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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP2003

WISCONSIN JUSTICE INITIATIVE, INC., a Wisconsin nonstock corporation, JACQUELINE E. BOYNTON, JEROME F. BUTING, CRAIG R. JOHNSON and FRED A. RISSER,

Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS, in her official capacity as Chair of the Wisconsin Elections Commission, DOUGLAS LA FOLLETTE, in his official capacity as Secretary of State of Wisconsin and JOSH KAUL, in his official capacity as Attorney General of Wisconsin,

Defendants-Appellants.

ON APPEAL FROM A NOVEMBER 3, 2020, DECISION AND ORDER, AND A NOVEMBER 23, 2020, JUDGMENT, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE FRANK D. REMINGTON, PRESIDING

BRIEF AND APPENDIX OF APPELLANTS

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INTRODUCTION

In May 2019, after two years of public debate and with bipartisan support, the Wisconsin Legislature passed a joint resolution placing a proposed constitutional amendment on the ballot for the April 7, 2020, election. The proposed amendment (the "Amendment"), commonly known as Marsy's Law, proposed changes to Wis. Const. art. I, § 9m, Wisconsin's constitutional provision for crime victims' rights. The Amendment proposed giving victims new constitutional rights and strengthening protection of victims' rights. Pursuant to constitutional and statutory obligations, the Legislature's joint resolution included the question to be placed on the ballot—the question that served to identify the amendment to be voted upon. At the election, Wisconsin voters overwhelmingly ratified the Amendment and it became part of the Wisconsin Constitution.

This case concerns the legal sufficiency of the referendum question that appeared on the ballot. (R. 25:3, A-App. 142, the "Ballot Question.") The circuit court ruled that the Ballot Question was constitutionally deficient. It concluded that the Ballot Question lacked essential elements, was misleading, and needed to be presented as multiple questions, because—in the court's view—it did not meaningfully confront the effects the Amendment could have on defendants' rights. It then "enjoined" the Amendment but stayed its order pending appeal. This Court should reverse.

A court's review of a ballot question, though de novo, is narrowly confined to whether the Legislature acted reasonably and within its discretion. A court's role is to determine whether the ballot question was so detached from the amendment itself that it fell outside the Legislature's broad constitutional authority to choose how to present the question to the people. Only if the question failed to present the real question, or presented an entirely different question,

may a court conclude that the Legislature acted unreasonably.

Here, the Legislature's Ballot Question passes constitutional muster because it concisely communicated that the Amendment would (1) give crime victims additional rights, (2) strengthen the protection of victims' rights, but (3) leave defendants' federal constitutional rights intact. This is a proper reflection of the Amendment's text, and therefore falls squarely within the Legislature's broad discretion.

Although this Court owes no deference to the circuit court's decision, its reasoning was incorrect in at least two critical respects. First and fundamentally, the court used the wrong test. Wisconsin law does not require that a ballot question provide information about possible legal or policy implications of a proposed amendment; instead, what is required is a concise summary. Second, the court improperly rested its analysis on possible legal effects of the Amendment. Neither the circuit court nor the Plaintiffs have identified any concrete effect this Amendment will have on the rights of the accused. The circuit court's conclusions are speculative at best, and mistaken at worst. The court erroneously concluded that the omission of possible impacts rendered the Ballot Question incomplete and further required a separate question.

Indeed, the circuit court's analysis conflated the Ballot Question's sufficiency with the legal and policy merits of the Amendment itself. But our supreme court has made clear that the political wisdom or legal merits of the Amendment are not relevant in a ballot question challenge. Instead, the Amendment's effects must be litigated in concrete disputes by a party who demonstrates an actual injury.

The circuit court's decision also raises troubling implications regarding separation of powers. The Legislature has discretion in prescribing the manner in which proposed

amendments are presented to the people. And our system expects the voters to independently educate themselves on the legal and policy implications of an Amendment—that is not the work of the ballot question. Given the importance of deferring to the Legislature and respecting the will of the people, it is no surprise that—before the circuit court's decision here—a constitutional amendment ballot question has only been invalidated *one* time in Wisconsin history. The circuit court did not properly defer to the Legislature, and instead assigned the Ballot Question a far heavier burden than it had to carry.

The Ballot Question was a proper exercise of the Legislature's constitutional discretion because it fairly presented the real question to the voters in a concise summary of the Amendment. Further, it was proper to submit this Amendment as a single amendment because all aspects were designed to accomplish a single overall purpose. This Court should reverse the circuit court and hold that the Legislature acted within its broad discretion.

ISSUES PRESENTED

1. Whether the Ballot Question constituted a proper exercise of the Legislature's discretion under Wis. Const. art. XII, § 1 because it met all requirements as to the necessary content and form to present the real question to the voters, namely, a concise summary that reasonably references every essential element of the Amendment.

The circuit court answered no.

This Court should answer yes.

2. Whether the Legislature properly exercised its discretion under Wis. Const. art. XII, § 1 to present the Amendment to the voters as a single amendment in a single ballot question.

The circuit court answered no.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary because the briefs, taken together, will adequately present the issues on appeal.

Publication is warranted to further clarify the proper standard to assess the sufficiency of a ballot question. Wis. Stat. § 809.23(1)(a)1. Further, this case is "of substantial and continuing public interest." Wis. Stat. § 809.23(1)(a)5.

STATEMENT OF THE CASE

I. Factual background.

A. The parties.

Plaintiff-Respondent Wisconsin Justice Initiative is an organization committed to advancing, among other things, defendants' rights. (R. 7:1–2 ¶¶ 1–3.) Plaintiffs-Respondents Jacqueline E. Boynton, Craig R. Johnson, Jerome F. Buting, and former State Senator Fred Risser are Wisconsin residents who oppose the Amendment. (R. 1:5 ¶¶ 2–5; R. 4; 6; 8.) Defendant-Appellant Wisconsin Elections Commission (WEC) administers the State's elections. (R. 19:2 ¶ 4.) The other Defendants-Appellants are Ann S. Jacobs, WEC's chairperson; Secretary of State Douglas La Follette; and Attorney General Josh Kaul. (R. 1:5 ¶¶ 7–9.)

B. The Amendment.

Wisconsin was one of the first states to pass a Crime Victims' Bill of Rights, and historically has had some of the strongest victims' rights. *See* Wis. Const. art. I, § 9m (2017–18) (created April 1993); *see generally* Wis. Stat. ch. 950. In 2017 and 2019, the proposed "Marsy's Law" constitutional amendment was introduced in the Legislature. (*See* R. 24; 25, A-App. 140–42; R. 1:10 ¶¶ 28, 31.)

The Amendment enhances the prior version of article I, section 9m by giving victims new rights and strengthening the protections of existing rights. The prior version read as follows:

> This state shall treat crime victims, as defined by law, with fairness, dignity and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused. The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.

Wis. Const. art. I, § 9m (2017–18), (A-App. 145).

The Amendment revised and added to this language; it divided article I, section 9m into the following six sections:[1]

Section 9m(1) now provides a definition for "victim" that is similar to the longstanding statutory definition in Wis. Stat. § 950.02(4). It provides that "victim," in certain circumstances, may include persons beyond the person against whom a crime was committed.

The introductory language of section 9m(2) contains a purpose statement: "to preserve and protect victims' rights to

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[1] For a complete blackline of the changes made by the Amendment, (*see* R. 25, A-App. 140–42). Defendants-Appellants have also provided in their appendix clean copies of article I, section 9m before and after the Amendment took effect. (A-App. 143–45.)

justice and due process throughout the criminal and juvenile justice process." Under section 9m(2), victims shall be entitled to the enumerated rights, which "shall vest at the time of victimization and be protected by law in a manner no less vigorous than the protections afforded to the accused." *Id.*

Many of the enumerated rights added through the Amendment echo the prior version of section 9m, or similar provisions in previously existing Wisconsin law:

> a. To be treated with dignity, respect, courtesy, sensitivity, and fairness.[2]
>
> b. To privacy.[3]
>
> c. To proceedings free from unreasonable delay.[4]
>
> d. To timely disposition of the case, free from unreasonable delay.[5]
>
> e. Upon request, to attend all proceedings involving the case.[6]

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[2] *See* Wis. Const. art. I, § 9m (2017–18) and Wis. Stat. § 950.04(1v)(ag) (requiring that crime victims were treated "with fairness, dignity and respect" for their privacy).

[3] *Id.*

[4] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring victims had "timely disposition of the case"); Wis. Stat. § 950.04(1v)(ar), (k) (the right to "a speedy disposition of the case").

[5] *Id.*

[6] *See* Wis. Const. art. I, § 9m (2017–18) (victims had "the opportunity to attend court proceedings"); Wis. Stat. § 950.04(1v)(b) (victims' right to "attend court proceedings in the case"); *see also* Wis. Stat. § 950.04(1v)(em), (nn), (nt), (nx).

> f. To reasonable protection from the accused throughout the criminal and juvenile justice process.[7]
>
> g. Upon request, to reasonable and timely notification of proceedings.[8]
>
> h. Upon request, to confer with the attorney for the government.[9]
>
> i. Upon request, to be heard in any proceeding during which a right of the victim is implicated, including release, plea, sentencing, disposition, parole, revocation, expungement, or pardon.[10]
>
> j. To have information pertaining to the economic, physical, and psychological effect upon the victim of the offense submitted to the authority with

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[7] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring victims had "reasonable protection from the accused throughout the criminal justice process"); Wis. Stat. §§ 950.04(1v)(e), 967.10(2), 938.2965(2) (victims' right to a waiting area or minimal contact with the accused).

[8] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring that victims had "notification of court proceedings"); Wis. Stat. § 950.04(1v)(g) (reasonable attempts are made "to notify the victim of hearings or court proceedings"); Wis. Stat. § 950.04(1v)(f), (gm), (vm), (ym) (victims' right to notification or reasonable attempts at notification).

[9] *See* Wis. Const. art. I, § 9m (2017–18) (victims had "the opportunity to confer with the prosecution"); Wis. Stat. § 950.04(1v)(i) (victims shall have opportunity to consult with intake workers, district attorneys, and corporation counsel in juvenile cases); *see also* Wis. Stat. § 950.04(1v)(j) (right to "the opportunity to consult with the prosecution").

[10] *See* Wis. Stat. § 950.105 (victims' right to assert "his or her rights as a crime victim" in a court in the county in which the alleged violation occurred).

> jurisdiction over the case and to have that information considered by that authority.[11]
>
> k. Upon request, to timely notice of any release or escape of the accused or death of the accused if the accused is in custody or on supervision at the time of death.[12]
>
> l. To refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused.[13]
>
> m. To full restitution from any person who has been ordered to pay restitution to the victim and to be provided with assistance collecting restitution.[14]

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[11] *See* Wis. Const. art. I, § 9m (2017–18) (victims had "the opportunity to make a statement to the court at disposition"); Wis. Stat. § 950.04(1v)(pm) (victims' right to "have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim").

[12] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring that victims had "information about . . . the release of the accused"); Wis. Stat. § 950.04(1v)(um), (v), (vg), (w), (x), (xm) (victims' right to have district attorneys and relevant state agencies make "a reasonable attempt to notify the victim" regarding conditional releases, community confinements, parole revocation, release to supervision, etc.).

[13] *See* Wis. Stat. § 950.04(1v)(er) (victims' right to "not be compelled to submit to a pretrial interview or deposition by a defendant or his or her attorney"); Wis. Stat. § 971.23(6c) ("Except as provided in s. 967.04, the defendant or his or her attorney may not compel a victim of a crime to submit to a pretrial interview or deposition.").

[14] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring victims' right to "restitution"); Wis. Stat. § 950.04(1v)(q) (victims' right to "restitution"); and Wis. Stat. § 950.04(1v)(r) (victims' right to "a judgment for unpaid restitution").

> n. To compensation as provided by law.[15]
>
> o. Upon request, to reasonable and timely information about status of the investigation and the outcome of the case.[16]
>
> p. To timely notice about all rights upon this section and all other rights, privileges, or protections of the victim provided by law, including how such rights, privileges, or protections are enforced.[17]

Wis. Const. art. I, § 9m(2)(a)–(p).

Section 9m(3) states that, except as provided under subsection (2)(n), all provisions of this section are self-executing, but the Legislature may prescribe further remedies for violations and procedures for enforcement.[18]

Section 9m(4) explains that victims may assert their rights in court, and may obtain review of adverse decisions

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[15] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring that victims received "compensation"); Wis. Stat. § 950.04(1v)(rm) (victims' right to "compensation").

[16] *See* Wis. Const. art. I, § 9m (2017–18) (ensuring that victims had "information about the outcome of the case"); Wis. Stat. § 950.04(1v)(y) (victims' right to "reasonable attempts made to notify the victim concerning actions taken in a juvenile proceeding"); Wis. Stat. § 950.04(1v)(zm) (victims' right to "request information from a district attorney concerning the disposition of a case").

[17] *See* Wis. Stat. § 950.04(1v)(t) (victims' right to "receive information from law enforcement agencies"); Wis. Stat. § 950.04(1v)(u) (victims' right to "receive information from district attorneys"); Wis. Stat. § 950.04(1v)(y) (victims' right to "reasonable attempts made to notify the victim concerning actions taken in a juvenile proceeding"); Wis. Stat. § 950.08(2) (the Wisconsin Department of Justice shall inform crime victims about their rights and victim services).

[18] *See* Wis. Const. art. I, § 9m (2017–18) ("The legislature shall provide remedies for the violation of this section.").

concerning their rights; it also provides that courts should act promptly and provide a remedy for a violation of a victim's right.[19]

Section 9m(5) clarifies that an action for money damages may not be brought against the state or state actors.

Lastly, section 9m(6) provides that article I, section 9m is "not intended and may not be interpreted to supersede a defendant's federal constitutional rights," and that it does not "afford party status in a proceeding to any victim."

C. The Legislature approved the Amendment and formulated the Ballot Question.

Wisconsin Const. art. XII, § 1 articulates the procedure that must be followed to amend the constitution. Each legislative house must agree by majority vote to adopt the proposal. Wis. Const. art. XII, § 1. In the next legislative session, each house must again agree by majority vote and submit the same proposal to the people for approval and ratification. *Id.*

Here, the Legislature first considered the Amendment in 2017. (R. 24.) It was approved by a bipartisan majority vote in both houses and became 2017 Enrolled Joint Resolution 13. (R. 24.)

The 2019 Legislature also considered the Amendment, set forth in 2019 Senate Joint Resolution 2. (R. 25, A-App. 140–42; R. 26; 27.) In May 2019, both houses of the Legislature agreed by majority vote to approve the Amendment's second consideration, which became 2019 Enrolled Joint Resolution 3.[20] The joint resolution

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[19] *See* Wis. Const. art. I, § 9m (2017–18) (requiring that the Legislature provided remedies for violation of victims' rights); Wis. Stat. § 950.105 (victims' right to assert "his or her rights" in a court in the county in which the alleged violation occurred).

[20] *See* History for Senate Joint Resolution 2, https://docs.legis.wisconsin.gov/2019/proposals/sjr2.

specified that the Amendment would be submitted to a vote of the people at the April 2020 election. (R. 25:2, A-App. 141.)

The joint resolution further directed that the question concerning ratification be stated on the ballot as:

> **QUESTION 1: "Additional rights of crime victims.** Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?"

(R. 25:3, A-App. 142.)

D. Informing the electorate about the Amendment and submitting the Ballot Question for vote.

As directed by the Legislature, the Amendment was submitted to a vote at the April 7, 2020, election. (R. 19:3 ¶ 7.) This triggered statutory duties for the WEC and municipal clerks. (R. 19:3 ¶ 7.)

Relevant here, after WEC certified the referendum question, municipal clerks had to prepare and publish three types of notices to inform voters about the Amendment. The Type A notice provided the Ballot Question and information on where a copy of the Amendment's entire text could be obtained. Wis. Stat. §§ 10.01(2)(a), 10.06(2)(f); (R. 19:4–5 ¶ 12; R. 20.) The Type B notice provided sample ballots and voting instructions. Wis. Stat. § 10.01(2)(b); (R. 19:5 ¶ 14; R. 21.) The Type C notice included the full text of the Amendment; it also included an explanatory statement explaining the effects of a "yes" or "no" vote, prepared by the Attorney General. Wis. Stat. § 10.01(2)(c); (R. 19:5–6 ¶¶ 15–16.)

On April 7, 2020, Wisconsin voters approved and ratified the Amendment by a three-to-one margin. The election results were certified on May 4, 2020, and the Amendment became effective that day. *See* Wis. Stat. § 7.70(3)(h).

II. Procedural background.

Prior to the election, Plaintiffs filed a complaint, alleging that the Ballot Question violated Wis. Const. art. XII, § 1, because it did not sufficiently inform voters about the substance and ramifications of the Amendment. (R. 1:11–14.) They also claimed that the Ballot Question violated the separate amendment rule under Wis. Const. art. XII, § 1. (R. 1:14–17.) Plaintiffs moved for a temporary injunction to prevent the Amendment from appearing on the April 2020 ballot. (R. 2.)

The circuit court denied the temporary injunction motion, following a February 7, 2020, hearing. (R. 29; 47.) The court concluded that, among other things, Plaintiffs failed to show a substantial likelihood of success on the merits. (R. 47:75.) It also concluded "that there would be irreparable harm to the democratic process," and "significant disruption to the orderly administration of the spring election" if it issued the injunction. (R. 47:81.)

After the Amendment passed, Plaintiffs filed a motion for a declaratory judgment. They argued that the Ballot Question did not include every essential element of the Amendment, that the Ballot Question was misleading, and that the Amendment needed to be presented as multiple amendments. (*See generally* R. 35.) Following briefing, (*see* R. 36), the circuit court heard argument on August 13, 2020. (R. 38:2). It then requested supplemental briefing on whether the principles of severability apply to the

Amendment[21], and what impact, if any, the *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35, decision had on this case. (R. 39–41; 48:24, 83.)

The circuit court issued a written decision on November 3, 2020. (R. 42, A-App. 104–39.) It ruled that the Ballot Question was constitutionally deficient because it did not communicate every essential element and was misleading because of omissions relating to effects on defendants' rights. The court also held that a separate ballot question should have been presented regarding the effects of the Amendment on defendants' rights. (R. 42:3, A-App. 106.)

The circuit court reasoned that the prior version of article I, section 9m "created rights for persons accused of a crime." (R. 42:11, A-App. 114.) According to the court, the Ballot Question was deficient because it did not communicate that the Amendment "would abrogate the rights of individuals accused of a crime of their right to a fair trial." (R. 42:12, A-App. 115.) The court also believed that the Ballot Question misled voters into "[s]tripping the rights formerly provided the accused that were in the State Constitution but assuring the voter that this does not change the United States Constitution." (R. 42:25, A-App. 128.)

The circuit court also concluded that the Ballot Question was misleading because it explained that victims' rights would be protected "with equal force" to protections afforded the accused, while the Amendment itself provides that victims' rights will be "protected by law in a manner no less vigorous than the protections afforded to the accused." (R. 42:15–20, A-App. 118–23.) The court reasoned that "equal"

[21] The parties agreed severability principles do not apply to the ballot-question analysis. (R. 39; 40.)

connotes the "same," while "no less vigorous" could mean "greater to that which is equal." (R. 42:18, A-App. 121.)

Lastly, the circuit court explained that the Amendment should have been submitted as two amendments because "expand[ing] the definition of a crime victim [ ] to give crime victims greater rights" is "sufficiently distinct" from "curtail[ing] the rights of persons only accused of committing a crime." (R. 42:30, A-App. 133.)[22]

In response to a request for clarification from Plaintiffs, the circuit court entered judgment on November 23, 2020, declaring that the ballot question did not meet constitutional and statutory requirements, and permanently enjoining the Amendment. (R. 43–44, A-App. 101–04.) It stayed its order pending appeal. (R. 44:3, A-App. 103.) This appeal followed. (R. 46.)

STANDARD OF REVIEW

Whether an amendment to the Wisconsin Constitution was properly adopted is a question of law reviewed de novo. *Milwaukee All. v. Elections Bd.*, 106 Wis. 2d 593, 604, 317 N.W.2d 420 (1982); *McConkey v. Van Hollen*, 2010 WI 57, ¶ 12, 326 Wis. 2d 1, 783 N.W.2d 855.

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[22] Plaintiffs advanced multiple other arguments. For example, based on their reading of the Amendment, they argued that the Ballot question had to explain that the Amendment would guarantee victims Wisconsin Supreme Court review. (R. 35:11.) They argued that the Ballot Question had to explain the "radical transformation" of making victims a party in "all but name." (R. 35:7–8.) They further argued that the Ballot Question had to explain the added definition of "victim." (R. 35:8–11, 19.) The circuit court either explicitly rejected these arguments, or implicitly rejected them by not addressing them. (*See* R. 42:7, 15, A-App. 110, 118.)

ARGUMENT

I. The Legislature properly acted within its discretion because the Ballot Question concisely summarized the Amendment.

A. The Legislature has broad discretion in crafting a ballot question, which must only provide a concise summary of essential elements.

The Wisconsin Constitution assigns "considerable authority and discretion" to the Legislature regarding the manner by which it submits proposed amendments to the people for a vote. *McConkey*, 326 Wis. 2d 1, ¶ 25; *see also Milwaukee All.*, 106 Wis. 2d at 604. Article XII, section 1 states in relevant part:

> it shall be the duty of the legislature to submit such proposed amendment or amendments to the people *in such manner and at such time as the legislature shall prescribe*; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

Wis. Const. art. XII, § 1 (emphasis added).

Through the enactment of various statutes, the Legislature has prescribed the manner for submitting proposed amendments to the people. Wis. Const. art. XII, § 1; *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803, 810–12 (1925).[23] The statutes govern the proper

[23] The relevant statutes have since been amended and renumbered. *Compare, e.g.*, Wis. Stat. §§ 6.10, 6.19(6), 6.23(8) (1923), *with* Wis. Stat. §§ 10.01, 10.02, 10.06, 5.64(2).

form of the ballot question and the required types of election notices. (*See* Statement of the Case sec. I.D., *supra*.)

Notably, Wis. Stat. § 5.64(2) specifies that the ballot must contain "a concise statement of each question in accordance with the act or resolution directing submission." Wis. Stat. § 5.64(2)(am); *Ekern*, 204 N.W. at 810 (citation omitted). "Concise" means "[e]xpressing much in few words; clear and succinct."[24]

Requiring a "concise" statement makes sense, as precedent also instructs that the ballot question is not considered in isolation. Rather, the surrounding processes help give it meaning. Wis. Const. art. XII, § 1; *Ekern*, 204 N.W. at 810–13; *Milwaukee All.*, 106 Wis. 2d at 603–04, 610. The *Ekern* court made clear that the statutory publication requirements, including publication of the entire text of the amendment and the official statement of the effect of a "yes" or "no" vote, work together to educate and inform the voter. *Ekern*, 204 N.W. at 810–12. Voters are expected to review these election notices and apprise themselves of public debate, and educate themselves on the substance and implications of a proposed amendment. *Id*. at 808.

Properly viewed in the context of the notice requirements, the ballot question serves to help the voter identify the question to be voted upon; it is not to explain the amendment in detail or educate the voter on the amendment's legal or policy implications. This Court has noted that, given "notice requirements, in particular the posting at each polling place, it is evident that every elector entering the voting booth has had the opportunity to read the entire [proposal] along with the ballot question before—in fact just moments before—reading the ballot in the voting booth and casting his

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[24] "Concise," American Heritage Dictionary, *available at*: https://ahdictionary.com/word/search.html?q=concise.

or her vote." *Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 33, 332 Wis. 2d 459, 798 N.W.2d 287 (discussing the validity of an ordinance enacted under Wisconsin's direct legislation statute). Such notice, as opposed to the ballot question, informs the voter about all the "details." *Id.*

The wording of the ballot question is within the Legislature's discretion. Wis. Stat. § 13.175; *Milwaukee All.*, 106 Wis. 2d at 603. Entrusting the Legislature with the question's form is "highly desirable," because the Legislature is capable of exercising "the highest degree of care and foresight" so as not to "thwart[ ] the will of the people." *Ekern*, 204 N.W. at 811. Still, drafting the ballot question is not supposed to be complicated; rather, it is "a simple ministerial duty, which any high school student of average ability would be able to do." *Id.* at 812.

Importantly, because, "the constitution grants the [L]egislature considerable discretion in the manner in which amendments are drafted and submitted to the people," *McConkey*, 326 Wis. 2d 1, ¶ 40, a reviewing court must uphold a ballot question even if it is not "entirely free from doubt." *Ekern*, 204 N.W. at 813. The Legislature is free to formulate that question in light of the surrounding notices and processes. And reviewing courts will not entertain requests to second-guess between viable alternatives. This is because our constitution leaves it to the Legislature—not courts—to determine the manner in which to submit the question to the people. Consistent with our constitution and the prior case law, this Court's review accordingly must be quite narrow.

While this Court must afford considerable deference to the Legislature's chosen language, the Legislature still must meet certain requirements to properly exercise its discretion. *Id.* at 811. A ballot question may be invalidated if it "failed to present the real question," or "presented an entirely different question" than that posed by the amendment. *Id.* The ballot

question also "must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment." *Id.*

In other words, the "essential criterion" is "a submission of a question or a form which has for its object and purpose an intelligent and comprehensive submission to the people, so that the latter may be fully informed on the subject upon which they are required to exercise a franchise." *Id.* This standard does not require the ballot question to fully inform the voter on every detail or potential effect of the proposed amendment; rather, it serves to inform the voter on the *subject* to be voted upon.

In sum, the Court's role is to determine if the ballot question was so detached from the amendment itself that it falls outside the Legislature's constitutional authority to choose how to present the question. Only if the question "failed to present the real question" or "presented an entirely different question," may this Court conclude that the Legislature acted unreasonably. *Id.*

B. The Ballot Question concisely communicated the essential elements of the Amendment.

Here, the Legislature met its constitutional and statutory requirements. To start, the only provision of the Wisconsin Constitution that the Amendment changed is article I, section 9m—the provision affording rights to crime victims. The Amendment, in essence, (1) gives crime victims additional rights,[25] (2) enhances the level of protection of these rights,[26] and (3) specifies that the Amendment may not be interpreted to supersede a defendant's federal

[25] Wis. Const. art. I, § 9m(2), (A-App. 140–41).

[26] Wis. Const. art. I, § 9m(2)(intro.), (4), (A-App. 140–41).

constitutional rights or to afford party status in a proceeding to any victim.[27] The Ballot Question, in turn, states:

> **Question 1: "Additional rights of crime victims.** Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?"

(R. 25:3, A-App. 142.) This question concisely communicated every essential of the Amendment, which is all that was required. Wis. Const. art. XII, § 1; Wis. Stat. § 5.64(2); *Ekern*, 204 N.W. at 811. Whether the question could have been alternatively worded is not a debate for this Court; the wording is a task for the Legislature. This Ballot Question cannot be said to be so detached from the Amendment itself as to fall outside of the Legislature's broad discretion. *See* Wis. Const. art. XII, § 1; *McConkey*, 326 Wis. 2d 1, ¶ 40.

The circuit court nevertheless appeared to treat the perceived effects of the Amendment on the state constitutional rights of the accused as an "essential" element that needed to be communicated in the Ballot Question. (R. 42:5–6, 20–26, A-App. 108–09, 123–29.) As an initial matter, the Ballot Question *did* adequately communicate what the Amendment says. By stating that the "federal constitutional rights of the accused [are left] intact," the Ballot Question summarized section 9m(6)'s directive that the guardrail for the Amendment's changes would be the federal constitutional rights of the accused.

Further, one cannot simply presume that the Amendment's focus on federal constitutional rights has a

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[27] Wis. Const. art. I., § 9m(6), (A-App. 141).

meaningful implication on defendants' state constitutional rights. As explained below, (Arg. sec. I.C., *infra*), the circuit court was wrong that article I, section 9m ever created affirmative rights for defendants. Its conclusions regarding the potential effects of the Amendment were speculative at best, and incorrect at worst.

A more fundamental problem exists with the circuit court's analysis: it asked and answered the wrong question. An assessment of the "*effect*" of the Amendment on the rights of the accused, (R. 42:6, A-App. 109), that is, the perceived or speculative *legal impacts* of the Amendment, is not what the Ballot Question either had to or should have communicated. The circuit court confused its questions about the legal merits of the Amendment, which may or may not play out in future litigation, with the legal sufficiency of the Ballot Question.

The circuit court's conflation of these analyses conflicts with Wisconsin law. Wis. Stat. § 5.64(2)(am); *Ekern*, 204 N.W. at 810. Moreover, consider the practical problems that arise: Without a specific claim and a factual record, it is impossible to properly analyze an alleged conflict between one section of the constitution and another. The proper way to debate an amendment's impacts is in the face of a concrete legal dispute presented by a party with standing to litigate.

Wisconsin's constitutional and statutory requirements for a sufficient ballot question are premised on the concept of "amendments," not "propositions" and "effects." An impact analysis is rightly not a requirement for a concise ballot question. Indeed, it would only confuse and raise an entire new set of problems about whose views to include, and in what form.

Importantly, as recognized in *Ekern*, other resources—not the Ballot Question—serve to help inform voters about possible effects of the Amendment. Voters have access to the relevant notices prepared by municipal clerks.

Further, voters "are presumed 'familiar with the elements of the Constitution and with the laws,' and to the extent they are not, they must avail themselves of the vast resources available to educate themselves on the content of an amendment." *Ekern*, 204 N.W. at 808. Private and public organizations "exist everywhere," in which "vital questions of public interest are discussed, and political organizations are also principally devoted to the education of the masses upon pending questions of public welfare." *Id*. "In fact, it may be truthfully said that no citizen is in reality competent to cast an intelligent vote unless he first informs himself of the subject to be voted upon." *Id*. The circuit court erred by engaging in an analysis that contradicted supreme court precedent, namely, by focusing on the perceived possible legal effects the Amendment may have on defendants' rights.

The Ballot Question communicated that the Amendment would give crime victims additional rights, further communicated that crime victims' rights would be protected in a more significant manner, and specified that the additional victim rights and enforcement could not supersede a defendant's federal constitutional rights. It concisely summarized the essentials of the Amendment, and falls squarely within the Legislature's constitutional authority and discretion.

C. The Ballot Question was not misleading.

The circuit court also erroneously decided that the Ballot Question misled the voters. Two key points are important: First, a ballot question is to be concise. It neither is nor should be a voter's only source of information. *Ekern*, 204 N.W. at 808–12. Second, the Legislature has "considerable discretion" in how it submits proposed amendments to voters. *McConkey*, 326 Wis. 2d 1, ¶ 40. This means that "hypercritical" differences will not invalidate a question where "its true import is obvious and not

calculated to mislead a voter." *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921, 925 (1936) (analyzing municipal referendum question). A ballot question *is* misleading, however, if it "presented an entirely different question" than that amendment. *Ekern*, 204 N.W. at 811.

1. The Ballot Question did not present an "entirely different question."

The Ballot Question fairly communicated the changes that would occur pursuant to the Amendment. It told voters that: (1) the Amendment would increase the constitutional rights of victims, (2) the Amendment would elevate the level of protection afforded victims' rights, and (3) the backstop for these changes would be the federal constitutional rights of the accused. Nothing in the Ballot Question "presented an entirely different question" from the Amendment itself. *Id.* This alone shows that the Ballot Question was not misleading.

Rather than honoring the Legislature's discretion, the circuit court instead engaged in the "hypercritical" second-guessing our case law prohibits. *Morris*, 266 N.W.2d at 925. This Court should not follow suit. It should instead hold that the Legislature's chosen phrasing was by no means so incongruous as to present an "entirely different question," and accordingly was not misleading. *Ekern*, 204 N.W. at 811.

2. The Ballot Question was not misleading concerning the potential effects on a defendant's ability to request that a victim be sequestered.

Despite the Ballot Question fairly and concisely articulating the guardrail on victims' rights when those rights may interplay with defendants' rights, the circuit court nevertheless held that the Ballot Question misled voters because it did not specifically discuss victim sequestration.

The previous version of article I, section 9m stated that victims had the opportunity to attend court proceedings "unless the trial court finds sequestration is necessary to a fair trial for the defendant." Wis. Const. art. I, § 9m (2017–18). Pursuant to the Amendment, our constitution now provides that the victims "shall be entitled," "[u]pon request, to attend all proceedings involving the case." Wis. Const. art. I, § 9m(2)(e). Section 9m thus no longer contains the "fair trial" explicit caveat to a victim's right to attend proceedings.

To the circuit court, this change "eliminated" "existing State Constitutional rights"— defendants' "right to a fair trial as explicitly recognized in the now repealed provisions of Wisconsin's Constitution." (R. 42:5–6, 12–13, A-App. 108–09, 115–16.) It held that the Ballot Question was accordingly misleading because it only discussed adding victims' rights: "Subtracting from the defendants' rights is fundamentally different than adding to victims' rights." (R. 42:13 n.6, A-App. 116.) The circuit court's rationale is incorrect in at least two critical respects.

To start, it rests on the premise that Wisconsin's 1993 adoption of article I, section 9m also created a distinct constitutional right for defendants. (*See* R. 42:21, A-App. 124.) That is incorrect. Wisconsin's Constitution has separate provisions articulating defendants' rights. Wis. Const. art. I, §§ 5–8. Article I, section 9m created a provision for the rights of "Victims of crime."

There is no support for the circuit court's opinion that the 1993 amendment also created a new and distinct "fair trial" constitutional right for criminal defendants—whether in general or specific to sequestration. A defendant could not have pointed to the previous version of article I, section 9m to argue that a court's failure to allow a witness to testify violated his right to a "fair trial." And sequestration as a means to protect a defendant's fair-trial right was not a new

concept in 1993. In 1977, for example, the supreme court held that the "purpose of a sequestration order is to assure a fair trial." *Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977), *overruled on other grounds by State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). Instead, the circuit court here improperly viewed article I, section 9m's original limitation on the *scope* of victims' rights as the *creation* of a separate right for defendants.

Significantly, the 1993 ballot question for the original adoption of article I, section 9m simply asked whether the constitution should be amended to require "fair and dignified treatment of crime victims" and to ensure "that the guaranteed privileges and protections of crime victims are protected by appropriate remedies in the law without limiting any legal rights of the accused." Wisconsin Briefs, *Constitutional Amendments and Advisory Referenda To Be Considered by Wisconsin Voters April 6, 1993*, LRB–93–WB–4, at 2, http://lrbdigital.legis.wisconsin.gov/digital/collection/p16831coll2/id/592/ (last accessed Feb. 8, 2021). It did not mention creating a new right for defendants.

Thus, to accept the circuit court's conclusion, this Court would have to effectively hold that the 1993 ballot question was *also* constitutionally deficient because it failed to advise voters of an essential element of the amendment—the creation of a new constitutional right for criminal defendants. But the 1993 ballot question was not deficient, and the Ballot Question here was not misleading.

Second, the circuit court's holding also demanded far more of the Ballot Question than was required. The Ballot Question was not the sole source for voter understanding. The Ballot Question simply served to help voters identify the matter at hand; the voters were expected to read the various notices and independently educate themselves about the implications of the Amendment. *Ekern*, 204 N.W. at 808–12.

The circuit court suggested that it "would have been much clearer" if the Legislature had informed voters that the "fair trial" language was being withdrawn. (R. 42:25, A-App. 128.) But the Legislature had "considerable discretion" in how it phrased the Ballot Question. *McConkey*, 326 Wis. 2d 1, ¶ 40. That the circuit court may have phrased it differently does not make it misleading.

Moreover, consider what would have actually been required for the Legislature to "inform the voters" that the "fair trial" sequestration language would be withdrawn: The Ballot Question would have had to explain that the existing constitutional provision ensured victims' opportunity to attend court proceedings. It would have had to explain that a victim could, however, be sequestered if a judge concluded it was necessary to ensure a fair trial for a particular defendant. That may have required explaining what "sequestered" means. And the Legislature would have had to explain that the "fair trial" limitation language would be withdrawn, but federal constitutional rights to a "fair trial"—which could potentially include victim sequestration—would remain.

The Legislature would have had to somehow explain all of that, *plus* the other components of the Amendment, in one "concise" ballot question. But the law does not impose such an onerous demand. The Ballot Question adequately communicated that victims would now have additional rights, while leaving the defendant's federal constitutional protections intact. That was not misleading—it was accurate.

3. The Ballot Question was not misleading with regard to potential effects on defendants' state constitutional rights.

The circuit court also concluded that the Ballot Question was misleading because it did not specifically advise voters that the following language would be removed from

article I, section 9m and replaced: "Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law." Wis. Const. art. I, § 9m (1993). Article I, section 9m now provides: "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights . . . ." Wis. Const. art. I, § 9m(6).

The circuit court ruled that the Ballot Question used "sleight of hand" to eliminate defendants' state constitutional rights, and "lull[ed] the voter into thinking that the source of existing substantive and procedural rights [for defendants] are found only within the United States Constitution." (R. 42:22, 25, A-App. 125, 128.) Here too, the circuit court's reasoning fails.

First, the circuit court again assigned more work to the Ballot Question than was due. In the circuit court's view, the Ballot Question was misleading because it did not communicate what the increase to victims' rights meant for the balancing of those rights with defendants' rights. But the Ballot Question did just that. It told voters that: (1) article I, section 9m would be amended to give victims "additional rights"; (2) those rights would now by default be protected with "equal force to the protections afforded the accused"; *but* (3) the Amendment would not allow a victim's rights to trump the "federal constitutional rights of the accused." (R. 25:3, A-App. 142.) The Ballot Question did not present an "entirely different question" than what the Amendment would accomplish. *Ekern*, 204 N.W. at 811. And contrary to the circuit court's suggestions, the Ballot Question did not have to broadly educate voters on the rest of the Wisconsin Constitution. *Id*. at 808–12.

Second, the circuit court's reasoning improperly rested on concerns about *possible effects* of the Amendment in particular cases. The circuit court stressed that, as a result of the Amendment, the "State Constitution does not now answer

the question of how courts should balance a conflict between the rights of crime victims with the rights of persons accused of a crime." (R. 42:13, A-App. 116.) Of course, both the Ballot Question and the Amendment explain that victims' rights cannot impact defendants' federal constitutional rights.

So, the circuit court essentially held that the Ballot Question was misleading because it did not inform voters that the Amendment could *possibly* result in cases where a judge may conclude that a victim's constitutional right outweighs a defendant's state constitutional right to the detriment of the defendant, *if* that right is not also protected by the federal constitution.

The Ballot Question, however, did not have to inform voters of all possible implications of the Amendment. *Ekern*, 204 N.W. at 808–12. Seemingly every constitutional amendment will have significant implications. If a ballot question may be struck down for not identifying all of them, it is hard to fathom a ballot question that would survive.

The circuit court concluded that the Ballot Question gave voters "the wrong impression that they were only approving amendments relating to the creation" of victims' rights. (R. 42:11, A-App. 114.) But the only constitutional provision being amended was indeed the *victims*' rights provision. Here again, the circuit court mistakenly understood a shift in the scope of victims' rights to be the striking down of affirmative, distinct rights for defendants. Nothing in article I, section 9m has ever created affirmative, new constitutional rights for defendants. Rather, article I, section 9m has only ever articulated victims' rights, and set boundaries on how far those rights may extend.

Third, there is nothing indicating that the circuit court's concerns would even prove correct. Indeed, the circuit court directly asked Plaintiffs at argument to give an example of a circumstance where "elevating the rights of crime victims

[would] further compromise or interfere with the rights of criminal defendants"; tellingly, Plaintiffs could not offer *any* meaningful example. (*See* R. 48:64–67.) Given the Legislature's broad discretion, it would be problematic for this Court to strike down the Ballot Question based on speculative concerns that may never prove true.

The circuit court also emphasized that the Wisconsin Constitution may provide greater rights to defendants than the U.S. Constitution. (R. 42:13, 23, A-App. 116, 126.) That is true. But consider how many steps are required to get from that truth to the court's conclusion: (1) because the Wisconsin Constitution may provide greater protections, there may be circumstances where it affords defendants a particular right that the federal constitution does not; (2) *if* that happens, such a right may possibly come into conflict with a victims' constitutional right; and (3) *if* that happens, a judge in a particular case may prioritize the victim's right. The Ballot Question neither could have nor had to fully inform the voter of every potential ramification of the Amendment. *Ekern*, 204 N.W. at 808–12.[28]

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[28] Though our supreme court could possibly recognize other defendants' rights, "any argument based on the Wisconsin Constitution must actually be grounded in the Wisconsin Constitution." *State v. Halverson*, No. 2018AP0858-CR, 2021 WI 7, ¶ 24, __ Wis. 2d __, __ N.W.2d __. And of the few instances where case law currently recognizes the Wisconsin Constitution as affording defendants greater protections than the U.S. Constitution, none would seem to interplay with victims' rights. *See, e.g., State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899 (deliberate *Miranda* violations); *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625 (good-faith suppression exception); *In re Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110 (voluntariness of juvenile interrogations). *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582 (show-up identifications), (*see* R. 42:24), is now overturned. *State v. Roberson*, 2019 WI 102, 389 Wis. 2d 190, 935 N.W.2d 813.

Ultimately, the circuit court's real concern appeared to rest with implementation of the *Amendment* itself: "The reverberations from these amendments will be felt as lower courts struggle to balance the competing rights of victims as against the rights of the accused." (R. 42:25, A-App. 128.) But that was not the question before it.

This Court should instead answer the proper question: whether the Legislature violated its broad discretion by presenting a question so off-base from the Amendment itself as to have been "calculated to mislead a voter." *Morris*, 266 N.W. at 925. The answer must be no: the Ballot Question told voters that an upward shift would occur for victims' rights, and told voters where the boundary on those rights would now be relative to defendants' rights. Its phrasing did not have to be "entirely free from doubt." *Ekern*, 204 N.W. at 813.

4. The Ballot Question's explanation that victims' rights would be protected "with equal force" was not misleading.

Lastly, the Ballot Question was not misleading by explaining that the Amendment would "require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact." (R. 25:3, A-App. 142.) That is indeed what the Amendment accomplished: it elevated the protection of victims' rights to the level of protection afforded defendants' rights.

The circuit court nevertheless deemed the Ballot Question misleading because it said victims' rights would be protected "with equal force," while the Amendment itself says that victims' rights will be "protected by law in a manner *no less vigorous* than the protections afforded to the accused." Wis. Const. art. I § 9m(2). The court reasoned that "equal" connotes the "same" while "no less vigorous" could mean

"greater to that which is equal." (R. 42:18, A-App. 121.) This reasoning is incorrect on multiple fronts.

First, the circuit court's conclusion is the very "hypercritical" second-guessing of word choice our case law forecloses. *Morris*, 266 N.W.2d at 925. The language described the level of *protection* provided to rights, as opposed to the amount or nature of rights themselves. And insofar as victims' rights previously existed, they had not been protected as aggressively as defendants' rights. Indeed, as the Wisconsin Supreme Court explained in 1983 when discussing Wis. Stat. ch. 950's use of "no less vigorous," "[t]he language . . . is indicative of a widely held societal concern that the criminal justice system too often tramples upon the victims of crime in an effort to do 'justice' for perpetrators of such crimes." *State v. Burns*, 112 Wis. 2d 131, 142, 332 N.W.2d 757 (1983).

The Legislature thus had to communicate to voters that the Amendment would elevate the strength of the protection of victims' rights from below the level afforded defendants' rights, up to that level.

Explaining this in concise, understandable fashion was not an easy task. "[N]o less vigorous"—the language used in the Amendment—is not necessarily commonly used language. The circuit court itself recognized this: "Quite honestly, nobody talks like that, no less vigorous. That's not a very precise terminology"; "The words 'no less vigorous' are not so easily understood." (R. 47:33; 42:18, A-App. 121.) And ballot question drafting is supposed to be so "simple" that "any high school student of average ability" could do it. *Ekern*, 204 N.W. at 812. So, the Legislature chose more commonly understood language, and explained in simple terms that if the Amendment passed, victims' rights would be protected with "equal force" to the protections afforded the accused.

But even if the language is not "entirely free from doubt," this Court still should affirm given the Legislature's

broad discretion. *Id.* at 813.[29] Any subtle difference in language, to the extent it suggests a different meaning, does not rise to the level of presenting an "entirely different question."

Second, the circuit court's conclusion, here again, rests on hypothetical concerns about possible effects of the Amendment. It depends on the predicate assumption that the Amendment could result in particular circumstances where victims' rights would be protected with *more* vigor than defendants' rights. (*See* R. 42:19, A-App. 122.)

But, here again, the circuit court saddled the Ballot Question with a greater burden than it had to carry. It did not have to address every possible argument a party could make, or every possible ramification. Rather, courts must expect voters to review notices and educate themselves as to possible implications. *Ekern*, 204 N.W. at 810–12. As required, this Ballot Question undeniably communicated that the Amendment would elevate the protection of victims' rights from a second-tier—below defendants' rights—upwards.[30]

Consider, for example, the difference between this case and the one instance where the Wisconsin Supreme Court invalidated a ballot question for a proposed constitutional amendment. In *Thomson*, the Legislature proposed an

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[29] The circuit court also suggested the Legislature could have just ignored the level of protection of victims' rights in the ballot question. (R. 42:20, A-App. 123.) But the Legislature had to ensure that the ballot question concisely described every essential element of the Amendment.

[30] The circuit court referenced, as an example, the Ohio Legislature's Marsy's Law ballot question language, providing that victims' rights would be "protected *as vigorously* as the rights of the accused." (R. 42:19 n.11, A-App. 122) (emphasis added). But one could seemingly make the same argument there, too: that "as vigorously" suggests "the same" level of vigor, unlike the Amendment itself.

amendment that would have permitted the Legislature to ignore assembly districts in creating new senate districts. *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 649, 654, 60 N.W.2d 416 (1953). The ballot question, however, told voters that pursuant the amendment, the Legislature "shall apportion" senate districts in a particular manner. *Id.* at 660. The Court held that the ballot question's use of mandatory "shall" language did not present the "real question," because the amendment would have done the opposite: it would have "free[d] the legislature from the observance of any lines whatever in apportioning senate districts." *Id.*

The Ballot Question here, unlike in *Thomson*, did not advise voters that the Amendment would accomplish the opposite of what the question stated. It told voters that protection of historically second-tier victims' rights would be elevated up to the level of defendants' rights. Any possible shades of difference between protecting victims' rights with "equal force" and protecting victims' rights "no less vigorously," are immaterial to the key shift the Amendment accomplished.

Third, the circuit court's hyper-literal view of the use of the word "equal" in place of "no less vigorous" overlooks that the Ballot Question also told voters that the Amendment would leave defendants' federal constitutional rights intact. How could the Ballot Question mislead voters into believing that victims' rights would *always* be protected to exactly "the same" extent as defendants' rights, when it also told them that the Amendment could not affect defendants' federal constitutional rights?

Fourth, this Amendment essentially "constitutionalize[d] the status quo" of victims' rights long set forth in Wis. Stat. ch. 950. *See McConkey*, 326 Wis. 2d 1, ¶ 53. For decades, our statutes have provided that victims' rights are to be "honored and protected . . . in a manner no less vigorous than the protections afforded criminal

defendants." Wis. Stat. § 950.01 (1981–82). Notably, Defendants have not found any examples of a Wisconsin court interpreting "no less vigorous" to mean victims' rights should be protected with force beyond that afforded defendants' rights.

Finally, the circuit court improperly started its analysis with skepticism, instead of deference, because the Legislature chose to use different language from the Amendment's language. (R. 42:16–18, A-App. 119–21.) Nothing, though, required the Legislature to use the same language. The Legislature had "considerable discretion" in phrasing. *McConkey*, 326 Wis. 2d 1, ¶ 40. The question fairly communicated the elevation in the level of protection of victims' rights.[31]

II. The Legislature properly exercised its discretion to present the Amendment as a single amendment in a single ballot question.

A. If an amendment's propositions are connected with a single overall purpose, the Legislature may submit them to the voters as one amendment.

The Wisconsin Constitution specifies "that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately." Wis. Const. art. XII, § 1. This is known as the separate amendment rule. The rule "does not prohibit a single constitutional amendment from being complex or multifaceted, or from containing a variety of specific prescriptions and proscriptions." *McConkey*, 326 Wis. 2d 1, ¶ 26. Because the constitution assigns

[31] The circuit court's questioning of the Legislature's reference to "rights" of crime victims but "protections" of the accused fails for the same reason. (*See* R. 42:17, A-App. 120.)

"considerable discretion" to the Legislature regarding the manner that it submits amendments to the people, this limit applies "only in exceedingly rare circumstances." *Id.* ¶ 40.

The separate-amendment test is as follows: "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." *Id.* ¶ 41 (quoting *Milwaukee All.*, 106 Wis. 2d at 604–05). "[A]ll of the propositions must 'tend to effect or carry out' the [amendment's] purpose." *Id.* (quoting *Thomson*, 264 Wis. at 656). In other words, if all propositions are dependent upon, or simply connected with, the amendment's overall purpose, the Legislature may submit them as a single proposed amendment. *Id.* ¶ 42.

Text and historical context should make the purpose of most amendments apparent. *Id.* ¶ 44. A plain reading of the text will usually reveal the amendment's purpose. *Id.* A court might also find other extrinsic contextual sources helpful, including the previous constitutional structure, legislative and public debates over the amendment's adoption, the title of the joint resolution, the common name for the amendment, the question submitted to the people for a vote, and other sources. *Id.*

The supreme court has considered whether a ballot question violates the separate amendment rule in four previous cases: *State v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882); *Thomson*, 264 Wis. 644; *McConkey*, 326 Wis. 2d 1; and *Milwaukee All.*, 106 Wis. 2d 593. Most instructive here, *Milwaukee Alliance* shows that a multifaceted amendment may be submitted as a single amendment where the provisions connect to the amendment's purpose. There, the Legislature submitted a single proposed amendment to revise the right to bail to a concept of conditional release. *Milwaukee All.*, 106 Wis. 2d at 600. The amendment authorized the Legislature to permit circuit courts to deny release on bail for

a limited period to certain accused persons without requiring monetary conditions. *Id*. Challengers argued that the issues of conditional release and anti-monetary bail should have been submitted to the voters as separate questions. *Id*. at 607.

The court rejected their argument because they did not apply the proper test. *Id*. at 607–08. The court explained that the amendment's purpose was to change the provision from the limited concept of bail to the concept of conditional release. *Id*. at 607. While "[t]here may be disagreement with the philosophy of that purpose," the question presented "contained integral and related aspects of the amendment's total purpose." *Id*. at 608. The court further reasoned that a single amendment could cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject. *Id*.

In short, as long as the different aspects relate to the same subject matter and are designed to accomplish one general purpose, the Legislature may exercise its broad discretion to submit the amendment as a single amendment in a single ballot question. *McConkey*, 326 Wis. 2d 1, ¶ 26.

B. The Amendment was properly submitted as a single amendment because all provisions concern crime victims' rights.

For the same reasons stated in *Milwaukee Alliance*, the Amendment here did not contain separate amendments requiring separate questions. The text of the Amendment reveals a general, unified purpose: "to preserve and protect victims' rights to justice and due process throughout the criminal and juvenile justice process." Wis. Const. art. I, § 9m(2)(intro.).

The previous constitutional structure confirms the Amendment's purpose. The quoted provision above replaced the following text in article I, section 9m: "This state shall treat crime victims, as defined by law, with fairness, dignity

and respect for their privacy. This state shall ensure that crime victims have all of the following privileges and protections as provided by law." Wis. Const. art. I, § 9m (2017–18). The Wisconsin Supreme Court held that the first sentence of the earlier text as a statement of purpose because it "uses very broad terms to describe how the State must treat crime victims," and "requires the State to 'ensure' that crime victims have a number of 'privileges and protections,' which are articulated in detail [below]." *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 17, 278 Wis. 2d 216, 692 N.W.2d 623.

The Amendment has replaced this purpose statement with text that uses similarly broad language to describe the Amendment's aim in protecting victims' rights. A detailed articulation of those rights then follows. The replacement of the current "purpose" language, in addition to the broad nature of the new language, confirms that this is article I, section 9m's new statement of purpose.

The entirety of the Amendment relates to the purpose of protecting the rights of crime victims by: (1) defining who is a "victim;" (2) outlining the specific constitutional rights of victims; (3) specifying the force by which those rights are to be protected; (4) stating how these victims' rights can be enforced and remedied; (5) clarifying that a cause of action for damages for violations of victims' rights cannot be brought against state actors; and (6) specifying that the Amendment may not be interpreted to allow victims' rights to supersede defendants' rights or afford victims party status.

All of these provisions relate to describing, preserving, and protecting crime victims' rights, which the Amendment identifies as its purpose. Like the proposed amendment in *Milwaukee Alliance*, the propositions in this Amendment are connected with that purpose.

The circuit court nevertheless ruled that the Amendment should have been submitted as two amendments because it "expand[ed] the definition of a crime victim" and "g[a]ve crime victims greater rights and at the same time curtail[ed] the rights of persons only accused of committing a crime." (R. 42:30, A-App. 133.) The court viewed those concepts as "sufficiently distinct" and requiring ratification by asking the voters two separate questions. (R. 42:30, A-App. 133.)

As explained above, (Arg. sec. I., *supra*), the court incorrectly viewed the Amendment as removing affirmative rights of defendants, and incorrectly rested its analysis on speculation. The Amendment, which only purports to elevate and protect the rights of crime victims, was properly submitted as a single Amendment.

This Court should hold that the Amendment was validly enacted pursuant to Wis. Const. art. XII, § I.[32]

[32] The circuit court "enjoined" the Amendment. (R. 44, A-App. 102–03.) As argued, this Court should reverse. To the extent this Court nevertheless agrees with the circuit court, Defendants-Appellants submit that the proper relief would be affirming the declaration that the Ballot Question did not meet all constitutional and statutory requirements, and therefore, "there has been no valid submission to or ratification by the people of the [ ] amendment," rendering the Amendment invalid. *Thomson*, 264 Wis. at 660; *see also State v. Marcus*, 160 Wis. 354, 152 N.W. 419, 427 (1915); *McConkey*, 326 Wis. 2d 1, ¶¶ 21–22.

CONCLUSION

Defendants-Appellants respectfully request that this Court reverse the circuit court's November 3, 2020, Decision and Order, as well as the circuit court's November 23, 2020, Judgment.

Dated this 8th day of February, 2021.

Respectfully submitted,

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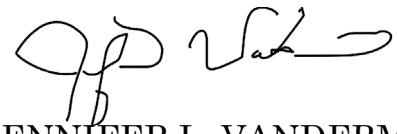

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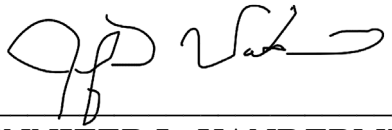
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,634 words.

Dated this 8th day of February, 2021.



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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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.

Dated this 8th day of February, 2021.

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