SUPREME COURT OF WISCONSIN
Case No. 2008AP001868

William C. McConkey,
Plaintiff-Appellant-Cross-Respondent,
v.

J.B. Van Hollen, in his role as
Attorney General of Wisconsin,
Defendant-Respondent-Cross Appellant.

BRIEF AND APPENDIX OF AMICUS CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., FAIR WISCONSIN, AND ACLU OF WISCONSIN, IN SUPPORT OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT

On Appeal from the Circuit Court of Dane County,
Honorable Richard G. Neiss Presiding,
Circuit Court Case No. 2007CV002657

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I. THE COURT SHOULD NOT INTERPRET THE MARRIAGE AMENDMENT PREMATURELY OR OVER-BROADLY.

This lawsuit asks whether a ballot question that amends the Wisconsin Constitution to limit marriage to different-sex couples may also include a separate provision prohibiting recognition of any legal status for same-sex couples that is "identical or substantially similar" to marriage ("Amendment") without violating Article XII, Section 1 of that Constitution ("separate-amendment rule"). This *amicus* brief is submitted to assist this Court in construing what the Amendment's terms "identical or substantially similar" mean. Although it is unclear whether those terms can be interpreted in ***any*** manner that would keep the Amendment from violating the separate-amendment rule (a question beyond this brief), it ***is*** clear that interpreting these terms too broadly would violate the separate-amendment rule and should be avoided.[1] Additionally, should the Court conclude that the Amendment does not violate the separate-amendment rule -- regardless of how the terms "identical or substantially

[1] *See In re Termination of Parental Rights to Max G.W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 (courts should avoid interpretations that create constitutional infirmities).

similar" are interpreted -- the Court should avoid prematurely construing the terms because the Amendment's effect on Wisconsin's recently-adopted domestic partnership law, 2009 Wis. Act 28 (June 30, 2009) ("Domestic Partnership Law"), is now the subject of separate litigation that merits its own full consideration.[2]

No one disputes that the plain language of the Amendment's first part limits marriage in Wisconsin to different-sex couples. The question is what the Amendment's second part prohibits. This Court examines three sources in construing a constitutional provision: the plain meaning of the words in their context; the constitutional debates and the existing practices when the provision was written; and "the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption [of the provision]." *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996). Here, each of these three sources compels the same construction – the Amendment's second part was meant to prohibit only (1) recognition of marriages

[2] *See Norquist v. Zeuske*, 211 Wis. 2d 241, 252, 564 N.W.2d 748 (1997) (questions regarding statute's constitutionality should not be decided prematurely, particularly where the record is insufficiently developed).

lawfully entered into elsewhere by same-sex couples (which are "identical" to marriage) and (2) same-sex legal relationships "essentially alike" marriage (which are "substantially similar" to marriage). The Amendment never was intended to prohibit the State from extending legal rights and protections to unmarried couples through a legal status that differs materially from marriage.

A. The Plain Language Of The Amendment's Second Sentence Prohibits Only Legal Statuses That Are Exactly The Same As Or Essentially Alike Marriage.

Under the plain meaning rule, "[w]ords and phrases are generally accorded their common everyday meaning, while technical terms or legal terms of art are given their accepted legal or technical definitions." *Wis. Citizens v. Dep't of Natural Res.*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 612. The terms "identical" and "substantially similar" are narrow and specific in meaning. When the Amendment was proposed, the Chief of Legal Services at the Wisconsin Legislative Council ("WLC") explained:

> 'Identical,' of course, means 'exactly the same for all practical purposes', 'being the same, having complete identity,' 'characterized by such entire agreement in qualities and attributes that identity may be assumed,' or 'very similar, having such close resemblance and such minor difference as to be essentially the same.' 'Similar' is defined as 'having characteristics in

> common, very much alike, comparable,' 'alike in substance or essentials,' or 'one that resembles another, counterpart', or 'nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference.' 'Substantially' is defined as meaning 'essentially; without material qualification.' Thus, something can be said to be 'substantially similar' if it is essentially alike something else.

WLC Letter regarding 2005 Assembly Joint Resolution 67 (Feb. 24, 2006) (App. 101-10.) (citations omitted; emphasis added).

The plain meaning of a legal status for same-sex couples that is "identical" to marriage cannot refer to anything other than marriages lawfully entered by same-sex couples in another jurisdiction. No legal status known by any term other than "marriage" can be considered exactly the same as marriage because no other status has the same consequences, is as meaningful to couples, carries the same ties to marriage's history, traditions, and celebrations or is accorded equal respect by society. Indeed, Wisconsin Statutes expressly recognize that "[t]he consequences of the marriage contract are more significant to society than those of other contracts." Wis. Stat. § 765.001(2).

The unique character of marriage has been recognized by courts across the country in ruling that legal

statuses such as civil unions or domestic partnerships fail to provide what marriage confers. For example, Massachusetts' high court ruled in *In re Opinions of the Justices*, 802 N.E.2d 565, 570 (Mass. 2004), that civil unions do not provide the same status as marriage, which "is specially recognized in society and has significant social and other advantages." Likewise, the California Supreme Court ruled in *In re Marriage Cases*, 183 P.3d 384, 445-46 (Cal. 2008), that even a comprehensive domestic partnership law denies same-sex couples marriage's "symbolic importance" and "dignity and respect" and provides a status of "lesser stature" than marriage and is unlikely to be treated the same as it. *See also Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (explaining that "the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody").

A number of states that have enacted civil union laws likewise have recognized that civil unions are far from identical to marriage. Even though they allowed civil unions providing all the same legal benefits, protections and

responsibilities as marriage,[3] both Vermont and New Hampshire this year enacted laws allowing same-sex couples to marry[4] because civil unions turned out not to be identical to marriage. *See* Report of the Vt. Comm'n On Family Recognition and Prot. at 26-27 (Apr. 21, 2008) (App. 111-44.) (civil unions unequal to marriage in practice, nor similar in terminology, social, cultural and historical significance or portability); *see also* Final Report of the N.J. Civil Union Review Comm'n at 1 (Dec. 10, 2008) (App. 145-223.) (providing same-sex couples civil unions rather than marriage "invites and encourages unequal treatment of same-sex couples and their children" and has "negative effect[s] … [on their] physical and mental health").

It is easy to see that a relationship other than marriage cannot be considered identical to it. Were a married couple told that they were no longer married but instead were in a civil union or domestic partnership, they unquestionably would feel that they had lost something precious. Even though the legal rights and responsibilities might be the same

[3] Vt. Stat. Ann., tit. 15, §1204(a) (1999); N.H. Rev. Stats. Ann. § 457A:6 (2008).

[4] 2009 Vt. Laws 3; 2009 N.H. Laws Ch. 59.

as before, they would lose the status of marriage. Thus, when the Amendment refers to a legal status identical to marriage, it cannot be referring to anything other than the marriages same-sex couples are allowed to enter in other states – which are identical to other marriages in those states – but which Wisconsin does not recognize because of the Amendment. *See* Memorandum, David S. Schwartz, Professor, to Jim Dole, Wisconsin Governor at 1-2, 9 (June 4, 2009) (App. 224-37) .

Less clear and indeed premature, particularly on this limited record, is what relationship other than marriage is "substantially similar." While some constitutional amendments barring marriage have also barred any legal status "similar" to marriage,[5] Wisconsin's Amendment is narrower than that and only prohibits a status that is "s*ubstantially* similar" to marriage. The lead definition of "substantially" contained in Black's Law Dictionary is "essentially." Black's Law Dictionary 1428-9 (9th ed. 2009). Accordingly, a plain reading of such a relationship would be one "essentially" similar to a marriage, in that they provide

[5] *E.g.*, Tex. Const., art. I, §32(b).

the same rights and responsibilities under a different name. The plain meaning of the phrase "substantially similar," however, cannot refer to any lesser status, which would not be essentially the same as marriage. Since the rights and responsibilities of a "civil union" or "domestic partnership" vary from state to state, it is premature for this Court to opine what relationship is "essentially alike" marriage in all but name.

B. The Electoral Debate Regarding The Amendment And The Practices To Which It Responded Confirm That It Was Not Intended To Bar A Status That Provides Fewer Legal Protections Than Marriage.

A second source important in construing a constitutional provision is the debate surrounding its adoption and the practices existing at the time. As explained *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (citations omitted), Wisconsin courts construe constitutional amendments to "give effect to the intent of the framers and of the people who adopted it."

In reviewing the Amendment's history, the Attorney General correctly observes that the prohibition against recognition of any legal status that is "substantially similar" to marriage had a specific and narrow intended

meaning – to "prevent same-sex marriages from being legalized in this state regardless of the name used by a court or other body to describe the legal institution." Att'y Gen. Br. at 27. This particular language was aimed, in part, at a pending bill that "would have created a new legal status conferring ***all*** the statutory and other rights and responsibilities of marriage" under a different name. *Id*. at 28 (emphasis added). The Amendment's proponents intended the "substantially similar" language to ensure the Amendment could not be "circumvented by the creation of an alternative legal status that was like marriage ***in all but name***." *Id*. at 29 (emphasis added).

The proponents apparently intended, at least in part, to respond to national marriage litigation developments where parallel institutions were created to provide ***all*** statutory rights, benefits and obligations of marriage, but under a different name. *E.g., Baker v. State of Vt.*, 744 A.2d 864, 886-7 (Vt. 1999) (permitting the legislature to create a status with all the same rights and responsibilities as marriage under the name "civil union"); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (same). Indeed, the Amendment's legislative sponsors unequivocally stated that the Amendment would not

prohibit extending legal benefits to same-sex couples, only legal relationships that conferred marriage by another name. State Senator Fitzgerald, who introduced the Amendment through 2005 Senate Joint Resolution 53, noted "Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could." (App. 240.)

Likewise, Representative Gundrum, in introducing the Amendment through 2003 Assembly Joint Resolution 66, wrote that it:

> 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.

(App. 243.) (emphasis supplied.)

It therefore has to be assumed that legislators voting for the Amendment did not intend it to prohibit a legal status conferring anything less than all legal rights of marriage. *See Dairyland v. Doyle*, 2006 WI 107, ¶¶ 33-36, 295 Wis. 2d 1, 719 N.W.2d 408 (when Wisconsin's legislators are told that an amendment will have a specific reach, they are assumed to have voted with that in mind).

This meaning of the Amendment is confirmed by "the information used to educate the voters during the ratification campaign," which also "provides evidence of the voters' intent." *Id.,* 2006 WI 107, ¶ 37. The organizations that conducted voter outreach supporting the Amendment stated that it would not prohibit extending domestic partnership benefits to same-sex couples. (App. 245 ("the bottom line is this: the marriage amendment is not about benefits. It is about preserving one-man/one-woman marriage and giving children the best opportunity to have a mother and a father.")) Julaine Appling, President of Vote Yes for Marriage in Madison, dismissed fears that the Amendment would affect domestic partner benefits as a "chicken little" scare tactic meant to distract voters from the proposal's real aim – preventing same-sex marriage.[6] (App. 247; *see also* Wisconsin Coalition for Traditional Marriage *Answers to Commonly Asked Questions* (App. 250-51)[7] ("nothing in the second sentence . . . would prohibit currently existing benefit

[6] Curiously, Ms. Appling is a petitioner in *Appling v. Doyle*, *supra*, where she now asserts the Amendment has precisely the effect she disclaimed.

[7] *See* http://www.savemarriagewi.org/faq.html.

arrangements such as hospital visitations or private property transfer, nor prevent such arrangements in the future").)

C. Subsequent Legislation Confirms The Amendment's Narrow Reach.

Finally, 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. As the first Wisconsin law passed after the Amendment's adoption that directly affects the legal rights of same-sex couples, the Domestic Partnership Law provides certain benefits to same-sex couples who register as domestic partners, but unquestionably does not afford them the full scope of rights provided to spouses in marriage,[8] confirming that the Amendment only bans a legal status "essentially alike" marriage, but not one short of that.

By way of example only, domestic partnership status under the Wisconsin law does not include:

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[8] *See* Letter from Don Dyke to Bob Lang, Director, Legislative Fiscal Bureau, (May 6, 2009) ("Fiscal Bureau Letter") (explaining that Domestic Partnership Act provides those who register as domestic partners only certain rights regarding health care, real property, and estate law, such as hospital visitation rights, health care decision-making, standing to sue for wrongful death, family leave eligibility, and the ability to hold property as joint tenants) (App. 273-280).

(1) the mutual obligation of support that spouses have in a marriage (*e.g.*, Wis. Stat. §§ 765.001(2) and 766.55(2)(a));

(2) the comprehensive marital property system applicable to spouses. (*see generally* Wis. Stat. ch. 766); or

(3) the availability of divorce law for terminating a marriage (*see generally* Wis. Stat. ch. 767).

Likewise "[t]he above legal aspects of marriage are comprehensive, core aspects of the legal status of marriage that are not generally included as part of the legal status conferred by a domestic partnership." (App. 275)

The Legislature's enactment of the Domestic Partnership Law evidences no impediment to providing unmarried couples benefits that were less comprehensive than those provided to those who legally marry. As "the first law passed following adoption [of the Amendment]" *Thompson,* 199 Wis. 2d at 680, the Domestic Partnership Law puts beyond doubt that only marriages of same-sex couples entered in other states, and perhaps an as yet undefined status "essentially alike" marriage by another name, can be considered legal statuses that the Amendment forbids as identical or substantially similar to marriage.

II. THE AMENDMENT WOULD VIOLATE THE SEPARATE-AMENDMENT RULE IF THE PROHIBITION AGAINST A "LEGAL STATUS SUBSTANTIALLY SIMILAR TO THAT OF MARRIAGE" WERE INTERPRETED TO APPLY TO MORE THAN A LEGAL STATUS PROVIDING *ALL* OF THE RIGHTS AND RESPONSIBILITIES OF MARRIAGE BY ANOTHER NAME.

"In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *State v. Timme*, 54 Wis. 318, 336 11 N.W. 785, 791 (Wis. 1882).[9] As the foregoing sections demonstrate, the language, purpose, and history of the Amendment all confirm it was intended to prohibit only recognition of marriages lawfully entered by same-sex couples in other states and relationships conferring all the rights and responsibilities of marriage under another name. This is a different subject than denying same-sex couples a lesser status under which they may receive more limited rights or benefits. Furthermore, the Amendment's purpose of not allowing marriage by same-sex couples – whatever name is conferred on that status – is not

[9] The two-subject test is discussed in McConkey's brief and not repeated here.

dependent upon or connected with denying same-sex couples more limited rights. Were the Amendment construed to have such a broad reach that it would prohibit more limited rights, like those just enacted in the Domestic Partnership Law, it would violate Wisconsin's separate-amendment rule. As demonstrated above, marriage (and marriage by a different name) are viewed as a vastly different subject than domestic partnership benefits by the Amendment's drafters and proponents, Wisconsin's legislature, and other states, including California, Massachusetts, New Jersey and Vermont.

Perhaps as important, these different statuses were seen as quite distinct by Wisconsin's voters when the Amendment was enacted. A 2006 statewide poll showed that Wisconsin's electorate understood that marriage was unique and fundamentally different than other types of relationship recognition. (App. 281-83.) The poll revealed that 59% of then-likely voters at least leaned "yes" on the Amendment, while 38% were at least leaning "no." (*Id.*)[10] In the same

[10] The Amendment ultimately was approved by 59% of the electorate. (Id.)

poll, however, 44% of likely-voters at least leaned "no" when presented with *only* the second sentence of the Amendment, while only 40% at least leaned "yes." (*Id.*).

The Attorney General correctly notes in his cross-appeal that "The separate amendment rule … prevents an unpopular measure from passing by being hitched to a popular one." Br. of Cross-Appellant at 6. That is precisely what the Amendment would have done if it actually barred not only marriage, but also less protective legal statuses. The Amendment therefore should not be construed so broadly that it would violate Wisconsin's separate amendment rule.

Dated this 27th day of August, 2009

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CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(7) for an amicus brief and appendix produced using the following font:

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Dated this 27th day of August, 2009

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings of opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Dated this 27th day of August, 2009

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