STATE OF WISCONSIN

IN SUPREME COURT

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, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF CROSS-APPELLANT

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TABLE OF CONTENTS

Page

CASES CITED

Page

OTHER AUTHORITIES CITED

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STATEMENT OF THE ISSUE

The issue presented by the Attorney General's cross-appeal is whether McConkey has standing to litigate the compliance of the marriage amendment with the separate amendment rule. Denying in part the Attorney General's motion to dismiss for lack of standing, the circuit court held that McConkey had standing to pursue his claim

under the separate amendment rule, and the Attorney General cross-appeals from that decision.

ARGUMENT

I. STANDARD OF REVIEW.

Whether a party has standing to seek declaratory relief is a question of law this Court reviews *de novo*. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315, 529 N.W.2d 245 (Ct. App. 1995).

II. HAVING STIPULATED THAT HE VOTED "NO" ON THE BALLOT QUESTION AND WOULD HAVE VOTED "NO" TO BOTH PROPOSITIONS WERE THEY PRESENTED SEPARATELY, MCCONKEY LACKS STANDING TO SUE.

A. Standing to Sue in Wisconsin.

As a general rule, a party asserting a constitutional claim must have personally suffered a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983); *State ex rel. 1st Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 309, 290 N.W.2d 321 (1980); *Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979). This is no less true for declaratory judgment actions, such as McConkey's, than it is for other types of actions. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189 (citing *Village of Slinger v. City of*

Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81) ("In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy.").

As formulated by the Wisconsin courts, a plaintiff must demonstrate that "[he] was injured in fact, [and that] the interest allegedly injured is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Mogilka v. Jeka*, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). This standard is "conceptually similar" to the federal rule. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240 (1975).

"Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox,* 112 Wis. 2d at 525. (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)).

Standing also requires that the injury be to a legally protectable interest. *See City of Madison v. Town of Fitchburg,* 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983). A legally protectable interest is one arguably within the zone of interests that the law under which the claim is brought seeks to protect. *See Chenequa Land Conservancy, v. Village of Hartland,* 2004 WI App 144, ¶ 16, 275 Wis. 2d 533, 685 N.W.2d 573.

The purpose of the Court's inquiry into standing "is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *Moedern*, 70 Wis. 2d at 1064 (citing *Flast v. Cohen*, 392 U.S. 83 (1968). Enforcing the standing requirement ensures that a concrete case informs the court of the consequences of its decision, and that people who are directly concerned and are truly adverse will genuinely present opposing viewpoints to the court. *Carla S. v. Frank B.,* 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330.

It is a foundational assumption of our judicial system that true adversity of the parties improves the soundness of judicial outcomes. This Court adheres to the standing requirement, not because it is jurisdictional, but because as a matter of sound judicial policy "a court should not adjudicate constitutional rights unnecessarily and because a court should determine legal rights only when the most effective advocate of the rights, namely the party with a personal stake, is before it." *Mast,* 89 Wis. 2d at 16. As the following argument will show, McConkey is not such a party.

The standing requirement also furthers the separation-of-powers principle that underlies our constitutional system, and "'keeps courts within certain traditional bounds vis-a-ví̀s the other branches, concrete adverseness or not.'" *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 611 (2007) (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996)); *see also Steel Co. v.*

Citizens for a Better Environment, 523 U.S. 83, 125 n.20 (1998) (Stevens, J., concurring) ("our standing doctrine is rooted in separation-of powers-concerns.") Relaxing the standing requirement therefore is "'directly related to the expansion of judicial power.'" *Hein*, 551 U.S. at 611 (quoting *U.S. v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).[1] This is particularly important in a case involving Wisconsin's separate-amendment rule, where our state's constitution gives the Legislature discretion to craft the language of proposed amendments. (*See* Respondent's Brief at 10-20). Adopting the circuit court's standing analysis in this case would erode that discretion by authorizing a court challenge to every single proposed and adopted constitutional amendment, even when the plaintiff's real grievance is not with the language of the amendment but with the outcome of the referendum.

[1]The Supreme Court's jurisprudence on the issue of standing is relevant here, because the Wisconsin requirement is "conceptually similar" to the federal rule. *Modern,* 70 Wis. 2d at 1067.

B. Standing To Challenge Constitutional Amendments on Separate Amendment Grounds.

1. Requiring a Plaintiff Who Would Have Voted Differently On The Multiple Propositions Helps Further The Purpose of the Separate Amendment Rule.

As discussed in both the Attorney General's Respondent's Brief, and in McConkey's Appellant's Brief, the separate amendment rule furthers the goals of preventing logrolling and riding, and encouraging transparency at the polls. (Appellant's Brief at 16-18; Respondent's Brief at 13-14). To further these goals, the Court should require a plaintiff who raises a challenge under article XII, section 1 of the Wisconsin Constitution to allege that he or she would have voted differently on the multiple propositions in an amendment. If a plaintiff cannot make such an allegation, then he or she is outside the zone of interests protected by the constitutional rule.

The separate amendment rule is designed to ensure that two amendments, each lacking majority support, are not passed by combining them into one amendment. Similarly, it prevents an unpopular measure from passing by being hitched to a popular one. When propositions are combined into one amendment that do not "relate to the same subject matter and are [not] designed to accomplish one general purpose," *Milwaukee*

Alliance Against Racist and Political Repression v. Elections Bd., 106 Wis. 2d 593, 604-05, 317 N.W.2d 420 (1982) (citing *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336, 11 N.W. 785 (1882)), at least some voters are faced with an undesirable choice: either they vote "yes" for the amendment, and thereby accept one proposition that they oppose, or they vote "no" on the amendment and contribute to the potential loss of the proposition they support. Violation of the separate amendment rule requires some voters to decide whether their opposition to the part they disfavor is greater than their support for the part they favor. When forced to make such a choice, the results of the referendum may not accurately reflect the true preferences of the electorate.

Therefore, a plaintiff who raises a separate amendment challenge must allege that his or her true preferences were impeded by the combination of multiple propositions in a single amendment. If a plaintiff concedes, as McConkey here conceded, that he or she would have voted "no" to both propositions had they been separated, that shows the plaintiff's preferences were unimpaired by the manner in which the ballot was presented. It shows that the plaintiff is not within the zone of interests protected by the constitutional rule.

McConkey's opposition to the *result* of the referendum is insufficient to establish his standing. Let us imagine a voter who attests to voting "yes" on the marriage ballot question, and concedes that even if the two propositions had been separated, she would have voted "yes" to both. It seems indisputable that such a voter would lack standing. But that voter lacks standing, not because of her opposition to the outcome of the referendum in this example (she

supported the outcome), but because she, like McConkey, was not forced into the choice that the separate amendment rule is designed to prevent. Her voting preferences were perfectly well expressed in her single "yes" vote.

That same "yes" voter, however, would obtain standing if she actually wanted to vote "no" on one of the propositions, but was prevented from doing so because of an alleged violation of article XII, section 1. That voter would be within the zone of interests protected by the rule; even though in this example her actual vote is still consistent with the outcome of the referendum, her real preferences were stymied by the way the ballot was crafted. There is no meaningful distinction between McConkey and the "yes" voter who, like him, cannot claim to have been pressed into the choice that the rule guards against. Requiring a plaintiff whose voting preferences were actually affected by the conjoining of multiple propositions in an amendment helps ensure that a plaintiff truly interested in the legal issue is involved in the case.

2. Cases In Other Jurisdictions Show That In Order to Have Standing To Raise Voting-Related Claims, Plaintiffs Must Show More Than That They Voted in The Election.

McConkey has characterized this lawsuit as a "voting rights case." (Appellant's Brief at 10). However, voting rights cases show that simply

being a voter or elector is not enough to challenge any and all alleged irregularities in the way an election is conducted. As with standing in other areas of the substantive law, voters must allege a particularized, direct injury to *their* rights in order to bring suit.

In *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), the Supreme Court of Tennessee held that plaintiffs challenging a marriage amendment on grounds of untimely publication lacked standing because, even though they voted in the referendum election, they failed to allege any discrete, concrete injury to them resulting from the alleged violation.

In *Darnell*, plaintiffs challenged the adoption of the Tennessee Marriage Amendment on the ground that it was not published in accord with a procedural provision of the state constitution. *Darnell*, 195 S.W.3d at 621. Plaintiffs alleged generally that their lives and their ability to seek future changes in the law would be greatly affected by the amendment, and the lesbian and gay individuals among them alleged that by specifically prohibiting same sex marriage the amendment directly affected their legal rights. *Id.*

The Tennessee court held that this was insufficient to establish standing, insofar as none of the plaintiffs had alleged that the late publication of the ballot question affected their own awareness of the election issues or their ability to participate in the public debate leading up to the vote. *Id.* at 622. Similar to McConkey, the plaintiffs in *Darnell* testified that they were aware of the ballot question, despite its alleged late publication. *Id.* As such, they all but

conceded their lack of standing; the Tennessee court required them to show actual injury from the alleged procedural irregularity, and they showed none. Whether other actual or potential voters in the referendum, or citizens generally, might have been injured by late publication was irrelevant, the court held. *Id*. at 624 ("Standing may not be predicated upon injury to an interest that a plaintiff shares in common with all citizens.")

Similarly, the United States Supreme Court has held that one's status as a voter, without more, in insufficient to confer standing on a plaintiff seeking to raise a claim under the federal Voting Rights Act and the federal and state constitutions. *U.S. v. Hays*, 515 U.S. 737, 746 (1995). In *Hays*, several Louisiana voters challenged the state's redistricting plan on the ground that one of the districts created thereunder was the result of racial gerrymandering. *Id*. at 744. The Court noted that "we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power," and the Court further held that "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other." *Id*. at 743.

Applying those principles, the Court held that the Louisiana voters lacked standing to challenge the redistricting scheme because they did not live in the district alleged to have been racially gerrymandered. *Id*. at 745. Recognizing that racial gerrymandering denies residents of gerrymandered districts equal treatment, the Court went on to say that "where a plaintiff does not live in such a district, he or she does not suffer those special harms." *Id*.

Notably, the Supreme Court specifically rejected the plaintiff's argument that even if they did not live in the district alleged to have been gerrymandered, they were nonetheless affected by the unlawful conduct since what is added to one district is, by definition, taken away from some other. *Id*. at 746. The Court explained, "The fact that Act 1 [the redistricting legislation] *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on *some* Louisiana voters—that every Louisiana voter has standing to challenge Act 1 as a racial classification." *Id*. (emphasis in original).

McConkey's admission puts him outside the zone of interests protected by the separate amendment rule, just as the *Hays* plaintiffs' place of residence put them outside the zone of interests protected by the Fourteenth Amendment. One must look beyond McConkey's status as a voter to the facts that would bring his vote within the zone of interests protected by the separate amendment rule. Here, no such facts exist.

C. McConkey Was Not Injured By The Inclusion of Both Propositions in the Marriage Amendment, Even If Doing So Violated the Separate Amendment Rule.

McConkey stipulated that if the ballot had included two questions, rather than one, corresponding to the two propositions contained in the actual ballot question, he would have voted

"no" to each question. (R. 55 at 7; R-Ap. 132).[2] McConkey therefore conceded that he lacks standing to sue for a violation of article XII, section 1, because even if the ballot question violated that constitutional provision (which the Attorney General denies), by McConkey's own admission he suffered no real, direct, actual injury. His "no" vote on the ballot question expressed his preferences as an elector and there was no injury to him.

The circuit court erred in denying the Attorney General's motion to dismiss. The court based its decision on the ground that every elector would have standing to litigate an alleged violation of article XII, section 1, regardless of how he or she intended, or did, vote on the challenged ballot. (R. 55 at 27; R-Ap. 134-36). The court stated that "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective." (R. 55 at 27; R-Ap. 134). The circuit court's rationale conflicts with the basic principles of standing in Wisconsin.

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[2]

> THE COURT: Mr. Pines, do you concede that your client alleges that he would not have voted for either proposition if they had been broken out?
>
> MR. PINES: I can concede that for purposes of this discussion, yeah.
>
> THE COURT: All right. And I understand you don't think that makes a difference.
>
> MR. PINES: That's correct.

McConkey's complaint failed to allege facts sufficient to establish his standing. In his "Petition for Injunction and Declaration of Unconstitutionality," McConkey included a section entitled "Standing" that said nothing about how the alleged non-compliance with the separate amendment rule affected his interests. He alleged that he is a registered voter who lives in Wisconsin, that he does business in the state, and that he pays taxes in the state. (R. 1 at 2). At no point in his Petition did McConkey allege facts showing that the constitutional violation he complained of, the placement of two allegedly unrelated questions in a single ballot question, directly affected his vote.

At the hearing on the motion to dismiss it became plain that whether the two propositions on the ballot in November 2006 were contained in one amendment or two, it made no difference to McConkey's preferences as a voter, since McConkey expressly conceded that he would have voted "no" on each one. (R. 55 at 7; R-Ap. 132).

Whether *other* voters might have wished to vote differently on the separate propositions is immaterial to the question of McConkey's standing, since he must allege that he personally suffered a real and direct, actual or threatened injury. He acknowledges that he did not do so.

The circuit court in this case erred by reasoning that McConkey suffered an injury merely by having to participate in an election in which the ballot allegedly violated the separate amendment rule. "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective. It may not be any different from any

other voter, but it may very well be." (R. 55 at 27; R-Ap. 134). The court essentially held that the potential existence of a constitutional violation creates the basis for standing.

The circuit court's rationale is contrary to how standing works. Even if the injury need only be "trifling," it must nonetheless exist, separate and apart from the constitutional violation itself. For the circuit court, merely casting a ballot subjected McConkey to possible injury, but the cases cited above show that it is not mere participation that confers standing, but objective, individualized behavior putting the plaintiff within the zone of interests. Moreover, under the circuit court's rationale, even the voter who said "yes" to the ballot and would have said "yes" to separate propositions would have standing, simply because he cast a ballot.

The separate amendment rule does not protect access to the voting booth. It protects voters against having to decide whether their support for one proposition is stronger than their opposition to another proposition. If a voter was indifferent to that decision, as McConkey was, then he lacks standing to sue.

The circuit court also rested its decision on the principle that standing is "liberally construed" in Wisconsin, *see* R-Ap. 134, but while the principle is quite correct, it was not properly applied here. Such liberality does not mean that standing exists even though it is apparent that no injury did or may occur to the plaintiff. By his own account, if the separate amendment rule was violated, McConkey lost nothing; his preferences were accurately expressed by his vote, regardless of any alleged procedural flaw.

CONCLUSION

McConkey acknowledges that he would have voted "no" on each proposition in the marriage amendment had they been presented as separate questions on the November 2006 ballot, and he therefore suffered no direct, personal injury as a result of any alleged failure of the Legislature to comply with the separate amendment rule. Under the traditional analysis of standing in Wisconsin, McConkey lacks standing to pursue his claim and the decision of the circuit court denying in part the Attorney General's motion to dismiss for lack of standing should be reversed.

Dated this ____ day of August, 2009.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,349 words.

Dated this _____ day of August, 2009.

_____
LEWIS W. BEILIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

_____
LEWIS W. BEILIN
Assistant Attorney General