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Case No. 20AP2003

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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.

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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

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**BRIEF OF AMICI CURIAE**  
**ACLU OF WISCONSIN & LAW FORWARD, INC.**

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## **INTERESTS OF *AMICI CURIAE***

The ACLU of Wisconsin Foundation aims to ensure that voters understand their voting rights and can freely exercise those rights. Law Forward exists to advance democracy in Wisconsin and revive our state's traditional commitment to clean and open government. *Amici* litigate, invest in public education, and engage in administrative processes to secure broad participation in elections.

## **INTRODUCTION**

Wisconsin's election code is highly detailed. The statutes prescribe every step of the election process—including voter registration, ballot preparation, vote counting, and disputes over results—to secure the fundamental promise of American democracy: government of, for, and by the people. This case goes to the heart of that promise, seeking to ensure that, when the people vote on whether to amend our state constitution, the meaning of the changes they are asked to consider are fully and fairly presented. Absent clear, complete, neutral presentations, we cannot be certain that constitutional changes reflect the people's will.

The decision below and the parties' briefs address the constitutional requirements and caselaw in detail. *Amici*

*curiae* seek to elucidate what it means to fully inform the voters in this context. There is no way to determine what elements of an amendment are “essential,” and what is or is not a separate subject, without understanding how voters make decisions.

### **ARGUMENT**

Marsy’s Law, a proposed amendment longer than the entire Bill of Rights, augured multiple changes to the Wisconsin Constitution. Yet it was presented to voters in a single, short, constitutionally invalid ballot question that neglected to describe major provisions of the proposed amendments and conflated topics not connected to the same general purpose.

Established research on decision-making underscores the infirmity of the ballot question. Voters may have evaluated Marsy’s Law differently if the ballot question had accurately described not only the law’s expansion of victims’ rights but also its potential curtailment of defendants’ rights.<sup>1</sup>

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<sup>1</sup> Appellants argue that the amendments do not eliminate defendants’ rights. For present purposes, *amici* argue that voters should have been informed of various textual changes because of their *potential* to narrow if not eliminate certain longstanding rights of defendants.

**I. The Marsy's Law Ballot Question Failed To Fully Inform Voters.**

Marsy's Law was presented to voters in a 64-word ballot question. (A-App. 142) That question failed to provide the basic information voters needed to make an informed decision on the effects of the thousand-word proposed amendment. A ballot question must be an "intelligent and comprehensive submission" so that the people "may be fully informed on the subject." *State v. Zimmerman*, 187 Wis. 180, 204 N.W. 803, 811 (1925).

Fully informing the voters need not require lengthy or technical exposition, which could reduce voter comprehension. But a ballot question must in all circumstances "reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment." *Id.* In adopting these standards, the Wisconsin Supreme Court reflected a basic understanding of the information voters need to make informed decisions. That understanding has now been confirmed by research.

Behind the short, anodyne ballot question voters saw, Marsy's Law comprises a long and detailed set of amendments. It rewrites Wisconsin's original Crime Victim



Bill of Rights, enacted in 1993. That provision was 148 words long. Wis. Const. art. I, § 9m (2017-18). Marsy's Law discarded nearly three-quarters of those words and created a new crime victims bill of rights, more than six times longer. Capturing for voters the substantial changes and the trade-offs involved in Marsy's Law required more than the ballot question provided.

**A. The ballot question was improperly framed and omitted necessary context.**

Framing and context are essential to how voters make decisions. Two principles of decision-making explain what voters needed to know to make an informed decision on proposed amendments: 1) individuals respond much differently to losses than to gains; and 2) individuals reach different conclusions on the same questions, depending on the amount of context provided. The Marsy's Law ballot question failed to fully inform voters in both respects. It lacked any information about potential losses of defendants' rights, and the minimal context provided was not only lacking but also misleading.

The Marsy's Law ballot question framed the amendments as a simple, positive addition of rights for a sympathetic

group of people. (*See* A-App. 142) Even “seemingly inconsequential changes” in how a choice is framed “cause[] significant shifts of preference.” Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 457 (1981). For example, asked whether a hate group should be permitted to hold a rally, 85% of respondents answered favorably if the question was prefaced with, “Given the importance of free speech,” but when the same question was framed as a security concern (“Given the risk of violence,”), only 45% were in favor. Dennis Chong & James N. Druckman, *Framing Theory*, *ANNUAL REV. POLI. SCI.*, 10:103-26 (2007) (internal citations omitted).

A different formulation of the same objective choice can alter an individual’s preference. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 368 (2013). Even voters with a “definite preference (i) might have a different preference in a different framing of the same problem; [and] (ii) are normally unaware of alternative frames and of their potential effects on the relative attractiveness of options.” Tversky & Kahneman, *supra*, at 457.

This is true because individual decision-making processes are often not linear, and people do not make decisions in a vacuum. Individuals make different decisions with respect to the exact same choice, depending on whether they are given a “minimal account” or “inclusive account” of the context for their decision. “People generally evaluate acts in terms of a minimal account, which includes only the direct consequences of the act.” Tversky & Kahneman, *supra*, at 456; *see also id.* at 457 (explaining why this happens).

There are times, however, where accurate decisions require broader context. *Id.* Consider, for example, deciding whether you should wait 10 minutes for the bus. Without any other information, you might answer yes; but with the additional information that the bus was already delayed 30 minutes, you might answer no. “Because of the nonlinearities of the evaluation process, the minimal account and a more inclusive one often lead to different choices.” *Id.* Context also mitigates framing bias. James N. Druckman & Arthur Lupia, *Mind, Will, and Choice*, at \*8, OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS, eds. Robert E. Goodin and Charles Tilly (Mar. 2006) (citing a study in which

individuals responded differently when given both frames of the same problem compared to just one frame).

Ballot measures often have framing biases that affect outcomes for several reasons. *First*, voters are relatively uninformed, even on the basics. In a 1991 survey, only “52 percent of respondents [knew] that their state had its own constitution.” Sanford V. Levinson & William D. Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 214 (2016) (citations and quotations omitted). Few voters spend a substantial amount of time researching ballot issues. *See, e.g.*, Werner Pleschbreger, “Making Informed Citizens in Local Direct Democracy. What Part Does Their Government Perform?” in *Local Government and Urban Governance in Europe* 233, 234, eds. C. Nunes Silva & J. Bucek (2017); Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, 32 POLITICAL COMMUNICATION 109, 112 (2015).

The ballot question is the *only* text that *all* voters see—as well as the last text that voters see—before casting their votes, which gives its framing particular power and

consequence. Burnett & Kogan, *supra*, at 112. Voters rarely read the full text of a proposed law; instead they rely on campaign messages, endorsements, and most importantly the ballot question itself. *Id.* at 114. Therefore language in ballot titles and summaries has an outsized effect. *Id.* at 110; *see also* Pleschbreger, *supra*, at 237.

**Second**, strong framing trumps other messages with weaker frames, even if the more accurate messages are more frequent. *See* Dennis Chong, and James N. Druckman, *Framing Public Opinion in Competitive Democracies*, 101:4 AM. POL. SCI. REV. 645, 647 (2007) (“[W]e find that strength once again dominates repetition.”). This makes the use of strong, overly simplified framing in ballot questions a particularly stark concern.

**Third**, the omissions from and one-sided framing of the ballot question for Marsy’s Law exacerbated problems created by voters’ lack of information. *See* Arthur Lupia, *The Effect of Information on Voting Behavior and Electoral Outcomes: An Experimental Study of Direct Legislation*, 78 PUBLIC CHOICE 1, 65, 81 (1994) (“When voters are badly informed (or the electoral alternatives are reasonably complex), and there are no effective information cues

available, small groups who have enough resources to obtain agenda control can use direct legislation to obtain preferred outcomes.”).

The chaos of the April 2020 election compounded these problems. Wisconsin held the nation’s first election during the COVID-19 pandemic, raising questions of when, where, how, and whether to vote, which distracted heavily from the substance of the election. *Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, N.Y. Times (Apr. 7, 2020).<sup>2</sup> This left voters even more vulnerable to framing bias in the ballot question, which for many was their main source of information about Marsy’s Law.

Lack of context also exacerbated these problems. Voters might have understood the ballot question differently had it provided a more inclusive account that explained the impact on defendants’ rights. Voters might have considered the ballot question differently had it acknowledged that Wisconsin’s Constitution already contained a Crime Victim Bill of Rights.

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<sup>2</sup> Available at <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>.

To most closely capture the will of the voters, the ballot question should have provided this context.

**B. The ballot question was misleading because voters evaluate gains and losses differently.**

The ballot question misled voters by framing Marsy's Law solely as creating new rights for crime victims and omitting information about potential losses for defendants. This is crucial because decision-makers consider losses more significant than gains. Tversky & Kahneman, *supra*, at 454-55. Individuals commonly perceive outcomes as either positive or negative (a gain or a loss), depending on a reference point. *Id.* at 454. Varying that reference point can tip whether a particular outcome is perceived as a gain or a loss, which will often determine which option an individual prefers. *Id.*

Depending on whether they are framed as a gain or a loss, two "logically equivalent statements" often "do not mean the same thing" and elicit different responses. Kahneman, *supra*, at 363. When stores began widely accepting credit cards, the credit card industry lobbied stores to offer a "cash discount" instead of charging a "credit-card surcharge" because consumers are less willing to accept loss (paying a surcharge)

than they are to forego a cash discount. Tversky & Kahneman, *supra*, at 456. The two options are “economically equivalent but they are not emotionally equivalent.” Kahneman, *supra*, at 364. Similarly, it matters whether a document characterizes the same entities as “major polluters” or “major sources of emissions.” Pleschbreger, *supra*, at 241. Positive terms can create support among an electorate even when it would be more appropriate to use a descriptive term. *Id.*

The framing effect holds true in ballot measures. In one study, respondents were asked whether they supported a proposed amendment. When the ballot question was titled negatively as “Eliminates the Right of Same-Sex Couples to Marry,” 39 percent supported it, but more than half supported the same amendment given the positive title of “The Protect Marriage Act.” Jeff Hastings & Damon Cann, *Ballot Titles and Voter Decisions Making on Ballot Questions*, 46(2) STATE & LOCAL GOV'T REV. 118, 122 (2014). This is one of many studies confirming that “framing effects due to ballot title wording are very real.” *Id.* at 124.

The Marsy's Law ballot question was framed as a simple and certain gain for victims. It was titled “Additional rights of



crime victims.” (A-App. 142) It asked if voters wanted to “give victims additional rights” and used words with positive associations like “protected,” “allow,” and “enforce.” (*Id.*) The only references to the rights of the accused were also framed positively: “leaving the federal constitutional rights of the accused intact.” (*Id.*)

But the law itself makes three changes that, contrary to that positive framing, have the potential to weaken defendants’ rights. **First**, it limits discovery available to defendants by allowing victims “[t]o refuse an interview, deposition, or other discovery request.” 2019 Senate Joint Resolution 2.<sup>3</sup> **Second**, it grants victims the right “to attend all proceedings” and deletes the qualifying phrase “unless the trial court finds sequestration is necessary to a fair trial for the defendant.” *Id.* **Third**, it removes from the Wisconsin Constitution a catch-all guarantee that “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.” *Id.*

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<sup>3</sup> Available at <https://docs.legis.wisconsin.gov/2019/related/enrolled/sjr2>

These provisions make clear that Marsy's Law is more nuanced and complex than the ballot question reveals. This is troubling because the framing solely in terms of victims' gains does not evoke the same response and therefore *does not mean the same thing* to a voter as a framing in terms of defendants' losses.

It is unrealistic to expect voters to research and reframe a ballot question to understand the potential losses it imposes. "Unless there is an obvious reason to do otherwise, most of us passively accept decision problems as they are framed and therefore rarely have an opportunity to discover the extent to which our preferences are *frame-bound* rather than *reality-bound*." Kahneman, *supra*, at 367. In one study, respondents were asked their preference of two possible medical treatments. Treatment A was sometimes described as having a "one-month survival rate [of] 90%," and other times described as having "10% mortality in the first month." Respondents preferred Treatment A when framed in terms of its survival rate, but not when framed in terms of its morbidity rate. *Id.*

Scientific studies on evaluation of losses indicate that voters may have responded differently if asked, "Should the

Constitution be amended to remove the defendant's right to sequester a victim witness if necessary for a fair trial?" or, more generally, "Should crime victims be granted additional rights in the investigation and prosecution that weaken or eliminate some rights of the accused?" The actual ballot question used for Marsy's Law made no reference whatsoever to potential losses. Indeed, the ballot question was misleadingly framed to *negate* a loss of defendants' rights by indicating the amendments would "leav[e] the federal constitutional rights of the accused intact." (A-App. 142)

**II. Multiple ballot questions would have mitigated the framing bias.**

To accurately capture the potential loss of defendants' rights and provide voters with an opportunity to express their preferences on both the potential losses and gains involved, Marsy's Law necessitated at least two ballot questions. This approach would have met the requirements of Wisconsin law, and could have ameliorated the framing problems discussed above.

Amendments that have “different objects and purposes,” which do not depend on each other, must be submitted to voters separately. *State v. Timme*, 54 Wis. 318, 11 N.W. 785, 791 (1882); *see also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 657, 60 N.W.2d 416 (1953). This “does not prohibit a single constitutional amendment from being complex or multifaceted, or from containing a variety of specific prescriptions and proscriptions.” *McConkey v. Van Hollen*, 2010 WI 57, ¶26, 326 Wis. 2d 1, 783 N.W.2d 855.

Marsy’s Law is not merely complex and multifaceted; it also contains provisions that accomplish separate purposes: adding victims’ rights, and removing state-law protections for both criminal suspects and defendants. These elements of the amendments are not interdependent, and voters could have accepted one while rejecting the other.

Wisconsin’s separate-amendment rule aims to ensure that ballot measures represent the will of the voters. The more closely focused the ballot question, the more likely the vote will accurately reflect voters’ desires. This is because “voters will simply not know about, much less understand in any

depth many of the sub-issues.” Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don’t Work*, 66 U. COLO. L. REV. 47, 85 (1995). Additionally, when ballot questions bundle multiple issues, voters have to weigh their opinions about one part of the question against their opinions about the other parts. If they strongly favor the first part and mildly disfavor the second, they may vote “yes” even though that does not accurately represent their opinion of the second part. *Id.* at 85. “If a majority does so, the state constitution contains language favored by the majority, the text of issue one, and language disfavored by the majority, the text of issue[] [two] ....” *Id.* at 85-86.

The expressed general purpose of Marsy’s Law was to expand victims’ rights, but some of its provisions were not necessary to further that goal. The three discrete changes at issue—victims’ rights to refuse discovery and to attend all proceedings, the deleted reference to a defendant’s right to a fair trial, and the deleted statement that no victims’ rights limit the rights of the accused—could and should have been

separate. None is a necessary “detail of a main purpose,” *Thomson*, 264 Wis. at 657—here, expanding victims’ rights. Voters should have had the option to vote on those changes separately because voters could have – and may – have wanted to expand crime victims’ rights without altering defendants’ rights. This is precisely the balance voters struck in adopting Wisconsin’s prior crime victims’ bill of rights. *See* Wis. Const. art. I, § 9m (2017-18) (“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.”).

Bundling independent issues into one ballot question defeats the fundamental purpose of direct democracy: to enact the true will of the voters.

### **CONCLUSION**

The Wisconsin Constitution entrusts voters with the final say on amending its text. But voters cannot discharge that obligation if the amendment questions are not clearly, accurately, and cogently presented on the ballot. As explained above, the Marsy’s Law ballot question did not allow voters the opportunity to make an informed choice on its essential

provisions. *Amici* respectfully urge this Court to affirm the circuit court decision.

Dated this 5th day of April, 2021.

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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 the Introduction, Argument, and Conclusion of the brief is 2,983 words.

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

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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 5th day of April, 2021.



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## CERTIFICATION OF FILING AND SERVICE

I hereby certify that the brief was hand delivered to the Clerk of the Wisconsin Court of Appeals on April 5, 2021. I further certify that three true and correct copies of the foregoing brief were mailed via first-class U.S. Mail, postage prepaid to counsel for the parties:

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