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STATE OF WISCONSIN

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

# REPLY BRIEF OF DEFENDANTS-APPELLANTS

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### I. The Ballot Question communicated the Amendment's essential purpose and did not present an entirely different question.

#### A. A Wisconsin Court's deferential review asks whether the Legislature's ballot question failed to communicate the amendment's essential purpose or presented an entirely different question.

This Court should hold that Wisconsin courts may not invalidate the Legislature's discretion in phrasing a constitutional-amendment ballot question unless the question either (1) failed to communicate the amendment's essential purpose or (2) presented an entirely different question.

First, Plaintiffs offer no guidance on how they believe *Ekern*'s "every essential" standard should work in application. They merely repeat the standard and its recitation in *Thomson*. (Pls.' Br. 11, 17.) But as the Court of Appeals recognized in its certification, this Court did not develop or apply the "every essential" standard in *Ekern* or *Thomson*. (*See* COA Cert. 9, A-App. 111.) This case presents the first opportunity to do so.

Plaintiffs' substantive arguments *do*, however, illustrate why this Court must set forth a method of application that respects the Legislature's discretion and permits only limited court review. Plaintiffs quote *Ekern*'s requirement that a ballot question must "reasonably, intelligently, and fairly comprise or have reference to *every essential* of the amendment. . . so that the [people] may be fully informed on the subject upon which they are required to exercise a franchise." (Pls.' Br. 17 (citation omitted).) No one disputes the groundwork *Ekern* laid through that standard. (*See, e.g.,* Defs.' Br. 25 (quoting that standard).)

But Plaintiffs go on to argue that the Ballot Question was inadequate because it did not reference "every essential element" of the Marsy's Law Amendment, which they purport includes: (1) the definition of "victim," (2) the effects on the previous backstop for the rights of the accused, and (3) the "nature of the exercise of the state Supreme Court's jurisdiction." (Pls.' Br. 16–23.) They fail to explain why *Ekern* would require such a list or to offer any distinguishing principle why these components, but not others, would constitute "every essential."[1]

Plaintiffs also ignore that the Legislature—constitutionally empowered to "prescribe" the "manner" for the submission to voters, Wis. Const. art. XII, § 1—has prescribed that a ballot question must be a "concise statement." Wis. Stat. § 5.64(2). This Court did not ignore that requirement when it decided *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803, 810 (1925) (citation omitted), and it cannot ignore it now.[2]

Plaintiffs further sidestep the ballot question's limited role by making much of the high number of absentee voters in April 2020 and the timing of the Type C notice. (Pls.' Br. 9–10, 21.) But the Type A notice specifically advised voters where they could obtain the amendment's text almost

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[1] Plaintiffs argue that *Ekern*'s statement—that the "question" was not "entirely free from doubt"—referred to whether the Legislature had properly exercised its authority, not the chosen language. (Pls.' Br. 11–12.) That is a distinction without a difference: this Court recognized the deference courts should show to the Legislature's exercise, and the same applies to the Legislature's language.

[2] Plaintiffs' distinguishing of *Metropolitan Milwaukee Association of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 24, 332 Wis. 2d 459, 798 N.W.2d 287, as a municipal direct legislation case (Pls.' Br. 10–11), is no response to the Legislature's prescription that a *constitutional amendment* ballot question must be concise.

a month before the election. Wis. Stat. §§ 10.01(2)(a), 10.06(2)(f); (R. 19:4–5 ¶ 12; 20). And voters are expected to educate themselves about the amendment's substance through both the notices and other resources. *Ekern*, 204 N.W. at 808.

This Court should hold that *Ekern*'s "every essential" standard—that the ballot question cannot "fail[] to present the real question," 204 N.W. at 811—requires reviewing courts to ask: Did the ballot question "fairly express[]" the "clear and essential purpose" of the proposed amendment? *Samuels v. City of Minneapolis*, 966 N.W.2d 245, 251 (Minn. 2021) (citation omitted). Requiring anything more would impose an untenable task upon the Legislature to explain any conceivable effects of an amendment, disregard that the question must be concise, and open the door to retroactive ballot-question challenges by parties who disapprove of the substance of a ratified constitutional amendment.

Plaintiffs also do not explain how, to them, courts should apply *Ekern*'s "entirely different question" limitation. They simply advance untethered "misleading" arguments and continue their misplaced effort to impose a "same language" requirement that is nowhere to be found in our Constitution or caselaw. (*See* Pls.' Br. 24–26.) This Court should instead hold that *Ekern* requires reviewing courts to ask: Did the Legislature's chosen ballot-question "present[] an entirely different question" than the amendment? *Ekern*, 204 N.W. at 813. If not, the ballot question should not be struck down as "misleading."

Plaintiffs argue that Defendants-Appellants' (hereinafter "the State's") standards for applying *Ekern* leave the Legislature's constitutional discretion "almost virtually unbounded." (Pls.' Br. 16.) The Legislature's broad discretion is no novel creation of the State here. Our Constitution vests the Legislature with that discretion. Wis. Const. art. XII, § 1. Courts' ability to invalidate the Legislature's exercise of

constitutional power must necessarily be limited to those narrow circumstances where the Legislature has violated its constitutional duty to "submit" the "proposed amendment. . . to the people."

### B. The Legislature properly exercised its broad discretion in writing the Ballot Question.

#### 1. The Ballot Question concisely communicated the Amendment's essential purpose.

*Did the Ballot Question fairly express the clear and essential purpose of the proposed amendment?* The answer must be yes. The ballot question concisely told voters that the Amendment would give victims additional rights and enhance the level of protection of their rights up to the level of defendant's rights, but that those rights could not supersede a defendant's federal constitutional rights. (R. 25:3, A-App. 164.) Notably, Plaintiffs recognize that the Amendment's "overall purpose" "was to increase and strengthen victims' rights." (Pls.' Br. 13.) That should end the inquiry.

Plaintiffs nevertheless argue that the Ballot Question failed to present the "real question." They first contend that the Ballot Question failed to explain that the Amendment "changed" the definition of "victim." (Pls.' Br. 17–18.) But defining "victim" was not the "essential purpose" of what the Amendment accomplished. *See Samuels*, 966 N.W.2d at 251. And the Amendment's definition of "victim" was not novel to Wisconsin law. With only minor distinctions, the Amendment constitutionalized the definition of "victim" that has long existed in our statutes. *See* Wis. Stat. § 950.02(4)–(5).

Plaintiffs' reliance on *Thomson* instead helps the State. (*See* Pls.' Br. 15, 17–18.) This Court considered a ballot question asking whether the constitution should 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?" *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 651, 60 N.W.2d 416 (1953). The amendment itself, however, also revoked constitutional language that excluded "untaxed Indians and the military from those who are to be counted in determining the representation to which a district is entitled." *Id.* at 657. This Court held 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." *Id.* (emphasis added).

Put differently, changing *who* would be counted in determining legislative representation was not a "detail" supporting the Amendment's "main purpose" of changing the Constitution to consider area in assigning senate districts. But *who* is a victim unquestionably relates to the Amendment's "main purpose" of adding to and increasing protection of victims' rights. And—though it involved a separate-amendment analysis, not an "essential" analysis—*Thomson*'s focus on the Amendment's "main purpose" further supports that, in application, *Ekern*'s "every essential" standard asks whether the Question fairly communicated the Amendment's essential *purpose*.

Second, Plaintiffs argue that the Legislature violated its constitutional discretion by not stating that the Amendment would "strike from the Constitution its only reference to a 'fair trial for the defendant'" and "a defendant's right to have a victim witness sequestered when necessary for a fair trial." (Pls.' Br. 18–23.) This argument fails because article I, § 9m is our *victims' rights* constitutional provision. It has never been a source of constitutional rights for defendants. Indeed, it did not exist until 1993.

Rather, the language Plaintiffs emphasize set forth previous backstops on the scope of *victims'* rights when in tension with defendants' rights. And the Ballot Question here communicated to that the Amendment would alter the disparity: that victims would get more rights, that the protection of those rights would be raised up to the level of protection of defendants' rights, *and* that the new backstop on victims' rights in tension with defendants' rights would be the federal constitution. (R. 25:3, A-App. 142.) Explanation beyond that would impose on the Question a nonexistent requirement to address the Amendment's perceived or speculative effects. *See Ekern*, 204 N.W. at 810.[3]

Third, Plaintiffs' jurisdiction argument is a non-starter as they conflate Amendment subsection 9m(4)(b) with subsection 9m(4)(a). (*See* Pls.' Br. 23–24.) Subsection 9m(4)(a) addresses victims' ability to seek enforcement at the trial-court level; it provides that "in any circuit court or before any other authority of competent jurisdiction," and the court or other authority "shall act promptly on such a request and afford a remedy for the violation of any right of the victim." Subsection 9m(4)(b) then addresses appellate proceedings: "[v]ictims *may* obtain review of all adverse decisions. . . by filing petitions for supervisory writ in the court of appeals and

[3] Though Florida's standards differ in other critical respects, Plaintiffs' citation to *Armstrong v. Harris,* 773 So.2d 7 (Fla. 2000), (Pls.' Br. 22), if anything, also supports the State. Florida asks whether the Amendment's "chief purpose" was communicated, *Armstrong*, 773 So.2d at 12, and the "chief purpose" here was unquestionably communicated. But there, unlike here, without a "hint[]" or "mention[]" in the question, the amendment eviscerated the source of a defendant's state right that existed from the state's constitution's inception and provided greater protection than the federal constitution. *Id.* at 7, 17–18.

supreme court." The Amendment does not create new mandatory supreme court jurisdiction for victims.[4]

### 2. The Ballot Question did not present an entirely different question.

*Did the Ballot Question present an entirely different question than the Amendment itself?* The answer must be no. The Ballot Question told voters that the Amendment's essential purpose was to add to and elevate protection of victims' rights up to the level of defendants' rights, with the backstop being a defendants' federal constitutional rights. (R. 25:3, A-App. 164.) That is not "entirely different" from what the Amendment does, *Ekern*, 204 N.W. at 813—it is *just* what it does. That should end the inquiry.

Plaintiffs nevertheless argue that the Ballot Question presented an "entirely different" question, in two ways. Their first argument amounts to hypercritical second-guessing and their second argument is flat wrong.

First, Plaintiffs propose that the Amendment "authorize[s] protection of the victim's rights twice, or three times, or ten times as vigorously" as defendants' rights, whereas the Ballot Question explained that victims' rights would "be protected with equal force." (Pls.' Br. 24–25.) Plaintiffs point to nothing requiring a ballot question to use the exact same language, because no such requirement exists.

Nor does "with equal force" present an entirely different question than the Amendment. This portion of the Amendment (and Ballot Question) addresses the *manner* in which victims' rights *are protected*—it does not provide victims with more or fewer *rights* than defendants. And, tellingly, Plaintiffs offer no examples of how victims' rights

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[4] Plaintiffs' separate-amendment argument similarly fails given their misreading of these subsections. (*See* Pls.' Br. 16 n.3.)

could be *protected* in a manner far exceeding the manner of protection of defendants' rights. Rather, their only asserted example is that victims are now on *equal* footing with defendants because both now have a right to be present in the courtroom. (*See* Pls.' Br. 25.)

By choosing to use the more commonly-understood phrase "with equal force," the Legislature did not mislead or misrepresent the Amendment's essential purpose. *See League of Women Voters Minnesota v. Ritchie*, 819 N.W.2d 636, 648 (Minn. 2012) ("that the ballot question reads differently than the proposed amendment. . . does not render [it]. . . misleading [so] as to be a palpable evasion of the constitutional requirement").[5]

Second, contrary to Plaintiffs' assertion, it was not "grossly misleading" for the Legislature to state that the Amendment "leav[es] the federal constitutional rights of the accused intact." (Pls.' Br. 24–27) That statement is true.

Plaintiffs claim that use of "intact" suggested that the Amendment would not have any effect on defendants' rights. (*See* Pls.' Br. 26–27.) Plaintiffs do not read "intact" in context. The Ballot Question did not just ask voters whether they wished to pass an Amendment that would "leav[e] the federal constitutional rights of the accused intact." The Ballot Question asked voters whether article I, § 9m should be amended to give victims more rights and to increase the level of protection of those rights up to the level of the protection of defendants' rights "*while* leaving the federal constitutional rights of the accused intact." (R. 25:3, A-App. 164 (emphasis added.) In context, this language told voters what the new

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[5] Plaintiffs' hyper-literal view of the use "equal" also ignores context: How could voters have been misled to believe victims' rights would always be protected to exactly "the same" extent when it also told them that the Amendment could not supersede defendants' federal constitutional rights?

backstop on victims' rights would be if those rights came into tension with defendants' rights.

The State in no way views defendants' state constitutional rights as "mere surplusage." (*See* Pls.' Br. 21.) The point is that the Ballot Question communicated the shift that would occur and did not present "an entirely different question." *Ekern*, 204 N.W. at 811.

Plaintiffs essentially argue that the Ballot Question was misleading for not explaining federalism to the voters. Namely, to Plaintiffs the Question needed to explain that there (1) *might* be circumstances where the Wisconsin Constitution could afford defendants a particular right that the federal constitution does not; (2) *if* that happened, such a right *might* come into conflict with a victim's right; and (3) if *that* happened, a judge *might* prioritize a victim's right. Even if the Legislature managed to state all that concisely, would not then another group, under Plaintiffs' application of the standards, be able to challenge *that* explanation as misleading because the Wisconsin Constitution does not currently provide defendants with any greater protections than the U.S. Constitution in a way that could come into tension with victims' rights? This all further shows why courts must recognize the limited role of the ballot question and defer to the Legislature's broad phrasing discretion.

At base, Plaintiffs would have preferred the Legislature to phrase as a negative manner what it phrased in an affirmative manner. The Legislature explained the shift in victims' rights and strength of enforcement as an *increase* for victims; Plaintiffs argue that the Legislature should have instead described this shift as a *decrease* for defendants. But article I, § 9m has never provided rights *to* defendants—it has only ever provided and limited the scope of rights for victims. The Amendment changed the nature and extent of protection of victims' rights and the backstop on them should they implicate a defendants' rights. The Ballot Question did not

present an "entirely different question." *Ekern*, 204 N.W. at 811.[6]

## II. The Legislature properly exercised its discretion to present a single amendment.

Plaintiffs do not dispute that the Legislature has discretion "to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 41, 326 Wis. 2d 1, 783 N.W.2d 855 (citation omitted); *see also* (Pls.' Br. 12). They nevertheless advance the circuit court's incorrect reasoning that the Amendment "[s]ubtracting from defendants' rights is a fundamentally different subject and a fundamentally different purpose than adding to victims' rights." (R. 53:13, n.5.)

What did the Amendment accomplish that was not connected to victims' rights? *Nothing*. If the essential purpose of increasing the nature and protection of victims' rights were removed from the Amendment, what would be left? *Nothing*.

Consider the bizarre conflict within Plaintiffs' argument: They, for example, argue that the Legislature was constitutionally required to propose as a separate amendment whether voters wanted to remove from article I, section 9m that victims have a right to attend proceedings "unless. . .

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[6] *Florida Department of State v. Florida State Conference of NAACP Branches*, 43 So.3d 662 (Fla. 2010), is categorically different than Plaintiffs' challenge. (*See* Pls.' Br. 27.) The Florida Supreme Court held that a ballot title, "*Standards* for Legislature to Follow in Legislative and Congressional Redistricting" was misleading because "the amendment actually *eliminates actual standards* and replaces them with discretionary considerations." *Fla. Dep't. of State*, 43 So.3d at 669 (emphasis added). The Amendment here, in contrast, accomplished what the Ballot Question said it would.

sequestration is necessary to a fair trial for the defendant." But it would be fundamentally incompatible for a voter to say "no" to the Ballot Question—i.e. to expand victims' rights—but "yes" to removal of the "fair trial" language—which serves to expand victims' rights.

Every component of the Amendment tended to "effect or carry out" the Amendment's "essential purpose" to increase the nature and protection of victims' rights. *McConkey*, 326 Wis. 2d 1, ¶ 26 (citation omitted). This Court should respect the Legislature's discretion in submitting a single amendment. *Id.* ¶¶ 40–41.

## CONCLUSION

The State respectfully requests 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 22nd day of April 2022.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

Dated this 22nd day of April 2022.

JODY J. SCHMELZER
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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. § (Rule) 809.19(12) (2019-20).

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 22nd day of April 2022.

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