to strengthen and provide additional rights to victims by adding the provisions in Marsy’s Law to Nevada’s Constitution.

Currently, a “victim” is defined in *Nevada Revised Statutes* (NRS) 217.070 as “a person who is physically injured or killed as the direct result of a criminal act[.]”<sup>9</sup> The NRS definition includes other examples of victims, but currently a person in Nevada is only considered a victim if s/he is harmed as a “direct result” of the criminal act. Question 1: Marsy’s Law redefines “victim” to mean “any person directly and proximately harmed by the commission of a criminal offense under any law of this State.”<sup>10</sup> In addition to expanding the definition of “victim,” Marsy’s Law seeks to provide victims with constitutional rights and protections, many of which currently exist in Nevada statutes and the *Nevada Constitution*.

If a majority of Nevada voters approve Question 1, existing victims’ rights provisions in the Nevada Constitution (Article I, Section 8) will be repealed and replaced with the Marsy’s Law’s provisions (Article I, Section 23), which will complement the current statutory victims’ protections.<sup>b, 11</sup>

Table 1 (below, pages 4-6) compares proposed provisions in Question 1: Marsy’s Law with comparable victims’ statutory and constitutional protections currently in place in Nevada and with analogous federal statutory protections.

### 4. What happens if it fails to pass?

Should Question 1 fail to pass, Article I, Section 8 will remain in the *Nevada Constitution*, and victims will retain the rights currently contained in the existing provisions.

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<sup>b</sup> Article I, Section 8 (2) of the Nevada Constitution reads: “The Legislature shall provide by law for the rights of victims of crime, personally or through a representative, to be: (a) Informed, upon written request, of the status or disposition of a criminal proceeding at any stage of the proceeding; (b) Present at all public hearings involving the critical stages of a criminal proceeding; and (c) Heard at all proceedings for the sentencing or release of a convicted person after trial. Should a majority of voters vote “yes” on Question 1, these rights would be repealed. However, the intent (or “spirit”) of these provisions is contained in the Marsy’s Law provisions.



**Table 1. Comparison of Question 1: Marsy’s Law Proposed Protections and Existing Protections**

A <b>Question 1: Marsy’s Law</b> <i>(proposed rights)</i>	B <b>Comparable Current Nevada Law</b>	C <b>Comparable Current Federal Law</b>
(a) To be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment and abuse, throughout the criminal or juvenile justice process.	No current statute, but the Nevada Attorney General’s “ <a href="#">Victim Advocate Model Protocols</a> ” states: “victims must be treated with dignity and respect at all times while protecting their right to autonomy and privacy.”	<a href="#">18 U.S.C. § 3771(a)(8)</a>
(b) To be reasonably protected from the defendant and persons acting on behalf of the defendant.	<a href="#">NRS 178.5692</a> <a href="#">NRS 178.5696</a>	<a href="#">18 U.S.C. § 3771(a)(1)</a>
(c) To have the safety of the victim and the victim’s family considered as a factor in fixing the amount of bail and release conditions for the defendant.	<a href="#">NRS 178.498</a>	<a href="#">18 U.S.C. § 3142(g)</a>
(d) To prevent the disclosure of confidential information or records to the defendant which could be used to locate or harass the victim or the victim’s family.	<a href="#">NRS 178.5691</a>	No comparable current federal statute found.
(e) To refuse an interview or deposition request, unless under court order, and to set reasonable conditions on the conduct of any such interview to which the victim consents.	No comparable current statute found.	No comparable current federal statute found.
(f) To reasonably confer with the prosecuting agency, upon request, regarding the case.	No comparable current statute found.	<a href="#">18 U.S.C. § 3771(a)(5)</a>
(g) To reasonable notice of all public proceedings, including delinquency proceedings, upon request, at which the defendant and the prosecutor are entitled to be present and of all parole or other postconviction release proceedings, and to be present at all such proceedings.	<b>Art. I. § 8, 2(a)</b> <b>Art. I. § 8, 2(b)</b>	<a href="#">18 U.S.C. § 3771(a)(2)</a>
(h) To be reasonably heard, upon request, at any public proceeding, including any delinquency proceeding, in any court involving release or sentencing, and at any parole proceeding.	<b>Art. I. § 8, 2(c)</b> <a href="#">NRS 176.015</a>	<a href="#">18 U.S.C. § 3771(a)(3)</a> <a href="#">18 U.S.C. § 3771(a)(4)</a>
(i) To the timely disposition of the case following the arrest of the defendant.	<a href="#">NRS 176.015</a>	<a href="#">18 U.S.C. § 3771(a)(7)</a>
(j) To provide information to any public officer or employee conducting a presentence investigation concerning the impact of the offense on the victim and the victim’s family and any sentencing recommendations before the sentencing of the defendant.	<a href="#">NRS 176.145</a>	No comparable current federal statute found.
(k) To be informed, upon request, of the conviction, sentence, place and time of incarceration, or other disposition of the defendant, the scheduled release date of the defendant and the release of or the escape by the defendant from custody.	<a href="#">NRS 178.5698</a>	<a href="#">34 U.S.C. § 20141(c)(5)</a>



A	B	C
<b>Question 1: Marsy's Law</b> <i>(proposed rights)</i>	<b>Comparable Current Nevada Law</b>	<b>Comparable Current Federal Law</b>
(l) To full and timely restitution.	<a href="#">NRS 176A.430</a>	<a href="#">18 U.S.C. § 3771(a)(6)</a>
(m) To the prompt return of legal property when no longer needed as evidence.	<a href="#">NRS 178.5696</a>	<a href="#">34 U.S.C. § 20141(c)(6)</a>
(n) To be informed of all postconviction proceedings, to participate and provide information to the parole authority to be considered before the parole of the offender and to be notified, upon request, of the parole or other release of the offender.	<a href="#">NRS 176A.630</a>	<a href="#">18 U.S.C. § 3771(a)(2)</a>
(o) To have the safety of the victim, the victim's family and the general public considered before any parole or other postjudgment release decision is made.	<a href="#">NRS 213.1099</a>	No comparable current federal statute found.
(p) To have all monetary payments, money and property collected from any person who has been ordered to make restitution be first applied to pay the amounts ordered as restitution to the victim.	<a href="#">NRS 213.126</a>	No comparable current federal statute found.
(q) To be specifically informed of the rights enumerated in this section, and to have information concerning those rights be made available to the general public.	No comparable current statute found that victims must be informed of rights. But, the rights are listed on the Nevada Attorney General's <a href="#">website</a> .	<a href="#">18 U.S.C. § 3771(a)(10)</a>
2. A victim has standing to assert the rights enumerated in this section in any court with jurisdiction over the case. The court shall promptly rule on a victim's request. A defendant does not have standing to assert the rights of his or her victim. This section does not alter the powers, duties or responsibilities of a prosecuting attorney. A victim does not have the status of a party in a criminal proceeding.	No comparable current statute found.	No comparable current federal statute found.
3. Except as otherwise provided in subsection 4, no person may maintain an action against this State or any public officer or employee for damages or injunctive, declaratory or other legal or equitable relief on behalf of a victim of a crime as a result of a violation of this section or any statute enacted by the Legislature pursuant thereto. No such violation authorizes setting aside a conviction.	<b>Art. I. § 8, 3.</b>	<a href="#">34 U.S.C. § 20141(d)</a>
4. A person may maintain an action to compel a public officer or employee to carry out any duty required by this section or any statute enacted by the Legislature pursuant thereto.	<b>Art. I. § 8, 4.</b>	No comparable current federal statute found.
5. The granting of these rights to victims must not be construed to deny or disparage other rights possessed by victims. A parole authority shall extend the right to be heard at a parole hearing to any person harmed by the offender.	No current statute, as this is a protective statement that would be included should a majority of voters approve Marsy's Law. <a href="#">NRS 213.131</a>	<a href="#">U.S. Constitutional Amendment IX</a>



A	B	C
Question 1: Marsy's Law <i>(proposed rights)</i>	Comparable Current Nevada Law	Comparable Current Federal Law
6. The Legislature shall by law provide any other measure necessary or useful to secure to victims of crime the benefit of the rights set forth in this section.	Art. I. § 8, 2.	No comparable current federal statute found.
7. As used in this section, "victim" means any person directly and proximately harmed by the commission of a criminal offense under any law of this State. If the victim is less than 18 years of age, incompetent, incapacitated or deceased, the term includes the legal guardian of the victim or a representative of the victim's estate, member of the victim's family or any other person who is appointed by the court to act on the victim's behalf, except that the court shall not appoint the defendant as such a person.	<a href="#">NRS 217.070</a> <a href="#">NRS 178.569</a>  <a href="#">NRS 178.5698</a>	<a href="#">34 U.S. Code § 20141(e)(2)(B)</a>

## 5. What are the primary arguments for Marsy's Law?

Question 1: Marsy's Law proponents argue that victims merit a more extensive set of rights, along with stronger protections for existing rights.

### 1. New victims' rights and an expansion of existing rights

Proponents seek the inclusion of a set of rights in the *Nevada Constitution* that would expand victims' roles in the judicial process and help them navigate the justice system. These rights would also strengthen existing victims' rights – including the right to be informed, right to be heard, and right to restitution, amongst others.

First, Marsy's Law proponents advocate for expanding the definition of "victim" to include immediate family members of those directly harmed by a crime (Table 1, Column A (7)).<sup>12</sup> This would ensure that those family members could be involved in the judicial process if the directly-harmed family member is killed or seriously injured by a defendant.<sup>13</sup> Including these family members would also grant them all of the rights of victims that otherwise would not be afforded to them.

Along with expanding the definition of "victim," proponents also argue that all victims should receive information about their rights (Table 1, Column A, (1(q))). Under Marsy's Law, victims would have the constitutional right to be informed of their rights.<sup>14</sup>

One of the rights proposed by Question 1: Marsy's Law is the victim's right to timely disposition of the case following the arrest of the defendant (Table 1, Column A, (1(i))).<sup>15</sup> Proponents contend that

this would encourage courts to “move proceedings forward quickly” and may ensure that victims’ rights are also considered when a court reviews requests for continuances or delays.<sup>16</sup>

If a right is not being enforced, Marsy’s Law would provide victims with the right to maintain a court action to compel a public officer to enforce their rights (Table 1, Column A, (4)).<sup>17</sup> Proponents argue that this would ensure that the victims’ rights provided for in Marsy’s Law are protected.<sup>18</sup> For example, if a victim’s rights were not protected during a hearing, a hearing could be repeated so the victim’s rights could be protected.<sup>19</sup>

Many of the rights included in Marsy’s Law exist currently in the *Nevada Constitution* and *Nevada Revised Statutes* (see Table 1).<sup>20</sup> However, proponents of Marsy’s Law believe that victims need stronger rights than are enshrined currently in the *Nevada Constitution* to protect victims more effectively during the judicial process.

Question 1: Marsy’s Law proponents believe that defendants currently have stronger rights than victims. Proponents point out that those accused of crimes have twenty different rights identified and protected in the U.S. Constitution, while victims do not have any explicit rights.<sup>21</sup> By extension, Marsy’s Law proponents argue that, because victims’ rights are not identified in the U.S. Constitution, victims’ statutory and state constitutional rights in Nevada do not provide adequate protections.<sup>22</sup> Proponents argue that enshrining these rights in the *Nevada Constitution* would address such problems and thus afford victims greater protections.<sup>23</sup>

Question 1: Marsy’s Law explicitly states that the new rights will not diminish or conflict with other rights victims already possess (Table 1, Column A, (5)).<sup>24</sup> (For example, proponents note that victims’ rights to timely disposition would not conflict with defendants’ rights to a speedy trial.)<sup>25</sup> This would ensure that any victims’ rights currently contained within state statutes would not be affected, even if they differ from the new Marsy’s Law rights.

### ***The right to be informed and present***

Supporters argue that victims need to know when public proceedings occur. Under Marsy’s Law, victims would have the constitutional right to know about all public proceedings regarding the case (upon request), and they would have the constitutional right to be present at those proceedings (upon request) (Table 1, Column A, (1(g))).<sup>26</sup> Question 1: Marsy’s Law proponents suggest that victims should have the constitutional right to be informed (upon request) of the defendant’s conviction, sentence, and place and time of incarceration (Table 1, Column A, (1(k))).<sup>27</sup> Also, supporters assert that victims should have the constitutional right to be notified (upon request) of the scheduled (and actual) release date of the defendant (and if the defendant escapes).<sup>28, 29</sup>

Question 1: Marsy’s Law would also provide victims the right to be informed of all postconviction proceedings and to provide information for the parole authority to consider before the parole of the offender (Table 1, Column A, (1(n))).<sup>30</sup> Further, victims would have the constitutional right to be notified (upon request) of the parole or other release of the offender.<sup>31</sup>

### ***The right to be heard***

Marsy's Law would give victims the constitutional right to confer reasonably with the prosecuting agency about the defendant's case involving the victim (Table 1, Column A, (1(f))).<sup>32</sup> Supporters contend that giving victims the opportunity to confer with the prosecutor could influence a prosecutor's decision regarding plea bargains with defendants.<sup>33</sup>

Proponents of Question 1 believe that victims should be able to make the impact of the offense known to any public officers who are completing a pre-sentence investigation. Thus, Marsy's Law includes a constitutional right to provide information about how the crime affected the victim and their family to those officers (Table 1, Column A, (1(j))).<sup>34</sup> Supporters stress that this, too, would provide victims with a voice in the judicial process and help to include them during the investigation of a crime.<sup>35</sup>

Similarly, proponents believe that victims should have the right to be reasonably heard (upon request) at any public proceeding involving the defendant's release, sentencing, or parole, including any delinquency (juvenile court) proceeding (Table 1, Column A, (1(h))).<sup>36</sup> They suggest that this could give victims a voice in the judicial process and ensure judges take victims' views into consideration when deciding if and how long to imprison a defendant.<sup>37</sup>

### ***The right to restitution***

Question 1: Marsy's Law would provide victims with full and timely restitution (Table 1, Column A, (1(l))).<sup>38</sup> Proponents say that this provision would "simply afford the order for restitution" in order to ensure that the victim does not carry the full financial burden of the crime.<sup>39</sup> Further, proponents state that the word "timely" takes into account the offender's ability to pay, so it would not force offenders to pay if they were unable to do so.<sup>40</sup>

To assist with full and timely restitution, Marsy's Law also would require that the court prioritize payments to victims before any other party. Specifically, under Marsy's Law, if restitution to the victim is ordered, the defendant's payments must first be applied to that restitution before allocation to other parole or probationary costs (Table 1, Column A, (1(p))).<sup>41</sup> Finally, Question 1: Marsy's Law would provide for the prompt return of a victim's property when it is no longer needed for evidence (Table 1, Column A, (1(m))).<sup>42</sup>

## **2. Expansion of victims' privacy protections**

Advocates argue that Marsy's Law would enhance victims' privacy protections and protections from the defendant.

### ***The right to privacy***

Proponents of Question 1: Marsy's Law argue that it would enhance privacy protections for victims. Proponents maintain that it is important for the victim to be treated fairly while the defendant's case



moves through the judicial process. Marsy’s Law would ensure this happens by giving victims the constitutional right to be treated fairly and have their privacy protected (Table 1, Column A, (1(a))).<sup>43</sup> This right would be accompanied by the right to be free from intimidation, harassment, or abuse, which would prevent the victim from being subjected to further trauma during the trial.<sup>44</sup>

To further the protection of victims’ privacy, Marsy’s Law also has a provision that would give the victim the constitutional right to refuse an interview or deposition request, unless under court order (Table 1, Column A, (1(e))). If there is an interview or deposition, Marsy’s Law also sets “reasonable conditions” for which the interview should be conducted.

Finally, victims’ right to privacy is protected under another provision that prevents the disclosure of confidential information that the defendant could use to locate or harass the victim or his/her family (Table 1, Column A, (1(d))).<sup>45</sup>

### ***Protection from the defendant***

Marsy’s Law would give victims the explicit constitutional right to be protected from the defendant or persons acting on the defendant’s behalf (Table 1, Column A, (1(b))).<sup>46</sup> Question 1: Marsy’s Law may also ensure that the court considers the safety of the victim and the victim’s family when fixing bail and release conditions for a defendant (Table 1, Column A, (1(c))).<sup>47</sup> Moreover, these same victim-centered safety considerations would be made when a court makes any parole or post-judgment decisions (Table 1, Column A, (1(o))).<sup>48</sup>

## **6. What are the primary arguments against Marsy’s Law?**

Opponents of Question 1: Marsy’s Law express three main concerns about the constitutional amendment. First, opponents argue that victims in Nevada already have rights, which are enshrined in the *Nevada Constitution* and current statutes, thereby rendering Marsy’s Law a “solution in search of a problem” (see Table 1 for a comparison of the proposed rights under Marsy’s Law versus current state law). Second, opponents assert that Marsy’s Law undermines defendants’ rights, which violates the U.S. Constitution, and that the proposed amendment could face constitutional challenges in Nevada courts. And third, opponents argue that Marsy’s Law poses significant costs and burdens on state and municipal budgets, as well as the court system.

### **1. Victims’ rights in Nevada are currently protected by the *Nevada Constitution* and in statute**

Opponents argue that enacting Marsy’s Law is a “solution in search of a problem,” given that the *Nevada Constitution*, in conjunction with state law, currently protect the rights of victims. These protections are enumerated in Article I, Section 8, of the *Nevada Constitution*, as well as Chapter 178 of the *Nevada Revised Statutes* (NRS).

In Article I, Section 8(2), victims are provided with three main rights:

- (a) that they are informed, upon written request, of the status or disposition of a criminal proceeding at any stage of the proceeding;

(b) that they have the right to be present at all public hearings involving the critical stages of a criminal proceeding; and

(c) that they have the right to be heard at all proceedings for the sentencing or release of a convicted person after trial.<sup>49</sup>

Further, while Article I, Section 8(3), of the *Nevada Constitution* prohibits a person from bringing a lawsuit for damages in violation of these rights, Section 8(4) provides a person the right to maintain an action to compel a public officer or employee to carry out any of the Section 8(2) duties. These Article I, Section 8, provisions were added as an amendment to the *Nevada Constitution* by ballot measure in 1996.<sup>50</sup>

In addition to the constitutional protections provided to victims in the state's constitution, Nevada also has victim protections in existing statutes.<sup>51</sup> In 1983, the Nevada Legislature passed a series of bills that became the Nevada Victims' Bill of Rights.<sup>52</sup> These bills gave victims the right:

- To know the status of the case in which they are involved
- To be free from intimidation or dissuasion
- To know when their impounded property may be released.
- To understand the existing victim compensation laws and receive compensation if applicable.
- To a secure waiting area, which is not available to the defendant or his family, when the victim is at court.
- To know when the defendant is released from custody before or during trial (upon written request).
- To know when the offender is released from prison (upon written request).<sup>53</sup>

Recent experiences shared during testimony provided during the 79<sup>th</sup> (2017) Legislative Session suggest that victims may not currently understand their existing rights.<sup>54</sup> In said testimony, victims shared that they had the right (via statute) to be notified when defendants were released on bail or from prison, but they were not notified when the defendants were released.<sup>55</sup> However, it is likely they were not notified because they did not request the notification, as required by statute.<sup>56</sup> Marsy's Law, while shifting this right from statute to the *Nevada Constitution*, would still require the victim to make a request to receive this notification.<sup>57</sup>

One of the central tenets of the United States justice system is to balance the rights of the accused with the protection of the general public, which includes victims of crimes. Opponents of Marsy's Law argue that the protections for victims currently enshrined in the *Nevada Constitution* and the *Nevada Revised Statutes* appropriately strike that balance by protecting and notifying victims during the judicial process, while still protecting defendants' constitutional rights.<sup>58</sup>

## 2. Marsy's Law may conflict with existing state and federal constitutional rights

Opponents argue that Question 1: Marsy's Law undermines defendants' rights, which violates the U.S. Constitution. Furthermore, due to Nevada's single-subject requirement, which requires that all sections of a proposed initiative must be "functionally related and germane to each other in a way that provides sufficient notice of the general subject of, and of the interests likely to be affected by the proposed initiative" (Nevada Revised Statute 295.009), the proposed amendment could face constitutional challenges in Nevada courts.<sup>59</sup>

### *Marsy's Law undermines defendants' constitutional rights*

As Meg Garvin, Executive Director of the National Crime Victims Law Institute,<sup>c</sup> stated in public testimony to the Nevada Senate Judiciary Committee on February, 23, 2017, "[t]he second elephant in the room is, if we elevate victims' rights, do we minimize defendants' rights?"<sup>60</sup> While Garvin argued that defendants' rights will not be diminished by Marsy's Law, opponents say that is exactly what Marsy's Law does when it seeks to provide rights to victims in the same way it provides defendants due process rights.<sup>61</sup> As opponents point out, the authors of the U.S. Constitution granted due process rights for defendants in order to protect them from the wrongful deprivation of life, liberty, or property at the hands of the government.<sup>62</sup>

In contrast, victims' rights are not protections from the state but from another person. The victims do not need protection from the government, but, instead, are asking for notifications, courtroom participation, and protections from the accused. The problem, opponents argue, is that establishing these provisions could actually strengthen the government's hand against the defendant, undermining those very rights defendants are afforded by the U.S. Constitution.<sup>63</sup>

Opponents argue that a defendant's right to a fair and impartial trial may be threatened when victims are more involved in court proceedings.<sup>64</sup> For example, granting victims the right to be heard at any public proceeding during the trial may allow emotions, rather than facts and the law, to influence the trial and deliberations. Further, proposed victims' rights such as the right to full restitution, to reasonable protection from the defendant, and to refuse a discovery or deposition request, disadvantage the defendant. Combined, the effect of these rights contained in Marsy's Law undermines the fundamental principal that a defendant is presumed innocent until proven guilty.<sup>65</sup>

Moreover, opponents assert, the proposed victim's right to be free from intimidation is so broad that a defense attorney who cross-examines a victim as a witness could be viewed as intimidating, in violation of the proposed provision. If this is the case, it could dissuade defense attorneys from cross-examining victims, which would undermine a defendant's Sixth Amendment right to cross-examination.<sup>66</sup>

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<sup>c</sup> The National Crime Victims Law Institute is a non-profit based out of Lewis & Clark Law School. [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/](https://law.lclark.edu/centers/national_crime_victim_law_institute/)

The Framers enshrined rights for the accused in the U.S. Constitution to protect them from government tyranny. The Framers, however, did not confer the same rights to victims, as they were understood as not confronting similar “dangers.” The presumption of innocence, a right to a fair and balanced trial, and the right to cross-examine one’s accuser are all fundamental rights, opponents of Marsy’s Law contend, noting that the proposed constitutional amendment could infringe upon those rights.

***Marsy’s Law could face a constitutional challenge due to Nevada’s “single-subject” requirement***

Marsy’s Law has been subject to constitutional challenges in other states that have adopted it. For example, in 2012, the U.S. District Court for the Eastern District of California ruled parts of the California Mary’s Law unconstitutional due to conflicts with the constitutional rights of parolees.<sup>67</sup> Additionally, and most notably, in 2017, the Montana Supreme Court ruled the entire law unconstitutional due to violations of the state’s “separate-vote” requirement (as will be discussed).<sup>68</sup> Likewise, Marsy’s Law could face a constitutional challenge in Nevada.

Opponents have argued that Marsy’s Law, as structured in Question 1, could face a constitutional challenge in court due to Nevada’s “single-subject requirement.” While single-subject rules and separate vote requirements, which most often apply to constitutional amendments, are different, courts have often interpreted their intent in a similar fashion.<sup>69</sup> Under the single-subject requirement, in order for a ballot initiative to be constitutional, it must not embrace more than one subject.<sup>70</sup> In addition, each of the initiative’s parts must be “functionally related” and “germane” to each other in a way that provides general notice of the proposed single-subject.<sup>d, 71</sup>

With regard to Question 1: Marsy’s Law, specifically, the most relevant court challenge took place in 2017 in Montana. There, in *Montana Association of Counties (“MACo”) v. State*, the Montana Supreme

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<sup>d</sup> In 2006 in *Nevadans for the Protections of Property Rights v. Heller*, the Nevada Supreme Court reviewed whether the provisions of a ballot initiative regarding eminent domain complied with the single-subject requirement. There, the court found one section had to do with making property rights fundamental rights, which did not fundamentally relate to eminent domain. Relatedly, the court found another section too broad when it required just compensation payments for certain government actions, so it was also not fundamentally related to eminent domain. Because the primary subject of the initiative was eminent domain, and the two provisions were not viewed as fundamentally related to the other provisions that embraced that primary subject, the court held the initiative violated Nevada’s single-subject requirement. However, because the other twelve of the original fourteen provisions were related to eminent domain, and because the initiative had a severance clause, the court chose to sever the unrelated provisions from the initiative instead of striking down the entire initiative. Accordingly, the court severed the provisions of the initiative that were not functionally related to eminent domain and allowed the remaining provisions to be placed on the ballot. Source: *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d 1235, 1243 (Nevada 2006). While there have been other challenges to ballot initiatives, in general, the Nevada Supreme Court seemingly has been reluctant to use the single-subject requirement to strike down ballot measures. For example, see *Education Initiative PAC v. Committee to Protect Nevada Jobs* and *Prevent Sanctuary Cities v. Haley*. Source: *Education Initiative v. Committee to Protect Nevada Jobs*, 293 P.3d 874, 884 (Nevada 2013); *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955.

Court reviewed whether a version of Marsy's Law approved by Montana voters in 2016 violated the state's separate-vote requirement.<sup>72</sup> In Montana, the separate-vote requirement requires that initiatives not include two or more changes to the state constitution if they are "substantial" but "not closely-related."<sup>73</sup> The court determined that Marsy's Law provisions that regulated attorney conduct, changed defendants' right to bail, and changed criminal procedure rules were all substantive, but were not closely-related to each other.<sup>74</sup> Additionally, the court also found that another provision that changed victims' right to privacy was unrelated to those provisions.<sup>75</sup> The court held that because several provisions were not closely related, they should have been individually presented to the voters.<sup>76</sup> Consequently, the court ruled the entire ballot initiative void and unconstitutional, and Marsy's Law was repealed.<sup>77</sup>

While the Nevada Supreme Court has seemingly been reluctant to use the single-subject requirement to strike down initiatives, it is worth noting the similarities between the holdings in *Nevadans for the Protections of Property Rights v. Heller* and *Montana Association of Counties ("MACo") v. State*. In *Nevadans for the Protections of Property Rights v. Heller*, the court reasoned that the single-subject requirement exists to protect voters from "logrolling," where a voter is forced to sign on to several provisions in order to enact a single provision they might support.<sup>78</sup> Similarly, the Montana Supreme Court in *MACo* used similar reasoning to explain why its separate-vote requirement exists when it held Marsy's Law unconstitutional.<sup>79</sup> It appears that both states' requirements partially exist for the same purpose of protecting voters from confusing ballot initiatives.

In addition to both states' requirements existing for the same purpose, the elements of both requirements are also similar. Nevada's single-subject requirement requires provisions be "functionally related" and "germane" to each other.<sup>80</sup> Likewise, Montana's separate-vote requirement requires provisions be "closely-related" to each other.<sup>81</sup> According to legal experts, the terms "functionally related" and "germane," and "closely-related," are similar enough to infer that arguments used in *MACo* could similarly be used in a case against Marsy's Law in Nevada.

Furthermore, even though the laws are not identical, Nevada's ballot initiative includes at least thirteen provisions that are similar to provisions in Montana's initiative.<sup>82</sup> Moreover, many of the "substantial" and "not closely-related" provisions cited by the Montana court as unconstitutional also exist in Nevada's initiative. For example, Question 1 would alter victims' right to privacy (Table 1, Column A (1(a), 2)), defendants' right to bail (c, g, h), how law enforcement handles information (Table 1, Column A, (1(d))), court proceedings (Table 1, Column A, (1(g), 1(h), 1(k))), and convicted criminals' right to parole (Table 1, Column A, (1(h), 1(o))). In short, opponents suggest that Nevada's single-subject requirement provides a foundation for opponents of Marsy's Law to challenge its constitutionality in court.

### **3. Marsy's Law could impose additional costs on state budgets and burden the justice system.**

Opponents argue that Marsy's Law includes unfunded mandates that will have unintended consequences, such as budget shortfalls for state and local governments, as other states with Marsy's Law in their constitutions have experienced. Moreover, the increased requirements of victim

involvement in the judicial process will further burden a justice system that is already under-resourced.

### ***Marsy's Law is an unfunded mandate***

Opponents of Question 1: Marsy's Law argue that it is a "classic unfunded mandate, in that the measure would require the state or local governments to carry out certain actions without providing (additional) financial resources to fulfill the requirements."<sup>83</sup> Some have cautioned that unfunded mandates are problematic because they impose new responsibilities on state and/or local governments without providing funds to fulfill those responsibilities.<sup>84</sup> While Question 1: Marsy's Law sets out seventeen required mandates, the proposed measure does not provide a funding mechanism to help implement and enforce the requirements. Opponents contend that local governments either would have to raise additional revenues or cut existing services in order to comply with the proposed requirements to provide more services to victims.<sup>85</sup>

The experience of other states—namely South Dakota—that implemented Marsy's Law reveals that efforts to comply with the additional requirements did require additional resources.<sup>86</sup> In 2017, in Pennington County, South Dakota, which has a population of just over 108,000, the State's Attorney added four new victims' advocates to comply with the law.<sup>87</sup> These new positions cost the county more than \$200,000 annually.<sup>88</sup> This amounted to almost four percent of the State's Attorney's budget for Fiscal Year (FY) 2017 in Pennington County.<sup>89</sup>

Similarly, in 2017, in Montana, before the law was overturned by the Montana Supreme Court, the Gallatin County Attorney's Office requested over \$179,000 to fund three new positions to comply with the law.<sup>90</sup> Without additional funding from other sources, this would have constituted 11 percent of the County Attorney's Office FY 2017 budget.<sup>91</sup> Likewise, in Bozeman, Montana, the Bozeman City Attorney's Office requested \$150,000 for "Marsy's Law-related personnel and software."<sup>92</sup> The Bozeman Police Department estimated that annual costs for Marsy's Law-related forms would be \$3,000.<sup>93</sup> And in Belgrade, Montana, the City Manager earmarked \$50,000 for a records management position and additional computer software.<sup>94</sup>

Opponents argue that Question 1: Marsy's Law is an unfunded mandate that places stress on city and/or county budgets, especially in rural counties. However, it is unclear how Marsy's Law will affect county and/or city budgets in Nevada. One District Attorney in a rural Nevada county said that the office did not foresee any Marsy's Law-related staffing additions despite not having a specific victims' advocate on staff.<sup>95</sup> However, the District Attorney stated the office would likely need to make changes to comply with Marsy's Law's notification and hearing requirements.<sup>96</sup> In contrast, the Washoe County District Attorney's office currently employs five victims' advocates and does not foresee any changes to daily operations should Marsy's Law pass by a majority of Nevada's voters.<sup>97</sup>

### ***Marsy's Law burdens the justice system***

Additionally, opponents of Question 1: Marsy's Law argue that the law could place an additional burden on the justice system. First, as previously stated, Marsy's Law seeks to expand the definition

of victim. In states that have adopted Marsy's Law, this has placed a constraint on the availability and delivery of services. For example, in South Dakota, Marsy's Law's definition of victims included businesses.<sup>98</sup> This new definition, combined with the mandate to contact victims, has resulted in victims' advocates spending time trying to contact these businesses in order to notify them about their court proceedings.<sup>99</sup> These outreach efforts have reduced the allocation of time spent with victims of violent crimes.<sup>100</sup> In Nevada, because Marsy's Law would expand the definition of "victim," some legal experts say businesses would qualify as victims just as they did in South Dakota.<sup>101</sup> And, opponents argue that this expanded definition could lead to victim support and law enforcement problems similar to those experienced in South Dakota.<sup>102</sup>

Moreover, the provision that prohibits the release of victim information has interfered with how law enforcement officials are able to share information with the public, and even releasing the locations and names of businesses that were robbed.<sup>103</sup> Consequently, this has which has hindered their ability to solve some crimes.

And in South Dakota's Pennington County, Marsy's Law's victim contact requirements forced stakeholders to revise their allocation of time. There, victims' advocates and law enforcement personnel spent much of their time communicating with people about "fairly low-level" cases such as petty thefts and criminal trespasses rather than violent crimes, thereby resulting in reduced services for those who may have a greater need for those services.<sup>104</sup> One South Dakota legal expert stated:

[Marsy's Law] puts violent sexual assault crimes on the same level as criminal trespass crimes. The law and the notification requirement have burdened the prosecutor's offices with petty crimes rather than dedicating greater time to victims of more serious crimes. Also, there have been multiple cases involving prosecutions where people who claimed to be victims were not really victims as they sought the protections of Marsy's Law."<sup>105</sup>

Collectively, these unforeseen effects that had a significant impact on local budgets and the quality and availability of services led South Dakota's House Speaker, Mark Mickelson, to first call for a repeal of Marsy's Law before eventually working out a compromise agreement with Marsy's Law for All to amend the constitutional amendment. This new amendment was presented to South Dakota voters, a majority of whom approved it on June 5, 2018.<sup>106</sup>

Referring to the fiscal and capacity issues experienced by several states, opponents argue that the costs of Question 1: Marsy's Law outweigh the benefits, particularly given that victims' rights are currently protected in the *Nevada Constitution* and state law. Accordingly, Marsy's Law opponents believe that Marsy's Law as proposed in Question 1 should not be passed as an amendment to Nevada's state constitution.

## 7. Can the Nevada Legislature make changes to Question 1 after it has been approved by voters?

If Question 1: Marsy's Law is approved by a majority of Nevada voters in November 2018 and added to the *Nevada Constitution*, any subsequent efforts to revise the scope and intent of the amendment would be subject again to the constitutional amendment process. In Nevada, there are two main processes to amend the constitution: (1) through legislative referendum, and (2) through voter-initiated petition.

1) To amend the *Nevada Constitution* by legislative referendum, there is a three-step process. First, both houses of the Nevada Legislature must pass a proposed amendment with a simple majority during a legislative session. Next, the legislature in the following legislative session must pass the same proposed amendment, with identical language, in the same manner. Finally, a majority of voters must pass the amendment in the following general election.<sup>107</sup> This is the process that Question 1: Marsy's Law has gone through thus far in Nevada.

Accordingly, if an amendment to change or repeal Marsy's Law were to go through the legislative referendum process, the Nevada Legislature could first pass the amendment during the 2019 Legislative Session. Next, the succeeding legislature would need to pass the same amendment in the same manner during the 2021 Legislative Session. Finally, a majority of Nevada voters would need to approve it in the 2022 General Election.

2) To amend the *Nevada Constitution* by voter-initiated petition, the amendment must be approved by a majority of Nevada voters in two consecutive general elections.<sup>108</sup> As a result, if an amendment to change or repeal Marsy's Law were to go through the voter-initiated petition process, it could first be approved by a majority of Nevada voters in the 2020 General Election. If approved in 2020, a majority of Nevada voters would again need to approve it in the 2022 General Election.

Consequently, regardless of the chosen process, should Nevadans wish to repeal or amend Marsy's Law, the earliest any changes could be made would be in the fall of 2022.



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The Kenny C. Guinn Center for Policy Priorities is a 501(c)(3) nonprofit, bipartisan, independent policy institute focused on providing fact-based, relevant, and well-reasoned analysis of critical policy issues facing Nevada and the Intermountain West. The Guinn Center engages policy-makers, experts, and the public with innovative, data-driven research and analysis to advance policy solutions, inform the public debate, and expand public engagement.

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- <sup>58</sup> Hearing on SJR 17, Assembly Committee on Legislative Operations and Elections, 78<sup>th</sup> Legislative Session, 28 (Nevada 2015) (Statements by Assemblyman Ohrenschaal and Assemblyman Anderson). <https://www.leg.state.nv.us/Session/78th2015/Minutes/Assembly/LOE/Final/1078.pdf>
- <sup>59</sup> Nevada Revised Statute (NRS) 295.009. <https://www.leg.state.nv.us/NRS/NRS-295.html>

- <sup>60</sup> Hearing on SJR 17, Senate Judiciary Committee, 79<sup>th</sup> Legislative Session, 17 (Nevada 2017) (Testimony by Meg Garvin in support of SJR 17). <https://www.leg.state.nv.us/Session/79th2017/Minutes/Senate/JUD/Final/229.pdf>
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- <sup>67</sup> *Valdivia v. Brown*, CIV. S-94-671 LKK, 2012 WL 219342, at \*7 (E.D. Cal. Jan. 24, 2012).
- <sup>68</sup> *Montana Association of Counties. ("MACo") v. State*, 404 P.3d 733, 748 (Montana 2017).
- <sup>69</sup> *Meyer vs. Bradbury*. Oregon. September 7, 2006. [https://www.courtlistener.com/html/2006/09/07/meyer\\_v\\_bradbury\\_2.html](https://www.courtlistener.com/html/2006/09/07/meyer_v_bradbury_2.html)
- <sup>70</sup> *Nevadans for the Protec. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1243 (Nevada 2006).
- <sup>71</sup> *Nevadans for the Protec. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1243 (Nevada 2006).
- <sup>72</sup> *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955.
- <sup>73</sup> *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955 at 742.
- <sup>74</sup> *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955 at 744-45.
- <sup>75</sup> *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955 at 747.
- <sup>76</sup> *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955.
- <sup>77</sup> *Prevent Sanctuary Cities v. Haley*, 74966, 2018 WL 2272955 at 748.
- <sup>78</sup> *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d at 1251.
- <sup>79</sup> *Montana Association. of Counties. ("MACo") v. State*, 404 P.3d at 738.
- <sup>80</sup> *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d at 1243.
- <sup>81</sup> *Nevadans for the Protection of Property Rights, Inc. v. Heller*, 141 P.3d at 742.
- <sup>82</sup> The following provisions of Montana's [initiative](#) contain substantially-similar language to provisions in Nevada's [initiative](#): (a), (b), (c), (d), (e), (f), (g), (i), (m), (n), (p), (r), (4)(b).
- <sup>83</sup> *Top reasons why Marsy's Law is wrong for victims and for Montana*, ACLU Montana (2017), <https://www.aclumontana.org/en/news/top-reasons-why-marsys-law-is-wrong-for-victims-and-montana>
- <sup>84</sup> *Top reasons why Marsy's Law is wrong for victims and for Montana*, ACLU Montana (2017), <https://www.aclumontana.org/en/news/top-reasons-why-marsys-law-is-wrong-for-victims-and-montana>
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- <sup>86</sup> Capital Journal Staff, *"Marsy's Law," aimed to help crime victims, showing unintended consequences*, Capital Journal (2017), [https://www.capjournal.com/news/marsy-s-law-aimed-to-help-crime-victims-showing-unintended/article\\_c741ba40-ea64-11e7-a505-63a3546a3c3c.html](https://www.capjournal.com/news/marsy-s-law-aimed-to-help-crime-victims-showing-unintended/article_c741ba40-ea64-11e7-a505-63a3546a3c3c.html)
- <sup>87</sup> Associated Press, *South Dakota Speaker, campaign negotiating Marsy's Law deal*, Chicago Tribune (2018), <http://www.chicagotribune.com/news/sns-bc-us-xgr--marsys-law-repeal-20180209-story.html>
- <sup>88</sup> James Nord, *South Dakota could be first state to tweak 'Marsy's Law,'* Seattle Times (2018), <https://www.seattletimes.com/nation-world/nation-politics/south-dakota-could-be-first-state-to-tweak-marsys-law/>
- <sup>89</sup> *2018 Annual Budget*, Pennington County, SD (2018), <http://docs.pennco.org/docs/ao/Budget/2018BudSumm.pdf>
- <sup>90</sup> Whitney Bermes, *Local prosecutors, police request funding for Marsy's Law implementation*, Bozeman Daily Chronicle (2017), [https://www.bozemandailychronicle.com/news/crime/local-prosecutors-police-request-funding-for-marsy-s-law-implementation/article\\_506da9fd-5552-53c4-8cc1-adfaa281ab7e.html](https://www.bozemandailychronicle.com/news/crime/local-prosecutors-police-request-funding-for-marsy-s-law-implementation/article_506da9fd-5552-53c4-8cc1-adfaa281ab7e.html)
- <sup>91</sup> *Office of the Gallatin County Attorney Department Overview*, Office of Gallatin County Attorney (2018), [http://gallatincomt.virtualtownhall.net/Public\\_Documents/gallatincomt\\_Fiscal/Current\\_County\\_Budget/GG\\_Attorney.pdf](http://gallatincomt.virtualtownhall.net/Public_Documents/gallatincomt_Fiscal/Current_County_Budget/GG_Attorney.pdf)
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- <sup>95</sup> Guinn Center conversation with a Nevada District Attorney.
- <sup>96</sup> Guinn Center conversation with a Nevada District Attorney.
- <sup>97</sup> Guinn Center conversation with Washoe County District Attorney Public Information officer Michelle Bays.
- <sup>98</sup> James Nord, *South Dakota could be first state to tweak 'Marsy's Law'*, Seattle Times (2018), <https://www.seattletimes.com/nation-world/nation-politics/south-dakota-could-be-first-state-to-tweak-marsys-law/>
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- <sup>103</sup> James Nord, *South Dakota could be first state to tweak 'Marsy's Law'*, Brookings Register (2018), <https://brookingsregister.com/article/sd-could-become-first-to-repeal-marsys-law>
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- <sup>106</sup> *South Dakota Constitutional Amendment Y, Changes to Marsy's Law Crime Victim Rights Amendment (June, 2018)*, Ballotpedia (2018), [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>107</sup> Nevada Constitution Article XVI, § 1, <https://www.leg.state.nv.us/Const/NVConst.html>
- <sup>108</sup> Nevada Constitution Article XIX, § 2, <https://www.leg.state.nv.us/Const/NVConst.html>