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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2020AP2003

WISCONSIN JUSTICE INITIATIVE, INC., a Wisconsin nonstock corporation, JACQUELINE E. BOYNTON, JEROME F. BUTING, CRAIG R. JOHNSON and FRED A. RISSE,

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 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

**NON-PARTY BRIEF OF MARSY'S LAW FOR WISCONSIN, L.L.C.,
MOTHERS AGAINST DRUNK DRIVING, WISCONSIN
VICTIM/WITNESS PROFESSIONALS ASSOCIATION,
WISCONSIN CHIEFS OF POLICE ASSOCIATION, MILWAUKEE
POLICE ASSOCIATION, WISCONSIN PROFESSIONAL POLICE
ASSOCIATION, BOLTON REFUGE HOUSE, INC., GOLDEN
HOUSE, INC., UNIDOS AGAINST DOMESTIC VIOLENCE, NEW
DAY ADVOCACY CENTER, AND EAU CLAIRE AREA HMONG
MUTUAL ASSISTANCE ASSOCIATION, INC.**

Wis. Stat. § (Rule) 809.19(7)

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INTRODUCTION

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

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

But there is no reason to rehash the state's well-taken points. Instead, this brief will offer a quick history of the victims' rights movement, and the leading role of Wisconsin in that campaign. The recent amendment is not a new trend, but instead the continuation of a steady march, supported by both sides of the political aisle, toward guaranteeing that victims are seen and heard, and treated as equal and valued players in the criminal justice system.

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

ARGUMENT

I. HISTORY OF VICTIMS' RIGHTS

A. A Brief History of Victimhood in America

Beginning in pre-revolutionary America, colonists adopted the practice of private prosecution, a tradition carried over from England. Under this system, victims fronted the costs for investigations, arrests, and prosecutions. Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 Utah L. Rev. 517, 521 (1985) (hereinafter "Abrahamson"). The primary goal of this process was to compensate victims for their losses. *Id.* In this way, the private prosecution system mirrored much of civil litigation today, with some important differences. Namely, if an offender could not afford to pay restitution, a victim could "sell the offender into service." *Id.* at 522.

Throughout the late-eighteenth and nineteenth centuries, enlightenment thinkers began to shift the focus of criminal prosecution

from the victim to society as a whole. *Id.* Content to let the state carry on this business, individuals broadly consented to the creation of government-run police forces and, later, prosecutors. *Id.*

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

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

B. Marsy's Law

Marsy's Law for All has become the preeminent advocacy organization within the greater victims' rights movement. The organization began with Marsalee ("Marsy") Ann Nicholas. At 17-years old, Marsy entered college at the University of California-Santa Barbara with the goal of becoming a special education instructor. Unfortunately, Marsy never was able to fully pursue that goal. In November 1983, during her senior year, an ex-boyfriend stalked and killed her. One week after the murder, on the day of her funeral, Marsy's killer confronted her mother at a local market. Authorities had not notified Marsy's family that her killer had been released on bail.

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

Marsy's Law for Wisconsin, L.L.C. ("MLW"), a state-specific subgroup, has lobbied for a bolstered victims' rights amendment in Wisconsin for years. MLW worked directly with legislators to draft proposed constitutional language that both protected victims and remained true to existing state law or procedure.¹ As noted on MLW's website, Wisconsin's enactment of Marsy's Law "ensures victims of crime have enforceable rights throughout the criminal justice process – just like accused persons do." Marsy's Law for Wisconsin, *About Marsy's Law for Wisconsin*, https://www.equalrightsforwi.com/about_marsys_law (2022). However, MLW has consistently, and explicitly, explained that "Marsy's Law does not impact the rights of the accused. It only ensures that victims have equal rights as the accused -- nothing more, nothing less." *Id.*

¹ MLW was not alone in its support for Wisconsin's 2020 Victims' Rights Amendment. The following organizations lobbied in support for either, or both, of the joint resolutions underlying the Amendment: Association of State Prosecutors; Badger State Sheriffs' Association; Children's Hospital of Wisconsin; Mothers Against Drunk Driving; Wisconsin Chiefs of Police Association; Wisconsin Coalition Against Sexual Assault; Wisconsin Nurses Association; Wisconsin Professional Police Association; Wisconsin Sheriffs and Deputy Sheriffs Association; and Wisconsin Troopers Association. See Wis. Ethics Comm'n, Eye On Lobbying: 2017 Senate Joint Resolution 53, <https://lobbying.wi.gov/What/BillInformation/2017REG/Information/14400?tab=Principals> (last visited Apr. 11, 2022); Wis. Ethics Comm'n, Eye On Lobbying: 2019 Senate Joint Resolution 2, <https://lobbying.wi.gov/What/BillInformation/2019REG/Information/15969> (last visited Apr. 11, 2022).

C. Additional Amici

In addition to MLW, this amicus brief is joined by many other organizations: Mothers Against Drunk Driving; Wisconsin Victim/Witness Professionals Association; Wisconsin Chiefs of Police Association; Milwaukee Police Association; Wisconsin Professional Police Association; Bolton Refuge House, Inc.; Golden House, Inc.; UNIDOS Against Domestic Violence; New Day Advocacy Center; and Eau Claire Area Hmong Mutual Assistance Association, Inc. The backgrounds and missions of these organizations are spelled out in the motion for leave to file this brief. Suffice it to say, these organizations cover the political and criminal justice spectrum, from the Wisconsin Victim/Witness Professionals Association, which works directly with victims to make sure they are up-to-date on proceedings in their cases, to police-related associations (which are typically the first to inform victims of their rights), to groups that provide shelter and recovery services to crime victims. Each of the members of this diverse array is keenly interested in making sure the will of the people of Wisconsin is respected. Here, the legislature drafted an appropriate ballot question, and Wisconsinites passed the amendment by a wide margin. That result should not be lightly cast aside.

D. Wisconsin Statutory Recognition

Wisconsin embraced the ideological foundation built by Marsy's Law's precursors to become the first state in the country to enact a Bill of Rights for Victims and Witnesses of crime in 1980.² While news clippings marking the law's passage are sparse, then-Dane County District Attorney James Doyle, Jr., who later became the 44th Governor of Wisconsin, urged passage of the law as a mechanism for increasing victim participation in the criminal justice system. *Doyle Plugs Crime-Victim Bill*, Wis. State J., Apr. 18, 1980, at 4.

The 1980 legislation created chapter 950 of the state statutes and established a 10-part "bill of rights" for Wisconsin crime victims. David Nispel, Wis. Legis. Reference Bureau, *Crime in Wisconsin: Responses from the 1979 Legislature*, Brief 80-11 (July 1980), <https://cdm16831.contentdm.oclc.org/digital/collection/p16831coll2/id/780/rec/1>. Among the rights created by the 1980 law were the right "to be informed of the final disposition of a case, to receive protection from harm as a result of cooperating with law enforcement and prosecution efforts, to

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

be informed of various services available to a victim or witness, and to be entitled to a speedy disposition of the pertinent case.” *Id.* at 2. Also included in Wisconsin’s original victims’ bill of rights is a preamble declaring that it was the legislature’s intent that the rights of victims be protected in “a manner no less vigorous than are the rights of a defendant.” *Id.*

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

E. Constitutional Enshrinement

A decade after Wisconsin became the first state in the nation to enact victims’ rights legislation, broad support for victims’ rights continued. In

April 1993, Wisconsin voters, *by a margin of 84 percent for to 16 percent against*, ratified article I, section 9m of the state constitution. Wisconsin Legislative Reference Bureau, *State of Wisconsin Blue Book* 883 (1993-94). The 1993 amendment granted crime victims a slate of rights including reasonable protection from the accused throughout the judicial process, notification of court proceedings, and the opportunity to speak to the court at disposition. The provision also made clear that “[n]othing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.” *Id.*

II. WISCONSIN’S 2020 VICTIMS’ RIGHTS AMENDMENT

By 2017, Wisconsin voters’ desire to further enhance victims’ rights remained strong. In November 2017, and again in May 2019, the state legislature overwhelmingly and bipartisanly passed identical joint resolutions proposing changes to Wisconsin’s constitutional victims’ rights provision, Wisconsin Constitution article I, section 9m. History of 2017 Wis. Senate Joint Resolution 53 (hereinafter “SJR 53”), https://docs.legis.wisconsin.gov/2017/proposals/reg/sen/joint_resolution/sjr53 ; History of 2019 Wis. Senate Joint Resolution 2 (hereinafter “SJR 2”), https://docs.legis.wisconsin.gov/2019/proposals/reg/sen/joint_resolution/sjr2

2.³ On April 7, 2020, Wisconsin voters considered and approved the constitutional amendment via the following ballot initiative:

Question 1: Additional rights of crime victims. Shall section 9m of article 1 of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?

Jillian Slaight, Wis. Legis. Reference Bureau, *Constitutional Amendment*

Relating to Crime Victims' Rights 1 (Mar. 2020),

https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/crime_victims_rights_amendment_5_1.pdf.

A. Legislative History

At the public committee hearings for the then-proposed amendment, lawmakers and other government officials made clear that the amendment meant to balance the rights of victims with those of the accused. During the joint resolution's 2017 consideration, State Senator Van Wanggaard, one of the provision's primary sponsors, stated as follows: "I have heard

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

repeatedly, and wrongly, that we are trying to shift the balance of justice from a defendant to victims and the prosecution. This is just not true. We are seeking to balance – to equalize – the rights of a victim with those of a defendant.” Wis. Legis. Council, Hearing Materials for 2017 SJR 53, Testimony of State Sen. Van H. Wanggaard, Sen. Comm. on Judiciary and Public Safety, *Testimony in Support of Senate Joint Resolution 53/Assembly Joint Resolution 47* (June 15, 2017) at 2, https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2017/sjr53/sjr0053_2017_06_15.pdf. State Representative Todd Novak, a cosponsor of the state Assembly’s version of the proposed amendment, made similar comments at the hearing: “It is also key to understand that the rights of the defendant are equally as important, which is why this legislation explicitly states that any rights granted to the victim may not be interpreted to supersede a defendant’s federal constitutional rights. We are simply leveling the playing field.” Testimony of State Rep. Todd Novak, *Assembly Joint Resolution 47, id.* at 3.

Then-Attorney General Brad Schimel, head of the state agency charged with defending and enforcing victims’ rights, echoed the comments made by lawmakers: “And most importantly, this amendment puts victims

on equal footing with the accused.” Prepared Testimony of Attorney General Brad D. Schimel, *Testimony on Senate Joint Resolution 53*, *id.* at 5.

Legislators made almost identical comments at the public hearing for the 2019 consideration of the amendment. *See* Wis. Legis. Council, Hearing Materials for 2019 SJR 2, Testimony of State Sen. Van H. Wanggaard, Sen. Comm. on Judiciary and Public Safety, *Testimony on Senate Joint Resolution 2 and Assembly Joint Resolution 2* (Jan. 10, 2019) at 1-2, https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2019/sjr2/sjr0002_2019_01_10.pdf (“Victims’ rights will NOT be given more weight than a defendant’s rights. They will be BALANCED with a defendant’s rights And I want to emphasize this again, because it is important. These rights do NOT supersede any rights of a defendant. They are put on the same legal playing field with a defendant’s rights.”).

Here, while there has been some debate over the meaning of the phrase “no less vigorous,” a phrase first introduced through the original state victims’ rights law, the legislative intent is clear. Lawmakers intended the amendment to *equalize* the rights of victims with those of the accused. They also explicitly stated that enforcement of victims’ rights could not

come at the expense of rights enjoyed by defendants. The April 2020 ballot question conveyed, in clear and concise terms, this same meaning to Wisconsin voters.

B. Contemporaneous Analysis of the Amendment

In the fall of 2020, *Wisconsin Lawyer* published an analysis that contradicts many of the lower court's findings.

For example, the authors consider the implications of the amendment's "no less vigorous" language. Nowhere do they note that the language will elevate victims' rights above those of the accused.

Donaldson, *Marsy's Law: Changes for Crime Victims?*, Wis. Law., Sept. 2020. In fact, they cite to language in the amendment restricting courts from construing the provision to supersede the federal constitutional rights of a defendant. *Id.* Importantly, the authors reiterate that this portion of the amendment is merely a recognition of the supremacy of the United States Constitution. *Id.*

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

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

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

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

Text matters. The title of article I, section 9m of the Wisconsin constitution is "Victims of crime." To suggest, as the lower court has, that this provision applies equally to both victims and the accused (such that two ballot questions were necessary) strains credibility. The lower court read intent into the amendment that is simply not there. Moreover, the

court's decision ignores the explicit language of the amendment: "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights or to afford party status in a proceeding to any victim."

Federalism matters. Ruling that the previous version of article I, section 9m affirmatively granted, for the first time, Wisconsin defendants the right to a fair trial necessarily means the lower court found that such rights did not exist prior to the amendment's 1993 enactment. Not only does this run contrary to state history, it overlooks that the state constitution cannot erase the fair trial rights of a criminal defendant. The supremacy of the United States Constitution, along with the fair trial rights of the Sixth Amendment, make such an action legally impossible. Thus, the fact that article I, section 9m of the Wisconsin constitution, in its current form, does not include the words "fair trial" whereas the original amendment did is a distinction without a difference. That issue did not merit separate mention in the ballot question. If it did, then many other aspects of the amendment would have needed mention as well, negating the legislature's ability to provide a "concise" summary of the amendment.

CONCLUSION

For the reasons set forth above, Marsy's Law for Wisconsin, L.L.C., Mothers Against Drunk Driving, Wisconsin Victim/Witness Professionals Association, Wisconsin Chiefs of Police Association, Milwaukee Police Association, Wisconsin Professional Police Association, Bolton Refuge House, Inc., Golden House, Inc., UNIDOS Against Domestic Violence, New Day Advocacy Center, and Eau Claire Area Hmong Mutual Assistance Association, Inc. urge the Court to reverse the decision of the lower court and affirm the validity of the April 2020 ballot question through which Wisconsinites resoundingly ratified an amendment to article I, section 9m of their constitution.

Dated this 20th day of April, 2022.

Respectfully submitted:

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FORM AND LENGTH CERTIFICATION

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

The length of this brief is 2,999 words.

Dated this 20th day of April, 2022.

Electronically signed by Kendall W. Harrison
Kendall W. Harrison

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

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

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

Dated this 20th day of April, 2022.

Electronically signed by Kendall W. Harrison
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