STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY
BRANCH 8

WISCONSIN JUSTICE INITIATIVE, INC.

Et. al,

CASE NO. 19-CV-3485

Plaintiffs,

v.

WISCONSIN ELECTIONS COMMISSION

Et. al,

Defendants.

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

INTRODUCTION

Plaintiffs Wisconsin Justice Initiative, Inc., Jacqueline E. Boynton, Jerome F. Buting, Craig R. Johnson, and Fred A. Risser, by their counsel, have moved this Court pursuant to Wis. Stats. §806.04(1), for a declaratory judgment that amendments to the Wisconsin Constitution regarding "Additional rights of crime victims," which were presented to voters in Ballot Question 1 on the April 7, 2020 statewide election ballots were not validly enacted because the Question failed to meet the requirements of the Constitution, and for a permanent injunction pursuant to Wis. Stats. §813.01 prohibiting the implementation or enforcement of the amendments.[1] The amendments, which provide certain constitutional rights to crime victims, are informally known as "Marsy's Law," and were the brainchild and personal cause of billionaire and now convicted drug felon Henry Nicholas III. The Ballot Question read as follows:

[1] Plaintiffs request the court to take judicial notice that the result of the vote on the ballot question in the April 7 election was to approve the proposeed amendments.

> QUESTION 1: "Additional rights of crime victims. Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?"

The recent amendments are deceptively sweeping. The simple ballot question masked a complicated bill twice as long as the U.S. Bill of Rights. The amendments add to the Constitution 16 new or expanded "victims' rights" in criminal cases, create new constitutional categories of "victims," and add duties and requirements for already overburdened law enforcement, state prosecutors, the courts and the state prison system. They strike from our state Constitution the only reference within it to the right to a "fair trial for the defendant," and do away with a defendant's constitutional right to have an alleged victim witness sequestered from a portion of the trial to protect that fair trial right. They also provide alleged victims the right to seek enforcement of victims' rights (including rights provided under these victims' rights provisions or under any other law) in any circuit court or any other authority of competent jurisdiction. The amendments provide: "The court or other authority with jurisdiction over the case shall act promptly on such a request and afford a remedy for the violation of any right of the victim." Any other party or entity in a case in Wisconsin can only request the Wisconsin Supreme Court to consider exercising its discretionary jurisdiction, which is granted only rarely. These amendments uniquely entitle alleged victims to mandatorily invoke the Wisconsin Supreme Court's jurisdiction, since they require that as an authority of competent jurisdiction the Court "shall act promptly and afford a remedy for the violation of any right of the victim. (Emphasis added)"

Question 1 informs the public that it amends the Constitution to give crime victims additional rights, but it fails to inform the voting public 1) regarding the nature of those

expanded constitutional rights; 2) that the amendments also expand the constitutional definition of crime victim; 3) that the amendments strike from the Wisconsin Constitution language protecting a defendant's right to have a witness who is a victim sequestered from a portion of a trial when "the trial court finds sequestration necessary to a fair trial for the defendant;" 4) that they strike from the Constitution its only reference to the right to a "fair trial for the defendant;" 5) that they alter any rights of the accused under the Wisconsin Constitution; 6) that they alter any rights and protections provided to the accused by state or federal statutes; and 7) that they dramatically and uniquely alter the nature of the Wisconsin Supreme Court's jurisdiction for alleged victims.

In addition to failing to fully inform voters of the essential elements of the proposed amendments, Question 1 states that the amendment will "require that the rights of crime victims be protected with equal force to the protections afforded the accused." Doc 9, p 22. However, the actual language of the amendments does not provide for equal protection or equal force – it requires that all of the rights of victims shall "be protected by law in a manner no less vigorous than the protections afforded to the accused." Section 9m (2) (intro.) Doc 9, p. 20. "No less vigorous" does not mean "equal to" – it means "equal to or greater than." And by striking from the Constitution a defendant's right to have a victim sequestered when necessary for a fair trial, the amendments clearly, specifically, and explicitly protect an alleged victim's rights with greater force than the rights of the accused. In addition, while Question 1 states that the amendments leave "the federal constitutional rights of the accused intact," this misstates the actual language of the amendment and misleads the public.

Each of the above failures violates the requirements under established Wisconsin law that the ballot question regarding a proposed constitutional amendment provide a full and fair

summary of the proposed change to the Constitution and that it not mislead the public. In addition, the proposed changes to the Constitution represent more than one amendment, and thus, separate questions are required in order "that the people may vote for or against such amendments separately." Wis. Const. Article XII, section 1.

RESPONSES TO QUESTIONS RAISED BY THE COURT AT THE HEARING ON PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION

A number of questions regarding a challenge to the sufficiency of a ballot question regarding a proposed amendment to the Wisconsin Constitution were raised and discussed at the hearing in this case on plaintiffs' motion for a temporary injunction. Perhaps the most important is the issue of what burden of proof is required. The Wisconsin Supreme Court has answered that in *Milwaukee Alliance Against Racist and Political Repression v. Elections Bd. State of Wis.*, 106 Wis. 2d 593, 604, 317 N.W.2d 420, 425 (Wis. 1982), as follows:

> Judge Jones did refer to placing the burden on the Alliance and requiring proof beyond a reasonable doubt. The factual basis of the challenge in this case was agreed to, namely the language of the question as submitted to the electorate and the constitutional provision involved. Therefore, the issue before Judge Jones and in this court is an issue of law, and no burden should have been assessed to either litigant. (Emphasis added)

The presumption of constitutionality to be given a duly enacted statute was also discussed at the previous hearing. However, statutes passed by both houses of the legislature do not go into effect without the governor having the opportunity to accept or reject them. Wis. Const. Article V, Section 10. Here, the legislature proposed constitutional amendments and a ballot question which was submitted to the voters, with no role for the governor. Plaintiffs here are not challenging the constitutionality of a regularly enacted statute – they are asking this court to determine whether the constitutionally prescribed requirements have been followed for the process by which the legislature proposes constitutional amendments for ratification by the

voters. None of the Wisconsin cases setting forth tests for the sufficiency of a constitutional amendment ballot question states or even suggests that the legislature's ballot question must be presumed to be constitutionally sufficient. Instead, they explain 1) how to determine whether more than one amendment has been presented, which mandates more than one ballot question[2]; 2) require that the question reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment (the "every essential" test)[3]; and 3) require that the question must not contain misinformation – so anything mentioned on the ballot "must be mentioned in accord with the fact."[4] What is clear from the cases is that the more strict "every essential" test for ballot questions has not been adopted by the supreme court outside the context of constitutional amendments. *Metro. Milwaukee Ass'n of Commerce Inc. v. City of Milwaukee*, 2011 WI App 45 ¶24, 332 Wis. 2d 459, 482, 798 N.W.2d 287, 299 (Wis. App. 2011).[5]

This court inquired as to how many voters would have to be shown to be misled by a misstatement in the ballot question for its ratification by the voters to be invalid. The supreme court in *Ekern*, *supra*, 264 Wis. at 660, 60 N.W.2d at 423, made clear that <u>where misinformation is printed on the ballot received by every voter, there is no need to inquire further</u>:

> It does not lie in our mouths to say that that which the people think of sufficient importance to put in their constitution is in fact so unimportant that misinformation concerning it printed on the very ballot to be cast on the subject, may be disregarded. <u>If the subject is important enough to be mentioned on the</u>

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[2] *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W 785 (Wis. 1882); *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W. 416 (Wis. 1953); *McConkey v. Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W. 2d 855 (Wis. 2010); *Milwaukee Alliance Against Racist and Political Repression v. Elections Bd. of Wis.*, 106 Wis. 2d 593, 317 N.W.2d 420 (Wis. 1982).

[3] *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803 (Wis. 1925); *State ex rel. Thomson v. Zimmerman*, *supra*.

[4] *State ex rel. Ekern v. Zimmerman*, *supra*; *State ex rel. Thomson v. Zimmerman*, *supra*.

[5] Defendants thus erred in previously citing the efficacy of pre-election publication of a proposed municipal ordinance in *Metro. Milwaukee* to inform voters as having any bearing on the adequacy of a ballot question to meet the "every essential" requirement for a constitutional amendment. Moreover, the Type C Notice which is the <u>only</u> one to contain the text of the proposed amendment is not published until only shortly before election day. Many voters used absentee ballots submitted to election officials before the Type C was published, with particularly heavy early absentee ballot voting in this April's election, which occurred during the statewide coronavirus pandemic lockdown.

> ballot it is so important that it must be mentioned in accord with the fact. (Emphasis added)

The controlling role of the ballot question that is provided to every voter, and the impossibility of knowing how many voters read statutory election notices was highlighted by the supreme court in *State ex rel. Thomson v. Peoples State Bank*, 272 Wis. 614, 621-22, 76 N.W.2d 370, 374 (Wis. 1956), where the ballot question itself was accurate and proper, but an error appeared in the explanation of the amendment in a notice of the election:

> There is no way of knowing how many electors read the explanation, but it is inconceivable that as many as 45,000 electors would read it or that they were misled in their voting.
>
> . . .
>
> There is no claim that the question as submitted was improper in any respect. The ballot was what the electors came directly in contact with. They presumably read the question as it appeared thereon and it is natural to assume that the question on the ballot was controlling. Under the circumstances we cannot say that there was any doubt or confusion in the minds of the electors at the time of voting. Certainly a sufficient number could not have been misled to have changed the results. (Emphasis added)

QUESTION 1 IS LEGALLY INSUFFICIENT BECAUSE IT FAILS TO SATISFY THE "EVERY ESSENTIAL" ELEMENT TEST

Article 1, section 9m of the Wisconsin Constitution, the preexisting victims' rights section, was created by constitutional amendment in 1993. It states in part, "**This state shall treat crime victims, as defined by law**, with fairness, dignity and respect for their privacy." It goes on to require the state to ensure that crime victims have a variety of specified privileges and protections.

The new amendments include 16 categories of new or expanded constitutional rights for crime victims and alleged crime victims, which new or expanded rights do not exist in article 1, section 9m as it previously existed. In addition, a victim is entitled at any time to seek enforcement of each of these rights (and any other rights the victim may have under law) either

personally, by an attorney or by other lawful representative in any circuit court or other competent authority, which are required to act promptly on such request and to provide a remedy for any violation. Victims may obtain review of all adverse decisions concerning their rights as victims by filing petitions for supervisory writ in the court of appeals and supreme court. While stating that the amendment is not intended to afford party status in a proceeding to any victim, the constitutional rights which it guarantees amount to making a victim a party in all but name. And, with respect to mandatory exercise of the Supreme Court's jurisdiction, an alleged victim, while not named as a party, is given unique and greater rights than any party in any case in the state. Question 1 failed to inform voters of this dramatic change which the amendments make to the Wisconsin Supreme Court's jurisdiction.

These amendments also erode the core foundation of the criminal justice system: that a prosecution is between the state and an accused citizen who is presumed to be innocent until proven guilty, not a contest between two private citizens. Thus, the prosecutor's duty is not simply to be an advocate for convicting everyone accused of crime and obtaining the maximum possible sentence. Rather, as our Supreme Court has explained in *State v. Conger*, 2010 WI 56, ¶ 19, 325 Wis. 2d 664, 664, 797 N.W. 2d 341, 349:

> Indeed, the prosecutor's role has been called "'quasi-judicial' in the sense that it is his or her duty to administer justice rather than simply obtain convictions." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 28, 271 Wis. 2d 633, 681 N.W.2d 110.

The amendments give victims an undefined and unlimited right to privacy, which the state is required to protect by law "in a manner no less vigorous than the protections afforded to the accused." They create a constitutional right for victims to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused. They give victims a constitutional right to confer with the attorney for the government and to be

heard in any proceeding. They give numerous other constitutional rights to victims, including an unlimited right to seek court review of any adverse decision relating to those rights at each and every stage in the criminal justice system. While denying that it makes victims a "party" to any proceeding, the amendments effectively transform the criminal justice system into a three-way contest between 1) the prosecutor, whose duty under the law on behalf of the state is to obtain justice, not simply to obtain convictions in all cases; 2) the accused, who seeks to demonstrate his or her innocence and/or to present mitigation evidence relative to punishment and to advocate for appropriate punishment for an offense; and 3) alleged victim(s), who may be seeking justice or may be motivated by vengeance, revenge, a desire for money, or simple animosity for someone they rightly or wrongly believe committed a crime against them. Occasionally, a "victim" may even seek to harm someone they knowingly falsely accuse of a crime. Question 1 failed to inform the public that the amendments entail such a radical transformation of the state's criminal justice system.

The amendments also amend and expand the definition of crime victim to include many persons who were not previously considered crime victims under the Wisconsin Constitution. They do so in part by assigning the status of crime victim at the time of the person's "victimization," before there has been any determination that a crime has been committed. They also expand the constitutional definition of crime victim to include categories of representatives for victims who are deceased or physically or emotionally unable to exercise their rights, including in addition to a variety of relatives, any person who resided with a deceased victim at the time of death. This would include, among others, unrelated college roommates or apartment mates, and unrelated in-home caretakers if they were living in the deceased victim's home.

However, Question 1 does not mention, or even suggest, that the amendments expand the previous Wisconsin Constitution definition of crime victim.

In *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W. 2d 416, 423 (1953) (quoting *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 204 N.W. 803 (1925)), the Wisconsin Supreme Court addressed the consequences of putting a proposed constitutional amendment to the voters with an inadequate ballot question, and described the requirements for a valid amendment ballot question as follows:

> Had the Legislature in the present case prescribe[sic] the form of submission in a manner which would have failed to present the real question, or had they, by error or mistake, presented an entirely different question, no claim could be made that the proposed amendment would have been validly enacted. In other words, even if the form is prescribed by the Legislature, it must reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment. . . ."[T]he principal and essential criterion consists in a submission of a question or a form which has for its object and purpose an intelligent and comprehensive submission to the people, so that the latter may be fully informed on the subject upon which they are required to exercise a franchise." (Emphasis added)

The Court held the amendment had not been validly enacted because 1) it encompassed at least three unconnected subjects, necessitating as many ballot questions (allowing senate districts to be formed on the basis of area as well as population; including Indians and the military in the population to be counted; and changing which municipality boundaries could be used in forming assembly districts), and also because 2) the question misstated what lines would be used in forming senate districts under the amendment. The Court stated at p. 660:

> It does not lie in our mouths to say that that which the people think of sufficient importance to put in their constitution is in fact so unimportant that misinformation concerning it printed on the very ballot to be cast on the subject, may be disregarded. If the subject is important enough to be mentioned on the ballot it is so important that it must be mentioned in accord with the fact. The question as actually submitted did not present the real question but by error or mistake presented an entirely different one and, therefore, as stated by Mr. Justice Doerfler in *State ex rel. Ekern v. Zimmerman, supra*, no claim can be made that the proposed amendment is validly enacted.

> We conclude that there has been no valid submission to or ratification by the people of the proposed amendment . . .

It was argued, in support of the validity of the amendment, that the expansion of the definition of the persons to be counted in the apportionment of population was merely a detail related to the subject matter of the amendment, changing how senate districts would be formed. The Supreme Court rejected this view, holding:

> A change of almost equal importance is that which revokes the provision of art. IV, sec. 3, Const., excluding untaxed Indians and the military from those who are to be counted in determining the representation to which a district is entitled, who, though they are not residents in the sense of being eligible to vote, in the case of the military see art. III, sec. 5, Const., are nevertheless to be added by the proposed amendment when a district's representation in the legislature is calculated. We consider that a constitutional change in the individuals to be counted is not a detail of a main purpose to consider area in senate districts but is a separate matter which must be submitted as a separate amendment.

60 N.W. 2d at 657.

Here, contrary to the requirements for amending the Wisconsin Constitution as set forth in *Thomson* and in *Ekern*, Question 1 did not inform the voting public of anything regarding the nature or scope of the numerous constitutional rights it would enact for victims of crime. Nor did the Question have reference to expanding the constitutional definition of crime victim. It is not comprehensive, as it does not even mention that the amendments expand the constitutional definition of "victim;" done in a way that disregards its plain or common meaning.[6] *Ekern*, 204 N.W. at 808, provides important guidance here regarding the public understanding of words used in a Constitution:

[6] Whether or not expanding the constitutional definition of victim is so unrelated to giving victims additional rights as to require a separate ballot question on the subject is a different question from whether it must be referred to in some way in the ballot question. An entire section of 2019 Enrolled Joint Resolution 3 is devoted to the constitutional definition of victim. However, expanding the constitutional definition of victim is a subject that the ballot question fails to comprise or to reference at all.

> Words or terms used in a Constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the legislature. . . .[I]t is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual significance and import, and the courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent.

Similarly, the Question did not alert voters that the amendments strike from the Constitution its only reference to "fair trial for the defendant," and that they also strike from the Constitution a defendant's right to have a victim witness sequestered when necessary for a fair trial. There was nothing in the Question to inform voters that all or part of a defendant's Wisconsin constitutional right to a fair trial was being eliminated, or that any other changes were being made to the Wisconsin constitutional rights of the accused. Certainly, eliminating such protections of defendants' rights from the constitution are "essentials" to which the ballot question needed to refer.[7]

Nor did the Question inform voters that the nature of the exercise of the Wisconsin Supreme Court's jurisdiction was being altered in any way. A new, unique form of mandatory Supreme Court jurisdiction for alleged victims was created, since a victim who is unsatisfied with how the Court of Appeals rules on a claim that his or her rights as a victim were violated can petition the Supreme Court, which as an authority of competent jurisdiction "shall act promptly on such a request and afford a remedy for the violation of any right of the victim." (Section 9m (4)(a).

[7] Defendants have cited *Dep't of State v. Hollander*, 256 So. 3d 1300 (Fla. 2018), which found the ballot title and summary there not to be misleading because "the actual text of the proposed amendment does not restrict any existing defendants' or victims' rights." (Three Justices dissented.) But the Wisconsin amendment here does restrict existing rights of defendants.

The Question did not inform voters that the amendments would make any changes to the rights of the accused. Nevertheless, the amendments made additional changes to the rights of the accused, even beyond those mentioned above. The amendments themselves strike the following from the current victim's rights section of the Constitution: "Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law." Section 9m (3). Doc. 9, p. 21. In their place, the amendments created the following language: "This section is not intended and may not be interpreted to supersede a defendant's federal constitutional rights." Section 9m (6). Doc 9, p. 21. Defendants have argued that this "carveout" obviates concerns regarding the impact of the amendments on the rights of the accused, and note, correctly, that neither the wisdom nor the constitutionality of the amendments are before the court in this lawsuit.

However, the previous language protecting rights of the accused that was stricken from Section 9m (3) is much more expansive than the protections in the "carveout" in Section 9m (6). The previous constitutional language provided that neither the Constitution's victim's rights provisions, nor any implementing statutes, shall limit any right of the accused which may be provided by law. The "carveout" says nothing about limiting the effect of implementing statutes on defendants' rights. Also, rather than protecting only a defendant's federal constitutional rights from being superseded, the previous constitutional language protected any accused, including individuals not yet charged with crime. Moreover, the previous constitutional language protected any right of the accused which may be provided by law – including those provided by the state Constitution and statutes as well as by any applicable federal constitutional or statutory

protections.[8] Nothing in Question 1 informed voters of the limited nature of this "carveout," and that courts will be free to interpret victims' constitutional rights as superseding a defendant's previously existing Wisconsin constitutional and statutory rights.

Also, the previous language in Section 9m (3) prevented constitutional or statutory victim's rights provisions from limiting any rights of the accused, not just from superseding such rights. It is clear from their respective definitions that superseding someone's existing right requires a more significant encroachment on it than merely limiting that right. Compare the Merriam-Webster Dictionary online (www.merriam-webster.com) definitions:

Supersede:	**Limit:**
1a **:** to cause to be set aside	1a **:** something that bounds, restrains, or confines
b **:** to force out of use as inferior	b **:** the utmost extent
2 **:** to take the place or position of	
3 **:** to displace in favor of another	

Previously, Wisconsin constitutional and statutory victim's rights provisions shall not bind or restrain or confine any rights of the accused which may be provided by law. Under the new amendments, the only restriction on the impact of victim's constitutional rights on the rights of the accused is that defendants' federal constitutional rights may not be entirely set aside, forced out of use, or displaced, though they could be limited, bound, or restrained. And, state constitutional rights of the accused are not protected at all, since victims' rights are explicitly authorized to be protected more vigorously than those of the accused. Thus, considerable encroachments on existing rights of the accused are authorized by the literal language of the recent amendments. Nevertheless, Question 1 made no mention that any rights of the accused

[8] *State v. Knapp*, 2005 WI 127, ¶ 60, 285 Wis. 2d 86, 700 N.W.2d 899, and *State v. Doe*, 78 Wis. 2d 161, 172, 254 N.W.2d 210 (1977), demonstrate that the Wisconsin Constitution's protections of rights may be more expansive than those of the U.S. Constitution, which serve as minimums.

will be changed in any way, and mentioned rights of the accused only by stating that the amendment will be "leaving federal constitutional rights of the accused intact."

Clearly, Question 1 did not fully inform the voting public on "every essential" of the amendments upon which they were to vote. As a result, "no claim could be made that the proposed amendment would have been validly enacted." In fact, *Thomson* requires that informing the voting public that the amendment would do each of these other things, in addition to providing additional rights of crime victims, is not only sufficiently important to be included in the ballot question, but that it is sufficiently important and distinct from expanding the rights of crime victims to require a separate ballot question on a number of separate amendments, as argued in a later section of this brief.

THE BALLOT QUESTION CONTAINED MISSTATEMENTS REGARDING THE CONTENTS OF THE AMENDMENT, MAKING ITS RATIFICATION INVALID

Question 1 stated that the amendment will "require that the rights of crime victims be protected with equal force to the protections afforded the accused." Doc 9, p 22. However, the actual language of the amendment does not provide for equal protection or equal force – it requires that all of the rights of victims shall "be protected by law in a manner no less vigorous than the protections afforded to the accused." Section 9m (2) (intro.) Doc 9, p. 20. "No less vigorous" does not mean "equal" – the plain, natural and usual meaning of those words is "equal to or greater than." Those words in the amended Constitution authorize protection of victims' rights equally with those of the accused, but they also authorize protection of victims' rights twice, or three times, or ten times as vigorously. The only limitation is that victims' rights must not be enforced less vigorously than those of the accused. The words of the Court in *Ekern, supra*, 204 N.W. at 808, quoted above, are also instructive here:

> [I]t is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual significance and import, and the courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent.

But there is more here than the difference in plain and common meaning between these two measures. Reading the actual words of the amendments can leave no doubt that these constitutional amendments do not protect the rights of victims and the accused "with equal force." By striking from the Wisconsin Constitution a defendant's right to have a victim sequestered when necessary for a fair trial, and indeed its only reference to a defendant's right to a fair trial, the amendments clearly, specifically, and explicitly protect an alleged victim's rights with greater force than the rights of the accused. Defendants' semantical argument that "no less vigorous than" may mean something like "equal to," or that it should be so interpreted, fails when the actual language elsewhere in the amendments demonstrates the explicit prioritization of protecting a victim's privacy rights over an accused's fair trial rights.[9]

The legislature may have seen fit to draft the proposed amendments and the ballot Question as they did, but it is beyond dispute that the amendments and the Question contradict one another. In this regard, it cannot be claimed that the ballot question accurately informs voters of the proposal on which they are called to vote – instead, it indisputably misinforms them!

The Question also informed voters that the proposed amendment gives certain rights to crime victims "while leaving the federal constitutional rights of the accused intact." This is grossly misleading. First, the actual language of the amendments states that they may not be interpreted to supersede a defendant's federal constitutional rights. As a result, the federal

[9] Moreover, since 1925, the Wisconsin Supreme Court has recognized that the ballot question language needs to be unambiguous, in order to enable voters to exercise their choice in an intelligent manner: "The question submitted on the ballot has heretofore been quoted. It is clear and unambiguous, so as to enable voters to vote intelligently." *State ex rel. Ekern, supra* 204 N.W. 2d at 812.

constitutional rights of accused persons who may have been arrested but not yet formally charged with a crime, and who are therefore not defendants, are subject to being superseded by victims' new or expanded rights under the amendments. Second, while the amendments' "carveout" may protect against superseding defendants' federal constitutional rights, that carveout does not protect against victims' rights limiting or infringing, but not entirely superseding those rights of defendants. The Question's statement that the amendments leave "the federal constitutional rights of the accused intact" is simply untrue.

Here, by referring to rights of the accused, the Question demonstrated that the relationship of the proposed amendments to the federal constitutional rights of the accused is important enough to be mentioned on the ballot, but the Question misstated the facts regarding the content of the amendments. The Question does not inform voters that any rights of the accused were being changed. Thus, it failed to present the real question before the voters; failed to reasonably, intelligently, and fairly comprise or reference every essential of the amendment; and failed to fully inform the voting pubic of the subjects upon which they are required to exercise a franchise.

As a result of all of the above misstatements, the Question was not merely insufficient by omission, but was misleading and fatally defective, by affirmatively misstating the contents and impact of the proposed amendment. The Court in *Thomson* was presented with such a defect, and dealt with it as follows:

> The ballot question is expressed in mandatory language: if the amendment is ratified the legislature shall apportion senate districts along town, etc., lines; yet the actual amendment, Joint Resolution No. 9, has no such mandate at all and under it the legislature is uncontrolled except that the territory enclosed shall be 'contiguous' and 'convenient'. . . .It does not lie in our mouths to say that that which the people think of sufficient importance to put in their constitution is in fact so unimportant that misinformation concerning it printed on the very ballot to be cast on the subject, may be disregarded. **If the subject is important enough to**

> **be mentioned on the ballot it is so important that it must be mentioned in accord with the fact.** The question as actually submitted did not present the real question but by error or mistake presented an entirely different one and, therefore, as stated by Mr. Justice Doerfler in *State ex rel. Ekern v. Zimmerman, supra,* no claim can be made that the proposed amendment is validly enacted.

60 N.W. 2d at 660. (Emphasis supplied) The same result is warranted here.

Courts in other jurisdictions with prohibitions against misstatements in constitutional amendment ballot questions have explained that this prohibition protects the right of voters to know and understand what they are voting on. In *Florida Dept. of State v Florida State Conference of NAACP Branches,* 43 So. 3d 662 (Fla. 2010), the court stated:

> "In practice, the accuracy requirement in article XI, section 5, functions as a kind of 'truth in packaging' law for the ballot." The proposed change in the constitution must "stand on its own merits and not be disguised as something else." "Reduced to colloquial terms, a ballot title and summary cannot 'fly under false colors' or 'hide the ball' with regard to the true effect of an amendment." (citations omitted)

In *Armstrong v. Harris,* 773 So. 2d 7, 17-18 (Fla. 2000), the Florida supreme court addressed a proposed amendment to the state's constitutional bill of rights and explained that the federal Constitution provided a minimum floor for basic freedoms; and the state constitution, the ceiling. It held that:

> In the present case, by changing the wording of the Cruel or Unusual Punishment Clause to become "Cruel and Unusual" and by requiring that our state Clause be interpreted in conformity with its federal counterpart, the proposed amendment effectively strikes the state Clause from the constitutional scheme. Under the federalist principles expressed above, where a proposed constitutional revision results in the loss or restriction of an independent fundamental state right, the loss must be made known to each participating voter at the time of the general election. ("This is especially true if the ballot language gives the appearance of creating new rights or protections, when the actual effect is to reduce or eliminate rights or protections already in existence.").

Similarly, in *City of Honolulu v. State,* 431 P.3d 1228, 1239-41 (Haw. 2018), where proposed amendments and their corresponding ballot questions were required to be phrased in

clear language that is not likely to deceive or mislead voters as to their nature and effect the court stated:

> "It is fundamental that, to provide a voter 'with sufficient information to make an informed decision about the true nature of the proposed constitutional amendment,' a ballot question must 'at least put [voters] on notice of the changes being made' to the constitution."

The court further noted:

> As stated by Justice Todd of the Pennsylvania Supreme Court, in everyday human interaction, in the arts and literature, as well as in legal documents, statutes, and constitutional provisions which govern our day-to-day affairs, there is a categorical difference between the act of creating something entirely new and altering something which already exists. Language which suggests the former while, in actuality, doing the latter is, at the very least, misleading, and, at its worst, constitutes a ruse.

QUESTION 1 IS LEGALLY INSUFFICIENT BECAUSE THE PROPOSED AMENDMENTS CONTAIN MORE THAN ONE SUBJECT, REQUIRING SEPARATE BALLOT QUESTIONS

The simplest basis for invalidating the constitutional amendments is that they violated the Wisconsin Constitution's separate amendment rule. Article XII, § 1 specifies 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." The amendments in 2019 Enrolled Joint Resolution 3 amend and expand the rights of crime victims. But they also amend and expand the definition of crime victims to include many persons who were not previously constitutionally considered to be crime victims.

Propositions are considered separate amendments requiring separate questions when they "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 v. Elections Bd*., 106 Wis. 2d 597, 317 N.W. 2d 420, 426 (Wis. 1982); *accord* Mc*Conkey v. Hollen*, 2010 WI 57, ¶ 30, 326 Wis 2d 1, 783 N.W. 2d 855, 862..

The Constitution grants the Legislature discretion in how it submits amendments to the people for a vote, but that discretion is not without limit. *McConkey v. Hollen*, 2010 WI 57, ¶¶ 25-26, 326 Wis. 2d 1, 783 N.W.2d 855. Although where the proposed changes concern only one general purpose, and all items are connected with that purpose, the Legislature has great latitude in how it drafts amendments, McConkey, 2010 WI 57, ¶ 31, the Legislature does *not* have latitude regarding the separate amendment rule.

In *Thomson*, the ballot question addressed the subject of the proposed amendment, which was the method to be used in forming senate districts. In addition to adding area as a factor to be used in senate districting, the amendment included changes which expanded the categories of persons to be included in the population to be allocated among districts, by doing away with the exclusion of Indians and military persons. *Thomson* held that these were distinct and separate subjects, which required that they be submitted to the public with separate ballot questions. 60 N.W. 2d at 657.

Plaintiffs submit that separate ballot questions are required here, one for the expansion of crime victims' constitutional rights, and another for adding categories of persons to the constitutional definition, just as a separate question was needed for expanding the categories of persons to be counted for districting in *Thomson*.

Prior to the recent amendments, article 1, § 9 provided rights to "crime victims, as defined by law." At the time of the 1993 amendment first adding victims' rights to the Constitution, "victim" was defined in Wis. Stat. § 950.02 as "a person against whom a crime has been committed." Therefore, the meaning of "crime victims" was set as that simple definition.[10]

[10] The definition in § 950.02 was later amended in 1997, but a subsequent statutory change cannot have changed a definition that voters locked in place in the Constitution in 1993.

The natural reading of this definition is that a victim is the person directly harmed by criminal conduct.

The recent amendments expand that definition to include for deceased and physically or emotionally incapable persons the "spouse, parent or legal guardian, sibling, child, person who resided with the deceased at the time of death, or other lawful representative." This expanded "crime victim" far beyond the definition previously incorporated in the Constitution. Voters were asked only whether crime victims, as then defined in the Constitution, should be granted additional rights, not whether additional persons should be given rights as victims. Thus, the expansion of the constitutional class of crime victims required a separate question. No natural reading of the term as adopted in 1993 would include siblings or roommates or live-in caregivers.

Moreover, as explained in greater detail above, the amendments here commit the state in Section 1 to protect crime victims' rights "in a manner no less vigorous than the protections afforded to the accused." Striking from our state Constitution the right of a defendant to sequester a witness where necessary to protect the right to a fair trial is far removed from the subject of "additional rights of crime victims."

Altering the Wisconsin Constitution in ways that amend or infringe upon current Wisconsin constitutional protections of the rights of the accused, or that otherwise alter the balance between those protections and the rights of alleged crime victims, is a distinctly different subject than "additional rights of crime victims." Altering the language and effect of the Wisconsin Constitution's protections of the rights of the accused simply cannot be characterized as a detail related to expanding crime victims' rights.

Examination of the actual language of the recent constitutional amendments demonstrates that several separate and distinct subjects were involved, requiring more than one ballot question under the direct meaning of the words of Article XII, Section 1 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." These are: 1) providing additional rights to victims, 2) expanding the constitutional definition of victim, 3) limiting the rights of the accused, and 4) creating unique mandatory Wisconsin Supreme Court jurisdiction for non-party victims. Since the amendments included changes to other subjects unrelated to and not connected to the rights of victims, the vote on Question 1 could not and did not validly ratify them.

SINCE THE BALLOT QUESTION WAS DEFECTIVE, THE SUBMISSION OF THE AMENDMENTS TO THE VOTERS WAS INVALID AND A PERMANENT INJUNCTION IS REQUIRED

For all the reasons set forth above, plaintiffs submit that Ballot Question 1 in the April 7 election was deficient in many, fundamental respects. It contained affirmative misstatements and omitted information needed to prevent other statements about the amendments from being misleading. It failed to inform voters regarding the essentials of the amendments – including that they eliminated existing constitutional rights of the accused and that they created unique and dramatic changes in Supreme Court jurisdiction. These amendments were so far-ranging that more than one ballot question was required to present them to the voters.

For almost 140 years, since *State ex rel. Hudd v. Timme*, *supra*, in 1882, it has been the role of Wisconsin's courts to protect the rights of our voters to have clear, comprehensive, and accurate ballot questions when voting on proposed amendments to the state Constitution. This court should enter a declaratory judgment that the amendments submitted to the voters in the April 7 election were not validly enacted. The court should further enter a permanent injunction,

requiring the Secretary of State to strike the amendments from the Constitution, and prohibiting the Attorney General from implementing or otherwise enforcing the amendments.

In *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 259 N.W.2d 310, (Wis. 1977), the Wisconsin Supreme Court discussed the requirements for granting an injunction as follows:

> While standards for the granting of temporary and permanent injunctive relief differ, the presence of irreparable injury and inadequate remedy at law are relevant factors to consider in granting either temporary or permanent injunctions for the reason that, "(I)f it appears . . . that the plaintiff is not entitled to the permanent injunction which his complaint demands, the court ought not to give him the same relief temporarily." Thus, a showing of irreparable injury and inadequate remedy at law is required for a temporary as well as for a permanent injunction.

Thus, as the Court of Appeals has more recently explained in *Diamondback Funding, LLC, v. Chili's of Wisconsin, Inc.*, No. 2006AP1743, ¶ 15 (Wis. App. 2007):

> When seeking an injunction, a plaintiff must show a sufficient likelihood that the defendant's future conduct will cause the plaintiff irreparable harm. *Pure Milk Prods. Co-op. v. National Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Irreparable harm is that which is not adequately compensable in damages. *Id*. The plaintiff must also lack an adequate remedy at law, *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 472, 588 N.W.2d 278 (Ct. App. 1998), and establish that "on balance, equity favors issuing the injunction," *Nettesheim v. S.G. New Age Prods., Inc.*, 2005 WI App 169, ¶21, 285 Wis. 2d 663, 702 N.W.2d 449.

Allowing implementation or enforcement of the invalidly enacted constitutional provisions denigrates the rights of the voters of Wisconsin, who were forced to deal with a deficient and misleading ballot question in the April 7 election. In addition, allowing invalid constitutional provisions to remain on the books and to be implemented or enforced would cause serious harm to the plaintiffs and to the public. These provisions alter and eliminate rights of the accused and present the potential of significant obstacles to the functioning of the state's criminal

justice system.[11] Allowing an invalidly enacted constitutional provision to be implemented or enforced harms not only every accused person whose rights are impacted, but also harms their attorneys and everyone involved in the criminal justice system whose rights and constitutional duties would unlawfully be altered.

During the hearing in this case on plaintiffs' motion for a temporary injunction, this court inquired regarding the impact on the availability of injunctive relief of the Wisconsin Supreme Court's decision in *League of Women Voters v. Evers*, No. 2019AP559 (Wis.) and of its stay order in *SEIU v. Vos*, 2019AP622 (Wis. 6/11/2019). Those cases do not restrict or diminish the well-established role of the judicial branch in general, or of circuit courts specifically, in ensuring that the legislature comply with constitutional requirements when submitting constitutional amendments to the public for ratification.

While the Court in *League of Women Voters* acknowledged the exclusive role of the legislature in making laws, it clearly reserved the role of the judiciary in ensuring the legislature's compliance with constitutional requirements:

> The judiciary serves as a check on the legislature's actions only to the extent necessary to ensure the people's representatives comply with our constitution in every respect. 2019AP559, ¶ 41. [12]

In SEIU, the Supreme Court referred to the presumption of constitutionality that attaches to regularly enacted statutes, and stated that substantial and irreparable harm results when a

[11] The decision of the Commonwealth Court of Pennsylvania in *League of Women Voters of Pa. v. Boockvar*, 2019 Pa. Commw. Unpub. LEXIS 623, affirmed by the Supreme Court of Pennsylvania, 2019 Pa. LEXIS 6171, describes the broad impacts on the criminal justice system and on accused persons that were presented by similar Marsy's law amendments that were proposed in that state. (See Exhibits 1 and 2 to Doc 11).

[12] *Florida Dept of State, supra*, at 668 similarly noted: "We do not ignore the fact that HJR 7231, proposing Amendment 7, was the product of a joint resolution passed by a three-fifths vote of the Legislature. While we traditionally accord a measure of deference to the Legislature, '[t]his deference. . . is not boundless, for the constitution imposes strict minimum requirements that apply across-the-board to all constitutional amendments, including those arising in the Legislature.' *Armstrong*, 773 So.2d at 14. "

regularly enacted statute is enjoined before any appellate review can occur. (Order, pp. 7- 8) However, we are not dealing here with a statute that has been "regularly enacted" by the legislature and subject to approval or rejection by the governor. Rather, this case invokes the well-recognized right and duty of courts to ensure compliance with constitutional requirements for ballot questions on proposed constitutional amendments. Moreover, in SEIU, the Supreme Court explained that the issues being resolved were "novel questions involving the separation of powers doctrine." (Order, p. 6). Here, in contrast, questions regarding whether a ballot question submitted by the legislature to voters has complied with constitutional requirements for amending the constitution has been addressed by trial and appellate courts in Wisconsin for almost 140 years.

CONCLUSION

For the above reasons, plaintiffs respectfully submit that this court should enter a declaratory judgment that Ballot Question 1 in the April 7 election was insufficient under the requirements of the Wisconsin Constitution for submission to the voters of the amendments that were then proposed; that the vote ratifying the amendments was null and void; and invalidating the amendments for that reason. The court should also enter permanent injunctions requiring the Secretary of State to strike the amendments from the Wisconsin Constitution and prohibiting the Attorney General from implementing or enforcing those amendments.

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