

IN THE SUPREME COURT OF WISCONSIN

Case No. 2020AP2003

WISCONSIN JUSTICE INITIATIVE, INC.,
a Wisconsin nonstock corporation,
JACQUELINE E. BOYNTON,
JEROME F. BUTING, CRAIG R. JOHNSON,
and FRED A. RISSER,

Plaintiffs-Respondents,

v.

WISCONSIN ELECTIONS COMMISSION,
ANN S. JACOBS, in her official capacity
as Chair of the Wisconsin Elections Commission,
DOUGLAS LA FOLLETTE, in his official capacity
As Secretary of State of Wisconsin, and
JOSH KAUL, in his official capacity
as Attorney General of Wisconsin,

Defendants-Appellants.

On Certification from District III of the Wisconsin Court of Appeals
Following Appeal from a Final Decision and Order Entered in the Dane
County Circuit Court, the Honorable Frank D. Remington, Presiding

BRIEF OF *AMICI CURIAE*
ACLU OF WISCONSIN & LAW FORWARD, INC.

Christine Donahoe
State Bar No. 1092282
ACLU of Wisconsin Foundation
207 E. Buffalo St., Suite 325
Milwaukee, WI 53202
cdonahoe@aclu-wi.org
414.272.4032
*Counsel for Non-Party ACLU
of Wisconsin*

Mel Barnes
State Bar No. 1096012
Elizabeth M. Pierson
State Bar No. 1115866
Law Forward, Inc.
P.O. Box 326
Madison, WI 53703
mbarnes@lawforward.org
epierson@lawforward.org
608.535.9808
*Counsel for Non-Party
Law Forward, Inc.*

(Additional counsel on inside cover)

Jeffrey A. Mandell

State Bar No. 1100406

Douglas M. Poland

State Bar No. 1055189

Pahoua Thao

State Bar No. 1098421

Stafford Rosenbaum LLP

222 West Washington Avenue

P.O. Box 1784

Madison, WI 53701-1784

jmandell@staffordlaw.com

dpoland@staffordlaw.com

pthao@staffordlaw.com

608.256.0226

Counsel for Non-Party

Law Forward, Inc.

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INTEREST OF *AMICI CURIAE*

The ACLU of Wisconsin aims to ensure that voters understand their voting rights and can freely exercise those rights. Law Forward exists to advance democracy in Wisconsin and revive our state's traditional commitment to clean and open government. *Amici* litigate, invest in public education, and engage in administrative processes to secure broad participation in elections.

INTRODUCTION

Marsy's Law—an amendment longer than the entire Bill of Rights—made multiple changes to the Wisconsin Constitution. Yet it was presented to voters in a single, short ballot question that neglected to describe major provisions of the proposed amendment and conflated topics not connected to the same general purpose.

Established research on decision-making elucidates the ballot question's flaws. Voters may have evaluated Marsy's Law differently had the ballot question accurately described not only the law's expansion of victims' rights, but also its potential curtailment of defendants' rights.¹

Whereas the circuit court decision and the parties' briefs address the constitutional requirements and caselaw, *amici* illustrate through research on voting and decision-making what it means, in this context, to fully apprise voters of the essential elements of a ballot question.

¹ The parties dispute whether the amendments affect defendants' rights. For present purposes, *amici* argue that voters should have been informed of various textual changes because of their *potential* to narrow, if not eliminate, certain longstanding rights of defendants.

ARGUMENT

The Wisconsin Constitution sets explicit and detailed requirements for what a ballot question must contain, and when multiple questions must be submitted to the electorate. A ballot question must be an “intelligent and comprehensive submission” so that the people “may be fully informed on the subject.” *State v. Zimmerman*, 187 Wis. 180, 204 N.W. 803, 811 (1925). Whether voters are “fully informed” depends on how the ballot question is framed and how much context it provides. *See, e.g., id.* Fully informing the voters need not require lengthy or technical exposition, but a ballot question must always “reasonably, intelligently, and fairly comprise or have reference to every essential of the amendment.” *Id.*

Scientific research about decision-making and voting demonstrates how the Marsy’s Law ballot question failed to fully inform voters because of both its framing and context. Specifically, the question misled voters by excluding information about potential losses to defendants’ rights. The research also demonstrates how multiple ballot questions would have mitigated the framing bias of the single, deficient ballot question.

I. The Marsy’s Law Ballot Question Failed To Fully Inform Voters.

The Marsy’s Law ballot question failed to provide essential information for voters to make informed decisions. All voters saw about Marsy’s Law on their ballots was a 64-word ballot question. A-App. 164. But Marsy’s Law effectuated a long and detailed set of constitutional changes. It rewrote Wisconsin’s original Crime Victim Bill of Rights, enacted in 1993. That provision was 148 words long. Wis. Const. art. I, § 9m

(2017-18). Marsy's Law discarded most of those words and created a new crime victims' bill of rights, more than six times longer. Fully informing voters of the substantial changes and the trade-offs involved in Marsy's Law required more than the ballot question provided.

A. Framing and context affect how voters understand ballot questions.

Two principles of decision-making explain what voters need to make an informed decision on proposed amendments: 1) individuals respond very differently to losses and gains; and 2) individuals reach different conclusions on the same questions, depending on the amount of context provided. A different formulation of the same choice can alter an individual's preference. DANIEL KAHNEMAN, THINKING, FAST AND SLOW, 368 (2013). Even voters with a "definite preference (i) might have a different preference in a different framing of the same problem; [and] (ii) are normally unaware of alternative frames and of their potential effects on the relative attractiveness of options." Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 457 (1981).

Even "seemingly inconsequential changes" in how a choice is framed "cause[] significant shifts of preference." *Id.* For example, asked whether a hate group should be permitted to hold a rally, 85% of respondents answered favorably when the question was prefaced with, "Given the importance of free speech." Dennis Chong & James N. Druckman, *Framing Theory*, ANNUAL REV. POLI. SCI., 10:103-26 (2007) (internal citations omitted). When the same question was prefaced with a security concern ("Given the risk of violence,"), only 45% were in favor. *Id.*

This is true because individuals' decision-making processes are often nonlinear, and do not occur in a vacuum. People make different decisions with respect to the exact same choice, depending on whether they are given a "minimal account" or "inclusive account" of contextual information. "People generally evaluate acts in terms of a minimal account, which includes only the direct consequences of the act." Tversky & Kahneman, *supra*, at 456; *see also id.* at 457 (explaining why this happens). Providing more context often changes the outcome of decisions. *Id.* Consider, for example, whether you should drive from one store to another to save \$20 on a pair of shoes. You would most likely be willing to make the drive if the shoes cost \$60, but not if the shoes cost \$500. This is because people generally evaluate the potential savings of \$20 in a more inclusive account, relative to the purchase price of the shoes. *See id.* "Because of the nonlinearities of the evaluation process, the minimal account and a more inclusive one often lead to different choices." *Id.* Context also mitigates framing bias. James N. Druckman & Arthur Lupia, *Mind, Will, and Choice*, at *8, OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS, eds. Robert E. Goodin and Charles Tilly (Mar. 2006) (citing a study in which individuals responded differently when given both frames of the same problem compared to just one frame).

Framing biases often affect the outcomes of ballot measures for two main reasons. **First**, voters are relatively uninformed, even on the basics. In a 1991 survey, only "52 percent of respondents [knew] that their state had its own constitution." Sanford V. Levinson & William D. Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 214 (2016) (citations and quotations omitted). Few

voters spend substantial time researching ballot issues. *See, e.g.*, Werner Pleschbreger, “Making Informed Citizens in Local Direct Democracy. What Part Does Their Government Perform?” in *Local Government and Urban Governance in Europe* 233, 234, eds. Carlos Nunes Silva & Ján Buček (2017); Craig M. Burnett & Vladimir Kogan, *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, 32 *POLITICAL COMMUNICATION* 109, 112 (2015). This is increasingly true in our digital age, as misinformation floods social media. *See, e.g.*, *Robocalls, Rumors and Emails: Last-minute Election Disinformation Floods Voters*, NPR, Oct. 24, 2020.²

The ballot question is the *only* text that *all* voters see—as well as the last text they see—before casting their votes, which gives its framing particular power and consequence. Burnett & Kogan, *supra*, at 112. Voters rarely read the full text of a proposed law, relying instead on campaign messages, endorsements, and most importantly, the ballot question itself. *Id.* at 114. Therefore, language in ballot titles and summaries has an outsized effect. *Id.* at 110; *see also* Pleschbreger, *supra*, at 237.

Second, strong framing trumps more accurate messages with weaker frames, even if the more accurate messages are more frequent. *See* Dennis Chong & James N. Druckman, *Framing Public Opinion in Competitive Democracies*, 101:4 *AM. POL. SCI. REV.* 645, 647 (2007). This makes the use of strong, overly-simplified framing in ballot questions particularly concerning.

² Available at <https://www.npr.org/2020/10/24/927300432/robocalls-rumors-and-emails-last-minute-election-disinformation-floods-voters>.

B. The ballot question here was misleading because it excluded information about potential losses to defendants' rights, and voters evaluate gains and losses differently.

The Marsy's Law ballot question failed to fully inform voters because it lacked any information about potential losses of defendants' rights, and that lack of context misled voters. Individuals commonly perceive outcomes as either positive or negative (a gain or a loss). Tversky & Kahneman, *supra*, at 454. The ballot question framed Marsy's Law solely as creating new rights for crime victims, omitting information about existing rights of crime victims and concomitant potential losses for defendants. This matters because decision-makers consider potential losses more significant than potential gains. *Id.* at 454-55.

Two "logically equivalent statements" often "do not mean the same thing" and elicit different responses. Kahneman, *supra*, at 363. When stores began widely accepting credit cards, the credit-card industry lobbied stores to offer a "cash discount" instead of charging a "credit-card surcharge" because consumers are less willing to accept loss (paying a surcharge) than they are to forego a cash discount. Tversky & Kahneman, *supra*, at 456. The two options are "economically equivalent but they are not emotionally equivalent." Kahneman, *supra*, at 364. In one study, respondents were asked their preference of two possible medical treatments. Treatment A was sometimes described as having a "one-month survival rate [of] 90%," and other times described as having "10% mortality in the first month." Though mathematically identical, respondents preferred Treatment A when framed

in terms of its survival rate, but not when framed in terms of its mortality rate. *Id.*

The framing effect holds true in ballot measures. In one study, respondents were asked whether they supported a proposed amendment. When the ballot question's title described a loss—"Eliminates the Right of Same-Sex Couples to Marry"—39 percent supported it, but when the same amendment had a title reflecting only gains—"The Protect Marriage Act"—support jumped to more than 50 percent. Jeff Hastings & Damon Cann, *Ballot Titles and Voter Decision Making on Ballot Questions*, 46(2) STATE & LOCAL GOV'T REV. 118, 122 (2014). This is one of many studies confirming that "framing effects due to ballot title wording are very real." *Id.* at 124.

The Marsy's Law ballot question was framed as a simple gain for victims. It was titled "Additional rights of crime victims." A-App. 164. It asked if voters wanted to "give victims additional rights" and used words with positive associations like "protect[]," "allow," and "enforce." *Id.* The only reference to the rights of the accused was also framed positively: "leaving the federal constitutional rights of the accused intact." *Id.*

But Marsy's Law itself makes four changes that, contrary to that positive framing, could weaken defendants' rights.

First, it limits discovery available to defendants by allowing victims "[t]o refuse an interview, deposition, or other discovery request." A-App. 162.

Second, it states that victims have the right "to attend all proceedings" deleting the caveat "unless the trial court finds sequestration is necessary to a fair trial for the defendant." *Id.*

Third, it removes from the Wisconsin Constitution a guarantee that “[n]othing 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.” A-App. 163.

Fourth, it requires that victims’ rights “be protected by law in a manner no less vigorous than the protections afforded to the accused,” a change in the balance of victims’ and defendants’ rights that the ballot question did not reflect. A-App. 162. The ballot question told voters that victims’ rights would be protected “with equal force” as the rights of the accused. This language again framed the amendment as strengthening victims’ rights only, without affecting other parties. But the actual language of the amendment arguably elevates victims’ rights *above* defendants’. Inaccurate framing hid this negative impact from voters.

Moreover, it is not settled that Marsy’s Law even creates new rights for crime victims. According to some victims’ rights advocates, “[a] close look reveals that victims could have argued these rights under the previous section 9m along with Wis. Stat. chapter 950 among other statutes.” Becca Donaldson et al., *Marsy’s Law: Changes for Crime Victims?* Wisconsin Lawyer (Sept. 8, 2020).³ If there are no new rights, the ballot question not only misled by understating losses but also by overstating gains.

At a minimum, uncertainty remains about how courts will interpret and apply Marsy’s Law—it is more nuanced and complex than the ballot question suggested. This is troubling because the framing solely in terms of victims’

³ Available at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=8&ArticleID=27930>.

gains does not evoke the same response and therefore *does not mean the same thing* to voters as a framing in terms of defendants' losses.

Lack of context exacerbated these problems. Voters might have considered the ballot question differently had it acknowledged that Wisconsin's Constitution already contained a Crime Victim Bill of Rights and specified what was new about the proposed constitutional amendment. As framed, the ballot question suggested—falsely—that a “yes” vote was necessary for crime victims to have constitutional protections.

It is unrealistic to expect voters to research and reframe a ballot question to understand the potential losses it imposes. “Unless there is an obvious reason to do otherwise, most of us passively accept decision problems as they are framed and therefore rarely have an opportunity to discover the extent to which our preferences are *frame-bound* rather than *reality-bound*.” Kahneman, *supra*, at 367.

Here, the chaos of the April 2020 election—the nation's first election during the Covid-19 pandemic—made it especially unlikely that voters would see the full text of Marsy's Law and detailed information about its context. Questions of when, where, how, and whether to vote distracted voters from the substance of the election. The stress of uncertainty around the April 2020 election left voters even more vulnerable to framing bias in the ballot question, which for many was their primary (if not only) source of information about Marsy's Law.

Scientific studies on evaluation of losses indicate that voters may have responded differently had the choices been contextualized and properly framed. Such questions could still be simple and comprehensible, such as, “Should the Constitution be amended to remove the defendant's right to

sequester a victim witness if necessary for a fair trial?” or, “Should crime victims be granted additional rights during investigation and prosecution that weaken or eliminate some rights of the accused?” The actual ballot question made no reference whatsoever to potential losses. Indeed, the ballot question was misleadingly framed to *negate* a loss of defendants’ rights by indicating the amendments would “leav[e] the federal constitutional rights of the accused intact.” A-App. 164. To capture the will of the voters, the ballot question required neutral framing and sufficient context.

II. Multiple Ballot Questions Would Have Mitigated the Framing Bias.

To accurately capture the potential loss of defendants’ rights and give voters an opportunity to express their preferences on both the potential losses and gains involved, Marsy’s Law needed at least two ballot questions. Multiple questions could have ameliorated the framing problems discussed above while following Wisconsin’s rule requiring separate questions for separate issues.

Amendments that have “different objects and purposes,” which do not depend on each other, *must* be submitted to voters separately. *State v. Timme*, 54 Wis. 318, 336, 11 N.W. 785 (1882); *see also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 657, 60 N.W.2d 416 (1953). This is known as the single-subject rule.

Wisconsin’s single-subject rule ensures that ballot measures accurately ascertain the will of the voters. The more focused the ballot question, the more likely the vote will accurately reflect voters’ desires. This is because “voters will simply not know about, much less understand in any depth many of the sub-issues.” Richard B. Collins & Dale Oesterle,

Structuring the Ballot Initiative: Procedures That Do and Don't Work, 66 U. COLO. L. REV. 47, 85 (1995). Additionally, when ballot questions bundle multiple issues, voters must weigh their opinions about one part of the question against their opinions about other parts. If they strongly favor one part and mildly disfavor another, they may vote “yes” even though that does not accurately represent their opinion of the second part. *Id.* “If a majority does so, the state constitution contains language favored by the majority, the text of issue one, and language disfavored by the majority, the text of issue[] [two]” *Id.* at 85-86. The Marsy’s Law ballot question avoided this problem by simply failing to disclose the amendment’s potential impact on defendants. But a single ballot question that successfully conveyed all essential information about Marsy’s Law would have put voters in the untenable position of voting on bundled issues. Separate questions were therefore necessary.

Wisconsin voters have reaffirmed the need for separate questions. In 1964, the electorate *rejected* a constitutional amendment that would have loosened the single-subject rule, allowing reasonably related items to be submitted to the voters in a single proposition. LRB “Ballot Initiative and Referendum in Wisconsin,” at 16;⁴ *see also* LRB Informational Bulletin No. 64-4, February 1964, at 7-10.⁵ Voters rejected the proposed rule change by a 29% margin. *Id.* at 16.

⁴ Available at https://docs.legis.wisconsin.gov/misc/lrb/wisconsin_elections_project/ballot_initiative_referendum_1_1.pdf.

⁵ Available at <http://lrbdigital.legis.wisconsin.gov/digital/api/collection/p16831coll2/id/237/download>.

Marsy's Law contains provisions that accomplish separate purposes: increasing victims' rights and lessening state-law protections for criminal suspects and defendants. These elements of Marsy's Law are not interdependent, and voters *could* have accepted one while rejecting the other.

The expressed purpose of Marsy's Law was to expand victims' rights, but some of its provisions were not necessary to, and did not, further that goal. The four discrete changes discussed above in part I. B affected defendants' rights could and should have been separate. None is a necessary "detail of a main purpose," *Thomson*, 264 Wis. at 657, of expanding victims' rights. Voters may have wanted to expand crime victims' rights without altering defendants' rights. This is precisely the balance voters struck in adopting Wisconsin's prior Crime Victims Bill of Rights. Wis. Const. art. I, § 9m (2017-18) ("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."). But voters were not given that option in 2020.

CONCLUSION

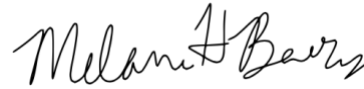
The Marsy's Law ballot question did not present the Constitutional amendments neutrally or fully. The question implied that the amendments did nothing but add rights, though Marsy's Law is more complex than that. The question also improperly bundled separate issues. The question thus distorted voters' decision-making process and violated constitutional requirements. These flaws rendered the ballot question inaccurate and undermined the referendum result. Accordingly, *amici* respectfully urge this Court to affirm the circuit court.

Dated: May 26, 2022.

Respectfully submitted by:

Christine Donahoe
SBN 1092282
ACLU of Wisconsin Foundation
207 E. Buffalo St., Suite 325
Milwaukee, WI 53202
cdonahoe@aclu-wi.org
414.272.4032

*Counsel for Non-Party ACLU of
Wisconsin*



Mel Barnes
SBN 1096012
Elizabeth M. Pierson
SBN 1115866
Law Forward, Inc.
P.O. Box 326
Madison, WI 53703
mbarnes@lawforward.org
epierson@lawforward.org
608.535.9808

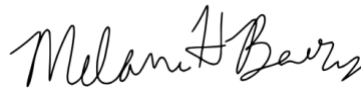
Jeffrey A. Mandell
SBN 1100406
Douglas M. Poland
SBN 1055189
Pahoua Thao
SBN 1098421
STAFFORD ROSENBAUM LLP
222 W. Washington Ave., Ste. 900
Madison, WI 53701-1784
jmandell@staffordlaw.com
dpoland@staffordlaw.com
pthoa@staffordlaw.com
608.256.0226

*Counsel for Non-Party Law
Forward, Inc.*

**CERTIFICATION OF COMPLIANCE
WITH WIS. STAT. § 809.19(8g)(a)**

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of the Introduction, Argument, and Conclusion of the brief is 2,985 words.

Signed:

A handwritten signature in cursive script that reads "Mel Barnes".

Mel Barnes

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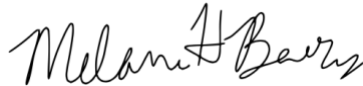
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wisconsin Supreme Court Order 2021 WI 62 (June 15, 2021).

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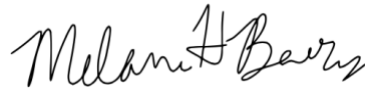


Mel Barnes

CERTIFICATION OF MAILING AND SERVICE

I certify that 22 paper copies of the foregoing Brief of *amici curiae* were hand-delivered to the Clerk of the Supreme Court on May 26, 2022.

I further certify that on May 26, 2022 I sent true and correct copies of the foregoing Brief of *amici curiae* by mail to all counsel of record who did not consent to receipt by email.

A handwritten signature in cursive script that reads "Mel Barnes".

Mel Barnes