STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2008AP1868

WILLIAM C.
MCCONKEY,

Plaintiff-Appellant,

v.

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

Defendant-Respondent-Cross-
Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE RICHARD J. NIESS, PRESIDING

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT

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BRIEF OF RESPONDENT

The Respondent, Attorney General J.B. Van Hollen, hereby submits his brief in the above captioned action.

STATEMENT OF THE ISSUES

The central question in McConkey's appeal is whether Article XIII, Section 13 of the Wisconsin Constitution—what will be referred to here as the "marriage amendment"—in fact consists of two amendments rather than one, thereby violating the "single-subject rule" set forth in Article XII, Section 1 of the Wisconsin Constitution. The circuit court held that the amendment complied with the single-subject rule and dismissed McConkey's complaint.

It is worth emphasizing that, as in a previous Wisconsin case challenging compliance with the single-subject rule, "[w]hat is not before this court is the wisdom or constitutionality of the substance of the amendment." *Milwaukee Alliance v. Elections Board*, 106 Wis. 2d 593, 602, 317 N.W.2d 420 (1982).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Attorney General J.B. Van Hollen respectfully requests oral argument in this case, which presents a matter of significant public concern. For the same reason, the Attorney General also respectfully suggests that the Court's decision in this case be published.

STATEMENT OF FACTS

As McConkey's brief provides only a partial recapitulation of the relevant facts presented to the circuit court, J.B. Van Hollen offers the following statement.

On November 7, 2006, voters in Wisconsin approved a referendum that added Article XIII, Section 13 to the Wisconsin Constitution. Colloquially known as the "marriage amendment," the amendment was proposed to the voters in a ballot question that read 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?

The ballot question had been introduced and voted on by two successive sessions of both houses of the state Legislature, as required by Wis. Const. Art. XII, § 1. The legislative resolution triggering the presentment of the question to voters was 2005 Senate Joint Resolution 53 (2005 Enrolled Joint Resolution 30). The Legislative Reference Bureau explained the proposal contained in 2005 Senate Joint Resolution 53 in the following way: "This proposed constitutional amendment . . . provides 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." (R. 47, App. 101.)[1]

The relationship between the first and second sentences in the marriage amendment was

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[1]References throughout this Combined Brief to documents in the circuit court record (abbreviated "R.") are to the numeration created by the Clerk of Circuit Court, with additional reference to the page or appendix page number as appropriate.

a topic of significant discussion and debate both inside and outside the Legislature. Legislative sponsors of the marriage amendment said in a memo to their colleagues that the second part of the amendment would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." (R. 47, App. 105.) "'The proposal preserves 'marriage' as it has always been in this state, as a union between one man and one woman.'" (*Id.*) In an article about the hearing on 2005 Assembly Joint Resolution 67 (the Assembly companion resolution to 2005 SJR 53), one of the authors of the proposed amendment said that it was drafted to prevent the state from creating "a new kind of marriage." (R. 47, App. 111.)

Attempts to delete the second proposition in the proposed amendment failed both in the Senate and in the Assembly. (R. 47, App. 114, 117.)

McConkey filed a "Petition for Injunction and Declaration of Unconstitutionality," challenging the substance of the marriage amendment and the procedure leading to its adoption by voters. Upon the motion of J.B. Van Hollen, the circuit court held that McConkey lacked standing to challenge the substantive constitutionality of the marriage amendment, but further held that McConkey did have standing to litigate his claim that the ballot question submitted to voters violated the "single-subject rule" embodied in Article XII, section 1 of the Wisconsin Constitution. (R. 37; 55).

The circuit court ultimately held that the ballot question and the marriage amendment fully complied with the requirements of Article XII,

section 1 in that it "properly included two propositions that both related to the same subject matter and were designed to accomplish the same general purpose." (R. 52.) This appeal and cross-appeal followed.

ARGUMENT

I. STANDARD OF REVIEW.

A claim that a ballot question violates the single-subject rule of Article XII, section 1 poses the question "whether the legislature in the formation of the question acted reasonably and within their constitutional grant of authority and discretion." *Milwaukee Alliance*, 106 Wis. 2d at 604. This is a question of law that imposes no presumption in favor of, nor burden of proof upon, either party. *Id.* at 602, 604. On appeal from the circuit court's ruling in favor of Defendant, this question of law is reviewed *de novo* by this Court. *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141.

II. THE LEGISLATURE HAS DISCRETION TO SUBMIT SEPARATE PROPOSITIONS IN A SINGLE BALLOT QUESTION REGARDING A PROPOSED CONSTITUTIONAL AMENDMENT, PROVIDED THE PROPOSITIONS RELATE TO THE SAME SUBJECT AND ARE DESIGNED TO ACCOMPLISH THE SAME GENERAL PURPOSE.

The Wisconsin Constitution gives the Legislature discretion in composing the form of a ballot question that proposes a constitutional amendment, subject to the proviso 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." *Milwaukee Alliance*, 106 Wis. 2d at 603 (citing Wis. Const. art. XII, § 1.)

As the Wisconsin Supreme Court has held, "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.* at 604-05 (citing *The State ex rel. Hudd v. Timme, Secretary of State*, 54 Wis. 318, 336, 11 N.W. 785 (1882)). To implement this discretion, the Legislature has enacted statutes that prescribe the manner or form of presentment to the electorate. *See* Wis. Stat. §§ 13.175, 5.64(2), 10.01(2)(c).

When a ballot question is challenged, as here, on the grounds that it includes multiple amendments that should have been submitted separately, "the issue is whether the legislature in the formation of the question acted reasonably and within their constitutional grant of authority and discretion." *Milwaukee Alliance*, 106 Wis. 2d at 604.

The Supreme Court has further explained that "'in order to constitute more than one amendment'" and thereby violate the single-subject rule, "'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.'" *Milwaukee Alliance*, 106 Wis. 2d at 605 (quoting *Hudd*, 54 Wis. at 336). Put another way, a single amendment may permissibly "'cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with

one subject.'" *Id.* at 607 (quoting *Hudd*, 54 Wis. at 339).

In light of these principles, it is not necessary for the Legislature to submit separate ballot questions whenever it would be *possible* to do so. As the Supreme Court in *Hudd* stated with respect to the amendment at issue in that case,

> [w]e do not contend that the legislature, if it had seen fit, might not have adopted these changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose.

Hudd, 106 Wis. 2d at 339.

What the Legislature clearly need not do is submit propositions to the voters separately if a "no" vote on one proposition would nullify the effect of a "yes" vote on another. Propositions need not be submitted as separate questions if "the defeat of either proposition would have destroyed the overall purpose of the total amendment." *Milwaukee Alliance*, 106 Wis. 2d at 607.

As will be explained below, separately submitting to voters the two propositions in the marriage amendment could have destroyed the overall purpose of the amendment, and the Legislature therefore acted within its discretion in submitting them together.

III. THE BALLOT QUESTION COMPLIED WITH THE SINGLE-SUBJECT RULE.

The ballot question proposing the marriage amendment unquestionably contained two propositions, the first providing that only a marriage between one man and one woman shall be valid or recognized as marriage in Wisconsin, the second providing that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. The Legislature properly exercised its discretion in compliance with the requirements of Article XII, section 1 of the constitution in placing both propositions within the same ballot question and amendment text. The propositions were "designed to accomplish one general purpose," *Milwaukee Alliance*, 106 Wis. 2d at 605, and "the defeat of either proposition would have destroyed the overall purpose of the total amendment." *Id.* at 607

A. The General Purpose of the Amendment Was To Preserve and Protect the Unique and Historical Status of Traditional Marriage, a Union between One Man and One Woman.

As the circuit court correctly put it, the purpose of the marriage amendment was "the preservation and protection of the unique and historical status of traditional marriage." (R. 56, p. 49). The marriage amendment contains two sentences that together effectuate that purpose.

The intent of the Legislature in framing a proposed constitutional amendment—in other words, the purpose of the amendment—may be determined from the plain meaning of the

provision, the debates and practices at the time, and the earliest legislative action following adoption. *Dairyland Greyhound Park, v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408.[2]

The text of the amendment itself shows that its purpose was to preserve the uniqueness of marriage as a union between one man and one woman. The first part of the amendment limits the existing legal status of "marriage" to unions between one man and one woman; the second part prohibits the recognition of any other legal status that would be identical or substantially similar to marriage but that, unlike marriage, could extend to unmarried individuals—*e.g.*, to same-sex couples. Taken together, the two propositions in the amendment come at the same purpose from two different directions: the first placing a constitutional limitation on who may enter into marriages; the second ensuring that entering into marriage is the only way to obtain the legal status now identified with marriage.

Thus, summing up the proposed amendment, the Legislative Reference Bureau explained the proposal contained in 2005 Senate Joint Resolution 53 in the following way: "This proposed constitutional amendment . . . provides that only a marriage between one man and one woman shall be valid or recognized as a marriage

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[2]This methodology differs from that employed in the interpretation of statutes. Interpretation of constitutional provisions requires greater reliance on extrinsic sources because these provisions do not become law until they are approved by the voters, who are more likely to rely on extrinsic sources, such as press reports and the public statements of legislators, in forming a perception of what the provision is intended to accomplish. *Dairyland Greyhound*, 295 Wis. 2d 1, ¶ 115-16 (Prosser, J., concurring in part and dissenting in part).

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." (R. 47, App. 101.)

McConkey incorrectly characterizes the purpose of the amendment as being merely to limit the existing legal status known as "marriage" to unions of one man and one woman. He denies that the purpose included maintaining marriage as a unique legal status, such that no other status identical or substantially similar could be created for non-married individuals. McConkey does this by focusing exclusively on a single sentence in the 2005 Senate Joint Resolution 53 (Enrolled Joint Resolution 30), and ignoring the numerous other statements in other, related sources.

McConkey contends that the purpose of the amendment is described in the following, *and only* in the following, statement from 2005 Joint Resolution 30: "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 as a marriage in this state." Focusing exclusively on this one statement, *see* Brief at 8, McConkey argues that the purpose of the amendment had no conceivable bearing on legal statuses other than "marriage," such as civil unions, and that, therefore, by including a ban on legal statutes "identical to or substantially similar

to that of marriage for unmarried individuals," the Legislature violated the single subject rule. (*See* Brief at 22-23.)[3]

But the purpose of the marriage amendment is made abundantly clear by reference to the host of related sources such as legislators' public statements, press reports and the legislative bureau pamphlets, all of which McConkey ignores. Legislators' public statements and press reports published at the time of the legislative process leading to presentment of the amendment to the voters confirm that the amendment was understood as being designed to preserve the unique legal status of marriage as a union between one man and one woman.

Sponsors of the marriage amendment said in a memo to their colleagues in the Legislature that the second part of the amendment would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." "'The proposal preserves 'marriage' as it has always been in this state, as a union between one man and one woman.'" (R. 47, App. 105.) The sponsors of the amendment were motivated not only to confine the marriage status to opposite-sex couples but to ensure that this limitation could not be circumvented by the

[3]As a threshold matter, the opening line of Joint Resolution that McConkey focuses exclusively upon is akin to the heading in a statutory enactment, and to rest one's interpretation of the text's purpose solely on a heading is unsound. Wisconsin Statutes § 990.001(6) provides that headings are not part of the statutes they introduce. The Wisconsin courts have cautioned that although headings may be helpful aids to interpretation, they are not dispositive. *See, e.g., Raymaker v. American Family Mut. Ins. Co.*, 2006 WI App 117, ¶ 31, 293 Wis. 2d 392, 407, 718 N.W.2d 154.

creation or recognition of other legal statuses that mimic marriage.

In an article about the Senate hearing on 2005 Assembly Joint Resolution 67, one of the authors of the amendment said that it was drafted to prevent the state from creating a new kind of marriage. (R. 47, App. 111.)

Perhaps most significantly, attempts to delete the second proposition in the proposed amendment failed both in the Senate and in the Assembly. This was known to the public through press reports that covered the legislative debate (R. 47, App. 114, 117.) To argue, as does McConkey, that the true purpose of the amendment was only to limit marriage to one man and one woman, *see* Brief at 8-9, and that the prohibition on "marriage-like" legal statuses was essentially a surprise, is unrealistic and unreasonable.

B. The Two Parts of the Ballot Question and Amendment Are Both Related to the Subject Matter of the Amendment and Designed to Accomplish Its General Purpose.

Marriage is not just a word, but a legal status conferring rights and responsibilities upon the individuals who enter into it. The marriage amendment limits marriage to a union between one man and one woman. But for this limitation to have its intended effect of "preserv[ing] and protect[ing] the unique and historical status of traditional marriage," R. 56, p. 49, it was necessary also to curtail the state's power to create or recognize other, new legal statuses that would confer the identical or substantially similar rights

and responsibilities as marriage upon those who enter into those other statuses. The second sentence in the marriage amendment is the essential complement to the first. As the circuit court put it, "The two propositions . . . are two sides of the same coin." (R. 56, p. 49).

The Wisconsin Supreme Court's three previous single-subject rule cases show that the Legislature here acted well within its discretion in placing both the first and second propositions in the same ballot question.

In *Hudd*, the Supreme Court held that not only two, but four distinct propositions were properly placed in the same ballot question because they all related to the same general purpose. The *Hudd* case arose from a constitutional amendment adopted by voters in 1881 that made changes to Article IV, sections 4, 5, and 11 of the constitution. The amendment provided that: (1) members of the Assembly would serve two-year terms and be elected from single districts; (2) senators would serve four year terms and be chosen alternately in odd and even numbered districts every two years; (3) the Legislature would meet once every two years; and (4) the salaries of legislators would be increased to $500.00. *Hudd*, 54 Wis. at 326.

The amendment in *Hudd* was challenged as being actually four distinct amendments, each of which should have been submitted separately to the voters. *Id.* at 334. The Supreme Court held, however, that all four propositions furthered the purpose of the amendment, which was to change the Legislature generally from annual to biennial sessions. *Id.* at 336. In reaching this conclusion, the *Hudd* court showed that the concept of "relatedness" as it is applied in the single subject

rule context is broader than McConkey portrays it, and easily encompasses the relation between the two parts of the marriage amendment at issue here.

The change from annual to biennial sessions of the Legislature was "so intimately connected" with the change of the tenure of office of legislators, that the *Hudd* court had no difficulty concluding that those propositions were properly placed within the same amendment. *Id.* at 335-36. The first three propositions together enabled a smooth transition from the existing, annual Legislature to a biennial one. If all three changes were not made simultaneously, the Legislature could have had empty seats and some legislators could have been elected to terms longer than the session itself, leaving them without duties to perform. *Id.* at 336.

The *Hudd* court found that even the salary increase provision was properly included with the other three provisions, despite the fact that "[t]he question of compensation was, perhaps, less intimately and necessarily connected with the change to biennial sessions." *Id.* at 337. It found that since the legislators' terms were being lengthened, it made sense to raise their salaries. *Id.* The court made clear that the Legislature could have adopted the salary change in a separate amendment, but the fact it could have did not mean it must have. *Id.*

The *Hudd* court went on to offer some valuable comments on another, pre-existing constitutional provision that was not being challenged in that case, but which provides a useful example of the meaning of the single subject rule.

The *Hudd* court pointed out that Article IV, section 31 of the constitution, which had been adopted in a voter referendum in 1871 (it has since been amended twice), contained several propositions (nine, in fact) far less interrelated than those at issue before the court in *Hudd*, while noting that the court "has never questioned its validity." *Id.*

Indeed, the *Hudd* court went on to opine that Article IV, section 31, which prohibits the Legislature from enacting nine different types of special or private laws, "was a single amendment, having for its purpose one thing, viz., the prevention of special legislation in nine different classes of cases." *Id.* at 338.

If the Legislature could place the salary raise within the same proposed amendment as the session and tenure changes; if it could place bans on private laws in nine different types of cases in the same proposed amendment—related only in the sense that they are all private laws—then the Legislature surely was empowered to place both propositions of the marriage amendment together in the same ballot question.

The next pertinent case is *Milwaukee Alliance*, which tested the 1981 adoption of an amendment to Article I, section 8 of the constitution. Among other things, that section deals with the right to conditional release for persons accused of criminal conduct. In *Milwaukee Alliance*, a single ballot question proposed to amend the constitution to provide that: (1) the Legislature could permit courts to deny or revoke bail for certain accused persons; and (2) the courts could set conditions, including bail, for the release of accused persons to assure their appearance in court, protect members of the

community, or prevent intimidation of witnesses. *Milwaukee Alliance*, 106 Wis. 2d at 602.[4]

The Supreme Court held that submitting both propositions in the same ballot question was proper because the purpose of the amendment was to shift from the limited concept of bail to a more comprehensive concept of "conditional release." *Id.* at 607. The court explained:

> The purpose of the amendment was to continue the guarantee of bail to those entitled to it, to allow release of some persons without requiring money bail but with other reasonable conditions, and at the same time, under a structured system, to hold persons for limited periods without the option of bail when a court determines that such action is necessary to protect . . . society's interest in the administration of justice by preventing the intimidation of witnesses.

Id. The two propositions were related to that general purpose, indeed they were "integral and related aspects of the amendment's total purpose." *Id.* at 608.

McConkey passes over *Milwaukee Alliance* quickly, noting its conclusion without dealing with its impact on the case at hand. (Brief at 17-18). However, just as the two propositions in *Milwaukee Alliance* were integral to implementing a new "conditional release" system, the two propositions in the marriage amendment were integral to, as the circuit court put it, preserving "the unique and historical status of traditional marriage." (R. 56, p. 49).

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[4]These are paraphrases of the changes to the existing constitutional provision that were proposed; the actual textual changes were extensive and detailed. A reproduction of the full text presented to voters is provided by the court in *Milwaukee Alliance*, 106 Wis. 2d at 600.

The plaintiffs in *Milwaukee Alliance* argued that because the two propositions on the ballot were not dependent upon one another, they should have been presented separately. The plaintiffs argued that because one *could* adopt the idea of conditional release without adopting the idea of non-monetary bail, and vice-versa, the two ideas *should* have been separately offered to voters. *Id.* at 607.

The Supreme Court rejected that argument as "unrealistic," *id.*, because the true purpose of the proposed changes was to institute a new scheme of conditional release; while both parts were not necessary to one another, they were nonetheless part of the same general plan, and could therefore be placed in the same amendment.

Under the holding of *Milwaukee Alliance*, which represents the Supreme Court's most recent articulation and application of the single-subject rule, what the Legislature did with the marriage amendment was well within the limits of its permissible discretion. Under *Milwaukee Alliance*, even if the two parts of the marriage amendment were not mutually-dependent, as in fact they are, it would still have been appropriate to put them together in the ballot question, because together they serve the same general purpose.

The third and final precedent on point is *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953), which involved a challenge to the 1953 Rogan Act. The Rogan Act put before the voters a referendum on the amendment of Article IV, sections 3, 4 and 5 of the constitution, dealing with apportionment of

legislative districts. The proposed ballot question was as follows:

> 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?

Zimmerman, 264 Wis. 2d at 651. At an election held in April 1953, the voters passed the referendum.

The Secretary of State thereafter announced that he would call the 1954 election in accordance, not with the new scheme of district apportionment, but with the pre-existing scheme, which determined the assembly and senate districts on the basis of population with no regard to area. *Id.* at 647-48.

In response to the Attorney General's complaint, which sought a declaration that the newly-enacted amendment required area and population-based apportionment, the Secretary of State argued that the ballot question violated the single-subject rule and was therefore unconstitutional and void. The Supreme Court agreed.

McConkey contends that the facts and reasoning of *Zimmerman* require a similar declaration here, *see* Brief at 21, but that is far from true. The ballot question in *Zimmerman* had numerous defects, only one of which was that it comprised multiple purposes and subjects. More fundamentally, it completely misrepresented the actual constitutional amendment that was being proposed, failing even to mention several specific changes to the apportionment scheme that were in

the Joint Resolution setting forth the new constitutional language. Nothing of the sort is at issue here.

The Joint Resolution proposing the constitutional changes in *Zimmerman* included the following alterations to the apportionment scheme: (1) drawing senate districts on the basis of area as well as population; (2) counting untaxed Indians and members of the armed forces when calculating population; (3) bounding assembly districts by town, village or ward lines; and (4) providing that assembly districts could be divided in forming senate districts, and leaving no direction or restriction whatever as to the boundaries of senate districts. *Id.* at 654-54.

There was no dispute between the parties in *Zimmerman* that the purpose of the constitutional change was to introduce area into the formation of senate districts, and the court analyzed the amendment on that basis. *Id.* at 656. The court did not hesitate to conclude that the amendment included multiple provisions that "ha[ve] *no bearing* on the main purpose of the proposed amendment." *Id.* at 656 (emphasis added). There was no connection between using area in apportionment and revoking the exclusion on untaxed Indians and the military when counting inhabitants, but the amendment did both. There was no connection between permitting the division of assembly districts when forming senate districts and the introduction of area as a factor, yet the amendment did both. Whereas before the amendment the constitution required assembly districts to be bounded by county, precinct, town or ward lines, the amended text shortened the list to town, village and ward lines. This change, too, had nothing at all to do with introducing area as a factor in the apportionment of districts. *Id.*

McConkey strains to depict the second proposition in the marriage amendment as having nothing to do with marriage, just like, in *Zimmerman*, counting military personnel had nothing to do with considering area in apportionment. (Brief at 26-27.) McConkey contends that "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." (Brief at 25.) This is implausible. Indeed, it is true only if one treats marriage as nothing but a word, a name, a label.

If the state government were empowered to create or recognize a legal status identical or substantially similar to marriage, and make it available to same-sex couples, then the limitation on the marriage relation to opposite-sex couples could cease to have practical significance. Opposite sex couples could enter into "marriages" and same sex couples could enter into these other, identical or substantially similar statuses, and but for the different names applied to their status, everything else about their status would be the same or substantially similar. It is clear that this is precisely what the voters intended to prevent.

McConkey confuses the issue by suggesting that when casting their ballots on the proposed amendment, voters were "required to consider a nearly infinite number of choices [as to legal statuses identical or substantially similar to marriage] and decide whether any one of them was appropriate to be preserved." (Brief at 25.)

That was definitely not the choice facing voters in the November 2006 referendum, because whether any particular legal status, hypothetical

or existing, actually is "identical or substantially similar" to marriage is not an issue addressed by the marriage amendment.[5] McConkey contends that by voting "yes" on the amendment voters were compelled to "foreclose" the extension of "many of the legal rights and responsibilities commonly associated with marriage" to same-sex couples. (Brief at 24.) But the amendment does not say what rights and responsibilities are forbidden to same-sex (or other unmarried) couples. It only says that a status identical or substantially similar *to marriage* will be unavailable to unmarried couples.

The two parts of the ballot question presented to voters in November 2006 related to and furthered the core purpose of the amendment: to preserve and protect the unique and historical status of traditional marriage. McConkey's strained effort to conceptually dissociate the two propositions should be rejected.

C. Courts In Other States Have Reached The Same Conclusion With Respect to Similar Ballot Questions and Similar or Identical Single Subject Constitutional Requirements.

Three other state high courts have rejected challenges to marriage amendments that are

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[5]In this regard it is worthwhile noting that in a letter dated December 27, 2006, to Madison City Attorney Michael P. May, outgoing Attorney General Peggy Lautenschlager opined that Madison's domestic partnership registration system, which protects domestic partners from discrimination in accommodation and makes such partners who are city employees eligible for benefits, including partial payment of health insurance, did not constitute a legal status "identical or substantially similar to marriage" and was therefore unaffected by passage of the amendment.

similar or identical to this one, under those states' respective iterations of the single-subject rule, which in some states is referred to as a single-*object* rule. Although not controlling on this Court, these cases provide guidance on the application of the single-subject rule to an amendment of this type.

In *Forum for Equality PAC v. McKeithen*, 893 So.2d 715 (La. 2005), the Supreme Court of Louisiana upheld a referendum that proposed to amend the state constitution by providing, among other things, that: "Marriage in the state of Louisiana shall consist only of the union of one man and one woman . . . A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." *Forum for Equality*, 893 So.2d at 725 (quoting from the joint resolution proposing submission of Article XII, Section 15 of the Louisiana Constitution, entitled "Defense of Marriage," to the voters).

Louisiana has what it calls a "single-object" requirement for constitutional amendments, which provides in relevant part that "a proposed amendment shall . . . be confined to one object. . . . When more than one amendment is submitted at the same election, each shall be submitted so as to enable the electors to vote on them separately." La. Const. art. XIII, § 1(B), quoted in *Forum for Equality*, 893 So.2d at 714.

Describing its task as "identify[ing] the main purpose or object of the constitutional amendment and then . . . examin[ing] each provision to determine whether the amendment embodies a single plan to accomplish the object and whether every [proposition] is germane to that plan," *id.* at 732, the Louisiana Supreme Court

found that the purpose of the marriage amendment was to "protect or defend our civil tradition of marriage." *Id.* at 734. As with the Wisconsin amendment, the purpose was thus not merely to prohibit same-sex marriage, but to maintain the unique status of marriage in the legal system.

Like McConkey, the plaintiffs in *Forum For Equality* "dissect[ed] the amendment sentence by sentence and interpret[ed] every provision as advancing a separate and distinct plan and object." *Id.* at 734-35. The court rejected this effort, finding that all the elements of the amendment—both its ban on same-sex marriage, and its ban on legal statuses "identical or substantially similar to marriage" were integral parts of the plan to defend the state's civil tradition of marriage. *Id.* at 736.

In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So.2d 1229 (Fla. 2006), the Supreme Court of Florida upheld a ballot question which read, "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." *Advisory Opinion*, 926 So.2d at 1232. Florida's constitution requires that proposed amendments to that constitution "shall embrace but one subject and matter directly connected therewith." Fla. Const. art XI, § 3 (quoted in Advisory Opinion, 926 So.2d at 1233.

The intervening opponents of the amendment raised the same arguments against the Florida amendment that McConkey raises here, and the Florida court rejected them. The opponents claimed that the second proposition in

the ballot question—dealing with "other legal unions"—was "beyond the subject of the definition of marriage." *Id.* at 1234. But the court held that "when the phrase challenged by the opponents is read in context and connection with the proposed amendment as a whole, it is clear that it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme'—the restriction of the exclusive rights and obligations traditionally associated with marriage to legal unions consisting of one man and one woman." *Id.*

The reasoning in *Advisory Opinion* is precisely on point here and counsels strongly in favor of upholding the marriage amendment under Wisconsin's single-subject rule.

The third state court to reach the same conclusion was the Supreme Court of Georgia, which in *Perdue v. O'Kelley*, 632 S.E.2d 110 (Ga. 2006) upheld a ballot question that contained 5 separate sentences relating to marriage. The first two sentences prohibited marriages between persons of the same sex. The second group of three sentences provided, in relevant part, that "[n]o union [of] persons of the same sex shall be recognized as entitled to the benefits of marriage." Georgia's single-subject rule requires that "[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more new articles or related changes in one or more articles may be submitted as a single amendment." Ga. Const. art. X, § 1(2), quoted in *Perdue*, 632 S.E.2d at 733 n.2.

The Georgia Supreme Court found that the purpose of the amendment was to establish that

marriage and its attendant benefits belong only to union of man and woman. *Id.* at 734. The *exclusivity* of marriage, the court found, was central to the amendment's purpose. *Id.* On this basis, the court concluded that the prohibition against recognizing same-sex unions as entitled to the benefits of marriage "is not 'dissimilar and discordant' to the objective of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman," *id.*, and the amendment therefore complied with the single-subject rule.

Taken together, these three high court cases from other states illustrate the implausibility of McConkey's effort to disassociate the two elements of Wisconsin's marriage amendment. Like those other courts, when analyzing amendments that were in relevant respects the same as Wisconsin's, in light of the same constitutional principle, this Court should reject McConkey's challenge and uphold the procedural validity of Article XIII, section 13.

CONCLUSION

The circuit court correctly held that Wisconsin voters were presented with a procedurally correct ballot question, and enacted a constitutional amendment that contained only one subject—that it was, in other words, a single amendment under Article XII, section 1.

Therefore, J.B. Van Hollen respectfully requests that this Court affirm the circuit court's Final Order in Action for Declaratory Judgment entered June 9, 2008.

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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 6,258 words.

Dated this 12th day of December, 2008.

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STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2008AP1868

WILLIAM C.
MCCONKEY,

Plaintiff-Appellant,

v.

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

Defendant-Respondent-Cross-
Appellant.

ON APPEAL AND CROSS-APPEAL FROM
FINAL ORDERS OF THE CIRCUIT COURT FOR
DANE COUNTY, THE HONORABLE
RICHARD J. NIESS, PRESIDING

BRIEF AND APPENDIX OF CROSS-APPELLANT J.B. VAN HOLLEN

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ISSUE PRESENTED ON CROSS-APPEAL

The issue presented by J.B. Van Hollen's cross-appeal is whether, regardless of the substantive merits of his claim, McConkey has standing to litigate the compliance of the marriage amendment with the single subject rule. Denying in part J.B. Van Hollen's motion to dismiss for lack of standing, the circuit court held that McConkey had standing to pursue his claim under

the single-subject rule, and J.B. Van Hollen cross-appeals from that decision.

ARGUMENT

I. STANDARD OF REVIEW

Whether a party has standing to seek declaratory relief is a question of law this Court reviews *de novo*. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315, 529 N.W.2d 245 (Ct. App. 1995).

II. HAVING STIPULATED THAT HE VOTED "NO" ON THE BALLOT QUESTION AND WOULD HAVE VOTED "NO" TO BOTH PROPOSITIONS WERE THEY PRESENTED SEPARATELY, MCCONKEY LACKS STANDING TO SUE.

A. Standing to Sue in Wisconsin.

As a general rule, a party asserting a constitutional claim must have personally suffered a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983); *State ex rel. 1st Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 309, 290 N.W.2d 321 (1980); *Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979).

As formulated by the Wisconsin courts, a plaintiff must demonstrate that "[he] was injured in fact, [and that] the interest allegedly injured is arguably within the zone of interests to be protected or regulated by the statute or constitutional

guarantee in question." *Mogilka v. Jeka*, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). This standard is "conceptually similar" to the federal rule. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240 (1975).

"Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox,* 112 Wis. 2d at 525. (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)).

Standing also requires that the injury be to a legally protectable interest. *See City of Madison v. Town of Fitchburg,* 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983). A legally protectable interest is one arguably within the zone of interests that the law under which the claim is brought seeks to protect. *See Chenequa Land Conservancy, v. Village of Hartland,* 2004 WI App 144, ¶ 16, 275 Wis. 2d 533, 685 N.W.2d 573.

The standing requirement is important because "a court should not adjudicate constitutional rights unnecessarily and because a court should determine legal rights only when the most effective advocate of the rights, namely the party with a personal stake, is before it." *Mast,* 89 Wis. 2d at 16.

B. McConkey's Vote Was Unaffected By The Inclusion of Both Propositions in the Marriage Amendment.

McConkey stipulated that if the ballot had included two questions, rather than one, corresponding to the two propositions contained in the actual ballot question, he would have noted "no" to each question. (R. 55, p. 7; App. 4)[1],[2] McConkey therefore conceded that he lacked standing to sue for a violation of Article XII, Section 1, because even if the ballot question violated that constitutional provision (which J.B. Van Hollen denies), by his own admission McConkey suffered no real, direct, actual injury. His "no" vote on the ballot question expressed his preferences as an elector and there was no injury to him.

The circuit court erred in denying J.B. Van Hollen's motion to dismiss. The court based its decision on the grounds that every elector would have standing to litigate an alleged violation of Article XII, Section 1, regardless of how he or she intended, or did, vote on the challenged ballot. (R. 55, p. 27). The court stated

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[1]"Court: Mr. Pines, do you concede that your client alleges that he would not have voted for either proposition if they had been broken out? Mr. Pines: I can concede that for purposes of this discussion, yeah." The Court: All right. And I understand you don't think that makes a difference. Mr. Pines: That's correct."

[2]In this Brief and Appendix of Cross-Appellant, references to "App." are to the Appendix of Cross-Appellant that is filed herewith.

that "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective." *Id.* (App. 5) The circuit court's rationale conflicts with the basic principles of standing in Wisconsin.

Standing as an elector, like standing as a taxpayer, is founded on a plaintiff's status as a participant in a particular process of government. *See Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001) (treating voter and taxpayer status as equivalent for standing analysis purposes). Not every taxpayer has standing to sue the state for legislative violations of the constitution just because the taxpayer has helped to fund, in a general way through tax payments, the government operations that are alleged to violate constitutional rights.

A taxpayer must instead allege a direct personal injury that is "different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988). Further, the taxpayer plaintiff must allege "direct and personal pecuniary interest in the litigation." *Id.* at 883. While the Wisconsin cases on taxpayer standing allow that the plaintiff's personal pecuniary loss need not be large, the loss must nonetheless be at least "slight." *Id.* at 878.

Under this principle, McConkey's complaint as a voter fails to allege facts sufficient to establish his standing. In his "Petition for Injunction and Declaration of Unconstitutionality," McConkey included a section entitled "Standing" that said nothing about how the alleged non-compliance with the single-subject rule affected his interests. He alleged that he is a registered voter who lives

in Wisconsin, that he does business in the state, and that he pays taxes in the state. (R. 1, p. 2). At no point in his Petition did McConkey allege facts showing that the constitutional violation he complained of, the placement of two allegedly unrelated questions in a single ballot question, directly affected his vote.

At the hearing on the motion to dismiss it became plain that whether the two propositions on the ballot in November 2006 were contained in one amendment or two, it made no difference to McConkey's preferences as a voter, since McConkey expressly conceded that he would have voted "no" on each one. (R. 55, p. 7; App. 4).

Whether *other* voters might have wished to vote differently on the separate propositions is immaterial to the question of McConkey's standing, since he must allege that he personally suffered a real and direct, actual or threatened injury. He acknowledges that he did not do so.

Although no Wisconsin case has applied this analysis to a voter challenging a ballot referendum under the single-subject rule, the Tennessee Supreme Court held that plaintiffs challenging a marriage amendment on grounds of untimely publication lacked standing, because they failed to allege any discrete, concrete injury to them resulting from the alleged violation. *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006).

In *Darnell*, plaintiffs challenged the adoption of the Tennessee Marriage Amendment on the ground that it was not published in accord with a procedural provision of the state constitution. *Darnell*, 195 S.W.3d at 621. Plaintiffs alleged

generally that their lives and their ability to seek future changes in the law would be greatly affected by the amendment, and the lesbian and gay individuals among them alleged that by specifically prohibiting same sex marriage the amendment directly affected their legal rights. *Id.*

The Tennessee court held that this was insufficient to establish standing, insofar as none of the plaintiffs had alleged that the late publication of the ballot question affected their awareness of the election issues or their ability to participate in the public debate leading up to the vote. *Id.* at 622. Similar to McConkey, the plaintiffs in *Darnell* testified that they were aware of the ballot question, despite its alleged late publication. *Id.* As such, they all but conceded their lack of standing; the Tennessee court required them to show actual injury from the alleged procedural irregularity, and they showed none.

The circuit court in this case erred by reasoning that McConkey suffered an injury merely by having to participate in an election in which the ballot allegedly violated the single-subject rule. "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective. It may not be any different from any other voter, but it may very well be." (R. 55, p. 27; App. 5). The court essentially held that the existence of an alleged constitutional violation creates the basis for standing. This is contrary to how standing works. Even if the injury need only be "trifling," it must nonetheless exist, separate and apart from the constitutional violation itself.

The circuit court also rested its decision on the principle that standing is "liberally construed" in Wisconsin, but while the principle is quite correct, it was not properly applied here. Such liberality does not mean that standing exists even though it is apparent that no injury did or may occur to the plaintiff. By his own account, if the single subject rule was violated, McConkey lost nothing; his preferences on the ballot propositions were accurately expressed by his vote, regardless of any alleged procedural flaw.

Enforcing the standing requirement is important generally to ensure that a concrete case informs the court of the consequences of its decision, and that people who are directly concerned and are truly adverse will genuinely present opposing viewpoints to the court. *Carla S. v. Frank B.*, 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 609, 626 N.W.2d 330. It is a foundational assumption of our judicial system that true adversity of the parties improves the soundness of judicial outcomes. The Court should require a plaintiff who can attest to being personally injured by the alleged wrongdoing, as McConkey has not.

Enforcing this requirement in this particular context is important because, as McConkey himself emphasizes, the single-subject rule is not a mere formality but is necessary to ensure that the votes accurately reflect voter preferences on the issues being presented to them. (*See* Brief at 11). When two separate amendments are presented in one ballot question, a voter who supports one but not the other is deprived of his ability to truly express his preferences. McConkey, however, has acknowledged that it was all the same to him. He wanted to vote "no" to both propositions; his vote was unimpaired.

CONCLUSION

McConkey acknowledges that he would have voted "no" on each proposition in the marriage amendment had they been presented as separate questions on the November 2006 ballot, and he therefore suffered no direct, personal injury as a result of any alleged failure of the Legislature to comply with the single-subject rule. Under the traditional analysis of standing in Wisconsin, McConkey lacks standing to pursue his claim and the decision of the circuit court denying in part Van Hollen's motion to dismiss for lack of standing should be reversed.

Dated this 12th day of December, 2008.

Respectfully submitted,

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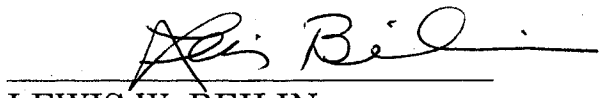
Dated this 12th day of December, 2008.



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