FILED
05-11-2022
CLERK OF WISCONSIN
SUPREME COURT

In the Supreme Court of Wisconsin

Appeal 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 THE COURT OF APPEALS
OF AN ORDER BY THE DANE COUNTY CIRCUIT COURT,
THE HONORABLE FRANK D. REMINGTON, PRESIDING

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, INC.

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

INTRODUCTION

In April 2020, Wisconsin voters overwhelmingly ratified "Marsy's Law"—the proposed amendment to Wis. Const. art. I, § 9m—which expanded the rights of crime victims. The circuit court below determined that Marsy's Law was invalid because its ballot question was flawed. This Court should reverse the circuit court's decision and uphold Marsy's Law.

This Court should make clear that judicial review of a ballot question and constitutional amendment must be narrow and limited. Three points compel this conclusion: (1) a court may not rewrite a legislative enactment; (2) proposed constitutional amendments are the most basic public policy question that falls squarely within the legislative branch, subject to public ratification; and (3) courts should not issue advisory opinions.

The circuit court's decision violates all three of those principles. It improperly attempts to rewrite the Legislature's chosen language, it interferes with the legislative process, and it amounts to an advisory opinion on various aspects of Marsy's Law.

ARGUMENT

This Court should uphold the Marsy's Law constitutional amendment because the circuit court erred by overstepping the limits of judicial review and infringing upon the Legislature's powers and process.

A. The judiciary does not have the power to craft constitutional amendments and other laws.

"This court has long held that it is the province of the legislature, not the courts, to determine public policy." *Flynn v. Department of Administration*, 216 Wis. 2d 521, 539, 576 N.W.2d 245. A court thus "may not substitute [its] judgment for that of the legislature" and "may not rewrite [a] statute." *City of Menasha v.*

Wisconsin Emp. Rels. Comm'n, 2011 WI App 108, ¶ 18, 335 Wis. 2d 250, 802 N.W.2d 531. This rule prevents courts from invading the province of the legislative branch. *See State v. Hall*, 207 Wis. 2d 54, 83–84, 557 N.W.2d 778 (1997). There is another sound reason for this rule: "The legislature is presumed to 'carefully and precisely' choose statutory language to express a desired meaning." *Southport Commons, LLC v. Wisconsin Dep't of Transportation*, 2021 WI 52, ¶ 32, 397 Wis. 2d 362, 960 N.W.2d 17. These rules apply equally to constitutional amendments. *See State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 191, 204 N.W. 803 (1925) (noting rules of statutory interpretation apply to our constitution).

If affirmed, the circuit court's decision could force the Legislature to use new language that no longer expresses the Legislature's desired meaning. The circuit court's decision essentially rewrites either the Marsy's Law amendment or ballot question. The court gave the Legislature two "choice[s] going forward." (R. 53:35.) It stated that the Legislature may either (1) make "*changes [to] the amendments* restoring the legal rights of the accused allowing the same question to again be presented to the voters"; or (2) keep "the amendments as drafted, and *present two new ballot questions* to the voters, one relating to victims and victim rights and the other relating to the change in the constitutional rights afforded the accused." (R. 53:35 (emphases added).) The court erred by essentially rewriting the Legislature's carefully chosen language.

The circuit court apparently thought that its decision would fix some ambiguities. The court stated that "[i]t is not in the best interest of crime victims that there be any lack of clarity in their rightful role in the administration of criminal justice. . . . Crime victims are not well served when their rights and the rights of the

accused are not clearly drawn." (R. 53:25.) The court, for instance, saw an ambiguity because the ballot question stated that victims' rights should be protected "equally" with those of defendants, although the amendment itself used the phrase "no less vigorously" instead of "equally." (R. 53:25.) The court also stated that the amendments are ambiguous because they mention victims' "rights" while referring to defendants' "protections." (R. 53:17.) The court opined that "rights" is not synonymous with "protections." (R. 53:17.)

But the Legislature presumptively chose those words for a reason, and it is not the circuit court's role to change them. It is irrelevant that the circuit court found the Legislature's chosen language ambiguous. A legislative enactment is not void simply because it may be ambiguous. *See, e.g.*, *Larson v. Burmaster*, 2006 WI App 142, ¶ 28 n.9, 295 Wis. 2d 333, 720 N.W.2d 134. Although a statute can be unconstitutionally vague, this vagueness doctrine "applies only to statutes that regulate conduct." *Id.* If a statute "does not regulate conduct or subject violators to penalties," then "the vagueness doctrine does not apply." *Id.* ¶ 30. Under those principles, Marsy's Law cannot be challenged as being unconstitutionally vague. Yet the circuit court essentially held that Marsy's Law was improperly enacted because it was too unclear for voters to understand. (*See* R. 53:17, 25, 34.) The circuit court erred by injecting the vagueness doctrine where it does not belong.

As a separate branch of government, the judiciary cannot encroach on the Legislature's power to make law. Courts cannot rewrite legislative enactments, as the circuit court did here.

B. Extensive public involvement in the amendment process informs legislative public policy decisions that are beyond the purview of judicial review.

Invalidating a constitutional amendment can encroach on the legislative power and upend the public policy preferences of the Legislature and the public. The Wisconsin Constitution intimately weaves public participation into the amendment process. The public's direct involvement in this lawmaking process demands the highest deference when a court reviews a constitutional amendment and its ballot question.

Unless the substantive validity of a constitutional amendment is challenged—which is not the case here—courts should give great deference to the Legislature when reviewing an already-ratified constitutional amendment. Article XII, Section 1 of the Wisconsin Constitution states that constitutional amendments "may be submitted to the people 'in such manner . . . as the legislature shall prescribe.'" *McConkey v. Van Hollen*, 2010 WI 57, ¶ 25, 326 Wis. 2d 1, 783 N.W.2d 855. "Thus, the constitution assigns considerable authority and discretion to the legislature in the way it submits amendments to the people for a vote." *Id.* This Court has "reaffirm[ed]" its "repeated holdings that the constitution grants the legislature considerable discretion in the manner in which amendments are drafted and submitted to the people." *Id.* ¶ 40.

Article IV, Section 1 of the Wisconsin Constitution vests the legislative power in the Legislature. Unlike ordinary lawmaking, the constitution blends the public into the legislative process when amending the constitution. Article XII, Section 1 of the Wisconsin Constitution explains that a proposed constitutional amendment must pass both chambers in two consecutive legislative sessions before the question is put to the electorate for ratification. This

process, while explained simply on paper, is far more complex in reality and highlights the deference that courts must give to the legislative branch.

The Marsy's Law amendment was a nearly three-year long process that intimately involved the public to carefully and precisely craft the language of the proposed amendment and ballot question. The amendment was first considered in the 2017 legislative session; identical versions were introduced in both chambers of the Legislature. *See* 2017 Senate Joint Resolution 53; 2017 Assembly Joint Resolution 47. Both proposals received public hearings in legislative committees at which numerous members of the public and other concerned parties voiced their opinions on the proposed constitutional amendment. The version ultimately passed by both chambers, 2017 Senate Joint Resolution 53, had multiple amendments introduced and adopted after this significant public input. Likewise, in the subsequent legislative session, an identical proposed constitutional amendment was introduced in both chambers; public hearings were held on both proposals at which numerous members of the public attended and voiced their support or opposition. Ultimately, 2019 Senate Joint Resolution 2 was passed by both chambers and put before the voters for ratification.

The Legislature presumptively expressed its intent in the text of the proposed amendment and ballot question. This presumption is especially justified because the Legislature worked with interested stakeholders—such as Marsy's Law for Wisconsin, LLC—when drafting this amendment.

By working with the Legislature to craft the Marsy's Law amendment, members of the public exercised their First Amendment right to petition the government. Likewise, those opposed to the Marsy's Law amendment also had their concerns

heard. The circuit court's decision interferes with that First Amendment right and upsets the Legislature's careful selection of language.

The question here is whether voters "were misled or misinformed as to the actual or real purpose" of Marsy's Law when they enacted it. *See Ekern*, 187 Wis. at 193. This Court has previously noted, when hearing a challenge to a proposed constitutional amendment, that the people "are presumed to be familiar with the elements of the Constitution and with the laws" because schools, the news media, places of worship, private and public organizations, and political organizations all devote time "to the education of the masses upon pending questions of public welfare." *Id.* at 192.

Given the amount of public discourse on the proposed Marsy's Law amendment, the ballot question did not mislead or misinform the voters. Information today is even more accessible and discourse even more prevalent than it was nearly a century ago when this Court decided *Ekern*. When voters ratified the Marsy's Law amendment in 2020, they were exposed to ubiquitous public debate about the amendment, either in the weeks and months preceding the public vote or in the prior years the proposed amendment was considered by the Legislature. *See, e.g.*, Laura Schulte, *You've Seen Commercials for Marsy's Law. Here's the Story Behind the Proposed Wisconsin Constitutional Amendment*, MILWAUKEE JOURNAL SENTINEL (March 27, 2020) (noting that more than $125,000 in advertising had been spent in public education efforts and where to find additional information in support of and opposition to the proposed amendment); Riley Vetterkind, *Voters to Decide on Crime Victim Constitutional Amendment on Tuesday's Ballot*, WISCONSIN STATE JOURNAL

(April 4, 2020) (providing information about the amendment and discussing arguments in favor of and opposed to the amendment).

The public's intimate involvement in the constitutional amendment process implicates the heart of the separation of powers between the judicial and legislative branches on matters of public policy. Judicial review in this case must therefore be narrow and accord broad discretion to the Legislature.

C. To avoid rendering an advisory opinion like the circuit court did here, judicial review of a proposed constitutional amendment and ballot question should be narrow.

A court should "not issue advisory opinions on how a statute could be interpreted to different factual scenarios in future cases." *State v. Steffes*, 2013 WI 53, ¶ 27, 347 Wis. 2d 683, 832 N.W.2d 101. This rule applies not only to statutes but also to constitutional amendments. *See, e.g.*, *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). After all, "in construing the Constitution, [courts] are governed by the same rules of interpretation which prevail in relation to statutes." *Ekern*, 187 Wis. at 191.

Robust judicial review of a constitutional amendment and ballot question would require a court to issue an advisory opinion, especially in cases where the constitutional amendment is lengthy and complex. This case highlights that concern. The circuit court's broad decision would effectively require two types of advisory opinions. First, the Marsy's Law ballot question would need to contain a far-reaching advisory opinion—even though a ballot question needs only a "concise statement" of the text of the amendment. Wis. Stat. § 5.64(2)(am). Second, a reviewing court would need to issue its own advisory opinion and compare it to the ballot question.

But judicial review of a constitutional amendment and ballot question should not involve a far-reaching decision on all the possible effects of the amendment. The circuit court here strayed out of bounds by issuing an advisory opinion on several aspects of this complex constitutional amendment.

Indeed, the circuit court seemed to acknowledge that it was rendering an advisory opinion. When addressing the removal of "fair trial" language in our state constitution, for example, the circuit court noted that "[i]t is not yet known how courts will balance the victim's right to be present if a court determined that his or her presence undermines the fairness of the trial." (R. 53:21.) The circuit court opined on the issue anyway, suggesting that the removal of this language was *not* "nonessential." (R. 53:22.) Regarding another aspect of the new constitutional amendments, the circuit court stated that criminal defendants were "likely losing something very important." (R. 53:23.)

The circuit court should not have opined on various aspects of Marsy's Law without having the benefit of concrete facts arising in a case where Marsy's Law applies. The court felt that Marsy's Law would cause "lower courts" to "struggle to balance the competing rights of victims as against the rights of the accused." (R. 53:25.) But other courts may never have the chance to interpret this complex and lengthy constitutional amendment if the circuit court's far-reaching decision stands.

In short, this Court should narrowly review the sufficiency of the Marsy's Law ballot question, allowing this complex constitutional amendment to be "interpreted [in] different factual scenarios in future cases." *Steffes*, 2013 WI 53, ¶ 27.

CONCLUSION

This Court should reverse the circuit court's order and hold that Marsy's Law was validly enacted.

Dated this 10th day of May 2022.

Respectfully Submitted,

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,195 words.

Dated this 10th day of May 2022.

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.

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 Rule 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 10th day of May 2022.

Electronically signed by
Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Attorney for Wisconsin Manufacturers & Commerce, Inc.