08AP1868

STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT 4

Case No. 2008AP001868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

Dane Co. Circuit Court
Case No. 2007-CV-002657

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL FROM THE FINAL ORDER IN ACTION FOR DECLARATORY JUDGMENT DATED JUNE 9, 2008, THE HONORABLE RICHARD G. NIESS PRESIDING, DANE COUNTY CIRCUIT COURT CASE NO. 2007-CV-002657

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

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ISSUES PRESENTED

The issue presented is as follows:

Issue: Did the submission of the referendum question to the voters that led to the amendment to the Wisconsin Constitution that created Article XIII, Section 13, violate Article XII, Section 1 of the Wisconsin Constitution thereby rendering the amendment unconstitutional and void?

The Circuit Court answered no.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

Appellant requests oral argument. This appeal involves a matter of significant public concern. Oral argument will allow the Court to question the parties and ensure that it thoroughly understands the parties' positions.

The decision in this case should be published because it will explain the manner in which Article XII, Section 1 and the cases which have interpreted it should be applied.

STATEMENT OF THE CASE

This case was commenced by the Plaintiff by the filing of a petition for injunction and declaratory relief on July 27, 2007 challenging both the substance of the amendment and the procedure that lead to its adoption. Specifically, the Plaintiff, William C. McConkey, (hereinafter "McConkey") requested the court to declare that Article XIII, Section 13 of the Wisconsin Constitution is unconstitutional because it was submitted to the voters in violation of Article XII, Section 1 of the Wisconsin Constitution. He also claimed that the amendment violated the due process and equal protection guarantees enjoyed by the citizens of Wisconsin and the United States.

The Defendant moved to dismiss on August 13, 2007 claiming that the Plaintiff had no standing to bring the lawsuit. On September 26, 2007 the court granted the motion

to dismiss in part and denied it in part, ruling that the Plaintiff did not have standing to challenge the substance of the amendment. The court allowed the Plaintiff to further brief the issue of whether he had standing to argue that the amendment was presented to the voters in violation of Article XII, Section 1 of the Wisconsin Constitution. In an oral ruling delivered on November 28, 2007, the court denied the Defendant's motion to dismiss for lack of standing. (The formal order was entered on December 21, 2007.) The Defendant filed an answer on December 7, 2007.

The parties then briefed Plaintiff's request for the court to issue a declaratory judgment. A hearing was held on May 30, 2008 at which the court denied the Plaintiff's motion for declaratory judgment in an oral decision and formally dismissed Plaintiff's complaint by an order dated June 9, 2008.

This appeal followed as did a cross appeal by the Defendant.[1]

[1] Originally both J.B. Van Hollen, in his official capacity as Attorney General, and James Doyle, in his official capacity as Governor, were Defendants. By stipulation of the parties, Governor Doyle was dismissed as a Defendant on February 21, 2008.

STATEMENT OF FACTS

On November 7, 2006, a referendum was submitted to the voters on this question:

> QUESTION 1: Marriage. Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?

The question was submitted to the voters following the adoption of the 2005 Joint Resolution 30 which described the purpose of the proposed amendment submitted to the voters of Wisconsin as follows:

> To create section 13 of XIII of the constitution; **relating to**: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

The referendum passed and the proposed amendment to the Wisconsin Constitution was adopted as Article XIII, Section 13.

ARGUMENT

I. INTRODUCTION.

Plaintiff-Appellant requests that the Court reverse the decision of the circuit court and declare that the "marriage amendment" to the Wisconsin Constitution, Article XIII, Section 13, adopted by referendum on November 7, 2006, is unconstitutional because the amendment, as submitted to the voters, violated the provision of Article XII, Section 1 of the Wisconsin Constitution. That provision states: "[I]f more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately." 2005 Joint Resolution 30 submitted more than one amendment to the people of this state.

The referendum question considered by the voters was as follows:

> QUESTION 1: Marriage. Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?

Newly created Article XIII, Section 13, as it now appears in the Constitution, is a two sentence provision: *Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.* Prior to the adoption of Article XIII, Section 13, the Wisconsin Constitution contained no provision about marriage.

The legislature, when it proposed the amendment for a referendum described its purpose as: *"an amendment to create Section 13 of Article XIII of the Constitution relating to "providing that only a marriage between one man and one woman shall be valid or recognized in the state."* Despite that stated purpose, the

legislature, in fact, submitted language to the voters that had an additional and distinctly separate purpose: to deny unmarried individuals any comprehensive legal recognition of their relationships.

The Plaintiff asserts that the two sentences found in Article XIII, Section 13, under the controlling law of this state, were distinct amendments that should have been presented to the voters as separate questions. The cases that elucidate the legal principles governing the analysis of this assertion are *State ex rel. Hudd v. Timme,* 54 Wis. 318, 11 N.W. 785 (1882) (hereinafter *"Hudd"*), *State ex rel. Thomson v. Zimmerman,* 264 Wis. 644, 60 N.W.2d 416 (1953) and *Milwaukee Alliance Against Racist & Political Repression v. Elections Bd. of Wis.,* 106 Wis. 2d 593, 317 N.W.2d 420 (1982) (hereinafter *"Milwaukee Alliance"*). Applying the legal principles found in those cases will lead to only one conclusion: the manner in which the referendum was submitted to the voters violated Article XII, Section 1 of the

Wisconsin Constitution, rendering Article XIII, Section 13 unconstitutional.

II. THERE ARE SERIOUS POLICY REASONS UNDERPINNING ARTICLE XII, SECTION 1 WHICH THE COURT SHOULD CONSIDER AS BACKGROUND TO ITS ANALYSIS OF THIS CLAIM.

Two key policy reasons exist for the single subject rule: preventing logrolling, particularly "coattails" logrolling in direct democracy measures; and preventing voter confusion and deception. *See* Kurt G. Kastorf, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single Subject Rule,* 54 Emory L.J. 1633, 1641 (2005). "Coattails" logrolling refers to the addition in a referendum of a less popular provision to a popular provision, thereby ensuring that both provisions pass. *Id.* at 160. Such a linkage puts voters in a "no-win" situation, because they have no choice but to vote for or against the

entire measure. *Id.* at 1638. Were the provisions put forth separately, many voters might not vote unilaterally. *Id.*

A second policy reason for the single subject rule is to prevent voter confusion and deception. *Id.* at 1652. While voter confusion over the referendum question's definition of marriage was likely not an issue, there was a significant potential for confusion over the "coattailed" provision banning legal statuses "identical or substantially similar to that of marriage for unmarried individuals." The referendum question undoubtedly left some voters believing that the amendment was a "gay marriage ban," and not realizing that the second part of the proposal equally affected unmarried gay couples and unmarried straight couples.

There is also a third policy reason for strictly interpreting the single subject rule: to place limits on the behavior of the majority that can be readily expressed through referenda in opposition to a minority. Marriage amendments,

like Wisconsin's, that seek to prevent legal recognition of same-sex unions or comprehensive legal protections for unmarried opposite-sex couples highlight the susceptibility of minority groups: unmarried couples, be they heterosexual or homosexual, to subjugation by the majority group, who oppose legal recognition of the existence of those ubiquitous relationships.

Unlike representative democracy where legislators must interact, negotiate and cooperate with each other repeatedly and represent all of their constituents, whether heterosexual or homosexual, direct democracy through a referendum is a "one-shot, winner-take-all transaction in which a large number of voters cast ballots anonymously." Kastorf, 54 Emory L.J. at 1649. Consequently, a direct democracy measure like the referendum question submitted to Wisconsin voters on November 7, 2006, that does not rigorously follow the single subject rule creates this risk: the proponents can

effectively push voters to adopt a more radical outcome than the legislative process, further tempered by the threat of a gubernatorial veto, might have produced.

III. THE FORM IN WHICH ARTICLE XIII, SECTION 13 WAS SUBMITTED TO THE VOTERS VIOLATED ARTICLE XII, SECTION 1 OF THE WISCONSIN CONSTITUTION.

A. Article XIII, Section 13 Contains Two Distinct Propositions.

The "marriage amendment" question, as submitted to the voters, presented two distinct propositions:

1. That only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and,

2. That a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The two propositions in the "marriage amendment" are very different despite the fact that the legislature itself, in its own resolution, stated but one purpose: to provide that marriage

was between one man and one woman. The first proposition enshrines in the Constitution a definition of marriage by establishing *who* may take part therein. The second proposition, on the other hand, limits the reach of the set of *rights and obligations associated* with marriage.[2]

B. There Is A Two Part Test That The Court Must Use To Analyze Proposed Amendments Containing More Than One Proposition.

Judicial review in Wisconsin of a ballot question has always required a two-part test. Not only must the various propositions contained in a ballot question be aimed at a **single purpose,** they must also be interrelated and interdependent, such that if they had been submitted as separate questions, the **defeat of one question would destroy the overall purpose** of the multi-proposition proposal. *State*

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[2] By no means does the proposed amendment attempt to create a comprehensive scheme.

ex rel. Hudd v. Timme, 54 Wis. 318, 11 N.W. 785, 791 (1882);[3] *Milwaukee Alliance*, 106 Wis. 2d at 604-605.[4]

The *Hudd* court considered a ballot question that contained as many as four propositions arising from the change from annual to biennial legislative sessions. In applying the two-part test, the court found that the propositions were properly put to the voters in one question. Answering the first prong of the test, the court observed:

> It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the legislature.

Hudd, 11 N.W. at 791.

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[3]*Hudd* formulates the test in terms of what qualities a ballot question must have to fail: it must contain two or more propositions which 1) "relate to more than one subject," and, 2) "have at least two distinct and separate purposes not dependent upon or connected with each other."

[4]*Milwaukee Alliance*, citing *Hudd*, states the test in terms of what qualities the ballot question must have to pass muster: a ballot question with more than one proposition may be submitted as a single amendment if: 1) the various propositions "relate to the same subject matter," and 2) the propositions "are designed to accomplish one general purpose."

Addressing the second prong, the court stated:

> To make that change it was necessary, in order to prevent the election of members of assembly, half of whom would never have any duties to perform, that a change should be made in their tenure of office as well as in the times of their election, and the same may be said as to the change of the tenure of office of the senators.

Id.

Commenting on the importance of the interrelatedness of the various propositions under the second prong, the *Hudd* court also noted that:

> the proposition to change from annual to biennial sessions is so intimately connected with the proposition to change the tenure of office of members of the assembly from one year to two years, that the propriety of the two changes taking place, or that neither should take place, is so apparent that to provide otherwise would be absurd.

Id. at 790.

One hundred years later, in the *Milwaukee Alliance* case, the Supreme Court again found that the single-amendment procedural requirement in Article XII, Section 1 had been met. There, addressing the first prong, the court found that the proposed amendment involved a single general purpose: to "change the constitutional provision from the limited concept of bail to the concept of 'conditional release.'" *Milwaukee Alliance*, 106 Wis. 2d at 607. It also found, under the second prong, that the two propositions identified by the plaintiff contained in the ballot question–the issue of conditional release and the issue of non-monetary bail–were interrelated, such that the failure of one of those propositions, if submitted as separate questions, would have defeated the overall general purpose of the multi-faceted proposal to "change the historical concept of bail . . . to a comprehensive plan for conditional release. . ." *Id.*

The various facets of that ballot question were integral parts of the overall scheme to fundamentally alter the state's management and control of those charged with crimes but not yet found guilty of those crimes. Such a change required a constitutional amendment, because prior to the amendment, the constitution required that bail be available for all persons criminally charged (except capital offenses). *Id.* at 600.

The only other Wisconsin case addressing the single-amendment requirement is *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). There, the Supreme Court found a ballot question to have violated the second prong of the single-amendment requirement as elucidated in *Hudd*. That question stated:

> Shall sections 3, 4 and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population?

Id. at 651.

The *Thomson* court first accepted for the sake of discussion the single general purpose of the ballot question advanced by the attorney general, which was to direct "the legislature to take area as well as population into account in apportioning the **senate** districts." *Id.* at 656 (emphasis added). It then analyzed one of the various propositions contained in the ballot question under the second prong to determine whether it was sufficiently related to that claimed overall purpose.

The court first observed that the amendment proposed changing the method of assigning **assembly** district boundaries, and that the change would be a "drastic, revolutionary alteration of the existing constitutional requirements on the subject." *Id.* Comparing that facet of the ballot question to the overall general purpose for the question as claimed by the attorney general, that is, to direct the legislature to consider area as well as population in drawing

senate districts, the court found that "the designation of the boundaries of assembly districts[ ] has no bearing on the main purpose of the proposed amendment, as that is stated by the attorney general[.]" *Id.* The court also found that the proposition relating to assembly boundaries did not "tend to effect or carry out that purpose." *Id.*

Having found a violation of the second prong of the *Hudd* test, the court circled back to the first prong of the test, the question of whether there truly was a single general purpose to the ballot question. The court found there were actually at least two purposes, observing that the proposition regarding assembly districts, "must have some different object or purpose" from the single general purpose regarding senate districts advanced by the attorney general. The court found that the ballot question failed to satisfy the *Hudd* test entitling several changes to be submitted as a single amendment, concluding "a separate submission was required of the

amendment changing the boundary lines of assembly districts." *Id.*

The *Thomson* case provides an excellent model by which the Court may analyze the ballot question here. The two propositions in the "marriage" ballot question should first be measured against the single general purpose stated in the joint resolution: "that Article XIII , Section 13 of the Constitution relating to: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." 2005 Joint Resolution 30. Then, if the defeat of one of the two propositions found in the proposed amendment would not destroy that asserted overall purpose, the Court should then consider whether the ballot question has in fact more than one purpose. As explained below, applying that methodology, the referendum question submitted to the voters on November 7, 2006 does not pass the single-amendment procedural requirements of our Constitution.

C. The Ballot Question Violated The Second Prong Of The *Hudd* Test.

Assuming that the purpose stated in the joint resolution is a "single purpose," the question under the second prong of the *Hudd* test, which the *Thomson* case applied, becomes: whether, if the two propositions in a referendum had been submitted to the voters separately, and one failed but the other passed, would the overall general purpose of "defining what is and what is not recognized as a valid marriage" have been defeated. The answer to that question with regard to the second proposition found in the question presented is a resounding "no."

Clearly, the first proposition of the ballot question, "only a marriage between one man and one woman shall be valid or recognized as a marriage in this state," that is, *who* may marry whom, is directly tied to the asserted general purpose of defining what is a valid and recognized marriage.

Indeed, the virtual identity between this asserted general purpose of the entire ballot question and the first proposition within that question explains how one could be confused about how the second prong of the *Hudd* test is applied here.

But as to the relationship between the stated purpose and the second proposition, "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state," nothing about an amendment stating what is and is not recognized as a valid marriage by the state required the voters to also decide whether and to what extent "unmarried individuals"[5] should be foreclosed, outside of the legal status of marriage, from gaining the same or similar legal protections granted to married people through marriage.

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[5] "Unmarried individuals" presumably means those individuals in non-marital relationships with other unmarried individuals, i.e., unmarried couples.

No one could reasonably deny that this is the intent of the second proposition. Likewise, deciding whether any "unmarried individuals" in Wisconsin should have available most or all of the legal protections provided to married couples in this state would have no effect on the amendment's definition of marriage.

Asking voters to decide how the law should treat non-marital relationships in the context of a proposal with a stated overall objective of defining what is and what is not recognized as a valid marriage creates precisely the dilemma that the single-amendment requirement, Article XII, Section 1, was designed to prevent. Under the first proposition contained in the ballot question, a voter need only consider whether same-sex relationships should be denied the legal status of marriage. That can be answered "yes" or "no."

However, to answer the second proposition, whether unmarried individuals should be foreclosed from a variety of

legal protections, the voter was required to consider a nearly infinite number of choices and decide whether any one of them was appropriate to be preserved. It is possible to decide that same-sex relationships should not be marriages, and at the same time decide that at least some unmarried couples should have access to many of the legal rights and responsibilities commonly associated with marriage.

Article XII, Section 1 protects the rights of Wisconsin voters to hold both views and reflect both judgments in their votes. Under our Constitution, voters cannot legitimately and constitutionally be presented with a ballot question that compels them to sacrifice or choose one judgment over the other.

D. The Ballot Question Addressed Two General Purposes, Not One.

To complete the analysis required by *Hudd,* the Court must finally consider whether there are at least two purposes

behind the ballot question. As shown above, while the first proposition of the ballot question is interconnected with the overall general purpose of the ballot question, the second proposition is not so related. This Court should find, as the *Thomson* court did, that the second proposition being insufficiently related to the overall purpose advanced by the legislature in its description in 2005 Joint Resolution 30, must have some different object or purpose. Thus, the proposed amendment as submitted to the voters violated the single-amendment requirement of Article XII, Section 1.

The circuit court concluded that the two propositions were "two sides of the same coin." (App. p. 7) That is incorrect. Had the second portion of the ballot question merely proposed that "marriage between any other individuals shall not be allowed, recognized or valid in this state," the circuit court's observation would be true. But the

second proposition was not so limited. It was not the obverse of the first.

Rather, the first proposition stated *who* may marry, and the second proposition limited unmarried individuals from accessing the same or a substantially similar set of rights and obligations to those provided to married people. That is a far different purpose than the first: defining what is and is not a valid marriage in Wisconsin.

By having those two distinct purposes, the ballot question violated the single general purpose prong of the single-amendment requirement set out in Article XII, Section 1 of the Wisconsin Constitution. Having done so, Article XIII, Section 13 is unconstitutional.

IV. CONCLUSION.

Amendments to the organic law of this state are not a trifle. The legislature should not be allowed to craft a proposition that allows voters to accept something that they

want to add to the Constitution and at the same time force them to add a second provision with which they may not agree, purely because the Legislature has attached them together. Article XII, Section 1 was adopted to ensure that voters not be put into that position. Yet, when confronting the "marriage amendment," that is exactly where the voters found themselves. They were required to consider two separate propositions, but were required to answer yes or no. Compromise, rejection out of uncertainty or postponement for further deliberation were disallowed by the Legislature's improper formulation of the referendum's question.

In *Loving v. Virginia,* 388 U.S. 1 (1967), the United States Supreme Court said that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival." 388 U.S. at 12. (Internal citation

omitted.) Thus, the question of who should be allowed access to marriage was a topic that the citizens would have wanted to carefully examine. Likewise, they would have wanted to pay particular attention to whom they would be excluding from most or all of the rights and obligations of marriage and, even more importantly, whether they wanted to forever exclude a group of fellow citizens from even an approximation of "one of the basic civil rights of man." But, the voters were denied that opportunity when the Legislature coupled those separate and fundamental issues through the very process of "coattails" logrolling that Article XII, Section 1 was adopted to prohibit.

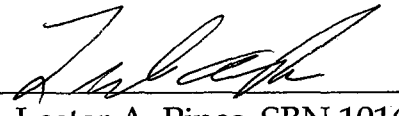
The framers of our Constitution were wise to legislative machinations and leery of direct democracy. They adopted Article XII, Section 1 to ensure that the citizens of this state would not be manipulated into adopting amendments to the

Constitution that coupled a popular notion with one that did not necessarily have the same appeal.

Applying the wisdom of the framers of our Constitution, the judgment of the circuit court should be reversed and this Court should declare that Article XIII, Section 13 of the Wisconsin Constitution is unconstitutional and void because the form by which it was submitted to the voters for consideration violated Article XII, Section 1 of the Wisconsin Constitution.

Dated this 11th day of November, 2008.

CULLEN WESTON PINES & BACH LLP

By: 

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Certification of Brief

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 4,034 words.

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