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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 OF COMMUNITY LEADERS DEDICATED TO CHILDREN RAISED BY MARRIED MOTHERS AND FATHERS IN SUPPORT OF DEFENDANT-RESPONDENT-CROSS APPELLANT

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

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INTRODUCTION

In a recent filing, *amici* Lambda Legal Defense and Education Fund, Fair Wisconsin and ACLU of Wisconsin argue that the Marriage Amendment should be interpreted to permit creation of comprehensive, state-sanctioned domestic partnership schemes in a way that is virtually identical to marriage. While one might expect such a premature exegesis to be offered as a way to resolve the present single amendment challenge (although it is wholly unnecessary for that), that is not why Lambda *amici* offer it. No, they say, it is not clear that *any* interpretation could save the Amendment (Lambda Br., 1) (emphasis original), disclosing that their filing is really a pre-emptive effort to influence the Court in *Appling v. Doyle*, Case No. 2009AP001860-OA, where petitioners allege that the domestic partner registry created under recently enacted Chapter 770, Stats. violates the Amendment.

Amici Community Leaders all worked to enact Article XIII, Section 13 and spent many hours contemplating and explaining its purpose and rationale to the press and the public. This brief is submitted to assist the Court in properly construing the Amendment's purpose, and especially to dispel any suggestion that the egregiously incorrect interpretation urged by

Lambda *amici* is somehow necessary to save the Amendment or to guide this Court's analysis in *Appling*.

I. INTERPRETING THE AMENDMENT IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND PURPOSE DOES NOT VIOLATE ARTICLE XII, SECTION 1.

While Lambda *amici* do not suggest a standard for applying Article XII, Section 1, they, like McConkey, seem to regard the search for a single subject or purpose as a theological or philosophical endeavor. The amendment's plain language, official and unofficial descriptions, contemporaneous debate concerning its meaning, and the understanding expressed by both supporters and opponents all suggest a single clear purpose – preserving the traditional understanding and status of marriage, which reflect the unique nature of heterosexual relationships and, in particular, the inherent need of children to grow up with a married father and mother.

Extending the legal status of "marriage" to other relationships which may share some of the attributes of marriage will inevitably change its status and meaning. Even if we don't use the term "marriage," change will still occur if whatever status we create is substantially similar to marriage such that it can be seen as a form of, or alternative to, marriage.

As the circuit court observed, the Amendment's two sentences are opposite sides of one coin, the first providing what *shall* be "valid or recognized" as marriage, the second providing what shall *not* be "valid or recognized" as marriage. One sentence is *positive*, what marriage *is*, the other negative, what marriage *isn't*. In other words, the amendment's single purpose is as simple as the old ad line: "Buy genuine GM parts. Accept no substitutes."

But McConkey and Lambda *amici*, by different turns (looking only at the caption of the enrolling resolution, use of opinion polls, resort to foreign judicial opinions, etc.), seek to problematize the uncomplicated.[1] They dismiss the Amendment's obvious purpose in pursuit of some Platonic Form of Purpose only dimly discernable in the mortal world.

However, this Court's treatment of Article XII, Section 1 has never been a metaphysical quest, but rather a pragmatic inquiry with appropriate deference to the legislature and the people: "[I]t is permissible to treat as one amendment a submission which covers several propositions all tending to effect and carry out one general object or purpose, and all connected with

[1] Remarkably, McConkey argues that the Amendment's purpose should be determined based *only* the caption of the legislature's joint resolution. *In other words, he proposes that this Court analyze the Amendment by ignoring it!*

one subject." *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). An amendment does not contain more than one subject as long as its separate propositions do not "relate to more than one subject" and do not have "at least two distinct and separate purposes not dependent upon or connected with each other...." *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336, 11 N.W. 785, 791 (1882). A single amendment does not require that there be only a single proposition. It is "within the discretion of the legislature to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose." *Milwaukee Alliance Against Racist and Political Oppression v. Elections Board*, 106 Wis.2d 593, 605, 317 N.W.2d 420 (1982).

As the Attorney General demonstrates, the question is not whether some hypothetical voter could differ on separate parts of the Amendment, nor even whether actual voters believed that one sentence served its purpose but not the other. In *Milwaukee Alliance*, voters could and did undoubtedly differ as to whether all aspects of the amendment establishing a conditional release system were necessary or desirable. The Court observed, "The recourse of members of the electorate who did not agree with the purpose of conditional release in any of its integral parts was simply to vote 'no' to

the question, and thereby retain the original provisions of the constitution." 106 Wis.2d at 607-08.

Only when an amendment has had provisions having "nothing to do with" the subject of its remaining provisions that a violation of Article XII, Section 1 has ever been found. Were it otherwise, much of our constitution, which has been amended 141 times, would be invalid.

II. THE AMENDMENT HAS A READILY DISCERNIBLE SINGLE PURPOSE.

In the view of the Community Leaders (and the circuit court), both sentences serves the single purpose consistently argued by Amendment proponents, *i.e.*, preservation of the traditional, unique status of conjugal marriage as the people of the State of Wisconsin have commonly understood it.[2] Recognizing that purpose makes clear that the two sentences are parts of the same whole and the same subject.

Put simply, the second sentence preserves (and prevents dilution of) the public meaning and unique legal status of marriage between one man and one woman established in the first by prohibiting official sanction and endorsement of any legal status "identical or substantially similar" to it.

[2] See "Commonly Asked Questions," Wisconsin Coalition for Traditional Marriage, available online at http://www.savemarriagewi.org/faq.html (last visited Oct. 16, 2009).

The danger from such sanction and endorsement is not the extension to non-married couples of any particular assembly of "benefits," but rather the evolution of alternative "substantially similar" statuses that would, if recognized for non-marital relationships, undermine the legal, social and cultural norms of marriage that have developed from factors unique to heterosexual relationships and the inherent needs of children for a married father and mother. The Amendment, to use a term coined by legal scholars (of an admittedly different ideological bent[3]), sought to avoid the "expressive harm" to traditional marriage resulting from recognition of alternative forms or equivalents as comparable.

The Amendment's purpose, of course, goes deeper than the mere name "marriage," and is not served simply by ensuring that legal statuses accorded non-marital relationships are provided fewer "rights, benefits and obligations" than marriage. (Lambda Br., 9.) The Amendment's purpose was not to penalize non-marital relationships, but to preserve a unique institution existing time out of mind, the "foundation of the family and society," whose "stability is basic to morality and civilization, and of vital interest to society and the state." Sec. 765.01, Stats.

[3] Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories Of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000).

Contrary to Lambda *amici*'s contention, when proponents said the Amendment permits conferring "benefits" on same-sex couples, they meant it.[4] But they also meant it when they said conferring benefits cannot be done by creating a legal status substantially similar to marriage.

That applying the Amendment is not simply a matter of "toting up benefits" like inventory in a warehouse becomes evident from a brief consideration of the path to harm posited by its proponents. In fact, a domestic partner registry may present harm precisely as much from incidents of marriage it does *not* confer as from those it *does*.

The petitioners in *Appling*, for example, argue that the Ch. 770 registry is substantially similar to marriage because the definition and procedural requisites it provides for creating domestic partnerships precisely track those for creating marriage, save the requirement that partners be of the same sex. The registry's age and consanguinity restrictions (as well as the context in which it was enacted) make clear that the new legislature intended to create a form of "marriage" for same-sex relationships.

[4] During the ratification debate, Lambda *amici* claimed that the Amendment might affect conferral of employment benefits by private employers to employees and partners. "Legal Effects of the Wisconsin Constitutional Amendment Banning Same-sex Marriage," Fair Wisconsin Education Fund, available online at http://www.fairwisconsin. com/ downloads/effects%20of%20amendm.pdf (last visited March 1, 2009). Amendment sponsors and proponents never made such a claim.

But the legal incidents reserved for registered domestic partners tend to be benefits rather than the mutual obligations and "stickiness" (e.g., duties of spousal support, community property, need for divorce and presumptions of parentage) associated with conjugal marriage. (Lambda Br., 12-13.) Thus, it is not hard to imagine that heterosexual couples might lobby or litigate for equal access to the registry as a form of "marriage lite" or, if you prefer, "freedom marriage,"[5] illustrating why Amendment proponents believed that the social approbation accompanying legal recognition of "alternative" forms of marriage would cause further devolution of marriage.

Devolution of marriage is the real issue. As Judge Posner noted, "*Lambda wants to knock marriage off its perch....*" *Irizarry v. Board of Educ. of City of Chicago*, 251 F.3d 604, 609 (7th Cir., 2001). (Emphasis added.)[6]

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[5] Proponents' concern was that the extension of marriage or a substantially similar legal status to same-sex "marriages" would encourage a view of marriage as primarily intended to validate and facilitate the interests of the adult participants. Whatever the value in doing so, the unique nature of heterosexual relationships, the inherent needs of children for married mother and father, and the norms of conjugal marriage all raise, and require the accommodation of, interests other than the reciprocal needs of two adults. *See, e.g.*, Original Action Petition in *Appling v. Doyle*, ¶¶ 21-36.

[6] Much of the scholarly work supporting creation of same-sex marriage or civil unions advocates a 'deprivileging' of marriage. *See, e.g.*, Ladelle McWhorter, *Bodies and Pleasures: Foucalt and the Politics of Sexual Normalization* 125 (1999) ("[H]eterosexuals are right, for example, that if same sex couples get legally married, the institution of marriage will change, and since marriage is one of the institutions that support heterosexuality and heterosexuality identities, heterosexuality and heterosexuals

III. THE FIRST SENTENCE BARS RECOGNITION OF OUT-OF-STATE SAME-SEX "MARRIAGES." THE SECOND SENTENCE BARS RECOGNITION OF IDENTICAL OR SUBSTANTIALLY SIMILAR LEGAL STATUSES.

Lambda *amici* assert the Amendment's second sentence will serve a different purpose than the first unless construed to prohibit only recognition of out-of-state "marriages" or statuses virtually identical to marriage. (Lambda Br., 8-9.)

But once the Amendment's purpose is understood, Lambda *amici*'s strained interpretation is unnecessary. The second sentence's proscription against recognizing statuses identical to marriage is not required to preclude recognition of a same-sex "marriage" entered into in Iowa or Massachusetts. Such a union would not be a status "*identical*" to marriage, it would be, in the eyes of the law, *actual* marriage. Because the plain language of the first sentence precludes such a "marriage" from being

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will change as well."); E.J. Graff, *Retying the Knot* in *Same-Sex Marriage: Pro and Con: A Reader* 134, 135-36 (Andrew Sullivan, ed.) (1997) ("Allowing two people of the same sex to marry shifts that institution's message …."); Judith Stacy, *Gay and Lesbian Families; Queer Like Us* in *All Our Families: New Policies for a New Century* 117, 128-29 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, eds.) (1998) ("Or, more radical still, perhaps some might dare to question the dyadic limitation of Western marriage and seek some of the benefits of extended family life through small group marriages arranged to share resources, nurturance and labor."). See also "Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships," Statement by lesbian, gay, bisexual, and transgender (LGBT) and allied activists, scholars, educators, writers, artists, lawyers, journalists, and community organizers, July 26, 2006, available online at http://www.beyondmarriage.org/full_statement.html.

legally recognized here, the second sentence would be unnecessary if that were the Amendment's only purpose.[7]

Lambda *amici* argue that a relationship that is not called "marriage" cannot be "identical" to marriage, even if it has virtually all the same legal incidents, because the courts of three other states have said it cannot. (Lambda Br., 4-6.) But borrowing the reasoning of foreign courts to interpret Wisconsin's Amendment is to commit a fundamental category error, like attempting to apply German grammar to an English sentence.

Those courts discovered a constitutional *command* to create the kinds of legal statuses that are the precise objects of the Amendment's express constitutional *prohibition*. They did so because they were persuaded that same-sex relationships are, for purposes of marriage, equivalent to heterosexual ones and that the "harm" that requires referring to them as "marriage" is the social distinction implicit in differing terminology. (*Id*. at 5.) Still other courts have rejected such reasoning.

In the end, however, it is not opinions regarding *other* states' constitutions that control here, but rather the Amendment's explicit

[7] This is the commonly held view of the first clause's meaning. Don Dyke, Wisconsin Legislative Council, Memorandum to Rep. Gundrum, Jan. 29, 2004, available online at http://www.news.wisc.edu/domesticPartnerBenefits/images/LegCouncil_0104.pdf.

prohibitions made part of *this* state's constitution by the overwhelming endorsement of its voters. In considering the Amendment's purpose, it would would be improper for this Court to adopt, as Lambda *amici* urge, the contested ideological proposition from foreign courts that civil unions do not affect marriage.

The question is not whether one agrees that protecting marriage requires that it be limited to one man and one woman or that no identical or substantially similar relationship be recognized. Rather, the question is whether this Court will accept the invitation of McConkey and Lambda *amici* to substitute its own judgment for that of Wisconsin's people and legislature, who concluded that the Amendment has a single subject and purpose served by both sentences.

IV. LAMBDA *AMICI* MISINTERPRET THE TERM "SUBSTANTIALLY SIMILAR."

Arguing that the second sentence of the Amendment is necessary (at least in part) to accomplish what is clearly achieved by the first, Lambda *amici* violate the presumption against constructions that create surplusage or redundancy.[8] They repeat the error by attempting to elide "substantially similar" into "exactly the same," claiming that the prohibition against

[8] *See, e.g., Jackson v. Benson***,** 218 Wis.2d 835, 882, 578 N.W.2d 602, 623 (1998).

recognition of substantially similar legal statuses applies only to relationships that have "*all* of the statutory and other rights and responsibilities of marriage." (Lambda Br. , 9.) (Emphasis added.)

Their construction suffers from the considerable burden of being inconsistent with what the Amendment actually says. In common parlance, "substantially similar" is not "exactly the same or essentially alike." Even were this not clear from the term itself, it would nonetheless be clear from the Amendment's juxtaposition of the term in disjunction with "identical." Lambda *amici* themselves acknowledge that it is the term "identical" which means "exactly the same or essentially alike," Lambda Br., 3-4, not the term "substantially similar."

By traditional rules of construction, when "substantially similar" is used in addition to "identical," it comprises a second distinct term qualifying what statuses can and cannot be recognized. Different and distinct terms cannot mean the same thing. *See Blazekovic v. City of Milwaukee*, 2000 WI 41, ¶ 30, 234 Wis.2d 587, 610 N.W.2d 467.

Lambda *amici* also rely on what appears to be an internal public opinion poll to suggest that the public either "opposed" the second sentence or regarded it as a separate amendment. Besides offending *Milwaukee*

Alliance's clear teaching that voters' disapproval of individual provisions does not create separate subjects, reliance on the poll is problematic for other reasons.

Although this Court has made limited use of such polls in the past, there is something fundamentally anti-democratic and inconsistent with the right to vote when such use alters the plain meaning of what voters actually adopted. Further, the poll question highlighted by *amici*, whether "[a] legal status identical or substantially similar to that of marriage shall not be valid or recognized in this state," is meaningless. Read literally, it asked respondents whether marriage should be banned in Wisconsin.

Finally, voters knew the Amendment would affect statuses other than those which were either *called* marriage or were *exactly the same as* marriage. The Attorney General told them precisely that in her August 2006 statement outlining the effect of a "Yes" vote: "Whether any particular type of domestic relationship, partnership or agreement between unmarried persons would be prohibited ... would be left to further legislative or judicial determination." Peggy A. Lautenschlager, "Attorney General's Explanatory Statement," in Michael J. Keane, "Constitutional Amendment

and Advisory Referendum to be considered by Wisconsin voters, November 7, 2006," LRB-06-WB-12, Brief 06-12, 2 (Sept. 2006).

Finding that the Amendment promotes a "single purpose" does not require that its supporters uniformly view its component propositions. Voters were informed of, and asked to vote upon, a claim that the protection of marriage was served by its limitation to one man and one woman and by prohibiting recognition of identical or substantially similar legal statuses. Those who disagreed with the second sentence, who disagreed with the proposed objective "in any of its integral parts," could vote "no."

CONCLUSION

Amici are right to say that resolution of the Ch. 770 challenge in *Appling* is "premature." (Lambda Br., 7) To resolve the question presented in *this* case, however, the Court needs only to hold that the Amendment's two sentences relate to a single purpose, that they are connected with one another. It needs only to hold that the Amendment's instruction to accept only "genuine marriage" is also served by its admonition to "accept no substitutes."

Respectfully submitted this 22nd day of October, 2009.

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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 font and 1.5 inch margins on all four sides. The length of this brief is 2,993 words.

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CERTIFICATION OF COMPLIANCE WITH

RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Stats.

I further certify that the electronic copy of the brief submitted is identical in content and format to the printed form of the brief filed with the court.

A copy of this certificate is being served upon all counsel for opposing parties and *amici* appearing in the case, by United States mail, first class postage pre-paid.

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