STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-
Cross-Respondent,

v.

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

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

COMBINED BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-CROSS APPELLANT

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RESPONDENT'S BRIEF

The respondent, Attorney General J.B. Van Hollen, hereby submits his brief in the above captioned action.

STATEMENT OF THE ISSUES

Issue 1: What is the appropriate standard for evaluating compliance of a constitutional amendment with the separate amendment rule of article XII, section 1 of the Wisconsin Constitution?

The circuit court, adhering to this Court's precedents, answered that it is within the discretion of the Legislature to submit several distinct propositions to the voters as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose.

Issue 2: Did the submission of proposed article XIII, section 13 of the Wisconsin Constitution to the voters violate the separate amendment rule contained in article XII, section 1?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Attorney General concurs with McConkey that holding oral argument and publishing the Court's decision in this case are appropriate.

STATEMENT OF THE CASE

The central question in McConkey's appeal is whether article XIII, section 13 of the Wisconsin Constitution—what will be referred to here as the "marriage amendment"—in fact consists of two

amendments rather than one, thereby violating the constitutional rule that amendments must be presented separately to voters. (Wis. Const. art. XII, § 1). The circuit court held that the amendment complied with the separate amendment rule and dismissed McConkey's complaint. The question in the Attorney General's cross-appeal is whether McConkey's factual concessions before the circuit court demonstrate that he lacks standing to challenge the amendment under article XII, section 1.

STATEMENT OF FACTS

The Attorney General does not dispute the accuracy of the facts presented in McConkey's Brief, but he does challenge the significance McConkey attaches to some of those facts. McConkey's statement is also incomplete.

On November 7, 2006, voters in Wisconsin approved a referendum that added article XIII, section 13 to the Wisconsin Constitution. Known as the "marriage amendment," the amendment was proposed to the voters in a ballot question that read as follows:

> 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?

The ballot question for this amendment had been introduced and voted on by two successive sessions of both houses of the state Legislature, as required by Wis. Const. art. XII, § 1. The legislative resolution triggering the presentment of the question to voters was 2005 Senate Joint Resolution 53 (2005 Enrolled Joint Resolution 30). The Legislative Reference Bureau ("LRB") explained the proposal contained in 2005 Senate Joint Resolution 53 in the following way: "This proposed constitutional amendment . . . provides 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." (R. 47, R-Ap. 101)[1]

The relationship between the first and second parts of the marriage amendment was a topic of significant discussion and debate both inside and outside the Legislature. Legislative sponsors of the marriage amendment said in a memo to their colleagues that the second part of the amendment would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." (Memo from Representatives Gundrum, Wood, *et al.* to Legislators, January 29, 2004; R-Ap. 104). ""The proposal preserves 'marriage' as it has always been in this state, as a union between one man

[1]References to the circuit court record are abbreviated "R.," with additional references to the Appellant's Appendix (A-Ap.) or Respondent's Appendix (R-Ap.), as appropriate.

and one woman.'" (*Id.*) In an article about the hearing on 2005 Assembly Joint Resolution 67 (the Assembly companion resolution to 2005 SJR 53), one of the authors of the proposed amendment said that it was drafted to prevent the state from creating "a new kind of marriage." ("Different Views But Equal Passion," *Milw. Journal Sentinel*, November 29, 2005; R. 47; R-Ap. 105-08).

Attempts to delete or modify the second part of the proposed amendment failed both in the Senate and in the Assembly. (*See* Assembly Amendment 1 to 2003 AJR 66; Senate Amendment 9 to 2003 AJR 66; Senate Amendment 4 to 2005 SJR 53; Senate Substitute Amendments 1, 4, 6 to 2005 SJR 53; R. 47, App. 114, 117.)

On March 1, 2004, the Senate Judiciary, Corrections and Privacy Committee held a public hearing on SJR 63, the companion resolution to AJR 66, regarding the marriage amendment. On March 4 and 5, the Assembly debated AJR 66, and it passed the Assembly on a 68-27 vote. The Senate then took up the measure, considering a substitute amendment as well as 12 separate amendments to the resolution, all of which were tabled. SJR 63 passed the Senate on a vote of 20-13.

On November 23, 2005, the Legislature took up its second consideration of the marriage resolution in the form of AJR 67 and SJR 53, which were textually identical to the resolution voted out of the previous session of the Legislature. A joint public hearing was held on the resolutions on November 29, 2005. The

Senate passed the resolution by a vote of 19-14, with 21 amendments having been offered, all of which were either voted down, withdrawn, or tabled. On February 28, 2006, the joint resolution cleared the Assembly on a vote of 62-31.

The Legislature then published a Notice of Referendum Election for three months prior to the November 7, 2006, general election. (R-Ap. 109-10). The Notice contained the full text of 2005 Enrolled Joint Resolution 30, as well as an "Explanation" of the effect that "yes" and "no" votes would have, prepared by the Attorney General, which read as follows:[2]

> Under present Wisconsin law, only a marriage between a husband and a wife is recognized as valid in this state. A husband is commonly defined as a man who is married to a woman, and a wife is commonly defined as a woman who is married to a man.
>
> A "yes" vote would make the existing restriction on marriage as a union between a man and a woman part of the state constitution, and would prohibit any recognition of the validity of a marriage between persons other than one man and one woman.
>
> A "yes" vote would also prohibit recognition of any legal status which is identical or substantially similar to marriage for unmarried persons of either the same sex or different sexes. The constitution would not further specify what is, or what is not, a legal

[2]Wisconsin Stat. § 10.01(2)(c) requires the inclusion of an explanation of the effect of "yes" and "no" votes on state referenda, to be prepared by the Attorney General.

> status identical or substantially similar to marriage. Whether any particular type of domestic relationship, partnership or agreement between unmarried persons would be prohibited by this amendment would be left to further legislative or judicial determination.
>
> A "no" vote would not change the present law restricting marriage to a union between a man and a woman nor impose restrictions on any particular kind of domestic relationship, partnership or agreement between unmarried persons.

(R-Ap. 109-10).

The referendum passed on November 7, 2006, by a vote of 1,264,310 to 862,924. *See* WISCONSIN BLUE BOOK 2007-2008, at 246.

Seven months later, on July 27, 2007, McConkey filed a "Petition for Injunction and Declaration of Unconstitutionality," challenging the substance of the marriage amendment and the procedure leading to its adoption by voters. Upon the motion of the Attorney General, the circuit court held that McConkey lacked standing to challenge the substantive constitutionality of the marriage amendment, but further held that McConkey did have standing to litigate his claim that the ballot question submitted to voters violated the separate amendment rule embodied in article XII, section 1 of the Wisconsin Constitution.

The circuit court ultimately held that the ballot question and the marriage amendment fully complied with the requirements of article XII, section 1 in that it "properly included two

propositions that both related to the same subject matter and were designed to accomplish the same general purpose." (A-Ap. 7-8). An appeal and cross-appeal followed.

ARGUMENT

I. INTRODUCTION.

McConkey's challenge to article XIII, section 13 on separate-amendment grounds is based on a misreading of this Court's precedents, and seeks to adopt into Wisconsin law a legal standard that is used in only a tiny fraction of states with separate amendment rules, most of which have constitutional structures different from Wisconsin's. This Court has recognized and respected the Legislature's discretion in crafting the language of proposed constitutional amendments; McConkey's proposed standard would deprive the Legislature of discretion.

The marriage amendment, however, satisfies both the standard set forth by this Court, and the stricter standard proposed by McConkey. As this brief will show, the circuit court was correct in recognizing the close linkage between the two propositions contained in the amendment. One part confined marriage to unions of one man and one woman; the other part ensured that the limitation of the first part could not be nullified by the creation of new legal statuses identical or substantially similar to marriage.

To sustain his challenge, McConkey devises a conception of the purpose of the marriage amendment that ignores the procedure this Court uses to guide its interpretation of constitutional amendments and defies common sense.

McConkey ignores the abundant evidence that shows the amendment's purpose to have been, as the circuit court held, "the preservation and protection of the unique and historical status of traditional marriage" as a union of one man and one woman. (A-Ap. 49).

II. STANDARD OF REVIEW.

A claim that a ballot question violates the separate-amendment rule of article XII, section 1 poses the question "whether the legislature in the formation of the question acted reasonably and within their constitutional grant of authority and discretion." *Milwaukee Alliance v. Elections Board*, 106 Wis. 2d 593, 604, 317 N.W.2d 420 (1982). This is a question of law that imposes no presumption in favor of, nor burden of proof upon, either party. *Id*. at 602, 604. On appeal from the circuit court's ruling upholding the marriage amendment, this question of law is reviewed *de novo* by this Court. *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141.

III. THE LEGISLATURE HAS DISCRETION TO SUBMIT SEPARATE PROPOSITIONS IN A SINGLE BALLOT QUESTION, PROVIDED THE PROPOSITIONS RELATE TO THE SAME SUBJECT AND ARE DESIGNED TO ACCOMPLISH THE SAME GENERAL PURPOSE.

A. The Separate Amendment Rule.

Article XII of the Wisconsin Constitution dates to 1848 and has never been amended. It contains one of the first separate amendment rules to appear in an American state constitution.[3] In Wisconsin, a committee tasked with drafting the provision submitted what is now section 1, and the convention adopted the provision without any debate. Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 WIS. L. REV. 648, 691 (1949).

In the history of Wisconsin's constitution, there have been 191 amendments submitted to voters, 141 of which were adopted. *See* "History of Constitutional Amendments," WISCONSIN BLUEBOOK 2007-08, at 246. Though these numbers may seem large, they are average in

[3]New Jersey appears to have been the first to adopt such a rule, in 1844. *See* N.J. Const. art. IX, § 5; *Californians for An Open Primary, et al. v. McPherson*, 134 P.3d 299, 305 n.9 (Cal. 2006).

comparison with the constitutional histories of other states.[4]

All fifty state constitutions enable their Legislatures to begin the amendment process by legislative vote. BOOK OF THE STATES 2008, Table 1.2, at 12 (R-Ap. 113). Wisconsin is among 17 states that require only a simple majority vote in the Legislature before presentment to the electorate, but it is also one of only 11 states that require passage by two successive sessions. *Id*. Eighteen state constitutions also authorize amendment by voter initiative (*i.e.*, without prior proposal by the Legislature); Wisconsin's is not among them. Forty-two state constitutions, including Wisconsin's, also provide for the calling of constitutional conventions. In Wisconsin, no convention has been held since the constitution first was enacted in 1848.

A rule requiring constitutional amendments to be presented to voters so that they can be voted on separately appears in the law of 33 states, including Wisconsin's, often in terms identical or nearly-identical to Wisconsin's. Almost all these rules appear within the text of the state constitutions themselves. Alaska's rule is found in its statutes, and in Illinois the supreme court has

[4]Alabama, for instance, has adopted 799 amendments since its current constitution came into force in 1901, South Carolina has amended almost 500 times since 1896, and California 514 times since 1879. (R-Ap. 111).

read the rule into a constitutional requirement that "all elections shall be free and equal."[5]

Significantly, almost all of these rules, like Wisconsin's, are separate *amendment* rules. Indeed, a number of states use language identical to Wisconsin's, requiring not that each amendment be confined to a single subject, but simply that no two amendments be combined on

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[5]*See* Alaska Stat. § 15.50.010; Ariz. Const. art. 21, § 1; Ark. Const. art. XIX, § 22; Cal. Const. art. 18, §§ 1, 8; Colo. Const. art. XIX, § 2; Fla. Const. art. XI, § 3 (amendment by initiative only); Ga. Const. art. X, § 1, ¶ 2; Idaho Const. art. XX, § 2; Ind. Const. art. 16, § 2; Iowa Const. art. X, § 2; Kan. Const. art. 14, § 1; Ky. Const. § 256; La. Const. art. XIII, § 1, ¶ B; Md. Const. art. XIV, § 1; Mass. Const. art. 48, Pt. 2, § 3; Minn. Const. art. IX, § 1; Miss. Const. art. 15, § 273; Mo. Const. art. XII, § 2(b); Mont. Const. art. 14, § 11; Neb. Const. art. XVI, §§ 1, 2 (separate amendment rule for legislature-proposed amendments; "one subject" limitation for amendments by voter initiative); N.J. Const. art. IX, § 5; N.M. Const. art. XIX, § 1; Ohio Const. art. XVI, § 1; Okla. Const. art. XXIV, § 1; Or. Const. art. XVII, § 1 (separate amendment rule for legislatively-proposed amendments); Or. Const. art. IV, § 1 ("one subject" rule for amendments by voter initiative); Pa. Const. art. XI, § 1; S.C. Const. art. XVI, §§ 1, 2 (separate amendment rule and distinct "germane to the subject" rule); S.D. Const. art. XXIII, § 1; Utah Const. art. XXIII, § 1; Wash. Const. art. XXIII, § 1; W. Va. Const. art. XIV, § 2; Wis. Const. art. XII, § 1; Wyo. Const. art. 20, § 2. *See also In re Opinion of Supreme Court*, 71 A. 798 (R.I. 1909) (giving Legislature discretion to submit several amendments separately to voters, in light of constitution's lack of any rule either mandating or limiting separate submission).

the ballot. In working out what is "an amendment," the state courts have introduced the "single subject" and "purpose" concepts to the analysis of the separate amendment rule, as will be further discussed below.

Of the 33 state constitutions referenced above, only 8 use the "subject" terminology in any fashion, and in 5 of those states, Kentucky, Mississippi, South Dakota, Utah, and West Virginia, the constitutions expressly *permit* multiple, related "subjects" in a single amendment. *See* Ky. Const. § 256; Miss. Const. art. 15, § 273; Mo. Const. art. XII, § 2(b); Okla. Const. art. XXIV, § 1; S.C. Const. art. XVI, § 1; S.D. Const. art. XXIII, § 1; Utah Const. art. XXIII, § 1; W. Va. Const. art. XIV, § 2.

Three state constitutions among the 33 include both a separate amendment (read: separate *vote*) rule, on the one hand, and a single subject rule on the other. *See* Cal. Const. art. 11, § 8, sub. d. (limiting amendments by initiative only to "one subject"); S.C. Const. art. § XVI, § 1 (two rules, both apply to all amendments); Or. Const. art. XVII, § 1, art. IV, § 1(2)(d). This is a significant feature of the legal landscape, as will be explained further below in the section addressing McConkey's argument for a heightened standard of review.

It is generally recognized that the separate amendment rule is intended to prevent logrolling and riding, and to encourage transparency. *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process,* 67 U. PITT. L. REV. 803, 813 (2006). Logrolling is the passage of more than one measure, each of which lacks majority support, by

combining them into a single proposal. A distinct purpose, often conflated with logrolling, is to prevent riding, whereby passage of a measure supported by only a minority of voters is obtained by hitching it to a measure supported by the majority.

The separate amendment rule also promotes transparency, in the sense that limiting the scope of each constitutional change will generally make it easier for voters to understand what is being proposed. The purpose of the separate amendment rule will be discussed further in the context of the appropriate standard to be applied when an amendment is challenged.

B. The Wisconsin Standard.

This Court has explained that "[i]t is within the discretion of the legislature to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose." *Milwaukee Alliance*, 106 Wis. 2d at 604-05 (citing *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336, 11 N.W. 785 (1882)). This standard has been reaffirmed in each of the three Wisconsin cases involving single-amendment challenges. *See also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953).

In light of this standard, it is not necessary for the Legislature to submit separate ballot questions whenever it would be *possible* to do so. As this Court stated in *Hudd* with respect to the amendment at issue in that case,

> [w]e do not contend that the legislature, if it had seen fit, might not have adopted these

> changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose.

Hudd, 54 Wis. at 337; *see also Milwaukee Alliance*, 106 Wis. 2d at 608 (quoting a portion of the above language from *Hudd*).

McConkey acknowledges that there has been only one standard used by this Court in separate amendment cases, *see* Appellant's Brief at 19-25, but he relies on a logical fallacy, and a misreading of this Court's cases, to argue that the standard is more stringent than it really is. McConkey argues that in order to place multiple propositions before voters in a single proposed amendment, the propositions must be "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." (Appellant's Brief at 19).

However, to say that the Court will not require the Legislature to separate mutually-dependent propositions does not mean that whenever two propositions are *not* mutually-dependent, they *must* be separated. As will be more fully explained below, some of the amendments upheld by the Court contained multiple parts that were so closely interrelated that to present them separately to voters could have "destroy[ed] the usefulness of all the other

provisions when adopted." *Hudd*, 54 Wis. at 335. However, this Court has never required that all propositions in a given amendment be interdependent in order to survive constitutional scrutiny.

Indeed, this Court specifically rejected the standard that McConkey advocates here, in *Milwaukee Alliance*, 106 Wis. 2d at 607 ("The Alliance argues that the issues of conditional release and anti-monetary bail should have been submitted to the voters as separate questions, because the successful adoption of either one would not have destroyed the usefulness of the other. That is not realistic.")

The standard set forth in *Hudd* influenced the high courts of other states and eventually came to be the dominant standard in the United States. As noted in 1971 by the Supreme Court of Kansas, "[t]he question of duplicity of an amendment was decided by the Wisconsin Supreme Court in the early case of [*Hudd*], which has been followed by a vast majority of the courts of the country as stating a sound rule." *Moore v. Shanahan*, 486 P.2d 506, 516, (1971) (citation omitted); *People v. Sours,* 74 P. 167, 178 (Colo. 1903); *Lobaugh v. Cook*, 102 N.W. 1121, 1124, (Iowa 1905); *Curry v. Laffoon*, 88 S.W.2d 307, 308 (Ky. 1935); *see also Gabbert v. Chicago, R.I. & P. Ry. Co*, 70 S.W. 891, 895 (Mo. 1902); *State v. Wetz*, 168 N.W. 835, 846-48 (N.D. 1918) (though note that North Dakota repealed its separate-amendment rule in 1918); *State v. Cook*, 185 N.E. 212 (Ohio 1932);

In some states, a language of "germaneness" is used to express Wisconsin's "relate to the same

subject" and "designed to accomplish one general purpose" standard. *See, e.g.*, *Carter v. Burson*, 198 S.E.2d 151, 157 (Ga. 1973); *Penrod v. Crowley*, 356 P.2d 73, 79 (Idaho 1960); *Andrews v. Governor of Md.*, 449 A.2d 1144, 1150 (Md. 1982); *Fugina v. Donovan*, 104 N.W.2d 911, 914 (Minn. 1960); *State ex rel. Roahrig v. Brown*, 282 N.E.2d 584, 586 (Ohio 1972); *City of Raton v. Sproule*, 429 P.2d 336, 342 (N.M. 1967); Either under the "germaneness" language, or language close to Wisconsin's own, this standard has remained the basic analytic tool for almost all state courts enforcing a separate-amendment rule.[6]

In the final analysis, however, the Wisconsin marriage amendment passes muster under both this Court's established standard, and under the more stringent standard that McConkey erroneously derives from the case law. As the circuit court held, A-Ap. at 7-8, the two propositions contained in the marriage amendment are not only related to the same subject matter and designed to accomplish one general purpose, but they are also interdependent, such that separating them could have destroyed the overall purpose of the amendment.

[6]Some states apply a standard less stringent than Wisconsin's, such as Arkansas, which requires only that the parts of each amendment "relate to" the same subject. *Brockelhurst v. State*, 111 S.W.2d 527, 530 (Ark. 1937).

C. This Court Accords Deference to the Legislature's Wording of Proposed Constitutional Amendments.

The foregoing discussion shows that when a ballot question is challenged, as here, on the grounds that it includes multiple amendments that should have been submitted separately, this Court accords deference to the Legislature's formulation of the ballot question. As stated by this Court, "[t]he issue is whether the legislature in the formation of the question acted reasonably and within their constitutional grant of authority and discretion." *Milwaukee Alliance*, 106 Wis. 2d at 604. This Court has given substance to the Legislature's discretion by formulating a standard that leaves room for judgment and common sense. McConkey's stricter standard would leave the Legislature with almost none.

Wisconsin's constitution does not permit amendment by voter initiative; as McConkey recognizes, only the Legislature can initiate the process of constitutional amendment or revision. However, McConkey fails to appreciate the significance of this limitation for judicial review of separate amendment challenges. Since the framers of the constitution invested the power to initiate and draft proposed constitutional amendments in the Legislature, they made compliance with the separate amendment rule first and foremost the responsibility of the Legislature.

The amendment process, requiring as it does passage of identical resolutions by successive

sessions of the Legislature, allows significant time for the public and government leaders to raise concerns about separate-amendment compliance, if any exist. Significantly, the legislative history of Wisconsin's marriage amendment shows no indication of an articulated concern that the amendment could run afoul of the separate amendment rule.

Like Wisconsin, the high courts of many states have explicitly accorded deference to their Legislatures when evaluating compliance with the separate amendment rule. *See Californians for An Open Primary v. McPherson*, 134 P.3d at 318 ("[W]e long have construed our two single subject provisions in an accommodating and lenient manner so as not to unduly restrict the Legislature's or the people's right to package provisions in a single bill or initiative."); *Lobaugh*, 102 N.W. at 1124 ("some discretion is, of necessity, allowed the General Assembly"); *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005) (giving Legislature "substantial deference"); *State ex rel. Clark v. State Canvassing Bd.*, 888 P.2d 458, 461 (N.M. 1995) ("the standard of review to be applied is the reasonable or rational basis test . . . and the principal question to be answered is 'whether the legislature reasonably could have determined that a proposed amendment embraces but one object.'"); *Sadler v. Lyle*, 176 S.E.2d 290, 293, (S.C. 1970) ("Of course, the legislative construction is not necessarily controlling, but 'there is a strong presumption that it is correct and should be adopted by the court'"); *Gottstein v. Lister*, 153 P. 595, 598, (Wash. 1915) ("the question must be viewed in a broader aspect as one largely of common sense, and in a spirit of deference to the discretion of the Legislature.").

McConkey's standard would deprive the Legislature of the meaningful discretion that this Court has recognized under our constitutional framework. By requiring that only mutually-dependent propositions can be included in any one amendment, McConkey's standard would make compliance with the separate amendment rule extremely difficult. Under that standard, compliance with the rule would require prescience of what the courts will consider "necessary" to the accomplishment of any given purpose. In rare instances, this may be easy to predict, but in most matters of public policy it would not be. As the next section will show, state courts that have adopted McConkey's stricter standard have made it virtually impossible to amend their constitutions.

D. MCCONKEY'S PROPOSED STANDARD IS THAT OF A SMALL NUMBER OF STATES WHOSE CONSTITUTIONAL STRUCTURES SIGNIFICANTLY DIFFER FROM THAT OF WISCONSIN.

McConkey's heightened "interrelated and interdependent" standard is used in only a small number of states, most of which articulate and structure the separate amendment rule in a way significantly different from Wisconsin's. Moreover, McConkey's standard has been expressly rejected by some states, and has come under significant judicial criticism. This Court should avoid McConkey's invitation to alter its

longstanding approach to separate amendment challenges.

The highest courts of only a few states have articulated a standard stricter than Wisconsin's, requiring that each discernable part of an amendment be inter-dependent, so that if any part possibly could stand alone, it must do so. *See Idaho Endowment Fund Inv. Bd. v. Crane,* 23 P.3d 129, 133 (Idaho, 2001); *Marshall v. State ex rel. Cooney*, 975 P.2d 325, 330 (Mont. 1999); *Cambria v. Soaries*, 776 A.2d 754, 765 (N.J. 2001); *Armatta v. Kitzhaber*, 959 P.2d 49, 64 (Or. 1998) (*overruled on other grounds by Swett v. Bradbury*, 67 P.3d 391 (Or. 2003)); *Lee v. State*, 367 P.2d 861, 864 (Utah 1962).

However, in only 2 of these states, Idaho and Utah, do the constitutions have separate amendment rules like Wisconsin's. In the other three states, the constitutions contain both a separate amendment rule and a distinct single-subject (or single-object) rule. Mont. Const. art. 14, § 11; N.J. Const. art. 9, ¶ 5, art. 4, § 7, ¶ 4; Or. Const. art. XVII, § 1, art. IV, § 1(2)(d). The high courts in those three states have determined that the separate vote rule must place a stricter requirement on amendments than the single-subject rule, which they otherwise interpret as Wisconsin interprets its separate amendment rule.

So McConkey asks this Court to abandon its hundred-year old standard in favor of a standard used by only two states with constitutional structures like Wisconsin's. Such a change would be inadvisable and damaging. Since 1998, when Oregon adopted McConkey's preferred "interdependent" standard, only one Oregon

amendment subjected to the standard has survived judicial scrutiny. *See Californians for an Open Primary*, 134 P.3d at 323 and n.41 (noting that in only one Oregon appellate decision raising a separate-vote issue has a violation not been found, and reviewing cases). Studying the effects of the adoption of the Oregon/McConkey standard, one commentator has predicted that most constitutional amendments will fail if subjected to it. Cody Hoesly, [Comment] *Reforming Direct Democracy: Lessons From Oregon*, 93 CAL. L. REV. 1191, 1224 (2005).

The California Supreme Court, having carefully reviewing this recent history, and the longer-term history of the separate amendment rule in the United States, expressly rejected the Oregon/McConkey standard, even though California is a state that has both a separate

amendment and distinct single-subject rule for constitutional amendments. *Californians for an Open Primary*, 134 P.3d at 327-28.[7]

IV. THE BALLOT QUESTION PROPOSING THE MARRIAGE AMENDMENT COMPLIED WITH THE SEPARATE AMENDMENT RULE.

The ballot question proposing the marriage amendment complied with the separate amendment rule whether one applies the standard used by this Court in *Hudd*, *Thomson,* and *Milwaukee Alliance*, or the standard proposed by McConkey. McConkey attempts to distinguish the two propositions by positing that the sole purpose of the amendment was to limit the existing status of marriage to heterosexual unions. According to McConkey, anything other than modifying the definition of the word "marriage" constitutes a

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[7]Further deviating from Wisconsin precedents, McConkey claims that the separate amendment rule is equivalent to the "single subject" test under article IV, section 18 of the Wisconsin Constitution, which provides, "No private or local bill may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." (Appellant's Brief at 28-29). McConkey finds language resembling his "interdependent" standard in the case law applying that latter rule. (Brief at 28). However, although article IV, section 18 has been part of the Wisconsin Constitution since 1848, this Court has never suggested that the standard applicable to that section should also be used in applying the separate amendment rule. McConkey offers no rationale for doing so now.

completely separate purpose requiring a separate vote. But McConkey's approach to determining the purpose of constitutional amendments is pure invention, unhinged from this Court's precedents, and his concept of "purpose" is unreasonably narrow, both in the abstract and in relation to the amendment at issue here.

A. The General Purpose of the Amendment Was To Preserve and Protect the Unique and Historical Status of Traditional Marriage As A Union between One Man and One Woman.

As the circuit court correctly put it, the purpose of the marriage amendment was "the preservation and protection of the unique and historical status of traditional marriage." (A-Ap. 7). The marriage amendment contains two propositions that together effectuate that purpose.

The goal in construing a constitutional amendment is "'to give effect to the intent of the framers and of the people who adopted it.'" *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967). This Court has held that the purpose of an amendment may be determined from the plain meaning of the provision, the debates and practices at the time, and the earliest legislative action following adoption. *Dairyland Greyhound Park, v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408; *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996).

This methodology differs from that employed in the interpretation of statutes. Interpretation of constitutional provisions requires greater reliance on extrinsic sources because these provisions do not become law until they are approved by the voters, who are more likely to rely on extrinsic sources, such as press reports and the public statements of legislators, in forming a perception of what the provision is intended to accomplish. *See Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶ 115-16 (Prosser, J., concurring in part and dissenting in part).

The text of the marriage amendment shows that its purpose was to preserve and protect the unique and historical status of marriage as a union between one man and one woman, and not only to limit marriages to heterosexual unions. The first part of the amendment limits the existing legal status of "marriage" to unions between one man and one woman; the second part prohibits the recognition of any other legal status that would be identical or substantially similar to marriage but that, unlike marriage, could extend to unmarried individuals—*e.g.*, to same-sex couples. Taken together, the two propositions in the amendment come at the same purpose from two different directions: the first placing a constitutional limitation on who may enter into marriages; the second ensuring that entering into marriage is the only way to obtain the legal incidents now identified with marriage.

McConkey's approach is to ignore the text of the amendment and focus exclusively on the language contained in the preamble or title to the joint resolution containing the proposed

amendment. Thus, McConkey argues that the purpose of the amendment is described in the following, *and only* in the following, statement from 2005 Joint Resolution 30: "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." (Appellant's Brief at 28). According to McConkey, since this one sentence does not specifically mention preserving the unique status of marriage, that was not part of the amendment's purpose at all.

But to confine the Court's study of this or any constitutional amendment's purpose to that single sentence preceding the joint resolution, ignoring all other sources including text, legislative context, and public debates, is contrary to this Court's precedents and to commonsense. The purpose of the marriage amendment is made abundantly clear by the full text of the amendment, the explanatory material in the public notice of referendum, related sources such as legislators' public statements, press reports, and legislative bureau memoranda, all of which McConkey ignores. These sources confirm that the amendment was understood as being designed, not only to limit the existing legal status of marriage to opposite-sex unions, but to preserve marriage as a unique legal status so that the limitation prescribed in the first part of the amendment could not be rendered illusory through separate legislation.

The LRB's analysis summed up the proposal in the following way:

> This proposed constitutional amendment . . . provides 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." [R. 47, App. 101; R-Ap. 101.]

While this analysis apparently was not reproduced in the *enrolled* joint resolution, it appeared prominently in each of the Assembly and Senate resolutions preceding it. The LRB's statement of what the amendment provides is a relevant indicator of what its purpose is.

Sponsors of the marriage amendment said in a memo to their colleagues in the Legislature that the second part of the amendment would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." (R-Ap. 104). The proposal preserves "marriage' as it has always been in this state, as a union between one man and one woman.'" (R-Ap. 104). The sponsors of the amendment were motivated not only to confine the marriage status to opposite-sex couples but to ensure that this limitation could not be circumvented by the creation or recognition of other legal statuses that mimic marriage.

In an article about the Senate hearing on 2005 Assembly Joint Resolution 67, one of the authors of the amendment said that it was drafted

to prevent the state from creating a new kind of marriage. (R-Ap. 105-08).

Attempts to delete the second proposition in the proposed amendment failed both in the Senate and in the Assembly. This was known to the public through press reports that covered the legislative debate ("Referendum closer on gay marriage ban," *Milw. Journal Sentinel*, December 7, 2005; R-Ap. 115-18). To argue, as does McConkey, that the true purpose of the amendment was only to limit marriage to one man and one woman and that the prohibition on "marriage-like" legal statuses was essentially a surprise, is unrealistic and unreasonable.

The second portion of the Wisconsin amendment needs also to be considered in light of the fact that just as it was being proposed and voted on, the Legislature was also considering a proposed law which, if enacted, would have created a new legal status conferring *all* the statutory and other rights and responsibilities of marriage, a status it termed "domestic partnership." (*See* 2003 Assembly Bill 955; 2005 Senate Bill 397; 2005 Assembly Bill 824; R-Ap. 138-44).[8] The LRB explained that proposed new law in the following way: "The bill provides that any state statute or rule that applies to a married person or a formerly married person, such as a widow, applies in the same respect to a domestic partner or a person who was formerly a domestic partner." ("Analysis by the Legislative Reference Bureau of 2005 Senate Bill 397," R-Ap. 139).

[8]The text of all three bills was identical.

It was clear to proponents of a constitutional ban on same-sex marriage that such a ban could be circumvented by the creation of an alternative legal status that was like marriage in all but name, because such a proposed alternative status was being suggested at the very same time. The content of this separately-considered legislative proposal sheds light on the purpose of the marriage amendment. *Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶ 19.

Finally, since the issue of same sex marriage was a topic of intense controversy and discussion around the United States at the time Wisconsin's amendment was being considered, the Court should consider relevant legal developments in the country as a whole when determining what the Wisconsin amendment was intended to accomplish.

The Wisconsin amendment, in fact, was motivated in significant part by developments in the law of other states. (*See* Wis. Legis. Council Memo, February 24, 2006, to Rep. Gundrum; R-Ap. 119-22). Sponsors of the amendment, and much of the public, had become aware of court decisions in other states invalidating marriage statutes on constitutional grounds. *See Baker v. State of Vermont*, 744 A.2d 864 (1999); *Goodridge, et al. v. Dep't of Public Health*, 798 N.E.2d 941 (2003). And it was public knowledge that in Vermont, the state Legislature had responded to *Baker* by enacting a civil union law that provided eligible same-sex couples the opportunity to "obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." (2000 VT. LAWS P.A. 91 (H. 847), § 2; *see* VT. STAT.

ANN. tit. 15, §§ 1201-1207).[9] The awareness that a legal status identical or substantially similar to marriage could be created legislatively, vitiating a limit on marriage to heterosexual unions, helps explain what the purpose of Wisconsin's amendment was.

B. The Two Parts of the Marriage Amendment Are Both Related to the Subject Matter of the Amendment and Designed to Accomplish Its General Purpose.

Marriage is not just a word, but a legal status conferring rights and responsibilities upon the individuals who enter into it. The marriage amendment limits marriage to a union between one man and one woman. But to ensure that this limitation could not be substantively avoided through legislation, it was within the Legislature's discretion to draft the amendment also to prohibit a legal status conferring the identical or substantially similar rights and responsibilities as marriage. The second sentence in the marriage amendment is the complement to the first. As the circuit court put it, "The two propositions . . . are two sides of the same coin." (A-Ap. 7).

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[9]In Massachusetts, the Legislature sought an opinion from the state's highest court whether a civil union law conferring "a legal status equivalent to marriage and . . . treated under law as a marriage," would satisfy the court's constitutional ruling. The court said no. *See In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, (Mass. 2004).

This Court's three previous separate amendment rule cases show that the Legislature here acted well within its discretion in placing both the first and second propositions in the same ballot question.

In *Hudd*, this Court held that not only two, but four distinct propositions were properly placed in the same ballot question because they all related to the same general purpose. The amendment in question provided that: (1) members of the Assembly would serve two-year terms and be elected from single districts; (2) senators would serve four year terms and be chosen alternately in odd and even numbered districts every two years; (3) the Legislature would meet once every two years; and (4) the salaries of legislators would be increased to $500.00. *Hudd*, 54 Wis. at 326.

The Supreme Court held that all four propositions furthered the general purpose of the amendment, which the Court determined was to change the Legislature generally from annual to biennial sessions. *Id.* at 336. In reaching this conclusion, the *Hudd* court showed that the concept of "relatedness" as it is applied in the single subject rule context, is broader than McConkey portrays it, and easily encompasses the relation between the two parts of the marriage amendment at issue here.

The change from annual to biennial sessions of the Legislature was "so intimately connected" with the change of the tenure of office of legislators, that the *Hudd* court had no difficulty concluding that those propositions were properly placed within the same amendment. *Id.*

at 335-36. The first three propositions together enabled a smooth transition from the existing, annual Legislature to a biennial one. If all three changes were not made simultaneously, the Legislature could have had empty seats and some legislators could have been elected to terms longer than the session itself, leaving them without duties to perform. *Id*. at 336.

The *Hudd* court found that even the salary increase provision was properly included with the other three provisions, despite the fact that "[t]he question of compensation was, perhaps, less intimately and necessarily connected with the change to biennial sessions." *Id*. at 337. It found that since the legislators' terms were being lengthened, it made sense to raise their salaries. *Id*. The court made clear that the Legislature could have adopted the salary change in a separate amendment, but the fact it could have did not mean it must have. *Id*.

The *Hudd* court went on to offer some valuable comments on another, pre-existing constitutional provision that was not being challenged in that case, but which provides a useful example of the meaning of the single amendment rule.

The *Hudd* court pointed out that article IV, section 31 of the constitution, which had been adopted in a voter referendum in 1871 (it has since been amended twice), contained several propositions (nine, in fact) far less interrelated than those at issue before the court in *Hudd*, while noting that the court "has never questioned its validity." *Id*.

Indeed, the *Hudd* court went on to opine that article IV, section 31, which prohibits the Legislature from enacting nine different types of special or private laws, "was a single amendment, having for its purpose one thing, *viz.*, the prevention of special legislation in nine different classes of cases." *Id*. at 338.

If the Legislature could place a salary raise within the same proposed amendment as the session and tenure changes; if it could place bans on private laws in nine different types of cases in the same proposed amendment—related only in the sense that they are all private laws—then the Legislature surely was empowered to place both propositions of the marriage amendment together in the same ballot question.

In *Milwaukee Alliance* the Court applied the *Hudd* standard and again sustained an amendment containing multiple parts. The amendment in question made changes to article I, section 8 of the constitution, which among other things deals with the right to conditional release for persons accused of criminal conduct. In *Milwaukee Alliance*, a single ballot question proposed to amend the constitution to provide that: (1) the Legislature could permit courts to deny or revoke bail for certain accused persons; and (2) the courts could set conditions, including bail, for the release of accused persons to assure their appearance in court, protect members of the

community, or prevent intimidation of witnesses. *Milwaukee Alliance*, 106 Wis. 2d at 602.[10]

This Court held that submitting both propositions in the same ballot question was proper because the purpose of the amendment was to shift from the limited concept of bail to a more comprehensive concept of "conditional release." *Id*. at 607. The Court explained:

> The purpose of the amendment . . . was to continue the guarantee of bail to those entitled to it, to allow release of some persons without requiring money bail but with other reasonable conditions, and at the same time, under a structured system, to hold persons for limited periods without the option of bail when a court determines that such action is necessary to protect . . . society's interest in the administration of justice by preventing the intimidation of witnesses.

Id at 608. The two propositions were related to that general purpose, indeed they were "integral and related aspects of the amendment's total purpose." *Id*. at 608.

McConkey passes over *Milwaukee Alliance* quickly (*see* Appellant's Brief at 21-22), and for good reason, because the plaintiffs in that case made exactly the same argument McConkey makes here, namely that because the two propositions on the ballot were not dependent

[10]These are paraphrases of the changes to the existing constitutional provision that were proposed; the actual textual changes were extensive and detailed. A reproduction of the full text presented to voters is provided by the court in *Milwaukee Alliance*, 106 Wis. 2d at 600.

upon one another, they should have been presented separately. This Court rejected the argument twenty years ago, and should do so again now.

The plaintiffs in *Milwaukee Alliance* argued that because one *could* adopt the idea of conditional release without adopting the idea of non-monetary bail, and vice-versa, the two ideas *should* have been separately offered to voters. *Id.* at 607. This Court rejected that argument as "unrealistic," *id.*, because the true purpose of the proposed changes was to institute a new scheme of conditional release; while both parts were not necessary to one another, they were nonetheless part of the same general plan, and could therefore be placed in the same amendment.

Under the holding of *Milwaukee Alliance*, which represents this Court's most recent articulation and application of the separate amendment rule, what the Legislature did with the marriage amendment was well within the limits of its permissible discretion. Under *Milwaukee Alliance*, even if the two parts of the marriage amendment were not mutually-dependent, as in fact they are, it would still have been appropriate to put them together in the ballot question, because together they serve the same general purpose.

The case of *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953), involved a challenge to the 1953 Rogan Act. The Rogan Act put before the voters a referendum on the amendment of article IV, sections 3, 4, and 5 of the constitution, dealing with apportionment of

legislative districts. The proposed ballot question was as follows:

> 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?

Thomson, 264 Wis. 2d at 651. At an election held in April 1953, the voters passed the referendum.

The Secretary of State thereafter announced that he would call the 1954 election in accordance, not with the new scheme of district apportionment, but with the pre-existing scheme, which determined the assembly and senate districts on the basis of population with no regard to area. *Id*. at 647-48.

In response to the Attorney General's complaint, which sought a declaration that the newly-enacted amendment required area and population-based apportionment, the Secretary of State argued that the ballot question violated the separate amendment rule and was therefore unconstitutional and void. The Supreme Court agreed.

McConkey contends that the facts and reasoning of *Thomson* require a similar declaration here, Appellant's Brief at 40-43, but that is incorrect. The ballot question in *Thomson* had numerous defects, only one of which was that it comprised multiple purposes and subjects. *Id*. at 660-62. More fundamentally, it completely misrepresented the actual constitutional amendment that was being proposed, failing even

to mention several specific changes to the apportionment scheme that were in the Joint Resolution setting forth the new constitutional language. *Id.* Nothing of the sort is at issue here.

The joint resolution proposing the constitutional changes in *Thomson* included the following alterations to the apportionment scheme: (1) drawing senate districts on the basis of area as well as population; (2) counting untaxed Indians and members of the armed forces when calculating population; (3) bounding assembly districts by town, village or ward lines; and (4) providing that assembly districts could be divided in forming senate districts, and leaving no direction or restriction as to the boundaries of senate districts. *Id.* at 654.

It is important to recognize that in *Thomson*, there was no dispute between the parties, and the Court assumed without discussion, that the purpose of the constitutional change simply was to introduce area into the formation of senate districts. *Id.* at 656. On that basis, the Court was quick to conclude that the amendment included multiple provisions that "ha[ve] *no bearing* on the main purpose of the proposed amendment." *Id.* at 656 (emphasis added). For instance, the Court found there was no connection between using area in apportionment and revoking the exclusion on untaxed Indians and the military when counting inhabitants, but the amendment did both. Similarly, there was no connection between permitting the division of assembly districts when forming senate districts and the introduction of area as a factor, yet the amendment did both. *Id.*

The *Thomson* Court did not consider whether all these parts could have furthered some common, general purpose other than "introducing area into the formation of senate districts." Without discussion or analysis it stated with that assumption and moved on. That is in stark contrast with this case, where a clear general purpose was articulated at the time of the marriage amendment's passage, and which ties together the amendment's two parts.

Relying on his implausible methodology for determining the marriage amendment's purpose, McConkey would have this court believe that the second proposition in Wisconsin's marriage amendment has *nothing to do with* the first. (Appellant's Brief at 37). But this is true only if one treats marriage as no more than a word, a name, a label.

If the state government were empowered to create or recognize a legal status identical or substantially similar to marriage, and make it available to same-sex couples, then the limitation on the marriage relation to opposite-sex couples could cease to have practical significance. Opposite sex couples could enter into "marriages" and same sex couples could enter into these other, identical or substantially similar statuses, and but for the different names applied to their status, everything else about their status would be the same or substantially similar. It is clear that this is precisely what the voters intended to prevent.

McConkey fails to acknowledge the correct legal standard when he writes that "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." (Appellant's Brief at 35). McConkey's statement says nothing except that the two propositions were, in fact, two propositions. No one says otherwise, but this Court has repeatedly held that multiple propositions may be embraced in a single amendment.

In order to drive a wedge between the two parts of the amendment, McConkey misconstrues the meaning of the second proposition when he writes that it "restrict[s] future legislatures from ever confronting the crux of the controversy: what comprehensive legal protections will be given to relationships that exist outside of marriage?" (Appellant's Brief at 38). That was not what the voters were asked to decide in the November 2006 referendum.

Whether any particular legal status, hypothetical or existing, actually is "identical or substantially similar" to marriage is not an issue addressed by the marriage amendment. The amendment does not say what rights and responsibilities are forbidden to same-sex (or other unmarried) couples. It only says that a status identical or substantially similar *to marriage* will be unavailable to unmarried couples.

The two parts of the ballot question presented to voters in November 2006 related to and furthered the general purpose of the amendment: to preserve and protect the unique and historical status of traditional marriage as a union of one man and one woman. McConkey's

strained effort to conceptually dissociate the two propositions should be rejected.

C. Courts In Other States Have Reached The Same Conclusion With Respect to Similar Ballot Questions and Similar or Identical Separate Amendment Requirements.

Four other state high courts have rejected challenges to marriage amendments that are identical or nearly identical to Wisconsin's, under those states' respective iterations of the separate amendment rule. These cases, though not controlling on this Court, nonetheless are persuasive authority that the Court should reach the same result here.

In *Forum for Equality PAC v. McKeithen*, 893 So.2d 715 (La. 2005), the Supreme Court of Louisiana upheld a referendum that proposed to amend the state constitution by providing, among other things, that: "Marriage in the state of Louisiana shall consist only of the union of one man and one woman . . . A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." *Forum for Equality*, 893 So.2d at 717 (quoting from the joint resolution proposing submission of article XII, section 15 of the Louisiana Constitution, entitled "Defense of Marriage," to the voters).

Louisiana has what it calls a "single-object" requirement for constitutional amendments, which provides in relevant part that "a proposed amendment shall . . . be confined to one object. . . . When more than one amendment is submitted at

the same election, each shall be submitted so as to enable the electors to vote on them separately." La. Const. art. XIII, § 1(B), quoted in *Forum for Equality*, 893 So.2d at 724.

The Louisiana Supreme Court found that the purpose of the marriage amendment was to "protect or defend our civil tradition of marriage." *Id*. at 734. As with the Wisconsin amendment, the purpose was thus not merely to prohibit same-sex marriage, but to maintain the unique status of marriage in the legal system.

Like McConkey, the plaintiffs in *Forum For Equality* "dissect[ed] the amendment sentence by sentence and interpret[ed] every provision as advancing a separate and distinct plan or object." *Id*. at 734-35. The court rejected this effort, finding that all the elements of the amendment—both its ban on same-sex marriage, and its ban on legal statuses "identical or substantially similar to marriage" were integral parts of the plan to defend the state's civil tradition of marriage. *Id*. at 736.

In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So.2d 1229 (Fla. 2006), the Supreme Court of Florida upheld a ballot question which read, "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." *Advisory Opinion*, 926 So.2d at 1232. Florida's constitution requires that proposed amendments to that constitution "shall embrace but one subject and matter directly connected

therewith." Fla. Const. art XI, § 3 (quoted in *Advisory Opinion*, 926 So.2d at 1233).

The intervening opponents of the amendment raised the same arguments against the Florida amendment that McConkey raises here, and the Florida court rejected them. The opponents claimed that the second proposition in the ballot question—dealing with "other legal unions"—was "beyond the subject of the definition of marriage." *Id.* at 1234. But the court held that "when the phrase challenged by the opponents is read in context and connection with the proposed amendment as a whole, it is clear that it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme'—the restriction of the exclusive rights and obligations traditionally associated with marriage to legal unions consisting of one man and one woman." *Id.*

The Supreme Court of Georgia in *Perdue v. O'Kelley*, 632 S.E.2d 110 (Ga. 2006) upheld a ballot question that contained 5 separate sentences relating to marriage. The first two sentences prohibited marriages between persons of the same sex. The second group of three sentences provided, in relevant part, that "[n]o union [of] persons of the same sex shall be recognized as entitled to the benefits of marriage." Georgia's single-subject rule requires that "[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more new articles or related changes in one or more articles may be submitted as a single amendment." Ga. Const. art. X, § 1, ¶ 2, quoted in *Perdue*, 632 S.E.2d at 733 n.2.

The Georgia Supreme Court found that the purpose of the amendment was to establish that marriage and its attendant benefits belong only to union of man and woman. *Id.* at 734. The *exclusivity* of marriage, the court found, was central to the amendment's purpose. *Id.* On this basis, the court concluded that the prohibition against recognizing same-sex unions as entitled to the benefits of marriage "is not 'dissimilar and discordant' to the objective of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman," *id.*, and the amendment therefore complied with the single-subject rule.

Finally, in *Arizona Together v. Brewer*, 149 P.3d 742 (Ariz. 2007), the Supreme Court of Arizona upheld an amendment that provided "only a union between one man and one woman shall be valid or recognized as a marriage," and also "no legal status for unmarried persons shall be created or recognized by this state . . . that is similar to that of marriage." The court concluded that the purpose "of both provisions is to preserve and protect marriage," and that both provisions "are sufficiently related to a common purpose or principle that the proposal can be said to 'constitute a consistent and workable whole on the general topic embraced,'" *id.* at 749 (quoting *Korte v. Bayless,* 16 P.3d 200, 204 (Ariz. 2001)). In fact, the court went further, and held, as the circuit court held in this case, that the two propositions were interrelated to such a degree that they "should stand or fall as a whole." *Id.*

These cases[11] are persuasive authorities supporting the procedural correctness of the Wisconsin marriage amendment. Variations on McConkey's arguments have been presented to the high courts in several states that enacted amendments virtually identical to Wisconsin's, and in none of them were those arguments persuasive. This Court should reach the same result here.

[11]The Supreme Judicial Court of Massachusetts also upheld a marriage-related amendment, but the text of that amendment differed significantly from Wisconsin's. *See Albano v. Attorney General*, 769 N.E.2d 1242, 1245 n.4 (2002).

CONCLUSION

The circuit court correctly held that Wisconsin voters were presented with a procedurally correct ballot question, and enacted a constitutional amendment whose two parts "relate to the same subject matter and are designed to accomplish one general purpose," consistent with article XII, section 1 of the Wisconsin Constitution.

Therefore, the Attorney General respectfully requests that this Court affirm the circuit court's Final Order in Action for Declaratory Judgment entered June 9, 2008.

Dated this ___ of August, 2009.

Respectfully Submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,156 words.

Dated this _____ day of August, 2009.

_____
LEWIS W. BEILIN
Assistant Attorney General

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 Wis. Stat. (Rule) § 809.19(12).

I further certify that the 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.

_____
LEWIS W. BEILIN
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant,
Cross-Respondent,

v.

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

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF CROSS-APPELLANT

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STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant,
Cross-Respondent,

v.

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

Defendant-Respondent-
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ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF CROSS-APPELLANT

STATEMENT OF THE ISSUE

The issue presented by the Attorney General's cross-appeal is whether McConkey has standing to litigate the compliance of the marriage amendment with the separate amendment rule. Denying in part the Attorney General's motion to dismiss for lack of standing, the circuit court held that McConkey had standing to pursue his claim

under the separate amendment rule, and the Attorney General cross-appeals from that decision.

ARGUMENT

I. STANDARD OF REVIEW.

Whether a party has standing to seek declaratory relief is a question of law this Court reviews *de novo*. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315, 529 N.W.2d 245 (Ct. App. 1995).

II. HAVING STIPULATED THAT HE VOTED "NO" ON THE BALLOT QUESTION AND WOULD HAVE VOTED "NO" TO BOTH PROPOSITIONS WERE THEY PRESENTED SEPARATELY, MCCONKEY LACKS STANDING TO SUE.

A. Standing to Sue in Wisconsin.

As a general rule, a party asserting a constitutional claim must have personally suffered a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983); *State ex rel. 1st Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 309, 290 N.W.2d 321 (1980); *Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979). This is no less true for declaratory judgment actions, such as McConkey's, than it is for other types of actions. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189 (citing *Village of Slinger v. City of*

Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81) ("In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy.").

As formulated by the Wisconsin courts, a plaintiff must demonstrate that "[he] was injured in fact, [and that] the interest allegedly injured is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Mogilka v. Jeka*, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). This standard is "conceptually similar" to the federal rule. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240 (1975).

"Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox,* 112 Wis. 2d at 525. (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)).

Standing also requires that the injury be to a legally protectable interest. *See City of Madison v. Town of Fitchburg,* 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983). A legally protectable interest is one arguably within the zone of interests that the law under which the claim is brought seeks to protect. *See Chenequa Land Conservancy, v. Village of Hartland,* 2004 WI App 144, ¶ 16, 275 Wis. 2d 533, 685 N.W.2d 573.

The purpose of the Court's inquiry into standing "is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *Moedern*, 70 Wis. 2d at 1064 (citing *Flast v. Cohen*, 392 U.S. 83 (1968). Enforcing the standing requirement ensures that a concrete case informs the court of the consequences of its decision, and that people who are directly concerned and are truly adverse will genuinely present opposing viewpoints to the court. *Carla S. v. Frank B.,* 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330.

It is a foundational assumption of our judicial system that true adversity of the parties improves the soundness of judicial outcomes. This Court adheres to the standing requirement, not because it is jurisdictional, but because as a matter of sound judicial policy "a court should not adjudicate constitutional rights unnecessarily and because a court should determine legal rights only when the most effective advocate of the rights, namely the party with a personal stake, is before it." *Mast,* 89 Wis. 2d at 16. As the following argument will show, McConkey is not such a party.

The standing requirement also furthers the separation-of-powers principle that underlies our constitutional system, and "'keeps courts within certain traditional bounds vis-a-ví̀s the other branches, concrete adverseness or not.'" *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 611 (2007) (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996)); *see also Steel Co. v.*

Citizens for a Better Environment, 523 U.S. 83, 125 n.20 (1998) (Stevens, J., concurring) ("our standing doctrine is rooted in separation-of powers-concerns.") Relaxing the standing requirement therefore is "'directly related to the expansion of judicial power.'" *Hein*, 551 U.S. at 611 (quoting *U.S. v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).[1] This is particularly important in a case involving Wisconsin's separate-amendment rule, where our state's constitution gives the Legislature discretion to craft the language of proposed amendments. (*See* Respondent's Brief at 10-20). Adopting the circuit court's standing analysis in this case would erode that discretion by authorizing a court challenge to every single proposed and adopted constitutional amendment, even when the plaintiff's real grievance is not with the language of the amendment but with the outcome of the referendum.

[1]The Supreme Court's jurisprudence on the issue of standing is relevant here, because the Wisconsin requirement is "conceptually similar" to the federal rule. *Modern,* 70 Wis. 2d at 1067.

B. Standing To Challenge Constitutional Amendments on Separate Amendment Grounds.

1. Requiring a Plaintiff Who Would Have Voted Differently On The Multiple Propositions Helps Further The Purpose of the Separate Amendment Rule.

As discussed in both the Attorney General's Respondent's Brief, and in McConkey's Appellant's Brief, the separate amendment rule furthers the goals of preventing logrolling and riding, and encouraging transparency at the polls. (Appellant's Brief at 16-18; Respondent's Brief at 13-14). To further these goals, the Court should require a plaintiff who raises a challenge under article XII, section 1 of the Wisconsin Constitution to allege that he or she would have voted differently on the multiple propositions in an amendment. If a plaintiff cannot make such an allegation, then he or she is outside the zone of interests protected by the constitutional rule.

The separate amendment rule is designed to ensure that two amendments, each lacking majority support, are not passed by combining them into one amendment. Similarly, it prevents an unpopular measure from passing by being hitched to a popular one. When propositions are combined into one amendment that do not "relate to the same subject matter and are [not] designed to accomplish one general purpose," *Milwaukee*

Alliance Against Racist and Political Repression v. Elections Bd., 106 Wis. 2d 593, 604-05, 317 N.W.2d 420 (1982) (citing *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336, 11 N.W. 785 (1882)), at least some voters are faced with an undesirable choice: either they vote "yes" for the amendment, and thereby accept one proposition that they oppose, or they vote "no" on the amendment and contribute to the potential loss of the proposition they support. Violation of the separate amendment rule requires some voters to decide whether their opposition to the part they disfavor is greater than their support for the part they favor. When forced to make such a choice, the results of the referendum may not accurately reflect the true preferences of the electorate.

Therefore, a plaintiff who raises a separate amendment challenge must allege that his or her true preferences were impeded by the combination of multiple propositions in a single amendment. If a plaintiff concedes, as McConkey here conceded, that he or she would have voted "no" to both propositions had they been separated, that shows the plaintiff's preferences were unimpaired by the manner in which the ballot was presented. It shows that the plaintiff is not within the zone of interests protected by the constitutional rule.

McConkey's opposition to the *result* of the referendum is insufficient to establish his standing. Let us imagine a voter who attests to voting "yes" on the marriage ballot question, and concedes that even if the two propositions had been separated, she would have voted "yes" to both. It seems indisputable that such a voter would lack standing. But that voter lacks standing, not because of her opposition to the outcome of the referendum in this example (she

supported the outcome), but because she, like McConkey, was not forced into the choice that the separate amendment rule is designed to prevent. Her voting preferences were perfectly well expressed in her single "yes" vote.

That same "yes" voter, however, would obtain standing if she actually wanted to vote "no" on one of the propositions, but was prevented from doing so because of an alleged violation of article XII, section 1. That voter would be within the zone of interests protected by the rule; even though in this example her actual vote is still consistent with the outcome of the referendum, her real preferences were stymied by the way the ballot was crafted. There is no meaningful distinction between McConkey and the "yes" voter who, like him, cannot claim to have been pressed into the choice that the rule guards against. Requiring a plaintiff whose voting preferences were actually affected by the conjoining of multiple propositions in an amendment helps ensure that a plaintiff truly interested in the legal issue is involved in the case.

2. Cases In Other Jurisdictions Show That In Order to Have Standing To Raise Voting-Related Claims, Plaintiffs Must Show More Than That They Voted in The Election.

McConkey has characterized this lawsuit as a "voting rights case." (Appellant's Brief at 10). However, voting rights cases show that simply

being a voter or elector is not enough to challenge any and all alleged irregularities in the way an election is conducted. As with standing in other areas of the substantive law, voters must allege a particularized, direct injury to *their* rights in order to bring suit.

In *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), the Supreme Court of Tennessee held that plaintiffs challenging a marriage amendment on grounds of untimely publication lacked standing because, even though they voted in the referendum election, they failed to allege any discrete, concrete injury to them resulting from the alleged violation.

In *Darnell*, plaintiffs challenged the adoption of the Tennessee Marriage Amendment on the ground that it was not published in accord with a procedural provision of the state constitution. *Darnell*, 195 S.W.3d at 621. Plaintiffs alleged generally that their lives and their ability to seek future changes in the law would be greatly affected by the amendment, and the lesbian and gay individuals among them alleged that by specifically prohibiting same sex marriage the amendment directly affected their legal rights. *Id.*

The Tennessee court held that this was insufficient to establish standing, insofar as none of the plaintiffs had alleged that the late publication of the ballot question affected their own awareness of the election issues or their ability to participate in the public debate leading up to the vote. *Id.* at 622. Similar to McConkey, the plaintiffs in *Darnell* testified that they were aware of the ballot question, despite its alleged late publication. *Id.* As such, they all but

conceded their lack of standing; the Tennessee court required them to show actual injury from the alleged procedural irregularity, and they showed none. Whether other actual or potential voters in the referendum, or citizens generally, might have been injured by late publication was irrelevant, the court held. *Id*. at 624 ("Standing may not be predicated upon injury to an interest that a plaintiff shares in common with all citizens.")

Similarly, the United States Supreme Court has held that one's status as a voter, without more, in insufficient to confer standing on a plaintiff seeking to raise a claim under the federal Voting Rights Act and the federal and state constitutions. *U.S. v. Hays*, 515 U.S. 737, 746 (1995). In *Hays*, several Louisiana voters challenged the state's redistricting plan on the ground that one of the districts created thereunder was the result of racial gerrymandering. *Id*. at 744. The Court noted that "we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power," and the Court further held that "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other." *Id*. at 743.

Applying those principles, the Court held that the Louisiana voters lacked standing to challenge the redistricting scheme because they did not live in the district alleged to have been racially gerrymandered. *Id*. at 745. Recognizing that racial gerrymandering denies residents of gerrymandered districts equal treatment, the Court went on to say that "where a plaintiff does not live in such a district, he or she does not suffer those special harms." *Id*.

Notably, the Supreme Court specifically rejected the plaintiff's argument that even if they did not live in the district alleged to have been gerrymandered, they were nonetheless affected by the unlawful conduct since what is added to one district is, by definition, taken away from some other. *Id*. at 746. The Court explained, "The fact that Act 1 [the redistricting legislation] *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on *some* Louisiana voters—that every Louisiana voter has standing to challenge Act 1 as a racial classification." *Id*. (emphasis in original).

McConkey's admission puts him outside the zone of interests protected by the separate amendment rule, just as the *Hays* plaintiffs' place of residence put them outside the zone of interests protected by the Fourteenth Amendment. One must look beyond McConkey's status as a voter to the facts that would bring his vote within the zone of interests protected by the separate amendment rule. Here, no such facts exist.

C. McConkey Was Not Injured By The Inclusion of Both Propositions in the Marriage Amendment, Even If Doing So Violated the Separate Amendment Rule.

McConkey stipulated that if the ballot had included two questions, rather than one, corresponding to the two propositions contained in the actual ballot question, he would have voted

"no" to each question. (R. 55 at 7; R-Ap. 132).[2] McConkey therefore conceded that he lacks standing to sue for a violation of article XII, section 1, because even if the ballot question violated that constitutional provision (which the Attorney General denies), by McConkey's own admission he suffered no real, direct, actual injury. His "no" vote on the ballot question expressed his preferences as an elector and there was no injury to him.

The circuit court erred in denying the Attorney General's motion to dismiss. The court based its decision on the ground that every elector would have standing to litigate an alleged violation of article XII, section 1, regardless of how he or she intended, or did, vote on the challenged ballot. (R. 55 at 27; R-Ap. 134-36). The court stated that "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective." (R. 55 at 27; R-Ap. 134). The circuit court's rationale conflicts with the basic principles of standing in Wisconsin.

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[2]

> THE COURT: Mr. Pines, do you concede that your client alleges that he would not have voted for either proposition if they had been broken out?
>
> MR. PINES: I can concede that for purposes of this discussion, yeah.
>
> THE COURT: All right. And I understand you don't think that makes a difference.
>
> MR. PINES: That's correct.

McConkey's complaint failed to allege facts sufficient to establish his standing. In his "Petition for Injunction and Declaration of Unconstitutionality," McConkey included a section entitled "Standing" that said nothing about how the alleged non-compliance with the separate amendment rule affected his interests. He alleged that he is a registered voter who lives in Wisconsin, that he does business in the state, and that he pays taxes in the state. (R. 1 at 2). At no point in his Petition did McConkey allege facts showing that the constitutional violation he complained of, the placement of two allegedly unrelated questions in a single ballot question, directly affected his vote.

At the hearing on the motion to dismiss it became plain that whether the two propositions on the ballot in November 2006 were contained in one amendment or two, it made no difference to McConkey's preferences as a voter, since McConkey expressly conceded that he would have voted "no" on each one. (R. 55 at 7; R-Ap. 132).

Whether *other* voters might have wished to vote differently on the separate propositions is immaterial to the question of McConkey's standing, since he must allege that he personally suffered a real and direct, actual or threatened injury. He acknowledges that he did not do so.

The circuit court in this case erred by reasoning that McConkey suffered an injury merely by having to participate in an election in which the ballot allegedly violated the separate amendment rule. "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective. It may not be any different from any

other voter, but it may very well be." (R. 55 at 27; R-Ap. 134). The court essentially held that the potential existence of a constitutional violation creates the basis for standing.

The circuit court's rationale is contrary to how standing works. Even if the injury need only be "trifling," it must nonetheless exist, separate and apart from the constitutional violation itself. For the circuit court, merely casting a ballot subjected McConkey to possible injury, but the cases cited above show that it is not mere participation that confers standing, but objective, individualized behavior putting the plaintiff within the zone of interests. Moreover, under the circuit court's rationale, even the voter who said "yes" to the ballot and would have said "yes" to separate propositions would have standing, simply because he cast a ballot.

The separate amendment rule does not protect access to the voting booth. It protects voters against having to decide whether their support for one proposition is stronger than their opposition to another proposition. If a voter was indifferent to that decision, as McConkey was, then he lacks standing to sue.

The circuit court also rested its decision on the principle that standing is "liberally construed" in Wisconsin, *see* R-Ap. 134, but while the principle is quite correct, it was not properly applied here. Such liberality does not mean that standing exists even though it is apparent that no injury did or may occur to the plaintiff. By his own account, if the separate amendment rule was violated, McConkey lost nothing; his preferences were accurately expressed by his vote, regardless of any alleged procedural flaw.

CONCLUSION

McConkey acknowledges that he would have voted "no" on each proposition in the marriage amendment had they been presented as separate questions on the November 2006 ballot, and he therefore suffered no direct, personal injury as a result of any alleged failure of the Legislature to comply with the separate amendment rule. Under the traditional analysis of standing in Wisconsin, McConkey lacks standing to pursue his claim and the decision of the circuit court denying in part the Attorney General's motion to dismiss for lack of standing should be reversed.

Dated this ____ day of August, 2009.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,349 words.

Dated this _____ day of August, 2009.

_____
LEWIS W. BEILIN
Assistant Attorney General

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 Wis. Stat. (Rule) § 809.19(12).

I further certify that the 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.

_____
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