STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Julaine K. Appling, Jo Egelhoff, Jaren E. Hiller, Richard Kessenich and Edmund L. Webster,
Plaintiffs-Appellants-Cross-Respondents,
v.
James E. Doyle, Karen Timberlake and John Kiesow,
Defendants-Respondents,

Fair Wisconsin, Inc., Glenn Carlson, Michael Childers, Crystal Hyslop, Janice Czyscon, Kathy Flores, Ann Kendzierski, David Kopitzke, Paul Klawitter, Chad Wege and Andrew Wege,
Intervening Defendants-Respondents-Cross-Appellants.

Court of Appeals Case No. 2011AP001572

On Appeal from the Circuit Court for Dane County, Case No. 10-CV-4434
The Honorable Daniel R. Moeser, Presiding

COMBINED BRIEF AND APPENDIX OF INTERVENING DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS

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STATEMENT OF THE ISSUE

Did Plaintiffs-Appellants (the "Appling Parties") prove beyond a reasonable doubt that Chapter 770 of the Wisconsin Statutes ("Chapter 770"), which establishes a domestic partnership registry for same-sex couples, creates a legal status for unmarried individuals that is so identical or "substantially similar" to marriage that it violates Article XIII, Sec. 13 of the Wisconsin Constitution (the "Marriage Amendment")?

Answered by the circuit court: No.

The circuit court correctly determined that Chapter 770 does not create a legal status for domestic partners that is identical or substantially similar to marriage, and therefore does not violate the Marriage Amendment. Based on this determination, the circuit court properly granted summary judgment to the Intervening Defendants-Respondents ("Fair Wisconsin").

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Fair Wisconsin is willing to present oral argument if the Court has questions, but respectfully submits that oral argument is not necessary because the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants. Wis. Stat. § 809.22(2)(b). In addition, the arguments of the Appling Parties are, on their face, without merit. Wis. Stat. § 809.22(2)(a)(2).

Fair Wisconsin believes that publication of the Court's opinion is warranted because this is a case of substantial and continuing public interest. Wis. Stat. § 809.23(1)(a)(5).

ARGUMENT

I. SUMMARY OF ARGUMENT

The circuit court correctly granted summary judgment in favor of Fair Wisconsin, finding that the Appling Parties had failed to prove beyond a reasonable doubt that Chapter

770 is unconstitutional because the plain language of the Marriage Amendment, the history surrounding the enactment and ratification of the Marriage Amendment, and the first legislative action related to the Marriage Amendment all demonstrate that a Wisconsin domestic partnership is not "substantially similar" to marriage.

II. THE APPLING PARTIES HAD THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT CHAPTER 770 IS UNCONSTITUTIONAL.

To obtain summary judgment, the Appling Parties had to satisfy a very high burden of proof. Under Wisconsin law, "[l]egislative acts are presumed constitutional, and the party challenging a legislative act must prove it unconstitutional beyond a reasonable doubt." *GTE Sprint Communications Corp. v. Wisconsin Bell*, 155 Wis. 2d 184, 192, 454 N.W.2d 797 (1990). The "beyond a reasonable doubt" standard is indeed a heavy burden:

> [t]he court indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, we must resolve that doubt in favor of constitutionality. To overcome this strong presumption, the party challenging a statute's constitutionality must demonstrate that the statute is unconstitutional beyond a

> reasonable doubt. It is not sufficient for the challenging party merely to establish doubt about a statute's constitutionality, and it is not enough to establish that a statute probably is unconstitutional.

Guzman v. St. Francis Hosp., Inc., 240 Wis. 2d 559, 780-781, 623 N.W.2d 776 (Ct. App. 2000).

The Wisconsin Supreme Court has emphasized that the presumption of constitutionality derives from significant deference that courts owe to the legislative role:

> The presumption of statutory constitutionality is the product of our recognition that the judiciary is not positioned to make the economic, social, and political decisions that fall within the province of the legislature . . . . [T]he legislature is . . . the more appropriate body for these considerations, and the judiciary rightly presumes the legislature makes such an assessment.
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> * * *
>
> We as a court are not concerned with the merits of the legislation under attack. We are not concerned with the wisdom of what the legislature has done. We are judicially concerned only when the statute clearly contravenes some constitutional provision. . . . The presumption of constitutionality promotes due deference to acts of the legislature.

State v. Cole, 2003 WI 112, ¶¶12, 18, 264 Wis. 2d 520, 665 N.W.2d 328, *quoting State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 47, 205 N.W.2d 784 (1973). The Appling Parties do not dispute that they had the burden of

proving beyond a reasonable doubt that Chapter 770 is unconstitutional. (Aplts' Brief p. 7.)[1]

In entering summary judgment in favor of Fair Wisconsin, the circuit court applied the proper standard of review and concluded that the Appling Parties had failed to meet their heavy burden. (R.131:8.)

III. THERE ARE THREE PRIMARY SOURCES THAT MUST BE EXAMINED TO DETERMINE THE MEANING OF AN AMENDMENT TO THE WISCONSIN CONSTITUTION: (1) THE PLAIN MEANING OF THE AMENDMENT; (2) THE HISTORY SURROUNDING THE LEGISLATIVE DEBATES AND VOTER RATIFICATION CAMPAIGN; AND (3) THE EARLIEST INTERPRETATION OF THE AMENDMENT BY THE LEGISLATURE.

The Wisconsin Supreme Court has outlined a three-part analysis for interpreting the meaning of a constitutional amendment:

> "The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]" *State ex rel. Bare v. Schinz,* 194 Wis. 397, 404, 216 N.W. 509 (1927) (citation omitted). We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates

[1] The designation "Aplts' Brief" is used to refer to the opening brief of the Appling Parties.

> and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption.

Dairyland Greyhound Park v. Doyle, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W.2d 408 (citations omitted); *see also State ex rel. Ekern v. Zimmerman,* 187 Wis. 180, 184, 204 N.W. 803 (1925); *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996). The circuit court carefully applied this three-part analysis in its decision. (R. 131:9.)

The following sections of this brief analyze the Appling Parties' constitutional challenge using the three-part *Dairyland* analysis. Individually, each leg of the analysis shows that Chapter 770 is constitutional. Viewed together, the analysis of all three sources leads to the irrefutable conclusion that the Appling Parties failed to meet their burden of proof and that the decision of the circuit court must therefore be affirmed.

IV. THE PLAIN MEANING OF THE MARRIAGE AMENDMENT DEMONSTRATES THAT CHAPTER 770 DOES NOT VIOLATE THE WISCONSIN CONSTITUTION.

A. Because the Marriage Amendment's second sentence is a prohibition on the creation of a legal status, this case involves a comparison of the legal status created by Chapter 770 with the legal status of marriage.

The first part of the constitutional analysis requires an examination of the plain meaning of the constitutional provision at issue. The Appling Parties argue that Chapter 770 violates the second sentence of the Marriage Amendment, which states: "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. Pertinent here is this sentence's prohibition on the creation of any legal status that is substantially similar to marriage. Thus, to determine whether Chapter 770 violates this prohibition, this Court must compare the legal status created by Chapter 770 with the legal status of a Wisconsin marriage to determine whether the two statuses are substantially similar.

Before undertaking a comparison of the two legal statuses, it is necessary to assess the plain meaning of the phrase "legal status." A "status" is "[a] person's legal condition, whether personal or proprietary; the sum total of a person's legal rights, duties, liabilities, and other legal relations." *Black's Law Dictionary* 1447 (8th ed., 2004). Stated more succinctly, a status is "[t]he standing of a person before the law." *Random House Dictionary of the English Language* 1862 (2nd ed., 1987). Each of these definitions of "status" reflects that the word has a legal meaning – i.e., a status is how a person is treated under the law. A focus on the legal meaning of the work "status" is particularly appropriate in this matter because of the Marriage Amendment's use of the word "legal" to modify the word "status."

The Marriage Amendment's use of the phrase "legal status" indicates that a comparison of the domestic partnerships created by Chapter 770 to a Wisconsin marriage must start with a legal comparison – i.e., to assess whether a

domestic partnership is "substantially similar" to marriage, the most relevant points of comparison are legal in nature. Such points of comparison include:

- What is the general legal nature of each status?
- What are the legal requirements regarding who can obtain each status?
- What are the legal procedures for entering into each status?
- What are the legal procedures for terminating each status?
- What specific legal rights, benefits, and responsibilities attach to each status?

The legal aspects of each status are the relevant points of comparison because, as the circuit court noted, "the Marriage Amendment only prohibits a 'legal status' that is identical or substantially similar to marriage for unmarried individuals; the Marriage Amendment does not prohibit a non-legal (*i.e.* social) status that is identical or substantially similar to marriage for unmarried individuals." (R.131:10.)[2]

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[2] Although the circuit court's comparison properly focused on the legal aspects of the two statuses, Fair Wisconsin also presented the circuit court with evidence and argument demonstrating that domestic partnerships also do not have a *social* significance that is similar to

B. The plain meaning of the phrase "substantially similar" indicates that the Marriage Amendment prohibits only the creation or recognition of legal statuses that are almost identical to marriage.

Before undertaking a comparison of the two legal statuses, is also necessary to determine the meaning of the phrase "substantially similar." The circuit court correctly noted that the word "substantially" means "essentially." (R.131:10, *citing Black's Law Dictionary* 1597 (rev. 4th ed. 1968).) The circuit court also was correct in defining "similar" as "alike though not identical." (R.131:10, *citing The American Heritage College Dictionary* 1270 (3rd ed. 1997).) Based on these definitions, the circuit court concluded that "substantially similar" means "essentially alike, though not identical." (R.131:10.)

The circuit court's conclusion about the meaning of "substantially similar" is consistent with a 2006 opinion issued by Attorney General Peggy A. Lautenschlager.

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marriage. (*See* R.88:4-6, R.89:Exs. 1-12 and R.129:6-7.) *See also* amicus brief filed by the American Civil Liberties Union, the ACLU of Wisconsin Inc. and several couples registered as domestic partners. (R.107.)

(R.66:Ex. 2.)[3] The Attorney General emphasized that the meaning of the phrase "substantially similar to . . . marriage" must be determined from the context in which it is used. Noting that, under rules of statutory construction, "[p]rovisions which have a purpose to restrict personal and property rights are construed strictly," she opined that:

> A specific intent to use "similar" with its strict meaning is evinced by the textual context of the term where it is preceded by the modifying adverb "substantially." According to recognized dictionaries, which can be used to determine the meaning of words, *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶ 24, 290 Wis. 2d 421, 714 N.W.2d 130, "substantially" means to a considerable degree. *Webster's Third New International Dictionary* 2280 (unabridged ed. 1986); *The American Heritage Dictionary of the English Language* 1791 (3rd ed. 1996).
>
> This modifier pushes the meaning of "similar" away from mere general likeness and much closer to virtual identity on the range of resemblance. Things are not substantially similar unless they have a considerable degree of similarity.

Id., p. 2 (emphasis added).

The Attorney General noted that her opinion was confirmed by the contextual linkage of "substantially similar"

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[3] The Attorney General's opinion has persuasive value as to the meaning and purpose of a legislative enactment. *See State v. Ludwig*, 31 Wis. 2d 690, 698, 143 N.W.2d 548 (1966).

to the word "identical" using the word "or" in the Amendment. She explained:

> Where "similar" is modified by "substantially," the juxtaposition of "similar" and "identical" as alternatives suggests that the phrase "substantially similar" is used with a meaning approximating "identical."
>
> Although it may be difficult to plot the precise point where a legal status becomes substantially similar to marriage, it is clear that this point lies somewhere close to correspondence with marriage high up on the scale between likeness and identity.

Id., pp. 2-3.

Furthermore, the Attorney General's definition of the phrase "substantially similar" fits with recent usage by the Wisconsin Supreme Court comparing the Takings Clauses of the Wisconsin and United States Constitutions:

> Article I, Section 13 of the Wisconsin Constitution provides in full that "[t]he property of no person shall be taken for public use without just compensation therefor."
>
> The text of this provision of the Wisconsin Constitution is **substantially similar** to the Takings Clause of the Fifth Amendment to the United States Constitution, which provides that private property shall not "be taken for public use, without just compensation."

City of Milwaukee Post No. 2874 VFW v. Redevelopment Auth., 2009 WI 84, ¶¶ 34-35, 319 Wis. 2d 553, 768 N.W.2d 749 (emphasis added). The Court went on to interpret the

Takings Clause of the Wisconsin Constitution as providing rights analogous to those existing in the Takings Clause of the United States Constitution. The Supreme Court thus used the phrase "substantially similar" to mean "almost identical."

Further support for the analysis of the circuit court and the Attorney General ironically comes from counsel for the Appling Parties, Professor Richard Esenberg of the Marquette University Law School. When asked to explain the meaning of the second sentence of the Amendment shortly before the ratification vote, Professor Esenberg stated:

> The second sentence will not interfere with legal accommodations of legitimate interests. Think of marriage as a bundle of sticks. Each stick is a different right or incident of marriage. The second sentence **only** prohibits creation of a legal status which would convey **virtually all** of those sticks.

(R.66:Ex. 3, pp. 40-41.) (emphasis added.)

Consistent with these analyses, the circuit court correctly concluded that "a status must be closer to identical to marriage, as opposed to merely alike marriage, before it will fall within the Marriage Amendment's prohibition." (R:131:10.) Thus, when comparing the legal statuses at issue

here, the relevant inquiry is whether Chapter 770 creates a legal status that is close to identical to marriage.

C. A comparison of the legal status created by Chapter 770 with the legal status of marriage in Wisconsin reveals that Chapter 770 does not create a legal status "substantially similar" to marriage.

When one compares the legal aspects of each status at issue here – the general legal nature of each status, the legal requirements and procedures for entry and exit associated with each status, and the legal rights, benefits and responsibilities assigned to each status – it becomes apparent that a Chapter 770 domestic partnership is *not* substantially similar to marriage.

1. The two statuses have fundamentally different legal natures – marriage is an enforceable contract; a Wisconsin domestic partnership is not.

An examination of the fundamental legal nature of the statuses at issue reveals that they are very different legal creatures and therefore cannot be considered substantially similar.

Under Wisconsin law, marriage is a contract:

> Marriage, so far as its validity at law is concerned, 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.

Wis. Stat. § 765.01. Section 765.001(2), which describes the intent underlying the Family Code, Chapters 765 to 768 further explains that,

> Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.[4]

Indeed, the economic consideration underlying the marital contract is found in Wis. Stat. § 765.001, which states that, through marriage, each spouse binds himself or herself to a legal relationship of "mutual responsibility and support" in which each person has "an equal obligation . . . to contribute money or services or both which are necessary for the

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[4] Section 765.001(2) is consistent with dictionary definitions of marriage. *See, e.g., Merriam Webster Online Dictionary* (http://www.merriam-webster.com/dictionary/marriage)("[t]he state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law.")

adequate support and maintenance" of the other and any minor children of the union. This obligation of each spouse to contribute to the support and maintenance of the other and any children is so strong that the State may enforce it through court-ordered support during a marriage and enforced maintenance and child support payments even when a marriage is dissolved. Wis. Stat. § 767.501.

The depth and meaning of the requirements of "mutual responsibility and support" are further expressed and enforced through numerous provisions in Wisconsin's statutes. For example, under Chapter 766 "Marital Property," individuals who enter into a marriage do so with the understanding that they are forgoing their right to accumulate property individually and agree that all property will be part of a "marital estate." Essentially, the provisions of Chapter 766 give each spouse an undivided one-half interest in any property that either spouse may acquire during the marriage and, as well, make each spouse responsible for debts incurred by the other for the benefit of the marital estate.

Furthermore, marriage is a particularly unique contract in that, by enforcing the obligations of the parties to the contract through statute, the State becomes a party to that contract. *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500 (1950). That makes the marriage contract unique among contracts, as the United States Supreme Court has explained:

> It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.

Maynard v. Hill, 125 U.S. 190, 210-211 (1888).

By contrast, **none** of this is true of a domestic partnership. Chapter 770 does not define domestic partnerships as civil contracts. In fact, a domestic partnership is not a contractual relationship at all. A domestic partnership is not a relationship of "mutual responsibility and support." Neither partner has an obligation to "contribute

money or services or both" to support the other. Nor is there any other element of consideration between domestic partners associated with registering under Chapter 770. Rather, registration of a domestic partnership triggers a set of rights accorded by the State to the individuals in that relationship. The State imposes no obligations between the partners themselves.

Furthermore, as demonstrated above, marriage is a "super contract." That is, the State takes more interest in a marriage contract and plays a more active role in the definition and enforcement of its terms, as well as in defining the circumstances under which it may be terminated, than it does in other civil contracts. The State plays no such role in Chapter 770 domestic partnerships.

The striking difference in the fundamental legal nature of the two statuses at issue is sufficient for this Court to conclude that they are not substantially similar. But, when this difference is considered along with the numerous other

legal differences in the two statuses discussed in the following sections, that conclusion becomes inescapable.

2. The two statuses have different eligibility requirements.

The Appling Parties claim, incorrectly, that the criteria for entrance into a domestic partnership "replicate" those for entry into marriage, except for the gender requirements. (R.2:¶18). A comparison of the criteria for entering a domestic partnership (*see* Wis. Stat. § 770.05) with the criteria for getting married (*see* Wis. Stat. §§ 765.02 & 765.03) reveals significant differences:

1. Domestic partners must always be of the same sex. Under Wisconsin's law, the parties to a marriage must always be one man and one woman.

2. Before individuals can become domestic partners they must share a common residence. There is no such requirement for a man and woman to be eligible to marry.

3. No minor may become a domestic partner, even with the consent of a parent or guardian, whereas minors between the ages of 16 and 18 years can marry with such consent.

4. No individuals who are nearer kin than second cousins may ever be domestic partners, whether their relationship is by blood or by adoption. First cousins by adoption may marry, as may first cousins where the female is over 55 years old or if at least one party to the contract is sterile.

5. An individual who has been divorced less than six months may become a domestic partner but may not marry. Similarly, an individual who is a domestic partner may marry without taking any action to terminate the domestic partnership; the marriage automatically terminates the domestic partnership.

These differences demonstrate that the criteria for entrance into the legal status of domestic partnership and marriage are not substantially similar.

The Appling Parties agree that the entry requirements of each status are a relevant point of comparison. Indeed, they select six of the entry requirements for marriage and, without citation to authority, proclaim them to be the "six defining characteristics" of marriage. (Aplts' Brief, pp. 14 and 17.) According to the Appling Parties, because domestic partnerships share all of these six so-called defining characteristics, Chapter 770 impermissibly "mimics" marriage. (Aplts' Brief, p. 17.)

The Appling Parties achieve this result by describing the so-called "defining characteristics" at a level of abstraction that effectively sweeps away any actual differences in the legal entry requirements for each status.

For example, the Appling Parties note that each status has age limitations and restrictions on consanguinity, but the fact that the two statuses have *different* age limitations and restrictions on consanguinity are cavalierly dismissed as being **only** "minor variations." (Aplts' Brief, p. 19-20.) Similarly, the Appling Parties rely on the fact that each status has restrictions regarding the gender of the members of the couple as evidence that the two statuses are substantially similar – an argument that ignores the fact that the two statuses have not only different, but mutually exclusive, gender restrictions. With respect to Chapter 770's requirement that domestic partners share a common residence, the Appling Parties argue that this makes domestic partnerships substantially similar to marriage because married couples often live together – an argument that glosses over the fact that there is no actual common residency ***requirement*** for couples who seek to marry.

As the circuit court correctly noted when it rejected these arguments, "[p]laintiffs do not appear to recognize the

significance of a *legal requirement.*" (R.131:34)(emphasis in original). Indeed, the Appling Parties' comparison of the entry requirements set forth in Chapter 770 to marriage's so-called "defining characteristics" is an illogical, result-oriented exercise in which any similarity is elevated to the level of evincing substantial similarity, but all of the actual legal differences between the two statuses are dismissed as "minor."

3. The two statuses have different legal procedures for entry.

The Appling Parties also incorrectly argue that the process by which a couple enters into a domestic partnership is substantially similar to the process of getting married. To form a domestic partnership, two individuals must:

1. Live in the county in which they file an application for a declaration for thirty days.
2. Submit a sworn application for a declaration of domestic partnership to the county clerk, presenting proof of identification and residence and paying a fee to the county to cover increased processing costs incurred by the county.
3. Present the clerk with certified copies of their birth certificates, and, where applicable, also provide copies of any judgments, certificates of termination of domestic

partnership, or death certificates affecting the domestic partnership status; and

4. Complete a declaration of domestic partnership after it has been issued by the county clerk, sign it before a notary who acknowledges the signatures, and submit the declaration to the register of deeds.

Wis. Stat. §§ 770.07 and 770.10. The legal status of domestic partnership is not achieved until the declaration is submitted to the register of deeds. Wis. Stat. § 770.10. The paperwork is both the beginning and the end to forming a legal status under Chapter 770. Once two individuals complete this paperwork, they are registered domestic partners. There is nothing else for them to do.

In contrast, paperwork is only the first step in the marriage process. To become married, individuals must first do the following:

1. One of the parties must live for thirty days in the county from which a marriage license is to be obtained, or, if neither party is a resident of the state, the license may be obtained from the county where the marriage ceremony is to be performed. (section 765.05);

2. Both parties submit a sworn application for a marriage license to the county clerk, presenting proof of identification and residence, certified birth certificates and, if applicable, death certificates or judgments affecting marital status. (section 765.09(3)); and

3. Both parties must complete a marriage license worksheet. (section 765.13).

Once a man and a woman have completed this paperwork, they have taken only the first step toward marriage; they have not yet achieved the legal relationship of husband and wife.

Following the marriage license application process – quite unlike the process for entering a domestic partnership – a number of individuals (including the district attorney and certain relatives of the applicants) then have the opportunity to object to the proposed marriage and ask for a court order requiring the parties to the application to show cause why the marriage license should not be refused. Wis. Stat. § 765.11. Upon a finding that the statements in the application are willfully false or insufficient, or that either or both applicants are not competent in law to marry, a court must make an order refusing the marriage license. *Id.*

Assuming a court does not prevent the issuance of a marriage license, to achieve the legal relationship of husband and wife, the couple seeking to marry must perform a marriage ceremony within 30 days. This ceremony is the

essential process through which a marriage is "validly solemnized and contracted in this state." Wis. Stat. § 765.12.

Wis. Stats. §§ 765.16 through 765.19 require specific elements of a marriage ceremony:

1. The parties must make mutual declarations that they take each other as husband and wife;

2. The mutual declarations must be made before a state-authorized officiant (or without an officiant under specified statutory circumstances);

3. Those mutual declarations must be made before two additional competent adult witnesses: i.e., they must be public declarations;

4. The marriage paperwork is then completed by the officiant and witnesses and returned to the register of deeds of the county in which the marriage was performed (which is not necessarily the same county to which the application was made).

Contrary to the Appling Parties' assertions, the process for forming a domestic partnership pales in comparison to the process for forming a marriage. The circuit court correctly identified several ways in which the two processes were significantly different. (R.131:37-38.) First, and most significantly, a solemnization ceremony is required to form a marriage, but no such ceremony is required to form a domestic partnership. The solemnization requirement is a

significant difference because it relates directly to the difference in the fundamental legal nature of the two statuses. It is through the solemnization ceremony that the two marrying individuals reflect their understanding of, and assent to, the contractual bonds of marriage. Because the law does not impose contractual bonds on registered domestic partners, no such ceremony is required.

The Appling Parties attempt to dismiss this distinction by arguing that domestic partners "solemnize" their relationship before a notary public. (Aplts' Brief, p. 22.) But, signing a form before a notary public is not a solemnization ceremony at all, and certainly is not one in which two people agree to assume the mutual obligation of support and other legal obligations that attach to a marital relationship. It is simply the acknowledgement of the parties that they have complied with the entry requirements for domestic partnership.

Second, unlike with the formation of a domestic partnership, the paperwork is not crucial to the formation of

marriage. When a marriage has been celebrated pursuant to Wis. Stat. § 765.16 and the parties have thereafter "assumed the habit and repute of husband and wife," a marriage license is deemed to have been issued after a period of time, even if one never was issued. Wis. Stat. § 765.23. In other words, while marriage paperwork is customary and useful should the validity of a marriage need to be proven in the future, so long as the marriage was properly solemnized before witnesses and by an authorized officiant and the parties have behaved as though they are married, the paperwork is not essential. Rather, it is the marriage ceremony itself, not the marriage license and not verification of the ceremony, that is essential. Conversely, no ceremony can substitute for the paperwork required to form a domestic partnership.

Third, non-Wisconsin residents can apply for a marriage license in the county in which the marriage ceremony is to be performed. There is no similar provision in Chapter 770 that allows non-residents to obtain a domestic partnership.

Fourth, couples seeking to get married must complete a marriage license worksheet. Wis. Stat. § 765.13. Two individuals who seek to enter into a domestic partnership are not required to complete such a worksheet.

Fifth, certain individuals have the opportunity under Wisconsin law to object to a marriage. Wis. Stat. § 765.11. By contrast, no one is given statutory authority to object to a domestic partnership.

Finally, a different-sex couple can pay a fee of not more than $25 to accelerate the marriage application process. Wis. Stat. § 765.08. Under Wisconsin law, the fee for accelerating the domestic partnership fee is capped at $10. Wis. Stat. § 770.07(1)(b).

The circuit court correctly concluded that, when taken together, these differences in the process of entering into the two legal statuses were probative of the fact that domestic partnerships are not substantially similar to marriage. (R.131:38.)

4. The two statuses have different legal procedures for termination.

The circuit court also was correct in concluding that the "striking difference" in the two processes used to terminate each of the legal statuses demonstrated that the two statuses are not substantially similar. A domestic partnership is unilaterally terminable by either party simply by filing a notice of termination with a county clerk and paying a fee. Wis. Stat. § 770.12(1)(a). Furthermore, a domestic partnership will automatically terminate if either partner gets married. Wis. Stat. § 770.12(4)(b).

The process for terminating a marriage is fundamentally different. A spouse must obtain permission from a court to divorce after a 120-day waiting period following the service of a summons and petition for divorce on the other spouse. Wis. Stat. § 737.335(1). As part of the divorce process, a court must make an assignment of debt and property between the two parties (Wis. Stat. § 767.61) and a determination must be made regarding maintenance between

the spouses and child custody and support of any minor children. Wis. Stat. § 767.385.

These differences in the termination process relate to the fundamental legal nature of each status. Because marriage is a unique contractual relationship among the two spouses and the State, the State is involved in its dissolution and neither spouse can unilaterally terminate the relationship, nor can both spouses, by agreement, terminate the marriage without obtaining the State's consent through a decree of divorce. In contrast, because domestic partnerships are not contracts, a domestic partner can unilaterally terminate the legal relationship with minimal involvement from the State.[5] The differences in the termination processes of the two statuses are further evidence that marriage and domestic partnerships are treated differently under the law and cannot, therefore, be regarded as substantially similar legal statuses.

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[5] In fact, the ability of a partner to unilaterally terminate a domestic partnership is further proof that a domestic partnership is not a contract at all because the required consideration is lacking. *See First Wisconsin Nat'l Bank v. Oby*, 52 Wis. 2d 1, 7, 188 N.W.2d 454 (1971) ("There is no consideration where "performance depends solely on [the party's] option or discretion, as where the promisor is free to perform or withdraw from the agreement at will.")

5. The two statuses have very different legal rights, benefits and responsibilities.

The circuit court correctly concluded that "[t]he state confers drastically different benefits, rights and responsibilities to domestic partners by virtue of the domestic partnership status in comparison to the benefits, rights and responsibilities given to spouses because of their marriage status." R.131:40. Once registered, domestic partners acquire 31 rights under state law in relation to third parties. Each of these rights was identified to the circuit court in the briefing below (R.68:28-31) and the circuit court listed most of them in its opinion. (R.131:40-48.) The court correctly noted that the vast majority of the rights provided to domestic partners are rights that the law also grants to parents, children, family members, and sometimes "close friends." (R.131:40.) The court also noted that some of the other rights granted to domestic partners also can be obtained by any two people without registering as domestic partners merely by executing certain documents. (Id.)

More importantly, however, based on its review of the law governing married couples, the circuit court correctly concluded that spouses are granted "countless additional rights, benefits, and responsibilities solely as the result of marriage." In its opinion, the circuit court presented a "non-exhaustive" list of 33 rights that married couples enjoy that are not provided to domestic partners. (R.131:49-51.) As a result, the circuit court concluded that "domestic partners have far fewer legal rights, duties and liabilities in comparison to the legal rights, duties, and liabilities of spouses" – a fact which the court noted bolstered its conclusion that "[t]he state does not recognize domestic partnership in a way that even remotely resembles how the state recognizes marriage." (R.131:52.) To underscore this point, the court noted that a Wisconsin domestic partnership is "not even close to similar to a Vermont-style civil union, which extends virtually all the benefits spouses receive to domestic partners." (Id.).

The Appling Parties do not dispute – because they cannot – that spouses receive far more legal rights than domestic partners. Instead, the Appling Parties take issue with the circuit court's "stick-counting" exercise. (Aplts' Brief, p. 23). According to Appellants, the number of rights is irrelevant. Instead, they argue that the two legal statuses are substantially similar because "the incidents appurtenant to domestic partners derive wholly from marriage." (Aplts' Brief, p. 25.) Because the law "bundles rights for domestic partners previously solely so bundled for marriage," they contend, the law "privileges" same-sex relationships in a manner that creates an "alternative" marital status. (Aplts' Brief, p. 28.)

The Appling Parties' argument is simply a retread of an argument that they made below, which was properly rejected by the circuit court – namely, that the Marriage Amendment prohibits the creation of *any* legal status for different-sex couples who are in an intimate relationship. (*See* Plaintiffs' Summary Judgment Brief, R.84:12 ("A

'substantially similar' status is one that can be seen as a form of marriage for same sex couples, i.e., for two persons in an intimate relationship in some sense mirroring that between a married man and woman.").) This argument is wrong for several reasons.

First, the Appling Parties' argument that a comparison of the bundle of rights associated with each status is not relevant to this Court's analysis is flatly contradicted by statements made by counsel during the voter ratification campaign. As noted earlier, in 2006, Professor Esenberg of the Marquette University Law School explained the plain meaning of the second sentence of the Marriage Amendment:

> The second sentence will not interfere with legal accommodations of legitimate interests. Think of marriage as a bundle of sticks. Each stick is a different right or incident of marriage. The second sentence only prohibits creation of a legal status which would convey virtually all of those sticks.

(R.66:Ex. 3, pp.40-41.) Professor Esenberg was correct when he stated that a comparison of the "bundle of sticks" was critical to the analysis of determining whether a legal status was prohibited by the Marriage Amendment. Indeed, the

notion of a "bundle of sticks" is embedded in the definition of a "legal status," which is the "sum total of a person's legal rights, duties [and] liabilities."

Second, contrary to the Appling Parties' assertion, the circuit court did not rest its interpretation of the plain meaning of the Marriage Amendment solely on the difference between the legal rights and obligations that attach to the two legal statuses – although that vast difference alone provides a sufficient reason to conclude that a Chapter 770 domestic partnership is not substantially similar to marriage. Rather, the court conducted a comprehensive analysis of *all* of the legal aspects that make the two statuses different, including the fundamental legal nature of the two statuses, the entry requirements of each status, and the legal procedures for entering and terminating each status. This analysis, in conjunction with the examination of the "bundle of sticks," conclusively proves that a Wisconsin domestic partnership is not substantially similar to marriage.

Third, the Appling Parties simply are wrong when they argue that all of the rights assigned to domestic partners "derive wholly from marriage." As the circuit court explained in great detail, most of the rights provided to domestic partners are rights that the law also grants to parents, children, family members and, in some instances, close friends. Thus, it is incorrect to say that these rights derive wholly from marriage.

Finally, the Appling Parties' argument that the Marriage Amendment prevents any and all "bundling" of rights for same-sex couples is inconsistent with the plain language of the second sentence of the Amendment. By prohibiting only a legal status that is "substantially similar" to marriage, the Marriage Amendment clearly implies that legal statuses that are not "substantially similar" to marriage are acceptable. Since a legal status is, by definition, a bundle of legal rights, benefits and responsibilities, the Marriage Amendment clearly permits a bundling of rights for same-sex couples, provided that it does not rise to the level of being

substantially similar to marriage. Indeed, as argued in Section V.B below, this is exactly what the Appling Parties told voters throughout the voter ratification campaign – namely, that the Marriage Amendment would not prohibit the legislature from providing a bundle of rights to same-sex couples and their families. Now, the Appling Parties are attempting to transform the narrow prohibition of the Marriage Amendment's second sentence into a wholesale ban on the State providing any benefits or protections, no matter how de minimus, to same-sex couples in committed relationships. Such an interpretation finds no basis in the plain meaning of the Amendment and should, therefore, be summarily rejected.

V. THE LEGISLATIVE DEBATES AND VOTER RATIFICATION CAMPAIGN REGARDING THE MARRIAGE AMENDMENT DEMONSTRATE THAT CHAPTER 770 IS CONSTITUTIONAL.

The second part of the required constitutional analysis is an examination of the history surrounding the passage of the Marriage Amendment – particularly the statements made

during the legislative debates and voter ratification campaign. This history also conclusively proves that Chapter 770 is constitutional.

A. The legislative proponents of the Marriage Amendment repeatedly told their colleagues that a legal status like that created by Chapter 770 would not be prohibited.

To ascertain the intent of the legislature in enacting the Marriage Amendment, the circuit court conducted a review of the debates about allowing same-sex couples to marry in other states that triggered some legislators to propose a constitutional amendment excluding same-sex couples from marriage in Wisconsin. (R.131:13-14.) The court then analyzed the Wisconsin legislative history surrounding the proposed amendment and made the following conclusion:

> A review of the drafting files indicates that the legislative proponents of the Marriage Amendment repeatedly told their colleagues and voters three messages: first, that the second sentence of the Amendment is only designed to prohibit something like a "Vermont-style" civil union that provides all of the rights and benefits of marriage; second, that the Amendment does not prohibit the state from creating a legal construct to provide benefits to same sex couples; and, third, that the Amendment does not prevent the legislature from packaging together a large bundle of rights for same-sex couples.

(R.131:17-18.)[6] In other words, the circuit court concluded that the legislative history demonstrated that the legislative proponents of the Marriage Amendment did not intend to prohibit the creation of the type of legal status created by Chapter 770.

There is ample, uncontroverted evidence in the record to support the court's conclusion, and the Appling Parties have not come anywhere near showing "beyond a reasonable doubt" that the court was wrong. For example, the authors and lead sponsors of the Amendment, Senator Scott Fitzgerald and Representative Mark Gundrum, assured their colleagues that the Amendment was not intended to prohibit domestic partnerships such as those created by Chapter 770. In his memo introducing the Amendment, Rep. Gundrum

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[6] In 1999, the Vermont Supreme Court held in *Baker v. Vermont* that the exclusion of same-sex couples from the benefits and protections incident to marriage violated the common benefits clause of Vermont's Constitution. 170 Vt. 194, 744 A.2d 864 (1999). In response, the Vermont Legislature created the status of civil unions which conferred to civil union partners "all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a civil marriage." Vt. Stat. Title 15 § 1204. Civil unions in which the parties received all of the rights and benefits of marriage under state law became known as "Vermont-style" civil unions.

explained what the proposed Amendment "**DOES NOT DO,**" (emphasis in original):

> [This proposal] 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.

(R.66:Ex. 8)(emphasis in original.)

Representative Gundrum and Senator Fitzgerald reiterated this message in a January 2004 press release:

> The proposed amendment, while preserving marriage as one man-one woman unions, would also preclude the creation of unions which are substantially similar to marriage. "Creating a technical 'marriage,' but just using a different name, to massage public opinion doesn't cut it," Gundrum said[.] "The institution of marriage goes deeper than just the eight letters used to describe it."
>
> Significantly though, the language does **not** prohibit the legislature, local governments or private businesses from extending particular benefits to same-sex partners as those legal entities might choose to do.

(R.66:Ex. 9.)

Representative Gundrum's memo also referred legislators to the January 28, 2004[7] "non-partisan Wisconsin Legislative Council Memo" from Don Dyke, Chief of Legal Services, for further details and clarification. In explaining what a legal status "substantially similar to that of marriage," would be, Attorney Dyke said:

> It may be reasonable to speculate that in interpreting the language, a court might determine the purpose of the provision is to prevent this state from sanctioning what is effectively a civil marriage between unmarried individuals where the arrangement is designated by some other name. Under this interpretation, a court might look to whether substantially all of the legal aspects of marriage are conferred, i.e., whether the legal status conferred is essentially intended to be the functional equivalent of marriage or something less than marriage that is not "substantially similar" to marriage.

(R.66:Ex. 10.)

This memorandum is an important part of the legislative history of the Marriage Amendment because the Legislative Council is responsible for research services for the legislature, including answering requests for research from its members. *State v. Cole*, 2003 WI 112, ¶36, n. 12. The Wisconsin Supreme Court has explained that Legislative

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[7] Presumably a typographical error, as the memo referred to is dated January 29, 2004.

Council analyses written at the time of drafting "provide[] the court with valuable information about the knowledge available to legislators. Further, the legal expertise of these agencies entitles their analysis to some consideration by this court." *Id.* Importantly, the memo was written at the request of one of the proposed Amendment's authors, who then referred other legislators to it for a better understanding of what the Amendment would and would not do.

On November 16, 2005, Senator Fitzgerald and Representative Gundrum sent a memo to "All Legislators" seeking co-sponsors for the proposed Amendment. (R.66:Ex. 11.) This memo reiterated that the Marriage Amendment prohibited only marriages entered into by same-sex couples and Vermont-style civil unions, i.e., "marriage by another name," but not legislation that would provide more limited benefits to same-sex couples.

Shortly thereafter, in December 2005, Senator Fitzgerald explained that a legislative package just like the

one created by Chapter 770 would not run afoul of the Amendment:

> [Lead Senate sponsor Scott] Fitzgerald said the proposed amendment's second sentence was necessary to clarify what kind of marriage would be recognized in Wisconsin. He said the amendment leaves open the possibility that the Legislature could someday define civil unions.
>
> "The second clause sets the parameters for civil unions," Fitzgerald said. "Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could."

(R.66:Ex. 12.)

Shortly after introduction of the proposal for second consideration, Legislative Council Chief Attorney Dyke, provided a second legal memorandum to Representative Mark Gundrum at the Representative's request, addressing concerns about the reach of the second sentence of the proposal. After reviewing the state and national developments surrounding same-sex marriage leading up to the introduction of the proposed Amendment, earlier statements of intent by legislative authors, and a detailed discussion of what "substantially similar" means as well as what marriage is

under Wisconsin law, Attorney Dyke advised Representative Gundrum that:

> While perhaps not dispositive on its own, the above contemporary expressions of intent, combined with the historical context and plain language of the proposed amendment, lend strong support to the conclusion that the intent of the Legislature with respect to the 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 that purports to be the same or nearly the same as marriage in Wisconsin.

(R.66:Ex. 14, p. 9.) After receiving this detailed and sophisticated legal opinion, Rep. Gundrum and Rep. Scott Suder, a co-author of the legislation, continued to state that the Marriage Amendment was designed to prevent "Vermont-style" civil unions but not the provision of benefits to same-sex couples through less extensive legislation. (R.66:Exs. 15-17.)

In summary, the evidence before the circuit court conclusively proved that the legislative proponents of the Marriage Amendment repeatedly told their colleagues and the public that the Amendment's second sentence prohibited only "Vermont-style" civil unions or other legal statuses that would provide virtually all of the legal rights associated with

marriage – which by no means describes Wisconsin's domestic partnership status. Thus, the legislative history supports the circuit court's decision to grant summary judgment to Fair Wisconsin.

B. Proponents of the Marriage Amendment – including plaintiff Julaine Appling – repeatedly told voters during the ratification campaign that a legal status like that created by Chapter 770 would not be prohibited.

The circuit court reached a similar conclusion about the voter ratification campaign. Based on a review of the extensive evidence of what was said to voters in the period leading up to the election, the court concluded:

> Based on a review of the public statements made to voters during the ratification campaign, it is clear that voters understood that the Marriage Amendment's second sentence prohibits the recognition of Vermont-style civil unions and similar government-conferred legal statuses for unmarried individuals that are identical or virtually identical to marriage. However, because they were consistently told that the provision would not impact benefits, voters understood that the Marriage Amendment does not prevent the state or legislature from creating a legal status to give some rights to same-sex couples. Voters also understood that the only legal status prohibited by the Marriage Amendment is a Vermont-style civil union or similar legal status that is identical or virtually identical to marriage.

(R.131:27.)

Although a review of all of the voluminous record evidence that supports the circuit court's conclusion is not possible in this brief, a representative sample of some of the statements made to voters illustrates the basis for the court's decision[8]. For example, five days before the election, Senator Fitzgerald again reassured voters that the Marriage Amendment was aimed only at same-sex marriage and Vermont-style civil unions and that a more limited legal status for same-sex couples, such as the one before the court now would be perfectly legal:

> The non-partisan Legislative Council has written that the proposed amendment does not ban civil unions, only a Vermont-style system that is simply marriage by another name. If the amendment is approved by the voters, which I expect it will be, the legislature will still be free to pass legislation creating civil unions if it so desires.

(R.66:Ex. 18.)

Julaine Appling, an appellant in this case and a leading proponent of the Marriage Amendment, repeatedly told voters that the Amendment's second sentence was aimed at

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[8] The complete record supporting the circuit court's decision, including argument and supporting exhibits, can be found in the summary judgment briefs of the Government Defendants and Fair Wisconsin (R.65, 88, 98 and 129) and the affidavits (with exhibits) submitted in conjunction with those briefs (R.66 and 89.)

Vermont-style civil unions, "marriage by another name," but not the kind of structure and benefits provided to same-sex couples through registration under Chapter 770. For instance, on December 13, 2005 she authored an op-ed in the Daily Cardinal, where she explained:

> The first phrase protects the word "marriage," while the second protects marriage from being undermined by "look-alike marriages," or marriage by another name, such as Vermont-style civil unions. Without the second phrase, the first one is meaningless and leaves the institution unprotected.
>
> Contrary to the message being consistently given by opponents of the amendment, the second phrase does not "ban civil unions." It does appropriately prohibit civil unions that are marriage by another name. However, it does not preclude the state legislature from considering some legal construct -- call it what you will -- that would give select benefits to cohabiting adults.

(R.66:Ex. 20).

Appling also told reporter Jason Shepard:

> The second sentence is the most important because it "protects the actual institution of marriage from look-alike relationships." This is to stop "Vermont-style" civil unions, which confer virtually all legal rights of marriage on gay couples.

(R.66:Ex. 21, p. 14.)

An organization with whom Ms. Appling was affiliated, the Wisconsin Coalition for Traditional Marriage, explained the purpose of the second sentence to voters:

> Q.8: What is the purpose of the second part?
>
> A: The purpose is to protect the people of Wisconsin from having a court impose "look-alike" or "Vermont-style" homosexual "marriage," which Vermont legalized as "civil unions." These civil unions are simply marriage by another name. They are a legally exact replica of marriage, but without the title. The second part to Wisconsin's marriage amendment protects citizens from having a court impose, against their will, this type of arrangement here, regardless of the name given to it.

(R.66:Ex. 22.)

The Family Research Institute of Wisconsin, another organization with whom Ms. Appling was affiliated, published the following in August 2006:

> [Q:] The first sentence of the amendment is pretty clear to me, but what about that second sentence? What does it mean and what will it do or not do? I've heard people say that part is extreme, harsh, and too far-reaching.
>
> [A:] The second part of Wisconsin's Marriage Protection Amendment is absolutely necessary in order to protect traditional marriage in Wisconsin. The two parts are a package deal: the first sentence clearly defines the word *marriage* and the second protects the institution itself from being undermined by "look-alike" marriages or marriages by another name.... If such relationships are "identical or substantially similar to" marriage as it is defined and

> proscribed in this state, then they would not be given legal recognition. Vermont-style civil unions, for instance, would not be valid here since Vermont's civil unions are exactly analogous to marriage....
>
> The second sentence doesn't even prevent the state legislature from taking up a bill that gives a limited number of benefits to people in sexual relationships outside of marriage, should the legislature want to do so. While The Family Research Institute of Wisconsin thinks this would be very ill advised, the Marriage Protection Amendment does nothing to prevent such consideration.

(R.66:Ex. 6, Q.4.)

These examples of statements made during the voter ratification campaign – as well as the other evidence about the campaign presented to the circuit court – conclusively show that voters were told repeatedly that the Marriage Amendment did not prevent the legislature from creating a legal status for same-sex couples and providing benefits to those couples through that status, as long as the created status did not provide virtually all of the rights and responsibilities of marriage. Since that is exactly what the legislature did in enacting Chapter 770, that legislation is constitutional and the decision of the circuit court should be affirmed.

C. The Appling Parties' argument regarding the history surrounding the legislative debates and voter ratification campaign is unpersuasive and contrary to the evidence.

In response to this overwhelming evidence regarding the legislative debates and voter ratification campaign, the Appling Parties make two unpersuasive arguments. First, they argue that the evidence relied on by the circuit court is "isolated" and "speculative." (Aplts' Brief, pp. 38-39.) Second, they argue that the circuit court should have found instead that the Marriage Amendment was adopted by Wisconsin voters to affirm a "conjugal model" of marriage, the purpose of which is to channel the "erotic and interpersonal impulses between men and women" into a legal status that reflects the belief that children do best when reared by their biological father and biological mother. (Aplts' Brief, pp. 44-49.) These arguments are neither persuasive nor supported by the evidence.

The Appling Parties' claim that the circuit court based its analysis of the legislative history and voter ratification campaign on "isolated" statements is belied by the sheer

number of statements in the circuit court opinion in which legislators and proponents of the amendment publicly stated that the Marriage Amendment would not preclude the legislature from providing a limited number of benefits to same-sex couples through the creation of a legal status. (R.131:17-27.)

Similarly, the Appling Parties' claim that the statements made by the Marriage Amendment's proponents are "speculative" because they "never addressed a marriage-mimicking scheme like Chapter 770" is contradicted by the content of the statements themselves. As discussed above, the evidence proved that the legislative proponents of the Marriage Amendment and other proponents, like Ms. Appling herself, repeatedly told voters that the Amendment did not prevent the legislature from creating a legal status that would provide same-sex couples with important benefits. In other words, to the extent that proponents of the Marriage Amendment were opining during the ratification campaign about the application of the Marriage Amendment to a

hypothetical situation, that hypothetical situation has now come to pass with the passage of Chapter 770. Thus, the evidence relied on by the court below relates directly to the situation before this Court and can hardly be considered "speculative."

What is speculative, however, is the Appling Parties' claim that, by enacting the Marriage Amendment, the voters embraced a so-called "conjugal model" of marriage that favors and privileges a particular form of child-rearing. The circuit court correctly concluded that "there is no evidence that voters ratified the Marriage Amendment with the intent to further a conjugal model of marriage." (R.131:52.)

Furthermore, the argument about the conjugal model of marriage is simply illogical. If one assumes for the sake of argument that voters enacted the Marriage Amendment because they believed that the purpose of marriage was to accommodate the potentially procreative nature of heterosexual relationships, it is entirely unclear why that would lead to a conclusion that Chapter 770 is

unconstitutional. There is no evidence at all that providing domestic partnership benefits to same-sex couples has any effect on society's ability to channel the procreative desires of heterosexual couples into the legal institution of marriage. The Appling Parties certainly did not provide any such evidence to the circuit court. Indeed, if the Appling Parties are correct that the primary function of marriage is to encourage "responsible procreation" for heterosexual couples, then that would be an additional reason why domestic partnerships are not substantially similar to marriage because domestic partnerships clearly do not have that function.

Finally, the Appling Parties also argue that statements allegedly made by Fair Wisconsin and other opponents of the Marriage Amendment indicate that voters were told that domestic partnerships would be unconstitutional. (Aplts' Brief, pp. 39-40.) The Appling Parties offer no legal authority for the proposition that the statements made by a constitutional amendment's opponents are even relevant to what a constitutional amendment means. Furthermore, none

of the statements upon which the Appling Parties rely actually espouse the view that the second sentence of the Marriage Amendment would legally prohibit a limited domestic partnership registry like that created by Chapter 770 – they simply warned voters that the Marriage Amendment's second sentence would invite legal challenges from anti-gay groups and could, therefore, threaten important benefits. Thus, the Appling Parties' argument should be rejected.

VI. CHAPTER 770 IS THE FIRST LEGISLATIVE ACTION RELATED TO THE MARRIAGE AMENDMENT AND THE LEGISLATURE ENACTED IT ONLY AFTER DETERMINING IT TO BE CONSTITUTIONAL.

The third source that the court must examine in construing a constitutional amendment is "the legislature's earliest interpretation" of the provision at issue, as manifested in "the first significant law passed" on the same topic. *Schilling v. State Crime Victims Bd.,* 2005 WI 17, ¶23, 278 Wis. 2d 216, 692 N.W.2d 623; *see also, State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984). 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 Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 45.

The biennial budget bill, 2009 Assembly Bill 75, which contained the provisions that created Chapter 770 domestic partnerships was the first action by the Wisconsin Legislature subsequent to the adoption of the Marriage Amendment that was related to a legal status for non-marital (and particularly same-sex) couples.

Chapter 770 starts with a "Declaration of Policy," expressing the Legislature's consideration of the constitutionality of the domestic partnership status and concluding that it does not run afoul of Article XIII, section 13 of the Wisconsin Constitution:

> The legislature finds that it is in the interests of the citizens of this state to establish and provide the parameters for a legal status of domestic partnership. The legislature further finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage. Nothing in this chapter shall be construed as inconsistent with or a violation of article XIII, section 13, of the Wisconsin Constitution.

Wis. Stat. § 770.001. The Legislature is a co-equal branch of the government of this state. It and its members, like the other two branches, have a duty and responsibility to protect, defend and interpret the Wisconsin Constitution. That is why duly enacted statutes carry a high presumption of constitutionality. Art. IV, § 28, Wis. Const.; *Dane County DHS v. Ponn P.,* 2005 WI 32, ¶ 16, 279 Wis. 2d 169, 694 N.W.2d 344.

The Declaration of Policy in Chapter 770 was not a pro-forma statement. It was based on a careful legal analysis performed by the Wisconsin Legislative Council. In response to questions about the proposed legislation, the Wisconsin Legislative Council's Chief of Legal Services engaged in a lengthy constitutional analysis based upon the framework most recently described in the *Dairyland* case and determined that the legal status of domestic partnership does not include the "core aspects of the legal status of marriage" such as the mutual obligation of support that spouses have in a marriage under Wis. Stat. §§ 765.001(2) and 766.55(2)(a); the

comprehensive property system that applies to spouses under the marital property law contained in Wis. Stat. ch. 766; and the requirements of divorce law contained in Wis. Stat. ch. 767, including the procedures for termination of marriage, division of property, support requirements, and a six-month prohibition against remarriage. He stated that

> it is reasonable to conclude that the domestic partnership proposed in Assembly Bill 75 does not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13.... Comprehensive, core aspects of the legal status of marriage in Wisconsin are not conferred on domestic partners by Assembly Bill 75.

(R.66:Ex. 30, pp. 7-8.)

Additionally, before he signed the bill creating domestic partnerships, Governor Jim Doyle requested that Professor David Schwartz from the faculty of the University of Wisconsin Law School provide a legal opinion to him specifically addressing the question of whether the domestic partnership provisions were compatible with the second sentence of the Marriage Amendment. (R.66:Ex. 32.) Professor Schwartz summarized his opinion as follows:

> Construed in accordance with the intent of the voters who adopted it, the intent of the legislature which drafted it, and the applicable principles of constitutional interpretation, Art. XIII, § 13 is intended to ban same-sex marriages and civil unions that exactly replicate the rights and obligations of marriage, but not civil unions or domestic partnerships that bear any significant difference from marriage.
>
> * * *
>
> This "any significant difference" test is met by [the domestic partnership provisions in 2009 Act 75]. . . . There are numerous . . . significant differences between marriage and the proposed Wisconsin domestic partnerships.

Id. at 1-2.

This evidence demonstrates that the legislature and the Governor understood that Chapter 770 does not violate the Marriage Amendment. More specifically, they understood that, by enacting Chapter 770, they were not creating a legal status substantially similar to marriage.

The Appling Parties argue, in essence, that the third prong of the constitutional analysis is irrelevant in this case because the first legislative enactment following the passage of the Marriage Amendment is Chapter 770 – the very act that is alleged to be unconstitutional. The Appling Parties further argue that the only relevant legislative enactment that would

shed light on the meaning of a constitutional amendment would be one that is contemporaneous with the amendment itself.

There are several problems with these arguments. First, the Appling Parties offer no legal authority for the proposition that only "contemporaneous" legislative actions are relevant to the constitutional analysis. Absent legal authority, this Court should decline to omit a part of the analysis that the Wisconsin Supreme Court has described as a "crucial component." *Dairyland*, 2006 WI 107, ¶ 45.

Second, the Appling Parties' arguments miss the point of the relevance of the third prong of the analysis in this particular case. As discussed above and noted by the circuit court, the third prong of the analysis here simply demonstrates that Chapter 770 was enacted only after careful consideration by the legislature of its constitutionality. Stated another way, the legislature did not act without any consideration of the constitutionality issue. Given the presumption of constitutionality of legislative actions as well

as the high burden of proof that must be met to prove a law unconstitutional, the third prong of the analysis in this case simply provides further relevant evidence that the Appling Parties failed to meet their burden.

Finally, even if this Court were to place little weight on the third prong of the constitutional analysis in this case, it should appropriately affirm the circuit court's decision because the first two prongs – the plain meaning and the history surrounding the passage of the amendment – each and together compel the conclusion that the Appling Parties have failed to prove beyond a reasonable doubt that Chapter 770 violates the Marriage Amendment.

CONCLUSION

For the foregoing reasons, the decision of the circuit court granting summary judgment in favor of Fair Wisconsin should be affirmed.

CROSS-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE

Did Plaintiffs/Cross-Respondents (the "Appling Parties") satisfy their obligation to establish that they had standing to bring this case when they failed to offer any evidence on summary judgment demonstrating: (1) that they are taxpayers and (2) that they have suffered a pecuniary loss?

Answered by the circuit court: Yes.

The circuit court incorrectly concluded from the summary judgment record submitted that the Appling Parties had standing to bring this case.

ARGUMENT

I. SUMMARY OF ARGUMENT

Because the Appling Parties offered no evidence demonstrating either that they are taxpayers or that they have suffered a pecuniary loss, they failed to prove that they have standing. Accordingly, this Court should affirm the circuit court's entry of summary judgment in favor of Fair Wisconsin on this alternative ground.

II. STANDING IS A THRESHOLD ISSUE THAT REQUIRES PROOF OF TAXPAYER STATUS AND PECUNIARY LOSS.

Standing is a mandatory threshold to bringing suit. *Thompson v. Kenosha County*, 64 Wis. 2d 673, 677, 221 N.W.2d 845 (1974). In this case, the Appling Parties seek a declaratory judgment. To have standing under the Declaratory Judgments Act, Wis. Stat. § 806.04, "the party must have a legal interest in the controversy, that is to say, a legally protectable interest." *Thompson*, 64 Wis. 2d at 678. The Appling Parties claim that they satisfy this requirement based on their status as taxpayers, alleging that "Chapter 770 requires the illegal and unconstitutional expenditure of public funds and extend illegal and unconstitutional exemptions from taxes." (R.2:¶10.)

To assert a claim based on taxpayer standing, plaintiffs must actually allege, ***and then prove***, that they are taxpayers. *See Tooley v. O'Connell*, 77 Wis. 2d 422, 439, 253 N.W.2d 335 (1977) (holding, on a motion to dismiss, that plaintiffs had standing because they asserted they were taxpayers); *see*

also J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 114 Wis. 2d 69, 84, 336 N.W.2d 679 (Ct. App. 1983) ("Wisconsin *taxpayers* have standing to contest the constitutionality of statutes which result in public expenditures.") (emphasis added). Federal and other state courts similarly recognize that taxpayer status is a ***material element*** that plaintiffs must prove to have taxpayer standing. *See, e.g., Freedom from Religion Found. v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988)(taxpayer status is a "threshold criteria"); *R.L. Bernardo & Sons, Inc. v. Duncan*, 147 So. 2d 542, 544 (Fla. Dist. Ct. App. 1963) (holding that chancellor erred in assuming that all citizens of the city were taxpayers without proof that plaintiff was actually a taxpayer); *Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293, 1298 (Haw. 1989) ("[P]laintiff must be a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made."); *Weimer v. Board of Education.*, 418 N.E.2d 368, 371 (N.Y. 1981) ("[T]axpayer status is a sine qua non."). Thus, to demonstrate that they have taxpayer standing, the Appling

Parties needed to *prove* that they are, in fact, taxpayers. They did not even try.

Plaintiffs who allege taxpayer standing also must prove that they have suffered "a direct and pecuniary loss." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988). It is this pecuniary loss that establishes the legally protectable interest required by the Declaratory Judgment Act.

Although Wisconsin law lacks clarity as to what type of pecuniary loss must be established, persuasive federal court precedent indicates that a plaintiff must prove that tax revenue is spent on the allegedly unconstitutional activity.[1] For example, in *Freedom from Religion Found., Inc. v. Zielke*, the appellants conceded that no tax money was spent to erect a monument of the Ten Commandments in a public park. 845 F.2d at 1470. Although the city spent public funds to purchase the land for the park, the court clarified that no

[1] Wisconsin courts look to federal case law as persuasive authority regarding standing questions. *Wisconsin's Environmental Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975) ("[R]ecent federal cases are certainly persuasive as to what [standing rules] should be.").

tax money had been spent on the allegedly unconstitutional monument. *Id.* As a result, the court ruled that the appellants did not have taxpayer standing. *Id.* *See also Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 408 (5th Cir. 1995) ("In order to establish ... taxpayer standing ... a plaintiff must not only show that he pays taxes to the relevant entity, he must also show that tax revenues are expended on the disputed practice."); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (explaining that the "necessary injury" for taxpayer standing is the "actual expenditure of tax dollars"). Thus, to establish that they have taxpayer standing, the Appling Parties were required to prove that the domestic partnership registry created by Chapter 770 results in the expenditure of tax revenue. They did not.

III. THE APPLING PARTIES LACK STANDING BECAUSE THEY FAILED TO PROVE THAT THEY ARE TAXPAYERS.

The Appling Parties failed to prove that they are, in fact, taxpayers. In its ruling, the circuit court based its determination that the Appling Parties were "adult residents

and taxpayers of the State of Wisconsin" solely on the allegations in plaintiffs' complaint. (R.131:2, *citing* Compl. ¶¶ 3-4.) This was error. Under Wisconsin law, a party may not rely on allegations or denials in pleadings on a motion for summary judgment. *See Krezinski v. Hay*, 77 Wis. 2d 569, 572, 253 N.W.2d 522, (1977) ("The allegations of the pleadings, however, may not be considered as evidence or other proof on a disposition of a motion for summary judgment."); *see also* Wis. Stat. § 802.08. Rather, a party must submit affidavits or other proof which would be admissible in evidence. Wis. Stat. § 802.08.

The Appling Parties did not offer any proof that they are taxpayers. They simply made that assertion in their Complaint – an allegation that Fair Wisconsin did not admit in its answer. (R.6.) Furthermore, Fair Wisconsin raised this point in its summary judgment briefing, arguing that the Appling Parties had failed to provide any admissible evidence to prove this essential element of their claim. *See* (R.98:3.) ("Plaintiffs have provided no evidence that they are even

taxpayers, so they cannot assert taxpayer standing.") and (R.129:3.) ("Despite having been given the opportunity to do so, Plaintiffs have still failed to provide admissible evidence that they are taxpayers....."). Thus, based on the record before it, the circuit court had no option; it should have concluded that the Appling Parties had failed to prove that they are taxpayers and, as a result, that they lacked standing to pursue their claims.

IV. THE APPLING PARTIES ALSO LACK STANDING BECAUSE THEY FAILED TO PROVE THAT THEY HAVE SUFFERED ANY PECUNIARY LOSS.

The circuit court also reached an incorrect conclusion with respect to the Appling Parties' alleged pecuniary loss. As the circuit court noted, the Appling Parties argued that they suffered a pecuniary loss because "public funds" have been expended to create and implement the domestic partnership registry created by Chapter 770. (R.131:6.) Yet, the Appling Parties failed to submit any admissible evidence to support this contention. In contrast, the Government Defendants submitted the affidavit of Andrew Forsaith, the

Budget Director for the Wisconsin Department of Health Services[2]. In his affidavit, Mr. Forsaith stated that only program revenue funds – i.e., funds collected for services such as licensing, fees, certifications and registrations – are used to fund the domestic partnership registry. (R.68:3, ¶10.) Mr. Forsaith further stated that program revenue is ***not*** tax revenue. *Id.* The Appling Parties submitted no evidence to counter Mr. Forsaith's affidavit.

Despite this uncontroverted evidence, the circuit court incorrectly concluded that the Appling Parties had standing because the program revenues referenced in Mr. Forsaith's affidavit are "public money" and Mr. Forsaith did not say that the domestic partnership registry was funded *solely* from program revenue derived from the registry itself. (R.131:8.)

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[2] When it filed its motion for summary judgment on March 8, 2011, Fair Wisconsin joined in the motion for summary judgment filed by the Government Defendants and incorporated by reference the arguments presented in the Government Defendants' brief. (R.87 and 88.) After the Government Defendants changed their position, the circuit court explicitly acknowledged that the substance of the Government Defendants' summary judgment motion had been incorporated by reference in Fair Wisconsin's summary judgment motion. (R.133.)

This conclusion by the circuit court was incorrect for several reasons. First, as discussed in Section II above, to have standing, a taxpayer must show that the statute alleged to be unconstitutional results in the expenditure of tax revenue, not simply "public funds." The Forsaith affidavit conclusively states that the domestic partnership registry is *not* funded by tax dollars. Thus, his testimony – the only competent evidence in the record addressing the subject – cannot establish the pecuniary loss that the Appling Parties were required to prove.

Second, even if the expenditure of general "public funds" were sufficient to establish pecuniary loss, the circuit court's reliance on Mr. Forsaith's failure to expressly state that the monies expended pursuant to the domestic partnership registry are those derived *only* from the registry's own program revenue was misplaced. The absence of a statement by Mr. Forsaith in this regard does not prove that revenue from other programs funds the domestic partnership registry. At best, it leaves the question open. The Appling

Parties, on whom the burden of proof and persuasion rested, had ample opportunity to provide evidence that the registry is funded by something other than its own program revenue. They failed to do so. Thus, they failed to prove an essential element of their case: that they have suffered a pecuniary loss. Therefore, the circuit court should have held that they lacked standing.

CONCLUSION

The Appling Parties failed to offer any evidence proving that they are taxpayers or that they have suffered a pecuniary loss. Therefore, they failed to prove that they have standing to pursue their claims. This failure to prove the elements of standing provides an alternative and independent reason to affirm the circuit court's decision to grant summary judgment to Fair Wisconsin.

The decision of the circuit court granting Fair Wisconsin's motion for summary judgment accordingly should be affirmed.

Dated: October 31, 2011.

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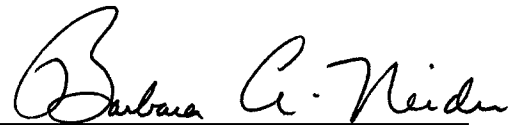
FORM AND LENGTH OF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief produced with a proportional serif font.

The length of the Respondent portion of this brief is 10,669 words.

The length of the Cross-Appellant portion of this brief is 1,692 words.

Dated: October 31, 2011.



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CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that: I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

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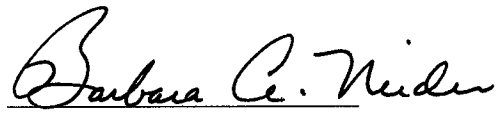

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CERTIFICATION REGARDING CONTENT OF APPENDIX

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 section 809.19(2)(a) and that contains, are a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under section 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 initial instead of full names of persons, specifically including

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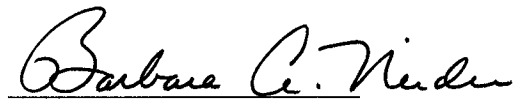

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CERTIFICATION REGARDING ELECTRONIC APPENDIX

I hereby certify that the content of the electronic copy of the Appendix to Combined Brief of Intervening Defendants-Respondents-Cross-Appellants is identical to the content of the paper copy of the appendix.

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CERTIFICATION OF FILING AND SERVICE

I hereby certify that the original and 10 copies of the attached brief and appendix were hand-delivered to the Clerk of the Court of Appeals on October 31, 2011.

I further certify that, on October 31, 2011, three copies of the attached brief and appendix were served via first class mail, postage prepaid, upon the persons listed below:

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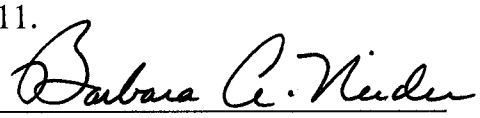

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