

## **Bail Constitutional Amendment Frequently Asked Questions (FAQs)**

### What does the proposed constitutional amendment do?

- The proposed constitutional amendment updates Wisconsin's constitutional restrictions on bail to put them more in line with the rest of the country. The proposed amendment is actually two separate questions.

### Why two questions?

- The proposed constitutional amendment makes two changes, one related to non-monetary conditions of release and one related to cash bail (monetary condition of release.) Each question relates to a different part of the proposed amendment.

### What does Question #1 do?

- Question #1 gives judges more flexibility to place restrictions on a defendant pre-trial.
  - Under the current constitution, judges can only place restrictions on defendants to prevent "serious bodily harm." Serious bodily harm is a legal term meaning an injury that creates a "substantial risk of death."
  - If Question #1 is adopted, a judge will be able to place restrictions on defendants to prevent "serious harm". Serious harm is a new legal term that is expected to be approved by the Legislature this week in Assembly Bill 54 or Senate Bill 75. (See more information below)

### Why is Question #1 necessary?

- Because of the "serious bodily harm" standard adopted in the Wisconsin Constitution in 1981, a judge's hands are tied when trying to protect the public.
- For example, a judge cannot prohibit an accused sex offender of children from going to a playground or a school, because there is unlikely to be an injury with "substantial risk of death."

### What does Question #2 do?

- Question #2 gives judges more flexibility when determining the amount of cash bail ("monetary condition of release) required for violent crimes.
  - Under the current constitution, a judge may only consider the likelihood of a defendant returning to trial and seek to prevent the intimidation of witnesses when setting a cash bail amount.
  - If Question #2 is adopted, a judge will be able to consider the "totality of the circumstances" including previous convictions for violent crimes, the need to protect the community from serious harm, the probability that a defendant will return to court, and potential affirmative defenses of the defendant (e.g. self-defense).

### Why is Question #2 necessary?

- Wisconsin is the only state that limits a judge to a single factor, flight risk, when setting cash bail. If a defendant has a lengthy criminal history, or is likely to cause harm to another person that cannot be considered when setting cash bail and is irrelevant.
- A three-time felon could say *in court* “I’m going to break your leg” or “I’m going to rob a bank when I get out of here.” A judge would be unable to consider those statements when setting cash bail.

### What happens if only one question is approved by voters?

- If only one question is approved, then only that part of the constitutional amendment is ratified.
  - If voters approve Question #1 but not Question #2, then judges will have more flexibility to set non-monetary conditions of release, but will be only be able to consider flight risk when setting cash bail for people accused of violent crimes.
  - If voters approve Question #2 but not Question #1, judges will be able to consider the “totality of the circumstances” when setting cash bail for violent offenses, but will be only be able to prevent injuries that cause a “substantial risk of death” when setting conditions of release.

### What does “Serious Harm” mean?

- Although the term “serious harm” is used in Wisconsin statutes, it is currently undefined.
- Under Assembly Bill 54 and Senate Bill 75 (which are anticipated to pass the legislature the week beginning March 19, 2023), serious harm is defined as:  
“Personal physical pain or injury, illness any impairment of physical condition or death, including mental anguish or emotional harm attendant to the personal physical pain or injury, illness or death;” or damage to property or economic loss over \$2,500 in value.

### How was the definition of “serious harm” created?

- Authors Representative Cindi Duchow (R-Delafield) and Senator Van Wanggaard (R-Racine) developed the definition of “serious harm” by evaluating the many existing statutory definitions of “harm,” “mental harm,” “bodily harm,” “grievous bodily harm,” “substantial bodily harm,” “great bodily harm,” and “serious bodily harm,” and found the right balance. The dollar amounts in the definition are tied to the current amounts for felonies, \$2,500.

### What does “Violent Crime mean?

- There are three existing definitions of “violent crime” in Wisconsin statutes. The authors consolidated the three existing definitions of violent crime, and added additional crimes that have violent elements or where violence is potentially imminent. A full list of violent crimes is attached.

## **VIOLENT CRIMES AS DEFINED BY ASSEMBLY BILL 54 AND SENATE BILL 75 AS AMENDED**

Domestic Abuse Restraining Order (violation)	813.12
Child Abuse Restraining Order (violation)	813.122
Harasment Restraining Order (violation)	813.125
Solicitation to Commit a Class A Felony	939.30
Conspiracy to Commit a Class A Felony	939.31
Attempt to Commit a Class A Felony	939.32
Increased penalty for certain domestic abuse offenses (enhancer)	939.621
Penalties; use of a dangerous weapon (enhancer)	939.63 (1)
1st Deg. Int. Homicide	940.01
1st Deg. Reckless Homicide	940.02
Felony Murder	940.03
2nd Deg. Int. Homicide	940.05
2nd Deg. Reckless Homicide	940.06
Homicide resulting from neg. control of vicious animal	940.07
Homicide by neg. handling of dang. weapon/explosive/fire	940.08
Homicide by intox. use of vehicle or firearm	940.09(1)
Homicide by neg. opp. of vehicle	940.10
Mutilating or hiding a corpse	940.11
Assisting Suicide	940.12
Battery; substantial battery; aggravated battery	940.19 (1) (2) (4) (5) or (6)
Battery to an unborn child	940.195 (1), (2), (4), (5), or (6)
Physical Abuse of an Elder Person	940.198 (2) or (3)
Battery; Special Circumstances	940.20
Battery or threat to witnesses	940.201(2)
Battery or threat to judge, prosecutor, or LEO	940.203(2)
Battery or Threat to Health Care Providers/Staff	940.204
Battery or threat to DOR employee	940.205 (2)
Battery or threat to DSPS or DWD employee	940.207 (2)
Battery to Co./C/V/T Employee	940.208
Mayhem	940.21
1st Deg. Sexual Assault	940.225 (1)
2nd Deg. Sexual Assault	940.225 (2)
3rd Deg. Sexual Assault	940.225 (3)
Reckless Injury	940.23
Strangulation and Suffocation	940.235
Injury by Negligent Handling of weapon, explosives or fire	940.24
Injury by Intoxicated Use of a Vehicle	940.25
Abuse of Individuals at Risk	940.285
Abuse of Residents at Penal Facilities	940.29
False Imprisonment	940.30

Human Trafficking for labor or commercial sex act by threat *	940.302 (2)
Taking Hostages	940.305
Kidnapping	940.31
Stalking	940.32
Intimidation of Witness; Felony	940.43
Intimidation of Victims; Felony	940.45
Endangering safety by use of a dangerous weapon	941.20
Disarming a peace officer	941.21
Possession of a Machine Gun and Certain Other Weapons; Felony	941.26
Possession of Short-Barreled Shotgun or Rifle	941.28
Straw Purchasing of Firearms	941.2905
Possession of a Weaponized Drone	941.292
Recklessly Endangering Safety	941.30
Tampering with Household Products	941.327
Criminal Gang Member Soliciting a Child; Violating Court Order	941.38 (2) or (3)
Victim, witness, or co-actor contact	941.39
Damage or Threat to Property of a Juror	943.01 (2) (c)
Damage or Threat to Property of a Witness	943.011
Damage or Threat of Property to a Judge	943.013
Arson of buildings, damage of property by explosives	943.02
Arson with Intent to Defraud	943.04
Molotov cocktails	943.06
Burglary	943.10
Operating w/o Consent (Carjacking w/dangerous weapon)	943.23 (1g)
Operating w/o Consent (Carjacking w/force)	943.23 (1r)
Threats to Injure or Accuse of Crime	943.30
Robbery	943.32
Robbery of Financial Institution	943.87
Assault by Prisoners	946.43
Harassment	947.013
Bomb Scares	947.015
Sexual assault of a child (1st & 2nd Degree)	948.02 (1) or (2)
Eng. In Repeat Sex. Acts w/ Same Child	948.025
Physical Abuse of a Child	948.03 (2) (3) or (5)
Causing Mental Harm to a Child	948.04
Sexual Exploitation of a Child	948.05
Trafficking of a Child	948.051
Causing a Child to View or Listen to Sexual Activity	948.055
Incest with a Child	948.06
Child Enticement	948.07
Soliciting a child for prostitution	948.08

Sexual assault of a child in substitute care	948.085
Sex Assault of Child by School Staff or Volunteer	948.095
Abduction of another's child; constructive custody (force or threat)	948.30 (2)
Leaving or Storing load firearm within reach or easy access of a child	948.55
Mistreating Animals	951.02
Instigating Fights Between Animals	951.08
Shooting at Caged or Staked Animals	951.09