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, THE HONORABLE RICHARD G. NIESS
PRESIDING, AND ON CERTIFICATION
FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF *AMICUS CURIAE* WISCONSIN FAMILY COUNCIL IN SUPPORT OF DEFENDANT-RESPONDENT-CROSS-APPELLANT J.B. VAN HOLLEN

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INTRODUCTION

William C. McConkey ("McConkey") brought this legal challenge against the Wisconsin Marriage Amendment ("Marriage Amendment" or "Amendment"). That constitutional provision, which was approved in November 2006 by 59% of Wisconsin voters, states:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

WIS. CONST. art. XIII, § 13. McConkey asserts what is known as a single-amendment or single-subject procedural challenge, contending that the Marriage Amendment violates Article XII, Section 1 of the State Constitution because its provisions serve distinct and separate purposes not dependent upon or connected with each other. This claim finds no

support in either Wisconsin law or in the law of other states, and thus should be rejected by this Court.

INTEREST OF AMICUS

Amicus Curiae Wisconsin Family Council ("WFC" or "*Amicus*") was founded in 1986 to educate the public and encourage the legislature to affirm Judeo-Christian principles and values in the areas of marriage, family, and religious liberty. To further its mission, WFC actively supported the Marriage Amendment challenged in this case. Initially, WFC worked closely with state legislators to place the Amendment on the ballot. Then, once the legislators submitted the Amendment to the people, WFC worked tirelessly educating the public about the Amendment and advocating for its enactment.

Because of its direct and extensive involvement in the Marriage Amendment's enactment, WFC has a heightened interest in ensuring that the Amendment

is not improperly invalidated. Moreover, WFC's first-hand knowledge about the purpose of and the procedure surrounding the Amendment will benefit the Court in resolving the legal issues in this case.

ARGUMENT

I. MCCONKEY LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE MARRIAGE AMENDMENT UNDER ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION.

The Circuit Court incorrectly concluded that McConkey had standing to challenge the constitutionality of the Marriage Amendment. Van Hollen's brief succinctly and persuasively addresses the standing question. So rather than restate the eloquent arguments expounded therein, *Amicus* joins and supports Van Hollen's arguments.

Amicus nevertheless emphasizes one point about the standing question. The Circuit Court found that "[e]very voter is entitled to a constitutionally, procedurally valid amendment and

is harmed . . . when that does not occur." *See* R-Ap. 135. In effect, the Circuit Court concluded that all voters have standing to challenge the procedural propriety of all constitutional amendments. This reasoning fundamentally transforms standing analysis in the voting context, *see Mast v. Olsen*, 89 Wis. 2d 12, 16 (1979), essentially permitting any voter to assert a procedural challenge to any constitutional amendment. That result conflicts sharply with precedent.

Neither federal nor Wisconsin law permits standing, as the Circuit Court has, based solely on a litigant's status as voter. Instead, voters have standing only to the extent that they allege facts showing a particular "disadvantage to themselves as individual[] [voters]." *Baker v. Carr*, 369 U.S. 186, 206 (1962). But as demonstrated in Van Hollen's brief, McConkey has failed to show that he suffered a

particularized injury. That requirement does not evaporate simply because McConkey's claim arises in the voting context. In short, affirming the Circuit Court's decision would greatly expand the doctrine of standing by permitting any disgruntled voter to bring a procedural challenge to any amendment he substantively dislikes.

The Court should thus find that McConkey lacks standing to bring this legal challenge.

II. THE MARRIAGE AMENDMENT DOES NOT VIOLATE ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION.

Article XII, Section 1 of the Wisconsin Constitution states, in pertinent part, that "if more than one amendment be submitted [to the voters], they shall be submitted in such manner that the people may vote for or against such amendments separately." WIS. CONST. art. XII, § 1. The enactment of a constitutional provision violates

Article XII, Section 1 only where the newly enacted provision contains more than one "amendment."

A. The Provisions Of The Marriage Amendment Constitute A Single Amendment.

A single amendment may include "several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject." *State ex rel. Hudd v. Timme*, 54 Wis. 318, 339 (1882); *see also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 655 (1953). "In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *Hudd*, 54 Wis. at 336.

"It 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 Against Racist and Political Repression v. Elec. Bd. of Wisconsin*, 106 Wis. 2d 593, 604-05 (1982). The legislature is "not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose." *Hudd*, 54 Wis. at 337. Instead, the legislature may bundle multiple propositions in one amendment so long as they all relate to the same subject and further the same "general object or purpose." *Milwaukee Alliance*, 106 Wis. 2d at 607.

The Marriage Amendment is composed of only two short sentences, containing a mere forty-three words. The first sentence—*i.e.*, the definitional provision—relates directly to the second sentence—*i.e.*, the imitation provision—and these inextricably intertwined provisions together constitute just one amendment. Both provisions address the subject of

marriage: the definitional provision defines marriage; and the imitation provision prohibits marriage counterfeits. Both provisions further the same general purpose: to preserve the unique institution of marriage as the union of one man and one woman. The definitional provision achieves that goal by defining marriage as the union of one man and one woman. The imitation provision furthers that purpose by preventing the indirect reconfiguration or imitation of marriage through alternative unions. In short, the Amendment protects the institution of marriage from redefinition or restructuring, by either direct or indirect means.

McConkey's analysis attempts to distort the Marriage Amendment's purpose. By focusing only on language from the Amendment's joint resolution, McConkey tries to limit its purpose to defining the institution of marriage in Wisconsin. *See* McConkey

Brief at 30-33. *Amicus*, however, as a first-hand participant in the Amendment's enactment, strenuously refutes McConkey's narrow characterization of its purpose. As Van Hollen's brief demonstrates and the Circuit Court found, the general purpose of the Marriage Amendment is much broader: to preserve and protect the unique institution of marriage. The Court should thus reject McConkey's self-serving characterization of the Amendment's purpose.

McConkey also attempts to create a more demanding legal standard, contending that the provisions of an amendment must be so "interrelated" that "the defeat of one question would destroy the overall purpose of the . . . proposal." *See* McConkey Brief at 19. While this Court has found that such a close relationship between provisions satisfies the single-amendment rule, *see Milwaukee Alliance*, 106

Wis. 2d at 607, it has never required that the relationship between provisions reach such a heightened level of interrelatedness. In fact, this Court has upheld a measure against a single-amendment challenge even though one of the provisions was not "intimately and necessarily connected" to the other provisions or the overall purpose. *See Hudd*, 54 Wis. at 336-37. This Court should thus reject McConkey's attempt to erect a stringent legal requirement not supported by precedent.

Nevertheless, McConkey's more rigorous standard, while not legally mandated, is satisfied here, because the enactment of the definitional provision without the imitation provision would "destroy the overall purpose" of the Amendment. As stated, the purpose of the Amendment is to preserve the unique institution of marriage. The two-sentence

Amendment recognizes that "marriage-by-another-name" relationships—such as civil unions or domestic partnerships—undermine the institution of marriage by offering simulated alternatives. While the term "marriage" is preserved by the first sentence of the Amendment, without the second provision, this protection would be merely grammatical because the institution itself would be susceptible to change and restructuring through imitation unions.[1] A marriage amendment without the imitation provision would be an insufficient protection for society's most important institution.

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[1] For example, a legislature could duplicate the concept of marriage, give it a new name like a "civil union," and offer that replica institution to whomever it chooses. *See* VT. STAT. ANN. Tit. 15, § 1204(a) ("Parties to a civil union shall have all the same benefits . . . as are granted to spouses in a marriage."). Or a court, as a judicial remedy, could force the legislature to create an imitation marital structure. *See Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006) (requiring the legislature, among other options, to "create a separate statutory structure [of marital unions], such as a civil union").

B. This Court's Precedent Demonstrates That The Enactment Of The Marriage Amendment Did Not Violate Article XII, Section 1.

Wisconsin law demonstrates that the enactment of the Amendment did not violate Article XII, Section 1. This Court has broadly defined the term "amendment," *see Milwaukee Alliance*, 106 Wis. 2d at 607; *Thomson*, 264 Wis. at 655; *Hudd*, 54 Wis. at 339, expansively interpreted the "general object or purpose" of challenged amendments, *see Milwaukee Alliance*, 106 Wis. 2d at 608, and accepted tenuous connections between an amendment's provisions and its general purpose, *see Hudd*, 54 Wis. at 36-38. This Court has thus repeatedly rejected single-amendment challenges, finding only one such violation throughout this State's long history.

The first Wisconsin case addressing a single-amendment challenge was *Hudd*, 54 Wis. at 318. In that case, this Court considered whether the

enactment of a constitutional amendment changing the legislative sessions from an annual to a biennial term violated Article XII, Section 1. That amendment included four separate provisions, one of which increased the legislators' salaries.

The *Hudd* Court found that, despite the joining of these four distinct provisions, a single-amendment violation had not occurred. This Court reasoned that "the whole scope and purpose of the matter submitted to the electors . . . was the change from annual to biennial sessions of the legislature." *Id.* at 336. The Court then concluded that all four provisions furthered that general purpose, specifically finding that the salary provision, while "perhaps[] less intimately and necessarily connected with the change to biennial sessions," was nevertheless connected with the amendment's overall purpose. *Id.* at 336-37. *Hudd* plainly demonstrates that this Court will

accept even a tenuous connection between an amendment's individual provisions and its general purpose. Here, however, the connection is direct: the imitation provision is clearly connected to—and, indeed, is an integral part of—the Marriage Amendment's purpose of preserving and protecting marriage as a unique institution.

Milwaukee Alliance, 106 Wis. 2d at 604-05, involved an amendment creating a "conditional release" system for those accused of crimes. The amendment included five substantive provisions, each involving distinct issues ranging from conditions of release to post-arrest hearings. *Id.* at 600-01.

This Court held that the expansive amendment at issue in *Milwaukee Alliance* did not violate the single-amendment requirement. In reaching that conclusion, this Court broadly defined the purpose of the amendment and concluded that its provisions

were "integral and related aspects of the amendment's total purpose of adopting the concept of conditional release." *Id.* at 608. Likewise, in this case, both the definitional provision and the imitation provision constitute "integral and related aspects" of the Marriage Amendment's purpose of preserving the unique institution of marriage as the union of one man and one woman.

Thomson, 264 Wis. at 654-57, is the only case where this Court has found a single-amendment violation. That case involved a constitutional amendment authorizing the legislature to consider physical area, in addition to population, when drafting senatorial voting districts. This Court found a single-amendment violation because the challenged amendment implemented two unrelated substantive changes in the law. *Id.* at 654. First, a provision changing the boundaries of assembly (rather than

senate) districts "ha[d] no bearing on the main purpose of the proposed amendment . . . , nor [did] it tend to effect or carry out that purpose." *Id.* at 656. Second, a provision adding Native-Americans to the population calculation was "not a detail of a main purpose to consider area in senate districts[,] but [was] a separate matter [that] must be submitted as a separate amendment." *Id.* at 657. For those reasons, this Court found a single-amendment violation.

Contrary to McConkey's suggestions, the redistricting amendment in *Thomson* is unlike the Marriage Amendment at issue here. Even though the purpose of the amendment in *Thomson* was merely to "direct[] the legislature to take area as well as population into account in apportioning the senate districts," *id.* at 656, that amendment made "drastic, revolutionary" changes in the assembly-district

boundaries and population computations, *id.* at 656-57. Thus, the *Thomson* amendment significantly impacted topics unrelated to its purpose. In contrast, the Marriage Amendment's purpose is to protect the unique institution of marriage. The definitional provision prevents the direct redefining of marriage, and the imitation provision prevents the restructuring of marriage through indirect means. Unlike in *Thomson*, both provisions of the Marriage Amendment further its overall purpose.

In sum, both provisions of the Marriage Amendment relate to the same subject and further the same purpose; thus, they together constitute one amendment whose enactment did not violate Article XII, Section 1.

III. EVERY STATE SUPREME COURT THAT HAS ADDRESSED A SIMILAR SINGLE-AMENDMENT CHALLENGE TO A MARRIAGE AMENDMENT HAS REJECTED THAT CLAIM.

Five state supreme courts have rejected legal challenges similar to the single-amendment challenge raised here. Each court found that the purpose of the challenged marriage amendment was to preserve marriage and its unique status (although each articulated that purpose in slightly different ways). And, most importantly, each court agreed that its state's marriage amendment did not violate single-amendment principles.[2]

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[2] A Kentucky trial court also addressed this question in an unpublished decision. *See Wood v. Commonwealth ex rel. Grayson*, No. Civ.A. 04-CI-01537, 2005 WL 1258921, at *5-8 (Ky. Cir. Ct. May 26, 2005). The language of the Kentucky marriage amendment is identical to the Marriage Amendment at issue here. *See* KY. CONST. § 233A. In rejecting that single-amendment challenge, the Kentucky court concluded:

> It cannot be said that the second clause of the amendment pertaining to [a] legal status "identical to or similar to marriage for unmarried individuals" [*i.e.*, the imitation provision] is so foreign that it has no bearing upon a constitutional definition of marriage. Nor can this [c]ourt conclude that the two clauses of the

The Massachusetts Supreme Judicial Court found that a proposed marriage amendment did not violate the single-amendment rule. *See Albano v. Attorney General*, 769 N.E.2d 1242, 1247 (Mass. 2002). The broadly worded amendment proposed in Massachusetts, which was far more intricate than the Amendment at issue here, contained both a definitional provision and an imitation provision (in addition to many others). *See id.* at 1245 n.4. An amendment does not violate Massachusetts' single-amendment rule "[so] long as the provisions of the [amendment] are related by a common purpose." *Id.* at 1247. The Massachusetts Supreme Judicial Court found that the proposed amendment did not violate the single-amendment rule because all of its

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> amendment at issue are essentially unrelated to one another.

Wood, 2005 WL 1258921, at *7. Following the *Wood* court's lead, this Court should likewise conclude that the two provisions of the Marriage Amendment are sufficiently related to constitute a single amendment.

provisions "relate[d] to the common purpose of restricting the benefits and incidents of marriage to opposite-sex couples." *Id.* at 1247.

Similarly, the Louisiana Supreme Court held that its state's marriage amendment did not violate the single-amendment rule. *See Forum for Equality PAC v. McKeithen*, 893 So. 2d 715, 729-37 (La. 2005). That state's lengthy amendment includes both a definitional provision and an imitation provision (in addition to a few others). *Id.* at 717. Louisiana law permits multiple provisions to "be submitted as one amendment" so long as all the provisions "may be logically viewed as parts of a single plan." *Id.* at 732. The Louisiana Supreme Court rejected the single-amendment challenge to its marriage amendment because that measure "contain[ed] a single plan to defend [the] civil tradition of marriage" and "each

provision [therein] constitute[d] an element of [that] plan." *Id.* at 736.

Moreover, the Florida Supreme Court also rejected a single-amendment challenge to its state's proposed marriage amendment. *See Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233-35 (Fla. 2006). The proposed Florida amendment contained nearly identical language to that found in the Amendment challenged here. *See id.* at 1232. Florida law allows multiple provisions to be submitted as one amendment so long as they are "logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Id.* at 1234. The court determined that the single plan of the proposed marriage amendment was "the restriction of the exclusive rights and obligations traditionally

associated with marriage to legal unions consisting of one man and one woman as husband and wife." *Id.* (quotations omitted). The court thus held that this common plan satisfied the requirements of the single-amendment rule. *Id.*

The Georgia Supreme Court also rejected a single-amendment challenge to its state's marriage amendment. *See Perdue v. O'Kelley*, 632 S.E.2d 110, 113 (Ga. 2006). Georgia's extensive marriage amendment contains both a definitional and imitation provision (in addition to many others). *See* GA. CONST. art. 1, § 4, ¶ 1. In that state, "whether . . . a constitutional amendment violates the multiple subject matter rule [depends on] whether all . . . parts of the . . . constitutional amendment are germane to the accomplishment of a single objective." *Perdue*, 632 S.E.2d at 112. The Georgia Supreme Court determined that the amendment's purpose was

to "reserv[e] marriage and its attendant benefits to unions of man and woman," and held that all the provisions were logically related to that purpose and, thus, did not violate the multiple-subject rule. *Id.* at 113.

Furthermore, the Arizona Supreme Court also rejected a single-amendment challenge to a proposed marriage amendment. *See Arizona Together v. Brewer*, 149 P.3d 742, 749 (Az. 2007). The amendment at issue in that case was nearly identical to the Amendment challenged here. *See id.* at 744 n.2. Arizona's single-amendment rule requires that provisions of a proposed amendment be "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 745 (quotations and alterations omitted). The Arizona Supreme Court determined that the common

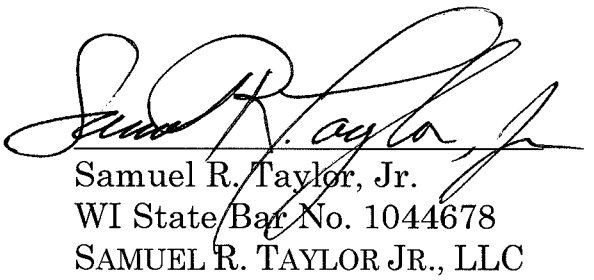
purpose of the proposed amendment was "to preserve and protect marriage" and that the provisions related directly to that purpose. *Id.* Thus, the court concluded that the proposed marriage amendment satisfied the single-amendment rule.

CONCLUSION

For the foregoing reasons, the enactment of the Wisconsin Marriage Amendment did not violate the single-amendment requirement in Article XII, Section 1 of the State Constitution.

Dated this 22 day of August, 2009.

Respectfully submitted,



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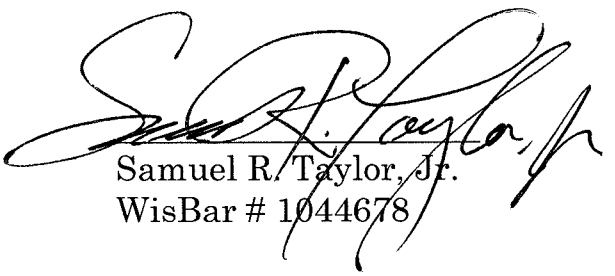
CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,910 words as calculated by the word-count feature in Microsoft Word.



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I am unable to submit an electronic copy of this brief, as required under Wisconsin Statutes § 809.19(12), until the Motion for Permission to File an *Amicus Curiae* Brief posts to the Court's docket. But I certify that I will submit an electronic copy of the brief once that Motion posts to the docket.

I further certify that the electronic brief will be identical in content and format to the printed form of the brief.

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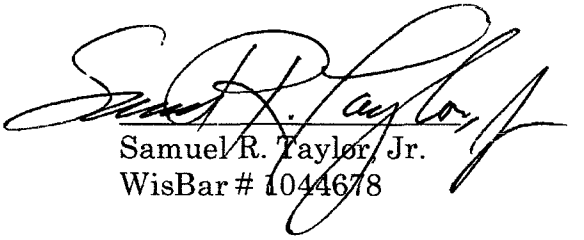

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