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 AND CROSS 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

COMBINED BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. McCONKEY

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Dated: August 28, 2009.

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I. THE DEFENDANT HAS FAILED TO ARTICULATE A REASONABLE METHOD FOR DETERMINING THE PURPOSE OF A PROPOSED CONSTITUTIONAL AMENDMENT.

A. The Three-Part Test Set Out In *Dairyland Greyhound Park v. Doyle* Is Not Used To Determine Purpose.

This case was certified to the Supreme Court in part because the Court of Appeals determined that the three previous cases interpreting Article XII, Section 1 of the Wisconsin Constitution stated the purpose of the proposed amendments before it, but did not explain how courts are to determine the purpose of a proposed amendment. The Court of Appeals stated:

> [W]e see a need for additional guidance as to the proper method for determining the purpose of a proposed amendment. Because it does not appear that the purpose of the amendments in Hudd, Thomson, or Milwaukee Alliance was at issue, each of those cases simply asserted an intended purpose without discussing how the court should determine purpose. Should a court look first at the language of the ballot question or the language of the legislative resolutions? What consideration should be given to materials from the legislative reference bureau and the notice provided to the public explaining the proposed amendment? Should other contemporaneous materials be considered only if there is an ambiguity in the text itself, as with determinations of legislative intent in the statutory construction context? Since the determination of

> purpose will often be dispositive, it is critical that guidance on this topic be provided.

Court of Appeals Certification, p. 6.

The Defendant implicitly dismisses the Court of Appeals concerns by claiming that our Supreme Court has already determined the issue, stating:

> 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)

Defendant's Brief at 24.[1]

Dairyland Greyhound Park and *State ex rel. Thompson v. Craney* say nothing of sort.

The *Dairyland* test has never been used to determine the "purpose" of a proposed amendment. The three-part test set out in that case is used to interpret the substantive meaning of an adopted amendment to the state Constitution when a subsequently enacted statute is challenged as violative of that

[1]Formally titled "Combined Brief and Appendix of Defendant-Respondent-Cross Appellant," filed with the Court on August 13, 2009, hereinafter referred to as "Defendant's Brief."

constitutional provision. In fact, the purpose of an amendment is one aspect used to determine its meaning under the three-part test. *See Dairyland* at ¶¶19 and 24. If the Defendant's proposed method is adopted, the courts will become stuck in an infinite loop, using the three-part test to determine purpose and then using that test and the purpose determined already to determine meaning. That would force the courts to step out of their role of interpreting legislation and into the role of creating it.

After misstating the proper use of the "three-part test," the Defendant then cites selected newspaper articles, Legislative Reference Bureau documents and earlier statutory proposals to supposedly meet the second prong of the test. It is fair to infer that the Defendant did so in order to avoid more strict rules of statutory interpretation which generally do no allow extrinsic materials to be used to interpret unambiguous legislative statements.

B. The Rules Of Statutory Interpretation Should Be Used To Determine Purpose.

An amendment to the Constitution is proposed to the voters by the legislature through passage of a joint resolution. Recognizing that a legislative joint resolution is more akin to a statute than an adopted constitutional amendment, McConkey asserts that the Court should adopt a simple rule for the determination of the purpose of a proposed constitutional amendment: rely on what the joint resolution that submitted it to the voters says. That is, McConkey urges this Court to answer "yes" to this question posed by the Court of Appeals:

> Should other contemporaneous materials be considered only if there is an ambiguity in the text itself, as with determinations of legislative intention the statutory construction context?

Court of Appeals Certification, p. 6.

Doing so is consistent with the rules of statutory construction:

> [I]n interpreting a statute, the court focuses on "statutory meaning" as opposed to "legislative intent." *See State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶36-52, 271 Wis. 2d 633, 681 N.W.2d 110. In doing so, the court relies heavily on "intrinsic" sources such as the words of the statute, including dictionary definitions, plus statutory context, scope, and purpose. As a rule, Wisconsin courts do not consult "extrinsic" sources of statutory interpretation unless the statute is ambiguous, *id.,*

> ¶50, although extrinsic sources may be used to confirm or verify plain statutory meaning. *Id.*, ¶51.
>
> The plain meaning rule of statutory interpretation prevents courts from tapping legislative history to show that an unambiguous statute is ambiguous. *Id.*

Dairyland Greyhound Park v. Doyle, *supra,* ¶ 114.

Because 2005 Enrolled Joint Resolution 30 is legislation, to determine its purpose, the Court should focus on the intrinsic expression of its purpose, not extrinsic descriptions of what the purpose might be. 2005 Enrolled Joint Resolution 30 says its purpose is: "***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." Because that stated purpose is clear and unambiguous, the Court need not resort to any extrinsic materials to verify it. It means precisely what it says.

Were the Court, however, to look to an extrinsic source to verify the plain meaning of the stated purpose, the truly important legislative history, which the Defendant failed to provide the court, is determinative. In 2003, §765.001(2) stated: "Under the laws of this state, marriage is a legal

relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support." That year, the Legislature passed 2003 Assembly Bill 475 adding this sentence to §765.001(2), the "intent" language relating to the Family Code:

> It is the public policy of this state that marriage may be contracted only between one man and one woman.

It also amended §765.01(1) to state that:

> Marriage, as far as its validity at law is concerned, *is a civil contract between one man and one woman.*

And, it added §765.01(2) to read:

> Regardless of whether s. 765.04 applies and regardless of whether a marriage takes place in another jurisdiction in which marriage other than one man and one woman is defined as valid, only marriage between one man and one woman shall be recognized as valid in this state.

Finally, it created §990.01(19p) to the statutes:

> "Marriage" means a civil contract between one man and one woman that creates the legal status for the parties of husband and wife.

Those statutory changes were vetoed on November 7, 2003 and the veto was sustained on November 12, 2003. *http://www.legis.state.wi.us/2003/data/AB475hst.html.* (last viewed 8/28/09). As a response to the veto of the statutory

changes, less than three months later, on February 9, 2004, 2003 Assembly Joint Resolution 66 was introduced, proposing the "marriage amendment" for the first time. (A-App. 19) Thus, the legislative history confirms that by proposing the marriage amendment and later adopting 2005 Enrolled Joint Resolution 30 submitting the amendment to the voters, the Legislature had the purpose of ensuring that in Wisconsin marriage was between one man and one woman, nothing more and nothing less.

II. MCCONKEY IS NOT PROPOSING A NEW STANDARD FOR ANALYZING WHETHER A REFERENDUM QUESTION VIOLATES ARTICLE XII, SECTION 1.

The Defendant argues that McConkey has urged the Court to deviate from virtually every other state and adopt a test for the single purpose rule that would make it almost impossible for the state Constitution to be amended. *Defendant's Brief at 21-22.* The Defendant reached that conclusion by creating a straw man and then knocking it down by stating: "McConkey . . . argue[s] 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 that had been submitted as separate questions, the defeat of one question would destroy the overall purpose of the multi-proposition proposal.'" *Defendant's Brief at 15.* He continues by saying that "this Court has never required that all propositions in a given amendment be interdependent in order to survive constitutional scrutiny." *Defendant's Brief at 16.*

McConkey has not made the argument that the Defendant attributes to him. He has merely asked the Supreme Court to apply the rules it set out in *State ex rel. Hudd v. Timme,* 54 Wis. 318, 11 N.W. 785 (1882), *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) and *Milwaukee Alliance Against Racist & Political Repression v. Elections Bd. of Wis.,* 106 Wis. 2d 593, 317 N.W.2d 420 (1982), to the referendum question submitted to the voters on the marriage amendment.

In fact, the Wisconsin Supreme Court has explained in that proposed amendments to our Constitution,

interrelatedness and interdependence are necessary to allow an amendment with multiple parts to meet the single purpose requirement. In *Milwaukee Alliance,* upholding the submission of a comprehensive change of the concept of bail to one of conditional release, the Court said that:

> When the purpose of the proposed amendment was to change the historical concept of bail with its exclusive purpose of assuring one's presence in court, as defined by common law, to a comprehensive plan for conditional release, the defeat of either proposition would have destroyed the overall purpose of the total amendment. The Hudd court held that a single amendment may "cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject." *Hudd, supra,* 54 Wis. at 339, 11 N.W. 785. That is exactly what the amendment question in this case did.

Milwaukee Alliance, *supra*, at 607.

"Interrelatedness and interdependence" is by no means "foreign" to Wisconsin constitutional amendment jurisprudence. It is integral to it.

III. THE DEFENDANT HAS MISSTATED MCCONKEY'S ESSENTIAL ARGUMENT.

The Defendant asserts that "McConkey passes over *Milwaukee Alliance* quickly . . ., and for good reason, because

the plaintiffs in that case made exactly the same argument here, namely that because the two propositions on the ballot were not dependent on one another, they should have been presented separately." *Defendant's Brief at 34-35.* The problem is this: that is not the argument that McConkey made.

McConkey asserted, and reasserts here, that the analysis done in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) is most closely applicable to an analysis of the marriage amendment. In *Thomson* the Court articulated what it must do to determine if there is more than one purpose to the proposed amendment, explaining that if the defeat of one of the two propositions found in the amendment would not destroy the overall purpose asserted by the Legislature, the Court should then consider whether the ballot question has in fact more than one purpose. *Thomson*, *supra* at 651.

As explained in McConkey's Brief[2] at pages 40-45, when that analysis is applied to the marriage amendment, the Court will find that it was submitted to the voters in violation of Article XII, Section 1 of the Wisconsin Constitution.

IV. CASES FROM OTHER STATES ARE IRRELEVANT.

The Defendant has directed the Court to other states whose supreme courts have addressed the single subject rule as it applies under their laws and constitutions, claiming that the Wisconsin Supreme Court ought to follow their lead in interpreting Wisconsin's marriage amendment. While those cases are interesting, ultimately, they are irrelevant for numerous reasons but primarily for this one: Wisconsin has its own history regarding its own constitution and its own line of cases from which the Wisconsin Supreme Court must derive the basis for its decision in this case. Moreover, as McConkey's Brief explained in detail, the Wisconsin Constitution contains two articles that address the framers deep concern with logrolling: Article XII, Section 1, and

[2]Formally titled "Brief of Plaintiff-Appellant-Cross-Respondent William C. McConkey," filed with this Court on July 8, 2009, hereinafter referred to as "McConkey's Brief."

Article IV, Section 18. It is within that constitutional context that the Court must make its decision.

Finally, it is impossible for this Court to know the political traditions of other states. The political traditions of this state, however, are well-known: Wisconsin has been and continues to be committed to open government, a high level of participation by its citizens in elections, and a full and fair presentation to the people by their representatives about the issues its government confronts. As a part of that tradition, Wisconsin voters had a right to expect that a crucial issue like the potential rights and obligations of unmarried individuals who are in a relationship that is not marriage would be discussed and considered fully. Instead, it was coupled with a definition of marriage that was emotionally compelling and presented to the voters in a logrolled resolution that stymied debate and restricted the voters' right to directly discuss and then address in the voting booth all of the issues before them.

V. CONCLUSION.

The judgment of the circuit court should be reversed and Article XIII, Section 13 of the Wisconsin Constitution should be declared unconstitutional because it was submitted to the voters in violation of Article XII, Section 1 of the Wisconsin Constitution.

Dated this 28th day of August, 2009.

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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 2,275 words.

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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.

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RESPONSE BRIEF OF CROSS-RESPONDENT

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STATEMENT OF THE ISSUE

Plaintiff-Appellant-Cross-Respondent William McConkey ("McConkey") disagrees with the standing issue as stated by the Defendant-Appellee-Cross-Appellant Attorney General J.B. Van Hollen ("Defendant") in his Brief. The Cross-Appellant's issue for appeal is more properly stated as follows:

> Does a voter who challenges the constitutionality of an amendment to the Wisconsin Constitution on the basis that the amendment was actually two distinct and separate amendments submitted to the voters as a single question in violation of the procedural "single subject" requirement contained in Article XII, Section 1 of the Wisconsin Constitution have standing to bring such a challenge when, had the questions been submitted to the voters in two referenda, he would have voted "no" on each question, and also would have been able to engage in electioneering to persuade other voters to at least vote "no" on the second question, even if they felt it necessary to vote "yes" on the first question?

The Circuit Court answered yes.

ARGUMENT

I. McCONKEY HAS STANDING TO BRING THIS CASE.

A. The General Standing Analysis.

The Defendant describes the general standing rules for Wisconsin courts relatively fairly. That is, to satisfy the standing requirement in Wisconsin, a plaintiff must allege that the action at issue directly caused injury to a legally protected interest of the plaintiff. *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs.*, 130 Wis. 2d 56, 65, 387 N.W.2d 245, 248-49 (1986); *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243, 248 (1975). The law of standing is construed liberally, and even a "trifling interest" may be sufficient where actual injury is demonstrated. *Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 64, 387 N.W.2d at 248; *Fox v. Wis. Dep't of Health and Soc. Servs.*, 112 Wis.2d 514, 524, 334 N.W.2d 532, 537 (1983).

Wisconsin courts are not jurisdictionally confined to consider only "cases and controversies" like Federal courts are; rather, they have jurisdiction over "all matters civil and

criminal." *Wis. Const. Art. VII, Sec. 8.* However, Wisconsin courts have applied a similar standing doctrine, and have drawn from Federal cases on standing, as a matter of "sound judicial policy." *See State ex rel. 1st Nat. Bank v. M & I Peoples Bank*, 95 Wis. 2d 303, 308, n. 5, 290 N.W.2d 321 (1980); *Fox v. Wisconsin Dept. of Health and Social Services*,112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983). Thus, Wisconsin courts find Federal case law to be persuasive as to what the standing rules should be. *See Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶14, n. 3, 282 Wis.2d 458, 467, 698 N.W.2d 301, *citing Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975).

In this case, the Defendant challenges McConkey's standing soley based on the claim that he has suffered no injury. This brief shows that McConkey has been injured in several different and important ways by the Legislature's logrolling activities, and therefore has standing to pursue his case.

B. McConkey's "No" Vote On The Second Question Was Diluted, And Therefore He Has Standing To Bring This Case.

Article XII, Section 1 of the Wisconsin Constitution guarantees each voter the opportunity to vote on each proposed amendment to the Constitution. As the Defendant acknowledges at pages 6-7 of his Standing Brief,[1] it is designed to protect against logrolling and ensure that the will of the voters on each proposition is accurately reflected in election results. Defendant then makes the logic-leap that those and only those who would have voted "yes"on the definition of marriage as "one man and one woman" (the first question) and "no" on the denial of marriage and any legal status "identical to or substantially similar" to marriage for unmarried individuals (the second question), i.e., only those voters who were themselves literally "logrolled," would have standing to bring this suit. He contends that because McConkey would have voted "no" on both questions, he does

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[1]Formally titled "Brief of Cross-Appellant," filed on August 13, 2009 as the second portion of the "Combined Brief and Appendix of Defendant-Respondent-Cross-Appellant," and hereinafter referred to as the Defendant's Standing Brief.

not.

The Defendant's position is narrow, legally unsupported, and reflects a failure to consider the very real and substantial injury to the effectiveness of McConkey's vote caused by the Legislature's logrolling activities. McConkey's claim in this case is that he and other voters as an electorate were deprived of the right to express their true collective will on each question when the two proposed amendments were presented as a single question, and thus their right to vote in accordance with Constitutional requirements was impaired. McConkey's own Constitutionally-protected right to vote was impaired when his "no" vote was diluted, as explained further below.

A citizen's right to vote without arbitrary impairment by the state has long been recognized as a legally protected interest conferring standing. *Baker v. Carr*, 369 U.S. 186, 208 (1962). A court need not decide whether a plaintiff challenging state action relating to voting rights will ultimately prevail in order to find that the plaintiff has

standing. *Id.* Instead, an action to protect a citizen's right to vote is sufficient to establish standing because the plaintiff is asserting a direct and adequate interest in maintaining the effectiveness of his vote. *Id.* Had the legislature complied with Article XII, Section 1, the Wisconsin electorate would have voted on each question separately, and the true will of the electorate would have been reflected in the results.

By forcing a "yes/no" voter to vote "yes" on both questions in order to indicate her support for the first question, the influence of McConkey's "no" vote on the second question was diluted. Dilution of a citizen's vote is an impairment sufficient to confer Article III standing, whether that dilution is the result of a "false tally," by refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box. *See Baker v. Carr*, 369 U.S. 186, 208 (1962).[2]

Article XII, Section 1 is just like the Apportionment Clause of the United States Constitution, Art. 1 sec. 3, cl. 3,

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[2]The viability of the *Baker v. Carr* standing rule for voters in voting cases has been reaffirmed by the Supreme Court on numerous occasions, most recently in *Lance v. Coffman*, 549 U.S. 437 (2007).

which ensures that the people are represented in the House of Representatives "according to their respective Numbers," in that both provisions ensure each voter "the effectiveness of their votes." *See Baker v. Carr*, 369 U.S. at 208. A claim by a voter that the effectiveness of his vote has been impaired is not, as the Defendant would have it, a generalized grievance that does not confer standing. Rather, the assertion of vote dilution "satisfies the injury-in-fact, causation, and redressibility requirements" of Article III standing. *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 334 (1999).

Department of Commerce involved a challenge under the Apportionment Clause to the Census Bureau's plan to use statistical sampling to determine the population for purposes of congressional apportionment. Under that method, Indiana would likely lose a seat in the House of Representatives. Merely by virtue of his status as an Indiana resident and voter, Plaintiff Hofmeister was found to have standing because "with one fewer Representative, Indiana residents' votes will

be diluted." Likewise in this case, with the ballot box on the second question effectively being "stuffed" with "yes" votes by voters who would have voted "no" if the two questions had been posed separately, McConkey's "no" vote on that question was diluted. Hence, he has standing to pursue this case.

C. McConkey Also Has Standing Because His Constitutional Right To Engage In Political Speech Was Impaired.

By failing to comply with Article XII, Section 1's command to submit each proposed amendment to the voters as a separate question, the legislature also hindered McConkey from engaging in full debate on each of the questions. Political debate is one of the most jealously guarded, fundamental constitutional rights protected by both the Wisconsin and United States Constitutions. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide open."); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process."); *see also Elections Board of Wisconsin v. Wisconsin*

Manufacturers and Commerce, 227 Wis. 2d 650, 597 N.W.2d 721 (1991); *Dalton v. Meister,* 52 Wis. 2d 173, 184-186, 188 N.W.2d 494 (1971).

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion). Any alleged violation of fundamental constitutional rights constitutes injury as a matter of law, particularly when more than merely money is at stake. *Milwaukee County Pavers Ass'n. v. Fiedler*, 707 F.Supp. 1016, 1031-32 (W.D. Wis. 1989); *see also Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1123 (W.D. Wis. 2001) ("the violation of a fundamental constitutional right constitutes irreparable harm, even if it is temporary.").

By combining the two questions into one, the debate over the two proposed amendments was necessarily truncated. McConkey and other electors were unable to discuss compromise. It was impossible for voters like McConkey to try and persuade those concerned about

"defending marriage" to accept the first amendment but reject the second. The debate on the amendment was telescoped into an "all or nothing" proposition. The single subject rule is designed to avoid just such effects. That restriction on debate, discussion and compromise, exactly the political speech protected as a fundamental right under the Wisconsin and United States Constitutions, caused injury to McConkey.

D. This Is A Rare Case Where Voter Status Alone Provides Standing.

Regardless of whether McConkey was injured by dilution of his vote, infringement on his free speech rights, or some other specific injury, this is also one of the rare cases where his status as a voter, otherwise undifferentiated, is sufficient to meet the standing criteria.

In another "marriage case," *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 618 (2004), the First Circuit Court of Appeals held that plaintiffs, seeking to enjoin implementation of the Massachusetts Supreme Court's order directing the State of Massachusetts to recognize the marriage of same-sex

couples, had standing to pursue their claim that the order deprived them of their federal right to a republican form of government under the Guarantee Clause. The plaintiffs asserted standing purely on the basis that they were citizens of Massachusetts; others asserted standing as members of that state's legislature acting as individuals. The defendants challenged the plaintiffs' standing, alleging, much as the Defendant does here, that "at most, they share an undifferentiated harm with other voters." The First Circuit Court rejected this argument:

> [T]he circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim. If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry–which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated–might well be adjusted to the nature of the claimed injury.

Id. at 224-25.

Similarly, a voter who had registered and paid a required poll tax was found to have standing to challenge the poll tax, in *Harman v. Forssenius*, 380 U.S. 528, 534, n. 6 (1965). Likewise, the Hawaii Supreme Court found the electorate as a

whole to have sufficient interest to confer standing on plaintiff voters in an action seeking to set aside election results in a challenge based on procedural irregularities. *Thirty Voters of the County of Kauai v. Do*, 599 P.2d 286, 288 (Haw. 1979).

Article XII, Sec. 1 provides a guarantee to all Wisconsin voters and the electorate as a whole that they will be given the opportunity to separately vote on each proposed amendment to the Wisconsin Constitution. By its terms, a violation of that provision is a violation of each and every voter's rights, and thus each and every voter who would wish to pursue vindication of those rights through a lawsuit like this one would have standing to do so. The "usual" standing inquiry, which distinguishes between injuries unique to a plaintiff and "undifferentiated" injuries, must be adjusted to fit the scope of the class of people and protections under the constitutional provision claimed to be violated. That is, if all voters are protected from logrolling by the legislature, as here, all voters must have standing to seek vindication.

E. Cases Cited By The Defendant, Finding No Standing Due To No Injury, Have No Bearing Here.

The Defendant cites *American Civil Liberties Union v. Darnel*, 195 S.W.3d 612 (Tenn. 2006) and *U.S. v. Hays*, 515 U.S. 737 (1995) at pages 9 to 11 of his Standing Brief to stand for the proposition that being a voter is not enough to challenge election "irregularities." In *Darnel*, the Tennessee Supreme Court rejected a challenge to Tennessee's marriage amendment. The only similarity between McConkey and the plaintiffs in *Darnel* is that they both challenged a marriage amendment. *Darnel* is completely inapposite here.[3]

In *Darnel*, the plaintiffs challenged a constitutional amendment after the state legislature failed to follow constitutional publication requirements. 195 S.W.3d at 622. The court found that the plaintiffs lacked standing because the purpose of the publication requirement was to give notice of the proposed amendment to voters; the plaintiff-voters had learned of the amendment through other means, had thus

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[3]Furthermore, *Darnel* is a decision by a foreign state court which is not mandatory authority in this court.

received notice, and therefore suffered no injury protected by the constitutional provision. *Id.*

In contrast, in this case and as shown above, McConkey was injured through dilution of his "no" vote: others who desired to vote "yes" on one amendment and "no" on another were deprived of that opportunity, thus reducing the number of "no" votes for one or both amendments and diluting the strength of McConkey's vote. That was not the situation in *Darnell*, where the plaintiffs still received notice of the proposed amendment; McConkey's "no" vote did not carry the same weight as it would have if others had been able to vote "yes" on one amendment and "no" on the other. Accordingly, his legally protected interest in voting was directly injured through the failure of the Legislature to comply with the Wisconsin Constitution.

Hays is similarly distinguished by the absence of injury. In that case, the plaintiffs did not live in either of the gerrymandered districts, and hence they could not claim injury: their votes were not limited in their effectiveness by

the legislature's action. McConkey's injuries, described in the previous subsections are clear. *Hays* provides no guidance here.

II. CONCLUSION.

Judge Niess was correct when he found that McConkey had standing. As he explained:

> . . . voting is the bedrock, the very lifeblood of the democracy that we live in, and it needs to be protected above all, I think, and if we do not have a completely open and constitutionally valid voting process, then it sets all kinds of potential harms in play.
>
> And so this isn't just a trifling interest because he could have voted no - - because he voted no or would have voted no on both of them. Every voter is entitled to a constitutionally, procedurally valid amendment and is harmed, has a civil right violated when that does not occur.

R-Ap. at 135.

Based on the arguments presented herein, McConkey asks that the Court find that he has standing to pursue this case.

Dated this 28th day of August, 2009.

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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 2,627 words.

/ s/ Tamara B. Packard
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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).

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