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STATE OF WISCONSIN
SUPREME COURT
Case No. 2011AP001572

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, ANNKENDZIERSKI, DAVID KOPITZKE, PAUL KLAWITER, CHAD WEGE AND ANDREW WEGE,

Intervening Defendants-Respondents.

PETITIONERS' REPLY BRIEF

Michael D. Dean
State Bar No. 01019171
First Freedoms Foundation, Inc.
17035 W. Wisconsin Avenue,
Suite 100
P.O. Box 2545
Brookfield, WI 53008
(262) 798-8044 (T)
(262) 798-8045 (F)

Richard Esenberg
Attorney at Law
13839 N. Lake Shore Drive
Mequon, WI 53097
(414) 288-6908 (T)

David Austin Robert Nimocks*
James A. Campbell*
Alliance Defending Freedom
801 G Street, NW, Suite 509
Washington, D.C. 20001
(202) 393-8690 (T)
(480) 444-0028 (F)

* Admitted *pro hac vice*

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I. The Plain Meaning of the Marriage Amendment Establishes That Chapter 770 is Unconstitutional.

The only way to avoid the inescapable conclusion that Chapter 770 violates the Marriage Amendment is through the twofold maneuver that Fair Wisconsin attempts. First, to generate distinctions between the legal status of marriage and that of domestic partnership, Fair Wisconsin proposes a broad definition of "legal status" that conflicts with case law from this state and other jurisdictions. *See* Pet'rs' Br. at 13-15, 22-27. Second, to enable minor distinctions between the legal status of marriage and that of domestic partnership to bring Chapter 770 into compliance with the Marriage Amendment, Fair Wisconsin employs an unjustified definition of "substantially similar" that effectively conflates that phrase with the word "identical." *See id.* at 15, 21. Because both of these arguments lack force, this Court should conclude that Chapter 770 is unconstitutional.

A. The Legal Status of Marriage is Not Determined by the Entrance or Exit Procedures Associated with It or the Incidents that Attach to It.

Marriage, like a domestic partnership, is a legally recognized domestic relationship between two persons, identified by their sex, who are competent to consent, over a specified age, not closely related, and not

married to someone else. *See* Wis. Stat. §§ 770.01, 770.05(1)-(5) (domestic partnership); Wis. Stat. §§ 765.01, 765.02(1), 765.03(1) (marriage). Fair Wisconsin disagrees, accusing Petitioners of "hand-pick[ing]" "out of whole cloth" these constituent elements of marriage. *See* Resp'ts' Br. at 17-18. Yet these elements are not figments of Petitioners' imagination; instead, they are dictated by and derived from the substantive provisions of Chapter 765 that define the legal status of marriage. *See* Wis. Stat. §§ 765.01, 765.02(1), 765.03(1). Truth be told, it is Fair Wisconsin (not Petitioners) that has departed from the objective statutory criteria defining the legal status of marriage and contrived out of whole cloth an expansive definition that considers relevant, among other things, the "legal procedures for entering," the "legal procedures for terminating," and the "specific legal rights, benefits, and responsibilities that attach" to marriage. *See* Resp'ts' Br. at 7-8.

The expansive definition of legal status concocted by Fair Wisconsin is misguided. Nothing about the Marriage Amendment suggests that the legal status of marriage is composed of ancillary procedural matters, such as the requirement that a married couple complete a marriage worksheet, or the opportunity for third parties to object to a couple's impending marriage.

See id. at 23. Indeed, this Court's precedent acknowledges that the legal status of marriage *does not even exist until a person enters into it*, and thus that status cannot be defined by its antecedent entrance procedures. *See Dillon v. Dillon*, 244 Wis. 122, 128, 11 N.W.2d 628, 631 (1943) ("[M]arriage . . . , *once entered into*, becomes a relation . . . and invests each party with a *status* towards the other, and society at large") (emphasis added). Nor, as Petitioners have already demonstrated at length, is the legal status of marriage determined by the incidents that flow from it. *See* Pet'rs' Br. at 22-27.[1]

The Ohio Supreme Court's decision in *State v. Carswell*, 871 N.E.2d 547, 554 (Ohio 2007), does not support Fair Wisconsin's attempt to define the "legal status" of marriage, as used in the Wisconsin Marriage Amendment, by its resulting incidents. The language of the Ohio Marriage Amendment, unlike the Marriage Amendment at issue here, prohibits a legal status approximating the "effect" of marriage, and thus requires an assessment of the incidents that attach as a result of marriage. *See* Ohio

[1] Fair Wisconsin attacks Petitioners' citation to *Varney v. Varney*, 52 Wis. 120, 8 N.W. 739, 741 (1881), but it is telling that Fair Wisconsin does not attempt to refute the other decisions from this Court that Petitioners rely upon. *See* Pet'rs' Br. at 14, 24-25 (discussing *Button*, *Forbes*, and *Duket*).

Const. art. XV, § 11. Because of this distinct constitutional language, *Carswell* is inapposite here.

B. The Legal Status of Domestic Partnership is Substantially Similar to the Legal Status of Marriage.

The legal status of domestic partnership mirrors the constituent elements of marriage as a legal status and thus is substantially similar to it. *See* Pet'rs' Br. at 13-21. The substantial similarity standard is violated where a new legal status exhibits a "fundamental resemblance" or is "closely comparable" to the status of marriage. *See id.* at 15. Fair Wisconsin counters this argument with an unjustified understanding of "substantially similar," relying on the 2006 opinion of then-Attorney General Peggy A. Lautenschlager, which concluded that "the phrase 'substantially similar' is used with a meaning approximating 'identical.'" (R. 65:16-17.)

That opinion should be given no weight because it adopts a strained interpretation that renders superfluous the term "identical" in the Marriage Amendment and thereby offends a well-established maxim of constitutional construction. *See* Pet'rs' Br. at 21; *De La Trinidad v. Capitol Indem. Corp.*, 2009 WI 8, ¶ 16, 315 Wis. 2d 324, 336, 759 N.W.2d 586, 592 ("An Attorney General's opinion is only entitled to such persuasive effect as the

court deems the opinion warrants") (quotation marks omitted). It is particularly inappropriate to give deference to this 2006 opinion considering that the current Governor and Attorney General have concluded the opposite with respect to the phrase "substantially similar" (*see* R. 105:1-2, 106:9-11), as have persuasive opinions construing identical constitutional language in other jurisdictions. *See* Ky. Op. Att'y Gen. No. 07-004, 2007 WL 1652597, at *3, *5 (June 1, 2007) (concluding that "a legal status with a general likeness to the basic elements of marriage would be substantially similar to the legal status of marriage," and that the "legal status" of marriage is determined by "the characteristics" of that status rather than "the benefits and obligations that the law confers upon the status holder").

Under a proper interpretation of the phrase "substantially similar," the almost identical age, consanguinity, two-person, sex-specification, exclusivity, and consent elements shared by marriage and domestic partnerships demonstrate that Chapter 770 is unconstitutional. *See* Pet'rs' Br. at 14-15. Even though the marriage laws include exceptions to the basic age and consanguinity rules, *see* Resp'ts' Br. at 17, these rarely invoked exceptions do not alter the fact that the general age and consanguinity elements remain the same for marriage and domestic

partnerships. That Fair Wisconsin relies upon these trivialities illustrates the dearth of differences between domestic partnerships and marriage.

The common residency prerequisite for domestic partnerships confirms that those unions, like marriages, are a legal status for a domestic relationship. *See* Pet'rs' Br. at 19-20. Fair Wisconsin disagrees, stressing that marriage does not require cohabitation as a condition for entrance. *See* Resp'ts' Br. at 19. But marriage needs no common residency prerequisite because, as community property principles illustrate, the law expects that spouses will cohabitate. *See* Wis. Stat. § 766.31(2). The common residency requirement merely cements by statute for domestic partners what the law presumes for married spouses. That a common residence is a pre-entry requirement for domestic partnerships and a post-entry presumption for marriages is of no consequence. In both instances, the law treats these statuses as recognizing relationships where the couples reside together.

The basic "legal nature" of domestic partnerships and marriage, notwithstanding Fair Wisconsin's arguments, *see* Resp'ts' Br. at 12-16, reinforces the substantial similarity between those statuses. While the formation of marriage and domestic partnerships involves contractual-like

steps,[2] both statuses (once created) are far more than contracts; they are legal statuses that are designed, defined, and regulated by the state, and that contemplate relationships of mutual support and obligations between the parties.

As this Court has noted, marriage "comes into existence in pursuance of a contract," but it is not "a mere contract"; "it is a status or legal condition established by law" involving "the highest interests of society and the state." *State v. Duket*, 90 Wis. 272, 63 N.W. 83, 84 (1895); *accord Dillon*, 244 Wis. at 128, 11 N.W.2d at 631 ("[Marriage] becomes a relation rather than a contract, and invests each party with a status towards the other, and society at large"); *see also Maynard v. Hill*, 125 U.S. 190, 212 (1888) ("When formed, [marriage] is no more a contract than fatherhood or sonship is a contract.") (quotation marks and citation omitted). Likewise, a domestic partnership is more than a contract; it is a legal status created, controlled, and regulated by the state. *See generally* Wis. Stat. §§ 770.001-770.18. Indeed, the state occupies a central role in

[2] Domestic partnerships require, for example, capacity to "consent[] to the domestic partnership," Wis. Stat. § 770.05(1), and a signature from "the parties intending to form the domestic partnership," Wis. Stat. § 770.07(1)(c).

both of these legal statuses, for neither domestic partners nor spouses may privately contract to vary the terms prescribed by law.

Both of these legal statuses, moreover, recognize domestic relationships of mutual dependence. Chapter 765 establishes an obligation of "mutual responsibility and support" between spouses. Wis. Stat. § 765.001(2). Similarly, Chapter 770 envisions joint support between domestic partners, for they must establish and maintain a "common residence." Wis. Stat. § 770.05(3). In addition, the various rights and benefits accorded domestic partners—rights pertaining to, among other things, joint property, *see* Wis. Stat. § 700.19, inheritance and probate, *see* Wis. Stat. §§ 861.21, 861.31, 861.33, 861.35, 861.41, family and medical leave allowances, *see* Wis. Stat. § 103.10(1)(ar), and health care matters, *see* Wis. Stat. §§ 50.032(2d), 50.06(3)(a)—plainly show that the law treats domestic partners, like spouses, as couples who support and take responsibility for each other.

Finally, the "transportability" (or lack thereof) of marriages and domestic partnerships across state lines, despite Fair Wisconsin's insistence, is immaterial to the substantial similarity analysis. *See* Resp'ts' Br. at 30-31. Whether a legal status is transportable to another jurisdiction

is dependent on the public policy and laws of the sovereign that is asked to recognize—or extend comity to—that status. *See Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 106 N.W. 821, 824 (1906) (noting that a state will extend comity only if doing so "will not violate [its] own public policy or laws"). But that inquiry into the public policy and laws *of foreign jurisdictions* is irrelevant to the question whether a Wisconsin legal status is substantially similar *under Wisconsin law*. Moreover, Fair Wisconsin's transportability argument, taken to its logical conclusion, would mean that no legal status, no matter how substantially similar to marriage, could ever violate the Marriage Amendment so long as the status is labeled something other than marriage. That cannot be a proper construction of the Marriage Amendment.

II. The Constitutional Debates and Practices Surrounding the Marriage Amendment Confirm That Chapter 770 is Unconstitutional.

During the constitutional debates, Fair Wisconsin (the foremost opponent of the Marriage Amendment) told voters that the Amendment would prevent the government from creating domestic partnerships like those established by Chapter 770. *See* Pet'rs' Br. at 30-35. Resisting this fact for litigation purposes, Fair Wisconsin now claims that its "overarching

message" was to communicate to voters that the Marriage Amendment was "ambiguous," "poorly drafted," and "dangerously vague." Resp'ts' Br. at 50, 53. The Court of Appeals, however, rejected this characterization of the opposition campaign, concluding that "the record . . . discloses . . . a consistent theme in the statements of . . . opponents": "that the second sentence . . . was inserted to accomplish a complete ban on domestic partnerships." *Appling v. Doyle*, 2013 WI App 3, ¶ 46 n.11, 345 Wis. 2d 762, 781, 826 N.W.2d 666, 675 (2012).

Fair Wisconsin's multiple television advertisements confirm this: they told voters not that the Marriage Amendment was poorly drafted, but that its second sentence was "orchestrated very carefully" (R. 130A:155 at 00:24-00:27), that it would hurt people who are unmarried "big time" (R. 130A:155 at 00:23-00:24), that it would "ban rights for all couples who aren't married" (R. 130A:152 at 00:11-00:13), and that it would fail to "giv[e] equal opportunities for all people who are couples" (R. 130A:155 at 00:05-00:09).

Fair Wisconsin's campaign inundated voters with this view of the Marriage Amendment's impact. The group's $4.3 million budget—which was almost seven times more than the sum spent by the Amendment's

supporters, *see* Pet'rs' Br. at 34—fueled "one of the largest grassroots voter mobilization efforts in Wisconsin history." *Id.* at 32 (quoting R. 130B:152-55).

Fair Wisconsin seeks to downplay the spending disparity between the sides, speculating that the supporters' actual "spending deficit" is unknown because supporters might have expended unreported funds "educating" voters. Resp'ts' Br. at 51. But this conjecture does nothing to diminish the spending gap, for it ignores the distinct possibility that opponents might have engaged in more unreported educational efforts than supporters did—a contingency that would exacerbate rather than alleviate the disparity. Fair Wisconsin also claims that supporters deliberately planned "a campaign that relied less on radio and television ads." *Id.* But the cited article does not establish that this was a premeditated campaign strategy instead of a reactive approach necessitated by the paucity of political funds available to supporters. *See* Resp'ts' Br. at 51-52; R. 66:65-66.

Supporters of the Marriage Amendment discussed "Vermont-style civil unions" as a tangible, real-world *example* of what the Amendment's second sentence would proscribe. (*See, e.g.*, R. 66:72 ("[T]he second

[sentence] protects marriage from being undermined by 'look-alike marriages,' or marriage by another name, *such as* Vermont-style civil unions") (emphasis added); R. 66:35 ("Vermont-style civil unions, *for instance*, would not be valid") (emphasis added); R. 66:61 ("[T]he 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*") (emphasis added); R. 66:131 (similar); R. 66:161 (stating that the second sentence of the Marriage Amendment was necessary "to make clear that civil unions *such as* those in Vermont would be prohibited from occurring here") (quotation mark omitted; emphasis added).) Contrary to Fair Wisconsin's argument, *see* Resp'ts' Br. at 42,[3] supporters did not communicate a consistent message that a Vermont-style civil union was the "only" legal status precluded by the Amendment's second sentence.

Marriage Amendment supporters also told voters that the Amendment would not forbid the government from providing benefits to

[3] Attempting to support this argument, Fair Wisconsin claims that legislative sponsors of the Marriage Amendment sent a memorandum to all legislators "reiterat[ing] that the Marriage Amendment prohibit[s] only marriages entered into by same-sex couples and Vermont-style civil unions[.]" Resp'ts' Br. at 42 (citing R. 66:47). Yet this memorandum does not even mention "Vermont-style civil unions"; instead, it supports Petitioners' contention that Chapter 770 is unconstitutional because it creates a legal status that is substantially similar to marriage. (*See* R. 66:47.)

unmarried individuals or couples. *See* Pet'rs' Br. at 37-38 (cataloguing relevant record citations). Yet those statements, despite Fair Wisconsin's insistence, did not communicate that *any* and *all* domestic partnerships would be permissible. *See* Resp'ts' Br. at 49-50. Instead, Amendment supporters expressed that even though the Amendment would leave the government free to extend benefits to unmarried individuals, couples, or groups, including same-sex couples, the government could not confer those benefits through a legal status substantially similar to the status of marriage. *See* Pet'rs' Br. at 37-38; R. 66:79, 66:99, 66:104.

Furthermore, during the debates, supporters publicly acknowledged that the Marriage Amendment would not take away benefits that some governmental entities were already granting to unmarried individuals and couples. Resp'ts' Br. at 48-49. Relying on these statements, Fair Wisconsin argues that because a few local governments had already created some domestic-partner benefit schemes when the Marriage Amendment was enacted, supporters effectively conceded that the Amendment would permit the domestic partnerships that have since been created by Chapter 770. Yet this argument ignores that a local governmental entity can create only a local legal status; unlike the Legislature, it lacks power to create a

statewide legal status. This illustrates a material difference between a legal status created by a local governmental entity and a legal status created by the state. By failing to account for this significant distinction, Fair Wisconsin's argument on this point rings hollow.

III. If the Incidents of Marriage and Domestic Partnerships Are Relevant to Resolving This Case, Chapter 770 is Nevertheless Unconstitutional.

Because the legal statuses of marriage and domestic partnership are not composed of the incidents that are consequent to those statuses, evaluating those incidents is not relevant to the question presented here. But if the Court considers them, it should conclude that they corroborate Chapter 770's unconstitutionality because the Legislature has (1) attached to domestic partnerships only the types of rights that attach to marriage, and (2) delivered those rights to domestic partners in the same manner that it did to spouses. *See* Pet'rs' Br. at 48-51. Even though, as Fair Wisconsin stresses, spouses receive additional rights not extended to domestic partners, the fact that all the rights given to domestic partners are also given to spouses, and that the rights afforded domestic partners are bundled and delivered in the same manner as rights afforded to spouses, amply

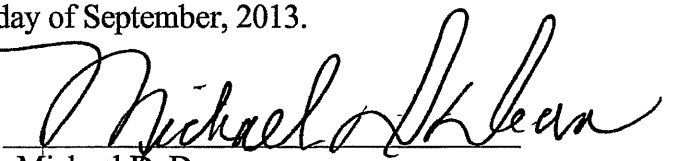
demonstrates substantial similarity between marriage and domestic partnerships. *See id.*

Fair Wisconsin notes that some statutes affording rights to spouses and domestic partners extend those rights to "parents, children, family members, and sometimes 'close friends.'" Resp'ts' Br. at 27. Yet those statutes bolster (rather than refute) Petitioners' position. For instance, the two statutes that mention "close friends"—both of which designate the person who may consent to an incapacitated individual's admission to a healthcare facility—include "order of priority" lists that begin with "[t]he spouse or domestic partner" and end with a "close friend." *See* Wis. Stat. §§ 50.06(3), 50.94(3); *see also* R. 131:40. Giving domestic partners, *along with spouses*, pride of place ahead of adult children, parents, adult siblings, and close friends further illustrates the substantial similarity between marriage and domestic partnerships.

CONCLUSION

For the foregoing reasons, this Court should declare Chapter 770 unconstitutional.

Respectfully submitted on this 30th day of September, 2013.



Michael D. Dean
First Freedoms Foundation, Inc.
17035 W. Wisconsin Avenue,
Suite 100
P.O. Box 2545
Brookfield, WI 53008
(262) 798-8044 (T)
(262) 798-8045 (F)

Richard Esenberg
Attorney at Law
13839 N. Lake Shore Drive
Mequon, WI 53097
(414) 288-6908 (T)

David Austin Robert Nimocks*
James A. Campbell*
Alliance Defending Freedom
801 G Street, NW, Suite 509
Washington, D.C. 20001
(202) 393-8690 (T)
(480) 444-0028 (F)

*Admitted *pro hac vice*

Attorneys for Petitioners

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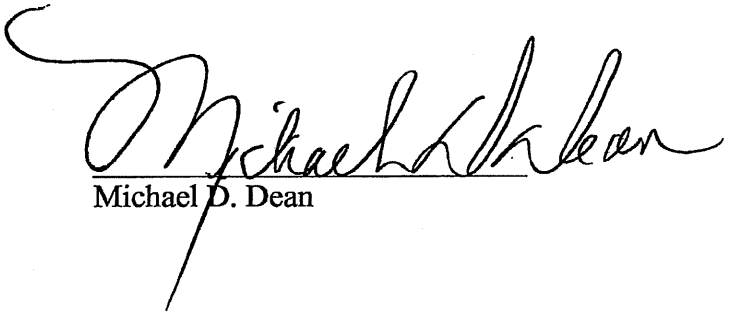

Michael D. Dean

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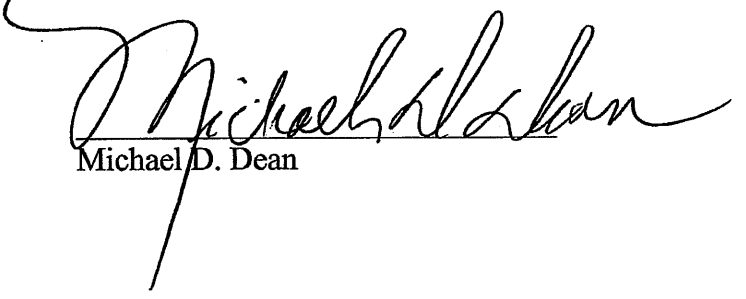

Michael D. Dean

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Madison, WI 53703

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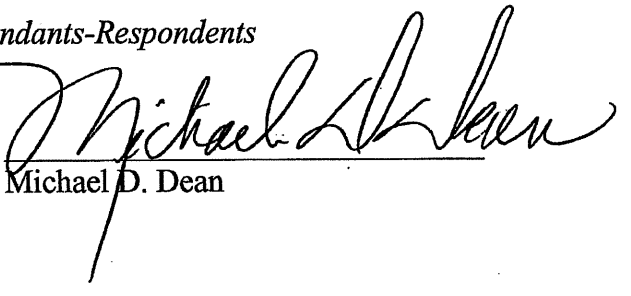
Brian K. Hagedorn
Office of the Governor
P.O. Box 7863
Madison, WI 53707
Attorney for Defendants-Respondents

Brian E. Butler
Barbara A. Neider
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53703

Christopher R. Clark
Lambda Legal Defense & Education Fund, Inc.
105 W. Adams, 26th Floor
Chicago, IL 60603
Attorneys for Intervening-Defendants-Respondents



Michael D. Dean