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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Appeal 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.
REMYINGTON, PRESIDING

**NON-PARTY BRIEF OF MARSY'S LAW
FOR WISCONSIN, L.L.C. AND MOTHERS
AGAINST DRUNK DRIVING**
Wis. Stat. § (Rule) 809.19(7)

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INTRODUCTION

The trial court's decision is wrong. Most significantly, the court treated Wisconsin's criminal justice system as a zero-sum game, where granting more rights to victims necessarily takes rights from the accused. That is neither true in practice, nor is it supported by the plain language and legislative history of the recent constitutional amendment.

Defendants-Appellants have identified the flaws in the lower court decision. In essence, the court overstepped its constitutional bounds by nitpicking the ballot question rather than providing the appropriate deference to the legislature. The ballot question was a clear and concise summary of the amendment; it did not mislead, nor did it ask an entirely different question than that posed by the amendment.

But there is no reason to rehash the state's well-taken points. Instead, this brief will offer a quick history of the victims' rights movement, and the leading role of Wisconsin in that campaign. The recent amendment is not a new trend, but instead the continuation of a steady march, supported by

both sides of the political aisle, toward guaranteeing that victims are seen and heard, and treated as equal and valued players in the criminal justice system.

To suggest, as the lower court's decision does, that the ballot question fooled Wisconsin residents into supporting the amendment, unfairly denigrates this state's voters. The people of Wisconsin have seen victims' rights as important for more than 40 years. That almost 75 percent of them voted in favor of the amendment is no mistake.

ARGUMENT

I. HISTORY OF VICTIMS' RIGHTS

A. A Brief History of Victimhood in America

Beginning in pre-revolutionary America, colonists adopted the practice of private prosecution, a tradition carried over from England. Under this system, victims fronted the costs for investigations, arrests, and prosecutions. Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 521 (1985) (hereinafter "Abrahamson"). The primary goal of this process was to

compensate victims for their losses. *Id.* In this way, the private prosecution system mirrored much of civil litigation today, with some important differences. Namely, if an offender could not afford to pay restitution, a victim could “sell the offender into service.” *Id.* at 522.

Throughout the late-eighteenth and nineteenth centuries, enlightenment thinkers began to shift the focus of criminal prosecution from the victim to society as a whole. *Id.* Content to let the state carry on this business, individuals broadly consented to the creation of government-run police forces and, later, prosecutors. *Id.*

As the country grew into the twentieth century, the heart of the criminal justice system shifted further away from the interests of those victimized by crime. Common parlance began to refer to a “debt to society” owed by offenders, rather than a debt to their victims. *Id.* at 523. As these ideas turned into core American values, the interests of victims became subordinate to those of the state. *Id.*

By the 1960s, the subordination of victims to the interests of the state and the accused fostered a growing resentment among those most victimized by crime—i.e., women, people of color, the elderly, etc. *Id.* at 524-25. As the interests of these groups coalesced, the victims' rights movement began to take shape. Advocacy by those associated with the movement has led to broad, bipartisan support for reform—one of the few issues Democrats and Republicans have agreed on over the past four decades. *Id.* at 525.

B. Marsy's Law

Marsy's Law for All has become the preeminent advocacy organization within the greater victims' rights movement. The organization began with Marsalee ("Marsy") Ann Nicholas. At 17-years old, Marsy entered college at the University of California-Santa Barbara with the goal of becoming a special education instructor. Unfortunately, Marsy never was able to fully pursue that goal. In November 1983, during her senior year, an ex-boyfriend stalked and

killed her. One week after the murder, on the day of her funeral, Marsy's killer confronted her mother at a local market. Authorities had not notified Marsy's family that her killer had been released on bail.

This experience led Marsy's brother, Henry Nicholas, to spearhead an effort to pass comprehensive victims' rights legislation by ballot initiative in California. Proposition 9: The California Victims Bill of Rights Act, or "Marsy's Law," passed in November 2008. Since Marsy's Law was adopted in California, voters have approved constitutional amendments to strengthen the rights of crime victims in Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and, of course, Wisconsin.

Marsy's Law for Wisconsin, L.L.C. ("MLW"), a state-specific subgroup, has lobbied for a bolstered victims' rights amendment in Wisconsin for years. MLW worked directly with legislators to draft proposed constitutional language that both protected victims and remained true to existing state law

or procedure.¹ As noted on MLW's website, Wisconsin's enactment of Marsy's Law "ensures victims of crime have enforceable rights throughout the criminal justice process – just like accused persons do." *About Marsy's Law for Wisconsin*, Marsy's Law for Wisconsin, https://www.equalrightsforwi.com/about_marsys_law (last visited Mar. 23, 2021). However, MLW has consistently, and explicitly, explained that "Marsy's Law does not impact the rights of the accused. It only ensures that victims have equal rights as the accused -- nothing more, nothing less." *Id.*

¹ MLW was not alone in its support for Wisconsin's 2020 Victims' Rights Amendment. The following organizations lobbied in support for either, or both, of the joint resolutions underlying the Amendment: Association of State Prosecutors; Badger State Sheriffs' Association; Children's Hospital of Wisconsin; Mothers Against Drunk Driving; WI Chiefs of Police Association; Wisconsin Coalition Against Sexual Assault; Wisconsin Nurses Association; Wisconsin Professional Police Association; Wisconsin Sheriffs and Deputy Sheriffs Association; and Wisconsin Troopers Association. See *Eye On Lobbying: Senate Joint Resolution 53*, Wisconsin Ethics Commission, <https://lobbying.wi.gov/What/BillInformation/2017REG/Information/14400> (last visited Mar. 23, 2021); *Eye On Lobbying: Senate Joint Resolution 2*, Wisconsin Ethics Commission, <https://lobbying.wi.gov/What/BillInformation/2019REG/Information/15969> (last visited Mar. 23, 2021).

C. Mothers Against Drunk Driving

Through its efforts to prevent drunk driving injuries and deaths, Mothers Against Drunk Driving (“MADD”) has also become one of the nation’s preeminent advocates for victims. Started in 1980 by one mom at her kitchen table, MADD has grown into a network of hundreds of thousands of volunteers all working toward one goal: no new victims of drunk or drugged driving. In furtherance of this mission, MADD provides victims of these violent crimes with the necessary resources to both navigate the criminal justice system and start a path toward mental and emotional recovery.

As part of its advocacy, MADD lobbies for increased support for crime victims at both the state and federal level. These lobbying efforts included vocal support for the joint resolutions underlying Wisconsin’s 2020 Victims’ Rights Amendment. At a 2017 committee hearing, MADD advocated in support of the provision, stating “Wisconsin has a history of being strong on victims’ rights, but MADD wants

to make sure those rights are truly equal.” Colleen Sheehy-Church, MADD National President, *Mothers Against Drunk Driving (MADD) supports Marsy’s Law (SJR 53 and AJR 47)*, https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/sjr53/sjr0053_2017_06_15.pdf (last visited Mar. 24, 2021) (hereinafter “2017 Committee Hearing”).

D. Wisconsin Statutory Recognition

Wisconsin embraced the ideological foundation built by Marsy’s Law’s and MADD’s precursors to become the first state in the country to enact a Bill of Rights for Victims and Witnesses of crime in 1980. Jill J. Karofsky, *Wisconsin’s History and the Crime Victims Rights Movement* 16, https://docs.legis.wisconsin.gov/misc/lc/study/2016/1492/030_november_14_2016_9_00_a_m_room_411_south/1_karofsky_ppt (last visited Mar. 23, 2021).² While news clippings

² Wisconsin even beat the federal government to the starting line, as Congress would not pass its own Victim and Witness Protection Act until 1982. *See* Abrahamson at 529-30.

marking the law's original passage are sparse, then-Dane County District Attorney James Doyle, Jr., who later became the 44th Governor of Wisconsin, urged passage of the law as a mechanism for increasing victim participation in the criminal justice system. *Doyle Plugs Crime-Victim Bill*, Wis. State J., Apr. 18, 1980, at 4.

The 1980 legislation created chapter 950 of the state statutes and established a 10-part "bill of rights" for Wisconsin crime victims. David Nispel, Wis. Legis. Reference Bureau, *Crime in Wisconsin: Responses from the 1979 Legislature*, Brief 80-11 (1980). Among the rights created by the 1980 law were the right "to be informed of the final disposition of a case, to receive protection from harm as a result of cooperating with law enforcement and prosecution efforts, to be informed of various services available to a victim or witness, and to be entitled to a speedy disposition of the pertinent case." *Id.* at 2. Also included in Wisconsin's original victims' bill of rights is a preamble declaring that it was the legislature's intent that the rights of victims be

protected in “a manner no less vigorous than are the rights of a defendant.” *Id.*

The provisions of the 1980 legislation demonstrate that many of the rights included in the recent amendment have existed statutorily for decades. Indeed, as an article in the *Wisconsin Lawyer* published just months after voters ratified the 2020 amendment noted, “these rights are effectively not new. Victims could argue these rights under preexisting law.” Rebecca M. Donaldson et al., *Marsy’s Law: Changes for Crime Victims?*, Wis. Law., Sept. 8, 2020, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=8&ArticleID=27930#:~:text=Patrick%20Shirley%2C%20U.W.,their%20privacy%20and%20other%20rights> (last visited Mar. 23, 2021).

E. Constitutional Enshrinement

A decade after Wisconsin became the first state in the nation to enact victims’ rights legislation, broad support for victims’ rights continued. In April 1993, Wisconsin voters, *by a margin of 84 percent for to 16 percent against*, ratified

article I, section 9m of the state constitution. *State of Wisconsin 1993-1994 Blue Book* 883 (Lawrence S. Barish ed., 1993-94). The 1993 amendment granted crime victims a slate of rights including reasonable protection from the accused throughout the judicial process, notification of court proceedings, and the opportunity to make a statement to the court at disposition. The provision also made clear that “[n]othing 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.”

II. WISCONSIN’S 2020 VICTIMS’ RIGHTS AMENDMENT

By 2017, Wisconsin voters’ desire to further enhance victims’ rights remained strong. In November 2017, and again in May 2019, the state legislature overwhelmingly and bipartisanly passed identical joint resolutions proposing changes to Wisconsin’s constitutional victims’ rights provision, Wisconsin constitution article I, section 9m. Wis. Legislature, Senate Joint Resolution 53, https://docs.legis.wisconsin.gov/2017/proposals/reg/sen/joint_

resolution/sjr53 (last visited Mar. 23, 2021) (hereinafter “SJR 53”); Wis. Legislature, Senate Joint Resolution 2 (hereinafter “SJR 2”), https://docs.legis.wisconsin.gov/2019/proposals/reg/sen/joint_resolution/sjr2 (last visited Mar. 23, 2021).³ On April 7, 2020, Wisconsin voters considered and approved the constitutional amendment via the following ballot initiative:

Question 1: Additional rights of crime victims.

Shall section 9m of article 1 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?

Jillian Slight, Wis. Legis. Reference Bureau, *Constitutional Amendment Relating to Crime Victims’ Rights 1* (2020), https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constit

³ The 2017 joint resolution passed the State Assembly by a vote of 81 ayes to 10 noes and the State Senate by a vote of 29 ayes to 4 noes. *See* SJR 53. The 2019 joint resolution passed the State Assembly by a vote of 82 ayes to 15 noes and the State Senate by a vote of 27 ayes to 5 noes. *See* SJR 2.

ution/crime_victims_rights_amendment_5_1.pdf (last visited Mar. 23, 2021).

A. Legislative History

At the public committee hearings for the then-proposed amendment, lawmakers and other government officials made clear that the amendment meant to balance the rights of victims with those of the accused. During the joint resolution's 2017 consideration, State Senator Van Wanggaard, one of the provision's primary sponsors, stated as follows: "I have heard repeatedly, and wrongly, that we are trying to shift the balance of justice from a defendant to victims and the prosecution. This is just not true. We are seeking to balance – to equalize – the rights of a victim with those of a defendant." Van H. Wanggaard, *Testimony in Support of Senate Joint Resolution 53/Assembly Joint Resolution 47*, 2017 Committee Hearing at 1. State Representative Todd Novak, a cosponsor of the state Assembly's version of the proposed amendment, made similar comments at a 2017 hearing: "It is also key to

understand that the rights of the defendant are equally as important, which is why this legislation explicitly states that any rights granted to the victim may not be interpreted to supersede a defendant's federal constitutional rights. We are simply leveling the playing field." Todd Novak, *Assembly Joint Resolution 47*, *id.* at 3.

Then-Attorney General Brad Schimel, head of the state agency charged with defending and enforcing victims' rights, echoed the comments made by lawmakers: "And most importantly, this amendment puts victims on equal footing with the accused." Prepared Testimony of Attorney General Brad D. Schimel, *Testimony on Senate Joint Resolution 53*, *id.* at 4.

Legislators made almost identical comments at the public hearing for the 2019 consideration of the amendment.

See

https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2019/sjr2/sjr0002_2019_01_10.pdf (last visited Mar. 23, 2021) ("Victims' rights will NOT be given more

weight than a defendant's rights. They will be BALANCED with a defendant's rights And I want to emphasize this again, because it is important. These rights do NOT supersede any rights of a defendant. They are put on the same legal playing field with a defendant's rights.”).

Here, while there has been some debate over the meaning of the phrase “no less vigorous,” a phrase first introduced through the original state victims' rights law, the legislative intent is clear. Lawmakers intended the amendment to equalize the rights of victims with those of the accused. They also explicitly stated that enforcement of victims' rights could not come at the expense of rights enjoyed by defendants. Agency heads charged with carrying out these new constitutional dictates showed a similar understanding of the amendment's scope. The April 2020 ballot question conveyed, in clear and concise terms, this same meaning to Wisconsin voters.

B. Contemporaneous Analysis of the Amendment

This past fall, *Wisconsin Lawyer* published an analysis that contradicts many of the lower court's findings.

For example, the authors consider the implications of the amendment's "no less vigorous" language. Nowhere do they note that the language will elevate victims' rights above those of the accused. Rebecca M. Donaldson et al., *Marsy's Law: Changes for Crime Victims?*, Wis. Law., Sept. 8, 2020. In fact, they cite to language in the amendment restricting courts from construing the provision to supersede the federal constitutional rights of a defendant. *Id.* Importantly, the authors reiterate that this portion of the amendment is merely a recognition of the supremacy of the United States Constitution. *Id.*

III. THE APRIL 2020 BALLOT QUESTION ACCURATELY AND CONCISELY INFORMED VOTERS OF THE SCOPE OF THE VICTIMS' RIGHTS AMENDMENT, WHICH INCLUDED A SINGLE SUBJECT.

Contrary to the conclusion of the trial court, the ballot question presented a single subject to the voters in a manner

that accurately and concisely informed voters of the amendment's scope. In reaching its conclusion, the trial court set aside the plain text of the amendment and divined meaning that defies both legislative intent and the Supremacy Clause of the United States Constitution.

Context matters. As noted above, the legislative history of the 2020 amendment proves that lawmakers sought only to elevate the rights of victims to the same level as those enjoyed by defendants. No more, no less. This legislative intent mirrors how legal experts interpreted the amendment shortly after voters ratified it. It also tracks with the ideological underpinnings of the victims' rights movement both in Wisconsin and around the country. Finally, the phrase "no less vigorous" has existed in Wisconsin victims' rights laws for more than four decades. In all that time, no recorded decision construes that phrase to mean that victims' rights should be given greater weight than those afforded to the accused.

Text matters. The title of article I, section 9m of the Wisconsin constitution is “Victims of crime.” To suggest, as the lower court has, that this provision applies equally to both victims and the accused (such that two ballot questions were necessary) strains credibility. The lower court read intent into the amendment that is simply not there. Moreover, the court’s decision ignores the explicit language of the amendment: “This section is not intended and may not be interpreted to supersede a defendant’s federal constitutional rights or to afford party status in a proceeding to any victim.”

Federalism matters. Ruling that the previous version of article I, section 9m affirmatively granted, for the first time, Wisconsin defendants the right to a fair trial necessarily means the lower court found that such rights did not exist prior to the amendment’s 1993 enactment. Not only does this run contrary to state history, it overlooks that the state constitution cannot erase the fair trial rights of a criminal defendant. The supremacy of the United States Constitution, along with the fair trial rights of the sixth amendment, make

such an action legally impossible. Thus, the fact that article I, section 9m of the Wisconsin constitution, in its current form, does not include the words “fair trial” whereas the original amendment did is a distinction without a difference. That issue did not merit separate mention in the ballot question. If it did, then many other aspects of the amendment would have needed mention as well, negating the legislature’s ability to provide a “concise” summary of the amendment.

CONCLUSION

For the reasons set forth above, Marsy’s Law for Wisconsin, L.L.C. and Mothers Against Drunk Driving urge the Court to reverse the decision of the lower court and affirm the validity of the April 2020 ballot question through which Wisconsinites resoundingly ratified an amendment to article I, section 9m of their constitution.

Dated: March 24, 2021

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,971 words.

Dated this 24th day of March, 2021.

s/Kendall W. Harrison

Kendall W. Harrison

**CERTIFICATION OF COMPLIANCE WITH
RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, 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 24th day of March, 2021.

s/Kendall W. Harrison

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CERTIFICATE OF SERVICE

I certify that on March 24, 2021 three true and correct copies of the foregoing brief were mailed via U.S. Mail to counsel for the parties:

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