STATEMENT OF THE LWVWI IN OPPOSITION TO THE PROPOSED CONSTITUTIONAL AMENDMENT REGARDING PRETRIAL DETENTION AND BAIL (SJR 4)

The League of Women Voters of Wisconsin opposes the approval of the proposed constitutional amendment on pretrial detention and bail.

League Position

The League of Women Voters of Wisconsin supports: "In the area of pre-trial disposition of the adult defendant in the criminal process, use of a point system based on past record, family ties, employment and length of residence, to evaluate the stability of the individual, and all who qualify to be released on recognizance." Administration of Justice | MyLO

Current Constitutional Language

Article I, Section 8(2) of the Constitution currently provides:

> All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court. The legislature may authorize, by law, courts to revoke a person's release for a violation of a condition of release.

There are currently three criteria used by judges to determine whether an accused person may be released before trial:

1. To assure their appearance in court;
2. To protect members of the community from serious bodily harm; or
3. To prevent the intimidation of witnesses.

There is only one criterion for the imposition of bail: that it is necessary to assure the appearance of the defendant in court.

Proposed Amendments

The proposed amendments to this provision would make two changes:

1. The criterion of "serious bodily harm" in the first sentence would be changed to: "serious harm, as defined by the legislature, by law." This change would dilute the requirement that the community must be protected from "serious bodily harm" by eliminating the word "bodily." In addition, the criterion "serious harm" would be defined by the legislature rather than determined by judges.
2. The second sentence, regarding the imposition of bail, would be changed by adding the following to the end of the sentence: "or if the person is accused of a violent crime as defined by the legislature by law, only upon a finding that there is a reasonable basis to

> believe that the conditions are necessary based on the totality of the circumstances, taking into account whether the accused has a previous conviction for a violent crime as defined by the legislature by law, the probability that the accused will fail to appear in court, the need to protect members of the community from serious harm as defined by the legislature by law, the need to prevent the intimidation of witnesses, and the potential affirmative defenses of the accused." This change would add five criteria to the determination of whether bail should be granted where now there is only one: that it is necessary to assure the appearance of the accused in court.

These proposed changes would result in the pretrial detention of more people who are accused of a crime, and are innocent until proven guilty. According to the Vera Institute of Justice, in 2015, pretrial detainees equaled 6,024 persons, or 47% of the total jail population. Incarceration Trends in Wisconsin. Pretrial detainees are held in local jails, not in prison. Thus, an increase in pretrial detention will impose additional costs on local taxpayers. These costs will be imposed in rural areas, as well as urban areas: "Incarceration is not only an urban phenomenon. In fact, on a per capita basis, the most rural places in the state often lock up the most people in jail and send the most people to prison." Incarceration Trends in Wisconsin

Moreover, increased pretrial detention would increase the disparity in the treatment of people of color: in 2015 Blacks constituted 7% of the total Wisconsin population but 29% of those in jail. In addition, expanding the considerations for denial of bail will fall on those with low incomes who cannot afford to post bail.

Language to appear on the ballot

Finally, the language which will appear on the ballot does not sufficiently advise voters of the actual changes of the proposed amendment:

QUESTION 1: "***Conditions of release before conviction.*** Shall section 8(2) of article I of the constitution be amended to allow a court to impose on an accused person being released before conviction conditions that are designed to protect the community from serious harm?"

The current Constitutional language provides that protecting the community from "serious bodily harm" is a consideration for conditions of release before conviction. The legislature proposes to delete the word "bodily" without defining the proposed term of "serious harm." The proposed amendment states that the legislature will define the term "serious harm" but the ballot language does not inform voters that the term will be defined at a later date.

QUESTION 2: "***Cash bail before conviction.*** Shall section 8(2) of article I of the constitution be amended to allow a court to impose cash bail on a person accused of a violent crime based on the totality of the circumstances, including the seriousness of the crime, previous convictions of the accused, the probability that the accused will fail to appear, the need to protect the community from serious harm and prevent witness intimidation, and potential affirmative defenses?"

The current Constitutional language provides only one condition for a judicial decision of imposing cash bail. Specifically, bail is imposed only if needed to assure the appearance of the accused in court. The legislature has added the term "totality of the circumstances," and specified five more conditions for a judge to consider when deciding to impose cash bail on a person accused of a violent crime, specifically, the seriousness of the crime; previous convictions; need to protect the community from "serious harm" (still not defined); prevention of intimidation of witnesses; and potential affirmative defenses. Determining the "totality of the circumstances," is a judgment reserved to the courts to define the conditions by which an accused person has cash bail imposed upon him/her. The current Constitutional language protects the accused and the community and needs no legislative amendment.

These ambiguous and misleading ballot questions will lead to legal challenge if the proposal is passed. The constitutional changes made in Marsy's Law were overturned by the Circuit Court because the ballot question was found to be inadequate: "Wisconsin voters cannot and should not be misled or deceived if the outcome of the ballot question is to have full force and effect of law."
https://www.wjiinc.org/uploads/6/1/2/9/61290857/53_2020_11_03_circuit_court_decision.pdf
That decision is now before the State Supreme Court. As with the wording of the Marsy's Law ballot, the language which will be submitted to the voters on the proposed amendment regarding pretrial detention and bail is misleading and deceptive.

Summary

- Increased pretrial detention and denial of bail will:
  - violate rights of those who are innocent until proven guilty
  - increase costs for local jails, including rural areas
  - increase racial disparity in the justice system
  - adversely impact the less affluent
- The ballot questions are ambiguous and misleading because voters are not advised that:
  - A consideration for pretrial detention of "serious bodily harm" is being changed to "serious harm, as defined by the legislature"
  - the five proposed additions to considerations of bail are new language, not included in the current statute
- The use of ambiguous and misleading ballot questions will result in costly legal challenges to the amendment, if passed.