SUPREME COURT OF WISCONSIN

Case No. 2011AP1572

JULAINE K. APPLING, JO EGELHOFF, JAREN E. HILLER, RICHARD KESSENICH and EDMUND L. WEBSTER,

Plaintiffs-Appellants, Petitioners,

v.

SCOTT WALKER, KITTY RHOADES and OSKAR ANDERSON,

Defendants-Respondents,

FAIR WISCONSIN, INC., GLENN CARLSON, MICHAEL CHILDERS, CRYSTAL HYSLOP, JANICE CZYSCON, KATHY FLORES, ANN KENDZIERSKI, DAVID KOPITZKE, PAUL KLAWITER, CHAD WEGE and ANDREW WEGE,

Intervening Defendants-Respondents.

RESPONSE BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS

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STATEMENT OF THE ISSUE

Did Plaintiffs-Petitioners (the "Appling Parties") prove beyond a reasonable doubt that Chapter 770 of the Wisconsin Statutes ("Chapter 770"), which establishes a domestic partnership registry for same-sex couples, creates a legal status for unmarried individuals that is so identical or "substantially similar" to marriage that it violates Article XIII, Sec. 13 of the Wisconsin Constitution (the "Marriage Amendment")?

Both the circuit court and court of appeals correctly determined that Chapter 770 does not create a legal status for domestic partners that is identical or substantially similar to marriage, and therefore does not violate the Marriage Amendment.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Intervening Defendants-Respondents ("Fair Wisconsin") concur with the Appling Parties' request for oral argument, as they believe oral argument will be helpful to the Court. Fair Wisconsin also believes that publication of the Court's opinion is warranted

because this is a case of substantial and continuing public interest. Wis. R. App. P. 809.23(1)(a)(5).

STANDARD OF REVIEW

The Appling Parties correctly identify *de novo* review as applicable on appeal, but omit the additional point that they bear the burden of demonstrating beyond a reasonable doubt that Chapter 770 is unconstitutional. Under Wisconsin law, "[l]egislative acts are presumed constitutional, and the party challenging a legislative act must prove it unconstitutional beyond a reasonable doubt." *GTE Sprint Communications Corp. v. Wisconsin Bell*, 155 Wis. 2d 184, 192, 454 N.W.2d 797 (1990). The "beyond a reasonable doubt" standard is a heavy burden because a court "indulges every presumption to sustain the law if at all possible" and "[i]f any doubt remains, this court must uphold the statute as constitutional." *State v. Cole*, 2003 WI 112, ¶¶ 11, 18, 264 Wis. 2d 520, 665 N.W.2d 328 (citations omitted).

SUMMARY OF ARGUMENT

There are three primary sources that must be examined to determine the meaning of an amendment to the Wisconsin Constitution: (1) the plain meaning of the amendment; (2) the history surrounding the legislative debates and voter ratification campaign; and (3) the earliest interpretation of the amendment by the legislature. The court of appeals and circuit court correctly concluded that a constitutional analysis based on these sources demonstrates that a Wisconsin domestic partnership is not "substantially similar" to marriage.

ARGUMENT

This Court has outlined a three-part analysis for interpreting the meaning of a constitutional amendment:

> "The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]" *State ex rel. Bare v. Schinz,* 194 Wis. 397, 404, 216 N.W. 509 (1927) (citation omitted). We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations

> of the provision by the legislature, as manifested through the first legislative action following adoption.

Dairyland Greyhound Park v. Doyle, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408 (citations omitted); *see also State ex rel. Ekern v. Zimmerman,* 187 Wis. 180, 184, 204 N.W. 803 (1925); *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996). Thus, to show Chapter 770 is unconstitutional beyond a reasonable doubt, the Appling Parties must prove that these sources demonstrate "that the voters who ratified the marriage amendment intended that it would ban the particular type of same-sex partnerships created by the domestic partnership law." *Appling v. Doyle*, 2013 WI App 3, ¶ 15, 345 Wis. 2d 762, 826 N.W.2d 666.

The Appling Parties contend that this Court should look only to the plain meaning of the constitutional amendment. But, an unbroken line of authorities insist that the interpretation of constitutional amendments in Wisconsin requires consideration of all three parts of the *Dairyland* analysis. *See e.g.*, *State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460 ("When

interpreting constitutional ... amendments, we look to intrinsic as well as extrinsic sources."); *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 17, 278 Wis. 2d 216, 692 N.W.2d 623; *Buse v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141 (1976). In any case, the Appling Parties failed to prove beyond a reasonable doubt that domestic partnerships are unconstitutional under the plain meaning of the Marriage Amendment.

The following sections of this brief analyze the Appling Parties' constitutional challenge using the three-part *Dairyland* analysis. Individually, each part of the analysis shows that Chapter 770 is constitutional. Viewed together, the analysis of all three sources leads to the irrefutable conclusion that the Appling Parties failed to meet their high burden of proof and that the decisions of the circuit court and court of appeals must be affirmed.

I. THE PLAIN MEANING OF THE MARRIAGE AMENDMENT DEMONSTRATES THAT CHAPTER 770 DOES NOT VIOLATE THE WISCONSIN CONSTITUTION.

The first part of the constitutional analysis requires an examination of the plain meaning of the constitutional provision at issue. The Appling Parties argue that Chapter 770 violates the second sentence of the Marriage Amendment, which states: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Article XIII, Sec. 13, Wis. Const. Thus, to determine whether Chapter 770 violates this prohibition, this Court must compare the legal status created by Chapter 770 with the legal status of a Wisconsin marriage to determine whether the two are substantially similar.

A. As used in the Marriage Amendment, the legal status of marriage encompasses all the legal aspects of marriage.

Before undertaking a comparison of the two legal statuses, it is necessary to determine the meaning of the phrase "legal status."

A "status" is "[a] person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations." *Black's Law Dictionary* 1447 (8th ed., 2004). Stated more succinctly, a status is "[t]he standing of a person before the law." *Random House Dictionary of the English Language* 1862 (2nd ed., 1987). Each of these definitions of "status" reflects that the word has a legal meaning—i.e., a status is how a person is treated under the law.

The Marriage Amendment's use of the phrase "legal status" indicates that a comparison of the domestic partnerships created by Chapter 770 to a Wisconsin marriage must indeed start with a legal comparison—i.e., to assess whether a domestic partnership is "substantially similar" to marriage, the most relevant points of comparison include:

- The general legal nature of each status.
- The legal requirements regarding who can obtain each status.

- The legal procedures for entering into each status.
- The legal procedures for terminating each status.
- The specific legal rights, benefits, and responsibilities that attach to each status.

The legal aspects of each status are the relevant points of comparison because, as the circuit court noted, "the Marriage Amendment only prohibits a 'legal status' that is identical or substantially similar to marriage for unmarried individuals; the Marriage Amendment does not prohibit a non-legal (*i.e.* social) status that is identical or substantially similar to marriage for unmarried individuals." (R.131:10.)

B. The plain meaning of the phrase "substantially similar" indicates that the Marriage Amendment prohibits only the creation or recognition of legal statuses that are almost identical to marriage.

Before undertaking a comparison of the two legal statuses, it is also necessary to determine the meaning of the phrase "substantially similar." The circuit court correctly noted that the word "substantially" means "essentially." (R.131:10, *citing Black's*

Law Dictionary 1597 (rev. 4th ed. 1968).) The circuit court also was correct in defining "similar" as "alike though not identical." (R.131:10, *citing The American Heritage College Dictionary* 1270 (3rd ed. 1997).) Based on these definitions, the circuit court concluded that "substantially similar" means "essentially alike, though not identical." (R.131:10.)

The circuit court's conclusion about the meaning of "substantially similar" is consistent with a 2006 opinion issued by Attorney General Peggy A. Lautenschlager. (R.66:Ex. 2.)[1] The Attorney General emphasized that the meaning of the phrase "substantially similar to ... marriage" must be determined from the context in which it is used. Noting that, under rules of statutory

[1] The Attorney General's opinion has persuasive value as to the meaning and purpose of a legislative enactment. *See State v. Ludwig*, 31 Wis. 2d 690, 698, 143 N.W.2d 548 (1966).

construction, "[p]rovisions which have a purpose to restrict personal and property rights are construed strictly," she opined:

> A specific intent to use "similar" with its strict meaning is evinced by the textual context of the term where it is preceded by the modifying adverb "substantially." According to recognized dictionaries ... "substantially" means to a considerable degree. *Websters Third New International Dictionary* 2280 (unabr. ed. 1986); *The American Heritage Dictionary of the English Language* 1791 (3rd ed. 1996).
>
> This modifier pushes the meaning of "similar" away from mere general likeness and much closer to virtual identity on the range of resemblance. Things are not substantially similar unless they have a considerable degree of similarity.

Id. at 2.

Furthermore, the Attorney General's definition of the phrase "substantially similar" fits with recent usage by this Court comparing the Takings Clauses of the Wisconsin and United States Constitutions:

> Article I, Section 13 of the Wisconsin Constitution provides in full that "[t]he property of no person shall be taken for public use without just compensation therefor."

> The text of this provision of the Wisconsin Constitution is **substantially similar** to the Takings Clause of the Fifth Amendment to the United States Constitution, which provides that private property shall not "be taken for public use, without just compensation."

City of Milwaukee Post No. 2874 VFW v. Redevelopment Auth., 2009 WI 84, ¶¶ 34-35, 319 Wis. 2d 553, 768 N.W.2d 749 (emphasis added). This Court went on to interpret the Takings Clause of the Wisconsin Constitution as providing rights analogous to those existing in the Takings Clause of the United States Constitution. This Court thus used the phrase "substantially similar" to mean "almost identical."

Consistent with these analyses, the circuit court correctly concluded that "a status must be closer to identical to marriage, as opposed to merely alike marriage, before it will fall within the Marriage Amendment's prohibition." (R:131:10.) Thus, when comparing the legal statuses at issue here, the relevant inquiry is whether Chapter 770 creates a legal status that is close to being identical to marriage.

C. A comparison of the legal aspects of each legal status at issue reveals that a Chapter 770 domestic partnership is not substantially similar to marriage.

1. The two statuses have fundamentally different legal natures—marriage is an enforceable contract; a Wisconsin domestic partnership is not.

An examination of the fundamental legal nature of the statuses at issue reveals that they are very different legal creatures and therefore cannot be considered substantially similar.

Under Wisconsin law, marriage "is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife." Wis. Stat. § 765.01. Section 765.001(2), which describes the intent underlying the Family Code, Chapters 765 to 768, further explains that,

> [u]nder the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children

> and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.[2]

Indeed, the economic consideration underlying the marital contract is found in Wis. Stat. § 765.001, which states that, through marriage, each spouse binds himself or herself to a legal relationship of "mutual responsibility and support" in which each person has "an equal obligation ... to contribute money or services or both which are necessary for the adequate support and maintenance" of the other and any minor children of the union.

The depth and meaning of the requirements of "mutual responsibility and support" are expressed and enforced through numerous provisions in Wisconsin's statutes. For example, under Chapter 766—Marital Property, individuals who enter into a marriage do so with the understanding that they are forgoing their right to accumulate property individually and agree that all property

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[2] Wis. Stat. § 765.001(2) is consistent with dictionary definitions of marriage. *See, e.g., Merriam Webster Online Dictionary* (http://www.merriam-webster.com/dictionary/marriage) ("[t]he state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law.")

will be part of a "marital estate." Essentially, the provisions of Chapter 766 give each spouse an undivided one-half interest in any property that either spouse may acquire during the marriage and, as well, make each spouse responsible for debts incurred by the other for the benefit of the marital estate.

Furthermore, marriage is a unique contract in that, by enforcing the obligations of the parties to the contract through statute, the State becomes a party to that contract. *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500 (1950). That makes the marriage contract unique among contracts, as the United States Supreme Court has explained:

> [M]arriage ... is something more than a mere contract.... Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.

Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

By contrast, *none* of this is true of a domestic partnership. Chapter 770 does not define domestic partnerships as civil contracts.

In fact, a domestic partnership is not a contractual relationship at all. A domestic partnership is not a relationship of "mutual responsibility and support." Neither partner has an obligation to "contribute money or services or both" to support the other. Nor is there any other element of consideration between domestic partners associated with registering under Chapter 770. Rather, registration of a domestic partnership triggers a set of rights accorded by the State to the individuals in that relationship. The State imposes no obligations between the partners themselves. As the circuit court correctly noted, "Chapter 770 is simply a legal construct created to provide benefits to same-sex couples."

Furthermore, as demonstrated above, marriage is a "super contract." That is, the State takes more interest in a marriage contract and plays a more active role in the definition and enforcement of its terms, as well as in defining the circumstances under which it may be terminated, than it does in other civil

contracts. The State plays no such role in Chapter 770 domestic partnerships.

It is not surprising that the Appling Parties fail to acknowledge the striking difference in the fundamental legal nature of the two statuses at issue because this difference alone is sufficient for this Court to conclude that the two statuses are not substantially similar. When this difference is considered along with the numerous other legal differences discussed in the following sections, the conclusion becomes inescapable.

2. The two statuses have different eligibility requirements.

The Appling Parties claim, incorrectly, that domestic partnerships are unconstitutional solely because they replicate certain eligibility requirements of marriage—what the Appling Parties now refer to as the "constituent elements" of marriage. Contrary to their assertions, a comparison of the criteria for entering a domestic partnership (*see* Wis. Stat. § 770.05) with the criteria for

getting married (*see* Wis. Stat. §§ 765.02 & 765.03) reveals significant differences:

1. Before individuals can become domestic partners they must share a common residence. There is no such requirement for a man and woman to be eligible to marry.

2. No minor may become a domestic partner, even with the consent of a parent or guardian, whereas minors between the ages of 16 and 18 years can marry with such consent.

3. No individuals who are nearer kin than second cousins may ever be domestic partners, whether their relationship is by blood or by adoption. First cousins by adoption may marry as may first cousins where the female is over 55 years old or if at least one party to the contract is sterile.

4. An individual who has been divorced less than six months may become a domestic partner but may not marry. Similarly, an individual who is a domestic partner may marry without taking any action to terminate the domestic partnership; the marriage automatically terminates the domestic partnership.

These differences demonstrate that the criteria for entrance into the legal status of domestic partnership and marriage are not substantially similar.

The Appling Parties contend that the legal status of marriage must be understood only by reference to what they refer to as the "constituent elements" of the status of marriage, a concept they have

up made up out of whole cloth. (Pet'rs' Br. 14-15.) They hand-pick six eligibility requirements for marrying and proclaim them to be "the constituent elements of the legal status of marriage." (*Id.* at 15.)[3] Because domestic partnerships share all of these six so-called constituent elements, they argue Chapter 770 impermissibly "mimics" marriage. (*Id.* at 16.)

They achieve this result by describing the so-called constituent elements at a level of abstraction that effectively sweeps away any actual differences in the legal eligibility requirements for each status. For example, the Appling Parties gloss over the different age limitations and restrictions on consanguinity. Then later in their brief, they insist that any differences Fair Wisconsin might point out are but "minor variances." (Pet'rs' Br. 21.) Yet, these differences are not minor and viewing them in conjunction with the additional

[3] The Appling Parties' support for this assertion is weak. *Varney v. Varney*, 52 Wis. 120, 8 N.W. 739, 741 (1881), on which they rely, states that misrepresentations by one spouse concerning "character, fortune, health or temper" will not void a validly executed marriage contract because "[t]hese are accidental qualities, *which do not constitute the essential and material elements on which the marriage relation rests*." *Id.* (emphasis added).

common residence requirement for domestic partnerships only heightens the degree of difference.

As to Chapter 770's requirement that domestic partners share a common residence, the Appling Parties argue that this makes domestic partnerships substantially similar to marriage because married couples often live together. However, this "comparison is flawed because [Appling] is comparing a pre-domestic partnership requirement with *post*-marriage practice." *Appling*, 2013 WI App 3, ¶ 80. In the Appling Parties' language, the common residence requirement can be seen as an additional "constituent element" necessary to the formation of a domestic partnership that is not similarly required for a marriage. The absence of this requirement for marriage "is not a trivial difference." *Id.*

As the circuit court correctly noted when it rejected these arguments made by the Appling Parties, "[p]laintiffs do not appear to recognize the significance of a *legal requirement.*" (R.131:34) (emphasis in original). Indeed, the Appling Parties' comparison of

the eligibility requirements set forth in Chapter 770 to marriage's so-called constituent elements is a purely result-oriented exercise in which any similarity is elevated to the level of evincing substantial similarity, but all of the actual legal differences between the two statuses are dismissed as "minor."

3. The two statuses have different legal procedures for entry.

The Appling Parties also ignore the major differences between the process by which a couple enters into a domestic partnership and the process of getting married. Although they now relegate their argument on formation procedures to two perfunctory paragraphs at the end of their brief, the Appling Parties previously insisted that it was significant that the two legal statuses had "virtually identical" procedures for entry. Plaintiffs-Appellants' Brief at 23, *Appling v. Doyle*, 2013 WI App 3, 345 Wis. 2d 762, 826 N.W.2d 666 (No. 2011AP1572). The circuit court and court of

appeals disagreed, identifying a number of significant differences in the two statuses' formation procedures.

Contrary to the Appling Parties' assertions, the process for forming a domestic partnership bears little resemblance to the process for forming a marriage. The court of appeals found that the most significant formation difference was that a solemnization ceremony is required to form a marriage, but no such ceremony is required to form a domestic partnership. *Appling*, 2013 WI App 3, ¶ 85. This is because the solemnization requirement relates directly to the difference in the fundamental legal nature of the two statuses. It is through the solemnization ceremony that the two marrying individuals reflect their understanding of, and assent to, the contractual bonds of marriage. Because the law does not impose contractual bonds on registered domestic partners, no such ceremony is required.

The Appling Parties attempt to dismiss this distinction by arguing that domestic partners "solemnize" their relationship before

a notary public. *Id.* ¶ 83. But, signing a form before a notary public is not a solemnization ceremony at all, and it certainly is not one in which two people agree to assume the mutual obligation of support and other legal obligations that attach to a marital relationship. It is simply the parties' acknowledgement that they have complied with the entry requirements for a domestic partnership. As the court of appeals aptly stated, a solemnization ceremony is "ceremonial in nature," while signing a form before a notary public "is purely a matter of assuring that the signatures are valid." *Id.* ¶ 85.

In addition to the solemnization requirement, the circuit court identified a number of other significant differences in the formation process. (R.131:37-38.) First, unlike with the formation of a domestic partnership, the paperwork is not crucial to the formation of marriage. When a marriage has been celebrated pursuant to Wis. Stat. § 765.16 and the parties have thereafter "assumed the habit and repute of husband and wife," a marriage license is deemed to have been issued after a period of time, even if one never was issued. Wis.

Stat. § 765.23. It is the marriage ceremony itself, not the marriage license and not verification of the ceremony that is essential. Conversely, no ceremony can substitute for the paperwork required to form a domestic partnership.

Second, non-Wisconsin residents can apply for a marriage license in the county in which the marriage ceremony is to be performed. There is no similar provision in Chapter 770 that allows non-residents to register as domestic partners.

Third, couples seeking to get married must complete a marriage license worksheet. Wis. Stat. § 765.13. Two individuals who seek to enter into a domestic partnership are not required to complete such a worksheet.

Finally, certain individuals have the opportunity under Wisconsin law to object to a marriage. Wis. Stat. § 765.11. By contrast, no one is given statutory authority to object to a domestic partnership.

The circuit court correctly concluded that, when taken together, these differences between the processes for entering into each legal status tended to prove that domestic partnerships are not substantially similar to marriage. (R.131:38.)

4. The two statuses have different legal procedures for termination.

The circuit court and court of appeals were correct in concluding that the "striking difference" in the two processes used to terminate each of the legal statuses demonstrated that the two statuses are not substantially similar. (R.131:39) A domestic partnership is unilaterally terminable by either party simply by filing a notice of termination with a county clerk and paying a fee. Wis. Stat. § 770.12(1)(a). Furthermore, a domestic partnership will automatically terminate if either partner gets married. Wis. Stat. § 770.12(4)(b).

The process for terminating a marriage is fundamentally different. A spouse must obtain permission from a court to divorce

after a 120-day waiting period following the service of a summons and petition for divorce on the other spouse. Wis. Stat. § 737.335(1). As part of the divorce process, a court must make an assignment of debt and property between the two parties (Wis. Stat. § 767.61) and a determination must be made regarding maintenance between the spouses and child custody and support of any minor children. Wis. Stat. § 767.385.

These differences in the termination process relate to the fundamental legal nature of each status. Because marriage is a unique contractual relationship among the two spouses and the State, the State is involved in its dissolution and neither spouse can unilaterally terminate the relationship, nor can both spouses, by agreement, terminate the marriage without obtaining the State's consent through a decree of divorce. In contrast, because domestic partnerships are not contracts, a domestic partner can unilaterally terminate the legal relationship with minimal involvement from the State. The differences in the termination processes of the two

statuses are further evidence that marriage and domestic partnerships are treated differently under the law and cannot, therefore, be regarded as substantially similar legal statuses. Faced with these substantial differences, the Appling Parties have declined to address termination whatsoever in their brief to this Court, or either of their briefs to the courts below.

5. The two statuses have very different legal rights, benefits and responsibilities.

The circuit court correctly concluded that "[t]he state confers different benefits, rights and responsibilities to domestic partners by virtue of the domestic partnership status in comparison to the benefits, rights and responsibilities given to spouses because of their marriage status." (R.131:40.) The court of appeals agreed that the deficit between the rights and obligations afforded by marriage and those afforded by domestic partnerships is so substantial that the Appling Parties did not and could not argue that they were substantially similar. *Appling*, 2013 WI App 3, ¶ 88.

Once registered, domestic partners acquire a mere 31 rights under state law in relation to third parties. Each of these rights was identified to the circuit court in the briefing below (R.68:28-31) and the circuit court listed most of them in its opinion. (R.131:40-48.) Contrary to the arguments made in the Appling Parties' brief to this Court (Pet'rs' Br. 48.), the circuit court correctly noted that the vast majority of the rights provided to domestic partners are rights that the law also grants to parents, children, family members, and sometimes "close friends." (R.131:40.) The court also noted that some of the other rights granted to domestic partners also can be obtained by any two people without registering as domestic partners merely by executing certain documents. (R.131:40.)

More importantly, however, based on its review of the law governing married couples, the circuit court correctly concluded that spouses are granted "countless additional rights, benefits, and responsibilities solely as the result of marriage." In its opinion, the circuit court presented a "non-exhaustive" list of 33 rights that

married couples enjoy that are not provided to domestic partners. (R.131:49-51.) As a result, the circuit court concluded that "domestic partners have far fewer legal rights, duties and liabilities in comparison to the legal rights, duties, and liabilities of spouses"—a fact that the court noted bolstered its conclusion that "[t]he state does not recognize domestic partnership in a way that even remotely resembles how the state recognizes marriage." (R.131:52.) To underscore this point, the court noted that a Wisconsin domestic partnership is "not even close to similar to a Vermont-style civil union, which extends virtually all the benefits spouses receive to domestic partners." (*Id.*)

The Appling Parties do not dispute—because they cannot—that spouses receive far more legal rights than domestic partners. According to the Appling Parties, the number of rights is irrelevant. Instead, they argue that the substantial similarity analysis should focus solely on their concept of the constituent elements of the legal status of marriage. Thus, the Appling Parties argue that the Court

should ignore the rights, benefits, and duties that arise out of the marital relationship, the procedures necessary to forming the legal status, the procedures necessary to dissolving that status, and the unique contractual nature of the status and *instead* focus on their six carefully crafted eligibility requirements to forming the legal status that they term the constituent elements of the marriage.

This Court's precedent precludes this artificial narrowing of the legal status of marriage. Wisconsin understands marriage as creating

> by law a relation between parties, and what is called a "status" of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the community. That relation between the parties, and that status of each of them with regard to the community which are constituted upon marriage, are ... imposed [and] defined ... by law.

State v. Duket, 90 Wis. 272, 276-77, 63 N.W. 83, 85 (1895). It is impossible to understand the legal position of the individual with regard to the community without reference to those rights, benefits, and duties that the State legislates as arising out of that relation. And those rights, benefits, and duties created by marriage are just as

much imposed and defined by law as are the eligibility requirements necessary to forming the status itself.

Claiming that voters bifurcated their understanding of marriage into a legal status consisting of just six laws governing eligibility and ignored the incidents consisting of every other law governing marriage defies logic. *See Appling*, 2013 WI App 3, ¶ 28. If the eligibility requirements for domestic partnerships were defined exactly as they are now, but the status provided only a single right—such as a hospital visitation right—it is unfathomable that any voter would think that this is a legal status substantially similar to marriage. Rather, the average citizens, relying on their real-life experiences, would have understood the legal status of marriage as encompassing the complete legal substance of the marital relationship.

When the legal status of marriage is compared with a domestic partnership in the proper context, it is clear that the two statuses are not substantially similar. This point is perhaps most

evident in the transportability of the legal status of marriage. Marriage is recognized across state lines under the long-established principles of comity, *Teague v. Bad River Band*, 2000 WI 79, 236 Wis. 2d 384, 612 N.W.2d 709, as well as by the federal government, *United States v. Windsor*, 570 U.S. ____, 133 S. Ct. 2675, 2692 (2013) (noting the federal government's "history and tradition of reliance on state law to define marriage"). Registration as domestic partners in Wisconsin enjoys no similar portability and respect.[4] This point alone certainly sounds a death knell to the Appling Parties' tortured comparison.

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[4] Numerous federal agencies have made clear that they will provide federal benefits only to same-sex couples in a valid marriage and not to those in civil unions or domestic partnerships. *E.g.*, IRS, *Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions* (Aug. 29, 2013), http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions (last visited Sept. 9, 2013); United States Office of Personnel Management, *Benefits Administration Letter, Coverage of Same-Sex Spouses* (July 17, 2013), http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf (last visited Sept. 9, 2013); United States Secretary of Defense Check Hagel, *Memorandum for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness, SUBJECT: Extending Benefits to the Same-Sex Spouses of Military Members* (Aug. 13, 2013), http://www.defense.gov/home/features/2013/docs/extending-benefits-to-same-sex-spouses-of-military-members.pdf (last visited Sept. 9, 2013).

The Appling Parties claim that the Michigan Supreme Court's ruling in *Nat'l Pride at Work v. Governor. of Mich.*, 481 Mich. 56, 748 N.W.2d 524 (2008) is persuasive authority in favor of their position. Under Michigan's Constitution, "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const., art. 1, § 25. In determining whether domestic partnerships were a union similar to marriage, the Court deemed consideration of the incidents awarded by each irrelevant. *Pride at Work*, 481 Mich. at 69-70. However, the use of the words "agreement" and "union" as opposed to the phrase "legal status" distinguishes the Michigan case. Michigan's Constitution precludes recognition of any union—defined as "something formed by uniting two or more things; combination ... a number of persons, states, etc., joined or associated together for some common purpose"—similar to marriage. *Id.* at 533 (quoting *Random House Webster's College Dictionary* (1991)).That definition focuses on the partnership itself

and, unlike legal status, is unconcerned with the rights that go along with the partnership.

Unlike Michigan, Wisconsin's Constitution does not speak in terms of a union, but rather a legal status. A more apt analogue to Wisconsin's Marriage Amendment is Ohio's Marriage Amendment, which states that Ohio "and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effect of marriage." Ohio Const. art. XV, § 11. In determining whether the State created "a legal status for unmarried persons," the Ohio Supreme Court concluded that it must account for "the legal responsibilities of marriage, and the rights and duties created by the status of being married." *State v. Carswell*, 871 N.E.2d 547, 551 (Ohio 2007) (emphasis added). Thus, the use of legal status, as opposed to union, compelled the Ohio Supreme Court to consider the incidents that go with marriage. Citing that decision, an Ohio court of appeals upheld the constitutionality of Cleveland's domestic

partnership registry, ruling the registry was "simply a label" and did not afford sufficient legal benefits such that it would "approximate the design, qualities, significance, or effect of marriage." *Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*, 2010 Ohio 4685 ¶¶ 10-15 (Ct. App. 2010).

Even if the Court accounts for the rights, benefits, and responsibilities conferred by marriage, the Appling Parties argue that the two legal statuses are still substantially similar because a "domestic partnership gives rise to a bundle of incidents ordinarily accorded only to marriage, and it delivers those incidents in a manner ordinarily reserved for marriage." (Pet'rs' Br. 48.) They then argue that this "demonstrate[s] that domestic partnerships ... are substantial[ly] similar to marriage." (*Id.* at 51.) This argument is wrong for several reasons.

First, the Appling Parties' argument, that a comparison of the bundle of rights associated with each status is not relevant to this Court's analysis, is flatly contradicted by statements made by their

own counsel, Professor Richard Esenberg of the Marquette University Law School, during the voter ratification campaign. In 2006, Professor Esenberg explained the plain meaning of the second sentence of the Marriage Amendment:

> The second sentence will not interfere with legal accommodations of legitimate interests. Think of marriage as a bundle of sticks. Each stick is a different right or incident of marriage. The second sentence only prohibits creation of a legal status which would convey virtually all of those sticks.

(R.66:Ex. 3, pp.40-41.) Professor Esenberg was correct when he stated that a comparison of the "bundle of sticks" was critical to the analysis of determining whether a legal status was prohibited by the Marriage Amendment. Indeed, the notion of a "bundle of sticks" is embedded in the definition of a "legal status," which is the "sum total of a person's legal rights, duties [and] liabilities."

Second, the Appling Parties are wrong when they argue that all of the rights assigned to domestic partners are "ordinarily accorded only to marriage" (Pet'rs' Br. 48.) As the circuit court explained in great detail, most of the rights provided to domestic

partners "are rights that the law also grants to parents, children, family members, and sometimes close friends." (R.131:40.) Those rights include, among many other things, victim notification by the Department of Corrections, right to receive unpaid wages from decedent's employer, and right to receive Worker's Compensation death benefits. (R.131:40, 47- 48.)

Finally, the Appling Parties' argument that the Marriage Amendment prevents any and all "bundling" of rights for same-sex couples is inconsistent with the plain language of the second sentence of the amendment. By only prohibiting a legal status that is "substantially similar" to marriage, the Marriage Amendment clearly implies that legal statuses that are not "substantially similar" to marriage are acceptable. Since a legal status is, by definition, a bundle of legal rights, benefits, and responsibilities, the Marriage Amendment permits bundling rights for same-sex couples, provided that it does not rise to the level of being substantially similar to marriage.

In the end, Chapter 770's plain language cannot be squared with the Appling Parties' newly-concocted "constituent elements of marriage" analysis and, moreover, it is unbelievable the average voter would ignore the plain language to resort to such tortured analysis. Rather, voters should be presumed to have understood the plain meaning of marriage in light of society's common and full understanding of all that being married entails. Thus, Fair Wisconsin prevails under the plain meaning analysis.

II. THE LEGISLATIVE DEBATES AND VOTER RATIFICATION CAMPAIGN REGARDING THE MARRIAGE AMENDMENT DEMONSTRATE THAT CHAPTER 770 IS CONSTITUTIONAL.

The second part of the required constitutional analysis is an examination of the history surrounding the passage of the Marriage Amendment—particularly the statements made during the legislative debates and voter ratification campaign. This history further defeats the Appling Parties' challenge.

A. The legislative proponents of the Marriage Amendment repeatedly told their colleagues that a legal status like that created by Chapter 770 would not be prohibited.

To ascertain the intent of the legislature in enacting the Marriage Amendment, the circuit court conducted a review of the debates about allowing same-sex couples to marry in other states that triggered some legislators to propose a constitutional amendment excluding same-sex couples from marriage in Wisconsin. (R.131:13-14.) The court then analyzed the Wisconsin legislative history surrounding the proposed amendment and made the following conclusion:

> A review of the drafting files indicates that the legislative proponents of the Marriage Amendment repeatedly told their colleagues and voters three messages: first, that the second sentence of the Amendment is only designed to prohibit something like a "Vermont-style" civil union that provides all of the rights and benefits of marriage; second, that the Amendment does not prohibit the state from creating a legal construct to provide benefits to same-sex couples; and, third, that the Amendment does not prevent the legislature from packaging together a large bundle of rights for same-sex couples.

(R.131:17-18.)[5] In other words, the circuit court concluded that the legislative history demonstrated that the legislative proponents of the Marriage Amendment did not intend to prohibit the creation of the type of legal status created by Chapter 770. The court of appeals agreed, saying "[t]he legislators' statements plainly informed voters that domestic partnerships would be permitted and that some subset of the rights and obligations that go with marriage could similarly be accorded to such partnerships." *Appling*, 2013 WI App 3, ¶ 56.

There is ample, uncontroverted evidence in the record to support both courts' conclusions, and the Appling Parties have not

[5] In response to the Vermont Supreme Court's 1999 decision in *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (1999), ruling that denying same-sex couples the benefits and protections incident to marriage was unconstitutional under that State's Constitution, the Vermont Legislature created the status of civil unions which conferred to same-sex partners "all the same benefits, protections, and responsibilities under law... as are granted to spouses in a civil marriage." Vt. Stat. Title 15 § 1204. Civil unions in which the parties received all of the rights and benefits of marriage under state law became known as "Vermont-style" civil unions. In some states, this same comprehensive legal status is referred to as a domestic partnership. Although the terminology can create some confusion, comprehensive domestic partnerships enacted in states such as Oregon or Nevada are the equivalent of "Vermont-style" civil unions, providing all of the incidents, benefits, and obligations of marriage that married different-sex couples enjoy. These are completely different than the limited domestic partnerships created under the Wisconsin registry that are the subject of this lawsuit.

shown "beyond a reasonable doubt" that those conclusions were wrong. For example, the authors and lead sponsors of the amendment, Senator Scott Fitzgerald and Representative Mark Gundrum, assured their colleagues that the amendment was not intended to prohibit domestic partnerships such as those created by Chapter 770. In his memo introducing the amendment, Representative Gundrum explained what the proposed amendment "**DOES NOT DO,**" (emphasis in original):

> [This proposal] does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As long as the legal construct designed by the state does not rise to the level of creating a legal status "identical or substantially similar" to that of marriage, (i.e., marriage, but by a different name), no particular privileges or benefits would be prohibited.

(R.66:Ex. 8.)(emphasis in original)

Representative Gundrum and Senator Fitzgerald reiterated this message in a January 2004 press release:

> The proposed amendment, while preserving marriage as one man-one woman unions, would also preclude the creation of unions which are substantially similar to marriage. "Creating a

> technical 'marriage,' but just using a different name, to massage public opinion doesn't cut it," Gundrum said[.] "The institution of marriage goes deeper than just the eight letters used to describe it."
>
> Significantly though, the language does **not** prohibit the legislature, local governments or private businesses from extending particular benefits to same-sex partners as those legal entities might choose to do.

(R.66:Ex. 9.)

Representative Gundrum's memo also referred legislators to the "non-partisan Wisconsin Legislative Council Memo" from Don Dyke, Chief of Legal Services, for further details and clarification. In explaining what a legal status "substantially similar to that of marriage," would be, Attorney Dyke said:

> It may be reasonable to speculate that in interpreting the language, a court might determine the purpose of the provision is to prevent this state from sanctioning what is effectively a civil marriage between unmarried individuals where the arrangement is designated by some other name. Under this interpretation, a court might look to whether substantially all of the legal aspects of marriage are conferred, i.e., whether the legal status conferred is essentially intended to be the functional equivalent of marriage or something less than marriage that is not "substantially similar" to marriage.

(R.66:Ex. 10.) Importantly, the memo was written at the request of one of the proposed amendment's authors, who then referred other

legislators to it for a better understanding of what the amendment would and would not do.

On November 16, 2005, Senator Fitzgerald and Representative Gundrum sent a memo to "All Legislators" seeking co-sponsors for the proposed amendment. (R.66:Ex. 11.) This memo reiterated that the Marriage Amendment prohibited only marriages entered into by same-sex couples and Vermont-style civil unions, i.e., "marriage by another name," but not legislation that would provide more limited benefits to same-sex couples.

Shortly thereafter, in December 2005, Senator Fitzgerald explained that a legislative package just like the one created by Chapter 770 would not run afoul of the amendment: "The second clause sets the parameters for civil unions.... Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could." (R.66:Ex. 12.)

Shortly after introduction of the proposal for second consideration, Legislative Council Chief Attorney Dyke, provided a

second legal memorandum to Representative Gundrum at the Representative's request, addressing concerns about the reach of the second sentence of the proposal. After reviewing the state and national developments surrounding same-sex marriage leading up to the introduction of the proposed amendment, earlier statements of intent by legislative authors, and a detailed discussion of what "substantially similar" means as well as what marriage is under Wisconsin law, Attorney Dyke advised Representative Gundrum that:

> While perhaps not dispositive on its own, the above contemporary expressions of intent, combined with the historical context and plain language of the proposed amendment, lend strong support to the conclusion that the intent of the Legislature with respect to the second sentence of the proposed amendment is to prohibit the recognition of Vermont-style civil unions or a similar type of government-conferred legal status for unmarried individuals that purports to be the same or nearly the same as marriage in Wisconsin.

(R.66:Ex. 14, p. 9.) After receiving this detailed and sophisticated legal opinion, Representative Gundrum and Representative Scott Suder, a co-author of the legislation, continued to state that the Marriage Amendment was designed to prevent "Vermont-style" civil

unions but not the provision of benefits to same-sex couples through less extensive legislation. (R.66:Exs. 15-17.)

The evidence before the circuit court overwhelmingly proved that the legislative proponents of the Marriage Amendment repeatedly told their colleagues and the public that the amendment's second sentence prohibited only "Vermont-style" civil unions or other legal statuses that would provide virtually all of the legal rights associated with marriage—which by no means describes Wisconsin's domestic partnership status. Thus, the legislative history supports the circuit court's decision to grant summary judgment to Fair Wisconsin.

B. Proponents of the Marriage Amendment—including Plaintiff Julaine Appling—repeatedly told voters during the ratification campaign that a legal status like that created by Chapter 770 would not be prohibited.

The circuit court reached a similar conclusion about the voter ratification campaign. Based on a review of the extensive evidence

of what was said to voters in the period leading up to the election, the court concluded:

> [B]ecause they were consistently told that the [amendment's second sentence] would not impact benefits, voters understood that the Marriage Amendment does not prevent the state or legislature from creating a legal status to give some rights to same-sex couples. Voters also understood that the only legal status prohibited by the Marriage Amendment is a Vermont-style civil union or similar legal status that is identical or virtually identical to marriage.

(R.131:27.) Echoing the circuit court, the court of appeals concluded that "the historical context of passage persuades us that informed voters would have understood that marriage amendment proponents were saying that the marriage amendment would not ban legally recognized domestic partnerships conferring a limited subset of the rights and obligations of marriage." *Appling*, 2013 WI App 3, ¶ 64.

Without listing in full detail the voluminous record evidence that supports both the circuit and appellate courts' conclusion, a representative sample of some of the statements made to voters illustrates why the courts' decisions were justified. For example, five days before the election, Senator Fitzgerald again reassured voters

that the Marriage Amendment was aimed only at same-sex marriage and Vermont-style civil unions and that a more limited legal status for same-sex couples, such as the one before the Court now would be perfectly legal:

> The non-partisan Legislative Council has written that the proposed amendment does not ban civil unions, only a Vermont-style system that is simply marriage by another name. If the amendment is approved by the voters... the legislature will still be free to pass legislation creating civil unions if it so desires.

(R.66:Ex. 18.)

Julaine Appling, an appellant in this case and a leading proponent of the Marriage Amendment, repeatedly told voters that the amendment's second sentence was aimed at Vermont-style civil unions, "marriage by another name," but not the kind of structure and benefits provided to same-sex couples through registration under Chapter 770. For instance, on December 13, 2005 she authored an op-ed in the Daily Cardinal, where she explained:

> Contrary to the message being consistently given by opponents of the amendment, the second phrase does not "ban civil unions." It does appropriately prohibit civil unions that are marriage by another name. However, it does not preclude the state legislature from considering some legal construct -- call it

> what you will -- that would give select benefits to cohabiting adults.

(R.66:Ex. 20.)

Appling also told reporter Jason Shepard:

> The second sentence is the most important because it "protects the actual institution of marriage from look-alike relationships." This is to stop "Vermont-style" civil unions, which confer virtually all legal rights of marriage on gay couples.

(R.66:Ex. 21, p. 14.)

An organization which Ms. Appling was affiliated with, the Wisconsin Coalition for Traditional Marriage, explained the purpose of the second sentence to voters:

> Q.8: What is the purpose of the second part?
>
> A: The purpose is to protect the people of Wisconsin from having a court impose "look-alike" or "Vermont-style" homosexual "marriage," which Vermont legalized as "civil unions." These civil unions are simply marriage by another name. They are a legally exact replica of marriage, but without the title. The second part to Wisconsin's marriage amendment protects citizens from having a court impose, against their will, this type of arrangement here, regardless of the name given to it.

(R.66:Ex. 22.)

The Family Research Institute of Wisconsin, another organization with whom Ms. Appling was affiliated, published the following in August 2006:

> The second part ... protects the institution itself from being undermined by "look-alike" marriages or marriages by another name.... If such relationships are "identical or substantially similar to" marriage as it is defined and proscribed in this state, then they would not be given legal recognition. Vermont-style civil unions, for instance, would not be valid here since Vermont's civil unions are exactly analogous to marriage....
>
> The second sentence doesn't even prevent the state legislature from taking up a bill that gives a limited number of benefits to people in sexual relationships outside of marriage, should the legislature want to do so. While The Family Research Institute of Wisconsin thinks this would be very ill advised, the Marriage Protection Amendment does nothing to prevent such consideration.

(R.66:Ex. 6.)

Ms. Appling also emphasized that the amendment "authors'[] intent was not to place in jeopardy any existing benefit arrangements." (R.66:Ex. 25; *see also* R.66:Ex. 28 Letter to Editor by Representative Gundrum: "I can confidently say not one privilege or benefit that now exists for heterosexual or homosexual couples

will be prohibited by this amendment.") Since two counties in Wisconsin already offered domestic partnerships akin to Chapter 770 domestic partnerships at the time the amendment was proposed and passed (R.66:Ex. 10), proponents clearly were conceding these domestic partnerships were acceptable.

So whereas proponents, when trying to sell the Marriage Amendment to the voters, argued that the amendment would allow the state legislature to create "some legal construct ... that would give benefits to co-habiting adults" (R.66:Ex. 20.), they now argue, in essence, that *any* legal construct that gives benefits to cohabiting adults is substantially similar to marriage and thus unconstitutional. However, the many examples of statements they made during the voter ratification campaign—as well as the other evidence about the campaign presented to the circuit court—undercut this new stance. The proponents' statements show that voters were told repeatedly that the Marriage Amendment did not prevent the legislature from creating a legal status for same-sex couples, as long as the new status

did not provide virtually all of the rights and responsibilities of marriage. The legislature, in enacting Chapter 770, did exactly what the proponents promised was permissible and, therefore, the resulting legislation is not only consistent, but also constitutional.

C. The Appling Parties' arguments regarding the history surrounding the legislative debates and voter ratification campaign are unpersuasive and contrary to the evidence.

In response to this overwhelming evidence regarding the legislative debates and voter ratification campaign, the Appling Parties argue that the voters heard and voted based not on the proponents' assurances described above, but on the opponents' warnings that the amendment was ambiguous enough that it could be interpreted to ban a limited legal status like Chapter 770 domestic partnerships. (Pet'rs' Br. 35.) Furthermore, against the manifest weight of the record, the Appling Parties argue that the opponents and proponents were in agreement that the amendment would prohibit legal statuses like domestic partnerships. (Pet'rs Br. 35-41.)

The Appling Parties argue that the opponents' statements are the most important source in understanding the constitutional debates surrounding the passage of the Marriage Amendment because the opponents outspent the proponents. (Pet'rs' Br. 30-32.) Yet, the proponents' campaign arm, Vote Yes for Marriage, spent a substantial sum promoting the amendment, $634,383.86. (R.130B:Ex.72.) Moreover, that sum only accounts for the amount spent explicitly campaigning for the amendment. Other groups supportive of the amendment spent an untold sum, not subject to Wisconsin's reporting requirements, "educating" voters about the amendment. (R.130B:Ex.53.) Consequently, the true spending deficit between the proponents and opponents—if there even was a deficit—is unknown.

The Appling Parties emphasize that Fair Wisconsin had a major media presence (Pet'rs' Br. 32.) but fail to acknowledge that the proponents specifically planned to mount a campaign that relied less on radio and television ads (although not abandoning them

completely), and more on conducting their campaign "at the very basic grass-roots level," by "working with 5,000 churches across the state with the potential to reach 2 million voters." (R.66:Ex.16.) While the proponents employed a different strategic approach from opponents, they certainly were able to effectively convey their message to Wisconsin voters. Contrary to the Appling Parties' assertions, Fair Wisconsin was not the exclusive voice heard by voters.

Furthermore, the Appling Parties mischaracterize the opponents' message. Fair Wisconsin's campaign reflected a diversity of opinions as to the consequences of the Marriage Amendment. Amendment opponents were unequivocal in stating that the amendment would ban Vermont-style civil unions that provided all or most of the benefits of marriage (called comprehensive domestic partnerships in some states). While some opponents expressed confusion over what the amendment actually meant, others did assert their belief that the amendment would

jeopardize the provision of benefits for all unmarried couples. (R.66:Ex. 3 p. 3.) However, Fair Wisconsin's overarching message emphasized that the amendment was poorly drafted and it was impossible to know with certainty what its consequences would be for unmarried partners. By asking difficult questions about the interpretation of the amendment, the opposition was simply calling on the proponents of the amendment to clarify its meaning to ensure that the voters understood its true intent. The proponents responded by repeatedly stating that the amendment would only prohibit Vermont-style civil unions.

Opponents warned voters that the Marriage Amendment's second sentence would invite legal challenges from anti-gay groups and could, therefore, threaten important benefits (R.66:Ex. 3 p. 9 ("Although [proponents state] that this will not create any problems with domestic partnerships.... I think people will litigate this issue.")). Fair Wisconsin communicated to voters that the second sentence of the amendment was dangerously vague. As the group's

spokesman explained: "It's not clear to people what it means and what it would do." (R.66:Ex.16.) That was emphasized in two of their television advertisements, where ordinary Wisconsinites express confusion as to the effects of the second sentence. (R.101A:13-14.) The record demonstrates that the opponents' primary message was not that the Marriage Amendment would definitely outlaw legal arrangements such as limited domestic partnerships, but rather that it *could* be interpreted that way. (R.66:Ex. 13.) Now, it is precisely that interpretation of the second sentence that the Appling Parties urge this Court to adopt.

The Appling Parties argue that proponents confirmed the opponents' warnings that the amendment would ban domestic partnerships. To the contrary, the proponents consistently responded to those warnings by asserting that the amendment would ban "only a Vermont-style system that is simply marriage by another name." (R.66:Ex. 18.) They insisted that the Amendment reached only those civil unions or domestic partnerships that "are a legally exact replica

of marriage, but without the title." (R.66:Ex. 22.) The Appling Parties cannot demonstrate to this Court that the two sides were in agreement on anything besides the fact that the amendment would ban those civil unions or domestic partnerships that granted everything but marriage.

What the Appling Parties' discussion of proponent and opponent statements does prove is that the term "legal status" in the second sentence was framed to voters in terms of the incidents of marriage, rather than the so-called "constituent elements" of marriage. *Appling*, 2013 WI App 3, ¶ 60 ("[N]otably absent from the proponent statements prior to the vote is the interpretation Appling advances … that the marriage amendment addresses only eligibility and formation requirements."). Given the central role of benefits in the campaign, voters should be seen as understanding the second sentence as dealing with legal statuses whose legal aspects, including incidents, are substantially similar to marriage, rather than

statuses that have only substantially similar eligibility requirements as marriage.

Furthermore, while many voters wanted to keep marriage between one man and one woman, they also did not want to deprive same-sex partners of all benefits (R.66:Ex. 25 "[One potential supporter] said he does not approve of gay marriage.... Although he's concerned the second sentence ... could call into question same-sex couples' rights [he] is leaning toward voting for the amendment."). Thus, it is reasonable to believe they voted for the amendment confident in proponents' assurances that it would not prevent same-sex couples from enjoying a limited subset of benefits. Yet, as the court of appeals noted, the Appling Parties are asking this Court to accept the "faulty logic" that voters "disbelieved the assurances of proponents, believed the warnings of opponents, and

then voted with the proponents." *Appling*, 2013 WI App 3, ¶ 47. This argument "makes little sense" and should be rejected. *Id.*[6]

III. CHAPTER 770 IS THE FIRST LEGISLATIVE ACTION RELATED TO THE MARRIAGE AMENDMENT AND THE LEGISLATURE ENACTED IT ONLY AFTER DETERMINING IT TO BE CONSTITUTIONAL.

The third source that the court must examine in construing a constitutional amendment is "the legislature's earliest interpretation" of the provision at issue, as manifested in "the first significant law passed" on the same topic. *Schilling*, 2005 WI 17, ¶ 23. The legislature's subsequent actions are "a crucial component of any constitutional analysis because they are clear evidence of the legislature's understanding of that amendment." *Dairyland*, 2006 WI 107, ¶ 45.

The biennial budget bill, 2009 Assembly Bill 75, which contained the provisions that created Chapter 770 domestic

[6] The Appling Parties also suggest that voters understood that affording a legal status to any union that looks like marriage would contribute to the "fading away" of the institution (Pet'rs' Br. 30.), citing for the first time two articles. (Pet'rs' Br. 29-30.) Nothing in the record indicates that voters were aware of, let alone accepted, this argument.

partnerships, was the first action by the Wisconsin Legislature subsequent to the adoption of the Marriage Amendment that was related to a legal status for non-marital (and particularly same-sex) couples.

Chapter 770 starts with a "Declaration of Policy," expressing the Legislature's consideration of the constitutionality of the domestic partnership status and concluding that it does not run afoul of Article XIII, section 13 of the Wisconsin Constitution:

> The legislature ... finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage. Nothing in this chapter shall be construed as inconsistent with or a violation of article XIII, section 13, of the Wisconsin Constitution.

Wis. Stat. § 770.001. The Legislature is a co-equal branch of the government of this state. It and its members, like the other two branches, have a duty and responsibility to protect, defend and interpret the Wisconsin Constitution. That is why duly enacted statutes carry a high presumption of constitutionality. Art. IV, § 28,

Wis. Const.; *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶ 16, 279 Wis. 2d 169, 694 N.W.2d 344.

Contrary to the Appling Parties' assertion, the legislature is not "vouch[ing] for its own constitutionality." (Pet'rs' Br. 46.) The Declaration of Policy in Chapter 770 was not a pro-forma statement. It was based on a careful legal analysis performed by the Wisconsin Legislative Council. In response to questions about the proposed legislation, the Wisconsin Legislative Council's Chief of Legal Services engaged in a lengthy constitutional analysis based upon the framework most recently described in *Dairyland*. He determined that the legal status of domestic partnerships does not include the "core aspects of the legal status of marriage" such as the mutual obligation of support that spouses have in a marriage under Wis. Stat. §§ 765.001(2) and 766.55(2)(a); the comprehensive property system that applies to spouses under the marital property law contained in Wis. Stat. ch. 766; and the requirements of divorce law contained in Wis. Stat. ch. 767, including the procedures for termination of

marriage, division of property, support requirements, and a six-month prohibition against remarriage. Consequently, he concluded that "it is reasonable to conclude that the domestic partnership proposed in Assembly Bill 75 does not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of [the Marriage Amendment]." (R.66:Ex. 30, pp. 7-8.)

This Court has explained that Legislative Council analyses written at the time of drafting "provide[] the court with valuable information about the knowledge available to legislators." *State v. Cole*, 2003 WI 112, ¶ 36. Thus, this memorandum shows that the information available to legislators informed them that the proposed domestic partnerships would be constitutional. Moreover, the memorandum contradicts the Appling Parties' claim that this was a purely political legislative effort to undermine rather than construe or apply the Marriage Amendment. (Pet'rs' Br. 13.)

Additionally, before signing the bill creating domestic partnerships, Governor Jim Doyle asked Professor David Schwartz

from the faculty of the University of Wisconsin Law School to provide him a legal opinion specifically addressing the question of whether the domestic partnership provisions are compatible with the second sentence of the Marriage Amendment. (R.66:Ex. 32.) Professor Schwartz summarized his opinion as follows:

> Construed in accordance with the intent of the voters who adopted it, the intent of the legislature which drafted it, and the applicable principles of constitutional interpretation, Art. XIII, § 13 is intended to ban same-sex marriages and civil unions that exactly replicate the rights and obligations of marriage, but not civil unions or domestic partnerships that bear any significant difference from marriage.
>
> * * *
>
> This "any significant difference" test is met by [the domestic partnership provisions in 2009 Act 75].... There are numerous ... significant differences between marriage and the proposed Wisconsin domestic partnerships.

Id. at 1-2.

This history hardly suggests that the legislature and governor were trying to subvert the will of the voters in passing this law. While the legislature did want to create some legal status for same-sex partners, it is clear it was committed to doing so *without* contravening the limits of Wisconsin's Constitution. Thus, Chapter

770 was enacted only after careful consideration of the law's constitutionality by both the legislature and the governor. Indeed, the evidence demonstrates they made efforts to satisfy themselves that Chapter 770 would *not* violate the Marriage Amendment and that, in enacting Chapter 770, they were not creating a legal status substantially similar to marriage.

The Appling Parties' argument that the third prong of the constitutional analysis is irrelevant in this case (Pet'rs' Br. 44-48.) is erroneous because they misunderstand the importance of this prong. As the circuit court observed, the third prong of the analysis demonstrates here that Chapter 770 was enacted only after careful consideration by the legislature of its constitutionality. Furthermore, the legislature is always presumed to act constitutionally, no matter which party is in control. Where the constitutionality of a piece of legislation is in question, "[a]ll doubts ... must be resolved in favor of upholding the act." *Craney*, 199 Wis. 2d at 680. Given the presumption of constitutionality of legislative actions as well as the

high burden of proof that must be met to prove a law unconstitutional, the third prong of the analysis in this case further supports the conclusion that the Appling Parties failed to meet their burden.

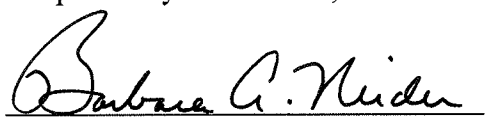
Finally, even if this Court were to place little weight on the third prong of the constitutional analysis, it still is appropriate to affirm the lower courts' decisions because the first two prongs (the plain meaning and the history surrounding the passage of the amendment), both considered independently and together, show the Appling Parties failed to prove beyond a reasonable doubt that Chapter 770 violates the Marriage Amendment.[7]

[7] The court of appeals did not consider the third part of the constitutional analysis, *Appling*, 2013 WI App 3, ¶ 74, but nonetheless concluded based on the first two parts of the analysis that the Appling Parties had fallen "far short" of meeting their burden of proving beyond a reasonable doubt that Chapter 770 is unconstitutional.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals upholding the circuit court's grant of summary judgment in favor of Fair Wisconsin should be affirmed.

Respectfully Submitted,



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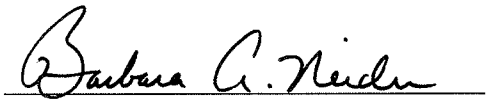
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,364 words.



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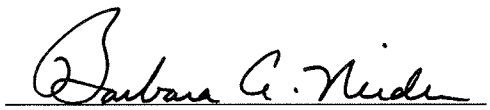

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CERTIFICATION OF FILING AND SERVICE

I hereby certify that the original and nine copies of the Response Brief of Intervening Defendants-Respondents were hand-delivered to the Clerk of the Wisconsin Supreme Court on September 11, 2013.

I further certify that, on September 11, 2013, copies of same were served via email and first class mail, postage prepaid, upon the persons listed below:

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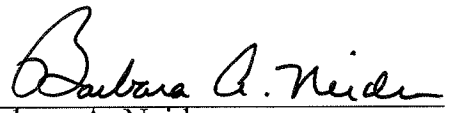

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