STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT IV
Case No. 2011 AP001572

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

Plaintiff-Appellants,

v.

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.

ON APPEAL FROM
THE CIRCUIT COURT FOR DANE COUNTY,
THE HONORABLE DANIEL R. MOSER, PRESIDING
DANE COUNTY CASE NO. 10-CV-4434

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Michael D. Dean
FIRST FREEDOMS FOUNDATION, INC.
17035 W. Wisconsin Avenue
Suite 100
PO Box 2545
Brookfield, WI 53008
(262) 798-8044; (262) 798-8045

Richard Esenberg
ATTORNEY AT LAW
13839 N. Lake Shore Drive
Mequon, WI 53097
(414) 288-6908

Austin R. Nimocks*
ALLIANCE DEFENSE FUND
801 G Street, NW, Suite 509
Washington, D.C. 20001
(202) 393-8690; (480) 444-0028

Brian W. Raum*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028

*Admitted *pro hac vice*

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Introduction

Before the enactment of Chapter 770, marriage existed alone as a truly unparalleled legal status. The structure and nature of marriage was so unique that no other legal status resembled it.

But when the legislature passed Chapter 770, and created a legal status for unmarried persons, it acted unconstitutionally by mimicking Wisconsin's marriage laws and requiring the same basic legal elements to create the domestic partnership legal status, to wit: a consensual exclusive union between two parties of specified sexes who are of age and are not closely related to each other.

The result is legally simple—the two legal statuses, marriage and domestic partnership, are substantially similar, not just in how they compare with each other, but also in how strikingly different they are from any other legal relationship in Wisconsin law.

Defending Chapter 770, the Fair Wisconsin Appellees ("Fair Wisconsin")[1] ignore case law, as well as the plain meaning

[1] Fair Wisconsin is defending Chapter 770 because both the Attorney General and the Governor see the law as unconstitutional and refuse to defend it.

of words, and attempt to do what the trial court did—re-write art. XIII, § 13 of the Wisconsin Constitution, and propose that the phrase "substantially similar" somehow means "close to identical in every detail." And while focusing on non-substantive minutia, Fair Wisconsin does nothing more than demonstrate what is both already understood and irrelevant—that marriage and Chapter 770 are not identical.

I. The plain meaning of the Marriage Amendment clearly shows that Chapter 770 is unconstitutional.

A. By law and plain meaning, "substantially similar" does not mean "virtually identical in every respect."

Following the lead of the circuit court, which re-wrote "substantially similar" to mean "virtually identical," Fair Wisconsin argues that this Court should use the phrase "close to identical." Clearly, the lynchpin of Fair Wisconsin's entire argument is to re-author the Marriage Amendment to include the word "identical." But neither the legislature nor the voters contemplated "identical" in its enactment.

Fair Wisconsin's only support for its interpretation is an Attorney General's opinion and a case that merely employs the phrase "substantially similar" once in passing, with no attempt to

define it. The Attorney General's opinion is not precedent and is "only entitled to such persuasive effect as the court deems the opinion warrants." *De La Trinidad v. Capitol Indem. Corp.*, 2009 WI ¶ 16, 315 Wis.2d 324, 336, 759 N.W.2d 586, 592.

But more important than the attorney general's opinion is that of the supreme court. *See State v. Hamilton*, 146 Wis. 2d 426, 433, 432 N.W.2d 108, 112 (1988) ("similar" simply means having a "resemblance."); BLACK'S LAW DICTIONARY 1416 (8th ed. 2004). Adding "substantially" merely amplifies the term to "strong resemblance."

For example, in construing the term "substantially probable," the supreme court recognized that "probable" means "more likely than not," and thus that "substantially probable" simply means "much more likely than not." *In re Commitment of Curiel*, 1999 WI ¶¶ 29-30, 227 Wis. 2d 389, 405-06, 597 N.W.2d 697, 704. The supreme court rejected the argument that "substantially probable" means "extreme likelihood."

Fair Wisconsin's attempts to transform "similar" to "identical" fall within the guidance of *Curiel*. While there may be reasonable alternate ways to express "substantially similar," re-writing "similar" to "identical" completely transforms the

substantive meaning of the amendment and should be rejected. The proper analysis is how the status of domestic partnership compares to the status of marriage regarding the "essential and material elements on which the marriage relation rests." *Varney v. Varney*, 52 Wis. 120, 8 N.W. 739, 741 (1881). As to those essential and material elements, they are substantially similar.

Moreover, read properly, the opinion of the attorney general actually supports Plaintiffs. The phrase "virtually identical" does not mean "identical." The modifier "virtually" means almost or close, *see*, *e.g.*, THE NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 1100 (Int'l ed. 1989), meaning that something "virtually identical" is not "identical." The attorney general opined that "substantially similar" means that something is merely "closer to virtual identity." Thus, "substantially similar" is not "identical," nor is it "virtually identical," but merely closer to "virtual identity" than a mere resemblance. With "substantially similar" meaning more than a mere resemblance, but multiple degrees removed from being "identical," and not even "virtually identical," then both the trial court and Fair Wisconsin's attempts to re-write the constitution with the word "identical" are inappropriate.

B. A "legal status" substantially similar to "that of marriage" is one that, like Chapter 770, mimics the elements of marital status.

There are a handful of elements that are essential to a valid marriage, including mutual consent, sex specific participants, exclusivity, age, and consanguinity.[2] Fair Wisconsin attempts to dismiss these as "entry requirements," but they are precisely what define the "legal status" of marriage.

But for the fulfillment of these requirements, there is no legal status of marriage. For example, if an incestuous or bigamous marriage is solemnized, the parties' relationship may be declared void. *See*, *e.g.*, *Lanham v. Lanham*, 136 Wis. 360, 117 N.W. 787, 788 (1908).

Identifying the substantial similarity between marital status and the legal status conferred by Chapter 770 is straightforward. Chapter 770 appropriates *every* uniquely-marital element and makes them essential for domestic partnership status. Wis. Stat. § 770.05. Just like marriage, if

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[2] *See, e.g.,* Wis. Stat. § 765.21; *Lyannes v. Lyannes*, 171 Wis. 381, 177 N.W. 683, 686 (1920) (identifying incestuous and bigamous marriages as invalid); *Swenson v. Swenson*, 179 Wis. 536, 192 N.W. 70, 72 (1923) (violation of age requirement makes marriage voidable); *Singer v. Hara*, 522 P.2d 1187, 1191 (1974) (marriage "as a legal relationship, may exist only between one man and one woman").

any of the criteria are unfulfilled, the legal status of domestic partnership is not conferred.

In an attempt to avoid this remarkable congruence, Fair Wisconsin contends that the same-sex nature of domestic partnerships is a relevant distinction. It is not. Same-sex legal statuses are within the meaning of the Amendment. *McConkey v. Van Hollen*, 2010 WI ¶ 58, 326 Wis. 2d 1, 31, 783 N.W.2d 855, 870.

Most of Fair Wisconsin's other arguments involve the search for any possible distinction to support its preferred standard of "close to identical in every detail." But this Court's focus is on whether the status of Chapter 770, as a whole, is *substantially similar* in the elements to that of marriage. Fair Wisconsin's attempt to get this Court to focus on differences in the minutia of elements of the two statuses subverts the legal question pending before this Court.

For instance, marital status offers a narrow and rarely-applicable exception to its consanguinity requirement that does not exist in Chapter 770. But in a "substantially similar" review, this exception is meaningless, as both statuses possess a foundational (and virtually identical) consanguinity requirement.

Similarly irrelevant is Fair Wisconsin's argument that parties to a marriage must wait six months after divorce to remarry, while domestic partners must wait three months.[3] Both statuses have a multi-month waiting period, adding to their substantial similarity.

Finally, Fair Wisconsin erroneously focuses upon Chapter 770's cohabitation requirement, as if the requirement of interdependence and mutual support is somehow exclusive to domestic partnerships. But to be married, prospective spouses must have their relationship solemnized, pledging their interdependence and mutual support while taking each other as husband and wife, Wis. Stat. § 765.16, and cohabiting. *Becker v. Becker*, 153 Wis. 226, 140 N.W. 1082, 1082-84 (1913).

Even if the interdependence (cohabitation) requirement was unique to Chapter 770, the existence of that element cannot change the basic identity of a domestic partnership as a marital mimic, for "a plagiarist can never excuse his wrong by showing how much he did not plagiarize." *Nat'l Comic Publ'n v. Fawcett Publ'n*, 191 F.2d 594 (2d Cir. 1951) (L. Hand, J.). This is particularly true where, as here, the interdependence element of

[3] *Compare* Wis. Stat. §§ 765.03(2) with 770.12(4)(a).

Chapter 770 mirrors the marital reality that spouses are interdependent and live together.

Placing the legal statuses of marriage and domestic partnership side-by-side clearly shows their substantial similarity.

COMPARISON OF WISCONSIN LEGAL RELATIONSHIPS

	Marriage	Domestic Partnership		
Limit of Two Persons?	Yes § 765.01	Yes § 770.05		
Parties of Specific Sexes?	Yes § 765.01	Yes § 770.05(5)		
Contract of Mutual Assent?	Yes § 765.03(1)	Yes § 770.05(1)		
Parties of a Certain Age?	Yes § 765.02(1)	Yes § 770.05(1)		
Consanguinity Requirement?	Yes § 765.03(1)	Yes § 770.05(4)	→→→	Does any other legal status in Wisconsin require these elements, or even most of these elements? **NO**
Parties Be in More Than One Marriage or Domestic Partnership, or Both?	No § 765.03(1)	No § 770.05(2)		
Demonstrate or Pledge Mutual Responsibility?	Yes § 765.16	Yes § 770.05(3)		

Moreover, Fair Wisconsin overlooks the fact that no other legal relationship, domestic or otherwise, pairs these types of requirements together. The drastic difference between marriage

and domestic partnerships, on the one hand, and every other form of legal relationship, on the other hand, demonstrates their substantial similarity. The comparison between the two cannot be made in a vacuum, but only against the appropriate backdrop of every other legal relationship at law.

C. The legal status of marriage is distinct from marital incidents and the marital contract.

In a continuing attempt to dilute the striking uniformity between the legal statuses of marriage and domestic partner, Fair Wisconsin attempts two other distinctions. First, Fair Wisconsin shifts focus to the incidents of marriage, attempting erroneously to make marriage the "sum total of a person's legal rights, duties, [and] liabilities." (R. 131:10). Next, Fair Wisconsin contends that marriage is a consideration-based contract, conflating how parties enter into the status with the status itself. Neither point impacts the legal status of marriage or domestic partnerships.

i. Confusing marital status with marital incidents is well-established error.

The supreme court recognized long ago that "fail[ing] to distinguish between status and the incidents…attach[ed] to the status" is legal error. *Forbes v. Forbes*, 226 Wis. 477, 277 N.W.

112, 114-15 (1938);[4] 52 Am. Jur. 2d Marriage § 8. And Fair Wisconsin's focus on the incidents accorded to marriage and domestic partnerships should be rejected by this Court, just as it was by the Michigan Supreme Court.

> Marriages give rise to many legal rights and responsibilities that domestic partnerships do not. However, we believe the pertinent question for purposes of the marriage amendment is not whether these relationships give rise to identical, *or even similar*, legal rights and responsibilities, but whether these relationships are *similar in nature*…

Nat'l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524, 534 n.6 (2008) (emphasis added). Analyzing "the *nature* of the marital and domestic-partnership unions themselves," *Id.* (emphasis in original), the court found that "domestic partnerships are similar " because the statuses have "core qualities in common." *Id.,* 481 Mich. at 75, 748 N.W.2d at 537.

Moreover, that the Wisconsin Marriage Amendment was not about the incidents of marriage is shown by its legislative history. Legislative proponents said repeatedly that "no particular privileges or benefits [of marriage] would be prohibited" to be extended to others by the Amendment. They also distinguished the Amendment from those in other states

[4] *Overruled on other grounds, Haumschild v. Continental Cas. Co.,* 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

that "prohibit[ed] the extension of benefits to same-sex companions." (R. 130B:1605). Instead, the focus of legislative proponents regarded a "legal construct designed by the state" which would be a "legal status 'identical or substantially similar' to that of marriage." *Id.* Citizen proponents were also clear on this: "Marriage is not a benefits package…[The Marriage Amendment is] about protecting the institution of marriage, not about rights or benefits." (R. 130B:1606-1609).

This legislative history also disposes of Fair Wisconsin's argument that only Vermont-style civil unions, which accorded *all* of the incidents of marriage, were addressed by the Marriage Amendment. Fair Wisconsin fails to comprehend that the incidents offered and/or received under a certain legal status are irrelevant. What matters is <u>how</u> those incidents are distributed that makes the difference. When the proponents sought to prevent "marriage, but by a different name," their focus regarded a counterfeit marital *status*, not the benefits incident to that status. (R. 130B:1605-1609); *accord Nat'l Pride*, 748 N.W.2d at 535 n.7 (rejecting the argument that "the marriage amendment was adopted in response to *Baker v. State*…[and thus] that the amendment only prohibits the establishment of 'civil unions' that

confer the same rights and obligations as does marriage."). Were the incidents of marriage the focus of the Marriage Amendment, its plain language would so reflect.

ii. Confusing the public marital status with the private marital contract is also immaterial.

Conflating the private agreement to marry with the public status that the state confers by law is clear error. The well-established distinction between the private contract to marry and the public status of marriage has been recognized for over a century. *Maynard v. Hill*, 125 U.S. 190, 213 (1888) (condemning confusion of "the contract to marry with the marriage relation itself."). While marriage "comes into existence in pursuance of a contract," the state's role in it is expressed through "a status or legal condition established by law." *State v. Duket*, 90 Wis. 272, 63 N.W. 83, 84 (1895). Marriage is not, as Fair Wisconsin suggests, a "super-contract." Rather, marriage "becomes a relation rather than a contract, and invests each party with a status towards the other, and society at large…" *Dillon v. Dillon*, 244 Wis. 122, 11 N.W. 628 (1943). "When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract." *Maynard*, 125 U.S. at 211.

This distinction is important because the Marriage Amendment regards only the *legal status*, not the contractual gateway to that status. Private parties may permissibly bind themselves by contract to something that looks like marriage since their private agreement does not create a *legal status*. And because that private contract does not create a legal status, the incidents that flow from that status are not conferred through the private contract.

The Marriage Amendment, thus, is unconcerned with the nature of any private agreement (*e.g.*, premarital agreements) regarding the entrance to marriage, but only the legal status conferred by the state upon that relationship. Irrespective of what agreement parties may or may not have, the state cannot create a legal status that both mimics the elements of marital status and binds the parties to that status in a union they cannot create, alter, or escape merely by means of private contract. But that is precisely what the state has unconstitutionally done through Chapter 770.

Wisconsin law provides the definitions of both legal statuses, how parties must publicly register with the state to obtain the legal statuses, and the precise public procedures for

how parties must end the legal statuses. Just like in marriage, domestic partners cannot privately contract to allow a third person to join the partnership, or privately consent to skip the status's registration requirements. And just like in a marriage, domestic partners cannot merely privately end their legal status.

Moreover, Fair Wisconsin contends that economic considerations regarding marriage establish a fundamental difference between marital and domestic partner contracts. But economic consideration is not material to the creation of marital status. *Maynard*, 125 U.S. at 213, 8 S.Ct. at 731 (Marriage "is not a mere matter of pecuniary consideration.").[5] Contractual consideration can consist of exchanged return promises that induce both parties to act. *Wisconsin Dept. of Revenue v. River City Refuse Removal, Inc.*, 2007 WI ¶¶ 50-51, 299 Wis. 2d 561, 586-87, 729 N.W.2d 396. This is true for both marriage and domestic partnerships.

Even if economic consideration were somehow material to the creation of marital status, Fair Wisconsin ignores the economic consideration required by Chapter 770. Chapter 770

[5] Only consent is "essential," Wis. Stat. § 765.01, because marriage "is not a contract resembling others in any but the slightest degree, except as to the element of consent." 52 Am. Jur. 2d § 7 (citation omitted).

requires that the parties establish a joint residence, thereby creating a marriage-like estate.

II. The Marriage Amendment's history shows that it precludes marriage-mimicking legal statuses like Chapter 770 domestic partnerships.

Fair Wisconsin's cited legislative history shows that Marriage Amendment proponents were focused on *legal statuses* and unconcerned with whether the incidents of marriage may be accorded to others. And against the overwhelming history of the Amendment, Fair Wisconsin focuses on a single statement made extemporaneously by a private citizen at a debate. But there is no evidence that anyone adopted that interpretation of the amendment, and mountains of evidence to the contrary.

Fair Wisconsin itself certainly was not assuaged by the statement. It and others spent millions of dollars repeatedly warning the public that the Marriage Amendment's proponents "refuse[d] to exempt domestic partners" from the substantially-similar prong of the Amendment because they intended to ban "legal recognition of relationships that are similar to marriage…includ[ing]…domestic partnerships." (R. 66:25; 130A:145).

The Amendment's history also supports a clear intent to maintain the "conjugal" model view of marriage over the "close relationship" model. The Marriage Amendment is "to preserve and constitutionalize the [marital] status quo," *McConkey*, 2010 WI ¶ 53, 326 Wis. 2d at 29, 783 N.W.2d at 868, that "marriage [i]s the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family." (R. 131:23).

Wisconsin law establishes marriage as "the institution that is the foundation of family and of society," and "'family' [is] to be within the 'marriage' context." *Watts v. Watts,* 137 Wis. 2d 506, 519, 405 N.W.2d 303, 308-09 (1987) (quoting Wis. Stat. § 765.001(2)). Thus, the conjugal model—encouraging sexual behavior within the stabilizing bonds of marriage for the benefit of society—is the status quo. *See* Wis. Stat. § 944.01.

Conclusion

Because Chapter 770 creates a legal status for unmarried individuals that is substantially similar to marital status, it is unconstitutional. This Court should so rule and reverse the opinion of the circuit court.

Respectfully submitted on this 26th day of January, 2012.

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

RICHARD M. ESENBERG

ALLIANCE DEFENSE FUND

Austin R. Nimocks
Brian W. Raum

MICHAEL D. DEAN, LLC

/s/
Michael D. Dean, SBN 01019171

CERTIFICATION OF FORM AND LENGTH REQUIREMENTS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a reply brief produced with a proportional serif font. The length of this brief is 2,992 words.

/s/
Michael D. Dean

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: January 26, 2012.

/s/
Michael D. Dean

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CERTIFICATE OF SERVICE

I certify that the 3 copies foregoing was sent via U.S. First Class mail on the 26th day of January, 2012, to the following:

Respondents-Defendants

Brian Hagedorn
OFFICE OF GOVERNOR SCOTT WALKER
115 East State Capitol
P.O. Box 7863
Madison, Wisconsin 53707

Respondents-Intervening Defendants-Cross Appellants

Christopher R. Clark
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
11 East Adams, Suite 1008
Chicago, Illinois 60603

Brian E. Butler
Barbara A. Neider
STAFFORD ROSENBAUM LLP
222 West Washington Avenue, Suite 900
Madison, Wisconsin 53701

/s/
Austin R. Nimocks