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**STATE OF WISCONSIN
SUPREME COURT**

**Case No. 11 AP 1572
Dane County Case No. 10 CV 4434**

**JULAIN 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.**

**ON APPEAL FROM AN ORDER FOR SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS, DATED JUNE 20, 2011, ENTERED
IN THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE DANIEL MOESER, PRESIDING**

**COURT OF APPEALS OPINION ISSUED DECEMBER 20, 2012
PETITION FOR REVIEW GRANTED JUNE 12, 2013**

AMICUS BRIEF OF DANE COUNTY

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TABLE OF CONTENTS

<u>Description</u>	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
ARGUMENT.....	1
I. CHAPTER 770 OF THE WISCONSIN STATUTES DOES NOT VIOLATE THE MARRIAGE AMENDMENT	1
A. Chapter 770, Wis. Stat., Has Not Been Proved Unconstitutional Beyond A Reasonable Doubt.....	1
B. By Its Plain Meaning, The Marriage Amendment Permits The Creation Of A Protective Status That Is Not Substantially Equivalent To Marriage And Thus Does Not Proscribe Domestic Partnerships Pursuant To Chapter 770 Of The Wisconsin Statutes.....	1
1. The legal status of domestic partnerships under Chapter 770 of the Wisconsin Statutes is designed to provide a less protective legal status than the status of marriage.....	2

2.	The fundamental benefits of marriage cannot be achieved through domestic partnership	5
II.	BY ENACTING A SYSTEM OF REGISTERED DOMESTIC PARTNERSHIPS UNDER CHAPTER 770 OF THE WISCONSIN STATUTES, WISCONSIN APPROPRIATELY ACTS WITHIN THE SCOPE OF ITS TRADITIONAL POLICE POWERS TO PROVIDE FOR THE GENERAL WELFARE OF ITS CITIZENS WITHOUT OFFENDING THE MARRIAGE AMENDMENT.....	11
A.	Chapter 770, Wis. Stat., Promotes The General Welfare Of Registered Domestic Partners And Their Families	12
B.	By Enabling Registered Domestic Partners To Care For Each Other, Chapter 770, Wis. Stat., Promotes The General Welfare Of Citizen Taxpayers	13
	CONCLUSION.....	14
	CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(8)(b) and (c)	15
	CERTIFICATION REGARDING COMPLIANCE WITH RULE § 809.19(12).....	16

TABLE OF AUTHORITIES

CASES

<i>Conant v. Physicians Plus Medical Group, Inc.</i> , 229 Wis. 2d 271, 600 N.W.2d 21 (Ct. App. 1999).....	8, 9
<i>In the Interest of Angel Lace M.</i> , 184 Wis. 2d 492, 516 N.W.2d 678 (1994).....	8
<i>In the Matter of the Guardianship of James D.K.</i> , 2006 WI 68, 291 Wis. 2d 333, 718 N.W.2d 38.....	10
<i>In the Matter of the Guardianship of O.G. M.-K.</i> , 2010 WI App. 90, 327 Wis. 2d 749, 787 N.W.2d 848.	9
<i>Norquist v. Zeuske</i> , 211 Wis. 2d 241, 564 N.W.2d 748 (1997).....	1
<i>Perry et al. v. Schwarzenegger et al.</i> , 704 F. Supp. 2d 442 (2010).....	3
<i>Town of Beloit v. County of Rock</i> , 2003 WI 8, 259 Wis. 2d 37, 657 N.W.2d 344.....	12
<i>United States v. Windsor, et al.</i> , 133 S. Ct. 2675 (2013)	2

STATUTES

Wis. Stat. § 40.51 (2011-2012).....	12
Wis. Stat. § 40.52 (2011-2012).....	12
Wis. Stat. § 40.55 (2011-2012).....	12

Wis. Stat. § 46.031 (2011-2012).....	13
Wis. Stat. § 46.22 (2011-2012).....	13
Wis. Stat. § 46.23 (2011-2012).....	13
Wis. Stat. § 46.238 (2011-2012).....	13
Wis. Stat. § 46.281 (2011-2012).....	13
Wis. Stat. § 46.90 (2011-2012).....	13
Wis. Stat. § 48.06 (2011-2012).....	13
Wis. Stat. § 48.81 (2011-2012).....	8
Wis. Stat. § 48.82 (2011-2012).....	8
Wis. Stat. § 49.141 (2011-2012).....	11
Wis. Stat. § 49.145 (2011-2012).....	11
Wis. Stat. § 49.325 (2011-2012).....	13
Wis. Stat. § 49.453 (2011-2012).....	11
Wis. Stat. § 49.455 (2011-2012).....	11
Wis. Stat. § 50.06 (2011-2012).....	12
Wis. Stat. § 50.90 (2011-2012).....	12
Wis. Stat. § 55.043 (2011-2012).....	13
Wis. Stat. § 55.045 (2011-2012).....	13
Wis. Stat. § 71.07 (2011-2012).....	7

Wis. Stat. § 103.10 (2011-2012).....	12
Wis. Stat. § 109.03 (2011-2012).....	13
Wis. Stat. § 765.01 (2011-2012).....	4
Wis. Stat. Chapter 766 (2011-2012)	6
Wis. Stat. Chapter 770 (2011-2012)	1-3, 11-14
Wis. Stat. § 770.001 (2011-2012).....	3
Wis. Stat. § 770.07 (2011-2012).....	4
Wis. Stat. § 854.20 (2011-2012).....	10
Wis. Stat. § 854.21 (2011-2012).....	10
Wis. Stat. § 891.39 (2011-2012).....	8
Wis. Stat. § 891.41 (2011-2012).....	8

OTHER AUTHORITIES

Wisconsin Constitution, Art. XIII, Sec. 13	2
Dane County Code of Ordinances, Chapter 60	3

ARGUMENT

I. CHAPTER 770 OF THE WISCONSIN STATUTES DOES NOT VIOLATE THE MARRIAGE AMENDMENT.

A. Chapter 770, Wis. Stat., Has Not Been Proved Unconstitutional Beyond A Reasonable Doubt.

All legislative acts are presumed constitutional and every presumption must be indulged to uphold the law if at all possible. To overcome the strong presumption of constitutionality, the contesting party must prove that the act is unconstitutional beyond a reasonable doubt. *Norquist v. Zeuske*, 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). Plaintiffs-Appellants-Petitioners were unable to meet this burden.

B. By Its Plain Meaning, The Marriage Amendment Permits The Creation Of A Protective Status That Is Not Substantially Equivalent To Marriage And Thus Does Not Proscribe Domestic Partnerships Pursuant To Chapter 770 Of The Wisconsin Statutes.

Much of this case revolves around the meaning of a few words within the marriage amendment, which reads as follows:

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.

Article XIII, Sec. 13, Wis. Const. The issue is whether the legal status of domestic partnership under Chapter 770, Wis. Stat., is identical or substantially similar to that of marriage. It is not. The legal status of domestic partnership is designed to provide a protective status for homosexual couples, but its legal status is substantially inferior to that of marriage.

1. The legal status of domestic partnerships under Chapter 770 of the Wisconsin Statutes is designed to provide a less protective legal status than the status of marriage.

The national trend is to legally recognize the status of marriage for homosexual couples because of the resulting inequality in failing to do so. See *United States v. Windsor, et al.*, 133 S. Ct. 2675 (2013). In California, even when the status of domestic partnership was intended to provide a substantially equivalent status to marriage, the U.S. District

Court determined that the different statuses were not substantially equal, violating the equal protection clause of the U.S. Constitution. The court wrote, “A domestic partnership is not a marriage; while domestic partnerships offer same-sex couples almost all of the rights and responsibilities associated with marriage, the evidence shows that the withholding of the designation “marriage” significantly disadvantages plaintiffs.” *Perry et al. v. Schwarzenegger et al.*, 704 F. Supp. 2d 921, 994 (2010).

Contrast this with Wisconsin’s law where the legislature did not intend to provide a legal status of domestic partnership identical or substantially similar to marriage. Sec. 770.001, Wis. Stat. The legal status of domestic partnership under Chapter 770 of the Wisconsin Statutes, falls short of providing a substantially similar legal status to that of marriage in the same way that Chapter 60 of the Dane County Code of Ordinances, creating the legal status of domestic partnership for heterosexual couples, falls short of providing a status similar to that of marriage. Domestic partnership is not

marriage and it is an inadequate alternative for someone seeking to marry.

“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.” Section 765.01, Wis. Stat. Marriage provides a legal relationship between two persons who owe to each other mutual responsibility and support and who owe to minor children of the union an equal duty of support. Marriage is the foundation of the family and society, and its stability is considered basic to morality and civilization. The termination of a marriage is considered to result in injury to the public. Section 765.001(2), Wis. Stat. Registered domestic partnerships are not similarly recognized or valued; nor does the state consider the stability of such relationships important to the public interest. A “domestic partnership” is simply a declaration that is filed with the register of deeds in the couple’s county of residence. Section 770.07, Wis. Stat.

Plaintiffs-Appellants-Petitioners conclude that the legal status of domestic partnership is substantially equivalent to the legal status of marriage after comparing the commonalities of the two statuses while ignoring the differences. When one contrasts the two legal statuses one must conclude that the legal status of domestic partnership in Wisconsin is substantially inferior to the legal status of marriage.

2. The fundamental benefits of marriage cannot be achieved through domestic partnership.

People likely marry for many reasons, but fundamental to the choice of entering into this profound relationship is to profess a life-long legally enforceable mutual commitment to support and care for each other, to raise children together in a socially recognized and supported family unit and to provide for the well-being of offspring of the family. Not every couple may want to undertake this level of commitment, but for the couple who does, domestic partnership is an unsatisfactory alternative.

- *Wisconsin law is indifferent to the stability of domestic partnerships.*

Wisconsin law does not encourage the stability of a registered domestic partnership as it does for a marriage. Couples wishing to end a marriage must obtain court permission by filing for divorce. Protections for married spouses provided in divorce actions include court ordered spousal and child support. Government child support agencies are maintained in every county to ensure that children are financially supported by both their parents. By contrast, a domestic partnership and all of its benefits may terminate unilaterally, by one of the domestic partners filing a notice of termination or by a domestic partner's marriage to another person. A dependent domestic partner whose relationship has been so terminated is without remedy and cannot expect to receive even temporary support from the other partner. Marital property protections under Chapter 766, Wis. Stat., do not apply. Property acquired during the registered domestic relationship to one partner stays with that partner who has title upon termination of the domestic partnership. There is

no interest of the other partner, unless secured by title, in the homestead, in pension or in retirement funds. The domestic partnership registry provides substantially insufficient protections to ex-domestic partners compared to the protections provided to ex-spouses after termination of their marriage.

- *Registered domestic partners receive inferior tax treatment to marital partners.*

The commitment of domestic partners to each other entitles them to no special treatment for Wisconsin tax purposes. Registered domestic partners may not file income taxes jointly as married people can, nor share deductions available to only one of the partners. Registered domestic partners may not obtain the married person's tax credit under section 71.07(6), Wis. Stat. For tax purposes, the status of domestic partnership provides no benefits at all similar to the status of marriage.

- *The children of parents in domestic partnerships have less family security than children of married parents.*

Registered domestic partnership, unlike marriage, is not considered the foundation of the family. Children born to a marriage are presumed to be the children of both spouses, regardless of actual biological parentage. Secs. 891.39 and 891.41, Wis. Stat. Wisconsin statutes do not similarly recognize domestic partners as parents to the children of the partnership. A domestic partner is recognized only as being a single parent of his or her own offspring. Under no circumstances may a domestic partner adopt the child of his or her domestic partner in order to legally become that child's other parent. Secs. 48.81(4) and 48.82(1), Wis. Stat.; *In Interest of Angel Lace M.*, 184 Wis. 2d 492, 507-508, 516 N.W.2d 678 (1994). The partner who is not recognized as parent of a child of the partnership can only establish guardianship to simulate a parent-like status raising the child. While guardianship imposes significant duties on the legal guardian of a child, those duties are not recognized as equal to the legal protections of a parent. *Conant v. Physicians Plus Medical Group, Inc.*, 229 Wis. 2d 271, 279, 600 N.W.2d 21

(Ct. App. 1999). For example, a child's guardian cannot maintain a separate loss of companionship claim in a tort action involving death or injury to the child as can a parent. While Wisconsin courts recognize the importance of the emotional value of intimate family relationships, derivative tort claims for loss of companionship are limited to those in the 'nuclear family' of which domestic partners parenting their partner's minor children are excluded. *Id.* at 276-282.

Children of registered domestic partnership relationships have less financial and emotional security than children of marriages. The 'non-parent' domestic partner's ability to establish guardianship depends entirely on the consent of the recognized parent domestic partner. *See In the Matter of the Guardianship of O.G. M-K.*, 2010 WI App. 90, 327 Wis. 2d 749, 787 N.W.2d 848. A parent cannot terminate the child's relationship with the other parent, but a parent can terminate the child's relationship with the child's guardian unless the court has determined the parent to be unfit or there exists extraordinary circumstances affecting the

health or safety of the child. *In the Matter of the Guardianship of James D.K.*, 2006 WI 68, ¶ 3, 291 Wis. 2d 333, 718 N.W.2d 38. The non-recognized parent of a domestic partnership risks the ability to maintain long term relationships with children of the relationship. Children of a terminated relationship may only look to his or her legally recognized parent for financial support. Finally, under Wisconsin's intestacy laws, children may not inherit from the domestic partner who is not legally recognized as the child's parent. See secs. 854.20 and 854.21, Wis. Stat. Wisconsin law does not provide the families of registered domestic partners the same financial security afforded families of married spouses with regard to raising children of the relationship.

- *Families of registered domestic partnerships are disadvantaged in the ability to participate in assistance programs that otherwise help to stabilize families financially.*

Because registered domestic partners' families are not given the same recognition as marital partners' families,

domestic partners are disadvantaged when participating in assistance programs designed to stabilize families during times of economic hardship. A domestic partner who is not the recognized biological or adopted parent of a child cannot participate in Wisconsin Works programs. Secs. 49.141(1)(j) and (s), and 49.145(2), Wis. Stat. The asset protections a “community spouse” may receive with regard to Medical Assistance eligibility of the “institutional spouse” does not apply to registered domestic partnership under sections 49.453 and 49.455, Wis. Stat. Assistance programs do not provide the same level of assistance to families of domestic partners that are provided to the families of married couples.

II. BY ENACTING A SYSTEM OF REGISTERED DOMESTIC PARTNERSHIPS UNDER CHAPTER 770 OF THE WISCONSIN STATUTES, WISCONSIN APPROPRIATELY ACTS WITHIN THE SCOPE OF ITS TRADITIONAL POLICE POWERS TO PROVIDE FOR THE GENERAL WELFARE OF ITS CITIZENS WITHOUT OFFENDING THE MARRIAGE AMENDMENT.

The Legislature has plenary police power, the object of which is securing the general welfare, comfort and

convenience of the people. The state's police powers are inherent and only limited by the constitution. *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 23, 259 Wis. 2d 37, 657 N.W.2d 344.

A. Chapter 770, Wis. Stat., Promotes The General Welfare Of Registered Domestic Partners And Their Families.

Chapter 770 of the Wisconsin Statutes promotes the general welfare of registered domestic partners and their families by permitting domestic partners to pool their family resources and providing limited benefits to enable partners and their families needed care. Section 103.10 of the Wisconsin Statutes permits registered domestic partners to obtain family or medical leave from employment to take care of a sick partner, but not to take care of the partner's sick child that may be living in the same household unless the partner is also the child's legal guardian. Sections 40.51, 40.52 and 40.55 of the statutes permit state employees to provide health coverage to domestic partners. Sections 50.06 and 50.90, Wis. Stat., permit registered domestic partners to

admit their incapacitated partner to care facilities and hospice for needed care. Section 109.03(3), Wis. Stat., permits remaining unpaid wages to be paid to the surviving registered domestic partner to prevent remaining family members from becoming impoverished following death of a domestic partner. The state's recognition of registered domestic partners enables them to better care for their families in times of economic uncertainty, disability and death.

B. By Enabling Registered Domestic Partners To Care For Each Other, Chapter 770, Wis. Stat., Promotes The General Welfare Of Citizen Taxpayers.

Under Wisconsin's human and social service systems, the bulk of services to assist families and individuals in need are delivered by counties. See secs. 46.031, 46.22, 46.23, 46.238, 46.281, 46.90, 48.06, 49.325, 55.043, 55.045, *etc.* By making it possible for domestic partners to care for each other and their children, there is less need for government assistance. While families of registered domestic partners do not have the security of the families of marital partners, tax paying citizens as a whole benefit when domestic

partnerships are able to privately care for themselves. The ability to provide such legally approved benefits is well within the state's police powers.

CONCLUSION

The plain meaning of the Marriage Amendment does not prohibit Wisconsin's domestic registry under Chapter 770 of the statutes because by design the domestic registry system is less protective, is less comprehensive and requires less commitment from the partners to maintain registered status than marriage. The legislature simply acted within its police power to provide a domestic registry for the benefit of homosexual couples, their families, and government units not needing to provide financial assistance as a result of the benefits extended to registered domestic partners.

Dated this ____ day of September, 2013.

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CERTIFICATION

I hereby certify that this response conforms to the rules contained in § 809.19, Wis. Stat., for a brief produced with a proportional serif font. The length of this brief is 2,251 words.

Dated this ____ day of September, 2013.

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CERTIFICATION REGARDING 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). I further certify that this electronic brief is identical to the text of the paper copy of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of September, 2013.

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