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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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Plaintiffs argue that the Ballot Question should have provided a comprehensive analysis of all of the Amendment's possible ramifications. This is out of step with the proper legal standard, and would assign the ballot question a much heavier burden than Wisconsin law requires. Ballot questions are not meant to educate voters on all possible effects or provide a detailed summary of every aspect of a proposed amendment. Voters are expected to educate themselves of those details through other means. The ballot question enables voters to identify the amendment being voted upon, much like the name of a candidate identifies the candidate to be voted upon.

Overturning any constitutional amendment, let alone one that was presented with bipartisan support and overwhelmingly approved by voters, is a drastic remedy. Courts must only do so when a ballot question is clearly outside the bounds of legislative discretion. Plaintiffs may have chosen to phrase the Ballot Question differently, but the Legislature's choice fell well within its broad discretion, and must be upheld.

ARGUMENT

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

A. Plaintiffs misunderstand the proper legal standard.

Plaintiffs argue that Defendants have misstated the relevant legal standards. (Pls.' Br. 4–6.)[1] They are mistaken.

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[1] "Pls.' Br." refers to Plaintiffs-Respondents' brief, filed with this Court on March 10, 2021.

Plaintiffs argue that *Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287, is not pertinent to the ballot-question standard here. (*Id.* at 5.) That case did not involve a constitutional amendment, as Defendants acknowledged, but it helps illustrate what it means for a ballot question to be "concise." *See* Wis. Stat. § 5.64(2)(am); *see also Metro. Milwaukee*, 332 Wis. 2d 459, ¶¶ 32–34. When construing a statute, it is appropriate to review case law involving similar provisions. *Id.* ¶ 13.

Metropolitan Milwaukee considered whether the municipal referendum question contained "a concise statement of [the ordinance's] nature," as required by Wis. Stat. § 9.20(6). *Id.* ¶ 8 (alteration in original) (citation omitted). As part of its analysis, this Court read Wis. Stat. § 9.20(6) in the context of the surrounding statutory scheme, which "require[d] publication and posting of the entire ordinance," several published notices "before the election in newspapers that are aimed at a wide circulation," and "an explanatory statement of the effect of either a 'yes' or 'no' vote." *Id.* ¶ 33. This Court ruled that processes for notices "suggests that the legislature did not intend to rely on the ballot question to inform the voter about the details of the proposed ordinance's content." *Id.*

This principle is instructive here, as a constitutional ballot question also (1) must be "concise" and (2) accompanies notice requirements to more broadly educate voters. (*See* Defs.' Br. 16–17.)[2] Properly viewed in the context of the notice requirements, a ballot question need not explain the

[2] "Defs.' Br." refers to Defendants-Appellants' brief, filed with this Court on February 8, 2021.

proposed amendment in detail or educate the voter on the amendment's legal or policy implications.[3]

The *Metropolitan Milwaukee* court suggested in dicta that the "every essential" standard—applicable to constitutional-amendment ballot questions but not the municipal question at issue there—requires something lengthier than that required for direct-legislation. 332 Wis. 2d 459, ¶ 35. This dicta is not binding here, and under Wisconsin Supreme Court precedent, "every essential" does not mean a high level of detail or legal analysis. (Defs.' Br. 15–17.) The ballot question serves to concisely identify the amendment to be voted upon, to enable the voters to vote intelligently. Wis. Const. art. XII, § 1; *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803, 808, 810–13 (1925); Wis. Stat. § 5.64(2)(am).

Plaintiffs contend that *Ekern* does not say that the ballot question need not be "entirely free from doubt." (Pls.' Br. 5–6.) Defendants would accept that. But Plaintiffs also recognize that a ballot question's phrasing lies within the Legislature's discretion. (*Id.* at 10.) This means that one cannot simply come to court and debate whether a ballot question might have been stated differently. A ballot question may be invalidated only if it "failed to present the real question," or "presented an entirely different question" than that posed by the amendment. *Ekern*, 204 N.W. at 811.

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[3] Plaintiffs reference the high number of absentee ballots cast on April 7, 2020, (Pls.' Br. 4), and imply (without support) that absentee voters may not have been as informed as in-person voters would have been after publication of the Type C notice. But the Type A notice—issued a month before the election—provided notice of the Amendment and where the Amendment's entire text could be found. (*See* R. 20:1.)

In other words, the ballot question "must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment." *Id*. But it must do so "concise[ly]." Wis. Stat. § 5.64(2)(am); *Ekern*, 204 N.W. at 810 (citation omitted).

Plaintiffs argue that the phrase "so detached from the amendment itself" omits parts of the legal standard as stated in *Ekern* and *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). (Pls.' Br. 10.) They are wrong, and misunderstand why this phrase, though not found in case law, is helpful when applying the relevant legal standards:

First, a court must afford considerable deference to the Legislature's chosen language, but the Legislature's language must still meet certain requirements. *Ekern*, 204 N.W. at 811.

Second, 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*.

Third, the ballot question "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*. (emphasis added).

These principles, distilled to their essence, demonstrate that a court's review is limited to whether 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.

B. Plaintiffs are incorrect that perceived effects and other non-essentials had to be included in the Ballot Question.

Plaintiffs point to minor components and misunderstandings of the Amendment, and disputes over ballot-question phrasing, to incorrectly contend that the Ballot Question did not reference every essential of the Amendment.

Plaintiffs mistakenly argue that the Amendment's definition of crime victim constituted an "essential element." (Pls.' Br. 10–12.) Plaintiffs cite nothing to support that a *definition* must be included in a ballot question. Plaintiffs rely on *Thomson*, in which an amendment removed the exclusion of "untaxed Indians and the military" when calculating a legislative district's population. 264 Wis. at 657. The change there affected how population was determined. *Id.* Here, however, the Amendment essentially codified Wisconsin's longstanding statutory definition of "victim." *See* Wis. Stat. § 950.02(4)–(5); *see also* Wis. Stat. § 950.02(4) (1997). There was no need to recite this in the Ballot Question as an essential element, and the circuit court agreed. (R. 42:3.) The *Thomson* court determined that the substantive shift in determining population, and consequently, representation, required a separate amendment. 264 Wis. at 657. This Court should reject Plaintiffs' attempt to shoehorn this discussion into *Ekern*'s "essential element" standard.

Plaintiffs also incorrectly argue that the Ballot Question should have stated that the Amendment changes rights of the accused. (Pls.' Br. 12–15; *see also id.* at 19–20.) Defendants will not repeat all of their reasons why the Ballot Question did not mislead voters concerning rights of the accused here, (*see* Defs.' Br. 21–29), but a few points bear mention.

First, Plaintiffs have not provided any authority to show that the removal of the "fair trial" language from the victims' rights amendment eliminated a defendant's right to fair trial. The source of a defendant's fair trial right has never been Article I, section 9m of the Wisconsin Constitution. (*See* Defs.' Br. 23–24.)

Second, Plaintiffs, like the circuit court, have failed to point to a single concrete example of how the Amendment will actually harm defendants' rights. Given the Legislature's broad discretion, and the Ballot Question's narrow role, this Court should not strike down the Ballot Question, and in turn the Amendment itself, where only abstract concerns have been offered.

Third, any shift in the balance of victims' rights with defendants' rights *was* properly summarized in the Ballot Question. Plaintiffs' discussion of article I, section 9m's history actually supports Defendants' arguments. (*See* Pls.' Br. 12, 19–20.) Because the 1993 amendment did not create new rights for defendants, that ballot question unsurprisingly did not explain to voters that it was—in addition to creating constitutional rights for victims—also creating a new constitutional right for defendants. (Defs.' Br. 24.) Rather, it communicated the *balance* that would occur with regard to defendants' rights. *See id.*

Plaintiffs argue that the now-stricken language from the previous version of article I, section 9m—limiting a victim's right to be present in court, and stating that victims' rights could not limit the rights of the accused—was not meaningless because it was designed to prevent existing protections from being overridden. (Pls.' Br. 12–13.) Plaintiffs do not focus on the correct inquiry, which is whether the Ballot Question properly and concisely summarized the Amendment. The Ballot Question explained that the Amendment would provide victims with more rights, and more protection and enforcement of those rights, with the

backstop now being the federal constitutional rights of the accused. The Ballot Question communicated the essential elements of the Amendment.[4]

Plaintiffs next contend that the Ballot Question failed *Ekern*'s test because it did not advise that the Amendment created a "new, unique form of mandatory supreme court jurisdiction for alleged victims." (Pls.' Br. 15.) The circuit court did not adopt this argument. (R. 42, A-App. 104–39.) Indeed, the Ballot Question properly explained that the Amendment provided additional enforcement mechanisms. But moreover, Plaintiffs misread the Amendment.

Their argument conflates Amendment subsection 9m(4)(b) with subsection 9m(4)(a). Under subsection 9m(4)(a), victims may seek enforcement of their rights "in any circuit court or before any other authority of competent jurisdiction." Subsection 9m(4)(a) also states that "[t]he court or other authority with jurisdiction over the case shall act promptly on such a request and afford a remedy for the violation of any right of the victim." This language pertains to enforcement at the trial level. Subsection 9m(4)(b) addresses appellate proceedings: "[v]ictims *may* obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) by

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[4] Plaintiffs' citations to the Florida Supreme Court's decision *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000), and caselaw that followed, do not help them. (Pls.' Br. 15, 20.) Florida's standards of course do not apply, but even if they did, the Florida analysis asks whether the Amendment's "chief purpose" was communicated. *Armstrong*, 773 So. 2d at 12. The "chief purpose" of the Marsy's Law Amendment was unquestionably communicated. In *Armstrong*, however, without even a "hint[ ]," let alone a "mention[ ]" in the ballot question, the amendment indisputably eviscerated a constitutional state right for defendants that (1) had existed since the state constitution's inception, and (2) specifically provided additional protections beyond the federal constitution. *Id*. at 7, 17–18.

filing petitions for supervisory writ in the court of appeals and supreme court."

The Amendment plainly provides victims a means to seek permissive "review" of a circuit court decision through a supervisory writ. There is nothing unique about this process, except that victims—who are not parties to the underlying criminal proceedings—now may seek this type of review. *See* Wis. Stat. §§ 809.51, 809.71. Nothing in the Amendment creates a new form of mandatory supreme court jurisdiction for crime victims. The Ballot Question could not have been defective for not referencing an incorrect understanding.

The Ballot Question accurately and concisely explained the Amendment's essentials: that it would (1) give victims additional rights, (2) enhance the protection and enforcement of victims' rights, and (3) leave the federal constitutional rights of the accused intact.

C. The Ballot Question was not misleading.

Plaintiffs maintain that the Ballot Question was misleading because it explained that the Amendment would protect victims' rights with "equal force," when the Amendment provides that victims' rights shall be protected in a manner "no less vigorous" than protections afforded the accused. (Pls.' Br. 17–18.) Plaintiffs assert that the Amendment permits "protection of victims' rights twice, or three times, or ten times as vigorously." (*Id*. at 17.) Plaintiffs' arguments fail.

First, they overlook that—as the Ballot Question explained—victims' rights cannot supersede defendants' federal constitutional protections. The only scenario where Plaintiffs' dramatic suggestion could hypothetically occur would be where (1) a defendant has a state constitutional right but no federal right, *and* (2) that right is at odds with a victim's right.

It is telling that as Plaintiffs all-but assert that the Legislature deliberately mislead voters, Plaintiffs *still* have not been able to articulate any meaningful example of how the Amendment's language could play out to defendants' detriment in a way that is not also captured by "with equal force." Instead, Plaintiffs—like the circuit court—disregard the discretion this Court must afford the Legislature's decisions on how best to summarize complicated concepts to the electorate.

Plaintiffs also argue that the use of "with equal force" bears no resemblance to the challenge deemed "hypercritical" in *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921 (1936). (Pls.' Br. 17–19.) If anything, that case involved a more significant difference between question and content. The ballot question there essentially asked voters: "Should this matter be put to vote?" In actuality, however, voters decided whether to approve the matter itself. *See Morris*, 266 N.W. at 924–25.

The Wisconsin Supreme Court nevertheless rejected a challenge to this discrepancy as "hypercritical." *Id.* at 925. If that difference is "hypercritical," then Plaintiffs' attempts to find shades of difference between "with equal force" and "no less vigorous" is also "hypercritical." The Amendment shifted the level of protection of victims' rights upwards. That shift was properly and fairly communicated in the Ballot Question.[5]

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[5] Without development, Plaintiffs suggest that the Ballot Question's use of "accused" instead of "defendant" was misleading. (Pls.' Br. 19 n.6.) Plaintiffs again impose a non-existent same-language requirement. The Legislature had discretion to use a more commonly understood term than "defendant" to distinguish "crime victims" from persons "*accused*" of the crime.

Plaintiffs also contend that it was "grossly misleading" not to inform the voters that rights of the accused were being changed. (Pls.' Br. 19.) As explained, this argument is flawed.

II. The Legislature properly submitted the Amendment in a single question.

Plaintiffs agree that the Amendment's purpose "was to increase and expand the rights of crime victims." (*Id.* at 7.) They further agree that the Wisconsin Constitution's separate amendment test gives the Legislature discretion to submit a proposed amendment as a single amendment if the components "relate to the same subject matter and are designed to accomplish one general purpose." (*Id.* at 6); *see also McConkey v. Van Hollen*, 2010 WI 57, ¶ 41, 326 Wis. 2d 1, 783 N.W.2d 855 (citation omitted). That should be the end of the matter. The Amendment, which purports to elevate and protect the rights of crime victims, was properly submitted as a single amendment.

Plaintiffs nevertheless argue that the Amendment's removal of text related to "the accused" should have been presented as a separate amendment. (Pls.' Br. 7–9.) As explained, both Plaintiffs and the circuit court incorrectly viewed the Amendment as removing affirmative rights for defendants, and incorrectly rest their analysis on speculation.

Further, the removal of this language is not on all fours with the changes made in *Thomson*. (*Id.* at 8–9.) There, a constitutional amendment contained the following changes: (1) Senate districts would be created taking land area and population into account, not just population; (2) military personnel and "Indians not taxed," who were not previously counted in creating Senate and Assembly districts, would now be counted; (3) Assembly districts would be created using town, village, and ward lines, where previously they were to include county, precinct, town, and ward lines; and (4) Assembly districts would no longer need to fall entirely

within a single Senate district. *Thomson*, 264 Wis. at 653–54; *see also McConkey*, 326 Wis. 2d 1, ¶ 33.

The ballot question, however, asked: "Shall sections 3, 4 and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population?" *Thomson*, 264 Wis. at 651 (citation omitted). The *Thomson* court found that the amendment's main purpose was to take area as well as population into account in apportioning Senate districts, and further concluded that two of the propositions—changes to assembly districts and counting military personnel and "Indians not taxed"—did not support this general purpose. *Id*. at 656–57.

Unlike the changes in *Thomson*, all changes in this Amendment support one purpose—preserving and protecting victims' rights. To the extent the Amendment shifts the possible balance of those rights with defendants' rights, that shift is not separate from the Amendment's overall purpose. The Legislature properly exercised its discretion in submitting the Amendment in a single ballot question.

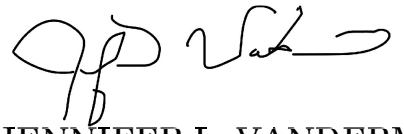
CONCLUSION

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 25th day of March, 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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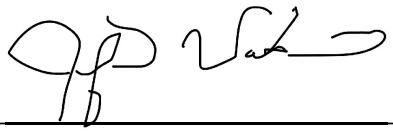
CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this reply brief is 2977 words.

Dated this 25th day of March, 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 reply brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic reply brief is identical in content and format to the printed form of the reply brief filed as of this date.

A copy of this certificate has been served with the paper copies of this reply brief filed with the court and served on all opposing parties.

Dated this 25th day of March, 2021.

JENNIFER L. VANDERMEUSE
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