



State Democracy Research Initiative

UNIVERSITY OF WISCONSIN LAW SCHOOL

Explainer: Wisconsin Supreme Court to consider clarity in ballot questions as it decides the fate of Marsy's Law

Dustin Brown, Senior Staff Attorney

Published: September 2, 2022

When Wisconsin voters were asked in 2020 whether to amend the state constitution to better protect the rights of crime victims, the response was overwhelming: the referendum passed by a three-to-one margin. But did voters know what they were getting?

That's the question at the heart of the first case of the Wisconsin Supreme Court's new term, [Wisconsin Justice Initiative, Inc. v. Wisconsin Elections Commission](#), to be argued Tuesday, September 6. According to the amendment's critics, the ballot question glossed over ways in which the measure could reduce the rights of criminal defendants – and [the trial court agreed](#). The appeal of that decision offers a rare opportunity for the Wisconsin Supreme Court to address how the language of a constitutional amendment is translated for voters at the ballot box.

The amendment at issue is popularly known as Marsy's Law, named for [Marsy Nicholas](#), a 21-year-old college student in California who was murdered by an ex-boyfriend in 1983. The family, never told that the killer was out on bail, bumped into him at a grocery store after Marsy's funeral – an encounter that later inspired her brother, billionaire Henry Nicholas, to [spearhead a campaign](#) to establish robust constitutional rights for crime victims. Marsy's Law now appears in the constitutions of [12 states](#), including Wisconsin. (In another two states, the amendment was endorsed by voters but later overturned in court.)

Wisconsin's constitution was already amended once to incorporate rights for crime victims, [back in 1993](#), and statutory protections existed, as well. [Marsy's Law](#) echoes many of those provisions and adds new ones. It spells out 16 distinct rights for "victims," a term defined expansively to include family members in some instances. The controversy now before the supreme court concerns the way these changes could affect the rights of the accused – and whether voters were adequately apprised of those effects.

In Wisconsin, a proposed [constitutional amendment](#) is placed on the ballot after the legislature endorses it in two successive sessions, and it becomes law if a majority of voters approve it. But the full text of the amendment doesn't appear on the ballot itself. Instead, the Wisconsin

constitution gives the legislature some discretion to “prescribe” the “manner” in which proposed amendments are presented “to the people,” as long as voters have the ability to vote for or against “more than one amendment” separately. In addition, Wisconsin case law dating as far back as 1925 requires a ballot question to identify “every essential” of the amendment¹ and prohibits “misinformation” from appearing on the ballot.²

For Marsy’s Law, the legislature reduced the 800-plus-word amendment to a 69-word ballot question:

Question 1: “**Additional rights of crime victims.** Shall section 9m of article I of the constitution, which gives certain rights to crime victims, be amended to give crime victims additional rights, to require that the rights of crime victims be protected with equal force to the protections afforded the accused while leaving the federal constitutional rights of the accused intact, and to allow crime victims to enforce their rights in court?”

The full text of the amendment and an explainer by the state attorney general were available at polling places for the April 2020 election. However, those materials did not appear on the ballot itself and were published shortly before election day – after many people had already voted absentee given the COVID-19 pandemic.

Was the ballot question enough to accurately convey the substance of the amendment? The Wisconsin Institute for Justice, which challenged the amendment both before and after its passage, [didn’t think so](#) – and a Wisconsin trial court judge agreed.

The alleged infirmities all concern the balance between rights of the victim and the accused:

- The ballot question says victims’ rights would be protected “*with equal force*” to those of the accused, but the amendment itself uses different language: victims’ rights would be protected “in a manner *no less vigorous than*” the accused’s. Thus, it’s possible for a victim’s protections to exceed, and not merely “equal” (as the ballot question put it), those of the defendant.
- Marsy’s Law gave a crime victim the right “to attend all proceedings involved in the case,” which meant a judge could no longer exclude the victim when necessary to protect the defendant’s rights – a change that the ballot question didn’t expressly state.
- Although the ballot question assured voters that the accused’s “*federal constitutional rights*” would remain intact, it did not state that this would replace language that had more broadly protected defendants by providing that a victim’s rights would not limit “*any right of the accused which may be provided by law.*”

Those claimed inconsistencies prompted the trial court to [strike down the amendment](#) for three

related reasons: (1) the ballot question didn't capture "every essential" feature of the proposed amendment; (2) it was misleading; and (3) it should have been posed as two separate questions. The court stayed its decision, however, meaning Marsy's Law remains the law of Wisconsin pending resolution of the appeal.

Attorneys from the state Department of Justice are [defending the amendment](#) on behalf of the Wisconsin Elections Commission. They highlight the legislature's broad discretion to craft ballot questions and dispute the perceived inaccuracies. They argue the legislature's duty is to write a concise question understandable by an average high schooler, which means it cannot tease out and explain every potential effect. Other notices available to voters, including the full text of the amendment, are meant to fill in some of those details.

The precedent governing these questions is thin, a gap that the court of appeals emphasized in [certifying the appeal](#) to go directly to the state supreme court. The century-old "every essential" test has never been used to invalidate or uphold a ballot question, and the court of appeals has questioned "whether there is a workable standard as to what constitutes an 'essential element.'"³ Meanwhile, how is a court to evaluate whether a particular question was misleading? Is it an objective test, based on the likely understanding of the average voter? That's the approach the court of appeals anticipated, but it punted to the supreme court to secure a definitive answer to these questions.

The case therefore goes far deeper than the survival of Marsy's Law. To resolve the fate of this amendment, the court is likely to clarify the standards that will govern how future constitutional questions in Wisconsin are presented to the voting public.

Argument starts at 9:45 a.m. on Tuesday, September 6, and can be seen live at Wisconsin Eye. The State Democracy Research Initiative will share updates following the argument on [Twitter](#).

¹ [State ex rel. Ekern v. Zimmerman](#), 187 Wis. 180, 201, 204 N.W. 803 (1925).

² [State ex rel. Thomson v. Zimmerman](#), 264 Wis. 644, 660, 60 N.W.2d 416 (1953)

³ [Metro. Milwaukee Ass'n of Com., Inc. v. City of Milwaukee](#), 2011 WI App 45, ¶ 35, 332 Wis. 2d 459, 798 N.W.2d 287.