STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT IV

CASE NO. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

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 DANE COUNTY CIRCUIT COURT,
THE HONORABLE RICHARD NIESS PRESIDING

BRIEF OF *AMICUS CURIAE* WISCONSIN FAMILY COUNCIL IN SUPPORT OF DEFENDANT-RESPONDENT-CROSS-APPELLANT J.B. VAN HOLLEN

Amy M. Salberg
State Bar No. 1025449
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street
Suite 1900
Milwaukee, Wisconsin 53202
Tel: (414) 978-5502

Brian W. Raum+
Austin R. Nimocks*
James A. Campbell*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
Tel: (480) 444-0020

+Of counsel, not admitted in this jurisdiction
*Admitted *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WISCONSIN CASES

OTHER STATE CASES

FEDERAL CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

INTRODUCTION

William C. McConkey ("McConkey") brought this legal challenge against the Wisconsin Marriage Amendment ("Marriage Amendment" or "Amendment"). That constitutional provision, which was approved in November 2006 by 59% of Wisconsin voters, states:

> 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.

WIS. CONST. art. XIII, § 13. McConkey asserts what is known as a single-amendment or single-subject procedural challenge, contending that the Marriage Amendment violates Article XII, Section 1 of the State Constitution because its provisions serve distinct and separate purposes not dependent upon or connected with each other. This claim, finding no support in either Wisconsin law or in the law of other states, should be rejected by this Court.

INTEREST OF AMICUS

Amicus Curiae Wisconsin Family Council ("WFC" or "*Amicus*") was founded in 1986 to educate the public and encourage the legislature to affirm Judeo-Christian principles and values in the areas of marriage, family, and religious liberty. To further its mission, WFC was directly involved in the enactment of the Marriage Amendment challenged in this case. Initially, WFC worked closely with state legislators to place the Amendment on the ballot. Then, once the legislators submitted the Amendment to the people, WFC worked tirelessly educating the public about the Amendment and advocating for its enactment. Given its extensive involvement, WFC has a heightened interest in ensuring that the Marriage Amendment, which it worked so hard to enact, is not improperly invalidated. Moreover, WFC's first-hand knowledge about the purpose of and the procedure surrounding the Amendment will benefit the Court in resolving the questions presented in this case.

ARGUMENT

I. MCCONKEY LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE MARRIAGE AMENDMENT UNDER ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION.

The Circuit Court incorrectly concluded that McConkey had standing to challenge the constitutionality of the Marriage Amendment. Van Hollen's brief succinctly and persuasively addresses the standing question. Thus, rather than rehash the eloquent arguments expounded therein, *Amicus* joins and supports Van Hollen's arguments.

Amicus nevertheless wishes to emphasize one point about the standing question. The Circuit Court found that "[e]very voter is entitled to a constitutionally, procedurally valid amendment and is harmed . . . when that does not occur." *See* Van Hollen App'x at 6. In effect, the Circuit Court reasoned that all voters have standing to challenge the procedural propriety of all constitutional amendments. This reasoning eradicates conventional standing analysis in the context of voting, *see Mast v. Olsen*, 89 Wis. 2d 12, 16

(1979), thus permitting any voter to assert a procedural challenge to any constitutional amendment. That result conflicts sharply with precedent on standing.

Neither federal nor Wisconsin law permits standing, as the Circuit Court has, based solely on a litigant's status as voter. Instead, voters have standing only to the extent they allege facts showing a particular "disadvantage to themselves as individual[] [voters]." *Baker v. Carr*, 369 U.S. 186, 206 (1962). As demonstrated in Van Hollen's brief, McConkey has failed to show that he suffered a particularized injury. That requirement does not evaporate simply because McConkey's claim arises in the voting context. Affirming McConkey's standing would greatly expand the doctrine of standing, permitting any disgruntled voter to bring procedural challenges to any amendment he substantively dislikes.

Therefore, this Court should reverse the Circuit Court's finding that McConkey has standing to bring this procedural challenge to the Marriage Amendment.

II. THE MARRIAGE AMENDMENT DOES NOT VIOLATE ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION.

Article XII, Section 1 of the Wisconsin Constitution states, in pertinent part, that "if more than one amendment be submitted [to the voters], they shall be submitted in such manner that the people may vote for or against such amendments separately." WIS. CONST. art. XII, § 1. The enactment of a constitutional provision violates Article XII, Section 1 only where the newly enacted provision contains more than one "amendment."

A. The Provisions Of The Marriage Amendment Constitute A Single Amendment.

A single amendment may include "several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject." *State ex rel. Hudd v. Timme*, 54 Wis. 318, 339 (1882); *see also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 655 (1953). "In order to constitute more than one amendment, 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." *Hudd*, 54 Wis. at 336.

"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." *Milwaukee Alliance Against Racist and Political Repression v. Elec. Bd. of Wisconsin*, 106 Wis. 2d 593, 604-05 (1982). The legislature is "not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose." *Hudd*, 54 Wis. at 337. Instead, the legislature may bundle multiple propositions in one amendment so long as they all relate to the same subject and further the same "general object or purpose." *Milwaukee Alliance*, 106 Wis. 2d at 607.

The Marriage Amendment is composed of only two short sentences, containing a mere forty-three words. The first sentence, *i.e.*, the definitional provision, relates directly to the second sentence, *i.e.*, the imitation provision,

and these inextricably intertwined provisions together constitute just one amendment. Both provisions address the subject of marriage: the definitional provision defines marriage, and the imitation provision prohibits marriage counterfeits. Both provisions further the same general purpose: to preserve the unique institution of marriage as the union of one man and one woman. The definitional provision achieves that goal by defining marriage in Wisconsin as the union of one man and one woman. The imitation provision effectuates that purpose by preventing the indirect reconfiguration or imitation of marriage. In short, the Amendment protects the institution of marriage from redefinition or restructuring, by either direct or indirect means.

In putting forth his analysis, McConkey first attempts to distort the Marriage Amendment's purpose. By focusing on only one statement in 2005 Senate Joint Resolution 53, McConkey tries to limit the purpose of the Marriage Amendment to merely identifying the persons "who may

marry." Brief at 27. *Amicus*, however, as a first-hand participant in the enactment of the Amendment, strenuously refutes McConkey's narrow characterization of the Amendment's purpose. As Van Hollen's brief demonstrates and the Circuit Court found, the general purpose of the Marriage Amendment is much broader: to preserve and protect the unique institution of marriage. The Court should thus reject McConkey's self-serving characterization of the Amendment's purpose.

McConkey then distorts the governing legal analysis, contending that the provisions of an amendment must be so "interrelated" that "the defeat of one question would destroy the overall purpose of the . . . proposal." *See* Brief at 14. While the Supreme Court has found that such a close relationship between provisions clearly satisfies the single-amendment rule, *see Milwaukee Alliance*, 106 Wis. 2d at 607, the Court has never required that the relationship be extremely close. In fact, the Court has denied a single-amendment challenge where one of the

provisions was "less intimately and necessarily connected" to the other provisions and the overall purpose. *See Hudd*, 54 Wis. at 336-37. Thus, this Court should refuse McConkey's attempt to erect a stringent legal requirement not supported by precedent.

Nevertheless, McConkey's more rigorous standard, while not legally mandated, is satisfied here, because the enactment of the definitional provision without the imitation provision would "destroy the overall purpose" of the Amendment. As stated, the purpose of the Amendment is to preserve the unique institution of marriage. The two-sentence Amendment recognizes that "marriage-by-another-name" relationships—such as civil unions or domestic partnerships—undercut the institution of marriage by offering simulated alternatives. While the term "marriage" is preserved by the first sentence of the Amendment, without the second provision, this protection would be merely grammatical because the institution itself would be susceptible to change and restructuring through

imitation unions.[1] A marriage amendment without the imitation provision would be an insufficient protection of society's most-important institution.

B. Wisconsin Supreme Court Precedent Demonstrates That The Enactment Of The Marriage Amendment Did Not Violate Article XII, Section 1.

Wisconsin law demonstrates that the enactment of the Amendment did not violate Article XII, Section 1. The Supreme Court has broadly defined the term "amendment," *see Milwaukee Alliance*, 106 Wis. 2d at 607; *Thomson*, 264 Wis. at 655; *Hudd*, 54 Wis. at 339, expansively interpreted the "general object or purpose" of challenged amendments, *see Milwaukee Alliance*, 106 Wis. 2d at 608, and consistently accepted tenuous connections between an amendment's provisions and its general

[1] For example, a legislature could duplicate the concept of marriage, give it a new name like a "civil union," and offer that replica institution to whomever it chooses. *See* VT. STAT. ANN. Tit. 15, § 1204(a) ("Parties to a civil union shall have all the same benefits . . . as are granted to spouses in a marriage."). Or a court, as a judicial remedy, may force the legislature to create some type of imitation marital structure. *See Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006) (requiring the legislature, among other options, to "create a separate statutory structure [of marital unions], such as a civil union").

purpose, *see Hudd*, 54 Wis. at 36-38. Applying these principles, the Supreme Court has repeatedly rejected single-amendment claims, finding only one violation throughout this State's long history.

The first case addressing a single-amendment challenge in Wisconsin was *Hudd*, 54 Wis. at 318. In that case, the Supreme Court considered whether the enactment of a constitutional amendment changing the legislative sessions from an annual to a biennial term violated Article XII, Section 1. That amendment included four separate provisions, one of which increased the legislators' salaries.

The *Hudd* Court found that, despite the joining of these four distinct provisions, a single-amendment violation had not occurred. The Court reasoned that "the whole scope and purpose of the matter submitted to the electors . . . was the change from annual to biennial sessions of the legislature." *Id.* at 336. The Court concluded that all four provisions furthered that general

purpose, specifically reasoning that the salary provision, while "perhaps[] less intimately and necessarily connected with the change to biennial sessions," was nevertheless connected with the amendment's overall purpose. *Id.* at 336-37. *Hudd* demonstrates that the Supreme Court will accept even a tenuous connection between an amendment's individual provisions and its general purpose. Here, however, the connection is direct: the imitation provision is clearly connected to—and, in fact, is an integral part of—the Marriage Amendment's purpose of preserving and protecting marriage as a unique institution.

Milwaukee Alliance, 106 Wis. 2d at 604-05, involved an amendment creating a "conditional release" system for those accused of crimes. The amendment included five substantive provisions, involving distinct issues ranging from conditions of release to post-arrest hearings. *Id.* at 600-01.

The Court found that this expansive amendment did not violate Article XII, Section 1. In doing so, the Court

broadly defined the purpose of the amendment and concluded that its provisions were "integral and related aspects of the amendment's total purpose of adopting the concept of conditional release." *Id.* at 608. Likewise, in the present case, both the definitional provision and the imitation provision constitute "integral and related aspects" of the Marriage Amendment's purpose of preserving the unique institution of marriage as the union of one man and one woman.

Thomson, 264 Wis. at 654-57, is the only case where the Supreme Court has found a single-amendment violation. That case involved a constitutional amendment authorizing the legislature to consider physical area, in addition to population, when drafting senatorial voting districts. The single-amendment violation occurred because the challenged amendment implemented two other unrelated, substantive changes in the law. *Id.* at 654. First, a provision changing the boundaries of assembly (rather than senate) districts "ha[d] no bearing on the main

purpose of the proposed amendment . . . , nor [did] it tend to effect or carry out that purpose." *Id.* at 656. Second, a provision adding Native-Americans to the population calculation was "not a detail of a main purpose to consider area in senate districts[,] but [was] a separate matter [that] must be submitted as a separate amendment." *Id.* at 657. For those reasons, the Court found a single-amendment violation pursuant to Article XII, Section 1.

Contrary to McConkey's suggestions, the redistricting amendment in *Thomson* is unlike the Marriage Amendment at issue here. Even though the purpose of the amendment in *Thomson* was merely to "direct[] the legislature to take area as well as population into account in apportioning the senate districts," *id.* at 656, that amendment made "drastic, revolutionary" changes in the assembly-district boundaries and population computations, *id.* at 656-57. Thus, the *Thomson* amendment significantly impacted topics unrelated to its purpose. In contrast, the Marriage Amendment's purpose

is to protect the unique institution of marriage. The definitional provision prevents the redefinition of marriage, and the imitation provision prevents the restructuring of marriage through indirect means. Unlike in *Thomson*, both provisions of the Marriage Amendment further its overall purpose.

In short, both provisions of the Marriage Amendment relate to the same subject and further the same purpose; thus, they together constitute one amendment whose enactment did not violate Article XII, Section 1.

III. EVERY STATE SUPREME COURT ADDRESSING A SIMILAR SINGLE-AMENDMENT CHALLENGE TO A MARRIAGE AMENDMENT HAS REJECTED SUCH A CLAIM.

Five state supreme courts have rejected legal challenges similar to the single-amendment challenge raised here. Each court found that the purpose of the challenged marriage amendment was to preserve marriage and its unique status, although each articulated that purpose in slightly different ways. And, most importantly,

each court agreed that its marriage amendment did not violate single-amendment principles.[2]

The Massachusetts Supreme Judicial Court found that a proposed marriage amendment did not violate the single-amendment rule. *See Albano v. Attorney General*, 769 N.E.2d 1242, 1247 (Mass. 2002). The broadly worded amendment proposed in Massachusetts, which was far more intricate than the Wisconsin Amendment, contained both a definitional provision and an imitation provision (in addition to many others). *See id.* at 1245 n.4. An amendment does not violate Massachusetts' single-

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[2] A Kentucky trial court also addressed this question in an unpublished decision. *See Wood v. Commonwealth ex rel. Grayson*, No. Civ.A. 04-CI-01537, 2005 WL 1258921, at *5-8 (Ky. Cir. Ct. May 26, 2005). The Kentucky marriage amendment is identical to the Wisconsin Marriage Amendment at issue here. *See* KY. CONST. § 233A. In rejecting that single-amendment challenge, the Kentucky court concluded:

> It cannot be said that the second clause of the amendment pertaining to [a] legal status "identical to or similar to marriage for unmarried individuals" [i.e., the imitation provision] is so foreign that it has no bearing upon a constitutional definition of marriage. Nor can this [c]ourt conclude that the two clauses of the amendment at issue are essentially unrelated to one another.

Wood, 2005 WL 1258921, at *7. This Court should likewise conclude that the two provisions of the Wisconsin Marriage Amendment are sufficiently related to qualify as a single amendment.

amendment rule "[so] long as the provisions of the [amendment] are related by a common purpose." *Id.* at 1247. The Massachusetts Supreme Judicial Court found that the entire proposed amendment "relate[d] to the common purpose of restricting the benefits and incidents of marriage to opposite-sex couples." *Id.* at 1247. The court thus held that the proposed marriage amendment did not violate the single-amendment rule.

The Louisiana Supreme Court similarly held that the Louisiana marriage amendment did not violate its state's single-amendment rule. *See Forum for Equality PAC v. McKeithen*, 893 So. 2d 715, 729-37 (La. 2005). That state's lengthy amendment includes both a definitional provision and an imitation provision (in addition to a few other provisions). *Id.* at 717. Louisiana law provides that multiple provisions "may be submitted as one amendment" so long as all the provisions "may be logically viewed as parts of a single plan." *Id.* at 732. The Louisiana Supreme Court determined that its marriage

amendment "contain[ed] a single plan to defend [the] civil tradition of marriage" and that "each provision [therein] constitute[d] an element of [that] plan." *Id.* at 736. The court thus rejected the single-amendment challenge.

The Florida Supreme Court also rejected a single-amendment challenge to its state's proposed marriage amendment. *See Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233-35 (Fla. 2006). The proposed Florida amendment contained nearly identical language to that found in the Wisconsin Amendment. *See id.* at 1232. Florida law provides that multiple provisions of a proposed amendment must "be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Id.* at 1234. The court determined that the single plan of the proposed marriage amendment was "the restriction of the exclusive rights and obligations traditionally associated with marriage to legal unions consisting of one man and one woman as husband

and wife." *Id.* (quotations omitted). The court thus held that this common plan satisfied the requirements of the single-amendment rule. *Id.*

The Georgia Supreme Court also affirmed its marriage amendment against a single-amendment challenge. *See Perdue v. O'Kelley*, 632 S.E.2d 110, 113 (Ga. 2006). That state's extensive marriage amendment contains both a definitional and imitation provision (in addition to many other provisions). *See* GA. CONST. art. 1, § 4, ¶ 1. In Georgia, "whether . . . a constitutional amendment violates the multiple subject matter rule [depends on] whether all . . . parts of the . . . constitutional amendment are germane to the accomplishment of a single objective." *Perdue*, 632 S.E.2d at 112. The Georgia Supreme Court determined that the amendment's purpose was to "reserv[e] marriage and its attendant benefits to unions of man and woman," and held that all the provisions were logically related to that purpose and, thus, did not violate the multiple-subject rule. *Id.* at 113.

The Arizona Supreme Court likewise rejected a single-amendment challenge to a proposed marriage amendment. *See Arizona Together v. Brewer*, 149 P.3d 742, 749 (Az. 2007). The amendment at issue in that case was nearly identical to the Wisconsin Amendment. *See id.* at 744 n.2. Arizona's single-amendment rule requires that provisions of a proposed amendment be "sufficiently related to a common purpose or principle that the proposal can be said to constitute a consistent and workable whole on the general topic embraced[.]" *Id.* at 745 (quotations and alterations omitted). The Arizona Supreme Court determined that the common purpose of the proposed amendment was "to preserve and protect marriage" and that the provisions related directly to that purpose. *Id.* Thus, the court concluded that the proposed marriage amendment satisfied the single-amendment rule.

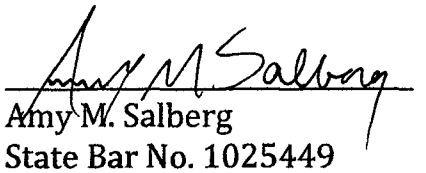
CONCLUSION

For the foregoing reasons, the enactment of the Wisconsin Marriage Amendment did not violate the single-

amendment requirement in Article XII, Section 1 of the State Constitution.

Dated: December 19, 2008

Respectfully submitted,



Amy M. Salberg
State Bar No. 1025449
WHYTE HIRSCHBOECK DUDEK S.C.
Attorneys for Wisconsin Family Council
555 East Wells Street
Suite 1900
Milwaukee, Wisconsin 53202
Tel: (414) 978-5502

Brian W. Raum+
Austin R. Nimocks*
James A. Campbell*
ALLIANCE DEFENSE FUND
Attorneys for Wisconsin Family Council
15100 N. 90th Street
Scottsdale, AZ 85260
Tel: (480) 444-0020

+Of counsel, not admitted in this jurisdiction
*Admitted *pro hac vice*

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c) for a brief produced with proportional serif font. The length of the brief is 2,998 words, as calculated by the word-count feature in Microsoft Word.

Amy M. Salberg
State Bar No. 1025449