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SUPREME COURT

IN SUPREME COURT

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 CERTIFICATION FROM DISTRICT III OF THE WISCONSIN COURT OF APPEALS FOLLOWING APPEAL FROM A FINAL DECISION AND ORDER ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE FRANK D. REMINGTON, PRESIDING

BRIEF OF PLAINTIFFS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

What is at stake in this case is the right of Wisconsin voters to be properly informed, and to not be misled by a ballot question when voting on proposed amendments to the Wisconsin Constitution. The wisdom or value of increasing the rights of crime victims, or the potential impact of the 2020 Marsy's Law amendments on any particular victim or accused person are not at issue here.

In 1993, Wisconsin amended our State Constitution to include victims' rights provisions, Wis. Const. art. I, § 9m. Specific language was included in the amendments to ensure that protections provided at that time under the Wisconsin Constitution and laws to those accused of crimes would not be affected by this expansion of victims' rights:

> **Victims of crime.** 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: 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. (Emphasis supplied).

Wis. Const. art. I, § 9m (2019), (A-App. 167). Those provisions, underlined above, were included in the Constitution to prevent the victims' rights provisions from conflicting with or limiting existing rights of the accused.

When the Wisconsin Legislature submitted additional victims' rights constitutional amendments, commonly known as Marsy's Law, for ratification by Wisconsin voters in the April 2020 election, the amendments that were proposed were longer than the entire U.S. Bill of Rights. In addition to expanding the Wisconsin Constitutional rights of victims, the 2020 amendments strike from the Constitution every one

of the underlined words set forth in art. I, § 9m above that prevented existing rights of the accused from being limited or overridden.

In the circuit court, plaintiffs challenged the legal sufficiency of the referendum question that appeared on the ballot. The Ballot Question described the proposed amendments as giving crime victims additional rights, requiring the rights of crime victims to be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and allowing crime victims to enforce their rights in court. The Question did not mention that any changes were being made to language in the Wisconsin Constitution that protected rights of the accused.

The circuit court recognized that by striking existing provisions of the Constitution that prevented rights of the accused from being limited, the 2020 amendments not only expanded crime victims' rights, but also reduced rights and protections provided by the Wisconsin Constitution to the accused. The circuit court ruled that amending the state Constitution to limit its protection of rights of the accused was a distinct and separate subject, requiring a separate Ballot Question under Wis. Const. art XII, § 1.

The circuit court also recognized that, in addition to presenting only one Question to the voters when more than one was necessary, the Question failed to meet other long-established requirements for presenting a constitutional amendment to the voters. Those requirements were designed to enable voters to be informed of what they were voting on. First, the Question failed to inform voters that the amendments would strike provisions from the Constitution that protect rights of the accused. Second, it stated that the amendments would require that the rights of crime victims be protected "with equal force" to the protections afforded the accused – when the amendments instead required victims' rights to be protected in a manner "no less vigorous" than the protections afforded the accused. In addition, the Question referred to "leaving the federal constitutional rights of the accused intact," which was confusing and misleading, in view of the Question's failure to inform voters that language in the state Constitution that

protected rights of the accused would be stricken. Thus, the Question failed to meet the "every essential" test, contained a misstatement regarding the contents of the amendments, and was ambiguous and misleading.

As a result, the court ruled that the Ballot Question was insufficient under Wisconsin law, and that the proposed amendments were not validly enacted. This court should affirm those rulings.

ISSUES PRESENTED

1. Whether more than one Ballot Question was required to present the Amendments to the voters under Wis. Const. art. XII, §1.

The circuit court answered yes.

This Court should answer yes.

2. Whether the Ballot Question met the requirements under Wis. Const. art XII, §1, to clearly and accurately reference all the essentials of the Amendments and to not mislead voters.

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's acceptance of the certification demonstrates that both oral argument and publication are warranted.

STATEMENT OF THE CASE

Plaintiffs supplement the Defendants' Statement of the Case by adding the following paragraph between the 5th and 6th paragraphs of Defendants' Section II:

The type C Notice, which is the only one to contain the text of the proposed amendment, is not required to be published until only shortly before election day. Wis. Stat. § 10.01(2). Many voters used absentee ballots submitted to election officials before the Notice was published, and there was particularly heavy early absentee voting for the April 7, 2020 election, which occurred during the statewide coronavirus

pandemic health emergency. The court can take judicial notice that the Wisconsin Elections Commission Absentee Voting Report regarding the April 7, 2020 election shows in Table 4 that 74.4% of voters in that election voted absentee by mail or early in person. https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf

ARGUMENT

I. Defendants misstate the standards in Wisconsin for a valid constitutional amendment ballot question.

For 140 years, Wisconsin courts have exercised their power and responsibility to decide challenges to the sufficiency of ballot questions presenting proposed constitutional amendments to voters for ratification, as a core power of the judiciary. (*See* R42:5, A-App 130). Several cases have explained how to determine whether more than one amendment has been presented, which requires more than one ballot question. *State ex rel Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953); *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855; *Milwaukee Alliance Against Racist and Political Repression v. Elections Bd.*, 106 Wis. 2d 593, 317 N.W.2d 420 (1982). Two cases require that the question reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment and require that the question must not contain misinformation – anything mentioned on the ballot "must be mentioned in accord with the fact." *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803 (Wis. 1925); *State ex rel. Thomson v. Zimmerman, supra. Ekern* also recognized that what is needed to enable voters to vote intelligently is a ballot question that is clear and unambiguous. 204 N.W. at 812.

It is also apparent from the cases that the strict "every essential" test for ballot questions on constitutional amendments is not applicable to ballot questions on municipal referenda questions or ballots on direct legislation of municipal ordinances. The court of appeals held in *Metropolitan Milwaukee Ass'n of Commerce Inc. v. City of Milwaukee*, 2011 WI App 45 ¶24, 332 Wis. 2d 459, 482, 798 N.W.2d 287, 299

(emphasis added), "only in the context of constitutional amendments has the supreme court adopted the 'every essential' standard."[1]

Nevertheless, citing *Metropolitan Milwaukee,* a municipal direct legislation case, Defendants argue that what the constitutional ballot question here needed to do is far more limited than what the "every essential" test requires – they claim it need only constitute a "brief statement of the general purpose." (See A-Brf. 26). They also assert what is required of a Ballot Question is that it "simply served to help voters identify the matter at hand." (A-Brf. 33). However, they fail to acknowledge that the requirements for ballot questions on constitutional amendments are more strict than that. It is, after all, a Constitution that was being amended here, not a mere municipal ordinance. The Question here needed to do more than "help" voters to identify what they were voting on – it needed to refer them to every essential of the amendment, and to describe its contents accurately and without misleading.

In this regard, Defendants cite *Ekern*, 204 N.W. at 813, twice in their brief for the proposition that a reviewing court must uphold a ballot question even if its language or phrasing is not "entirely free from doubt." (A-Brf. 23, 39). In fact, only one page earlier in the opinion, the *Ekern* Court stated the actual standard on avoiding doubtful language in a ballot question: "The question submitted on the ballot has heretofore been quoted. It is clear and unambiguous, so as to enable voters to vote intelligently." *Ekern*, 204 N.W. at 812. That case involved a constitutional amendment ballot question that had been drafted by the Secretary of State rather than by the Legislature itself. It is clear from the Court's opinion that the "question" being referred to that was not entirely free from doubt was not the ballot question itself but whether the drafting of the ballot question by an entity other than the Legislature was grounds for invalidating the amendment. The Court ruled that this was not a ground for rejecting the amendment, and that the clear and unambiguous language in the ballot question was

[1] As a result, municipal referendum cases can be of little assistance here.

sufficient for the amendment to have been validly enacted, regardless of who drafted it.[2]

II. More than one Question was required to submit the 2020 amendments to the voters because the amendments were not limited to one subject.

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. In 1882, this Court explained the separate-amendment rule as follows:

> In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other.

Hudd, 11 N.W. at 791. 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 v. Van Hollen,* 2010 WI 57, ¶ 26, 326 Wis. 2d 1, 783 N.W.2d 855.

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 Alliance. v. Elections Bd.*, 106 Wis. 2d 593, 604–05, 317 N.W. 2d 420 (1982)). "[A]ll of the propositions must 'tend to effect or carry out' the [amendment's] purpose." *Id.* (quoting *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 656, 60 N.W. 2d 416 (1953)). In other words, if all propositions are dependent upon, or connected with, the amendment's overall purpose, the Legislature may submit them as a single proposed amendment. *Id.* ¶ 42.

[2] Defendants' error in citing that language in *Ekern* for their proposed standard was pointed out by Plaintiffs in the circuit court, and again in the court of appeals, but they continue to press the mistaken point here. (See R. 37:3, R-Ct App. Brf. 5-6).

Here, the title and text of the Ballot Question, and the common name for the amendments, "Marsy's Law," all indicate to voters that the purpose of the amendments was to increase and expand the rights of crime victims.

In *Milwaukee Alliance*, a single amendment was proposed to revise the existing right to bail to a concept of conditional release. 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 upheld use of a single ballot question, holding that 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*.

Here, while the overall purpose of the Marsy's Law amendments was to increase and strengthen victims' rights, the text of the amendments also included striking existing provisions from the Wisconsin Constitution, specifically the words in section 9m of Article I underlined below, that protected rights of the accused:

> **Victims of crime.** 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: 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. (Emphasis supplied).

Wis. Const. art. I, § 9m (2019), (A-App. 167).

The circuit court correctly recognized that striking these provisions altered the rights of persons accused of crime in significant ways. Striking the first underlined provision deleted a defendant's right to have a victim witness sequestered and deleted the only reference in the state Constitution to a defendant's right to a "fair trial." Striking the final sentence from Section 9m did away with the 1993 constitutional language that prevented victims' rights from limiting any legal rights of the accused:

> But now, with the repeal of the preexisting language, the inescapable conclusion is that presently crime victims have a State Constitutional right to attend all proceedings even if their removal from the courtroom is otherwise necessary for a fair trial for the defendant. (emphasis added)

(R. 42:13, A-App. 138). Striking the final sentence from § 9m as it had been enacted in 1993 altered the rights of the accused under the State Constitution:

> It was generally understood that the constitutional language in the now repealed portion guided the court, at a minimum, to not allow the rights of crime victims to automatically supersede the rights of the accused, and at most, made clear that the court should protect and preserve the rights of the accused that were provided for and guaranteed by Wisconsin law.

(Id.)

The circuit court carefully considered the Wisconsin Supreme Court cases addressing the separate amendment rule, including *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, which is most pertinent here. (See R. 42:26-29, A-App. 129-132). In *Thomson*, the Court held that an amendment had not been validly enacted because 1) it encompassed at least three distinct subjects, necessitating as many ballot questions:

- allowing senate districts to be formed on the basis of area as well as population;
- including Indians and the military in the population to be counted; and
- changing which municipality boundaries could be used in forming assembly districts,

and also because 2) the question misstated what lines would be used in forming senate districts under the amendment.

Defendants argue here that changes to victims' Wisconsin constitutional rights (the "what"), changes to who is constitutionally defined as a victim (the "who"), changes to an accused's or defendant's constitutional rights (the "others"), and creation of a right of victims to obtain review and a remedy in the Wisconsin Supreme Court ("nondiscretionary Supreme Court review") are all sufficiently related to enable one ballot question to submit all of them to the voters. However, to the contrary, in *Thomson* even though all three sets of changes related to how legislative districts were to be formed, the Court held that the basis for establishing senate districts (a "what"), the change in who was to be counted in determining districts' population for districting (the "who"), and the boundaries to be followed for assembly districts (another "what") each required separate ballot questions.

Here, the circuit court properly recognized that "[s]ubtracting from defendants' rights is a fundamentally different subject and a fundamentally different purpose than adding to victims' rights." (R.42:13 n 6; A-App.138). And the court correctly ruled that at least two separate questions needed to be submitted to the voters:

> If the Legislature wanted to expand the definition of a crime victim and to give crime victims greater rights and at the same time curtail the rights of persons only accused of committing a crime, it was required to frame the issues to elicit voter ratification by asking two separate questions. The two concepts are sufficiently distinct. They should be submitted to voters as separate questions. Conflating the separate questions of creating something new for crime victims and deleting something old for persons only accused of committing a crime was a mistake of constitutional proportions. It may be that in the end Wisconsin voters will ratify redefining "crime victim", increasing crime victim rights, and curtailing the rights of the accused. But having two separate and clearly worded questions is the only way to know for sure.

(R. 42:30, A-App. 155). In other words, voters were entitled to be asked not only whether they approved expanding victims' rights but separately

whether they approved changes that limited rights of the accused under the state Constitution.[3]

III. The Ballot Question was inadequate for submitting these constitutional amendments to the voters because it failed to satisfy the "every essential" test, misstated the contents of the amendments, and was misleading.

.

A. The Ballot Question was inadequate because it failed to reference every essential element of the amendments.

1. The Question failed to state that the constitutional definition of "victim" was being changed.

The Legislature certainly has discretion in determining the contents of a ballot question. Defendants argue here that that discretion is almost virtually unbounded. They urge that the only limitations on that discretion are "if the ballot question (1) 'failed to present the real question' or (2) 'presented an entirely different question.'" (A-Brf. 25).

However, Defendants' standard omits the requirement that the ballot question "must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment." *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416, 423 (1953) (quoting *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803 (1925)).

In *Thomson*, the Wisconsin Supreme Court addressed the consequences of putting a proposed constitutional amendment to the voters with an inadequate ballot question, and, quoting *Ekern*,

[3] The circuit court rejected Plaintiffs' argument that changing the constitutional definition of crime victim required a third question and did not address the question of whether the amendments' change to Supreme Court jurisdiction required a fourth question. It continues to be Plaintiffs' position that providing victims a right to mandatory rather than discretionary review in the Supreme Court if they seek review of an appellate court ruling regarding any of their rights required a separate question. Creating a right to Supreme Court review is fundamentally distinct from expanding crime victims' rights.

described the requirements for a valid amendment ballot question in greater detail as follows:

> Had the Legislature in the present case prescribed the form of submission in a manner which would have failed to present the real question, or had they, by error or mistake, presented an entirely different question, no claim could be made that the proposed amendment would have been validly enacted. In other words, even if the form is prescribed by the Legislature, it must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment. . . ."[T]he principal and essential criterion consists in 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).

Defendants completely ignore *Thomson* and *Ekern's* "in other words" explanation of the "every essential" standard – it requires a ballot question that reasonably, intelligently and fairly references every essential of the amendment so voters may be fully informed. This has been the standard in Wisconsin for 97 years and should remain so. It requires more of a ballot question than Defendants' standards demand.[4]

It was argued in *Thomson*, in support of the validity of the amendment, that expanding the definition of persons to be counted in the apportionment of population was merely a detail related to the subject matter of the amendment, changing how senate districts would be formed. The Supreme Court rejected this view, holding:

> A change of almost equal importance is that which revokes the provision of art. IV, sec. 3, Const., excluding untaxed Indians and the military from those who are to be counted in determining the

[4] In the Court of Appeals, Defendants urged that the limitation on drafting a ballot question should be that it is not "so detached from the amendment itself that it falls outside the Legislature's broad constitutional authority." (A-Ct App. Brf. 1, 18). But they have abandoned that definition here. They now point to Minnesota caselaw in search of a definition of "every essential." But that definition for Wisconsin is already found in *Ekern* and *Thomson*.

> representation to which a district is entitled, who, though they are not residents in the sense of being eligible to vote, in the case of the military see art. III, sec. 5, Const., are nevertheless to be added by the proposed amendment when a district's representation in the legislature is calculated. We consider that a constitutional change in the individuals to be counted is not a detail of a main purpose to consider area in senate districts but is a separate matter which must be submitted as a separate amendment.

264 Wis. at 657.

Here, even though an entire section of the 2020 amendments is devoted to expanding the constitutional definition of victim, changing the constitutional definition of victim is not mentioned in the Ballot Question at all. The definition of victim adopted in the 1993 constitutional amendment was that of "victim" as it was then defined in Wis. Stats. § 950.02: "a person against whom a crime has been committed." Expanding the constitutional definition of victim to include housemates or live-in assistants is quite different from and unrelated to giving victims themselves additional rights. Even if a separate ballot question might not be needed, as the circuit court decided, changing the constitutional definition of victim needed to be referred to in some way in the ballot question. As in *Thomson*, changing the "who" in the Constitution's language here was not a mere detail that could be ignored in the ballot question. Instead, it was an essential element.

2. The Question failed to state that changes were being made to the Constitution regarding rights of the accused.

The Question here failed to alert voters that the 2020 amendments strike from the Constitution its only reference to a "fair trial for the defendant," or that they strike from the Constitution language protecting a defendant's right to have a victim witness sequestered when necessary for a fair trial. There was nothing in the Question to inform voters that all or part of a defendant's Wisconsin constitutional right to a fair trial was being eliminated, or even that any changes at all were being made to the Wisconsin Constitution regarding rights of the accused. Certainly, that the Constitution was being

amended by deleting words that protected rights of the accused was an "essential" element of the amendments to which the ballot question needed to refer.

The 2020 amendments encompassed at least two different and distinct purposes – providing victims with increased rights under the state Constitution, and striking provisions from that Constitution that protected or preserved rights of the accused. Plaintiffs submit that, if this Court rules that a separate ballot question was not required to address the changes made by the amendments regarding rights of the accused, those changes were sufficiently distinct and sufficiently important that they needed to be referred to in the Question.

Contrary to Defendants' claims, the Plaintiffs do not contend that the language in the 1993 constitutional amendments that protected rights of the accused had created new rights for the accused at that time. Rather, as the circuit court properly recognized, and as supported by the legislative drafting record at the time, that language was added to and included in the 1993 amendments to prevent already existing protections of the accused from being repealed, overridden or limited as a result of the 1993 victims' rights amendments. (A-App. 138). (See "Constitutional Amendments Given 'First Consideration' Approval by the 1991 Wisconsin Legislature," LRB-93-IB-2, January 1993, at 3-5, http://lrbdigital.legis.wisconsin.gov/digital/collection/p16831coll2/id/381/rec/5).

Those words in our Constitution protected the right of the accused to have victim witnesses sequestered when necessary for a fair trial and prevented any rights of the accused under law from being limited by the 1993 Constitution's victims' rights provisions or by any implementing statutes. Appropriately, the 1993 ballot question had specifically informed voters of this language in the amendments, stating that victims' rights would be protected "without limiting any legal rights of the accused," as admitted by defendants. (A-Brf. 33). Removing the referenced words from our Constitution in 2020, while victims' constitutional rights were being further expanded, indisputably limited

the rights of the accused under the Wisconsin Constitution, but the Question failed to inform voters of that.

Defendants argue that because these words protecting rights of the accused were not the original source of those rights, those words could be removed from our Constitution without being referred to in the Ballot Question (A-Brf: 32-33, 27, 37). They have not explicitly argued that the newly stricken words had no meaning and could for that reason be eliminated without notice to the voters in the Question. However, defendants' argument here presumes that the stricken words were meaningless, contrary to rules of construction that require that words in the Constitution not be treated as mere surplusage. Constitutional "language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Appling v. Walker*, 2014 WI 96 ¶23, 358 Wis. 2d 132, 853 N.W.2d 888 (quoting *C. Coakley Relocation Sys., Inc. v. City of Milwaukee,* 2008 WI 68 ¶ 17, 310 Wis. 2d 456, 750 N.W.2d 900).

The circuit court recognized that the 2020 amendments, by adding words to the Constitution that expanded victims' rights and by deleting words in the 1993 constitutional amendments that prevented rights of the accused from being limited, changed Wisconsin rights of the accused. The court did not engage in hypotheticals or rampant speculation about the "potential effect" of the amendments. Rather, it examined the words added to and the words removed from our Constitution by the proposed amendments themselves. Clearly, the drafters of the 2020 amendments wanted to change the ground rules in Wisconsin's criminal justice system. To do so, they made changes to both the rights of victims and the protections afforded to the accused under the Wisconsin Constitution.

The issues in this case do not include whether such changes are or are not wise or desirable – that is for the Legislature to propose and for the voters to determine. Nor are the details of the effects and ramifications of these constitutional changes in individual cases or situations in the future at issue in this case. This case is about whether the Ballot Question adequately and accurately informed voters of the

contents of the amendments on which they were voting. The Question did not inform voters that any changes were being made to the Wisconsin Constitution's protection of rights of the accused. As a result, the Question failed to meet the "every essential" test.

At page 24 of their brief, citing *Ekern* and quoting from a municipal case, Defendants argue that a ballot question is only "part of the submission" of a constitutional amendment to the voters, who should review election notices and educate themselves on the substance and implications of the amendment. However, the *only* notice which set forth the text of the 2020 amendments was the type C notice, not published until very shortly before election day, too late to educate and inform the many voters who voted early during the covid pandemic. This contrasts greatly with *Ekern*, where the full text of the proposed amendment, along with an explanation prepared by the secretary of state, was published weekly "from not later than the last Friday of September until the election to which it referred" (in November). 204 N.W. at 812

Defendants argue that since federal constitutional rights of the accused are unaffected by the amendments, there would be little or no practical impact if state constitutional protections of the accused were being altered. (A-Brf. 35-37). Defendants' approach denigrates the purpose and role of the Wisconsin Constitution. Without giving notice to voters in the Question, the 2020 amendments eliminated constitutional language that preserved defendants' rights under the Wisconsin Constitution and under state statutes if victims' rights conflicted with them. Defendants apparently view state constitutional provisions protecting defendants' rights (or protecting any other rights, perhaps), as mere surplusage that can be deleted from our Constitution in whole or in part, without even being mentioned in a ballot question — as long as the Question mentions that federal constitutional rights would not be impacted.[5] The point of having rights provisions in our

[5] The Question did not mention that language protecting rights of the accused was being deleted from the Wisconsin Constitution. It seems designed to either mislead or distract voters, since no amendments to the Wisconsin Constitution could impact

State Constitution, even if they may largely resemble federal constitutional provisions, is that they set forth an independent set of protections. As the circuit court noted, Wisconsin is free to provide rights that are more expansive than those of the U.S. Constitution, which serve as minimums, and has on occasion done so. (R.42:22-25, A-App. 147-50).[6] In *Armstrong v. Harris*, 773 So. 2d 7, 17-18 (Fla. 2000), the Florida supreme court explained how these federalist principles affect amending state constitutions as follows:

> [W]here a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election. ("This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.")

Here, the circuit court recognized that the discrepancies between the Question and the actual contents of the 2020 amendments were not merely academic:

> The question today is about the integrity of the process of amending the State Constitution by ballot. Voters deserve to know what they are voting on. Wisconsin has a long tradition of an informed electorate. Only by framing a question that reasonably, intelligently, and fairly comprised or referenced every essential of the amendment, could the voters decide whether and how to change the rights of persons accused of crimes, including the preservation of the right to sequester, which for generations has served the important interest of promoting truthfulness in witness testimony. It is hard to imagine that when informed that the words in the State Constitution referencing a "fair trial" were to be deleted, there would be anybody that would think that information was nonessential. More likely, many voters might pause before voting to delete what should be a universally accepted proposition even notwithstanding the legal

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federal constitutional rights, because of the Supremacy Clause. U.S. Constitution, Art. VI. See Section III.B. *infra*.

[6] Equally important, Wisconsin's constitutional protections cannot be amended without the consent of Wisconsin's Legislature and voters, while the meaning of current federal constitutional rights could be altered at any time by the decision of five or more United States Supreme Court Justices, and those rights themselves could be altered or eliminated without the agreement of Wisconsin legislators or voters through federal constitutional amendments.

> complexity relating to the difference between state versus federal constitutional rights.

(R. 42:22; A-App. 147). The circuit court correctly held that under the requirements for constitutional amendments established in Wisconsin law, the Question was invalid for failure to inform voters that existing protections of the accused were being removed from the state Constitution.

3. The Question failed to state that Supreme Court jurisdiction was being changed.

The Question failed to inform voters that the nature of the exercise of the state Supreme Court's jurisdiction was being altered in any way. However, a new, unique form of mandatory supreme court jurisdiction for alleged victims was created by the 2020 amendments.

Under the 2020 amendments, a victim who seeks enforcement in circuit court of any of their rights and is unsatisfied with the circuit court's decision can appeal to the court of appeals. A victim who is unsatisfied with the appellate court decision can then petition the Supreme Court, which is then an authority of competent jurisdiction, which "shall act promptly on such a request and afford a remedy for the violation of any right of the victim." Wis. Const. art I, § 9m (4)(a), (A-App. 143). Thus, under the actual wording of the amendments at issue here, the Constitution mandates that this Court afford a remedy for the violation of any right of the victim. This new constitutional language eliminated the Court's usual discretion to determine whether or not to review any decision of the court of appeals, and instead requires this Court to exercise its jurisdiction when requested by a victim. Plaintiffs submit that this significant and unique change to the nature of review in the Supreme Court is not a mere "detail" of expanding victims' rights, but an "essential element" of the amendments that needed to be referred to in the Question.[7]

[7] Having already found that more than one ballot question was needed, and that the Question misstated the contents of the amendments regarding the reduction in rights of the accused, the circuit court did not address whether this change to the Supreme Court's jurisdiction was an essential element that needed to be mentioned. Plaintiffs

B. The Ballot Question was inadequate because it misstated the contents of the amendments and was misleading.

A fundamental requirement of ballot questions on proposed Constitutional amendments is that they not contain misstatements. In *Thomson,* 264 Wis. at 660, in addition to finding the ballot question invalid because more than one question was required, this Court held it to be invalid because it misstated what lines would be used in forming senate districts under the amendment:

> It does not lie in our mouths to say that that which the people think of sufficient importance to put in their constitution is in fact so unimportant that misinformation concerning it printed on the very ballot to be cast on the subject, may be disregarded. If the subject is important enough to be mentioned on the ballot it is so important that it must be mentioned in accord with the fact. The question as actually submitted did not present the real question but by error or mistake presented an entirely different one and, therefore, as stated by Mr. Justice Doerfler in *State ex rel. Ekern v. Zimmerman, supra*, no claim can be made that the proposed amendment is validly enacted.
>
> We conclude that there has been no valid submission to or ratification by the people of the proposed amendment . . .. (Emphasis added.)

The Question here stated that the amendment will "require that the rights of crime victims be protected with equal force to the protections afforded the accused." (A-App. 142). However, the actual language of the amendment does not provide for equal protection or equal force – it provides something different. It requires in Section 9m(2) that all of the rights of victims shall "be protected by law in a manner no less vigorous than the protections afforded to the accused." (A-App. 165). "No less vigorous than" does not mean "equal to" – the plain, natural and usual meaning of the former four words is "as vigorous as or more vigorous than" – or in other words, "equal to or

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contend that not only did this change to the nature of Supreme Court jurisdiction need to be mentioned, but that it required a separate Question. Creating a special category of (non-party) persons with a unique right to mandatory rather than discretionary review in our Supreme Court is quite removed from giving expanded constitutional rights to victims. If such an unprecedented change to this Court's jurisdiction need not be mentioned in the ballot Question, then what would need to be?

greater than." Those words in the amended Constitution may well authorize protection of victims' rights equally vigorously with those of the accused, but they also authorize protection of victims' rights twice, or three times, or ten times as vigorously. It is simply inaccurate to say that the amendment will "require" equal protection of the accused. The only limitation is that victims' rights must not be enforced less vigorously than those of the accused. Thus, the Question and the words in the 2020 amendments themselves contradict one another, and the Question misinformed voters. It said the amendments required one thing, when actually they allowed something different.

The words of the Court in *Ekern, supra*, 204 N.W. at 808, are instructive here:

> [I]t is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual significance and import, and the courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent.

But there is more here than only the difference in plain and common meaning between these two measures. Reading the actual words of the 2020 amendments can leave no doubt that these constitutional amendments themselves do not protect the rights of victims and the accused "with equal force." By striking from the Wisconsin Constitution the words which preserved a defendant's right to have a victim sequestered when necessary for a fair trial, and indeed its only reference to a defendant's right to a fair trial, these amendments clearly, specifically, and explicitly protect an alleged victim's rights with greater force than the rights of the accused. Defendants' semantical argument that "no less vigorous than" may mean something like "equal to," or that it should be so interpreted, fails when the actual language elsewhere in the amendments demonstrates the explicit prioritization of protecting a victim's privacy rights over an accused's rights. The deletion of the final sentence from the pre-amendment version of Article 1, § 9m that broadly protected rights of the accused makes this all the more clear. The 2020 amendments

simply do not provide anything like protecting rights of victims with "equal force" to protections afforded the accused.

Defendants argue that the difference between words in the Question and in the amendments was only "hypercritical," and would not invalidate a ballot question, citing *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921, 925 (1936). That municipal referendum case involved voter ratification of a municipal water supply system contract and issuance of mortgage certificates to finance the project. The ballot question asked voters whether they wished to vote for or against "the resolution below." The resolution that directed the village clerk to put a question on the ballot authorizing the village officers to approve the contract and to issue the mortgage certificates was then printed in full on the ballot. The mortgage certificates were later challenged as invalid, on the grounds that the ballot question improperly referred to authorizing the referendum rather than asking voters whether to authorize the village officers to act as described in the resolution. Recognizing that there was no doubt that voters understood that they were being asked to vote on whether or not to authorize the project, not on whether a referendum was to be held, the Court ruled:

> It is literally true that an affirmative vote would merely indicate approval of a resolution which simply authorized a referendum. However, we concur in the conclusion of the trial court that the objection to the form of ballot is hypercritical, and <u>that its true import is obvious and not calculated to mislead a voter</u>. (Emphasis added)

The serious discrepancy between the "equal force" wording of the Question here and the "no less vigorous than" language of the 2020 amendments themselves, as discussed by the circuit court in its Decision and Order, bears no resemblance to the circumstances in *Morris*. (See R. 42:15-20; A-App. 140-145). Moreover, *Morris* dealt with a municipal referendum, not a state constitutional amendment, where more strict standards are applicable to ballot questions.

In addition, here the Question informed voters that the proposed amendment would give certain rights to crime victims "while leaving the federal constitutional rights of the accused intact." This is grossly misleading. <u>By referring to rights of the accused, the Question</u>

demonstrated that voters might be concerned about the effect the proposed amendments might have on rights of the accused. As demonstrated above, the amendments deleted words that had protected rights of the accused under the Wisconsin Constitution from being impacted by victims' rights. The Question did not inform voters that any rights of the accused were being changed. Instead, by referring to leaving "federal constitutional rights of the accused intact," the Question misdirected voters' attention away from the fact that changes were in fact being made to rights of the accused under the Wisconsin Constitution.

In *Florida Dept. of State v. Florida State Conference of NAACP Branches*, 43 So. 3d 662, 667-68 (Fla. 2010), the court explained that requiring accuracy in constitutional ballot questions:

> ". . . functions as a kind of 'truth in packaging' law for the ballot." The proposed change in the constitution must "stand on its own merits and not be disguised as something else." "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment."(internal citations omitted)

The circuit court correctly determined that the misstatement and misdirection in the Question here should result in the same result as the misstatement in *Thomson*, that is declaring that the ratification of the amendments was invalid and of no effect.

CONCLUSION

Plaintiffs-Respondents respectfully request that this Court affirm the circuit court's November 3, 2020 declaration that the Ballot Question did not meet all constitutional and statutory requirements, and rule therefore, that there has been no valid submission to or ratification by the people of the 2020 amendments, rendering the 2020 amendments invalid.[8]

[8] Plaintiffs accept defendants' suggestion that this is a more appropriate form of relief than was stated in the circuit court's November 3, 2020 Decision and Order and the November 23, 2020 Judgment.

Dated this 11th day of April, 2022.

Respectfully submitted,

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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 7,273 words.

Dated this 11th day of April, 2022.

ATTORNEY DENNIS M. GRZEZINSKI

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 11th day of April, 2022.

ATTORNEY DENNIS M. GRZEZINSKI