STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2020AP002003

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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 of the Wisconsin Elections Commission,
DOUGLASS 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.

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# NONPARTY BRIEF AS AMICI CURIAE LOTUS LEGAL CLINIC, INC.

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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.

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## INTRODUCTION

Even where the interests of the victim and accused in a criminal matter might appear to diverge, the origin development of their respective legal rights reflect a unifying—and critically important—convergence of purpose: to protect individuals from State power within the criminal justice system. Contrary to the circuit court's presumption, an increased prioritization of more than one individual's legal rights does not automatically diminish the power of one in favor of the other. Thus, a ballot question on Wis. Const. art. I, § 9m which preemptively anticipates such a reduction of the rights of a defendant would do exactly what the circuit court decision purports to prevent: mislead voters.

## ARGUMENT

Ask an average Wisconsin voter to identify rights foundational to our justice system, and they will likely point to the rights of the criminally accused. Particularly familiar, for instance, are the right to remain silent, the right to a fair trial, and the presumption of innocence. Such rights, originating early in our nation's history and developing over hundreds of years, form a cornerstone of our democracy. Enshrined in our United States and state constitutions, statutes, and common law, they are practically sacred.

The recent emergence of crime victims' rights shares with the accused the purpose of both protecting against and remedying governmental harm. In elevating and enumerating victim rights, the 2020 amendment to Wis. Cons. art. I, § 9m

(the Amendment, herein) constitutionalizes government accountability in a way Wisconsin voters already recognize and support, consistent with principles fundamental to our justice system.

## I. The Rights of the Accused and Victim Derive from Well-established Histories of Systemic Mistreatment.

Albeit at different paces, the development of legal rights for victims and accused reflect a parallel effort to protect individuals from misapplication of State power. This important context, thus far overlooked, should frame analysis of the Ballot Question.

### A. The rights of the accused respond to the imbalance between government and individual power.

Since our democracy's earliest days, protecting the civil rights of the accused has endured as a central tenet of American jurisprudence, evidenced through its ever-expanding body of constitutional, statutory, and common law.

Our founders understood—and wisely sought to establish protections from—State oppression over the governed when an individual's life, liberty, and property are at stake.[1] The drafters, therefore, dedicated considerable attention to the interests of the criminally accused in the United States Constitution and the Bill of Rights. *See, e.g.*, U.S. Const. amend.VI (right to speedy public trial, to

[1] "Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *The Papers of Thomas Jefferson, vol. 12*, 438-443 (Julian P. Boyd ed., 1955).

confrontation, to counsel). *See also*, U.S. Const. amend. IV-V, VIII (outlining additional rights of the accused).

As our justice system has developed over centuries, so too have defendants' rights, resulting in a robust, dynamic body of case law. For example, the doctrine of selective incorporation prevents states from enacting laws that violate a citizen's Constitutional rights. *See, McDonald v. Chicago*, 561 U.S. 742 (2010) (summarizing the evolution of selective incorporation doctrine). The Supreme Court has long held that the Fourteenth Amendment's Due Process and Equal Protection Clauses require states to uphold certain protections contained in the Bill of Rights. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963). Other seminal decisions have steadily strengthened protections for the accused. *See, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927); *Strickland v. Washington*, 466 U.S. 668 (1984); *Crawford v. Washington*, 541 U.S. 36 (2004). Meanwhile, state and federal legislatures have also prioritized the development of defendants' rights. *See, e.g.*, Wis. Const. art. I, §§ 5-8 (setting out enumerated rights of the accused). *See also*, Wis. Stat. Ch. 967-980 (establishing rules of criminal procedure).

These laws establish critically important expectations and parameters for how the government treats an individual within the criminal justice system.

### B. Enumerated rights designed to protect the interests of the victim do the same.

Like the accused, victims face the force of government within the criminal justice system. But unlike the accused, despite their distinct stake in a criminal matter, victims have had no articulable role in criminal proceedings until very recently, resulting in a system that is "appallingly out of balance", "serv[ing] lawyers and judges and defendants [while] treating the victim with institutionalized disinterest". *President's Task Force on Victims of Crime*, Final Report, vi (1982).

Consistent with the due process interests of the accused, our criminal justice system evolved from a private prosecution model to public prosecution system.[2] Beginning in the 1920's, "[p]rivate prosecution [became] inconsistent with the American concept of democratic process and [, thus,] had a short life span." Joan E. Jacoby, *The American Prosecutor: A Search for Identity,* 80, 10 (1980). Shifting away from prioritizing the individual's harm, now the cost of a crime to society became the dominant consideration.[3] Michael E. O'Neill, *Private Vengeance and the Public Good,* 12 U. Pa. J. Const. L. 659, 681 (2010). "It is against public policy and the impartial administration of criminal law for a court to allow attorneys for private persons to appear as prosecutors". *State v. Biemel*, 71 Wis. 444, 37 N.W. 244

[2] *See generally*, Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J. L. & Pub. Pol'y 357 (1986).

[3] *See, e.g.*, *Malley v. Lane*, 115 A. 674, 676 (Conn. 1921) ("...[A] sense of safety is necessary to the comforts and happiness of every citizen, and which the government is instituted to secure.")

(1888). *See also, State v. Russell,* 83 Wis. 330, 53 N.W. 441 (1892).

This system of public prosecution protects a defendant's due process rights by progressively restricting the participation of private individuals. *See generally,* Douglas E. Beloof, Paul G. Cassell and Steven J. Twist, 11-17 (3d ed. 2010). The U.S. Supreme Court held that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973). "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—seen but not heard". *Kenna v. District Court*, 435 F.3d 1011 (9th Circuit 2006). Thus, victim "participation" has largely hinged on the discretionary invitation of the parties and the court.

Meaningful acknowledgement of this systemic disregard did not emerge until the 1970's, when national dialogue began contemplating reforms that would give more consideration to victims' concerns. *See,* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 Utah L. Rev. 861, 865-69 (2007). In *Linda R.S.*, the Court emphasized the legislative framework for victims' rights: "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute". 410 U.S. 614, fn. 3.

The President's 1982 Task Force on Victims of Crime concluded in its recommendation endorsing a federal constitutional amendment for crime victims that: "the criminal justice system has lost an essential balance…victims of crime have been transformed into a group oppressively burdened by a system designed to protect them." *President's Task Force on Victims of Crime*, Final Report, 114 (1982). The bipartisan push for this recommended constitutional amendment ultimately gave way to a constellation of state constitutional amendments and statutes provisions aimed at re-integrating the victim into the criminal justice system. *See,* Cassell, at 865-70. *See also*, U.S. Department of Justice, Office for Victims of Crime, *New Directions from the Field: Victims' Rights and Services for the 21st Century,* 3-37 (1998).

Despite these new laws, systemic marginalization has persisted, giving rise to new legislative responses. Indeed, Wisconsin's own legislative history relating to Wis. Const. art. I, § 9m illustrates this progression. The statutory crime victim Bill of Rights was not protecting victims from systemic mistreatment, thereby resulting in the 1993 passage of Wis. Const. art. I, § 9m. The rationale of this original constitutional amendment mirrors that of the Amendment—namely, that it "was necessary to give weight" to existing statutory provisions and to "give our courts a constitutional basis for recognizing the victim's interest." *Constitutional Amendments and Advisory Referenda to Be Considered by*

*Wisconsin Voters April 6, 1993,* LRB-93-WB-4, at 3-4 (March 1993).[4]

### C. The rights of both victim and accused co-exist to safeguard against State mistreatment.

As individuals navigating the criminal justice system, the victim and accused are uniquely aligned in their shared need for protection against systemic mistreatment. Like the accused, "[j]ust as a pebble dropped in a pool causes rippling all across the water, the mistreatment of victims spread resentment and distrust of the justice system throughout entire communities". *Schilling v. State Crime Victims Rights Bd.*, 278 Wis.2d 216, 228 692 N.W.2d 623-629 (2005), quoting Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 Wayne L. Rev. 29, 30 (1987).[5] Together, their respective legal protections help to ensure that individual system participants are treated fairly within the confines of the law.

The interplay and shifting applicability of the rights of the victim and accused for a human trafficking survivor illustrates the systemic value of these simultaneous legal protections. A young victim forced to engage in commercial sexual activity gets hooked on drugs provided by her trafficker. She is arrested, along with her trafficker, and criminally charged with prostitution and drug possession. Effective enforcement of her rights as both the defendant and

[4] Statements made by the Legislative Reference Bureau should not be ignored because the agency "is deeply involved in the legislative drafting process as LRB attorneys draft the bills and resolutions that are introduced into the legislature." *State v. Cole,* 2003 WI 112, P36 n.12, 264 Wis.2d 520.

[5] Victims and defendants are harmed in different ways when their rights are violated. We do not intend to imply that the victim's interest when their civil rights are violated in a criminal matter outweigh, or even match, the grave liberty consequences when the accused's rights are violated.

victim are critical to ensuring a just outcome. All of these protections converge to ensure the State's fair and efficient administration of justice.

Compared to those of the accused, victims' rights law is still in its infancy. Even so, its limited maturation over the past three decades in spite of robust legal protections illuminates the need for the Amendment: "to preserve and protect victims' rights to justice and due process throughout the criminal and juvenile justice process…
in a manner no less vigorous than the protections afforded to the accused." Wis. Const. art. I, § 9m (2).

## II. When Evaluated in This Context, the Ballot Question Neither Misleads nor Omits.

By conflating the victim with the State and disregarding the historical context of the relevant laws, the circuit court mistakenly construes the Amendment as a contest between the victim and accused. But a ballot question that presents the Amendment as such—as the circuit court recommends—would be rooted in misconceptions about the role of the victim, thereby perpetuating a mistaken notion that the criminal justice system cannot protect the interests of the victim without violating the accused's.

### A. The Amendment does not curtail the constitutional protections of the accused.

The Amendment elevates the victims' substantive rights and clarifies the procedural pathway to assert these rights without altering the landscape of the accused's. The Ballot Question effectively explained this to voters.

The circuit court, nonetheless, concluded that certain modifications and omissions within the Amendment change the state constitutional protections of the accused, contrary to the wording of the Ballot Question. (R. 53:11-12) For example, the court devoted considerable attention to the meaning of the constitutional phrase "no less vigorous", predicting that it amounts to a balancing test which risks usurping the rights of the accused in new ways and to a greater extent than the language of the Ballot Question. (*See* R. 53:15-20). This interpretation overlooks an alternative interpretation consistent with the intention of protecting victims from systemic mistreatment—namely, that the oft-ignored rights of the victim require the same diligent, thoughtful consideration and application as those of the accused.

Because the rights of the accused exist outside of Art. I, sec. 9m, the Amendment's elevation of enumerated rights neither alters the supremacy of the federal Constitution nor modifies, subjugates, or denies the well-established rights of the accused. Each of the accused's common law, state and federal constitutional protections endure regardless of the language of the Amendment. For example, when first enacted in 1993, Art. I, § 9m included a reference to the accused's right to a "fair trial." The Amendment's omission of reference to this right cannot strip a defendant of the right to a fair trial because the supremacy of the United States Constitution guarantees it. U.S. Const. art. VI, cl. 2. Its absence from the

Amendment does not now create ambiguity, as contemplated by the circuit court. (R. 53:21)

The rights of the accused do not originate, nor should they, in Wis. Const. art. I, § 9m. Notably entitled "Victims of Crime", the Amendment was to "give crime victims additional rights" and not the other way around.[6] *See,* 2019 Senate Joint Resolution 2. That this Amendment expressly for victims would confer upon the accused new, additional constitutional protections—as the circuit court reasoned—leaps over the contextual history of systemic mistreatment that gave rise to the Amendment in the first place. (R. 53:21).

### C. The Ballot Question properly articulates the Amendment's purpose.

The Amendment requires the system to consider and balance the interests of the victim, in addition to those of the accused and the State—a task well within the judiciary's capabilities.

Unfortunately, the historical lack of victim autonomy in the criminal justice system has resulted in the flawed misperception that the State and the victim are one and the same, thereby presumptively pitting two against one. This pervasive false narrative even seeps into the circuit court's reasoning: "Some Wisconsin voters may not have approved the constitutional recognition of the rights of crime victims be enforced more vigorously than the respect to the rights of the accused *if it meant that the innocent should unjustly suffer.* Or at least, it is not hard to accept that some

[6] Additionally, we are unaware of any assertions made by defense counsel that the constitutional right to a fair trial or any other rights of the accused are found in Wis. Const. art. 1, § 9m.

voters would want the choice to give innocent crime victims all the rights they rightfully deserve but *decline to diminish the rights of persons only accused of committing a crime*." *Emphasis added.* (R. 53:14).

The interests of the State and victim frequently diverge, cutting against the notion that the Amendment may cause unjust suffering of the innocent or diminish the rights of the accused. For example, the State's case may benefit from access to the victim's deeply personal and legally protected information, regardless of the harmful impact such access might have on the victim's life. Or, the State might request a third adjournment of long-scheduled trial dates even though the victim is prepared to testify as scheduled and frustrated by delays in the case. And perhaps most commonly, the State may engage in plea negotiations without consideration of the victim's interests. Such examples powerfully illustrate the problem with improperly assigning the victims' rights to the State.[7] The victim's interests are not inherently contrary to those of the defendant's; victims are not always aligned with the State.

Courts are fully capable of balancing the competing rights of multiple interested parties through proper application of the law. This is, after all, the primary purpose of the judicial system. *See, e.g., Gabler v. Crime Victims Rights Bd.*, 2017 WI 67 ¶37, 376 Wis.2d at 174-175, 897 N.W.2d at

[7] Relatedly, it also demonstrates why individual standing for crime victims is so vital by serving the dual purpose of: (1) protecting the rights enumerated in Chapter 950 of the Wisconsin Statutes and section 9(m) of the Wisconsin Constitution and (2) allowing victims access to attorneys to help explain the interplay between their rights as crime victims and as defendants.

397 (2017) ("No aspect of judicial power is more fundamental than the judiciary's exclusive responsibility to exercise judgment in cases and controversies arising under law."). *See also*, *State v. Williams*, 2012 WI 59 ¶36, 341 Wis.2d 191 ("The constitution's grant of judicial power therefore encompasses 'the ultimate adjudicative authority to finally decide rights and responsibilities between individuals'", citing *State v. Brocklin*, 194 Wis. 441, 443, 217 N.W. 277 (1927). To that end, consistent with the Amendment's purpose, since its passage, circuit courts throughout Wisconsin are permitting victims to be heard in criminal cases when their rights are implicated and weighing their input against that of both the State and defendant when making decisions.[8]

Properly distinguishing the victim and the State precludes the presumption that the Amendment will unfairly shift the balance of power further away from the accused. Thus, by neither underplaying nor overstating the Amendment's impact on the rights of the accused, the Ballot Question accurately conveyed its essential elements.

## CONCLUSION

There can, will, and should be legitimate debate about the meaning, scope, and application of victims' constitutional rights, as occurs with every law. But predicating the language of the Ballot Question on how the Amendment might impact

[8] This acceptance is new. Prior to the Amendment, we frequently litigated the issue of victim standing to persuade a court to permit our participation. Since the Amendment, standing has not been questioned, let alone litigated.

the accused would distract and mislead voters by perpetuating the false narrative that elevating the rights of crime victims tips the scales of justice in favor of the State.

Dated this 9th day of June 2022.

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## CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,998 words.

Dated this 9th day of June, 2022.

Signed:

/S/ Rachel E. Sattler
Rachel E. Sattler

## CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 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 § 809.19 (12). I further certify that this 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.

Dated this 9th day of June, 2022.

Signed:

/s/ Rachel E. Sattler
Rachel E. Sattler

## CERTIFICATION OF MAILING AND SERVICE

I hereby certify that 22 copies of the foregoing Brief of *amici curiae* were hand-delivered to the Clerk of the Supreme Court on June 9, 2022.

I further certify that on June 9, 2022, I sent true and correct copies of the foregoing Brief of *amici curiae* by mail to all counsel of record.

/s/Rachel E. Sattler
Rachel E. Sattler