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.

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

It is important to understand the nature of plaintiffs' challenge in this case to the Marsy's Law Amendments. This case does not challenge either the wisdom or the constitutionality of the provisions in the Amendments that were presented to and voted on by the public in the April election. Rather, it is about whether the ballot question that presented these Amendments to the public satisfied the established standards for a constitutional amendment ballot question. Whether all, some, or none of the provisions of the Amendments themselves pass constitutional muster, either on their face or as applied, are issues that might remain for other parties and other cases. What is important here is that defendants admit that the adequacy of the ballot question can be determined based on the undisputed language of the Question and of the Amendments, and is therefore a question of law, with no burden of proof on either side. (Doc. 47, p. 5.)

DEFENDANTS' STANDARD FOR BALLOT QUESTIONS IS CONTRARY TO ESTABLISHED WISCONSIN LAW AND UNSUPPORTED BY APPLICABLE AUTHORITY

Despite a series of Wisconsin Supreme Court decisions dating back to 1882 which have addressed the adequacy or inadequacy of constitutional amendment ballot questions, defendants assert that the content of the ballot question may be "a matter entirely within legislative control and discretion, not subject to judicial review. (Doc. 47, p. 8.)[1] All but ignoring the standards that those cases establish for determining the adequacy of such ballot questions, defendants urge that any question devised by the Legislature must be accepted as sufficient, so long as it is not "so detached from the Amendment as to be violative of the Legislature's broad discretion." (*Id*.) They cite no relevant authority for this lenient standard. They cite *State ex rel. Thomson v. Peoples State Bank*, 272 Wis. 614, 623, 76 N.W.2d 370 (1956), for the proposition that a showing of "mere irregularity" will not suffice to invalidate a ballot question, but the irregularity in that case was a misstatement in an explanation of the proposed amendment in an election notice, and no irregularity was present in the ballot received by voters. They cite *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921, 925 (1936), which rejected "hypercritical differences" as being sufficient to invalidate a question, to set the standard here, even though that case addressed a village ordinance referendum, not a proposed constitutional amendment.[2] And, completely mistakenly, they cite *State ex rel. Ekern v. Zimmerman*, 187 Wis. 189, 204 N.W. 803, 813

[1] They then backtrack and acknowledge that the role of the courts is to check the Legislature's actions only as necessary to ensure that they comply with the Constitution "in every respect." That is precisely what plaintiffs request here. Amending the state Constitution requires approval by the electorate, and it is the role and responsibility of the courts to protect the right of voters to have clear, unambiguous and comprehensive ballot questions that encompass every essential of proposed constitutional amendments and do not mislead voters as to their content. That is not second-guessing the Legislature's actions but ensuring that voters are enabled to vote in an informed manner and not be misled. This history of judicial review shows that we are dealing here with a "shared" power, not a "core" legislative power exercised exclusively by the Legislature. *See SEIU v. Voss*, 2020 WI 67, ¶ 28.

[2] This ignores the Court of Appeals' recognition in *Metropolitan 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, that our Supreme Court's more strict "every essential" test for constitutional amendment questions has not been adopted for municipal referenda.

(1935), for the proposition "that a ballot question's phrasing need not be 'entirely free from doubt.'" (Doc. 47, p. 5.) In fact, only one page earlier in the opinion, the *Ekern* Court stated the actual standard on "doubt:" "The question submitted on the ballot has heretofore been quoted. It is clear and unambiguous, so as to enable voters to vote intelligently." *Ekern*, 204 N.W. at 812. The case involved a constitutional amendment ballot question that had been drafted by the Secretary of State rather than by the Legislature itself. It is clear from the Court's opinion that the "question" that was not entirely free from doubt was whether the drafting of the ballot question by an entity other than the Legislature was grounds for invalidating the amendment. The Court ruled that it was not, and that the clear and unambiguous ballot question was sufficient for the amendment to have been validly enacted.

The defendants' proposed standard, which limits court review "only to whether the Ballot Question was so detached from the Amendment as to be violative of the Legislature's broad discretion," is itself completely "detached" from the standards established in Wisconsin law. In *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W. 2d 416 (1925), the court held that an amendment had not been validly enacted because 1) it encompassed at least three distinct 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. Defendants argue here that changes to victims' Wisconsin constitutional rights (the "what"), to who is constitutionally defined as a victim (the "who"), and to a defendant's constitutional right to a fair trial (the "others"), and creation of a right of victims to obtain review and a remedy in the Wisconsin Supreme Court ("nondiscretionary Supreme

Court review") are all sufficiently related to enable one ballot question to submit them to the voters. To the contrary, even though all three sets of changes in *Thomson* related to how legislative districts were to be formed, the Court held that the basis for establishing senate districts (a "what"), the change in who was to be counted in determining districts' population for districting (the "who"), and the boundaries to be followed for assembly districts (another "what") required separate ballot questions. Moreover, the Court held:

> 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 . . . .

Id. at 660. Thus, a misstatement on a constitutional amendment ballot question means the ballot question fails to present the real question before the voters and presents an entirely different one.

THE BALLOT QUESTION HERE FAILS THE "EVERY ESSENTIAL" ELEMENT TEST

The Marsy's Law Amendments deleted language in the Wisconsin Constitution that protected the right to have a victim witness sequestered if the trial court determined that was necessary for a fair trial for the defendant. Defendants argue here that this change is inconsequential and did not need to be mentioned on the ballot because "it concerns only one change in language – in the *victim's* rights provision of the constitution, not in the provisions articulating a defendant's rights." (Doc. 47 p. 20.) While the Constitution articulates various rights of defendants in different provisions, this Amendment eliminated the only specific reference anywhere in the Constitution to a defendant's right to a fair trial. Defendants assert: "This Amendment simply built upon a victim's already-existing Wisconsin constitutional right to attend court proceedings." They do not argue that defendants continue to have the right under the amended Wisconsin Constitution to sequester a victim witness, but assert that a defendant's federal constitutional right to a fair trial will remain, which of course it will, because the

Wisconsin Legislature, with or without the consent of the Wisconsin electorate, does not have the power to alter or amend federal constitutional rights.

Defendants' approach denigrates the purpose and role of the Wisconsin Constitution. Without notice to voters, the Amendments eliminated the constitutional provision that preserved a defendants' rights under the Wisconsin Constitution and state statutes if victims' rights conflict. Defendants' argument views Wisconsin constitutional provisions protecting defendants' rights (or other individuals' rights, for that matter), as mere surplusage, that can be deleted in whole or in part, without even being mentioned in a ballot question, so long as the amendments state the truism that federal constitutional rights would not be superseded. The point of having rights provisions in our State Constitution, even if they largely resemble federal constitutional provisions, is that they set forth an independent set of protections. Wisconsin is free to provide rights that are more expansive than those of the U.S. Constitution, which serve as minimums, and as noted in plaintiffs' previous brief, has on occasion done so.[3] Despite this, the ballot question failed to mention that any change to defendants' state constitutional rights was included in the Amendments.[4] That is not an inconsequential omission, and it renders the ballot question inadequate under the "every essential" element test.

Nor did the Question inform voters that the exercise of the Wisconsin Supreme Court's jurisdiction was being altered in any way. Defendants begin by mischaracterizing the change that plaintiffs submit has been made by the Amendments. What has happened is not the creation of a direct appeal for alleged crime victims to the Wisconsin Supreme Court, but creation of a

[3] Equally important, Wisconsin's constitutional protections cannot be amended without the consent of Wisconsin's voters, while the meaning of current federal rights could be altered by the decision of five or more United States Supreme Court Justices, and those rights themselves could be altered or eliminated without the agreement of Wisconsin voters through federal constitutional amendments.

[4] As plaintiffs' previous brief noted, the Wisconsin Constitution's language also protected defendants' statutory rights from being limited by victims' rights prior to the Marsy's Law Amendments.

right to mandatory Supreme Court review for victims who request review of any decision by the Court of Appeals regarding their rights.

Section 9m(4)(a) of the Constitution now authorizes a victim to "assert and seek in any circuit court or before any other authority of competent jurisdiction, enforcement of the rights in this section and any other right, privilege, or protection afforded to the victim by law. 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." Section 9m(4)(b) further provides that: "Victims may obtain review of all adverse decisions concerning their rights as victims by courts or other authorities with jurisdiction under par. (a) by filing petitions for supervisory writ in the court of appeals and supreme court."

Accordingly, if a crime victim seeks enforcement of his or her rights in the circuit court and then in the Court of Appeals and is unhappy with the appellate court's decision, the victim then has the right to file a petition for a supervisory writ in the Supreme Court. At that point, the Supreme Court is "any other authority with jurisdiction over the case" under Section 9m(4)(a), which commands the Supreme Court, as a matter of constitutional obligation, "to act promptly on such a request and afford a remedy for the violation of any right of the victim."[5] Unlike any other situation in which a person or entity seeks Supreme Court review, which is available only at the Court's discretion, this amended constitutional language mandates the Court to "act promptly on such a request and afford a remedy for the violation of any right of the victim." Plaintiffs submit that this dramatic, unprecedented change in the Supreme Court's control of its docket is a constitutional change that so differs in kind and degree from the rest of the

[5] Defendants' argument at page 15 of their Brief that section 9m(4)(a) applies only to actions at the trial court level requires deleting the words "or before any other authority of competent jurisdiction" from the constitutional text. As written, the amended Constitution eliminates the Supreme Court's discretion to decline review when a petition for supervisory writ is filed by a victim unhappy with a decision of the Court of Appeals.

Amendments that it required a separate ballot question. And if not, at a minimum the fact that the nature of the Supreme Court's exercise of its jurisdiction was being dramatically changed needed to be mentioned in the ballot question.

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.) Instead, the Amendment 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.) However, "no less vigorous" is not the same as "equal" – the plain, natural and usual meaning of those words is "equal to or greater than." Those words authorize but do not require protection of victims' rights equally with those of the accused, and they also authorize protection of victims' rights multiple 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,* 204 N.W. at 808, are 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.

Defendants acknowledge that "equal to or greater" is not the same as "equal," but argue that there is no substantial difference as a practical matter. (Doc. 47, p. 25.) As this court recognized at the February 7 hearing, "no less vigorous" is not a very precise terminology.[6] On the other hand, "equal to" is precise and very well understood. It cannot be argued with a straight

[6] At a minimum, "no less vigorous" is unclear and ambiguous. Since 1925, the Wisconsin Supreme Court has recognized that constitutional amendment ballot question language needs to be unambiguous, in order to enable voters to exercise their choice in an intelligent manner. *Ekern*, 204 N.W.2d at 812.

face that anyone reading "with equal force" in the ballot question would have understood that the Amendments actually authorized protection of victims' rights multiple times as vigorously as protections afforded to the accused. Defendants cite *Milwaukee Alliance*, 106 Wis. 2d at 609, in which a change from "shall" to "may" was found to represent "no change in meaning or substance" in the context of a ballot question. However, review of the passage in question demonstrates that in the context of the specific sentences at issue in that case, there indeed was no change at all in meaning. Here, the two phrases clearly mean something quite different.

In footnote 8, defendants also urge reference to legislative history, noting testimony of supporters of the amendment to the effect that equality between defendants' and victims' rights was intended. However, it was the text of the Amendment that was enacted by the Legislature and approved by the voters, not the words of a couple of the Amendments' supporters. Their testimony cannot alter what the text actually says.[7] 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.

By referring to rights of the accused, the Question demonstrated that the relationship of the proposed amendments to those rights is important enough to be mentioned on the ballot. However, the Question misled voters on the subject. The Question does not inform voters that any rights of the accused were being changed, instead reassuring them that defendants' federal constitutional rights would not be superseded. Thus, it failed to present the real question before the voters; failed to reasonably, intelligently, and fairly comprise or reference every essential of

[7] As the Supreme Court recently stated in *SEIU*, 2020 WI 67, ¶28, "[i]t is the enacted law, not the unenacted intent, that is binding on the public."

the amendment; and failed to fully inform the voting public of the subjects upon which they are required to exercise a franchise.

As a result of all 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 added). The same result is warranted here.

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

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." *Milw. Alliance v. Elections Bd.*, 106 Wis. 2d 597, 317 N.W.2d 420, 426 (1982); *accord McConkey v. Van Hollen,* 2010 WI 57, ¶ 30, 326 Wis. 2d 1, 783 N.W.2d 855, 862. 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.

Plaintiffs submit that separate ballot questions are required here, at least 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*. 60 N.W.2d at 657. In addition, the creation of an unprecedented form of mandatory Supreme Court jurisdiction required another question.

In particular, the Amendments altered the constitutional definition of "victim" from the commonly understood meaning adopted in 1993 to an unusual meaning that includes roommates and live-in caregivers. Defendants gloss over the change by saying the new definition is "essentially the same" as a statutory definition passed in 1997. Subsequent statutes should not justify an end-run around the constitutional mandate for separate ballot questions.

CONCLUSION

For the above reasons, plaintiffs respectfully submit that this court should enter a declaratory judgment that Question 1 on the April 7 ballot was insufficient under requirements of the Wisconsin Constitution for submission of the Amendments to the voters; that the vote ratifying the amendments was null and void; and that the Amendments are invalid.

Dated: July 29, 2020

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