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To: The Senators and Representatives of the Kentucky General Assembly

We are writing to you in regards to SB15, known colloquially as “Marsy’s Law.” We opposed this well-meaning but misguided attempt to amend Kentucky’s constitution when it moved through the General Assembly in 2018, and we oppose it again.

This bill’s aims are valid and laudable—to help support those who have been victimized as criminal cases move through the court system. We know there are members of our communities and our families who have been harmed by others, and we want them to feel supported and heard. However, this law is not the answer to that admirable goal, for the reasons discussed below.

Our concerns about Marsy’s Law generally fall within three categories:

### *Lack of Clarity and Guidance*

At its very core, this law is confusing and unclear. Even stakeholders in the court system and those who practice law are unsure what many of the provisions of SB15 mean (we’ll refer to SB15 throughout, but our concerns extend to SB80, which we believe to be the implementing language of “Marsy’s Law”). This is a fatal flaw in a well-meaning bill, because judges, attorneys, and court staff throughout our 60 judicial districts will not know how to implement the bill.

As a stark example, the law says that victims “shall have standing” to assert the rights enumerated in the bill, but states several lines later that “[n]othing in this section shall afford the victim party status.” This simply does not make sense, because ordinarily these two phrases would be largely synonymous. This contradictory language raises important questions about what role victims will be able to play in the court system. Justice Keller noted this specific internal inconsistency during oral arguments challenging the 2018 ballot measure, stating simply, “I don’t know what that means.” If even the justices of our state Supreme Court cannot make sense of this bill, we can’t expect our entire legal system to be able to either.

This law purports to create constitutional rights for victims that are “protected by law in a manner no less vigorous” than the constitutional rights afforded to the accused. But no information or



guidance is given about how to resolve the numerous conflicts that appear to occur with the state and federal constitutional rights afforded the criminally accused. For instance, the rights may conflict when:

- A victim invokes their right to “proceedings free from unreasonable delay” under SB15 and demands a speedy trial, but a defendant requests additional time before trial for their counsel to be prepared and adequately represent them, consistent with their Sixth Amendment right to counsel;
- A victim invokes their “right to have the safety of the victim and the victim’s family considered in setting bail,” and objects to a court setting an affordable bail amount, but the court must consider the defendant’s Eighth Amendment right to be free from excessive bail;
- A victim invokes their right to “safety, dignity, and privacy” to demand that certain information about the case is withheld from the defendant, but the defendant needs access to that information to challenge the evidence against him, pursuant to his Sixth Amendment confrontation clause rights.

These are just a few examples of the ways that the constitutional rights enumerated in SB15 may come into direct conflict with defendants’ state and federal constitutional rights—with no guidance at all to our District and Circuit Court judges as to how they are to interpret these conflicts.

### ***Lack of Resources or Support***

As you likely know, the rights outlined in SB15 are already contained within Kentucky law—KRS 421.500-421.575. This means that victims already have, for example, a legal right in Kentucky to timely notice of all proceedings and to be heard in any proceeding involving a release, plea, or sentencing; the right to be present at trial and all other proceedings; the right to consult with Commonwealth or County Attorneys—all rights that SB15 purports to provide. If these rights are not already being respected and upheld, enshrining them in the constitution will do nothing to further that goal.

What is needed, instead, is a review of what resources are available to the court system, including within the local prosecuting attorneys’ offices upon which many of these obligations will fall, and an introduction of measures that will increase resources where



needed. SB15 allocates no additional resources to this endeavor. It simply creates an unfunded mandate and will not change victims' experiences through the justice system.

In fact, SB15 creates a need for substantial additional resources—again, without allocating any. In particular, SB15 allows victims the right to be heard with counsel but does not indicate what counsel will be available to indigent victims who cannot afford to hire private attorneys. If this right is to be protected “in a manner no less vigorous than the protections afforded to the accused,” it would follow that the state should provide attorneys for indigent victims just as a public defender is provided for indigent defendants. This is an enormous cost that is not contemplated by the bill. Again, the Kentucky Supreme Court justices noted this problem during oral arguments last year, citing the numerous financial and logistical ramifications of the bill as important information for voters to understand before voting on the ballot measure. However, this version of the bill and the language for the amendment still contain no information about the cost of the measure.

Not only does SB15 not provide the resources for victims, it explicitly states that victims who feel their rights have been violated cannot bring a civil claim for damages—which is ordinarily the mechanism by which civil rights or liberties violations may be remedied. Nor are any other remedies provided for in the bill. In this way, it creates an empty promise for those who think SB15 will make it easier for victims to be made whole.

### *Unintended Consequences*

The full effect of this constitutional amendment, given how expansive and vague it is, simply cannot be known. However, we do know that other states' versions of Marsy's Law have had unintended consequences beyond what the bill sponsors contemplated. For instance, in other states, members of the press and citizens concerned about crime in their communities have been unable to get information from local police departments who interpret Marsy's Law's “privacy right” to mean that even basic information about victims and crimes must be withheld. In other states, parties not originally intended to be considered “victims” under Marsy's Law—for example, an entire police department, and a private defense attorney in Florida—nevertheless claim “victim” status to invoke privacy and other “rights.”

As discussed above, the cost of this measure simply cannot be known. Other states that have considered versions of Marsy's Law



can offer some insight here. In North Dakota, for instance, state officials estimated it would need approximately \$2 million per year to properly implement the law. North Carolina’s legislature had the benefit of a judicial branch fiscal note when it considered Marsy’s Law in recent years, and learned that the North Carolina Administrative Office of the Courts estimated the law would cost \$16.4 million to implement and \$30.5 million annually in subsequent years. SB15 does not include a Fiscal Note, so we do not have a Kentucky-specific cost estimate of this measure.

California was the first state in the nation to adopt a version of Marsy’s Law—it is the home state of Henry Nicholas, Marsy’s Law’s founder and funder. Yet, four years after that law was adopted, a “Report and Recommendations” prepared by the California Crime Victims Assistance Association and the District Attorneys Association identified the most significant challenges in enforcing Marsy’s Law as: “inadequate funding, lack of guidance by appellate case law interpreting the provisions of Marsy’s Law, confusion around the role of victims’ rights attorneys, and training needs for all allied professionals working in the criminal justice system.” As we hope you can see here, Kentucky’s SB15 does not offer solutions to any of those challenges. Were this amendment to be adopted, then, we could expect many of the same problems with no guidance or resources for solutions.

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Rather than create such a quagmire, we strongly encourage legislators to examine KRS 421.500-421.575, the existing “Kentucky Crime Victim Bill of Rights,” with an eye toward improving victims’ experiences under the current statutory rights. Legislators could hear from stakeholders in the criminal justice system about what reforms are needed in that chapter, and what resources are necessary to support victims through the justice system. This type of comprehensive review of the current state of victims’ rights, and identifying the necessary resources and reforms needed within our statutory Victim’s Bill of Rights, will go much farther and do much more to protect victims—not an empty promise and an unfunded mandate like SB15.

As always, we are available and eager to discuss this with members of the Kentucky General Assembly, and we thank you for hearing our concerns regarding this proposed constitutional amendment.



Sincerely,

A handwritten signature in blue ink that reads "Corey Shapiro". The signature is fluid and cursive, with a long horizontal stroke at the end.

Corey Shapiro  
Legal Director

A handwritten signature in blue ink that reads "Heather Gatnarek". The signature is cursive and somewhat stylized.

Heather Gatnarek  
Staff Attorney