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STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2019AP664 - CR

STATE OF WISCONSIN,

Petitioner-Respondent,

T.A.J.,

Appellant,

v.

ALAN S. JOHNSON

Defendant-Respondent.

**NONPARTY BRIEF AS AMICI CURIAE IN SUPPORT
OF APPELLANT, T.A.J.**

ON REVIEW OF A DECISION OF THE COURT OF
APPEALS REVERSING A NONFINAL ORDER
ENTERED IN WAUPACA COUNTY CIRCUIT COURT,
THE HONORABLE RAYMOND S. HUBER, PRESIDING

LOTUS LEGAL CLINIC
Erika Jacobs Petty, SBN: 1059488
2515 N. 124th Street, Suite 201
Brookfield, WI 53005

WISCONSIN COALITION AGAINST SEXUAL ASSAULT
2801 W. Beltline Hwy., Suite 202
Madison, WI 53713

NATIONAL CRIME VICTIM LAW INSTITUTE
at Lewis & Clark Law School
1130 SW Morrison St. Suite 200
Portland, OR 97205

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Introduction.....	1
Argument.....	1
Conclusion.....	11
Certification of Form and Length	12
Certification of Service	13

TABLE OF AUTHORITIES

Cases	Page
<i>Armada Broad., Inc. v. Stirn</i> , 183 Wis. 2d 463, 516 N.W.2d 357 (1994)	7, 9
<i>Bence v. City of Milwaukee</i> , 107 Wis. 2d 469, 320 N.W.2d 199 (1982).....	2
<i>Carter v. Bigelow</i> , No. 2:02-CV-326 TS, 2011 WL 6069214 (D. Utah Dec. 6, 2011).....	3
<i>City of Madison v. Town of Fitchburg</i> , 112 Wis. 2d 224, 332 N.W.2d 782 (1983).....	5
<i>Democratic Party of Wisconsin v. Wisconsin Dep't of Just.</i> , 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584.....	2
<i>Doe v. United States</i> , 666 F.2d 43, 46 (4th Cir. 1981).....	3
<i>Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.</i> , 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789.....	4, 5
<i>In re Guardianship & Protective Placement of Carl F.S.</i> , 2001 WI App 97, 242 Wis. 2d 605, 626 N.W.2d 330.....	4
<i>In re Jessica J.L.</i> , 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1999).....	10
<i>Melissa J. v. Superior Ct.</i> , 190 Cal. App. 3d 476 (Cal. Ct. App. 1987).....	3
<i>Moedern v. McGinnis</i> , 70 Wis.2d 1056, 236 N.W.2d 240 (1975).....	4
<i>People v. Brown</i> , 54 Cal. Rptr. 3d 887 (Cal. Ct. App. 2007).....	8

<i>People v. Meconi</i> , 746 N.W.2d 881 (Mich. Ct. App. 2008).....	8
<i>Roe v. Wade</i> , 410 US 113 1973).....	6
<i>State ex rel. First National Bank v. M & I Peoples Bank</i> , 95 Wis.2d 303, 290 N.W.2d 321 (1980).....	2
<i>State ex rel. Romley v. Superior Court</i> , 891 P.2d 246 (Ariz. Ct. App. 1995).....	8
<i>State of New Jersey in the Interest of K.P.</i> , 709 A.2d 315 (N.J. Sup. Ct. 1997).....	3
<i>State v. Johnson</i> , 2020 WI App 73, 394 Wis. 2d 807, 951 N.W.2d 616.....	10
<i>State v. Lynch</i> , 2016 WI 66, 371 Wis. 2d 1, 885 N.W.2d 89.....	7
<i>State v. Popenhagen</i> , 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611.....	4
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977).....	6
<i>Wilson v. Commonwealth</i> , 839 S.W.2d 17 (Ky. Ct. App. 1992).....	8
<i>Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission</i> , 2020-AP-02003.....	10
<i>Woznicki v. Erickson</i> , 202 Wis. 2d 178, 549 N.W.2d 699 (1996).....	1
Statutes	Page
Wis. Stat. § 905.04.....	6, 7
Wis. Stat. § 950.105.....	4

Wis. Stat. Ann. § 905.04.....7

Wis. Stat. Ann. § 950.04 (1v)(ag).....6

Wis. Stat. Ann. § 995.50.....6

Other Authorities

Page

Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*,
9 Lewis & Clark L. Rev. 559
(2005).....9

Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*,
2005 BYU L. Rev. 255 (2005).....8

Heather R. Hlavka, *Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization*,
20(4) Men and Masculinities 482, 491 (2017).....1

Ilene Seidman and Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*,
38 Suffolk U. L. Rev. 467 (2005).....7

Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking A Balance to Ensure A Fair Trial for Victims and Defendants*,
83 Tex. L. Rev. 1453 (2005).....6

Robert Weiss, *Treating Male Survivors of Sexual Abuse*,
Psychology Today (June 2, 2016),
<https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/201606/treating-male-survivors-sexual-abuse>..... 1

Constitutional Provisions

Page

Wis. Const. art. I, § 9m..... 9

INTRODUCTION

This case involves an issue fundamental to all victims in Wisconsin—standing to seek enforcement of statutory and constitutional rights. In this case, well-established, fundamental principles of standing are being obfuscated by a misguided focus on the 2020 Constitutional Amendment (Amendment) that granted crime victims additional rights but did not alter Wisconsin’s standing analysis.

ARGUMENT

Male child sexual abuse victims often suffer from shame and socially constructed stigmas that prevent them from disclosing their victimization to others. *See* Heather R. Hlavka, *Speaking of Stigma and the Silence of Shame: Young Men and Sexual Victimization*, 20(4) *Men and Masculinities* 482, 491 (2017) (“Whether perpetrated by men or women, victimization was shameful and stigmatizing for boys and they did not want to risk exposure by disclosing to others.”); Robert Weiss, *Treating Male Survivors of Sexual Abuse*, *Psychology Today* (June 2, 2016), <https://www.psychologytoday.com/us/blog/love-and-sex-in-the-digital-age/201606/treating-male-survivors-sexual-abuse> (reporting that on average male victims do not disclose their victimization for 20 years). When male victims do disclose, failing to protect their privacy can amplify their experience of shame, and further chill reporting.

Fortunately, victims in Wisconsin have clear privacy rights. *See Woznicki v. Erickson*, 202 Wis. 2d 178, 185, 549 N.W.2d 699, 702 (1996) (superseded by statute on other

grounds) (recognizing that Wisconsin “statutes and case law have consistently recognized the legitimacy of the interests of citizens to privacy and the protection of their reputations.”); *Cf. Democratic Party of Wisconsin v. Wisconsin Dep’t of Just.*, 2016 WI 100, ¶ 14, 372 Wis. 2d 460, 474, 888 N.W.2d 584, 591 (recognizing that “protecting the privacy of victims of crime—especially children affected by very sensitive crimes—weighs heavily in favor of nondisclosure” of public records). These privacy rights are at stake in *Shiffra-Green* proceedings, during which the question of whether to disclose a victim’s privileged, confidential mental health records is adjudicated.

Courts have a duty to ensure those with a personal stake in the issue being litigated are heard, regardless of their party status. *See Bence v. City of Milwaukee*, 107 Wis. 2d 469, 478, 320 N.W.2d 199, 203 (1982) (recognizing that “[t]his court has held that the law of standing in Wisconsin should not be construed narrowly or restrictively” and finding that plaintiffs had standing because they “clearly have a personal stake in the outcome of the actions.”). Even a trifling interest may be sufficient to confer standing. *State ex rel. First National Bank v. M & I Peoples Bank*, 95 Wis.2d 303, 309, 290 N.W.2d 321, 325 (1980) (finding “the magnitude of a plaintiff’s injury is not a determinant of his standing” based on the “basic idea ... that an identifiable trifle is enough for standing...” (citations omitted).

Despite the clarity of the rights and standing principles, standing in this case has been unnecessarily complicated by misplaced fear that the victim’s limited participation to

protect their personal rights will usurp the role of prosecutor. A person's standing to protect their rights does not turn them into, or require them to be, a party in a case.¹ As the practice of victim participation across the country has demonstrated, criminal courts are able to accommodate limited victim participation for the purpose of asserting their rights without interfering with a prosecutor's discretion.²

The victim's statutory and constitutional privacy rights are at stake in this case. Records related to his mental health treatment necessitated by the childhood sexual abuse perpetrated against him are under threat of disclosure. By limiting standing in *Shiffra-Green* proceedings to the state and defense, the individual with the most at stake is omitted. Such a result is incompatible with the cornerstone of standing. Here, where the state has failed to file written objections to defense's *Shiffra-Green* motions or provide zealous advocacy on the victim's behalf regarding privacy,

¹ Party status has never been prerequisite to or substitute for this standing analysis. Indeed, it is not uncommon to recognize victim standing for limited purposes in connection with criminal proceedings. *See, e.g., Doe v. United States*, 666 F.2d 43, 46 (4th Cir. 1981) (finding the victim had standing to appeal an adverse trial court decision following a rape shield hearing and stating "the congressional intent embodied in rule 412 will be frustrated if rape victims are not allowed to appeal an erroneous evidentiary ruling made at a pre-trial hearing conducted pursuant to the rule.").

² *See, e.g., Melissa J. v. Superior Ct.*, 237 Cal.Rptr. 5, 5, 190 Cal. App. 3d 476, 479 (Cal. Ct. App. 1987) ("The victim is not considered a party to a criminal proceeding. However, where the court has issued an order concerning [the victim's rights], the victim may assert his or her legitimate rights by the procedures available to parties."); *State of New Jersey in the Interest of K.P.*, 311 N.J.Super. 123, 134, 709 A.2d 315, 320 (N.J. Sup. Ct. 1997) ("It is difficult for the court to imagine that the Legislature intended to give victims these expansive rights, yet specifically intended that they should not be a factor for the court to consider The court finds that the legislative intent is more in line with considering the victim's position as opposed to ignoring it. The court finds a victim is a constructive equivalent to a party in the case."); *see also, Carter v. Bigelow*, No. 2:02-CV-326 TS, 2011 WL 6069214, at *4 (D. Utah Dec. 6, 2011) (granting the victim's motion to strike the petitioner's motion to amend his habeas petition in part because it concluded that "disallowing amendment is necessary to protect [the victim's] statutory right to a proceeding free from unreasonable delay and his right to be treated with fairness").

the trial court's exclusion of the victim is particularly damaging. The result should not stand.

I. Victims Have Standing to Assert and to Seek Enforcement of Their Rights.

Standing in Wisconsin is a judicial policy meant to ensure 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.” *Moedern v. McGinnis*, 70 Wis.2d 1056, 1064, 236 N.W.2d 240, 244 (1975) (citation omitted); *State v. Popenhagen*, 2008 WI 55, ¶ 24, 309 Wis. 2d 601, 617, 749 N.W.2d 611, 618–19 (“A person has standing to seek judicial intervention when that person has ‘a personal stake in the outcome’ and is ‘directly affected by the issues in controversy.’”) (citations omitted). Standing is meant to limit litigation to those who are directly concerned in the issue. *See In re Guardianship & Protective Placement of Carl F.S.*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 609, 626 N.W.2d 330, 332 (“The purpose of the requirement of standing is to ensure that ... people who are directly concerned and are truly adverse will genuinely present opposing petitions to the court.”).

Standing need not be explicitly provided.³ *See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 56, 333 Wis. 2d 402, 432, 797 N.W.2d 789, 804

³ Amici did not brief the argument that Wis. Stat. § 950.105 provides an explicit statutory grant of standing to participate in *Shiffra-Green* proceedings, as it is raised and thoroughly briefed in Appellant's Response Brief, Section I, pp 6 -15. Amici agree that the plain language of the statute also provides the victim with standing in this case.

(holding that where there no statute or constitutional provision governs the standing analysis, “a court determines whether the asserted interest of the party whose standing is challenged is to be recognized by the court on the basis of the facts and relevant legal principles.”); *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 231–32, 332 N.W.2d 782, 785 (1983) (rejecting defendant’s argument that plaintiff lacked standing to sue because the statute at issue did not explicitly grant standing, and finding plaintiffs had sufficient personal interests in the outcome of the controversy to establish standing). As this Court clarified after an exhaustive review of Wisconsin standing, a determination of standing has a long been based on three aspects: “the personal interest, the adverse effect, and judicial policy.” *Foley-Ciccantelli*, 2011 WI at ¶ 42, 333 Wis. 2d at 423, 797 N.W.2d at 799. When substantive statutory or constitutional provisions are at issue, these aspects are represented in a test for standing that asks: “whether the party’s asserted injury is to an interest protected by a statutory or constitutional provision.” *Id.* at 36, ¶ 54, at 430, at 803. The court makes this determination “after examining the interests involved, applicable statutes, constitutional provisions, rules, and relevant common law principles.” *Id.* at 36, ¶ 57, at 432, at 804.

To refuse to recognize the standing of the person with the most interest in the outcome of a *Shiffra-Green* hearing turns this well-established law on its head.

A. Wisconsin Victims’ Privacy Rights in Their Privileged and Confidential Mental Health Records Give Them a Legally Protected Interest at Risk of Injury in *Shiffra-Green* Proceedings.

In this case, the victim's privileged, confidential mental health records fall squarely within statutory and constitutional privacy rights, providing the victim with a legally protected interest. *See, e.g.*, Wis. Stat. Ann. § 950.04 (1v)(ag) (granting victims the right "[t]o be treated with fairness, dignity, and respect for his or her privacy by public officials, employees, or agencies."); Wis. Stat. Ann. § 995.50 ("The right of privacy is recognized in this state."); Wis. Stat. Ann. § 905.04 (recognizing a patient's privilege with their psychologist, social worker, or professional counselor); *Whalen v. Roe*, 429 U.S. 589, 599, 97 S. Ct. 869, 876, 51 L. Ed. 2d 64 (1977) (recognizing that the United States Constitution provides a right to personal privacy, which includes an "individual interest in avoiding disclosure of personal matters"); *Roe v. Wade*, 410 U.S. 113, 152, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973) ("[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); *see also* Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking A Balance to Ensure A Fair Trial for Victims and Defendants*, 83 Tex. L. Rev. 1453, 1473 (2005) (citing federal court cases that have recognized that counseling records are protected by a federal constitutional right of privacy); *Cf. Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 475, 516 N.W.2d 357, 361 (1994) (recognizing a "heightened significance given to privacy and reputation" in Wisconsin).

A *Shiffra-Green* hearing is the procedure used to determine whether a defendant seeking privileged,

confidential records has made the showing necessary to overcome the victim's privacy interests. *See State v. Lynch*, 2016 WI 66, ¶ 2, 371 Wis. 2d 1, 4, 885 N.W.2d 89, 90 (“Under Shiffra/Green, a defendant can acquire a complainant's privileged mental health treatment records when he demonstrates ‘a reasonable likelihood that the records contain relevant information necessary to a determination of guilt or innocence....’”) (citation omitted) (lead opinion). Thus, the very purpose of the proceedings determines scope and application of a victim's rights. *See, e.g., Id.* at ¶56 (noting that any right that defendant has to obtain victim's mental health records “would ... need to be balanced against Wis. Stat. § 905.04, the privilege statute.”). If defendant is successful, the outcome of the proceeding is disclosure of the victim's records to the very person charged with causing them harm, an outcome that causes significant injury. *See, e.g., Ilene Seidman and Susan Vickers, The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 473 (2005) (“For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot.”). As such, a straightforward application of this Court's standing analysis makes clear that victims whose records are at issue have standing to participate in *Shiffra-Green* proceedings.

B. The Independent Nature of Victims' Rights Renders the State's Participation in the *Shiffra-Green* Hearing Non-Determinative of Standing.

Victims' privacy rights and interests are individually held. *See, e.g.*, Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. Rev. 255, 270-74 (2005) (observing that "[v]ictims . . . possess independent rights to participate at certain stages of the criminal process").⁴ No one else can be expected to advocate as vehemently for those interests as the victim. *Doe*, 666 F.2d at 46 (reasoning that victims cannot rely on the government to advance their interests, as it does not "share[] these interests to the extent that they might be viewed as a champion of the victim's rights."); *Cf. Armada Broad., Inc.*, 183 Wis. 2d at 476-77, 516 N.W.2d at 362 (granting intervention where the media sought access to a sexual harassment investigation report from a school district and finding: "We cannot not expect the District to defend the mandamus action with the vehemence of someone who is directly affected by public disclosure of the report. . . . Therefore, we find that in order to be adequately represented [the person affected] must be allowed to intervene in the mandamus action."). Moreover, it is well-established that the government does not represent the victim. *See, e.g.*, Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The*

⁴ *See also State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 381, 891 P.2d 246, 249 (Ariz. Ct. App. 1995) (finding that the state cannot waive victims' restitution rights); *People v. Brown*, 147 Cal. App. 4th 1213, 1226, 54 Cal. Rptr. 3d 887, 896 (Cal. Ct. App. 2007) ("Victim restitution may not be bargained away by the People."); *Wilson v. Commonwealth*, 839 S.W.2d 17, 21 (Ky. Ct. App. 1992) (holding that the rights guaranteed Kentucky victims "belong to the victim independent of the Commonwealth, and cannot be plea bargained away without the crime victim's actual approval"); *People v. Meconi*, 277 Mich. App. 651, 659, 746 N.W.2d 881, 885 (Mich. Ct. App. 2008) (Sawyer, J. concurring) (finding that the prosecutor's express agreement to a sequestration order could not waive the victim's right to be present because, *inter alia*, "[t]he right of the victim to attend the trial belongs to the victim, not the prosecutor").

Prosecutor's Duty of Neutrality, 9 Lewis & Clark L. Rev. 559 (2005) (discussing prosecutorial neutrality).

Indeed, as evidenced in this case, the State does not always adequately represent the victim's interests. The minor victims sought independent counsel *after* the prosecution failed to file written responses to either of defendant's motions requesting the victim's and his sister's mental health records, and failed to zealously advocate against disclosure at the *Shiffra-Green* hearing. See Response Brief of Appellant, 3. Without victim participation the trial court was presented with a less than full development of the issue.

C. Application of the 2020 Amendment Granting Victims Additional Rights and Explicit Standing is Not Determinative of the Victim's Standing in this Case.

The standing analysis in this case has been obfuscated by a red herring – the 2020 Amendment, Wis. Const. art. I, § 9m. The appellate court relied on explicit language in the Amendment to overturn the trial court's denial of standing,⁵ see *State v. Johnson*, 2020 WI App 73, ¶ 40, 394 Wis. 2d 807, 834, 951 N.W.2d 616, 629, and defendant now argues that the appellate court erred in finding that the Amendment grants victim standing because, *inter alia*, it is not retroactive. Brief

⁵ *State v. Johnson*, 2020 WI App 73, ¶¶ 24-26, 394 Wis. 2d 807, 826, 951 N.W.2d 616, 625 (“The 2020 Constitutional Amendment Grants Crime Victims Standing to Oppose a Defendant's *Shiffra/Green* Motion, and Abrogates *Jessica J.L.* ¶25 The 2020 Amendment grants victims rights using broad language. Pertinent here, the amendment subsections (2) and (2)(i) state that a victim has the right to be heard in any proceeding ‘during which a right of the victim is implicated,’ and that these and other rights of the victim must be ‘protected by law in a manner no less vigorous than the protections afforded to the accused.’ See Wis. Const. art. I, § 9m (2) and (2)(i). Paragraph (4)(a) states that a victim may ‘assert and seek’ in circuit court rights delineated in the amendment and ‘any other right[s], privilege[s], or protection[s] afforded to the victim by law.’ See *id.* art. I, § 9m (4)(a).”).

of Defendant-Respondent-Petitioner, 25-29. This Court need not address retroactivity of the Amendment as neither defendant's argument nor the appellate court's analysis is salient to the issue before the Court. Standing of the victim is the issue before this Court, and the victim has established standing without relying on the Amendment. As explained above, victim standing in the *Shiffra-Green* proceedings is satisfied using traditional notions of standing, making any explicit provision in statute or constitutional amendment irrelevant.^{6,7}

CONCLUSION

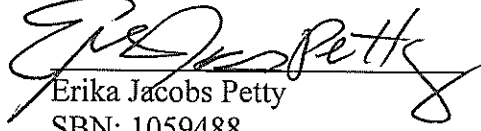
Rights afforded must be able to be protected. It is undisputed that the victim in this case has rights. Those rights are directly implicated in the *Shiffra-Green* hearing. For an accurate and thorough presentation of the issues, the person with the most at stake in the outcome – the victim – is necessary. Such limited participation falls well within the established contours of Wisconsin's standing doctrine.

⁶ A challenge to the Amendment relied upon by the court below, *see Johnson*, 2020 WI App at ¶ 40, is pending in the court of appeals, arguing it violated the single-subject rule when presented to voters. *Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission*, 2020-AP-002003.

⁷ For the same reasons put forth here, *In re Jessica J.L.*, 223 Wis. 2d 622, 589 N.W.2d 660 (Ct. App. 1998), in which the appellate court held that statutory directive was necessary to grant victims standing to object to the disclosure of their records, was wrongly decided and this Court's decision is necessary to correct the erroneous decision. While the appellate court's decision in this case overrules the holding in *In re Jessica J.L.*, it does not abrogate the flawed reasoning employed in the decision that may affect future cases.

Dated this 22nd day of June, 2021.

Counsel for Amici



Erika Jacobs Petty
SBN: 1059488

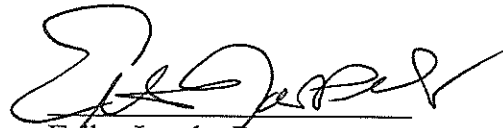
LOTUS Legal Clinic, Inc.
2515 N. 124th Street, Suite 201
Brookfield, WI 53005

**FORM AND LENGTH CERTIFICATION
AND
CERTIFICATION OF COMPLIANCE WITH
WIS. STAT. § 809.12(12)**

I hereby certify that the foregoing brief conforms to the rules contained in Wis. Stat. § 809.19 (7), (8)(b), (8)(c)2, and (8)(d), for a non-party brief produced with a proportional serif font. The length of this brief is 2,184 words (maximum is 3,000).

Per Wis. Stat. § 809.19 (12), the text of the electronic copy of this brief is identical to the text of the paper copy filed with the Court.

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



Erika Jacobs Petty
State Bar No. 1059488
LOTUS Legal Clinic, Inc.
2515 N. 124th Street, Suite 201
Brookfield, WI 53005
(414) 455-8346

CERTIFICATE OF SERVICE

Rachel E. Sattler herein certifies that she is employed by LOTUS Legal Clinic, Inc., which is located at 2515 N. 124th Street, Brookfield, WI 53005; that on the 23rd day of June, 2021, she hand-delivered 22 copies of the Brief of *Amici Curiae* LOTUS Legal Clinic, National Crime Victim Law Institute, and Wisconsin Coalition Against Sexual Assault, in the above-entitled case, to the Clerk of the Wisconsin Supreme Court, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, WI 53701-1688; and deposited in the U.S. mail, three copies of the above-referenced brief, securely enclosed, the postage prepaid and addressed to:

Hon. Raymond S. Huber
Circuit Court Judge
Waupaca County Courthouse
811 Harding Street
Waupaca, WI 54981

Veronica Fay Isherwood
District Attorney
811 Harding St.
Waupaca, WI 54981

Terrie J. Tews
Clerk of Circuit Court
Waupaca County Courthouse
811 Harding St.
Waupaca, WI 54981

Andrea K. Rufo
Legal Action of Wisconsin
4900 Spring St., Ste. 100
Mount Pleasant, WI 53406

Sarah Burgundy
Wisconsin Dept. of Justice
17 W. Main Street
Madison, WI 53707

Nathaniel J. Wojan
Petit & Dommershausen
1650 Midway Road
Menasha, WI 54952

Ellen Henak
Henak Law Offices, S.C.
316 N. Milwaukee St., Ste. 535
Milwaukee, WI 53202-5888

Louis J. Molepske Jr.
District Attorney
1516 Church Street
Stevens Point, WI 54481

Aaron Nelson
Nelson Defense Group LLC
811 First St., Ste. 101
Hudson, WI 54016



Rachel E. Sattler
State Bar No. 1069328
LOTUS Legal Clinic, Inc.
2515 N. 124th St. Ste. 201
Brookfield, WI 53005
(414) 477-0789