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SUPREME COURT OF WISCONSIN

JULAIN K. APPLING, JO
EGELHOFF, JAREN E. HILLER,
RICHARD KESSENICH and
EDMUND L. WEBSTER

Plaintiff-Appellants-Petitioners,

v.

Appeal No. 2011AP1572

SCOTT WALKER, KITTY RHOADES
and OSKAR ANDERSON,

Defendants-Respondents,

FAIR WISCONSIN, INC., GLENN
CARLSON, MICHAEL CHILDERS,
CRYSTAL HYSLOP, JANICE
CZYSKON, KATHY FLORES, ANN
KENDZIERSKI, DAVID KOPITZKE,
PAUL KLAWITER, CHAD WEGE and
ANDREW WEGE,

Intervening Defendants-
Respondents.

Review of a Decision of the Wisconsin Court of Appeals, District IV
Deciding an Appeal from the Circuit Court for Dane County
Case No. 10-CV-4434
The Honorable Daniel R. Moeser, J., Presiding

**NONPARTY BRIEF OF AMICI WISCONSIN LGBT CHAMBER OF
COMMERCE, KATHARINE HEYNING, JUDITH TRAMPF,
WENDY WOODRUFF, MARY WOODRUFF, JAYNE DUNNUM,
ROBIN TIMM, VIRGINIA WOLF, AND CAROL SCHUMACHER**

Donald K. Schott (WBN 1010075)
Joseph T. Hanes (WBN 1074313)
Quarles & Brady LLP
33 East Main Street, Suite 900
Madison, WI 53703-3095
(608) 251-5000

Sarah L. Fowles (WBN 1056752)
Quarles & Brady LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, WI 53202-4497

Laurence J. Dupuis (WBN 1029261)
ACLU of Wisconsin Foundation, Inc.
207 East Buffalo Street, #325
Milwaukee, WI 53202
(414) 272-4032

John A. Knight
American Civil Liberties Union Foundation
180 North Michigan Avenue, Suite 2300
Chicago, IL 60601
(312) 201-9740
(312) 288-5225 Facsimile

*Attorneys for Amici LGBT Chamber Of
Commerce, Katharine Heyning, Judith
Trampf, Wendy Woodruff, Mary Woodruff,
Jayne Dunnum, Robin Timm, Virginia Wolf,
And Carol Schumacher*

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ARGUMENT

Wisconsin Statutes Chapter 770 does not violate the Marriage Amendment (hereinafter, the “Amendment”) because it does not create a legal status that is identical or substantially similar to marriage. Amici agree with the analysis and conclusion set forth in the Respondents’ Brief and urge the Court to affirm the decision of the court of appeals.

Many Wisconsin employers have chosen to offer domestic partner benefits in order to attract and retain quality employees – in other words, because they have concluded that it is good for their businesses to do so. Chapter 770 assists Wisconsin employers by providing statewide recognition of a legal status for same-sex partners. Additionally, it has benefited the couples listed as amici as well as numerous other same-sex couples, who would be seriously injured if the legal status granted by Chapter 770 was found to be unconstitutional.

At the time the Amendment was being debated, many Wisconsin municipalities and employers already recognized and provided benefits and protections for same-sex domestic partnerships. Like Chapter 770, these registries and employee benefit programs typically relied on a common set of basic eligibility criteria: two individuals, often identified by gender, who

are in domestic relationships of mutual support, are not related, and are not married or involved in another domestic partnership. The basic nature of what it means to be domestic partners was familiar to voters during the Amendment's ratification. During the public debates over the Amendment, its proponents, including its legislative sponsors and Petitioner Julaine Appling, repeatedly provided voters with two assurances: the Amendment would not affect the privileges and benefits that were already in existence; and the Amendment would not prohibit the legislature from creating a legal status for same-sex couples, as long as that status did not grant virtually all of the rights and incidents of marriage.

The Petitioners' current interpretation of the Amendment contrasts with what was presented to the voters during ratification, and if accepted, it could achieve what the proponents continually assured voters the Amendment would not do. The Petitioners' interpretation should be rejected. It undermines employers' ability to attract quality employees, hurts Wisconsin same-sex couples, and is contrary to the expectations of the legislature and the public that approved the Amendment.

**I. LEGAL PROTECTIONS FOR DOMESTIC PARTNERS
HELP EMPLOYEES ATTRACT QUALITY EMPLOYEES**

A. Employers have determined that offering domestic partner benefits to same-sex couples is a sound business decision.

Significant numbers of employers offer same-sex domestic partner benefits to attract and retain a quality workforce that is key to success in today's economy. For example, as of 2011, 88 percent of the top 50 Fortune 500 companies extended domestic partner benefits to same-sex domestic partners. Brad Sears & Christy Mallory, The Williams Institute, *Economic Motives for Adopting LGBT Related Workplace Policies*, at 2 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>. And, as of 2013, 62 percent of all Fortune 500 companies offer medical benefits to same-sex domestic partners that are equivalent to the benefits that they offer to spouses. Human Rights Campaign Foundation, *Corporate Equality Index 2013*, at 8 (2012), available at <http://www.hrc.org/corporate-equality-index>.

Employee recruitment and retention is a key factor driving companies' decisions to offer domestic partnership benefits. Companies offering these benefits receive a positive response from both gay and

heterosexual employees, likely because providing same-sex domestic partner benefits demonstrates that the company has respect for and values all of its employees. Judy Greenwald, *More U.S. Employers Seen Adding Benefits for Domestic Partners*, Business Insurance, Aug 2003, at 1 (quoting Ed Kahn, Director of Human Resources at Shell Oil Company); *see also* Domestic Partner Benefits: Fair Policy and Good Business for the Federal Government: Hearing Before the Comm. on Homeland Security and Governmental Affairs, 111th Cong. 12 (Oct. 15, 2009) (testimony of William H. Hendrix, III, Ph.D., Dow Chemical Company).

In Wisconsin, hundreds of employers have decided to offer domestic partner benefits to same-sex employees. The list compiled on the Fair Wisconsin website includes many of the state's largest employers. *See* Fair Wisconsin, Wisconsin Employers Offering Domestic Partner Benefits, <http://fairwisconsin.com/couples/wiemployers>.

In fact, Wisconsin's largest employer, Wal-Mart, recently announced plans to offer same-sex domestic partnership benefits to its employees across the country. Clare O'Connor, *Walmart Extends Benefits to LGBT Employees' Same-Sex Domestic Partners*, Forbes, Aug. 28, 2013, *available at* <http://www.forbes.com/sites/clareoconnor/2013/08/28/>

walmart-extends-benefits-to-lgbt-employees-same-sex-domestic-partners/.

In an internal memo, a Wal-Mart executive framed the decision as “a business decision, not a moral or political decision” and noted that “[o]f 30 retail competitors, all but two . . . provide either same- or opposite-sex domestic partner coverage.” *Id.*

In states like Wisconsin that do not recognize same-sex marriage, employers that chose to provide benefits to same-sex partners must determine which individuals qualify to receive these benefits. Because Wisconsin offers a domestic partnership registry, employers can use the official registry documentation as proof that the employee and his or her partner have a relationship that is recognized under the law. Thus, the domestic partnership registry eases the administrative obligations for employers who offer same-sex domestic partner benefits.

Moreover, what makes good business and workforce development sense for individual businesses also makes good business sense for the State of Wisconsin. Although individual businesses may court prospective employees by offering domestic partner benefits, they cannot offer their lesbian and gay employees the legal protections that are offered by Chapter

770 (notwithstanding their limited scope¹). The statewide domestic partner registry in Chapter 770 complements the efforts of Wisconsin employers by providing basic legal protections for same-sex domestic partners.

B. Benefits for same-sex couples are important to attracting investment from the creative class.

Management consulting firm McKinsey & Company has highlighted the “war for talent” as a major competitive issue facing U.S. companies. Ed Michaels et. al, *The War for Talent*, 2 (2001). Urban affairs expert Richard Florida has described how cities that are winning the war for talent are actively engaging our nation’s “creative class.” See Richard Florida, *The Rise of the Creative Class* (2002); Richard Florida, *The Flight of the Creative Class* (2005).

Cities with a thriving “creative class” prosper economically as companies locate to these hubs of talent where entrepreneurship flourishes. Researchers have concluded that there is a strong connection between a city’s “level of tolerance for a range of people, its ethnic and social diversity, and its success in attracting talented people, including high-technology workers.” Richard Florida & Gary Gates, The Brookings Institute Center on Urban & Metropolitan Policy, *Technology and*

¹ Chapter 770 offers far fewer obligations and protections than marriage. (See affidavits of Amici, R.108-115.) Petitioners make no argument to the contrary.

Tolerance: The Importance of Diversity to High-Technology Growth 2 (2001). Not only gay and lesbian employees, but also many heterosexual employees look for employers who offer domestic partner benefits as a signal that an employer values diversity and creativity. Florida, *The Rise of the Creative Class*, *supra*, at 79.

Wisconsin's domestic partnership registry fosters the development of Wisconsin's creative class, which is precisely the workforce that is necessary for success in today's economy. Chapter 770 offers a basic safety net for lesbian and gay couples, signals that Wisconsin values diversity, and assists Wisconsin's employers in drawing more talented workers from across the country and retaining employees here in Wisconsin.

Wisconsin Manufacturers & Commerce has repeatedly decried the skills gap facing Wisconsin's companies. According to its Foundation President, "The skills gap is real in Wisconsin, and everything we are hearing from employers points to the fact that they struggle filling jobs." *See* Press Release, Skills Gap is Real, Employers Struggle with Hires, June 13, 2013, *available at* <http://www.wmc.org/news/wmc-skills-gap-is-real-employers-struggle-with-hires/>.

If this Court were to eliminate Wisconsin's domestic partner registry, it would send the following message to Wisconsin's current and prospective workers: Lesbian and gay employees seeking basic legal protections for their partners will not find them in Wisconsin, and they and others who wish to live in a state that values and protects diversity should look elsewhere. At a time when Wisconsin companies are struggling with an extreme "skills gap," Wisconsin should not turn back the clock on legal protections for same-sex couples.

II. LONG BEFORE THE AMENDMENT WAS RATIFIED, MUNICIPALITIES AND EMPLOYERS RECOGNIZED DOMESTIC PARTNERSHIPS BASED ON ELIGIBILITY CRITERIA LIKE THAT IN CHAPTER 770.

At the time that the Amendment was being debated, recognition of domestic partnerships was becoming commonplace in Wisconsin. Local governments and employers were developing programs to extend certain rights and benefits to domestic partners, and the eligibility criteria for these emerging programs mirrored the eligibility criteria that were later used in Chapter 770.

In 1999, for example, the City of Milwaukee passed an ordinance authorizing same-sex couples to register as domestic partners with the city clerk, as long as they met certain eligibility criteria. Domestic partners had

to be, among other things: “in a domestic relationship of mutual support,” “the same sex,” “competent to enter into a contract,” “18 years of age or older,” “not related by kinship to a degree that would bar marriage”; and “not married” nor recently registered as domestic partnership with someone else. (R.119:Exs.6-7.) Additionally, registrants had to reside together in the city of Milwaukee. (*Id.*) The City of Madison’s domestic partner ordinance had almost identical criteria, except that domestic partnerships were available to same-sex and opposite-sex couples. (R.66:Ex.23.)

Many employers used similar eligibility criteria to determine which of their employees were eligible for domestic partner benefits. As just one example, one technical college in La Crosse required employees to sign an Affidavit of Domestic Partnership averring in part that:

1. We are domestic partners in a committed and mutually exclusive relationship
2. We are both unmarried.
3. We reside together in the same principal residence and intend to do so permanently.
4. We are not blood relatives.
5. We are at least eighteen (18) years of age and mentally competent to consent to contract.

(R.119:Ex.7.) The record is replete with examples of employers using similar eligibility criteria to determine which relationships should be

recognized as domestic partnerships. (R.118:Exs.1-3; R.121:Ex.1; R119:Exs.8-10; R120:Ex.11.)

Because public and private recognition of domestic partnerships based on similar eligibility criteria was widespread when the Marriage Amendment was being debated, voters would have had an understanding of these domestic partnership programs and their eligibility requirements.

III. BASED ON THE PROPONENTS' REPEATED ASSURANCES, VOTERS EXPECTED THAT THE AMENDMENT WOULD NOT JEOPARDIZE EXISTING BENEFITS OR PRECLUDE LEGAL STATUSES FOR SAME-SEX COUPLES.

As discussed by the court of appeals, the Court's task is "to give effect to the intent . . . of the people who adopted it." *Appling v. Doyle*, 2013 WI App 3, ¶11, 345 Wis.2d 762, 826 N.W.2d 666 (quoting *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶19, 295 Wis.2d 1, 719 N.W.2d 408). That intent can be shown through "[p]ublic statements meant to educate the public by what appear to be knowledgeable persons." *Id.*, ¶13 (citing *Dairyland*, 295 Wis.2d 1, ¶ 37). The public statements of sponsors and proponents are especially helpful here because it is reasonable to assume that their view prevailed with voters.

During the ratification process, the sponsors and proponents of the Amendment repeatedly reassured voters of two things. They assured voters that existing benefits for same-sex couples would not be jeopardized by the passage of the Amendment. (*See, e.g.*, R.66 Exs.24, 25, 28.) Additionally, they assured voters that the Amendment would not prohibit the legislature from creating a legal status that would grant some (but not all) of the benefits of marriage to same-sex couples. (*See, e.g.*, R66:Ex3, at 40-41.)

As noted above, there were already same-sex domestic partnership registries and benefit structures in existence at the time the Amendment was enacted. One of the sponsors of the amendment, Representative Mark Gundrum, addressed existing benefits in a letter to the editor of the Milwaukee Journal-Sentinel titled *Opponents Resort to Deception, Fear*. (R.66:Ex.28.) He explained: “Two legal opinions from the non-partisan state Legislative Council have clearly articulated that no present legal privileges or benefits enjoyed by unmarried couples -- gay or straight -- are in danger.” (*Id.*) He specifically assured the public that “as an attorney and chairman of the Assembly Judiciary Committee, I can confidently say [that] not one privilege or benefit that now exists for heterosexual or homosexual couples will be prohibited by this amendment.” (*Id.*)

This sentiment was not limited to the Amendment's sponsors. Julaine Appling, a leading public spokesperson supporting the Amendment, repeatedly assured voters that existing arrangements were safe. She told the Wisconsin State Journal that opponents were "vastly distorting the potential impact" of the Amendment, and that it "isn't going to change benefit structures that exist." (R.66:Ex.24.) Similarly, a fact sheet published by Appling's organization, the Family Research Institute of Wisconsin, explained: "According to legal experts in the area of Wisconsin's constitution, the second part does not take away benefits that have already been granted by local units of government, such as the Cities of Madison and Milwaukee and various school districts, nor does it take away such benefits given by private corporations or companies." (R.66:Ex:6; *see also* R.66:Ex.22 at Q.9.)

Additionally, as is discussed extensively in the Respondents' brief, the proponents continually emphasized that the Amendment would not prohibit the legislature from creating a new legal status that would grant some of the benefits of marriage to same-sex couples. (Respondents' Br. at 38-48.) According to the proponents' public statements, the key to interpreting the Amendment's second sentence was to determine whether

the rights and incidents offered by a legal status were substantially similar to the rights and incidents of marriage. (*See id.*)

As just one example, in a televised debate shortly before the ratification vote, Amendment proponent Professor Richard Esenberg explained that marriage should be viewed as “a bundle” of rights and incidents, and that the Amendment only prohibited “creation of a legal status which would convey virtually all of those sticks.” (R66:Ex3, at 40-41.) This focus on the rights and incidents of marriage is consistent with the volume of statements made by the proponents of the Amendment. The briefs and the record are replete with examples of assurances that, in Appling’s words, the Amendment would only prohibit recognition of legal statuses “which confer virtually all legal rights of marriage on gay couples.” (R.66:Exh.21 at 14; *see also* Respondents’ Br. at 38-48.)

For these reasons, the circuit court found as a fact that “[t]he vast majority of informational materials available during the ratification campaign reveal that voters were repeatedly told that the purpose of the Marriage Amendment was to prohibit same-sex marriage and Vermont-style civil unions.” (R.131 at 22.) Similarly, the court of appeals correctly concluded that “informed voters would have understood that marriage

amendment proponents were saying that the marriage amendment would not ban legally recognized domestic partnerships conferring a limited subset of the rights and obligations of marriage.” *Appling*, 345 Wis.2d 762, ¶64.

IV. THE COURT SHOULD INTERPRET THE AMENDMENT CONSISTENT WITH VOTERS’ EXPECTATIONS

In contrast with the voters’ expectations, the Petitioners now contend that the only determinative factors when comparing the legal statuses of marriage and Chapter 770 domestic partnerships are six criteria for eligibility that are common to both: a domestic relationship between two people, of specified sexes, who are competent to consent, are generally over a specified age, are not related, and are not married to someone else. Petitioners assert that any other legal status that has substantially similar criteria for eligibility is precluded by the Amendment.²

Amici agree with the Respondents’ extensive discussion of this interpretation, and we likewise conclude that the Petitioners’ analysis of whether Chapter 770 domestic partnerships are substantially similar to

² Petitioners attempt to distance themselves from “eligibility and formation” criteria by claiming that they are focusing on the “constituent elements” of marriage. (Petitioners’ Br. at 18-19.) But the only “constituent elements” they identify are the eligibility criteria for marriage.

marriage is deeply flawed for many reasons. One reason is that interpreting the second sentence of the Amendment based solely on the eligibility criteria for marriage is in direct conflict with what the proponents of the Amendment told the voters it means.³

Moreover, it would be significantly more challenging to construct a legal status for same-sex couples for which eligibility would not be based, at least in part, on a common set of basic eligibility criteria. Therefore, contrary to the proponents' repeated assurances, the Petitioners' current interpretation would significantly hinder the legislature's ability to create a legal status for the purpose of granting selected rights and incidents to couples in same-sex relationships. This outcome is inconsistent with the expectation of the voters who approved the Amendment, based on plain statements of sponsors and public proponents of the Amendment, including the Petitioner.

Wisconsin couples, municipalities, and employers administering benefit programs have a strong interest in certainty. Prior to passage of the

³ Petitioners do not present even one instance in which a proponent publicly defined the "legal status" of marriage based on the "constituent elements" listed above. Petitioners attempt to obscure this gap in the record by pointing to the proponents' explanation that the Amendment would prevent "marriage by another name." (Petitioners' Br. at 35-38.) Yet, Petitioners' brief omits the proponents' explanation of what they meant by "marriage by another name" -- a legal status that conferred substantially the same rights and incidents as marriage.

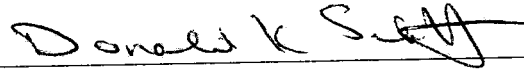
Marriage Amendment, they were told over and over again by proponents that existing benefits for same-sex couples would not be jeopardized and that the Amendment would not prohibit the creation of a legal status that would grant some (but not all) of the benefits of marriage to same-sex couples. Chapter 770 fits that bill. Consistent with the text of the Amendment and voters' expectations, the Court should uphold its constitutionality.

CONCLUSION

The Court should affirm the decision of the Court of Appeals and thereby support employers' efforts at attracting and maintaining a top-notch workforce, lend employers certainty about their benefit arrangements, and affirm the voters' expectations.

Dated this 11th day of October, 2013.

Donald K. Schott
WBN 1010075
Joseph T. Hanes
WBN 1074313



QUARLES & BRADY LLP
33 East Main Street, Suite 900
Madison, WI 53703-3095
(608) 251-5000

Sarah L. Fowles
WBN 1056752
QUARLES & BRADY LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, WI 53202-4497

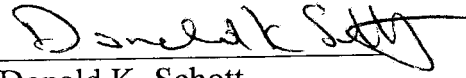
Laurence J. Dupuis
WBN 1029261
ACLU of Wisconsin Foundation, Inc.
207 East Buffalo Street, #325
Milwaukee, WI 53202
(414) 272-4032

John A. Knight
American Civil Liberties Union Foundation
180 North Michigan Avenue, Suite 2300
Chicago, IL 60601
(312) 201-9740
(312) 288-5225 Facsimile

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (d) for a brief where proportional serif font is used. The enclosed nonparty brief contains 2970 words.

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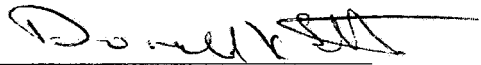
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Donald K. Schott
Quarles & Brady LLP

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Dated this 11th day of October, 2013.

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Donald K. Schott
Quarles & Brady LLP

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this Nonparty Brief and this Certificate of Service were sent via U.S. Mail this 11th day of October, 2013, to the following:

Michael D. Dean
10735 W. Wisconsin Ave., Ste. 100
P.O. Box 2545
Brookfield, WI 53008

Austin R. Nimocks
James A. Campbell
Brian W. Raum
15100 N. 90th Street
Scottsdale, AZ 85260

Brian E. Butler
Barbara A. Neider
P. O. Box 1784
Madison, WI 53701-1784

Christopher R. Clark
105 W. Adams, 26th Floor
Chicago, IL 60603

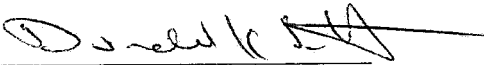
David B. Goroff
321 North Clark
Chicago, IL 60654

Daniel A. Manna
Linda E. Hansen
777 E. Wisconsin Ave.
Milwaukee, WI 53202-5306

Brian K. Hagedorn
115 E State Capitol
P. O. Box 7863
Madison, WI 53707-7863

Dyann L. Hafner
1202 Northport Drive #432
Madison, WI 53704-2020

Theresa A. Andre
P. O. Box 1497
Madison, WI 53701-1497


Donald K. Schott
Quarles & Brady LLP

QB\090022.02373\22946517.6