

SUPREME COURT OF WISCONSIN

Case No. 2009AP001860-OA

JULAINÉ APPLING, JAREN E. MILLER
and EDMUND L. WEBSTER,

Petitioners,

v.

JAMES E. DOYLE, in his official capacity as
Governor of the State of Wisconsin,

KAREN TIMBERLAKE, in her official
capacity as Secretary of the Wisconsin
Department of Health Services, and

JOHN KIESOW, in his official capacity as
State Registrar of Vital Statistics,

Respondents.

FAIR WISCONSIN, INC.'S BRIEF IN SUPPORT OF ITS MOTION TO
INTERVENE

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Fair Wisconsin, Inc., through its undersigned counsel, submits this memorandum in support of its Motion To Intervene.

FACTUAL BACKGROUND

The Domestic Partnership Law and The Legal Challenge

On June 29, 2009, Governor James E. Doyle signed into law a state budget that included the creation of a domestic partner registration system under Chapter 770 of the Wisconsin Statutes (the “Domestic Partnership Law”). To qualify for a domestic partnership under the Domestic Partnership Law, two individuals must: be at least 18 years old and capable of consenting to the domestic partnership; be members of the same sex; share a common residence, with one partner having resided in the county for at least 30 days; not be nearer of kin than second cousins; and, not be married or in another domestic partnership.

At the same time that the Domestic Partnership Law was enacted, the Wisconsin legislature revised certain existing state statutes so that they would be applicable to domestic partners. These revisions had the effect of granting a limited number of legal protections to domestic partners including: the right to share a room in a nursing home and visit one another in the hospital, the right to inherit from the estate of a domestic partner who

dies without a will, the ability to take a medical leave to care for a domestic partner with a serious medical condition, the right to sue for a partner's wrongful death, the presumption that real estate held between domestic partners is held as joint tenants with rights of survivorship, and an exemption from real estate transfer fees for real estate transferred between domestic partners.

Although important, the protections extended to domestic partners are limited in scope. For example, domestic partners do not have the mutual obligation of support that spouses have in a marriage. Nor do they enjoy the comprehensive property system that applies to spouses under the marital property law. Domestic partners are also not afforded the rights, benefits and responsibilities associated with divorce law.

On July 23, 2009, Petitioners filed their "Petition To Take Jurisdiction Of Original Action" (the "Petition") in which they ask this Court to take jurisdiction of, and grant leave to commence, an original action challenging the constitutionality of the Domestic Partnership Law. The Petition asserts that the Domestic Partnership Law violates Article XIII, sec. 13 of the Wisconsin Constitution (the "Marriage Amendment"),

which was passed by the voters of Wisconsin in November 2005. The Marriage Amendment states:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The Petition asks this Court to declare the Domestic Partnership Law unconstitutional and to enjoin the Governor, the Secretary of the Wisconsin Department of Health Services and the State Registrar of Vital Statistics (collectively, the “Respondents”) from enforcing its provisions.

On August 17, 2009, this Court ordered the Respondents to file, by August 31, 2009, a response to the Petition containing a statement regarding the relevant facts that Respondents believed were in dispute. On August 21, 2009, the Wisconsin Attorney General issued a statement stating that he would not represent the Respondents in defending the Domestic Partnership Law. In response, Governor Doyle appointed private outside counsel and this Court granted the Respondents an extension until September 22, 2009 to respond to the Petition. Contemporaneous with the filing of its motion to intervene, Fair Wisconsin is filing its proposed opposition to the Petition.

Fair Wisconsin and Its Members¹

Fair Wisconsin is a statewide nonprofit membership organization dedicated to advancing and protecting the civil rights of lesbian, gay, bisexual and transgender people. (Belanger Decl. ¶ 1.) Fair Wisconsin carries out its mission through education, legislative advocacy, grassroots organizing, coalition building, and electoral involvement. (Belanger Decl. ¶ 1.) These efforts are designed to educate the general voting public, sensitize the media, promote a politically active and effective organizational membership, and better inform policy makers on issues of concern to its members. (Belanger Decl. ¶ 1.)

Fair Wisconsin was originally known as Action Wisconsin. (Belanger Decl. ¶ 3.) In March 2006, Action Wisconsin launched Fair Wisconsin as a referendum group focused on educating the public about the Marriage Amendment and attempting to convince voters not to support it. (Belanger Decl. ¶¶ 3 and 4.) As part of that process, the organization filed a *Campaign Registration Statement* (EB-1) creating the Fair Wisconsin referendum group with the then State Elections Board. (Belanger Decl. ¶

¹ The following factual statements about Fair Wisconsin and its members are supported by the accompanying Declaration Of Katie Belanger in Support of Fair Wisconsin, Inc.'s Motion to Intervene ("Belanger Decl."), Executive Director of Fair Wisconsin.

4.) Fair Wisconsin and its members participated in the public debate about the Marriage Amendment by issuing press releases, speaking with the media, distributing education materials, conducting fundraisers, and organizing grass roots election activities. (Belanger Decl. ¶ 4.) During the debate, Fair Wisconsin monitored, and responded to, public statements made by the leading legislative and political proponents of the Marriage Amendment. (Belanger Decl. ¶ 4.) Fair Wisconsin also conducted and analyzed public opinion polls about the Marriage Amendment. (Belanger Decl. ¶ 4.) In short, Action Wisconsin, through the Fair Wisconsin referendum group, was the principal organization opposing passage of the Marriage Amendment. (Belanger Decl. ¶ 4.)

After the November 2006 election, Action Wisconsin officially changed its name to Fair Wisconsin. (Belanger Decl. ¶ 5.) Since that time, Fair Wisconsin has devoted significant resources to enacting important domestic partnership protections for same-sex couples. (Belanger Decl. ¶ 5.) Indeed, Fair Wisconsin was the principal organization advocating on behalf of the Domestic Partnership Law. (Belanger Decl. ¶ 7.) As part of that effort, Fair Wisconsin developed a broad coalition of support from across the community, lobbied the Governor and the State Legislature, and

conducted grassroots organizing and educational outreach. (Belanger Decl. ¶ 7.) Katie Belanger, Fair Wisconsin's current Executive Director, served as the organization's Legislative Director from January 5, 2009 to June 30, 2009. (Belanger Decl. ¶ 6.) In that capacity, Ms. Belanger managed, and was responsible for, Fair Wisconsin's lobbying efforts with respect to the Domestic Partnership Law. (Belanger Decl. ¶ 6.) Ken Walsh, an independent contract lobbyist with Martin Schreiber & Associates, Ms. Belanger, and Fair Wisconsin Inc. all registered with the Government Accountability Board as lobbyists – first with respect to domestic partnerships generally, and then with respect to the specific budgetary provisions that became the Domestic Partnership Law. (Belanger Decl. ¶ 6.)

Fair Wisconsin has over 25,000 members in Wisconsin who contribute time and money to the organization's goal of advancing and protecting the civil rights of lesbian, gay, bisexual and transgender people. (Belanger Decl. ¶ 2.) Fair Wisconsin's members include hundreds of same-sex couples, many of whom have already registered as domestic partners under the Domestic Partnership Law or intend to do so in the future. (Belanger Decl. ¶¶ 2 and 8.)

ARGUMENT

Fair Wisconsin seeks to intervene in this matter to oppose the Petitioners' request that this Court take jurisdiction of this matter. In the alternative, should this Court take jurisdiction of this matter, Fair Wisconsin seeks to intervene to defend the constitutionality of the Domestic Partnership Law.

As a nonprofit organization, Fair Wisconsin has the right to seek intervention in judicial proceedings and to raise claims on behalf of its members. Wis. Stat. § 184.07. Indeed, Wisconsin courts routinely allow organizations to intervene in suits seeking declaratory and injunctive relief against government entities or agencies. *Wis. Citizens Concerned for Cranes and Doves v. Wis. Dept. of Natural Resources*, 270 Wis. 2d 318, 677 N.W.2d 612 (2004) (in which the U.S. Sportsmen's Alliance Foundation intervened as a defendant in a suit against the Department of Natural Resources); *Mallo v. Wis. Dept. of Revenue*, 253 Wis. 2d 391, 645 N.W.2d 853 (2002) (in which several farmer's organizations intervened as defendants in a suit against the Department of Revenue); *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992) (in which several civil rights

organizations intervened as plaintiff challenging the constitutionality of a statute).

Intervention may be established as a matter of right or may be granted by permission through the exercise of this Court's discretion. Wis. Stat. §§ 803.09(1) and (2). Fair Wisconsin is entitled to be granted intervention as of right. In the alternative, it requests that the Court permit it to intervene.

I. FAIR WISCONSIN HAS THE RIGHT TO INTERVENE.

As a nonprofit association, Fair Wisconsin has the right to intervene in judicial proceedings and to assert claims on behalf of its members pursuant to Wis. Stat. § 803.09(1). To establish intervention as of right, a movant must satisfy each of the following four criteria:

- (a) that the movant's motion to intervene is timely;
- (b) that the movant claims an interest sufficiently related to the subject of the action;
- (c) that disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest;
- (d) that the existing parties do not adequately represent the movant's interest.

Helgeland v. Wisconsin, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1.

These criteria are not analyzed in isolation from one another – rather, courts consider the interplay between the requirements and the fact that a strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements. *Helgeland*, 2008 WI 9, ¶ 39. As this Court has noted, the requirements must be “blended and balanced” to determine whether the movant has the right to intervene. *Id.*

A. *Fair Wisconsin’s Motion To Intervene Is Timely.*

Fair Wisconsin’s motion is timely because these proceedings have just begun. Indeed, this Court has not yet even determined whether it will take jurisdiction of this matter and allow Petitioners to commence an action in this Court. Thus, there can be no credible claim that intervention at this preliminary stage would cause prejudice to any of the parties. *See, e.g., Bilder v. Township of Delavan*, 112 Wis. 2d 539, 550-51, 334 N.W.2d 252 (1983) (finding that a lack of prejudice to any party in the litigation was a factor weighing in favor of concluding that a motion to intervene was timely).

B. Fair Wisconsin's Members Have An Interest Directly Related To The Subject Of This Action.

Fair Wisconsin's members have the type of interest in this litigation that satisfies the intervention standard set forth in *Helgeland*. As this Court noted in *Helgeland*, no precise test exists for determining what type of interest in the litigation is sufficient to allow a party to intervene as a matter of right. *Helgeland*, 2008 WI 9, ¶ 43. Instead, Wisconsin courts employ a “pragmatic approach” to allow participation by as many concerned parties as is compatible with efficiency and due process. *Id.* at ¶ 43-44. In applying this pragmatic approach, courts consider whether the interest of the intervening party is “of such direct and immediate character that the intervenor will either gain or lose by direct operation of the judgment.” *Id.* at ¶ 45.

In *Helgeland*, eight municipalities sought to intervene in a declaratory judgment action brought by state employees and their domestic partners challenging the constitutionality of state employee trust fund statutes. The municipalities asserted several interests in the disposition of the action – including a financial interest in the dispensation of health and dental benefits to municipal employees (which they claimed might be increased if similar programs for state employees were forced to include

domestic partners in their eligibility standards) and an interest in preserving the municipalities' collective bargaining agreements with municipal employees (which they argued they might be forced to modify if the plaintiffs prevailed in the *Helgeland* matter). This Court rejected these interests as insufficient for intervention because their connection to the subject matter of the action – the state's employee trust fund statutes – was “too remote and speculative.” *Id.* at ¶ 53. The Court concluded that the interests asserted by the municipalities were not “unique” or “special” because they were the types of interests that other municipalities could claim in almost any action challenging the constitutionality of a state statute, or that any employer could claim when an action affects a contract similar to one to which an employer is a party. *Id.* at ¶ 71. In short, because the municipalities' employee benefit plans and collective bargaining agreements were not directly at issue in the *Helgeland* case, this Court determined that the municipalities failed to satisfy the second part of the intervention analysis.

By contrast, Fair Wisconsin's members do have a direct and unique interest in the subject of this action. Fair Wisconsin's central mission is to advance and protect the civil rights of lesbian, gay, bisexual and

transgender people. As part of that mission, the organization dedicated significant time, money and resources to achieving passage of the Domestic Partnership Law – legislation that provides important legal protections for same-sex couples in Wisconsin. Many of Fair Wisconsin’s members are a part of same-sex couples who have availed themselves of, or intend to avail themselves of, the legal protections provided by the Domestic Partnership Law. As a result, Fair Wisconsin’s members have a direct and unique interest at stake in this matter – a specific personal interest in preserving the legal protections that are provided by the Domestic Partnership Law. In other words, the interests of Fair Wisconsin’s members are “of such direct and immediate character that [Fair Wisconsin’s members] will either gain or lose by the direct operation of the judgment.” *Id.* at ¶ 45. Because Fair Wisconsin’s members have a unique interest directly related to the subject matter of this action, the second part of the intervention analysis is satisfied. *See also Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 474, 516 N.W.2d 357 (1994) (holding that an intervenor satisfied the second part of the intervention analysis because he had a “unique and significant” interest in the outcome of the case).

C. *Granting The Relief Sought By Petitioners Would Impair The Ability Of Fair Wisconsin And Its Members To Protect Their Interests.*

Fair Wisconsin also satisfies the third part of the intervention analysis because a disposition of this matter in favor of the Petitioners would directly and immediately impair the ability of Fair Wisconsin's members to protect their interests. The third part of the intervention analysis is closely tied to the second – i.e., if an interest is not directly related to the subject matter of the action, then it is unlikely that an intervening party will be able to demonstrate that disposition of the action will sufficiently impair the intervenor's ability to protect its interest. In *Helgeland*, for example, this Court found that the municipalities' argument that the disposition of the action would impair their ability to protect their interests was "weak at best" because the municipalities only had a "generalized interest" in the subject matter of the lawsuit.

In contrast, a decision in favor of the Petitioners in this matter would directly impair the ability of Fair Wisconsin's members to protect their interests. If, for example, the Domestic Partnership Law were determined to be unconstitutional, then Fair Wisconsin's successful lobbying effort to achieve limited, but important, legal protections for same-sex couples

would be undone. Furthermore, a decision that the Domestic Partnership Law was a legal status “substantially similar” to marriage would limit Fair Wisconsin’s future efforts to advocate for legislation on behalf of same-sex couples because it would provide a restrictive precedent that might dramatically limit the type of legislation that could be enacted in the future to protect same-sex couples. Such a decision would impair the ability of Fair Wisconsin’s members to protect their interests because it would strip them of the legal protections provided by the Domestic Partnership Law and greatly curtail their ability to achieve these protections in the future. They would no longer have the ability to legally guarantee that they could visit each other in the hospital, share a room in a nursing home or similar facility, or take a medical leave to care for each other. Thus, “an adverse holding in the action would apply to the [Fair Wisconsin’s members’] particular circumstances” (*see Helgeland*, 2008 WI 9, ¶ 80) and would impair the ability of many of them to protect important legal interests.

Finally, this Court has given consideration to the extent to which the action will result in a novel holding of law. As this Court has noted, “[t]he effect of stare decisis is more significant when a court decides a question of first impression.” *Helgeland*, 2008 WI 9, ¶ 81. Because this Court has yet

to construe the Marriage Amendment or determine its scope, the impact of any decision ultimately rendered in this case on Fair Wisconsin's members should be given special significance in balancing Fair Wisconsin's right to intervene.

D. The Existing Parties Do Not Adequately Protect The Interests Of Fair Wisconsin And Its Members.

The fourth part of the intervention test – i.e., that the existing parties do not adequately represent the intervenor's interest – also demonstrates that Fair Wisconsin has the right to intervene. This Court has held that the showing required for proving inadequate representation should be treated as “minimal.” *Armada Broadcasting*, 183 Wis. 2d 463, 476 (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 539 (1972) (“The requirement of the [inadequate representation showing] is satisfied if the applicant shows that representation of his interest *may be* inadequate; and the burden of making that showing should be treated as minimal.”) (emphasis added and internal quotation marks omitted)). Although adequate representation is presumed when a movant and an existing party have the same ultimate objective or when a governmental body or officer is charged by law with representing the interests of the absentee, these presumptions are balanced against the nature of the interest claimed by the

intervenor. See *Helgeland*, 2008 WI 9, ¶¶ 90-91 and 117. Specifically, the Court considers whether the interest of the intervenor is different from, or more powerful or personal than, the interests of the existing parties such that the intervenor should be permitted to intervene to protect the intervenor's interest.

For example, in *Armada*, this Court held that a school teacher had the right to intervene in an action in which a broadcasting company sought a writ of mandamus directing a school district to disclose a report detailing sexual harassment allegations against the teacher. Although the school district and the teacher had the same ultimate objective of preventing disclosure of the report, this Court held that the "personal nature" of the teacher's interest in the matter was sufficient to demonstrate that his interests were not adequately represented by the district. *Armada Broadcasting*, 183 Wis. 2d at 476. The Court noted that intervention was warranted because one could not expect the school district to defend the action with the same "vehemence" as someone who would be directly affected by the outcome of the case. *Id.*; see also *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 601 N.W.2d 301 (1999) (permitting a township to intervene even though it was not wholly adverse to the county

defendant because the township had different interests such that it would defend the matter “more vigorously” than the county).

In contrast, in *Helgeland*, this Court concluded that the municipalities that sought intervention failed to demonstrate inadequate representation because they did not have a “special, personal or unique” interest that was more powerful or personal than the interests of the named defendants in the case. *Helgeland*, 2008 WI 9, ¶ 117. Because the municipalities could not show that they had “more at stake” than the existing defendants, this Court determined that intervention was not appropriate.

Fair Wisconsin’s members have the type of interest that satisfies the “inadequate representation” part of the intervention analysis. In this matter, the Petitioners are challenging the constitutionality of the Domestic Partnership Law by seeking to sue three government respondents – the Governor, the Secretary of the Wisconsin Department of Health Services, and the State Registrar of Vital Statistics. The duty to represent the respondents and defend the constitutionality of the law normally rests with the Attorney General. In this matter, however, the Attorney General has declined to fulfill this duty. Although Governor Doyle has retained outside

private attorneys to represent the government respondents, the fact that the governmental officer charged by law with representing the respondents has refused to do so weighs in favor of granting intervention to those vitally concerned about the Domestic Partnership Law's defense.

Although Fair Wisconsin and its members desire the same outcome as the government respondents – namely, upholding the validity of the Domestic Partnership Law, Fair Wisconsin's members have a unique, special and personal interest in this matter that is different than the interest of the government respondents and thus motivates their defense in a very different way. The government respondents have a general interest in upholding the law of Wisconsin and protecting the legitimate use of the political process. In contrast, Fair Wisconsin's members have a specific interest in upholding this particular law and the legal protections it provides because of the direct effect it has on them personally. Although the government respondents will no doubt defend the law through their outside attorneys, it can naturally be expected that their arguments, motivated by protection of the political process, would differ significantly from those asserted by Fair Wisconsin, an organization that spent considerable time, money and resources advocating for legislation that lies at the core of its

mission and whose members have a very personal stake in the outcome of this litigation because it threatens a law that they need to protect their families. Because these interests are fundamentally different than – and more powerful and personal than – the interests of the government respondents, this Court should conclude that Fair Wisconsin has made the minimal showing necessary to satisfy the inadequate representation part of the intervention analysis.

II. IN THE ALTERNATIVE, FAIR WISCONSIN SHOULD BE PERMITTED TO INTERVENE.

If this Court concludes that Fair Wisconsin does not have the right to intervene, the organization respectfully requests that this Court exercise its discretion and permit Fair Wisconsin to intervene pursuant to Wis. Stat. § 803.09(2). Permissive intervention is appropriate when a movant's claim or defense and the pending action have a question of law or fact in common. Wis. Stat. § 803.09(2). In this matter, Fair Wisconsin seeks to intervene to defend the Domestic Partnership Law before the court that ultimately considers the merits of this action against the petitioners' argument that it creates a legal status "substantially similar" to marriage by demonstrating that it does not. In essence, Fair Wisconsin seeks a declaration that is the polar opposite of the declaration sought by the

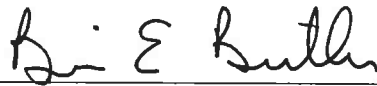
Petitioners. As a result, Fair Wisconsin's claim, and its defense to the claim raised by the Petitioners, raise all of the same questions of law and fact raised in the pending action.

It is particularly appropriate for the Court to exercise its discretion and allow Fair Wisconsin to intervene because Petitioner Applig was affiliated with the "the principal organization" that advocated for passage of the Marriage Amendment. (Petition, ¶23.) In contrast, Fair Wisconsin was the principal organization that opposed passage of the Marriage Amendment. Thus, this Court will benefit from allowing representatives of both of these two organizations to bring their unique knowledge to this matter and to allow them the opportunity to present evidence and argument in support of their respective claims and defenses.

CONCLUSION

For the foregoing reasons, Fair Wisconsin respectfully asks this Court to grant its Motion To Intervene.

Respectfully submitted,



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,768 words.



Brian E. Butler