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

REPLY BRIEF OF CROSS-APPELLANT

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The Cross-Appellant, Attorney General J.B. Van Hollen, hereby submits his reply brief in the above captioned action.

ARGUMENT

I. MCCONKEY CANNOT OBTAIN STANDING AS A REPRESENTATIVE OF OTHER VOTERS.

As an example of how he believes a violation of Wis. Const. Art. XII, section 1 would impair a voter's rights, McConkey writes that "[a] voter intending to vote 'yes' on the first question and 'no' on the second question, or vice versa, was denied that opportunity." (Response Brief of Plaintiff-Appellant-Cross-Respondent William C. McConkey, hereinafter "Resp. Br.," at 3). However, by his own admission, McConkey was not such a voter: he acknowledged he would have voted no on each question if they had been presented separately.

McConkey's response brief on the cross-appeal consists mainly of an effort to link himself to *other* voters: those who, unlike McConkey, would have voted differently on each proposition were they presented as separate questions. McConkey strains to explain how the effect of an alleged violation of the single-subject rule impaired his own vote *via* its effect on the votes of others. It is not always clear how this effect is supposed to have occurred, but McConkey has come very close to saying, if he has not actually done so, that he has standing to sue because other voters may have been injured. That is not Wisconsin law.

McConkey argues that the vote count may have been skewed by the inclusion of both propositions in the same ballot question, and as such, "McConkey's position on one or both

questions could have succeeded." (Resp. Br. at 4). But whether the overall vote count might have been different if the two propositions had been presented separately is not the proper question to ask when evaluating McConkey's standing. The question is whether McConkey himself, as a voter in the November 2006 referendum, was directly and actually injured. What matters is whether McConkey's own vote was impaired, not whether his "position" on the issues could have prevailed had the alleged procedural error not occurred.

If McConkey's argument here were correct, then a person could have standing without even having voted on the referendum, based on an allegation that, but for the alleged error, her "position" on the issues might have succeeded. "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury." *Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

McConkey notes correctly that he "need not prove that the outcome would have been different in order to satisfy standing requirements," and that the merits of his legal claim do not factor into the analysis of his standing. (*See* Resp. Br. at 4). But then McConkey falls into the very analytical trap he warns against when he writes that the Court should *consider* that "if the amendments had been properly presented to the voters, the outcome could have been different." (*Id.*) McConkey links the outcome of the referendum to "the effectiveness" of his own vote.

McConkey cites no authority for his claim that the Court should consider, as a factor tending

to support his standing, the possibility that the outcome of the vote could have been different were the two referendum propositions presented separately. Attorney General J.B. Van Hollen has found no such authority. Moreover, it would make little sense to treat this as a factor, because it would always point in one direction. As a matter of logic, were any ballot question changed in some way, the voting *could have* been different. If the very same ballot were presented again, the vote might be different. Such abstractions should not alter the legal requirements for standing.

Throughout his brief, McConkey speaks of the "very real and substantial effect on the effectiveness of McConkey's vote caused by the Legislature's failure to comply with [the single-subject rule]," *see* Resp. Br. at 5, but he never explains just what this effect was. McConkey tries to distinguish the way a voter votes (in this context, "yes" or "no") from "the effectiveness" of that vote, but the distinction is obscure.

McConkey's use of the term "effectiveness" is, in fact, a rhetorical transformation of his claim to have standing because as a representative of other voters who would have voted differently than he did. This becomes clear when McConkey writes,

> 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.

(Resp. Br. at 10-11).

McConkey does not explain how the "effectiveness" of his vote (as opposed to his wishes for the outcome of the election) depends on the way other people voted. McConkey suggests that his "'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," Resp. Br. at 10, but votes were not "weighted" in the November 2006 referendum. McConkey is basically suggesting that his vote counted less because more people voted on the (combined) referendum question than might have voted on either proposition had the two propositions been separated. McConkey's argument rests on the false premise that the more votes are cast, the less his vote counts.

Having attempted to ground his standing upon the preferences of other voters, McConkey then compares his situation with that of the plaintiff in *Milwaukee Alliance*, Resp. Br. at 11-12, but the comparison is inappropriate. McConkey suggests that because the plaintiff in *Milwaukee Alliance* was an organization that could not vote, rather than an individual voter who did vote, it follows that McConkey, an individual who cast a ballot, must have standing. (Resp. Br. at 11).

The problem with this position is two-fold. First, the issue of standing was not raised or ruled upon in *Milwaukee Alliance*; whether the organization could have survived a challenge to its standing is unknown. Second, had the issue been raised in *Milwaukee Alliance*, the plaintiff might have established standing under what this Court refers to as the "association standing rule." *See Metropolitan Builders Ass'n v. Village of Germantown*, 2005 WI App 103, ¶ 1, 282 Wis. 2d 458, 698 N.W.2d 301 (citing *Wisconsin's Environmental*

Decade, Inc. v. PSC, 69 Wis. 2d 1, 230 N.W.2d 243 (1975)).

McConkey, however, cannot rely on the association standing rule. He has sued for himself and himself alone; he does not represent other voters. Whether other voters in this state might have had standing to litigate compliance with the single subject rule is a question that the Court need not, indeed should not, consider; McConkey conceded the facts that conclusively establish that he lacks standing.

CONCLUSION

McConkey has failed to show that he personally suffered a real and direct, actual injury resulting from the presentation of the marriage amendment in the form it was presented. He lacks standing to litigate the ballot's compliance with Article XII, section 1 of the Wisconsin Constitution, and the circuit court's partial denial of Attorney General J.B. Van Hollen's motion to dismiss should be reversed.

Dated this 27th day of January, 2009.

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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 1,364 words.

Dated this 27th day of January, 2009.

LEWIS W. BEILIN
Assistant Attorney General