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

COMBINED BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

CULLEN WESTON PINES & BACH LLP

Attorneys for Plaintiff-Appellant-
Cross-Respondent
Lester A. Pines, SBN 1016543
122 W. Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

Dated: January 12, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Constitution

Other Authorities

ARGUMENT

I. THE ATTORNEY GENERAL INCORRECTLY STATES THE ALLEGED PURPOSE OF THE AMENDMENT.

A. The Phrase "Traditional Marriage" Is Not Found In The Legislation That Led To The Submission Of The "Marriage Amendment" To The Voters.

The Attorney General states that the purpose of the "marriage" amendment was "the preservation and protection of the unique and historical status of traditional marriage," referring as its sole source for that assertion the statement made by the circuit court in rendering its oral decision. (Attorney General's Brief, p. 8) There is nothing that was supplied to the circuit court and there is nothing that has been supplied to this Court showing that the legislature at any time stated that the purpose of the amendment was "the preservation and protection of the unique and historical status of traditional marriage."

Moreover, the Attorney General has not even suggested a definition of "traditional marriage." Does "traditional marriage" mean a marriage as referred to in the New Testament in which wives are to be subservient to their husbands? (*Wives, submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the church: and he is the saviour of the body. Therefore as the church is subject unto Christ, so let the wives be to their own husbands in every thing.* The Bible (King James version); Ephesians 5:22-5:24) Does "traditional marriage" mean a marriage in which the husband controls the property of his wife? Does it mean a marriage in which a husband may have forcible sexual relations with his wife? Is it a marriage in which a husband may beat his wife without fear of prosecution? Is it a marriage where the husband is employed and the wife manages the household and cares for children?

In fact, no one even knows what the phrase "traditional marriage" means. The legislature did not use it when it proposed the "marriage amendment." The phrase is a chimera. It is a diversion. It is a loaded phrase used by politicians of a certain ilk as a part of a wedge strategy based on the belief that a substantial part of the voting public will respond to proposals favoring guns, supporting God and opposing gays ("the guns, God and gays" strategy). The claim by the Attorney General and the amicus that the amendment was adopted to defend "traditional marriage" is part of that strategy. It has no place in a serious discussion about the manner in which the referendum on the proposed amendment was put before the voters.

B. The Three Part Test Cited By The Attorney General Is Not Used To Determine The Purpose Of A Proposed Amendment.

The Attorney General cites to *Dairyland Greyhound Park v. Doyle,* 2006 WI 107, ¶19, 295 Wis 2d 1 719 N.W. 2d 408 to support his assertion that the Court may look beyond the 2005 Joint Resolution 30 and from extraneous sources determine the purpose of the amendment. That case does not support the Attorney General's claim. *Dairyland* considered legality of certain Indian gaming compacts in light of the adoption of Article IV, Section 24 (1) of the Wisconsin Constitution. To make that determination, the Supreme Court had to interpret the substance of Article IV, Section 24 and construe it. When doing that, the Supreme Court applied the well-known test for construing constitutional amendments described in *Dairyland:*

> ¶ 19 The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. *State v. Cole,* 2003 WI 112, ¶ 10, 264 Wis.2d 520, 665 N.W.2d

> 328 (citations omitted). Constitutions should be construed so as to promote the objects for which they were framed and adopted. Id. "The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]" *State ex rel., Bare v. Schinz*, 194 Wis. 397, 404, 216 N.W. 509 (1927) (citation omitted). We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption. *Schilling v. Wisconsin Crime Victims Rights Bd.*, 2005 WI 17, ¶ 16, 278 Wis.2d 216, 692 N.W.2d 623 (citing *Wisconsin Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 44, 270 Wis.2d 318, 677 N.W.2d 612; Cole, 264 Wis.2d 520, ¶ 10, 665 N.W.2d 328). See also *Thompson v. Craney*, 199 Wis.2d 674, 680, 546 N.W.2d 123 (1996) (citations omitted).

Here, this Court is not being asked to construe the substance of the adopted amendment, Article XIII, Section 13. It is reviewing the proposed referendum question adopted by 2005 Joint Resolution 30 to determine if that question violated Article XII, Section 1 of the Wisconsin Constitution. The Joint Resolution is legislation, not a constitutional amendment.

Thus, the rules for the interpretation of legislation apply, not the rules for the construction of a provision of the constitution. If the legislation is not ambiguous, the courts may not use extraneous evidence or information to interpret it, most certainly neither its legislative history nor the statements of legislators made about it and reported in the media. *State ex rel. Kalal v. Circuit Court,* 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110.

The indisputable fact is this: 2005 Joint Resolution 30 described the purpose of the proposed amendment: to define marriage by "providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." The proposed amendment far exceeded that purpose.

II. THE ATTORNEY GENERAL IGNORES THE TWO STEP PROCESS FOR THE ANALYSIS OF ARTICLE XII, SECTION 1.

The Attorney General ignores the two step analysis of Article XII, Section 1 claims set out by Appellant. (Appellant's Brief, pp.15-27) Instead, he focuses on a "general purpose" argument and claims that the amendment accomplishes such a purpose. He makes that argument because it allows him to avoid the thorough analysis of a amendment that both *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882) and *Milwaukee Alliance Against Racist & Political Repression v. Elections Bd. of Wis.*, 106 Wis. 2d 593, 317 N.W.2d 420 (1982) require. Appellant will not repeat its analysis of the steps that this Court must take to properly analyze this proposed referendum question under *Hudd* and *Milwaukee Alliance*. Suffice it to say that the Attorney General did not suggest that

the Appellant's explanation of those steps was wrong; he merely ignored Appellant's analysis.

However, even under the more truncated analysis suggested by the Attorney General, the proposed referendum question violate Article XII, Section 1. *Hudd* and *Milwaukee Alliance* both discussed and analyzed amendments which created comprehensive schemes to change existing sections of the Wisconsin Constitution: *Hudd* reviewed a change from an annual to a biennial legislature; *Milwaukee Alliance* reviewed a change from bail to conditions of release. By necessity, those comprehensive schemes had within them subparts that, if not adopted as a whole, would have destroyed the broad change in the constitution that the legislature was submitting to the voters.

The marriage amendment, however, was not a change to an existing section of the constitution. Nor did it purport to

be a comprehensive scheme to restructure the law on marriage in Wisconsin, as *Milwaukee Alliance* did regarding bail and *Hudd* did as to legislative sessions. The legislature was well aware when it adopted 2005 Joint Resolution 30, that Chapter 765, entitled "Marriage," provided a comprehensive explanation of marriage and its meaning.

By no means were the two parts of the amendment proposed in that resolution intended to create a comprehensive scheme to supplant the details of Chapter 765. The amendment touched only one part of Chapter 765. It essentially amended Section 765.02 by inserting the words "one man and one woman" in the phrase "marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support" so that the law in this state now says that marriage is a "legal

relationship between 2 equal persons, one man and one woman . . ."

Only when the legislature has proposed an amendment which is a comprehensive scheme can the public be asked to adopt a provision that contains multiple questions. In the *Hudd* case, the propositions contained in the move from annual to biennial sessions of the legislature were so intertwined that either they were all adopted or the entire revision to legislative session would have been rendered meaningless. Likewise in *Milwaukee Alliance* when the proposition completely changed bail, a right already in the constitution, to conditions of release, the voters had to either accept or reject an "all or nothing" package or the revisions would have been rendered meaningless. The proposed amendment in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) was not a "comprehensive scheme."

It was a set of proposed amendments appeared to be related but were not and that in large part was why the Supreme Court found that proposed referendum to have violated Article XII, Section 1.

With the marriage amendment, the legislature presented an utterly non-comprehensive scheme. Instead, it did precisely what the framers of the constitution wanted to avoid: it tacked onto the definition of marriage a permanent prohibition on the extension of legal protections to unmarried individuals. Those concepts are not "two sides of the same coin." They are distinct questions that are not "interrelated." Just as in *State ex rel. Thomson v. Zimmerman,* the provision of the marriage amendment relating to the rights of unmarried individuals has "no bearing on the main purpose of the proposed amendment" which was enacted to define marriage.

The first question to the voters was: do you want the organic law of this state to forever define "marriage" as a legal relationship between "one man and one woman?" The second question asked was: do you want to forever deny your neighbors who live in relationships in which they have committed to one another their mutual responsibility and support any legal protection of their relationships because it falls outside of the definition of marriage? Those two questions are distinct. They have different purposes. They are not by any means "interrelated." Thus, the marriage amendment as submitted to the voters violated Article XII, Section 1 of the Wisconsin Constitution.

III. CASES FROM OTHER STATES ARE INTERESTING, BUT MEANINGLESS.

The cases cited by the Attorney General and the *amicus*, are interesting but ultimately meaningless. This Court should be guided solely by the cases decided in this state interpreting

our own constitution. And, while we cannot determine how, if at all, the "guns, God and gays" agenda may have influenced the courts in other states, we do know that it certainly will not influence the courts here.

IV. CONCLUSION

The judgment of the circuit court should be reversed and Article XIII, Section 13 of the Wisconsin Constitution should be declared unconstitutional and void.

Dated this 12th day of January, 2009.

Respectfully submitted:

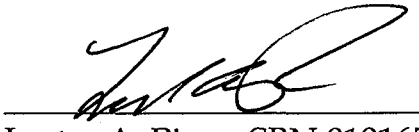
CULLEN WESTON PINES & BACH LLP

By: _____

Lester A. Pines, SBN 1016543
Attorneys for Plaintiff-Appellant-
Cross-Respondent

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 1,867 words.



Lester A. Pines, SBN 01016543

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.

RESPONSE BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

CULLEN WESTON PINES & BACH LLP

Attorneys for Plaintiff-Appellant-
Cross-Respondent
Lester A. Pines, SBN 1016543
122 W. Washington Avenue, Suite 900
Madison, Wisconsin 53703
Telephone: (608) 251-0101

Dated: January 12, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. WILLIAM McCONKEY HAS STANDING TO CHALLENGE THE LEGISLATURE'S COMPLIANCE WITH THE REQUIREMENTS OF ARTICLE XII, SECTION 1 OF THE WISCONSIN CONSTITUTION.

A. William McConkey Suffered Injury To His Legally Protected Right To Vote As A Direct Result Of The Failure Of The Legislature To Comply With Article XII, Section 1 Of The Wisconsin Constitution.

To satisfy the standing requirement in Wisconsin, a plaintiff must allege that the action at issue directly caused injury to a legally protected interest of the plaintiff. *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs.*, 130 Wis. 2d 56, 65, 387 N.W.2d 245, 248-49 (1986); *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243, 248 (1975). The law of standing is construed liberally, and even a "trifling interest" may be sufficient where actual injury is demonstrated. *Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 64, 387 N.W.2d at 248; *Fox v. Wis. Dep't of Health*

and Soc. Servs., 112 Wis.2d 514, 524, 334 N.W.2d 532, 537 (1983).

A citizen's right to vote without arbitrary impairment by the state has been judicially recognized as a legally protected interest. *Baker v. Carr*, 369 U.S. 186, 208 (1962). A court need not decide whether a plaintiff challenging state action relating to voting rights will ultimately prevail in order to find that the plaintiff has standing. *Id.* Instead, an action to protect a citizen's right to vote is sufficient to establish standing because the plaintiff is asserting a direct and adequate interest in maintaining the effectiveness of his vote. *Id.*

Here, William McConkey ("McConkey") suffered injury to his legally protected right to vote where the Legislature submitted to voters two proposed constitutional amendments

a majority of "no" votes. Thus, McConkey's position on one or both questions could have succeeded.

The ultimate outcome if the constitutional amendment had been properly presented as two distinct amendments is not at issue for purposes of the standing argument, and McConkey need not prove that the outcome would have been different in order to satisfy standing requirements. It is unnecessary to decide whether a plaintiff's allegations of impairment of his vote will ultimately entitle him to relief in order to find that the plaintiff has standing. *Baker*, 369 U.S. at 208. Instead, as the preceding discussion demonstrates, if the amendments had been properly presented to the voters, the outcome could have been different. The effectiveness of McConkey's vote was directly imperiled, if not impaired, by the failure of the Legislature to comply with Article XII,

Section 1 of the Wisconsin Constitution. That alone is sufficient to establish standing.

B. The Attorney General Fails To Substantiate Or Support Its Narrow Interpretation And Application Of Wisconsin Law On Standing.

The Attorney General argues that because McConkey would have voted "no" on both questions if the two amendments had been presented separately, he was not harmed by the presentation of both amendments as one ballot measure. (Brief of Cross-Appellant at 4). However, the Attorney General's position is narrow and reflects a failure to consider the very real and substantial effect on the effectiveness of McConkey's vote caused by the Legislature's failure to comply with the Wisconsin Constitution. The Attorney General argues that how other voters may have voted is immaterial because, in his narrow view, only

McConkey's inability to vote as he wished would establish a direct and personal injury. (Brief of Cross-Appellant at 6).

The Attorney General misses the point. The injury to McConkey is not that he was unable to vote as he would have if the constitutional amendments had been properly presented as two separate questions; instead, the injury to McConkey is to the *effectiveness* of his vote—a legally protected interest recognized by the United States Supreme Court in *Baker v. Carr*.

The Attorney General first asserts that a voter is treated in the same manner as a taxpayer for purposes of standing, and thus a voter, like a taxpayer, must allege an injury different than that sustained by the general public. (Brief of Cross-Appellant at 5). However, the Attorney General does not provide the court with any application of this principle by Wisconsin courts; in fact, the only case cited by the Attorney

General is from a Tennessee state appellate court. The Attorney General has presented no mandatory authority requiring a court in this state to treat a voter the same as a taxpayer and require the plaintiff to allege an injury different than that sustained by the general public. Therefore, this assertion should be rejected.

Even if the court adopts the Tennessee position asserted by the Attorney General, McConkey has satisfied the standard for taxpayer standing established by the Wisconsin Supreme Court, *see City of Appleton v. Town of Menasha*, 142 Wis.2d 870, 419 N.W.2d 249 (1988), because a taxpayer standing if the taxpayer alleges even a slight injury.

> [C]ourts are disposed toward granting standing to individual taxpayers seeking to challenge the constitutionality of statutes relating to governmental powers that affect them as individuals. . . . [U]nless a taxpayer has standing to make the challenge in state courts, no one else would be able to do so. . . . [I]f an injured taxpayer is denied standing to challenge the constitutionality of a statute, the legislature could

> violate the constitutional limitations of its powers . . . with impunity.

142 Wis.2d at 878; 419 N.W.2d at 252.

"The fact that the ultimate pecuniary loss to the individual taxpayer may be almost infinitesimal is not controlling." 142 Wis.2d at 879-80; 419 N.W.2d at 253. "[A] taxpayer has standing to challenge the constitutionality of a statute on behalf of himself and all similarly situated taxpayers if he has a direct and personal pecuniary interest in the litigation." 142 Wis.2d at 883; 419 N.W.2d at 254.

That standard is easily satisfied here, where McConkey suffered a direct and personal injury to the effectiveness of his vote. The fact that thousands of other individuals who also voted on the amendment share the same interest is immaterial; it is sufficient that McConkey is challenging the constitutionality of state action "on behalf of himself and all

similarly situated taxpayers" and he has a direct and personal interest in protecting the effectiveness of his vote.

The Attorney General next asserts that McConkey is similar to the plaintiffs in *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), a case in which the court rejected the plaintiffs' challenge to Tennessee's marriage amendment. (Brief of Cross-Appellant at 6). However, the only similarity between McConkey and the plaintiffs in *Darnell* is that both challenged a marriage amendment. *Darnell* is completely inapposite here.[2]

In *Darnell*, the plaintiffs challenged a constitutional amendment where the state legislature failed to follow constitutional publication requirements. 195 S.W.3d at 622. The court found that the plaintiffs lacked standing because the purpose of the publication requirement was to give notice of

[2] Furthermore, *Darnell* is a decision by a foreign state court which is not mandatory authority in this court.

the proposed amendment to voters; the plaintiff-voters had learned of the amendment through other means, and had thus received notice, so they suffered no injury protected by the constitutional provision. *Id.*

On the contrary, in this case, as the Attorney General admits, "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. 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." (Brief of Cross-Appellant at 8). While McConkey was effectively able to vote "no" on both amendments, he was injured through the diminishment in the effectiveness of his vote because others who desired to vote "yes" on one amendment and "no" on another were deprived of that opportunity, thus possibly

reducing the number of "no" votes for one or both amendments. That was not the situation in *Darnell,* where the plaintiffs still received notice of the proposed amendment; McConkey's "no" vote did not carry the same weight as it would have if others had been able to vote "yes" on one amendment and "no" on the other. Accordingly, his legally protected interest in voting was directly injured through the failure of the Legislature to comply with the Wisconsin Constitution.

In the most recent case interpreting Article XII, Section 1 of the Wisconsin Constitution, *Milwaukee Alliance Against Racist and Political Repression v. Elections Board of the State of Wisconsin,* 106 Wis. 2d 953, 317 N.W.2d 420 (1982), the plaintiff, a political organization—not a voter, had standing to challenge an alleged improperly submitted mixed constitutional amendment under Article XII, Section 1.

Accordingly, there is not a doubt that McConkey, an individual who actually voted has standing to make such a claim.

Judge Niess was correct when he said:

> . . . I agree that standing is to be liberally construed. I believe that, absent the guidance of Supreme Court precedent precisely on point, I have to kind of reach out and look at the policy reasons behind standing. Here 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.
>
> But I don't believe that we need to distinguish one voter from another, and the reason for that is that voting is the bedrock, the very lifeblood of the democracy that we live in, and it needs to be protected above all, I think, and if we do not have a completely open and constitutionally valid voting process, then it sets all kinds of potential harms in play.
>
> And so this isn't just a trifling interest because he could have voted no - - because he voted no or would have voted no on both of them. Every voter is entitled to a constitutionally, procedurally valid amendment and is harmed, has a civil right violated when that does not occur.

(R. 55, pp. 27-28)

II. CONCLUSION.

The Court should affirm the decision of the circuit court on the standing issue.

Dated this 12th day of January, 2009.

Respectfully submitted:

CULLEN WESTON PINES & BACH LLP

By: _____

Lester A. Pines, SBN 1016543
Attorneys for Plaintiff-Appellant-
Cross-Respondent

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 1,853 words.

Lester A. Pines, SBN 01016543