STATE OF WISCONSIN
SUPREME COURT
Case No. 2011AP1572

JULAINE K. APPLING, JO EGELHOFF, JAREN E. HILLER, RICHARDKESSENICH AND EDMUND L. WEBSTER,
Plaintiffs-Appellants Petitioners,

v.

JAMES E. DOYLE, KAREN TIMBERLAKE AND JOHN KIESOW,

Defendants-Respondents,

FAIR WISCONSIN, INC., GLENN CARLSON, MICHAEL CHILDERS,CRYSTAL HYSLOP, JANICE CZYSCON, KATHY FLORES, ANNKENDZIERSKI, DAVID KOPITZKE, PAUL KLAWITER, CHAD WEGE AND ANDREW WEGE,
Intervening Defendants-Respondents.

COMBINED PETITION FOR REVIEW AND APPENDIX

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CONSTITUTIONAL PROVISION AT ISSUE

Wis. Const. art. XIII, § 13. *[As created Nov. 2006]* Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

ISSUE PRESENTED FOR REVIEW

Does Ch. 770 violate art. XIII, § 13 of the Wisconsin Constitution?

CRITERIA SUPPORTING REVIEW

This case presents a constitutional issue of paramount importance, the resolution of which will have statewide impact. As evidenced by the Court of Appeals' certification to this Court, the case presents a novel question that can not be resolved merely by the application of well-settled principles of law to the factual situation. A decision by this Court will help develop, clarify or harmonize the law.

Moreover, as explained herein, the Court of Appeals' decision is not only incorrect, but provides no functional standards for determining whether future state or local legislation creating legal statuses or according

benefits for same-sex couples violates art. XIII, § 13. *See* Wis. Stat. § 809.62(1r).

STATEMENT OF THE CASE

Marriage is a long-standing, world-wide institution that is the fundamental building block of society.[1] In November 2006, the people of Wisconsin—by a 19-point margin—amended the state constitution regarding marriage, affirming its legal status in Wisconsin as the union of one man and one woman, and protecting that status from being undermined by the creation of substantially similar statuses. The Wisconsin Constitution thus provides that:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Wis. Const. art. XIII, § 13.

In 2009, the Legislature enacted Chapter 770, creating a legal status titled "domestic partnership." This new legal status is defined almost identically to marriage, entered into in essentially the same manner as marriage, and accorded many of the unique core incidents of marriage.

[1] "Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state." Wis. Stat. § 765.001.

And domestic partnerships were placed in the Family Code adjacent to marriage (Chapter 765). Shortly after Chapter 770's passage, Petitioners filed this lawsuit claiming that Chapter 770 is unconstitutional because the legal status of domestic partnerships is substantially similar to the legal status of marriage. Because the Attorney General agrees that Chapter 770 is unconstitutional, he refused its defense.[2] After taking office on January 3, 2011, Governor Walker ceased the government's defense of the lawsuit because he also agreed that Chapter 770 is unconstitutional.[3]

On June 20, 2011, the circuit court concluded that Chapter 770 is constitutional because "the sum total of domestic partners' legal rights, duties, and liabilities is not identical or so essentially alike that it is virtually identical to the sum total of spouses' legal rights, duties, and liabilities." App. at 62. Petitioners appealed.

After the case had been fully briefed on appeal, the Court of Appeals certified the case to this Court,

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[2] *See, e.g.*, *EDITORIAL: Don't blame AG Van Hollen*, Beloit Daily News, August 27, 2009, *available at* http://www.beloitdailynews.com/opinion/todays_opinion/editorial-don-t-blame-ag-van-hollen/article_ed87cb70-16fe-5b13-b653-e4e464eff4ce.html (last visited on Jan. 20, 2013).

[3] *See, e.g.*, *Gov. Walker attempts to withdraw state's defense of domestic partner registry*, Wisconsin State Journal, May 16, 2011, *available at* http://host.madison.com/news/local/govt-and-politics/gov-walker-attempts-to-withdraw-state-s-defense-of-domestic/article_be236612-800c-11e0-8503-001cc4c002e0.html#ixzz2IVCvwc9A (last visited on Jan. 20, 2013).

> [b]ecause this case involves a novel constitutional issue and because a decision in this case will have statewide significance, we certify this appeal to the Wisconsin Supreme Court for its review and determination.

App. at 86. However, this Court refused the certification, with two dissents.

On December 20, 2012, the Court of Appeals affirmed the circuit court's decision that Chapter 770 is constitutional. Petitioners now seek review by this Court.

INTRODUCTION

The Court of Appeals failed to employ a proper plain meaning analysis, and its opinion demonstrates why surmising as to what was in the minds of hundreds of thousands of voters is both ineffective jurisprudence and not the standard employed by this Court. Almost immediately in its opinion, the Court of Appeals wades into uncharted waters:

> As explained further below, [Petitioners] must demonstrate, by reference to the language of the marriage amendment and other voter-intent evidence, that voters intended to prohibit the particular type of domestic partnership created by the legislature. We conclude that [Petitioners] fall[] far short of meeting [their] burden. As we shall see, there is little reason to think informed voters believed that the marriage amendment language would prohibit the domestic partnerships at issue here.

App. at 2, ¶4. But this is not the standard. The plain meaning of an amendment is designed to be a window into voter intent, not vice versa. But the Court of Appeals effectively skipped any plain meaning analysis.

To support replacing plain meaning analysis with conclusory assertions about what hundreds of thousands of voters intended, the Court of Appeals also created a straw man by mischaracterizing Petitioners' argument. The Court of Appeals claimed that Petitioners argued that the rights and obligations attaching to the legal status of marriage are entirely irrelevant.[4] This casting of Petitioners' argument is not only inaccurate, but ignores entire sections of Petitioners' briefing, discussing the significance of the rights and obligations in relation to proper constitutional analysis. Petitioners' Brief, *inter alia*, provided:

> Indeed, every right extended to domestic partners is already enjoyed by spouses. There are essentially no legal rights exclusive to domestic partners. That the incidents appurtenant

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[4] The Court of Appeals misstates Petitioners' arguments as follows:

> 2. The term "legal status" encompasses only the eligibility and formation requirements of marriages and domestic partnerships, not the rights and obligations that come with these relationships.
> 3. Because "legal status" refers only to eligibility and formation, the constitutionality of the domestic partnership law is measured solely by determining whether the eligibility and formation requirements of marriage and domestic partnerships are "substantially similar."

App. at 6-7, ¶19. Regrettably, this mischaracterization of Petitioners' argument is repeated multiple times throughout the Court of Appeals' opinion, creating an ongoing theme of the Court of Appeals' faulty reasoning. *See* App. at 7 (¶21), 8-10 (¶¶26, 27, 29, 30, 31), 11 (¶36), 11-12 (¶38), 17-18 (¶60), 25-26 (¶88).

> to domestic partners derive wholly from marriage uncovers the true nature of the unconstitutional legal status created by Chapter 770.
> . . .
>
> Chapter 770 created a legal status that unconstitutionally resembles marriage and the law now accords to that status incidents in a manner that shows it to be the substantial equivalent of marriage.

App. at 124-29, 154. Petitioners maintain their position that the constitutionality of Chapter 770 does not hinge upon a "stick counting" exercise of the rights and obligations appurtenant to domestic partnerships. The nature of the rights and obligations incidental to domestic partnerships, in conjunction with how they are accorded, can help answer the constitutional question posed.

However, the Court of Appeals did not consider rights and obligations in this manner and proceeded to "count sticks." App. at 11, ¶36.[5] The Court of Appeals fundamentally failed to understand *how* the core rights and obligations of marriage impact the question before the court. And while the Court of Appeals professed a search for the "whole picture," App. at 10, ¶33, it fell well short of painting one.

[5] The Court of Appeals also illogically concludes that what is the "same" is also "substantially similar."

Petitioners did not argue that rights and duties were irrelevant in all cases. Rather, they argued that in *this* case specifically challenging the constitutionality of Ch. 770,

> 1) The trial court erred in failing to find that the "legal status" of marriage exists *solely and immediately* upon compliance with the procedural regimen promulgated by the legislature,[6]
>
> 2) The Chapter 770 regimen for creating domestic partnerships alone violated the Amendment irrespective of statutory rights and obligations incidental to it because that regimen is virtually identical to the Chapter 765 regimen for creating marriage,[7]
>
> 3) Although defining the legal status of marriage as a stick-counting exercise trivializes marriage and creates an unworkable legal standard,[8] the "rights and obligations" that attach to the Chapter 770 domestic partnership status nevertheless violate the Amendment because they are *defined, bundled and delivered* solely by comparison to marriage,[9]
>
> 4) The Amendment's purposes were, *inter alia*, to preserve in both substance and appearance to the public and the next generation the uniqueness of both the marital relationship and of the roles of mothers and fathers.[10]

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[6] Petitioners argued:

> Yet the circuit court was erroneously "only concerned with the legal rights, duties, and liabilities of both statuses" and explicitly refused to analyze the similarity of the legal statuses *themselves*, apart from the incidents accorded them. That fundamental error provides sufficient basis to overturn its decision.

App. at 107.

[7] App. at 122-24, 167-69.

[8] App. at 114.

[9] App. at 124-29.

[10] App. at 142-44.

Accordingly, Petitioners contend that this Court has good cause to grant this petition.

ARGUMENT

This Court examines "three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates 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, Inc. v. Doyle*, 2006 WI 107, ¶19, 295 Wis. 2d 1, 28, 719 N.W.2d 408, 422.

I. PLAIN MEANING

As this Court has made clear,

> The general purpose of a constitutional amendment is not an interpretive riddle. Text and historical context should make the purpose of most amendments apparent. *A plain reading of the text of the amendment will usually reveal a general, unified purpose*. A court *might* also find other extrinsic contextual sources helpful in determining what the amendment sought to change or affirm, including the previous constitutional structure, legislative and public debates over the amendment's adoption, the title of the joint resolution, the common name for the amendment, the question submitted to the people for a vote, legislative enactments following adoption of the amendment, and other such sources.

McConkey v. Van Hollen, 2010 WI 57, ¶44, 326 Wis. 2d 1, 25, 783 N.W.2d 855, 867 (emphasis added).

Remarkably, the Court of Appeals did not cite *McConkey* in its analysis. This omission, aside from neglecting this Court's critical first and only guidance to date for construing the Amendment, allowed the Court of Appeals to begin with an improper legal standard—fatally distorting its constitutional analysis.

The Court of Appeals correctly states that Petitioners' challenge requires it to "interpret the meaning of a constitutional amendment." App. at 4, ¶11. However, it then states, "our task is to construe the amendment 'to give effect to the intent . . . of the people who adopted it.'" And also to "determine voter intent." *Id*. (citing *Dairyland*, 2006 WI 107, ¶19).

The Court of Appeals characterized its mission as determining *only* "voter intent" by distorting *Dairyland*. The Court of Appeals omits by ellipsis important language in this Court's instruction in *Dairyland* to also give effect to *legislator* intent—that of the "framers" who drafted the Amendment.[11]

[11] The *complete* citation is, "The purpose of construing a constitutional amendment is to give effect to the intent *of the framers and* of the people who adopted it." *Dairyland*, 2006 WI 107, ¶19 (citing *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328) (emphasis added). *See also, e.g.*, *State v. Hamdan*, 2003 WI 113,

Discerning the intent of the framers, legislators, and voters begins with reviewing the plain language of the Amendment. And where appropriate, this Court need not even go beyond the plain language.[12] But the Court of Appeals ignores conventional methods of textual construction in its plain meaning analysis, and instead proceeds to analyze things with improper standards ("what comes to mind," "common sense," and "unreasonable to think"), all in an effort to discern "voter intent." App. at 8-9, ¶¶27-29.

But the Court of Appeals has the process reversed. Determining the plain meaning of the text will discern the intent of "the framers and of the people who adopted it," not vice versa as the Court of Appeals suggests. Moreover, this Court has not authorized plain meaning analysis based on "what comes to mind" or guesswork analysis about what may be "understood by average voters," *id.*, ¶28, and what "voters thought." *Id.*, ¶29.[13] This Court has plain meaning rules of construction to be employed.

¶94, 264 Wis. 2d 433, 492, 665 N.W.2d 785, 814 (J. Bablitch, concurring) ("The majority is absolutely correct in concluding that this could not have been the result intended by the legislators who wrote the constitutional amendment nor the voters who ratified it.")

[12] "A court ***might*** also find other extrinsic contextual sources helpful . . . ." *McConkey*, 326 Wis. 2d at 25 (emphasis added).

[13] The Court of Appeals' resort to guessing about the mindset of voters not only failed to provide a plain meaning of the text at issue, but also conflated the "plain meaning" with "public debates."

Belying the Court of Appeals' efforts to de-emphasize ordinary rules of construction is its misuse of *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976). The Court of Appeals states, "[i]n contrast with statutory construction, we do not stop with an analysis of the text, *even if that analysis reveals unambiguous language*." App. at 4, ¶11 (citing *Buse*, 74 Wis. 2d at 568) (emphasis added). However, *Buse* says nothing about looking at the second and third sources *even if* the plain meaning is unambiguous. Rather, *Buse* cites *Sinclair*, where this Court only went beyond the dictionary definition *after* observing that the term left some ambiguity when read *in context*. *Buse*, 74 Wis. 2d at 568 (citing *Bd. of Ed. v. Sinclair*, 65 Wis. 2d 179, 182, 222 N.W.2d 143, 145 (1974) ("However, with the addition of the words 'and without charge for tuition' there is a logical restriction on the scope of the word 'free'")).

Second, because it omitted the *framers'* intent, other than agreeing with Petitioners that the dictionary definition of "legal status" is not helpful, App. at 8, ¶25, the Court of Appeals ignores this Court's past and recent constructions of plain meaning employing conventional methodologies similar to those for construing statutes. There is no question that constitutional construction can employ sources and methods other than

ordinary statutory construction,[14] but as indicated as recently as *McConkey*, this Court made clear that those sources and methods are *in addition to* and *not instead of* conventional methods of textual construction. *McConkey*, 2010 WI 57, ¶¶49, 50.

Accordingly, the Court of Appeals' opinion is devoid of any meaningful textual construction and genuine review of the plain meaning of the text. Substituted in its place is the Court of Appeals' speculation about what the voters may have thought by cherry-picking certain public statements that buttressed its conclusion, and ignoring others. Therefore, it is critical that this Court grant this petition and analyze the Amendment's

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[14] Historically, constitutional provisions were construed by "by the ordinary rules of interpretation." *Akerly v. Vilas*, 24 Wis. 165, 181 (1869). *See also State ex rel. Bond v. French*, 2 Pin. 181, 1849 WL 1882 *2 (Wis.) ("In deciding this question, our only guide is the constitution, in construing which we are to be governed by the same general rules of interpretation which prevail in relation to statutes."). *See State ex rel. Ekern v. Zimmerman*, 204 N.W. 803, 807 (Wis. 1925) ("[W]e are governed by the same rules of interpretation which prevail in relation to statutes," citing *French*). But because the constitution and subsequent amendments were/are ratified by voters at large, additional rules of construction unique to that process in construing constitutional text. *Cf. B.F. Sturtevant Co. v. O'Brien*, 186 Wis. 10, 202 N.W. 324, 327 (1925).

> Words or terms used in a Constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be applied in interpreting statutes and acts of the Legislature. This gives rise to the recognized rule of construction that *it is presumed that words appearing in a Constitution have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a Constitution in order to search for some other conjectured intent*.

Id. (quoting 6 R. C. L. § 47, tit. Constitutional Law) (emphasis added).

plain meaning consistent with this Court's past and recent conventional methods construing the meaning of constitutional text.

A. THIS COURT'S PAST AND RECENT METHODS OF CONSTRUING CONSTITUTIONAL TEXT.

A brief review of this Court's past and recent methods for construing the meaning of constitutional text is instructive. Generally, although this Court considers special *additional* rules and sources appropriate to determining the meaning of text ratified by the people as a whole, this Court employs conventional methods of construction because its task is to determine the meaning of text drafted by its framers and approved by the legislature.

Text of the original constitution or an amendment should be construed in light of its purpose; *McConkey*, 2010 WI 57, ¶50; its complete textual context, *Dairyland*, 2006 WI 107, ¶117; and the statutory scheme existing at the time of its approval by the legislature and ratification by the voters, *Dairyland*, 2006 WI 107, ¶32; *McConkey*, 2010 WI 57, ¶¶51-53. The statutory scheme is especially important where the purpose of an amendment is to maintain the status quo. *Dairyland*, 2006 WI 107, ¶32. *See generally Dairyland*, 2006 WI 107, ¶¶25-36; *McConkey*, 2010 WI 57, ¶53. This Court should not construe a text to yield absurd, unreasonable, or

contradictory results; *McConkey*, 2010 WI 57, ¶29 (citing *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882)); or one that leads to confusion. *Payne v. City of Racine*, 217 Wis. 550, 259 N.W. 437, 441 (1935); *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447, 454 (1967).

B. THE PLAIN MEANING OF THE AMENDMENT'S TEXT PROHIBITS MARRIAGE "LOOK ALIKES" LIKE CHAPTER 770.

1. Ambiguity.

The Court of Appeals' opinion highlights the problem of ignoring conventional methods employed by this Court to construe constitutional text. It is one thing to find ambiguity in the text itself.[15] It is quite another thing to go outside the text to "popular debate" to create or "resolve" ambiguity where none exists in the text itself.

In cases where language is ambiguous, it is reasonable to go outside the text to consider a provision "in its setting,"[16] to follow "the real

[15] *E.g.*, *Buse* cites *Bd. of Ed. v. Sinclair*, 65 Wis. 2d 179, 182, 222 N.W.2d 143, 145 (1974), where this Court first looked at the dictionary definition to determine the meaning of "free" in the school funding mandate (Wis. Const. art. X, § 3), then went beyond the dictionary definition and considered history *after* making the observation that the term left some ambiguity when read *in context*. *Bd. of Ed. v. Sinclair*, 65 Wis. 2d at 182 ("However, with the addition of the words 'and without charge for tuition' there is a logical restriction on the scope of the word 'free'"). *Cf.* App. at 108-09.

[16] *Heil*, 242 Wis. at 55.

meaning and substantial purpose of those who adopted it,"[17] and to determine the purpose of the provision intended by framers.[18] But if the meaning of the text is clear, "the court may not venture outside the plain meaning of a provision in order to create an ambiguity and then resolve the ambiguity by what it finds outside." *Kayden*, 34 Wis. 2d at 732 (citing *Estate of Ries*, 259 Wis. 453, 459, 49 N.W.2d 483, 50 N.W.2d 397 (1951)).

Cases where this Court resorted to employing legislative and popular debates involved the original 1846 and 1848 constitutions. Considering debates at the outset for these texts can be important because the true meaning of the text could be elusive given the long passage of time. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 350 (1915); *State ex rel. Zilisch v. Auer*, 197 Wis. 284, 221 N.W. 860, 862 (1928); *State ex rel. Martin v. Heil*, 242 Wis. 41, 55-56, 7 N.W.2d 375, 381 (1942).

But the rationale for consulting popular debates at the inception of this Court's analysis is much weaker when construing recently ratified amendments. This is because the Court has its own contemporaneous sense

[17] *Id.*

[18] *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331, 350 (1915); *State ex rel. Ekern*, 204 N.W. at 805; S*tate ex rel. Zimmerman*, 228 N.W. at 598; *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 729, 150 N.W.2d 447, 452 (1967).

of the text's meaning. Thus, this Court's consistent cautions are well taken, especially where construing recent amendments.

2. Purpose of the Amendment

This Court has already explained that the Amendment's purpose was to preserve the "status quo" provided in the statutory scheme governing marriage that existed at the time the Amendment was ratified.[19] The Amendment "*was therefore an effort to preserve and constitutionalize the status quo, not to alter the existing character or legal status of marriage*" and to "*preserve the legal status of marriage in Wisconsin as between only one man and one woman.*"[20]

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[19] In *McConkey*, this Court construed the Amendment according to its purpose in the same way a statute is construed according to its purpose. *See, e.g., Wenke v. Gehl Co.*, 2004 WI 103, ¶42, 274 Wis. 2d 220, 249, 682 N.W.2d 405, 419 ("When construing statutes, courts must presume that the legislature intends for a statute to be interpreted in a manner that advances the purposes of the statute, not defeats those purposes." *Beard v. Lee Enters., Inc.*, 225 Wis.2d 1, 22, 591 N.W.2d 156 (1999) (citing *Verdoljak v. Mosinee Paper Corp.*, 200 Wis.2d 624, 635, 547 N.W.2d 602 (1996)).

[20] This Court stated,

> . . . . The text of this amendment and historical context in which it was adopted make its general subject and purpose plain.
>
> . . . .
>
> Before the marriage amendment was adopted, marriage in Wisconsin was already limited by statute to the unions of one man and one woman. *See* Wis. Stat. § 765.001(2) (2005-06) ("Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife."); § 765.01 ("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."). *This amendment was therefore an effort to preserve and*

3. The statutory scheme for marriage

The Amendment includes the term "marriage" in both sentences, but does not define the term. Rather, as *McConkey* holds, that term is defined by existing statutes, §§ 765.001(2)[21] and 765.01.[22] *McConkey*, 2010 WI 57, ¶53. Other statutes within the existing statutory scheme regarding marriage include §§ 765.09(3)(b),[23] 765.16,[24] 765.09,[25] and 765.21.[26]

> *constitutionalize the status quo, not to alter the existing character or legal status of marriage.*
>
> . . . .
>
> *Why preserve the status quo through a constitutional amendment?* This is no secret either. The sponsors of the amendment were quite clear that state supreme court decisions overturning the marriage laws of other states were the primary reason for the amendment. In short, the sponsors of the amendment wanted to protect the current definition and legal status of marriage, and to ensure that the requirements in the first sentence could not be rendered illusory by later legislative or court action recognizing or creating identical or substantially similar legal statuses. *The purpose of the marriage amendment, then, was to preserve the legal status of marriage in Wisconsin as between only one man and one woman. Both propositions in the amendment tend to effect or carry out this general purpose.*

McConkey, 2010 WI 57, ¶¶51, 53, 55 (emphasis added) (footnotes omitted).

[21] In pertinent part, § 765.001(2) provides, "Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and wife."

[22] Section 765.01 provides, "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." (emphasis added)

[23] Section 765.09(3)(b) provides, "Each applicant for a marriage license shall exhibit to the clerk a certified copy of a birth certificate, and each applicant shall submit a copy of any judgment or death certificate affecting the applicant's *marital status*." (emphasis added)

[24] Section 765.16 provides,

> Marriage contract, how made; officiating person. Marriage may be *validly* solemnized and contracted in this state only after a marriage license has been issued therefor, and only by the mutual declarations of the 2 parties to be joined in marriage that they take each other as husband

Thus, under the statutory scheme, the term "marriage" means (1) a "legal relationship" between "husband and wife," § 765.001(2) and (2) a "civil contract" formed by "consent of the parties capable . . . of contracting" which "creates the legal status of husband and wife." Wis. Stat. § 765.01. A person's "marital status" may be affected by two and only two documents: a "judgment" (divorce, annulment, etc.) and a "death

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and wife, made before an authorized officiating person and in the presence of at least 2 competent adult witnesses other than the officiating person. (emphasis added).

[25] In pertinent part, § 765.09 provides:

Identification of parties; statement of qualifications[.]

(1) (a) No application for a marriage license may be made by persons lawfully married to each other and no marriage license may be issued to such persons.

(b) Paragraph (a) does not apply to persons whose marriage to one another is *void* under s. 765.03 (2) and who intend to intermarry under s. 765.21.

. . .

(3) . . . (b) Each applicant for a marriage license shall exhibit to the clerk a certified copy of a birth certificate, and each applicant shall submit a copy of any judgment or death certificate affecting the applicant's *marital status.* If any applicable birth certificate, death certificate or judgment is unobtainable, other satisfactory documentary proof of the requisite facts therein may be presented in lieu of the birth certificate, death certificate or judgment. Whenever the clerk is not satisfied with the documentary proof presented, he or she shall submit the presented proof to a judge of a court of record in the county of application for an opinion as to its sufficiency. (emphasis added)

[26] Section 765.21 provides:

Unlawful marriages void; *validation*[.] All marriages hereafter contracted in violation of ss. 765.02, 765.03, 765.04 and 765.16 shall be void, except as provided in ss. 765.22 and 765.23. The parties to any such marriage may *validate* the marriage by complying with the requirements of ss. 765.02 to 765.24 as follows: (1) At any time, if the marriage is declared void under s. 765.02 or 765.16. (2) No earlier than 6 months after the divorce judgment is granted, if the marriage is declared void under s. 765.03(2).

certificate." Wis. Stat. § 765.09(3)(b). The Court of Appeals' opinion is devoid of analysis along these lines.

More importantly, the "legal status" of "husband and wife" marriage is created by the *contract* of *two private citizens* who (1) consent, and (2) conform to the criteria and regimen prescribed by the legislature. That "legal status" is *not* created by the legislature subsequently attaching rights and obligations to the status the private citizens have already created. By the same rationale, the legal status of lawyers defined by the Court of Appeals is inapt.[27]

4. Sentences of the amendment are to be read *in pari materia*.

The Court of Appeals correctly notes this Court's characterization of the first source: "the plain meaning of the words of a constitutional provision *in the context used*." App. at 5, ¶12 (citing *Dairyland*, 2006 WI 107, ¶117 (Prosser, J., concurring in part, dissenting in part) (citing *Buse v. Smith*,74 Wis.2d 550, 568, 247 N.W.2d 141 (1976) (emphasis added)).[28]

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[27] The lawyer analogy employed by the Court of Appeals also underscores its improper legal standard. Like marriage, the legal status of lawyers is hardly a function of what "people think," "underst[and]," or "talk about." App. at 9, ¶28.

[28] For the exact same formulation of the source, see *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 530-31, 665 N.W.2d 328, 333 (quoting *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996) (citations omitted)).

Remarkably, however, the Court of Appeals never once considered the *first* sentence of the Amendment as *context* for determining the plain meaning of "legal status" in the *second* sentence. And this omission is especially remarkable in light of this court's unanimous decision considering the two sentences of the Amendment *in pari materia*, holding explicitly that the two sentences deal with the same purpose and subject. *McConkey*, 2010 WI 57 ¶¶51-56. *See, e.g., Serv. Inv. Co. v. Dorst*, 232 Wis. 574, 288 N.W. 169, 170 (1939).

5. The terms "valid" and "recognized" appear in both sentences, and must be construed consistently.

The terms "valid" and "recognized" appear in both sentences but, like "marriage," are not defined. As with "marriage," the court should look to the existing statutory scheme for definition.

The first sentence defines marriage as between a man and woman. Wis. Const. art. XIII, § 13. This court has read existing statutes to classify a marriage as "valid," "void," or "voidable."[29] Thus, by limiting "valid"

[29] In a case recently accepted by this court on certification, the court of appeals stated,

> The supreme court has defined three types of marriages: valid, void, and voidable. *Lyannes*, 171 Wis. at 389–90, 177 N.W. 683. A valid marriage is where the parties were competent when they entered into the marriage

marriages to only those between one man and one woman, existing statutes require that a purported marriage other than between one man and one woman is "void," or at least "voidable." And by limiting "recognized" marriages to those between one man and one woman, the Amendment prohibits recognition of *other* relationships which might not be outright void—*i.e.*, a foreign union titled marriage which, but for the Amendment, might be recognized in Wisconsin. Thus, the first sentence requires that any relationship labeled "marriage," other than between one man and one woman, be deemed a nullity.

The second sentence prevents state officials or entities from *validating* or conferring legal *recognition* upon marriage-mimicking statuses themselves. *E.g.*, *Xiong ex rel. Edmondson v. Xiong*, 2002 WI App 110, ¶14, 255 Wis. 2d 693, 700, 648 N.W.2d 900, 903 ("Marriages valid

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> and complied with all the statutory requirements. *Id* . at 389, 177 N.W. 683. A void marriage is where the parties "by reason of some positive inhibition of the law are absolutely disabled and prohibited from sustaining to each other the lawful relationship of husband and wife." *Id.* A void marriage "is an absolute nullity from its very beginning and cannot be ratified." *Id.* at 390, 177 N.W. 683. A voidable marriage is one "which, although improper, illegal, or irregular in its inception, may by the removal of the impediments then existing or by subsequent cohabitation or recognition of the relationship become valid."[3] *Id.* at 389–90, 177 N.W. 683. "[A]nnulment is the proper remedy to set aside both the void and the voidable marriage." *Id.* at 392, 177 N.W. 683.

In re Estate of Laubenheimer, Nos. 2011 AP 1176, 2011AP1177, 2012 WL 2336246, at *3 (Wis. Ct. App. June 20, 2012) (unreported); App. at 245.

where celebrated are valid everywhere, except those contrary to the law of nature and those which the law has declared invalid upon the ground of public policy," (citing *In re Estate of Campbell*, 260 Wis. 625, 631, 51 N.W.2d 709 (1952)).

6. Syntax of first and second sentence.

The term "marriage" is used in both sentences of the Amendment, and must be assumed to have the same definition in both sentences—the "legal relationship" between "husband and wife." Wis. Stat. § 765.001(2). The second sentence reads: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

Parsing the syntax of the second sentence, it reads: "A legal status for unmarried individuals that is identical or substantially similar to the legal status of the relationship between husband and wife shall not be valid or recognized in this state." Thus, "marriage" in the second sentence depends on "marriage" in the first sentence.

However, the Court of Appeals' analysis, by virtue of its "stick counting," requires a *different* definition and more obscure definition for the term "marriage" in the second sentence than that which is undeniably

clear in the first sentence. This inconsistency must be corrected by this Court.

7. The Court of Appeals' construction of the Amendment yields absurd or confusing results.

As stated above, a court may not apply a constitutional provision in a way that leads to confusion. *Payne*, 217 Wis. at 550. Nor may it "construe a provision whose meaning is clear if a literal application of the provision would lead to an absurd or unreasonable result." *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447, 454 (1967) (citing *Isaksen v. Chesapeake Instrument Corp.*, 19 Wis. 2d 282, 289-290, 120 N.W.2d 151 (1963)).

The Court of Appeals' discussion of Petitioners' "cross-jurisdictional" argument[30] also acknowledges that the construction of a constitutional provision cannot yield absurd results. But the Court of Appeals' analysis does just that. By the Court of Appeals' rationale, neither "formation" nor appearance alone determine "legal status" without "stick counting" the substantive bundle of rights and obligations. App. at

[30] Petitioners argued that in considering foreign marriages, Wisconsin courts do not consider whether the rights and obligations attached to the foreign marriages are comparable to those attaching to marriage in Wisconsin. Rather, Wisconsin courts inquire *only* whether the parties complied with the procedural regimen for forming marriages recognized in those jurisdictions. *See Xiong*, 2002 WI App 110; *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112 (1938) (overruled on other grounds).

8-9 (¶¶27, 29), 10 (¶33), 11 (¶36), 12 (¶40), 18-19 (¶64), 22 (¶76). By that logic, Chapter 770 would *not* be substantially similar to marriage, even if it was titled "same-sex marriage" or "marriage for same-sex couples," so long as its bundle of rights and obligations was not identical to those of marriage.

While *substantive* rights and obligations might be relevant in some cases where *procedural* qualifications are dissimilar, where those qualifications are substantially similiar, as here, the Amendment *necessarily* prevents the validation or recognition of substantially similar legal statuses based on *procedural* incidents *alone*. As this Court is aware, marital status attaches based on the recognition of a cultural equivalent in its rites of creation, *regardless* of jurisdiction. And while "rights and obligations" might help identify a marital status, the status itself does *not* include "rights and obligations" because that would require an ancillary inquiry into the substantive law of the foreign jurisdiction of its creation. Because the procedural scheme for creating domestic partnerships is substantially similar to those for creating marriage, that alone is sufficient to render Chapter 770 invalid.

And there is a good reason that the Amendment does not define "legal status" as "rights and obligations," or marriage's "bundle of sticks." Marriage is *not* so trivial as to consist of whatever amorphous statutory incidents happen to survive the annual vicissitudes of party politics.[31]

Again, a substantive inquiry may be required in *other* cases. It is possible that the incidents of formation for a particular legal status may be quite dissimilar to those of marriage, yet the substantive incidents of that status be "identical or substantially similar to [those] of marriage." But the "counting the sticks" approach adopted by the Court of Appeals is unworkable. There is no meaningful or workable standard for deciding how many is too many, or what meets the "substantially similar" standard when counting sticks, because the number of available sticks is constantly in flux (both in Wisconsin and other jurisdictions).

[31] For example, in the 2011 – 2012 legislative session, at least six Assembly Bills proposed changes to multiple subsections of the Family Code alone. *See* 2011 Assembly Bill 42; 2011 Assembly Bill 54; 2011 Assembly Bill 66; 2011 Assembly Bill 235; 2011 Assembly Bill 271; 2011 Assembly Bill 599. Since 2001, approximately thirty-seven acts have amended sections of the Family Code. *See* 2001 Act 16; 2001 Act 38; 2001 Act 59; 2001 Act 61; 2001 Act 103; 2001 Act 105; 2001 Act 109; 2003 Act 52; 2003 Act 130; 2003 Act 225; 2003 Act 326; 2005 Act ; 2005 Act 101; 2005 Act 130; 2005 Act 174; 2005 Act 215; 2005 Act 216; 2005 Act 253; 2005 Act 264; 2005 Act 304; 2005 Act 342; 2005 Act 387; 2005 Act 443; 2005 Act 471; 2007 Act 20; 2007 Act 81; 2007 Act 96; 2007 Act 97; 2007 Act 187; 2007 Act 214; 2009 Act 28; 2009 Act 79; 2009 Act 79; 2009 Act 180; 2009 Act 185; 2009 Act 321; 2011 Act 32. Some subsections of the Family Code have been amended by more than ten different legislative acts since 2000. *See, e.g.*, Wis. Stat. §§ 767.41 and 767.57.

II. THE CONSTITUTIONAL DEBATES AND PRACTICES

As already discussed, the Court of Appeals mischaracterized its primary task as seeking only "voter intent." But "debates" involve both the legislative history/framers' intent and popular debates among both supporters and opponents. Not only did the Court of Appeals omit from its analysis this Court's determination of the intent of the sponsors and framers of the Amendment (from the *McConkey* decision), but it misconstrued the full measure of the campaign surrounding the Amendment.

A. Legislative intent.

As already determined by this Court, the sponsors of the Amendment clearly drafted it to prevent this Court or the legislature from creating, or forcing the creation of, same-sex marriage or marriage look-alikes.

> *Why preserve the status quo through a constitutional amendment?* This is no secret either. The sponsors of the amendment were quite clear that state supreme court decisions overturning the marriage laws of other states were the primary reason for the amendment. In short, the sponsors of the amendment wanted to protect the current definition and legal status of marriage, and to ensure that the requirements in the first sentence could not be rendered illusory by later legislative or court action recognizing or creating identical or substantially similar legal statuses. *The purpose of the marriage amendment, then, was to preserve the legal status of marriage in Wisconsin as between only one man and one*

> *woman. Both propositions in the amendment tend to effect or carry out this general purpose.*

McConkey, 2010 WI 57, ¶55 (emphasis added). And this effort did not occur in a vacuum, as the sponsors were following the federal approach employed at the time.

> In response to *Goodridge* and "activist judges and local officials" making an "aggressive attempt to redefine marriage," President Bush called for an amendment to the U.S. Constitution. The President expressed concern that the courts could strike down DOMA. Subsequently, 2003 House Joint Resolution 56 was introduced in the House of Representatives. The Resolution set forth:
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> > "Section I. Marriage in the United States shall consist only of a union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

Carl J. Rasmussen, Susan L. Collins, *Wisconsin Constitutional Amendment to Define Marriage: The Legal Context*, Wis. Law., March 2005 (footnotes omitted).

B. What the public "debates" reveal

The Court of Appeals omits from its analysis the most substantial evidence of the "debates"—the substantive agreement of both campaigns—which was transmitted statewide through the expenditure of millions of

dollars. The organization leading the charge against the Amendment was Fair Wisconsin, the Intervenor herein, which raised and spent over $4.3 million dollars.[32] Its efforts included seven different television advertisements,[33] radio advertising, a large paid staff,[34] and a statewide grassroots effort.[35] By contrast, the primary organization supporting the Amendment spent just $634,000[36] and ran only one TV advertisement.[37]

However, unique to this particular race was a unifying understanding between the campaigns of the impact of the Amendment—that it would not permit marriage-mirroring relationships. And as to this wholesale message, Wisconsinites were bombarded by a $5,000,000.00 statewide campaign educating them that the Amendment *would* prevent a scheme like Chapter 770. Fair Wisconsin correctly contended that the Amendment would ban "legal recognition of relationships that are similar to marriage—that includes civil unions and domestic partnerships," and that stopping the amendment would mean that "civil unions and domestic partnerships will

[32] App. at 136 n.47.
[33] App. at 136 n.48.
[34] App. at 136 n.49.
[35] App. at 137 n.50.
[36] App. at 137 n.51.
[37] App. at 137 n.52.

continue to be options for couples."[38] Like Proponents, Fair Wisconsin recognized that this effect of the proposed amendment was because "[d]omestic partner policies…require couples to…demonstrate…the *marriage-like nature of their relationship*."[39]

Further, Fair Wisconsin argued at every turn that the amendment was—among other things—a "civil union" ban.[40] To those who were confused about what a civil union was, it offered a definition—which it said "does a good job of explaining civil unions"—that stated that civil unions are "also called domestic partnerships."[41] Other advocates saw the "substantially similar" language as proscribing legal statuses like Chapter 770's, because such statuses would give "[i]ndividuals in committed relationships…the same legal status as married people."[42] And this message was pounded into the hearts and heads of voters through Fair Wisconsin's relentless, multi-million dollar television campaign, featuring seven different television advertisements.[43]

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[38] App. at 182.

[39] App. at 183.

[40] *See, e.g.*, App. at 184-88; *see also* R. 130A:152-155 (Video recordings of Fair Wisconsin's aired advertisements against the Marriage Amendment).

[41] App. at 189-90.

[42] App. at 191-82.

[43] Fair Wisconsin paid approximately $3 million to its advertising company, Adelstein Liston of Chicago. Vote Yes for Marriage paid approximately $395,000 to its

Like the circuit court, the Court of Appeals improperly cherry-picked comments, articles, and press releases instead of embracing the modern-era statewide campaign that provided the gravamen of what the voters saw, read, and heard, *supra*. The Court of Appeals' approach also ignores the undeniable force of television advertisements in American politics.[44] And while news stories and press releases can be helpful, selected written news sources, within the context of this campaign, cannot be viewed as dispositive or an appropriate "representative sampling." App. at 14-16, ¶¶48-55.

III. THE VALUE OF THE FIRST LEGISLATIVE ENACTMENT

As already discussed, consulting the earliest legislative action following a constitutional amendment is arguably more appropriate regarding amendments that are several decades old. And if post-amendment "legislation of first impression" survives decades or more with its constitutionality unchallenged, the fact of its survival can be indicative

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advertising company, Non Box of Hales Corners. Vote Yes also purchased approximately $75,000 of radio advertising. *See, e.g.*, App. 196-244.

[44] *See, e.g.*, Larry Bivens, *Campaigns bombard ad-weary Wisconsinites*, Green Bay Press Gazette, Oct. 29, 2012, *available at* http://www.greenbaypressgazette.com/article/20121029/GPG010402/310290115/Campaigns-bombard-ad-weary-Wisconsinites (last visited on Jan. 20, 2013) ("'You can't take a breath without seeing a political ad right now,' said Michael Wagner, a political expert at the University of Wisconsin-Madison. 'If you haven't seen a political ad in Wisconsin, you must not own a TV set.'").

of its consistency with the constitutional text. But where, as here, the constitutional text under consideration is recent, and this Court possesses its own contemporaneous sense of the language, deference to a subsequent legislature as to what it means seems unnecessary.

Deferring to a first legislative enactment is an invitation to legislative mischief, as Petitioners contend occurred here. Seeking to buffer itself from this lawsuit, the legislature proclaimed in Chapter 770 "that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage." Wis. Stat. § 770.001.

This Court was likely not envisioning this type of legislative roguery when it developed the first legislative enactment standard to help interpret amendments from the mid 1800's. Nor is it reasonable to conclude that this Court was granting the legislature a license to undermine constitutional amendments with which it subsequently came to disagree. And no case, prior to this one, involved the earliest legislative act being, in fact, the act being challenged.[45] Thus, applying the earliest legislative enactment standard to the circumstances presented in this case appears unwarranted.

[45] *See, e.g., Dairyland, supra*; *Schilling v. Wisconsin Crime Victims Rights Bd.*, 2005 WI 17, ¶16, 278 Wis. 2d 216, 692 N.W.2d 623; *State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328 (2003) (no subsequent legislative act); *Craney*, 199 Wis. 2d at 680 (earliest legislative enactment was in 1902); *Payment of Witness Fees in State v. Brenizer*, 188

As this Court is aware, a much different legislature passed Chapter 770 than the legislatures responsible for placing art. XIII, § 13 onto the ballot. The political composition of the legislature that enacted Chapter 770 was antithetical to that of the legislatures that championed the enactment of art. XIII, § 13. And continuing the legislative antagonism towards art. XIII, § 13, the next legislature actually proposed "[*t]o amend* so as in effect *to repeal* section 13 of article XIII of the constitution."[46]

The Court of Appeals refused to address this argument in its opinion. App. at 21, ¶¶73-74. However, because courts will continue to be tasked with the interpretation of constitutional amendments, clarifying this standard will be helpful.

CONCLUSION

Chapter 770 created a legal status that unconstitutionally resembles marriage. And though Chapter 770 creates precisely the harms that this Court identified the Amendment was passed to prevent, the Court of

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Wis. 2d 665, 674, 524 N.W.2d 389 (Wis. 1994) (earliest legislative enactment was in 1850); *State v. Beno*, 116 Wis. 2d 122, 341 N.W.2d 668 (Wis. 1984); *Buse*, 74 Wis. 2d at 563-72 (earliest legislative enactment was in 1849); *Payne*, 259 N.W. 437, 438-39, 440-42 (challenging the interpretation of the phrase "public utility," but not challenging the statute itself as unconstitutional); *State v. Johnson*, 176 Wis. 107, 114, 186 N.W. 729, 730 (1922) (earliest legislative enactment rendered the meaning of art. VI, § 4 to encompass a "hold over" interpretation of Wis. Stat. § 59.12).

[46] 2011 Assembly Joint Resolution 138.

Appeals both ignored *McConkey* and failed to properly analyze the constitutional question before it. The question presented is one of statewide importance, and because of the many errors committed by the Court of Appeals, this Court should grant review.

Respectfully submitted on this 22nd day of January, 2013.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wisconsin Statutes Annotated § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif—Times New Roman 13 point—font (and 11 point Times New Roman font for footnotes). This petition is 7,920 words, as calculated by Microsoft Word, the word processing software with which it was created.

s/ Michael D. Dean
Michael D. Dean

CERTIFICATE OF COMPLIANCE WITH WISCONSIN STATUTES ANNOTATED § 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, as required by § 809.19 (12). I further certify that this electronic petition is identical in content and format to the printed form of the petition as filed as of this date.

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

Dated: January 22, 2013.

s/ Michael D. Dean
Michael D. Dean