RECEIVED
07-08-2009
CLERK OF SUPREME COURT
OF WISCONSIN

SUPREME COURT OF WISCONSIN

Appeal No. 2008AP001868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

Dane Co. Circuit Court
Case No. 2007-CV-002657

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL FROM THE FINAL ORDER OF THE
DANE COUNTY CIRCUIT COURT DATED JUNE 9, 2008,
THE HONORABLE RICHARD G. NIESS, PRESIDING, AND
ON CERTIFICATION FROM THE COURT OF APPEALS

BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

CULLEN WESTON PINES
& BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
122 W. Washington Ave., #900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

EDWARD S. MARION
ATTORNEY-AT- LAW LLC

Edward S. Marion, SBN 1016190
716 Ottawa Trail
Madison, WI 53711
Telephone: (608) 334-9741

Dated: July 8, 2009.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Wisconsin Constitution

Other Authorities

ISSUES PRESENTED

The issues presented are as follows:

Issue 1: When a referendum question to amend the Wisconsin Constitution is challenged under the single subject rule contained in Wisconsin Constitution Article XII, Section 1, may a court look beyond the legislature's stated purpose to determine the purpose of the proposed amendment?

The Circuit Court answered yes.

Issue 2: Did the submission of the single referendum question to the voters that led to the amendment to the Wisconsin Constitution creating Article XIII, Section 13 violate the single subject rule contained in Article XII, Section 1 of the Wisconsin Constitution thereby rendering the amendment unconstitutional and void?

The Circuit Court answered no.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

Plaintiff-Appellant-Cross-Respondent respectfully requests oral argument. This appeal involves a matter of significant public concern.

The decision in this case should be published because it will explain the manner in which the single subject rule contained in Article XII, Section 1 and the cases which have interpreted that rule should be applied.

STATEMENT OF THE CASE

This case was commenced by Plaintiff-Appellant-Cross-Respondent William C. McConkey (hereinafter "McConkey") by the filing of a petition for injunction and declaratory relief on July 27, 2007 challenging both the substance of the amendment creating Article XIII, Section 13 of the Wisconsin Constitution and the procedure that lead to its adoption. *(R. 1).* Specifically, McConkey requested the court to declare Article XIII, Section 13 of the Wisconsin Constitution unconstitutional because it was actually two distinct and separate amendments submitted to the voters in violation of a procedural requirement contained in Article XII, Section 1 of the Wisconsin Constitution: the requirement that constitutional amendments "be submitted in such a manner that the people may vote for or against such amendments separately." He also challenged the amendment substantively, claiming it violated the due process and equal protection guarantees enjoyed by the citizens of Wisconsin and the United States.

The Defendant moved to dismiss on August 13, 2007 claiming that McConkey lacked standing to bring the substantive and procedural challenges. *(R. 3).* On September 26, 2007 the court granted the motion to dismiss in part, ruling that McConkey did not have standing to challenge the substance of the amendment. However, the court allowed the parties to further brief the issue of whether McConkey had standing to bring the procedural challenge, i.e., whether he had standing to argue that the amendment was presented to the voters in violation of the single subject rule contained in Article XII, Section 1 of the Wisconsin Constitution. *(R. 18).*

In an oral ruling delivered on November 28, 2007, the court denied the Defendant's motion to dismiss the procedural challenge for lack of standing. (The formal order was entered on December 21, 2007.) *(R. 29 and 33).* The Defendant filed an answer on December 7, 2007. *(R. 30).*[1]

[1] Originally both J.B. Van Hollen, in his official capacity as Attorney General, and James Doyle, in his official capacity as Governor, were Defendants. By stipulation of the parties, Governor Doyle was dismissed as a Defendant on February 21, 2008. *(R. 36 and 37).*

The parties then briefed the merits of McConkey's single subject rule challenge. At a hearing on May 30, 2008, the court orally ruled against McConkey on his procedural challenge and thus denied McConkey's motion for declaratory judgment. *(R. 56, A-App. 1).* In particular, the circuit court first found that the purpose of the proposed amendment was "the preservation and protection of the unique and historical status of traditional marriage." *(R. 56, A-App. 7).* It also found that both propositions placed before the voters furthered that purpose, and concluded that the method by which the proposed amendment was put to the voters did not violate the single subject rule in Article XII Section 1. *Id.* The court formally dismissed the Complaint by order dated June 9, 2008. *(R. 52, A-App. 11).* McConkey appealed on the procedural challenge only and the Defendant cross-appealed on McConkey's standing to bring that challenge. *(R. 53 and 54).*[2] On April 9, 2009 the Court of Appeals certified the appeal to

[2]If the Defendant wishes to pursue its challenge to McConkey's standing, it will raise that in its Initial Brief, due along with its response to this Brief. Therefore, the question of standing will be addressed in future briefs, if necessary, but not in this one.

the Wisconsin Supreme Court, which accepted the certification on May 12, 2009.

STATEMENT OF FACTS

On November 7, 2006, a referendum was submitted to Wisconsin voters on this question:

> QUESTION 1: Marriage. Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?

Article XII, Section 1 of the Wisconsin Constitution sets forth the procedure that must be followed to amend the Wisconsin Constitution. Among other things, in order for an amendment to be effectively adopted, each house of the Legislature must agree by majority vote to the proposal. In the next legislative session, each house must again agree by majority vote to the proposal and submit the same proposal to the people for approval and ratification. In particular, Article XII, Section 1 provides:

> and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

There is no dispute that both houses of the 2003 Legislature agreed by majority vote to a Joint Resolution with the following title setting forth the purpose of the Resolution:

> ***To create*** section 13 of article XIII of the constitution; **relating to**: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (first consideration).

2003 Assembly Joint Resolution 66, lines 1-3 (A-App. 17), designated by the Secretary of State as 2003 Enrolled Joint Resolution 29, hereinafter referred to as "2003 J.R. 29." See History of 2003 Assembly Joint Resolution 66. (A-App. 19)

The Resolution itself contained two sections: the first section was to create section 13 of article XIII of the constitution to read "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."[3] The second section dealt with the numbering of the proposed new section. *2003 J.R. 29 (A-App. 18)*.

[3] "Unmarried individuals" presumably means those individuals in non-marital relationships with other unmarried individuals, i.e., unmarried couples.

Likewise, there is no dispute that both houses of the 2005 Legislature agreed by majority vote to a Resolution with the same first section and the same stated purpose: "***To create*** section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." *2005 Senate Joint Resolution 53, lines 1-3 (A-App. 13), designated by the Secretary of State as 2005 Enrolled Joint Resolution 30, hereinafter referred to as "2005 J.R. 30." See History of 2005 Senate Joint Resolution 53 (A-App. 15).* In the 2005 Joint Resolution, the 2005 Legislature also submitted to the people of Wisconsin by referendum on the November 2006 ballot the question posed at the beginning of this section. *2005 J.R. 30 (A-App. 14).*

The referendum passed and the proposed amendment to the Wisconsin Constitution was adopted as Article XIII, Section 13.

ARGUMENT

I. INTRODUCTION.

At its core, this is a voting rights case. In this Nation, as well as in this State, the right to vote is "a fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "The right to vote is the principal means by which the consent of the governed, the abiding principal of our form of government, is obtained." *McNally v. Tollander*, 100 Wis. 2d 490, 498, 302 N.W.2d 440 (1981). "It is a right which has been most jealously guarded and may not under our Constitution and laws be destroyed or even unreasonably restricted." *State ex rel. Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 190 N.W. 563, 565 (1922). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In Wisconsin, "we adhere to the general principle that the individual has the fundamental, inherent right to have his or her vote counted . . ." *Sturgis v. Town of Neenah Bd. of Canvassers*, 153 Wis. 2d 193, 199, 450 N.W.2d 481 (Ct. App. 1989).

McConkey contends that his Constitutional right to vote in a fair election was violated when he and other voters were forced in November 2006 to vote on two separate and distinct proposed amendments to the Wisconsin Constitution, now commonly known as "the marriage amendment," with only a single answer. He requests that the Court reverse the decision of the circuit court and declare that the "marriage amendment" to the Wisconsin Constitution, Article XIII, Section 13, is unconstitutional because the process by which the amendment was submitted to the voters for approval and ratification violated the single subject rule of Article XII, Section 1 of the Wisconsin Constitution.

Article XII, Section 1 sets forth the process by which the Constitution may be amended. In particular, it requires that an election be held at which voters consider whether to approve and ratify proposed amendments, and that at the election, *"if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against*

such amendments separately."[4] An election which does not meet this single subject rule is, by definition, an unfair election.

Section II of this Brief addresses the policy and purpose behind the single subject rule, and why the framers found it important to prevent logrolling, particularly in direct democracy activities. Section III describes the test used by courts in Wisconsin for more than 100 years to determine whether Article XII, Section 1 has been violated, and discusses the three cases that have applied it in the past.

Because none of those three cases have directly stated how the courts are to determine the "purpose" yardstick by which proposed amendments are measured, Section IV offers a logical method consistent with and drawing on existing precedent. Specifically, courts should look to the purpose stated by the two consecutive Legislatures which have chosen to put the proposal to the voters. In this case, both the 2003 and 2005 Legislatures, when they agreed to the proposed amendment, described its purpose in the title of their

---

[4] Throughout this brief, references to Article XII, Section 1, unless otherwise noted, mean that phrase in Article XII, Section 1.

Resolutions as: "***to create*** *section 13 of article XIII of the constitution* ***relating to:*** *providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."* That is the "purpose" yardstick by which the question put to the voters should be measured to determine whether there was in fact more than one purpose in the ballot question, in violation of the single subject rule.

Finally, Section V of this Brief, will show that the ballot question presented to the voters in November 2006 actually contained two separate questions which merited separate consideration, discussion, and voting. When the electors were forced to answer both questions with a single answer, they were effectively denied the right to vote on half of the questions presented. In turn, the appearance of fairness in the election was undermined, as was the public's confidence in the integrity of the election, and Article XII, Section 1 was violated.

II. THE ANTI-LOGROLLING POLICY BEHIND THE SINGLE SUBJECT RULE CONTAINED IN ARTICLE XII, SECTION 1.

Article XII, Section 1 was enacted to ensure that the people had the opportunity to vote on the precise amendments that were proposed to be added to the Constitution. That basic principle is found in the words of the provision: *if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.* The inclusion of that principle in our Constitution was deliberate.[5]

While there is no record of debate on Article XII, Section 1 in the 1848 constitutional convention, the Court can readily determine from the structure of our Constitution that the framers were committed to a republican form of government and provided for very little direct democracy. They made it difficult to amend the Constitution by requiring both houses in two successive sessions of the Legislature to pass an identical resolution calling for a referendum on a

[5] When citing "Article XII, Section 1" this brief is referring to the last phrase of that section as quoted above.

proposed constitutional amendment before it could be submitted to the voters for approval and ratification. An editorial in the *Prairie du Chien Patriot* published during the campaign for adoption of the 1848 Constitution commented about the reasons that the framers sought to ensure that amendments were carefully considered:

> Thus we see that fundamental changes are placed beyond the reach of sudden ebullition of feeling, prompted by whatever motive; and the deliberate action of both legislature and people is required to effect a change so important.

Milo Quaife, *The Attainment of Statehood* 114 (1928).

The framers were "broad gauged men of affairs, intensely practical and hard headed," "a distinguished body of delegates . . [who] were past and future officials of high rank in Wisconsin--judges, legislators, congressmen and governors." Alice Smith, *From Exploration to Statehood* 654 (1985). They were familiar with a mechanism used by some legislative bodies whereby a controversial provision was combined with a more popular one in order to enhance the probability that the combined item would be approved, while the controversial provision, if considered separately, might

not. That process and the method by which to halt it had ancient roots:

> This device for compelling the people to choose between voting for something they did not approve or rejecting something they did approve became so mischievous in Rome by the year 98 B.C. that the *Lex Caecilia Didia* was enacted, forbidding the proposal of what was known as a *lex satura*; that is, a law containing unrelated provisions.

Robert Luce, *Legislative Procedure* 548-549 (1922).

Wisconsin framers' solution to this questionable practice was consistent with the Romans' *Les Caecilia Didia*, and they included similar provisions in our Constitution: Article IV, Section 18, as well as the final phrase of Article XII, Section 1. Article IV, Section 18 specifically prohibits the legislature from logrolling[6] in private or local bills:

> No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

As the Wisconsin Supreme Court observed, the anti-logrolling provision expressed in Article IV, Section 18:

---

[6] "[T]he generally accepted definition of logrolling includes the concept of joining unrelated provisions and creating a union of interests to secure passage of the legislation." *State ex rel Wisconsin Senate v. Thompson,* 144 Wis. 2d 429, 445, 424 N.W.2d 385 (1988).

> promotes independent legislative consideration of separate, unrelated, and distinct proposals. The framers trusted that if a bill affecting private or local interests had a single subject and a title which called attention to the subject matter, legislators and the people affected by the bill would be alerted and could intelligently participate in considering the bill.

City of Brookfield v. Milwaukee Metropolitan Sewerage Dist., 171 Wis. 2d 400, 425, 491 N.W.2d 484 (1992)(internal citation omitted).

The single subject rule expressed in Article XII, Section 1 articulates the same anti-logrolling policy and serves the same purpose for those circumstances where the legislature is proposing an amendment to the Constitution. That constitutionally-mandated policy is crucial to ensuring that amendments to the Constitution are subject to a clear decision by the people. When considering legislation, legislators can negotiate and compromise to pass a statute, and the governor, through the veto power, can force further improvement to a bill. Voters in a referendum, however, have no opportunity to engage in compromise or revision. Consequently, a referendum that does not rigorously follow the single subject rule creates a risk that through a logrolled joint resolution, the legislature will effectively push voters to adopt a more radical

outcome than (a) the legislative process, tempered by the threat of a gubernatorial veto, or (b) separate questions considered separately, might otherwise have produced. This is especially dangerous where the issue addressed in the proposed constitutional amendment is one subject to the "ebullition of feeling" as the issues of marriage and same-sex relationships have become. The wisdom behind Article XII, Section 1 is its command that the people not be forced to a single vote on a dual purpose measure.

In fact, determining whether or how to provide legal protections for same-sex relationships has provoked "one of the great social and political controversies of our time." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶154, 307 Wis. 2d 1, 71, 745 N.W.2d 1(Prosser J. dissenting). The referendum submitted to the voters by 2005 J.R. 30, which combined a reservation of marriage to heterosexual couples with a prohibition on the legislature ever providing the obligations and benefits of marriage to unmarried individuals, deprived Wisconsin's voters of "the opportunity to slug it out in the

process leading to an ultimate decision," *id.* ¶*156,* because they were forced by the structure of the proposal to make an "all or nothing" decision. By finding that the presentation of the "marriage amendment" violates Article XII, Section 1, the Court will vindicate the right of the voters to debate all subjects presented in proposed amendments to our organic law and then have the opportunity to cast their vote on each and every one of them.

III. THE TWO-PART TEST BY WHICH COURTS MUST ANALYZE PROPOSED AMENDMENTS.

Judicial review of a ballot question to amend the Wisconsin Constitution has always required the same two-part test. Not only must the various propositions contained in a ballot question be (1) aimed at a single purpose, they must also be (2) interrelated and interdependent, such that if they had been submitted as separate questions, the defeat of one question would destroy the overall purpose of the multi-proposition proposal. *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785, 791 (1882); *Milwaukee Alliance Against Racist &*

Political Repression v. Elections Bd. of Wis., 106 Wis. 2d 593, 604-05, 317 N.W.2d 420 (1982).[7]

Only three decisions in Wisconsin's history have applied Article XII, Section 1. *Hudd* was the first. The *Hudd* court considered a ballot question that contained as many as four propositions arising from the change from annual to biennial legislative sessions. In applying the two-part test, the court found that the propositions were properly put to the voters in one question. Answering the first prong of the test, that all propositions be aimed at a single purpose, the court observed:

> It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the legislature.

Hudd, 11 N.W. at 791.

---

[7] *Hudd* formulates the test in terms of what qualities a ballot question must have to fail: it must contain two or more propositions which 1) "relate to more than one subject," and, 2) "have at least two distinct and separate purposes not dependent upon or connected with each other." *Milwaukee Alliance*, citing *Hudd*, states the test in terms of what qualities the ballot question must have to pass muster: a ballot question with more than one proposition may be submitted as a single amendment if: 1) the various propositions "relate to the same subject matter," and 2) the propositions "are designed to accomplish one general purpose." While these two decisions, written 100 years apart, do not use identical language to state the test, they state mirror images of the same test.

Addressing the second prong, that the propositions need be interrelated and interdependent, the court stated:

> To make that change it was necessary, in order to prevent the election of members of assembly, half of whom would never have any duties to perform, that a change should be made in their tenure of office as well as in the times of their election, and the same may be said as to the change of the tenure of office of the senators.

Id.

Commenting on the importance of the interrelatedness of the various propositions under the second prong, the *Hudd* court also noted that:

> the proposition to change from annual to biennial sessions is so intimately connected with the proposition to change the tenure of office of members of the assembly from one year to two years, that the propriety of the two changes taking place, or that neither should take place, is so apparent that to provide otherwise would be absurd.

Id. at 790.

In the *Milwaukee Alliance* case, the Supreme Court again found that the single-amendment procedural requirement in Article XII, Section 1 had been met. There, addressing the single purpose prong, the court found that the proposed amendment involved a single general purpose: to "change the constitutional provision from the limited concept of bail to the

concept of 'conditional release.'" *Milwaukee Alliance*, 106 Wis. 2d at 607. It also found, under the second prong, that the two propositions identified by the plaintiff contained in the ballot question–the issue of conditional release and the issue of non-monetary bail–were interrelated, such that the failure of one of those propositions, if submitted as separate questions, would have defeated the overall general purpose of the multi-faceted proposal to "change the historical concept of bail . . . to a comprehensive plan for conditional release. . ." *Id.*

The various facets of that ballot question were integral parts of the overall scheme to fundamentally alter the state's management and control of those charged with crimes but not yet found guilty of those crimes. Such a change required a constitutional amendment, because prior to the amendment, the constitution required that bail be available for all persons criminally charged (except capital offenses). *Id.* at 600.

The final Wisconsin case that has addressed the single subject rule of Article XII, Section 1 is *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). There, the

Supreme Court found a ballot question to have violated the second prong of the single subject rule: the interdependent and interrelatedness prong. That question stated:

> Shall sections 3, 4 and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population?

Id. at 651.

The *Thomson* court first accepted for the sake of discussion that the single general purpose of the ballot question was to direct "the legislature to take area as well as population into account in apportioning the **senate** districts." *Id.* at 656 (emphasis added). It then analyzed one of the propositions contained in the ballot question under the second prong to determine whether it was sufficiently related to that claimed overall purpose.

The court observed that a portion of the amendment proposed changing the method of assigning **assembly** district boundaries, and that the change would be a "drastic, revolutionary alteration of the existing constitutional requirements on the subject." *Id.* Comparing that facet of the

ballot question to the overall general purpose for the question, that is, to direct the legislature to consider area as well as population in drawing senate districts, the court found that "the designation of the boundaries of assembly districts[ ] has no bearing on the main purpose of the proposed amendment, as that is stated by the attorney general[.]" *Id.* The court also found that the proposition relating to assembly boundaries did not "tend to effect or carry out that purpose." *Id.*

Having found a violation of the second prong of the *Hudd* test, the court circled back to the first prong of the test, the question of whether there truly was a single general purpose to the ballot question. The court found there were actually at least two purposes, observing that the proposition regarding assembly districts, "must have some different object or purpose" from the single general purpose regarding senate districts advanced by the attorney general. The court found that the ballot question failed to satisfy the *Hudd* test entitling several changes to be submitted as a single amendment, concluding "a separate submission was required of the

amendment changing the boundary lines of assembly districts." *Id.*

IV. THE PURPOSE OF A PROPOSED AMENDMENT TO THE WISCONSIN CONSTITUTION IS DETERMINED BY REVIEWING THE TITLES PROVIDED BY TWO CONSECUTIVE LEGISLATURES TO THEIR JOINT RESOLUTIONS.

A. Existing Case Law Under Article XII, Section 1 Does Not Direct Courts How To Identify A Proposed Amendment's Purpose.

As the Court of Appeals aptly noted in its Certification to this Court, the shortcoming of the three prior decisions applying the single subject rule test under Article XII, Section 1 is that none of them explicitly state how the courts are to determine the purpose by which proposed amendments are measured: "each of those cases simply asserted an intended purpose without discussion how the court would determine purpose." *(Certification by Wisconsin Court of Appeals, p. 6)*

It is unnecessary for the Court to newly-craft a methodology for determining purpose in an Article XII, Section 1 case. The purpose of a proposed constitutional amendment can be determined from the description of the

amendment in the title of the Joint Resolutions that approve it: both the first consideration Joint Resolution, as well as the second consideration Joint Resolution, which also submits the proposal to the voters. That method is consistent with and draws upon existing precedent, as will be shown below.

B. Current Practice For Titling Joint Resolutions.

All joint resolutions are drafted in the same form and each contains a description of its purpose in its title. Joint resolutions fall into three categories: (1) organizing the Legislative calendar, *see, e.g.,* 2005 Senate Joint Resolution 1 *(A-App. 21)*; (2) expressions by the Legislature of events it wants to note, such as birthdays of prominent individuals, deaths of soldiers and special days or weeks, *see, e.g.,* 2005 Senate Joint Resolution 12 *(A-App. 44)*; and (3) proposing constitutional amendments, s*ee, e.g.,* 2005 Senate Joint Resolutions 2, 9, 10, 19, 21, 25, 33, 35, 53, 54, 61, 63 *(all beginning at A-App. 30).*

The titles of all twelve Senate Joint Resolutions proposing constitutional amendments during the 2005 legislative session follow the same format: they contain a

description of the section of the Constitution to be created or amended, followed by the phrase "relating to," which is then followed by a statement of the purpose of the proposed amendment. For example, the title to 2005 Senate Joint Resolution 10 *(A-App. 40)* is:

> ***To amend*** so as in effect to repeal section 10 (2) of article XIII; to renumber section 10 (1) of article XIII; ***and to amend*** section 1 of article V, section 2 of article V, section 3 of article V, section 7 of article V, section 8 of article V and section 1 of article VII of the constitution; **relating to**: abolishing the office of lieutenant governor (first consideration).

The purpose of that proposed amendment is to abolish the office of lieutenant governor.

The titles to 2003 J.R. 29 and 2005 J.R. 30, the first and second considerations by the Legislature approving the proposed "marriage amendment," followed the exact same pattern. They described the section to be created and explained the purpose for doing so:

> ***To create*** section 13 of article XIII of the constitution; **relating to**: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

(A-App. 13 and 17).

The purpose of the proposed "marriage amendment" was to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

C. Purpose Is Identified From The Title Of A Bill In Single Subject Rule Challenges Under Article IV, Section 18.

Utilizing the "purpose" yardstick stated by the Legislature in the title of its joint resolution is consistent with how courts find a bill's purpose in single subject rule challenges under Article IV, Section 18. Just as with Article XII, Section 1, under Article IV, Section 18, "a bill has a single subject if all of its provisions are related to the same general purpose and are necessarily or properly incident to that purpose." *City of Brookfield v. Milwaukee Metropolitan Sewerage District*, 171 Wis. 2d 400, 427, 491 N.W.2d 484 (1992); *compare to* the test under Article XII, Section 1, discussed in Section III, *supra*. That is, the single subject test is the same under both of these constitutional provisions. The Wisconsin Supreme Court explained the policy behind Article IV, Section 18 this way:

> In adopting art. IV, sec. 18, the framers had two purposes: 1) to guard against combining distinct and unconnected matters in a single bill, thereby uniting various interests in support of the whole bill when they would not unite in favor of the individual matters if considered separately, and 2) to prevent legislators and the public from being misled by the title of a private or local bill. The constitutional amendment promotes independent legislative consideration of separate, unrelated, and distinct proposals. *Durkee v. City of Janesville*, 26 Wis. 697, 701 (1870); *Milwaukee County v. Isenring*, 109 Wis. 9, 23, 85 N.W. 131 (1901). The framers trusted that if a bill affecting private or local interests had a single subject and a title which called attention to the subject matter, legislators and the people affected by the bill would be alerted and could intelligently participate in considering the bill.

Id. (footnote omitted.)

Article IV, Section 18 requires that local and private bills embrace only a single subject and that the subject be expressed in the title. The legislature is used to following the mandate to express a single subject in the title of local and private bills. It is likewise capable, if a proposed constitutional amendment embraces only a single subject, of stating that subject in the title to the Joint Resolutions approving and proposing the amendment to the voters.

D. Relying On The Legislature's Plain Language In The Title Of Its Joint Resolutions Is Also Consistent With Rules Of Statutory Interpretation.

While the rules of statutory interpretation do not apply to joint resolutions because they are not statutes, the principles of statutory interpretation provide guidance as to why the Court should not deviate from focusing on the language describing the purpose of a proposed amendment found in a joint resolution's title when determining its purpose. Statutory interpretation in Wisconsin requires a court to focus first on the plain meaning of the statute.[8] From the plain meaning of the words in the titles of 2003 J.R. 29 and 2005 J.R. 30, the Court can determine the purpose of the proposed amendment: "***to create*** *section 13 of article XIII of the constitution;* ***relating to:*** *providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state*."[9]

---

[8]The methodology for determining plain meaning was fully elucidated in *State ex rel. Kalal v. Circuit Court,* 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

[9]Most certainly, the Court should not apply the test used to substantively construe a constitutional provision when a statute or other

Constitutional amendments are not hurried items slipped into a bill by amendment in the dead of night. They begin as legislative proposals that are considered by each house in two consecutive legislative sessions. Each member of the Assembly and the Senate of at least two Legislatures sees the stated purpose for the proposed amendment before voting on it. If there truly is a single purpose to a proposed amendment, the legislature will have enunciated it. Conversely, if there is more than a single purpose, the legislature's statement of only one will make the absence of a single purpose apparent, as it is in this case.

Were the Court to base its determination of a proposed amendment's purpose on something other than the one found in the Enrolled Joint Resolutions, for instance, by determining purpose from statements made by those participating in the public debate surrounding the amendment, it would be

---

official act has been challenged as violating that constitutional provision. *See Dairyland Greyhound Park v. Doyle,* 2006 WI 107 ¶19, 295 Wis 2d 1, 28, 719 N.W.2d 408. This paradigm has never been applied to a single subject rule challenge, and the Court must guard against ruling on matters not before it.

deviating from the determination of purpose already made by the Legislature and legislating from the bench. That is what the circuit court did, when it found that the purpose of the amendment was "the preservation and protection of the unique and historical status of traditional marriage." *(R. 1, A-App. 7),* 2003 J.R. 29 and 2005 J.R. 30 say nothing about preservation, protection, uniqueness, traditional marriage or historical status.

Would the Court look beyond the plain meaning of words of 2005 Senate Joint Resolution 33, which proposed an amendment to the Constitution "**relating to:** prohibiting partial vetoes from creating new sentences" to determine, for example, that its purpose was "to restore the balance of power between the legislature and the Governor?" Of course it would not, because the purpose can readily be determined from the meaning of the words that the Legislature chose to use in its description.

Likewise, the purpose of the proposed "marriage amendment" is derived from the meaning of the words that

the Legislature chose to use in its description: to provide "that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." 2003 J.R. 29; 2005 J.R. 30 *(A-App. 13 and 17).*

The next question for the Court is whether both portions of the referendum put to the voters are sufficiently related to that expressed purpose, as required by Article XII, Section 1 of our Constitution.

V. THE FORM IN WHICH ARTICLE XIII, SECTION 13 WAS SUBMITTED TO THE VOTERS VIOLATED ARTICLE XII, SECTION 1 OF THE WISCONSIN CONSTITUTION.

A. Article XIII, Section 13 Contains Two Distinct Propositions.

The "marriage amendment" contains two distinct propositions:

1. "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." and,

2. "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

The first portion of the ballot question, "to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state," plainly related to the

2003 and 2005 Legislatures' stated purpose of "providing that only a marriage between one man and one woman shall be valid or recognized in the state." Indeed, the virtual identity of the language between the purpose and the first proposition shows that the purpose was fully met with the first proposition. It begs the question: what room existed for any further provision? The second provision, to provide "that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state," was not referred to or referenced at all in the Legislature's stated purpose, and had an additional and distinctly separate purpose. That separate purpose was to deny the legislature the power to provide unmarried individuals access to all of the rights and responsibilities of civil marriage.

Asking voters to limit the legislature's power to decide how the law should treat non-marital relationships in the context of a proposal with a stated overall objective of identifying whose marriages will be recognized as valid

creates precisely the dilemma that the single-amendment requirement in Article XII, Section 1, was designed to prevent. Under the first proposition contained in the ballot question, a voter need only consider whether marriages involving same-sex couples should be denied validity and recognition by the state of Wisconsin. That can be answered "yes" or "no."

However, to answer the second proposition, whether the legislature should be foreclosed from providing unmarried individuals all of the legal protections, rights, and responsibilities of civil marriage, the voter was required to consider the numerous constituencies who could be affected by the proposal and the large number of rights and responsibilities that could be foreclosed by the second proposition. It is possible to decide that same-sex couples should not be allowed marriage, and at the same time decide that at least some unmarried couples should have access to all of the legal protections, rights and responsibilities associated with marriage.

For instance, a voter might view marriage as a primarily religious institution and based on their faith's teachings regarding homosexuality feel that same-sex couples should not be allowed to marry, but at the same time might recognize that the legal incidents to the civil contract of marriage would benefit the community as a whole if they were available to same-sex couples. Such a voter should have been allowed to vote "yes" on the first proposition and "no" on the second. Similarly, another voter might find it appropriate to deny same-sex couples access to the legal status of marriage, yet wish to leave the door open for the legislature to protect heterosexual elderly couples who, if they were to marry, would lose substantial income based on the Social Security record or pension of a deceased wage-earning spouse. This voter, too, should have been allowed to vote "yes" on the first proposition but "no" on the second. The referendum allowed only two classes of voters: "yes, yes" voters and "no, no" voters. It foreclosed anyone who wanted to vote "yes, no" (or "no, yes") from so voting, thus skewing the results.

Article XII, Section 1 protects the rights of Wisconsin voters to hold all of these views and reflect all of these judgments in their votes. Under our Constitution, voters cannot legitimately and constitutionally be presented with a ballot question that compels them to sacrifice 50% of their true convictions, simply in order to preserve and express another conviction.

The inclusion of the second provision by the Legislature in an amendment the purpose of which was to provide that "only a marriage between one man and one shall be valid or recognized in this state" is directly analogous to the inclusion of the provision regarding assembly apportionment in the amendment found unconstitutional in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). As discussed in Section III, *supra*, in that case, the proposed amendment included a provision directing the legislature to apportion assembly districts according to population without regard to county boundaries, while the purpose of the amendment was to direct "the legislature to take area as well as population into

account in apportioning the senate districts." *Id.* at 656. Most certainly, apportionment of assembly and senate districts can be said to be related; the senate and assembly together make up the Legislature, and the district boundaries of each are related to those of the other. However, the *Thomson* court perceived the provision relating to assembly apportionment insufficiently related to the stated purpose regarding senate apportionment, especially where the change in assembly boundaries was a "drastic, revolutionary alteration of the existing constitutional requirements on the subject."

Here the Legislature, in the face of "one of the great social and political controversies of our times" attached the second provision, not to state whose marriages are recognized as valid in Wisconsin, as was the stated purpose, but to restrict future legislatures from ever confronting the crux of the controversy: what comprehensive legal protections will be given to relationships that exist outside of marriage? That is a purpose separate and apart from the Legislature's stated purpose.

B. To Find That The Joint Resolution Proposed An Amendment With Two Separate Purposes Does Not Require A Substantive Interpretation Of The Meaning Of The Amendment.

Recognizing that the joint resolution submitted two separate amendments to the people in one question involves only the narrow issue of whether the form of the proposed constitutional amendment put to the voters violates the single subject rule of Article XII, Section 1. This dispute does not call upon the Court to determine the exact meaning and reach of the second sentence, a question best left to be answered if and when the legislature creates a new legal status for unmarried individuals that someone contends is identical or substantially similar to that of marriage.

Such a determination is also unnecessary. Even if the second proposition is viewed narrowly as prohibiting "marriage by another name," that is a separate and distinct proposition from reserving the legal status of marriage to opposite-sex couples. As the California Supreme Court recognized in its decision upholding the recent amendment to the California Constitution limiting marriage to opposite-sex

couples (i.e., Proposition 8, codified as California Constitution Article I, Section 7.5), the official designation of "marriage" is, in and of itself, a significant right, separate and apart from the core set of basic substantive legal rights and attributes traditionally associated with marriage. *Strauss v. Horton,* 207 P.3d 48, 74-77 (Cal. 2009):

> Accordingly, although the wording of the new constitutional provision reasonably is understood as limiting the use of *the designation of "marriage"* under California law to opposite sex couples . . . the language of article I, section 7.5, on its face, does not purport to alter or affect the more general holding in the *Marriage Cases* that same sex couples, as well as opposite-sex couples, enjoy the constitutional right, under the privacy and due process clauses of the California Constitution, to establish an officially recognized family relationship.

Strauss, 207 P.3d at 75 (*emphasis in the original*).

C. The *Thomson* Case Should Be Used To Analyze This Ballet Question To Determine That It Violated The Second Prong Of The *Hudd* Test.

The *Thomson* case provides an excellent model by which the Court may analyze the ballot question here. *See State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) and discussion in Section III at pp. 22 - 25, *supra*. The two propositions in the "marriage amendment" ballot question should first be measured against the single general purpose

stated in 2003 J.R. 29 and 2005 J.R.30: "***to create*** Article XIII, Section 13 of the Constitution **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." If the defeat of one of the two propositions found in the proposed amendment would not destroy that asserted overall purpose, *see Thomson*, 264 Wis. at 651, the Court should then consider whether the ballot question has in fact more than one purpose. *See, id.* As explained below, applying that methodology, the referendum question submitted to the voters on November 7, 2006 does not pass the single-amendment procedural requirement of our Constitution.

Assuming that the purpose stated in the joint resolution is a "single purpose," the question under the second prong of the *Hudd* test, which the *Thomson* court applied, becomes: whether, if the two propositions in a referendum had been submitted to the voters separately, and one failed but the other passed, would the overall general purpose have been

defeated. The answer to that question with regard to the second proposition in the referendum is a resounding "no."

Clearly, the first proposition of the ballot question, "only a marriage between one man and one woman shall be valid or recognized as a marriage in this state," that is, stating *whose marriages are valid and recognized by this state,* is directly tied to the asserted general purpose. The stated purpose of the proposed amendment is fully met with the first sentence of the proposed amendment.

As to the relationship between the stated purpose and the second proposition, "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state," there is nothing inherent in a statement of whose marriages will be recognized as valid by the state that requires the determination of whether and to what extent the legislature should be foreclosed from crafting a legal status identical or substantially similar to marriage for unmarried individuals. However, no one could reasonably deny that forcing such a

determination upon the voters is the intent of the second proposition. Likewise, deciding whether to limit the legislature's power to create a scheme through which "unmarried individuals" in Wisconsin may gain most or all of the legal protections provided to married couples in this state does not require a determination of whose marriages are considered valid by the state in the first place.

The latter is the purpose set forth in the titles to 2003 J.R. 29 and 2005 J.R. 30, putting the proposed constitutional amendment to the voters. That stated purpose is constitutionally insufficient because, drawing from Article IV, Section 18 jurisprudence, "a reading of the [proposed amendment] with the full scope of its title in mind discloses a provision clearly outside the title." *City of Brookfield v. Milwaukee Metropolitan Sewerage District*, 171 Wis. 2d 400, 430, 491 N.W.2d 484 (1992).

D. The Ballot Question Addressed Two General Purposes, Not One.

To complete the analysis required by *Hudd,* the Court must finally consider whether there are actually at least two

purposes behind the ballot question. As shown above, while the first proposition of the ballot question is interconnected with the stated purpose of the ballot question, the second proposition is not so related. This Court should find, as the *Thomson* court did, that the second proposition, being insufficiently related to the purpose advanced by the legislature, must have some different object or purpose, and therefore there was more than one purpose to the proposed amendment. Thus, the proposed amendment as submitted to the voters violated Article XII, Section 1.

The circuit court concluded that the two propositions were "two sides of the same coin." *(R. 56, A-App. 7)* That is incorrect. Had the second portion of the ballot question merely proposed that "marriage between any other individuals shall not be allowed, recognized or valid in this state," the circuit court's observation would be true. But the second proposition was not so limited. It was not the obverse of the first.

Rather, the first proposition stated *whose* marriages would be recognized as valid by the state, and the second proposition limited the legislature's power to provide to unmarried people a status that is "identical or substantially similar" to marriage. That is a far different purpose than the first.

The Legislature erred by trying to accomplish two separate and distinct things through one ballot question. By having those two distinct purposes, the ballot question violated the single general purpose prong of the single-amendment requirement set out in Article XII, Section 1 of the Wisconsin Constitution. Having done so, Article XIII, Section 13 is unconstitutional.

VI. CONCLUSION.

In *Loving v. Virginia,* 388 U.S. 1 (1967), the United States Supreme Court said that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man' fundamental to our very

existence and survival." 388 U.S. at 12. (Internal citation omitted.) As such, the determination of who should be allowed access to marriage is a topic that citizens should be permitted to carefully examine. As a separate and distinct consideration, citizens should be allowed to consider whether it is appropriate to tie the hands of the Legislature from creating for any couples, including same-sex couples and elderly heterosexual couples, a legal status "identical or substantially similar" to "one of the basic civil rights of man." The voters were denied the opportunity to consider those two separate and distinct questions separately.

The framers of our Constitution adopted Article XII, Section 1 to ensure that the citizens of this state would not be manipulated into adopting an amendment to the Constitution that coupled an emotionally laden and more popular provision with one that did not necessarily have the same appeal. Applying the wisdom of the framers of our Constitution, the judgment of the circuit court should be reversed and this Court should declare that Article XIII,

Section 13 of the Wisconsin Constitution is unconstitutional and void because the form by which it was submitted to the voters for consideration violated Article XII, Section 1 of the Wisconsin Constitution.

Dated this 8th day of July, 2009.

CULLEN WESTON PINES & BACH LLP

By: /s/ Tamara B. Packard
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111

EDWARD S. MARION ATTORNEY-AT-LAW LLC

By: /s/ Edward S. Marion
Edward S. Marion, SBN 1016190

Attorneys for Plaintiff-Appellant-Cross-Respondent William C. McConkey

Certification of Brief

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,024 words.

/s/ Tamara B. Packard
Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

Certificate of Compliance with Rule 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

/s/ Tamara B. Packard
Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111