SUPREME COURT OF WISCONSIN

No. 2008AP001868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

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* THE LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

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INTRODUCTION

Amicus Curiae asserts that the Circuit Court was correct in finding that McConkey has standing and disagrees with the standing issue as stated by the Defendant-Appellee-Cross-Appellant Attorney General J.B. Van Hollen ("Defendant") in his Brief. As set forth below, standing to challenge a governmental act that implicates voting and First Amendment concerns is perforce an extremely low threshold. Courts do not delve into the merits of the constitutional challenge to determine whether standing exists; rather, it is the assertion of the constitutional right, and the threatened or actual alleged violation of that right, that provides standing to assert the challenge through to a decision on the merits.

The Defendant's position here is that the only person with any standing to assert a constitutional challenge to the Marriage Amendment under Article XII, Section 1 of the Wisconsin Constitution is one who would have voted "yes" to one separate question and "no" to another. This position lacks merit on many levels, but one fundamental defect stands out sharply: the alleged harm to First Amendment rights from the bundling of two separate issues into one extends not only within the voting booth but without – McConkey and other citizens have a protected First Amendment right to advocate for specific votes on separate constitutional amendments. The harm to this right of free speech and association provides standing to McConkey under well-established constitutional precedent.

INTEREST OF AMICUS

Amicus Curiae League of Women Voters of Wisconsin Education Fund, Inc., ("League" or "*Amicus*") is a nonpartisan, grassroots membership organization that encourages active and informed participation in government, works to increase understanding of major public policy issues and seeks to influence public policy through education and advocacy. The League works to protect the fundamental right to vote by providing general information to the public about the process of voter registration, produces voter guides with candidates' answers to questions, encourages citizen participation between elections, and takes positions on selected issues. The League publicly opposed the Marriage Amendment.

Based on its long-term involvement in fostering voter participation and protection of the fundamental right to vote, the League has a heightened interest in protecting the right to vote and the intertwined rights of freedom of speech and ability to petition the government by challenging violation of these rights through the judicial process. The League considers the ability to make a clear choice, free of confusion, to be a critical voting right.

Moreover, the League possesses ninety years of experience in developing case law and public policy concerning voter rights nationwide and in Wisconsin, which will benefit the Court in resolving the legal issues in this case.

ARGUMENT

I. MCCONKEY HAS STANDING TO PURSUE THIS CONSTITUTIONAL CHALLENGE

A. General Standing Analysis

Where a plaintiff has raised a constitutional challenge to legislative, executive, or administrative acts, the standing question is twofold: whether "the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action,'" and "whether the constitutional … provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (citation omitted). *See also Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205, 207 (1979) ("A party has standing to challenge a statute if that statute causes that party injury in fact and the party has a personal stake in the outcome of the action.").

The magnitude of plaintiff's injury is not the issue. *State ex. rel. First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 309, 290 N.W.2d 321, 326 (1980). "'[A]n identifiable trifle is enough for standing to fight out a question of principle.'" *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14, (1973).

In fact, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (quoting *Warth*, 422 U.S. at 500). The violation of a fundamental constitutional right constitutes irreparable injury, even if only temporary. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Milwaukee County Pavers Assoc. v. Fiedler*, 707 F. Supp. 1016, 1031 (W.D. Wis. 1989) (where violations of constitutional rights are alleged, further showing of irreparable injury may not be required).

In evaluating a standing argument, courts should not delve into the underlying merits of the case. *See Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), *cert. denied*, 549 U.S. 1245 (2007). In *Walker*, groups desiring to mount a ballot initiative alleged that a state constitutional provision imposing a supermajority voting requirement violated their First Amendment right of free speech. Specifically, plaintiffs alleged that the constitutional provision had "a chilling effect on [the plaintiffs'] speech" in support of certain initiatives. *Id.* at 1088. The defense argued that the plaintiffs did not have standing because their claim on the merits was incorrect. The Tenth Circuit, in finding the plaintiffs had standing, declined to consider the merits arguments in the context of the standing review because the defendants had "confused[d] standing with the merits," and that, "[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest," because that would be a determination of the merits of plaintiffs' claim under the guise of an evaluation of their standing. *Id*. at 1092.

In this case, the Circuit Court correctly determined that McConkey had standing, and the Defendant's assertion otherwise is incorrect. McConkey alleged a violation of his Constitutional rights, which, by itself, represents an irreparable injury. The merits of the underlying claim are irrelevant to a finding of standing. McConkey has alleged constitutional injury and seeks to redress that injury through the judicial process. He has a personal stake in the outcome of this case, given the violation of his fundamental constitutional rights to vote and freedom of speech.

B. McConkey's Status as a Voter Is Sufficient, By Itself, to Provide Standing.

Voting is a "fundamental political right, because it is preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); and this right is a fundamental interest protected by the Constitution. *Reynolds v. Simms*, 377 U.S. 533, 554-55 (1964). A citizen's right to vote without arbitrary impairment by the state is a legally protected interest that confers standing. *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Lance v. Coffman*, 549 U.S. 437 (2007); *Reynolds v. Simms*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate [or issue] of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). Equal protection requires heightened judicial scrutiny of an election law that burdens the right to vote. *See Bush v. Gore*, 531 U.S. 98, 105 (2000). Further, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

It is an "obligation of government" that the ballot be "balanced, impartial and neutral," with options that are clearly identified and free of confusion, as this can implicate due process concerns. *New Progressive Party v. Hernandez-Colon*, 779 F. Supp. 646, 660 (D.P.R. 1991); *Burton v. Georgia*, 953 F.2d 1266, 1269 (11th Cir. 1992); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated.").

Voters have standing to challenge laws that impact voting rights because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Baker v. Carr*, 369 U.S. 186, 208 (1962); quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

Voters have standing, solely on the basis of their status as voters, to allege violations of First and Fourteenth Amendments and the Voting Rights Act and to seek redress of injury to voting rights. *Nixon v.*

Herndon, 273 U.S. 536 (1927); *Terry v. Adams*, 345 U.S. 461 (1953); *Baker v. Carr*, 369 U.S. 186 (1962); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Bullock v. Carter*, 405 U.S. 134 (1972); *AFSCME Council 25 v. Land*, 583 F. Supp. 2d 840 (E.D. Mich. 2008) (court finds standing of individual plaintiffs based on intent to campaign and allegations of a violation of voting rights).

In fact, the Supreme Court notes that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). In *Nader v. Brewer*, 2006 WL 1663032 (D. Ariz. 2006), the court found plaintiffs had standing solely on the basis of their contention that their vote and their free speech rights were diminished by limits placed on ballot choices. *See also Kidd v. Cox*, 2006 WL 1341302 (N.D. Ga. 2006).

Every Wisconsin voter has the opportunity to vote on each proposed amendment to the Constitution. Wis. Const. Article XII, Section 1. The legislature designed this provision to protect against logrolling and ensure that the opinion and intent of voters is accurately reflected in the results.

The deprivation of McConkey's right to separately express his will on the two amendments because these amendments were not part of a single purpose, resulting in vote dilution, is sufficient to confer standing. Courts frequently recognize that "[a] plaintiff need not have the franchise wholly denied to suffer injury." *Charles H. Wesley Educ. Found., Inc., v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). It is the process itself in which McConkey asserts his rights were violated. His possession of the fundamental right to vote grants him standing to challenge constitutional errors and violations in the process. This is the rule according to the United States Supreme Court, and federal and state courts throughout the nation.

The Defendant's allegation that McConkey lacks standing because he would have voted "no" on both parts of the Amendment, had they been submitted separately, is simply a misstatement of the law. McConkey has a right to a valid, constitutional ballot in the first place. How a person votes is irrelevant if the ballot itself is illegal. Additionally, the analysis of whether the Amendment was the result of log-rolling does not have a role

in a Court's determination of standing. These questions go to the very merits of the case, and as multiple courts have held, are irrelevant and improper to consider in determining standing.

Therefore, as a voter in Wisconsin, McConkey has standing to challenge the Constitutionality of the Marriage Amendment.

C. McConkey Has Standing Based On His Suffering An Injury-In-Fact, Namely, The Violation Of His First Amendment Rights.

The right to vote is deeply intertwined with First Amendment protections. For what good is the right to vote if governments are allowed to infringe upon an individual's ability to educate others about the meaning and impact of laws on which they are voting? The case at bar not only includes an alleged infringement on the right to vote, but a violation of the plaintiff's First Amendment right to free speech. The irreparable injury inflicted upon the plaintiff was the deprivation of freedom of speech. This alleged violation of First Amendment rights independently confers standing upon McConkey.

The First Amendment guarantees that "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Art. I, U.S. Const. Free speech is also guaranteed by Art. I, § 3 of the Wisconsin Constitution, which provides, "[e]very person may freely speak, write and publish his sentiments on all subjects … and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

"First Amendment freedoms are designed to ensure the proper functioning of the democratic process and to protect the rights of individuals and minorities within that process." *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 958 (S.D. W.V. 1996). "[T]he purpose of the First Amendment includes the need … to secure [the] right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of

the authority which the people have conferred upon them." *Wood v. Georgia*, 370 U.S. 375, 392 (1962). Speech involves the communication of information, expressing opinions, and seeking support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Supreme Court decisions have long held that the First Amendment protects the right to receive information and ideas, and that this right is sufficient to confer standing to challenge restrictions on speech. *See, e.g. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

"[P]olitical speech is at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). The timeliness of political speech is also particularly important, and deprivation of free speech prior to an election or vote constitutes irreparable injury. *Carroll v. Princess Anne*, 393 U.S. 175, 182 (1968); *Wood*, 370 U.S. at 391-92.

Within the context of the First Amendment, justification exists to lessen the prudential limitations on standing. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well-established that the Constitution protects the right to receive information and ideas."). Individuals have standing as registered voters who stated their intention to vote or not to vote, or their opposition to being coerced into having to vote. *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Partnoy*, the Court found that not only did the state action unconstitutionally burden the right to vote, but it also violated the plaintiff's First amendment rights. *Partnoy*, 277 F. Supp. 2d at 1078.

A voter has a protected right to voice his opinion and attempt to influence others because a legitimate interest exists in fostering an informed electorate. *Burdick v. Takushi*, 937 F.2d 415, 420 (9th Cir. 1991) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 796 (1983)). A plaintiff has standing to sue based on the alleged deprivation of his First Amendment right to receive and publish protected speech during an election. *North Dakota Family Alliance, Inc. v. Bader*, 261 F. Supp. 2d 1021 (D. N.D. 2005) (finding that this injury is sufficiently actual, concrete, and particularized to satisfy the prudential standing and the constitutional "injury-in-fact" requirements). First Amendment claims may also be permitted by those who did not themselves intend to engage in speech, but instead wanted to challenge a restriction on speech they desired to hear. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976).

There exists a basic right of political association assured by the First Amendment which is protected against state infringement by the due process clause of the Fourteenth Amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). The right to have one's voice heard and one's views considered is at the core of the right of political association. *Id.*

Plaintiff suffered an injury at the time he chose to express his First Amendment rights and was impaired by not being able to effectively lobby other voters on the Marriage Amendment because, as alleged, it contained two separate issues improperly bundled into a single question. McConkey was limited to pursuit of a "vote no" campaign against the Amendment, when a more targeted approach would have been available if separate questions were presented. For example, a voter in favor of defining "marriage" as only between a man and a woman may very well be opposed to the notion of depriving same-sex partners economic, social, and other benefits. McConkey's ability to speak on these separate political issues was hindered by the single Amendment.

The injury stems from the restraints on his legally cognizable First Amendment right to free speech. The Framers sought to protect voting and the electoral process as one of the basic freedoms of American democracy. Coupled with the First Amendment, speech surrounding the voting process

is fundamentally protected, and McConkey's allegation that his free speech rights were violated is sufficient to confer standing.

CONCLUSION

For all of the foregoing, this Court should uphold the Circuit Court's finding that McConkey had standing to challenge the constitutionality of the Marriage Amendment.

Dated this 30th day of September, 2009.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

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 the brief is 2,917 words.

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Matthew W. O'Neill, SBN 1019269
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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of September, 2009, pursuant to § 809.80(3)(b) and (4), Wis. Stats., twenty-two (22) copies of this Brief of *Amicus Curiae* The League of Women Voters of Wisconsin Education Fund were served upon the Wisconsin Supreme Court via first-class mail. Three (3) copies of the same were served upon counsel of record via first-class mail.

Dated at Milwaukee, Wisconsin this 30th day of September, 2009.

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Matthew W. O'Neill, SBN1019269
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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), Wis. Stats. 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.

Dated at Milwaukee, Wisconsin this 30th day of September, 2009.

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