COURT OF APPEALS OF WISCONSIN
DISTRICT IV

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

Plaintiffs-Appellants-Cross-Respondents,

vs.

Appeal No.
2011 AP 1572

JAMES E. DOYLE, KAREN TIMBERLAKE, and JOHN KIESOW,

Defendants-Respondents,

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

Intervening Defendants-Respondents-Cross-Appellants.

Appeal From The Circuit Court Of Dane County
Honorable Daniel R. Moser Presiding

BRIEF OF *AMICI CURIAE* IN OPPOSITION TO BRIEF OF PLAINTIFFS-APPELLANTS-CROSS RESPONDENTS

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INTRODUCTION

Amici are five lesbian couples registered as domestic partners in Wisconsin ("the Couples"), the American Civil Liberties Union, and the ACLU of Wisconsin, Inc. As registered domestic partners and organizations dedicated to protecting civil liberties, *Amici* share the interest of Intervening Defendants-Respondents-Cross-Appellants (collectively "Fair Wisconsin") in seeing Ch. 770 upheld.

Amici support the arguments of Fair Wisconsin, and supplement those arguments with two additional arguments. First, Wisconsin domestic partnerships are very different from "Vermont-style" civil unions, and voters only intended to outlaw the latter when voting for the Marriage Amendment. Moreover, the public and private domestic partnership benefits available in 2006 were relationship-based like those in Ch. 770, and voters expected that such arrangements would be permissible under the Marriage Amendment. Second, under the "clean hands" doctrine, Plaintiffs-Appellants-Cross-Respondents' ("the Appling Parties") attempts to mislead the public should bar them from obtaining equitable relief.

Amici request that the circuit court's decision be affirmed.

ARGUMENT

I. IN PASSING THE MARRIAGE AMENDMENT, THE VOTERS OF WISCONSIN DID NOT INTEND TO OUTLAW LIMITED DOMESTIC PARTNERSHIPS SUCH AS THOSE CREATED BY CHAPTER 770.

For almost a year prior to the November 2006 amendment referendum, proponents of the Marriage Amendment argued to voters that the Amendment would not impact existing domestic partnership benefits or prohibit the adoption of such benefits in the future. Now, having become "victims" of their own success in selling this narrative to the public, the Appling Parties argue that the voters disregarded their message in favor of a contrary view. Their argument is both logically and legally deficient.

The Appling Parties admit that "the views of an amendment's proponents are usually privileged over those of its opponents." (Appling Br. 33 n.31.) And some of the Marriage Amendment's staunchest supporters were Julaine Appling, her political organization, and the legislative sponsors of the Amendment. Throughout the amendment campaign, these supporters maintained that domestic partnership benefits were not in danger.

As the defendants have explained, Julaine Appling made numerous public statements during the ratification campaign that were meant to convince voters that same-sex benefits would be safe under the Marriage Amendment. (*See* R. 65, Br. in Supp. of Defs.' Mot. for Summary Judgment 55-57.) Similarly, the

Amendment's champions in the legislature worked hard during the ratification campaign to assure the public that limited domestic partnerships like those eventually created by Ch. 770 would be legal if the Amendment passed. As the circuit court explained in detail,[1] Senator Scott Fitzgerald and Representatives Scott Suder and Mark Gundrum each confirmed that the second sentence of the Amendment was meant to prevent "Vermont-style civil unions" and their equivalents, not limited domestic partnerships. (*See* R. 131, Decision and Order 21-25, June 20, 2011.)

The distinction drawn by amendment proponents during the campaign is important. Civil unions such as those permitted in Vermont at the time of the ratification campaign[2] and in Illinois today are unlike the limited domestic partnerships permitted under Ch. 770. Civil unions are similar to marriage, providing legal benefits, protections, and responsibilities that are coterminous with

[1] The circuit court found 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." (See R. 131, Decision and Order 22, June 20, 2011.)

[2] Same-sex marriage became legal in Vermont on September 1, 2009. At the time of the ratification campaign, however, only civil unions were permitted for same-sex couples.

those conveyed in marriage.[3] Wisconsin's domestic partnership law, in contrast, is much more limited in scope and effect, and provides only a fraction of the benefits that married couples enjoy. The amendment proponents publicly distinguished "Vermont-style" civil unions and their equivalents from constructs like Ch. 770, telling voters that the former would be outlawed under the Amendment while the latter would be permitted. The passage of the Amendment is evidence that voters took the proponents' messages to heart, and thus evidence that voters did not intend to ban limited domestic partnerships.

In addition, the proponents also repeatedly declared that domestic partnership benefits then in existence would not be altered by the Amendment. For example, Julaine Appling told the Wisconsin State Journal that "[t]his amendment isn't going to change benefit structures that exist."[4] Similarly, Rep. Gundrum wrote a letter to the editor of the Milwaukee Journal-Sentinel in which he stated that "[a]s an attorney and chairman of the Assembly Judiciary Committee, I can confidently say that not one privilege or

[3] *See* Vt. Stat. Ann., tit. 15, § 1204(a) (1999); 750 Ill. Comp. Stat. 75/5 (2011).

[4] R. 66, Aff. of Counsel Ex. 24, Ryan J. Foley, Labor unions to fight gay marriage amendment, Wisconsin State Journal August 1, 2006.

benefit that now exists for heterosexual or homosexual couples will be prohibited by this amendment."[5] Statements such as these undermine the Appling Parties' voter intent argument because the benefit structures in existence at the time of the ratification campaign shared many essential features of the system created by Ch. 770.

At the time of the ratification campaign, numerous public and private organizations offered domestic partner benefits. Many of these organizations established prerequisites to the receipt of domestic partner benefits that mirrored the requirements now found in Ch. 770. In particular, many organizations required that couples be in an exclusive relationship, that they not be related by blood, and that they live in the same household.

For example, City of Milwaukee Ordinance Ch. 111, enacted in 1999, created a domestic partner registry that permitted same-sex couples to register their partnerships with the City Clerk upon filing a declaration that they: "Are not married … Are not related by kinship to a degree that would bar marriage in this state … Reside together in the City of Milwaukee … Have not been in a registered domestic partnership with another individual during the

[5] R. 66, Aff. of Counsel Ex. 28, Rep. Mark Gundrum, Opponents Resort to Deception, Fear, Milwaukee Journal-Sentinel August 6, 2006.

12 months immediately prior to the application date." (R. 119, First Aff. of Vintee Sawhney ¶ 2; Exhibit 2.[6]) Thus, the City of Milwaukee's domestic partnership program, with which many voters would have been familiar, had consanguinity, shared residence and exclusivity requirements.

Similarly, the Middleton-Cross Plains School District provided health insurance benefits to the domestic partners of their employees prior to the referendum on the amendment. The district offered health coverage through three insurance companies, all of whom defined "domestic partner" to require exclusivity, non-consanguinity and cohabitation. For example, Group Health Cooperative defined domestic partners as "two (2) individuals of the same-sex or opposite sex who . . . [n]either are legally married to, nor the domestic partner of, any other person under statutory or Common law . . . [a]re not related by marriage . . . [a]re not related by blood to a degree of closeness that would prohibit marriage in the state of Wisconsin . . . [s]hare a permanent residence, and have done so for at least one year, prior to coverage." (R. 119, First Sawhney

[6] City of Milwaukee Ordinance § 111-3-10, enacted in 2001, created a similar registry for city employees and their domestic partners, which became the basis for providing employment benefits to domestic partners. That ordinance, attached as Exhibit 6 (R. 119, First Sawhney Aff. ¶ 2), used a nearly identical definition of domestic partner, except that the partner need not be of the same sex.

Aff. ¶ 5; Exhibit 9) The domestic partner criteria used by the Sun Prairie School District, (R. 120, Second Aff. of Vintee Sawhney ¶ 2; Exhibit 11), and the LaCrosse School District in 2006 prior to the passage of the amendment had similar criteria of exclusivity, non-consanguinity and cohabitation.

By making exclusivity, non-consanguinity, and cohabitation requirements for recognition, Chapter 770 creates a legal status that mirrors what many voters already understood to be domestic partnership. And because the proponents ensured that the voters knew that existing benefits structures would not change, it could not have been the intent of the voters in passing the amendment to prohibit the type of domestic partnership established by Ch. 770.

II. THE APPLING PARTIES' ATTEMPTS TO MISLEAD VOTERS DURING THE AMENDMENT CAMPAIGN SHOULD BAR THEM FROM OBTAINING EQUITABLE RELIEF UNDER THE CLEAN HANDS DOCTRINE.

Julaine Appling spent much of 2006 telling voters that the very type of law that she now argues is unconstitutional would be perfectly acceptable if the Marriage Amendment was ratified. Her duplicity and that of her fellow appellants (who adhered to the same

message as members of Appling's "Wisconsin Family Council"[7]) should prevent them from obtaining any relief in this action.

Under the equitable doctrine of "clean hands," a party may not seek equitable relief from a harm that has resulted from that party's own wrongful conduct. As discussed at p. 3, *supra*, Appling emphatically assured the citizens of Wisconsin, in order to secure their vote for the Marriage Amendment, that the Amendment would not affect the ability of couples to receive domestic partnership benefits or of the state to enact legislation providing such benefits. Then, when the state enacted the type of domestic partner law Appling promised would not violate the amendment, she and the other Plaintiffs promptly filed suit claiming such a violation. The Appling Parties' claim was properly denied because Ch. 770 does not, as they now claim, create a relationship that is substantially similar to marriage. But their attempt to perpetrate a fraud upon the public by reversing course from their unequivocal (and accurate) statements during the ratification campaign, offers another basis upon which the circuit court could have dismissed the Appling Parties' Complaint. If they are correct now that Ch. 770 violates the marriage amendment – and they are not – then their false assertions

[7] Appellants are all board members of Wisconsin Family Action, Inc., of which Wisconsin Family Council is part. (R. 2, Complaint, ¶¶ 3-4)

to the contrary during the amendment campaign should bar them from seeking relief in equity – an injunction.[8]

Wisconsin courts have long recognized the equitable principle that a plaintiff who asks for affirmative relief must have "clean hands" before the court will entertain his plea. *Timm v. Portage County Drainage Dist.*, 145 Wis. 2d 743, 753 (Ct. App. 1988) (quoting *Huntzicker v. Crocker*, 135 Wis. 38, 41-42 (1908)). The *Huntzicker* court explained the principle:

> [H]e who has been guilty of substantial misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction shall not be afforded relief when he comes into court.

[8] Legal commentators have raised a number of critiques of initiative campaigns, *See, e.g.*, Phillip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 Ann. Sur. Am L. 477, 482-94 (1996) (summarizing critiques of two of the leading scholars, Julian Eule and Jane Schachter). The clean hands doctrine provides a response to one structural problem of ballot initiatives – "the lack of formal structural mechanisms for binding the initiative proponents to what they say." Glen Staszewski, *The Bait-And-Switch in Direct Democracy*, 2006 Wis. L. Rev. 17, 37. Unless this Court holds ballot proponents to their commitment that limited domestic partner benefits are safe through its interpretation of the Marriage Amendment or the Court refuses to grant Plaintiffs equitable relief because of their unclean hands, Plaintiffs will continue to benefit from their efforts to mislead voters. *See id.* at 37 ("In the absence of some tangible basis for discouraging this type of behavior, the initiative proponents (and their allies) have structural incentives to change their position on potentially contentious interpretive issues – to 'flip-flop,' so to speak – once an election has occurred.").

Id. So long as the equitable relief Plaintiffs are seeking is based on the fruit of their own wrongful course of conduct, the court should deny plaintiff relief in equity under the clean hands doctrine. *Cf. S & M Rotogravure Service, Inc. v. Baer*, 77 Wis. 2d 454, 467 (1977).

A party's wrongful conduct need not be directed towards its opponent in litigation for the party to be barred from relief under the clean hands doctrine. *See Lebedinsky v. Akhmedov*, 321 Wis. 2d 748 (table) (Ct. App. Sept. 29, 2009)) (Court refused to order return of property title to plaintiff who had transferred title to friend to keep it out of the marital estate during plaintiff's divorce, and then sued friend to recover title).

Where, as here, the public that the victim of Plaintiff's malfeasance, the clean hands doctrine applies with even greater force. *See* 30A C.J.S. Equity § 116 (2011) (citing *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945)). In *Precision Instrument,* the plaintiff brought suit to enforce two patents, one of which it acquired despite knowledge that the original applicant had committed perjury when testifying about the origin of the patent. The clean hands doctrine is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior

of the defendant." *Id.* at 814. "[W]hile equity does not demand that its suitors shall have led blameless lives as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." *Id.* at 814-15. The Court also made special note of the importance of the clean hands doctrine where public deceit is involved:

> [W]here a suit in equity concerns the public interest as well as the private interests of litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance.

Id. at 815 (citing *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492-94 (1942)). "The possession and assertion of patent rights are issues of great moment to the public," giving it "a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct." *Id.* at 816. Because of the plaintiff's knowledge of perjury related to the patent application, plaintiff's unclean hands barred it from seeking to enforce the patent. *Id.* at 819-20. *See also Intamin, Ltd. v. Magnetar Technologies Corp.*, 623 F. Supp. 2d 1055, 1072-78 (C.D. Cal. 2009) (recovery for patent infringement denied because of harm to the public interest by

patent holder's fraudulent assignments filed with the Patent and Trademark Office).

Courts have applied the clean hands doctrine in numerous other contexts where public interests are implicated. For example, in *In re Casa Nova of Lansing, Inc.*, 146 B.R. 370 (Bankr. W.D. Mich. 1992), the court *sua sponte* disallowed the cross-plaintiffs' claims for fraud under the clean hands doctrine, because a tax evasion scheme and perjury were central to the claim. *Id.* at 381. "[T]he interests protected by the clean hands doctrine are wide ranging, but the essence of the inquiry in each case is whether the public is the victim of the inequitable conduct rather than one of the parties," and "perjury to the detriment of the public was an underlying assumption of the parties throughout this transaction." *Id.* at 380-81. *See also Packers Trading Co v. Commodities Futures Trading Comm'n*, 972 F.2d 144, 150 (7th Cir. 1992) (reparations denied brokerage firm because owner's dishonest conduct "affects the operation and integrity of the commodities exchange in which the public has substantial interest."); *International Union, Allied Indus. Workers of America, AFL-CIO v. Local Union No. 589, Allied Industrial Workers of America, AFL-CIO*, 693 F.2d 666 (7th Cir. 1982) (International union's bad faith in appointing father-in-law of employer's assistant manager as regional representative and

administrator over local union barred most of its claims for relief from local affiliate); *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961) (parties' agreement to conceal signing of professional football contract to circumvent NCAA eligibility rule against post-season play barred enforcement of contract). As the Fifth Circuit explained in *New York Football Giants*, "[w]e think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity with a pleas that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout." 291 F.2d at 474.

By saying that domestic partnership benefits would be permissible to induce the public to support the Amendment, then arguing the opposite in court, Plaintiffs have perpetrated a deceit upon both the public and the Court.[9] Plaintiffs should not be permitted to seek equitable relief here, because Plaintiffs engaged in wrongful conduct that led to the passage of the Amendment that

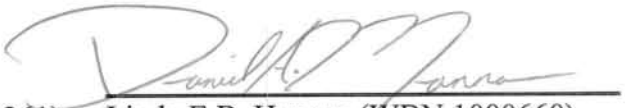
[9] The Appling Parties may incorrectly argue that opponents of the amendment misled the public, but the doctrine of clean hands closes the doors of equity to misbehaving plaintiffs "however improper may have been the behavior of the defendant." *Precision Instrument*, 324 U.S. at 814. The conduct of any opponents of the marriage amendment is irrelevant as concerns the question of whether Plaintiffs should be barred from seeking equitable relief under the clean hands doctrine.

provides the basis for their claimed "relief" – invalidation of domestic partnerships. Application of the doctrine of clean hands to bar Plaintiffs' claims both prevents the wrongdoers from enjoying the fruits of their transgressions and prevents injury to the public. *See Precision Instrument*, 324 U.S. at 815.

CONCLUSION

The voters of Wisconsin ratified the Marriage Amendment with the understanding that it would not affect the state's ability to recognize limited domestic partnerships. The circuit court's decision should be affirmed.

Dated: November 30, 2011.



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

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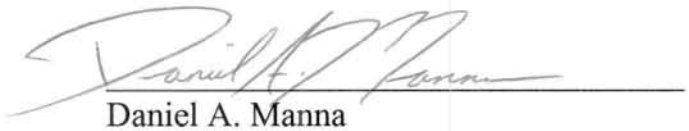

Daniel A. Manna

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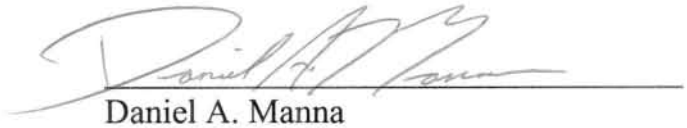

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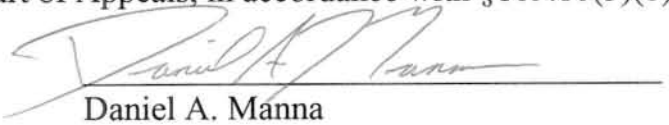
AFFIDAVIT OF MAILING

I, Daniel Manna, being first duly sworn, state that on November 30, 2011, I filed a copy of Brief of *Amici Curiae* in Opposition to Brief of Plaintiffs-Appellants-Cross Respondents by delivering a copy to Federal Express for overnight delivery to the Wisconsin Court of Appeals, in accordance with §809.80(3)(b).



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