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STATE OF WISCONSIN
SUPREME COURT
Case No. 2011AP001572

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

Plaintiffs-Appellants-Petitioners,

v.

SCOTT WALKER, KITTY RHOADES AND OSKAR ANDERSON,

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.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Is the legal status of domestic partnership created by Wisconsin Statutes Chapter 770 "substantially similar" to the legal status of marriage and thus unconstitutional under Article XIII, Section 13 of the Wisconsin Constitution?

Both the Circuit Court and the Court of Appeals concluded that the legal status of domestic partnership is not substantially similar to the legal status of marriage.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Petitioners respectfully request oral argument in this case, which presents constitutional issues of paramount importance to the state. Furthermore, because the resolution of this issue will no doubt have a statewide impact, Petitioners also respectfully suggest that publication of the Court's opinion is warranted because the decision will settle the law in this area and give guidance to the Legislature and lower courts.

STATEMENT OF THE CASE

I. Introduction and Nature of the Case

Wisconsin law affirms that "[m]arriage is the institution that is the foundation of the family and of society," whose "stability is basic to

morality and civilization, and of vital interest to society and the state." Wis. Stat. § 765.001; *see also State v. Duket*, 90 Wis. 272, 63 N.W. 83, 84 (1895) ("[Marriage] is a status or legal condition established by law, involving, not only the well-being of the parties, but also the highest interests of society and the state, and having more to do with the morals and civilization of a people than any other institution.").

When courts in other states began questioning or overturning the marriage laws of their respective states, the people of Wisconsin moved to constitutionally preserve the status quo by passing the Marriage Amendment as Article XIII, Section 13 of the Wisconsin Constitution. Its purpose, as this Court has recognized, "was to preserve the legal status of marriage in Wisconsin as between only one man and one woman," and to ensure that "no legislature, court, or any other government entity [could] get around the [provision defining marriage] by creating or recognizing 'a legal status identical or substantially similar to that of marriage.'" *McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 54-55, 326 Wis. 2d 1, 29-30, 783 N.W.2d 855, 869.

Despite this clear directive from the people, immediately following a shift in political power from one party to the other in both the Legislature

and Governor's office, the new elected officials created the legal status of domestic partnership (Wisconsin Statutes Chapter 770). The Legislature thereby attempted to do exactly what the people had voted to prevent—to "get around" the Amendment's definition of marriage and "render[] illusory" the people's attempt to preserve marriage as a unique legal status. *Id*. at ¶¶ 54-55.

Chapter 770 is unconstitutional because the new legal status of domestic partnership mirrors the constituent elements of the legal status of marriage. The constituent elements of marriage are the elements that "serv[e] to compose or make up" marriage as a legal status. *See* Random House Webster's Unabridged Dictionary 436 (2d ed. 1999) (defining "constituent"). They are *the component parts of the marital relationship* to which the law grants a status "in [and] with regard to the rest of the community." *See Duket*, 63 N.W. at 85. They do not include the legal incidents consequent to that status.

Marriage, as a legal status, thus is a legally recognized, consensual, exclusive domestic union between two persons, identified by their sex, who are of age and are not closely related by blood. *See* Wis. Stat. §§ 765.01, 765.02(1), 765.03(1). Domestic partnership, as a legal status, likewise is a

legally recognized, consensual, exclusive domestic union between two persons, identified by their sex, who are of age and are not closely related by blood. *See* Wis. Stat. §§ 770.01, 770.05(1)-(5). The legal status of domestic partnership, as created by the Legislature, is thus substantially similar to the legal status of marriage and, as a result, is unconstitutional.

The Legislature deliberately designed domestic partnerships to mimic marriage. Indeed, many of the constituent elements of domestic partnerships—most notably, the same-sex and no-close-blood-relation elements—make little sense unless the Legislature intentionally set out to approximate marriage. For example, there is no plausible reason, other than an intent to copy marriage, why the Legislature should withhold the benefits afforded by domestic partnerships from two brothers who live together and share household expenses, or a young woman who lives with and helps care for her widowed grandfather.

Further confirming the Legislature's intent to copy marriage's essential structure, marriage and domestic partnerships now stand together in Wisconsin on one side of a great chasm that separates them from all other legal statuses known or recognized at law. No other legal status in Wisconsin looks or acts like a marriage or a domestic partnership.

Following Chapter 770's enactment, the people of Wisconsin have shown that they know a marriage copycat when they see one. Each spring the John Muir Middle School in Wausau requires its students to play the "Game of Life," where students form a family unit and learn to manage a budget. (R. 130A:165.) Until the Legislature passed Chapter 770, one boy and one girl formed a family unit; after Chapter 770's passage, the school informed its students that now two girls, or two boys, may also form "family units." (*Id.*) The school bases "the [g]ame on what is legal in Wisconsin," (*id.*); and understandably, what is currently "legal" to the layperson after the passage of Chapter 770 is a legal status substantially similar to marriage. In short, domestic partnerships look so much like marriages that educators now incorporate into their instructional curricula the obvious legal equivalence between the two.

Both the Circuit Court and the Court of Appeals committed fundamental error by confusing the *legal status* of marriage with the *incidents* conditioned upon that status. Comparing the incidents that result from marriage with the incidents that result from domestic partnerships is unnecessary because marriage, as a legal status, does not obtain its identity from the collection of rights and liabilities that attaches to it. This Court

and countless others have already recognized the firmly rooted distinction between marriage's legal status and its consequent benefits and obligations. *See, e.g.*, *Button v. Button*, 131 Wis. 2d 84, 94, 388 N.W.2d 546, 550 (Wis. 1986). It is also telling that Chapter 765 (which establishes the status of marriage) and Chapter 770 (which establishes the status of domestic partnership) are devoid of language pertaining to rights, duties, benefits, or liabilities. Were the legal status of marriage defined by the incidents that flow therefrom, that status would change every time the Legislature amends a statute affecting a marital incident. But the legal status of marriage is not a fluctuant construct that changes upon every legislative update to its consequent incidents.

In short, Chapter 770 uses the blueprint for marriage to design a substantially similar legal status called domestic partnership. This Court should therefore conclude that Chapter 770 cannot stand.

II. Statement of the Facts

On November 7, 2006, the people of Wisconsin—by a 19-point margin—amended their state constitution to affirm marriage as the union of one man and one woman, and to protect against the Legislature or state courts undermining that legal status by creating an "identical or

substantially similar" legal status. Enshrined in the Constitution as Article XIII, Section 13, the Marriage Amendment states:

> 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.

The ballot question that preceded the Marriage Amendment was approved by two successive sessions of the Legislature. (R. 130B:93, 130B:99, 130B:145.) The relationship between the definitional provision ("marriage between one man and one woman") and the legal status provision (no legal status "identical to or substantially similar to" marriage) was a topic of extended discussion during these legislative sessions. (R. 66:48-49, 130B:85, 130B:107-08, 130B:128-29, 130B:139, 130B:141-43.)

One of the authors of the Marriage Amendment stated its purpose and effect clearly: "Marriage is more than just a basketful of government benefits—it is the cornerstone of our society. . . . Creating a technical 'marriage,' but just using a different name, to massage public opinion, doesn't cut it." (R. 66:42.) Legislators were made well aware that "regardless of what creative term is used—civil union, civil compact, state sanctioned covenant, whatever," no legal status substantially similar to

marriage would be valid in Wisconsin. (R. 66:41.) Legislative opponents of the Amendment, with full knowledge of its purposes, repeatedly attempted in both the Senate and the Assembly to delete its legal status provision, but their efforts failed. (R. 66:49, 130B:142.)

Just three years after the people enacted the Marriage Amendment, when political opponents of the Amendment gained control of the Legislature and the Governor's office, Chapter 770 was enacted, and the legal status of domestic partnership was created.

III. Procedural Status of the Case

After Chapter 770's enactment, Petitioners, as concerned Wisconsin taxpayers, filed suit in Dane County Circuit Court, seeking to have Chapter 770 declared unconstitutional, because the legal status of domestic partnership is substantially similar to the legal status of marriage. (R 2:1-11.)[1]

The Attorney General, after thoroughly reviewing Chapter 770, concluded that it violated the Marriage Amendment and declined to defend it in court. (R. 106:9-11.) The Government Defendants then appointed

[1] Before commencing this suit in the Circuit Court, Petitioners filed a petition to take jurisdiction of original action with this Court, seeking to raise the issues presented by this case. This Court declined to take original jurisdiction. *See* Order at 1, *Appling v. Doyle*, No. 2009AP1860-OA (Wis. Nov. 3, 2009).

special counsel, who filed a brief in support of their motion for summary judgment on December 22, 2010. (R. 65:1-68.) Petitioners filed a cross-motion for, and brief in support of, summary judgment on March 8, 2011, as did the Intervening Defendants FAIR Wisconsin, Inc., et al. (R. 83:1-2, 84:1-46, 87:1-2, 88:1-11.)

Following a change in gubernatorial administrations, the Government Defendants filed a motion on May 13, 2011, to withdraw from the action because the new administration, after conducting its own legal review of Chapter 770, concluded (like the Attorney General had) that the legislation was unconstitutional. (R. 105:1-2.) The Circuit Court ordered the Government Defendants to remain in the case, although they no longer defended against Plaintiffs' claims, yet the Court permitted the substance of the Government Defendants' brief to be incorporated into the Intervening Defendants' filing. (R. 133:1-14.) The Circuit Court thus considered the Government Defendants' originally proffered defense of Chapter 770.

On June 20, 2011, the Circuit Court denied Petitioners' motion for summary judgment and granted the Intervening Defendants' motion, concluding 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." (R. 131:31.) On July 1, 2011, Petitioners appealed the judgment of the Circuit Court. (R. 132:1.) After briefing, the Court of Appeals essentially concurred with the decision of the Circuit Court, holding that Chapter 770 was not unconstitutional because "domestic partnerships carry with them substantially fewer rights and obligations than those enjoyed by and imposed on married couples." *Appling v. Doyle*, 2013 WI App 3, ¶ 4, 345 Wis. 2d 762, 766, 826 N.W.2d 666, 667.

Petitioners filed their Petition for Review with this Court on January 22, 2013, and this Court granted that Petition on June 12, 2013.

STANDARD OF REVIEW

Summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). In this case, there are no material facts in dispute, which leaves only questions of law for this Court to resolve.

Questions of law are reviewed *de novo* by this Court. *1325 N. Van Buren, LLC v. T-3 Grp., Ltd.*, 2006 WI 94, ¶ 22, 293 Wis. 2d 410, 426, 716 N.W.2d 822, 830. Constitutional provisions are likewise interpreted *de*

novo by this Court. *Vincent v. Voight*, 2000 WI 93, ¶ 28, 236 Wis. 2d 588, 612, 614 N.W.2d 388, 402. While a constitutional challenge to a statute must overcome a presumption of constitutionality, *State v. Thiel*, 188 Wis. 2d 695, 706, 524 N.W.2d 641, 645 (Wis. 1994), "a constitutional amendment is of the highest dignity and prevails over legislative acts . . . to the contrary," *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 733, 150 N.W.2d 447, 454 (1967).

ARGUMENT

In construing the Marriage Amendment, this Court must "give effect to the intent of the framers and of the people who adopted it." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 28, 719 N.W.2d 408, 421. Wisconsin courts generally look to three primary sources when interpreting 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." *Id*.

Courts give priority to the plain meaning of the constitutional text, and sometimes proceed no further with their analysis. *See McConkey*, 2010 WI 57, ¶ 44 ("A plain reading of the text of the amendment will usually

reveal a general, unified purpose."); *Dairyland*, 2006 WI 107, ¶ 117 (Prosser, J., concurring in part, dissenting in part) ("Courts should give priority to the plain meaning of the words of a constitutional provision in the context used") (citations omitted); *Jacobs v. Major*, 139 Wis. 2d 492, 503-04, 407 N.W.2d 832, 836-37 (Wis. 1987) (finding no ambiguity in the constitutional provision at issue and deciding to "go no further than holding that [the constitutional provision] has plain, unambiguous meaning"); *see also State ex rel. Kuehne v. Burdette*, 2009 WI App 119, ¶¶ 9-19, 320 Wis. 2d 784, 790-94, 772 N.W.2d 225, 228-30 (affirming that courts interpreting constitutional provisions "should give priority to the plain meaning of the words of the provision in the context used," and concluding, without considering other interpretive sources, that the statute contravened the plain meaning of the constitution) (alterations, citations, and quotation marks omitted).

In this case, the first source—the plain meaning of the Marriage Amendment—conclusively establishes that Chapter 770 is constitutionally infirm, and in light of the overwhelming weight of this source, this Court need not analyze the others. If, however, this Court considers the second source, the legislative and ratification debates, that factor will serve only to

reinforce Chapter 770's unconstitutionality. And Petitioners contend that the third source, which analyzes the earliest legislative interpretation of the Marriage Amendment, is inapt here, because the challenged statute and the first legislative action are one in the same and part of a political effort to undermine, not construe or apply, the Marriage Amendment.

I. The Plain Meaning of the Marriage Amendment Establishes That Chapter 770 is Unconstitutional.

The Marriage Amendment provides that a "legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in" Wisconsin. Wis. Const. art. XIII, § 13. Chapter 770 unquestionably validates and recognizes domestic partnership as a legal status. The only issue for this Court to decide, then, is whether the legal status of domestic partnership is substantially similar to the legal status of marriage.

A. The Legal Status of Domestic Partnership is Substantially Similar to the Legal Status of Marriage.

"Legal" means "of or pertaining to law." Random House, *supra*, at 1098. "Status," as this Court has recognized, "means in its common and approved usage 'state or condition.'" *Cnty. of Dane v. Norman*, 174 Wis. 2d 683, 688, 497 N.W.2d 714, 715-16 (Wis. 1993) (quoting Black's Law

Dictionary (6th ed. 1990)). Discussing these terms in the context of marriage, this Court long ago stated:

> [Marriage] creates by law a relation between the parties, and what is called a 'status' of each. The status of an individual, used as a legal term, means the legal position of the individual in or with regard to the rest of the community. That relation between the parties, and that status of each of them with regard to the community which are constituted upon marriage, are . . . imposed [and] defined . . . by law.

Duket, 63 N.W. at 85.

This Court thus must look to state statutes to ascertain the "legal status" of marriage in Wisconsin. When reviewing those statutes, it is necessary to identify the constituent elements that make the legally recognized marital relationship what it is—*the component parts of the marital relationship* to which the law grants a legal status "in [and] with regard to the rest of the community." *See id.*

The legal status of marriage in this state recognizes (1) a domestic relationship between two persons, Wis. Stat. § 765.01; (2) of specified sexes (one man and one woman), *id.*; (3) who are competent to consent, Wis. Stat. § 765.02(1); (4) who generally are over a specified age (18), *id.*; (5) who are not closely related, Wis. Stat. § 765.03(1); and (6) who are not married to someone else, *id.* These are the "essential and material elements

on which the marriage relation rests," *Varney v. Varney*, 52 Wis. 120, 8 N.W. 739, 741 (1881), constituent elements that establish by law the legal status of marriage in Wisconsin.

The legal status of domestic partnership similarly is (1) a domestic relationship between two persons, Wis. Stat. § 770.01(2); (2) of specified sexes (one man and one man, or one woman and one woman), Wis. Stat. § 770.05(5); (3) who are competent to consent, Wis. Stat. § 770.05(1); (4) who are over a specified age (18), *id.*; (5) who are not closely related, Wis. Stat. § 770.05(4); and (6) who are not married to, or in a domestic partnership with, someone else, Wis. Stat. §770.05(2).

"Similar" means "having a likeness or resemblance, esp[ecially] in a general way." Random House, *supra*, at 1782; *see also State v. Kay Distrib. Co.*, 110 Wis. 2d 29, 36-37, 327 N.W.2d 188, 193 (Wis. Ct. App. 1982) (upholding trial court decision defining "similar" to mean "comparable"). "Substantially" means "basic," "fundamental," or "pertaining to the essence." Random House, *supra*, at 1897. "Substantially similar," then, means exhibiting a fundamental resemblance or being closely comparable, which might occur, as it does here, as a result of copying material components.

A comparison of the legal status of domestic partnership to the legal status of marriage reveals a purposeful mimicry. A domestic partnership is defined just like marriage in Wisconsin, in that it is a legally recognized, consensual, exclusive domestic union between two persons, identified by their sex, who are of age and are not closely related by blood to each other. The Legislature thus created a legal status that is substantially similar to marriage.

Many of the constituent elements of domestic partnerships make little sense absent an intent to mimic marriage. It is difficult to ascertain why the Legislature would have insisted that domestic partnerships include, for example, the sex-specification and no-close-blood-relationship elements, unless its purpose was to create a marriage-like status. Nothing but an intent to create a marriage-mirroring same-sex legal status could explain why only two persons of the same sex would qualify for domestic partnership status, while two persons of the opposite sex should not. And nothing but an intent to mimic marriage explains why two unrelated persons are entitled to domestic partnership status, while closely related blood relatives are not. Moreover, the remaining marriage-mirroring elements of domestic partnerships—the exclusivity, age, consent, and two-

person components—even if some might be innocently explained in isolation, demonstrate when considered collectively that the Legislature created a legal status that is substantially similar to marriage.

That marriage and domestic partnerships are mutually exclusive, or direct legal alternatives, further bolsters the conclusion that domestic partnerships mimic marriage. *See, e.g.*, Wis. Stat. § 770.05(2) ("Two individuals may form a domestic partnership if . . . [n]either individual is married to, or in a domestic partnership with, another individual."); Wis. Stat. § 770.12(4)(b) ("If a party to a domestic partnership enters into a marriage that is recognized as valid in this state, the domestic partnership is automatically terminated"). Other legal statuses—such as parent, landowner, corporate officer, business partner, or employer—can be held irrespective of marital status. Only the legal status of domestic partnership is mutually exclusive with marriage. This is because domestic partnerships are a substantially similar alternative to marriage.

Confirming that the Legislature mirrored marriage's essential structure, marriage and domestic partnership are now set apart from all other legal statuses—nothing else in the law looks like them, as even the Court of Appeals acknowledged. *See Appling*, 2013 WI App 3, ¶ 93

("[M]arriage and domestic partnerships are very different from other legal relationships."); *see also Nat'l Pride At Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 535-36 (Mich. 2008) ("Although there are, of course, many different types of relationships in Michigan that are accorded legal significance—e.g., debtor-creditor, parent-child, landlord-tenant, attorney-client, employer-employee—marriages and domestic partnerships appear to be the only such relationships that are defined in terms of *both* gender and the lack of a close blood connection."). The substantial similarity of these two legal statuses, set apart from all others, is reinforced by other factors like the placement of Chapter 770 in the "Marriage and Family" Section of Wisconsin Statutes, and the many statutes that now refer to "spouses and domestic partners" when apportioning various rights and benefits. *See, e.g.*, Wis. Stat. §§ 50.06(3)(a), 859.25(1)(g), 861.21, 861.41, 905.05.

Contrary to the assertion of the Court of Appeals, Petitioners did not argue below that the legal statuses of marriage and domestic partnership encompass "the *eligibility* and *formation* requirements." *Appling*, 2013 WI App 3, ¶ 19. Instead, Petitioners' focus below centered, like it does now, on the constituent elements, or "defining characteristics," of marriage and domestic partnership as legal statuses. *See* Plaintiffs-Appellants' Brief at

16-17, *Appling v. Doyle*, 2013 WI App 3 (No. 2011AP1572). The practical steps for entering into these legal statuses are not constituent elements of those statuses. If that were the case, the completion of forms, along with trips to government offices, would constitute what marriage is. This Court should thus reject any attempt to posit the constituent elements of marriage as mere eligibility or formation requirements.

It is true, of course, as the Court of Appeals points out, that domestic partnerships have a common residency prerequisite, whereas marriage does not. *See Appling*, 2013 WI App 3, ¶¶ 79-81. It is also true that domestic partnerships are defined by statute as an exclusively same-sex legal status, whereas marriage is defined by statute as an exclusively opposite-sex legal status. *See id.* at ¶ 78. Yet domestic partnerships' common residency prerequisite and their same-sex character do not undermine, but actually provide further support for, Petitioners' arguments.

First, domestic partnerships' common residency prerequisite simply demonstrates that domestic partnerships, like marriages, are a legal status for a "domestic" relationship—that is, a relationship "pertaining to the home . . . or the family." *See* Random House, *supra,* at 581. Wisconsin law presumes that married couples reside together. *See Harris v. Kunkel*,

227 Wis. 435, 278 N.W. 868, 869 (1938) ("Cohabitation . . . is certainly a marital duty and obligation"). Indeed, community property principles presumptively establish shared residences and property for spouses as a matter of law. *See* Wis. Stat. § 766.31(2) ("All property of spouses is presumed to be marital property."). Thus, Chapter 770's common residency requirement does nothing to reduce the substantial similarity between domestic partnerships and marriage. If anything, it strengthens the correlation.

Second, for purposes of this Court's analysis, the same-sex character of domestic partnerships does not provide a relevant distinction from marriage. The Court of Appeals correctly reasoned that the proper comparison is to focus on whether the legal status specifies a "permissible gender combination," which both marriage and domestic partnerships do, rather than focusing on the content of that specification. *Appling*, 2013 WI App 3, ¶ 78. "Moreover, because the plain purpose of the marriage amendment is to preserve the institution of opposite-sex marriage," the Court of Appeals accurately reasoned, "it makes no sense to say that one difference weighing in favor of the constitutionality of domestic

partnerships is that they involve same-sex relationships." *Id.* This Court should concur in that assessment.

Even if Respondents were able to identify minor variances between the legal status of domestic partnership and the legal status of marriage, that would not save Chapter 770. Legal statuses that are "substantially similar," by definition, have some distinctions between them; otherwise, the statuses would be "identical." *See* Wis. Const. art. XIII, § 13. Conflating those distinct concepts, both of which are included in the Marriage Amendment, presents two significant concerns. It would defeat the very purpose of the Marriage Amendment, which, as this Court has recognized, is to preserve the one-man-one-woman character of marriage and to prevent the Legislature or state courts from circumventing that preservation by creating marriage substitutes. *See McConkey*, 2010 WI 57, ¶¶ 49-55. And it would offend basic principles of statutory and constitutional construction, which require that effect "be given, if possible, to each and every word" in a constitutional provision, and that courts should "avoid[] wherever possible" a "construction that would result in any portion . . . being superfluous." *Columbia Cnty. v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129, 135 (Wis. 1980).

B. The Legal Statuses of Marriage and Domestic Partnership Are Not Determined by the Incidents—the Rights, Benefits, Obligations, and Liabilities—That Ordinarily Attach to Them.

The *legal statuses* of marriage and domestic partnership are not composed of the *incidents* that are consequent to those statuses. Marriage as a legal status exists separate and apart from the incidents that accompany it, and it was fundamental error for the Circuit Court and the Court of Appeals to conclude that the legal status of domestic partnership was not substantially similar to the legal status of marriage simply because all the rights and obligations that result from marriage do not also attach to domestic partnerships.

The Legislature itself has demonstrated that the legal statuses of marriage and domestic partnership do not include the rights and benefits accompanying them. The purpose of Chapter 770, by its own terms, is to "establish[]" and "provide the parameters for a *legal status* of domestic partnership." Wis. Stat. § 770.001 (emphasis added). But tellingly, Chapter 770 does not define the legal relationship in terms of the incidents associated with it.[2] The same is true of the legal status of marriage.

[2] The Court of Appeals recognized that Chapter 770 does not assign incidents to domestic partnerships, but failed to acknowledge the significance of this fact. *See Appling*, 2013 WI App 3, ¶ 7 ("Chapter 770 does not specify the rights and obligations of domestic

Chapter 765, which establishes the legal status of marriage, does not prescribe the rights or benefits that attach to the status. This statutory structure illustrates that the legal statuses of marriage and domestic partnership are distinct from the incidents that attach to them.

When faced with a similar question to the one before this Court, the Michigan Supreme Court held that the incidental rights and benefits of marriage are not relevant when assessing whether the legal status of domestic partnership is similar to the legal status of marriage. *See Nat'l Pride at Work, Inc.*, 748 N.W.2d at 534 ("[T]he dissimilarities identified by plaintiffs are not dissimilarities pertaining to the *nature* of the marital and domestic-partnership unions themselves, but are merely dissimilarities pertaining to the *legal effects* that are accorded these relationships.").[3] The

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partnerships. The mechanism the legislature chose for conferring rights and obligations was to select a subset of rights and obligations found in other parts of the statutes that already apply to marriages and then indicate, in the text of those other statutes, that they apply to domestic partnerships."). Implicit in the court's observation is the admission that domestic partnerships, at least with respect to the manner in which rights and benefits are bundled and delivered, most assuredly do mimic marriage. While this is not the required analysis, it cuts against the court's own conclusion and demonstrates the Legislature's intent to mirror marriage, a point Petitioners address in Section (IV) below.

[3] The Court of Appeals dismissed the Michigan Supreme Court's acknowledgement of the distinction between the *legal status* of marriage and its *incidents*, stating that "Michigan's marriage amendment more broadly prohibits recognition of 'similar union[s]' to marriage." *Appling*, 2013 WI App 3, ¶ 36 n.7. But when determining the role of marital incidents in the analysis, it matters not whether a constitutional provision prohibits similarity to marriage, as Michigan's Constitution does, or substantial similarity to marriage, as Wisconsin's Constitution does. In both scenarios, the reviewing court should consider the constituent elements of the union—what marriage is, its elemental

Attorney General agrees that this is the proper legal analysis under Wisconsin law. (*See* R. 106:9-10 ("The constitutional analysis does not hinge on a comparison of benefits conferred by law to those who are married and those who are domestic partners. . . . Chapter 770 . . . does not define the legal relationship [of domestic partnership] in terms of benefits[.]").

Much like the court in *National Pride*, this Court has consistently preserved the distinction between the *legal status* of marriage and the *incidents* that attach to the status, stating that "[m]arriage is a legal status in which the state has a special interest" and from which "[c]ertain rights and obligations dictated by the state flow." *Button*, 131 Wis. 2d at 94; *see*, *e.g.*, *Dillon v. Dillon*, 244 Wis. 122, 128, 11 N.W.2d 628, 631 (1943) ("The marriage contract, once entered into, becomes a relation rather than a contract, and invests each party with a *status* towards the other, and society at large, *involving* duties and responsibilities") (emphasis added); *Forbes v. Forbes*, 226 Wis. 477, 277 N.W. 112, 115 (1938) (distinguishing between the *status* of a married couple and the *incidents, rights, duties, and obligations* that attach to marital status), *overruled on other grounds by*

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nature—and not the incidental rights and benefits that go along with it. The *National Pride* case is thus persuasive precedent here.

Haumschild v. Cont'l Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959).[4] The distinction in Wisconsin law between a legal status and the rights and obligations consequent to that status is confirmed in other contexts as well.[5] This Court's precedent thus amply illustrates that the incidents of marriage are consequent to, and not constituent of, the legal status of marriage. Neither duties and responsibilities, nor incidental rights and benefits, combine to create status of marriage—they are merely called forth to accompany it once that legal status exists.

Wisconsin is not alone in recognizing this distinction. Myriad marriage-related cases throughout the country likewise distinguish between the legal status of marriage and the incidents that flow therefrom. *See*, *e.g.*, *Turner v. Safley*, 482 U.S. 78, 96 (1987) (noting that "*marital status* often is a *precondition* to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of

[4] *See also Xiong v. Xiong*, 2002 WI App 110, ¶¶ 13-24, 255 Wis. 2d 693, 699-706, 648 N.W.2d 900, 903-06 (ignoring the incidents associated with marriage when evaluating whether a foreign marriage-like union qualified as a marriage in Wisconsin).

[5] *See, e.g.*, Wis. Stat. § 48.02(12) ("'Legal custody' means a legal status . . . , which confers [certain] right[s] and dut[ies]"); *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 59 Wis. 2d 1, 17, 207 N.W.2d 826, 835 (1973) (finding that the "completion of the [adoption] proceedings gave to the adoptive parents a legal status *and* interests" and discussing the "consequential rights of the adoptive parents").

wedlock)") (emphasis added); *State v. Green*, 99 P.3d 820, 836 (Utah 2004) ("[M]arriage is a state-conferred *legal status*, the existence of which *gives rise to the rights and benefits* reserved exclusively to that particular relationship.") (emphasis added); *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) (same); *Calhoun v. Bryant*, 133 N.W. 266, 271 (S.D. 1911) (holding that the legal status of marriage connotes a certain "relationship," and that although "the law of the state where the marriage is consummated establishes th[at] 'relationship,'" "the mere incidents flowing from that 'status' or relationship are controlled by the law of the domicile of the parties").

Defining the legal status of marriage by tallying up the incidental rights and benefits that attach to it not only conflicts with the principles discussed in all these cases, it also creates an unworkable standard requiring constant judicial reappraisal. Under the lower courts' logic, the current domestic partnership scheme is circumscribed enough in rights and benefits to pass constitutional muster. Presumably, the Legislature, as elected officials have done in other states,[6] can in piecemeal fashion continue to

[6] California's history with domestic partnerships illustrates this point. The California Legislature created the legal status of domestic partnership in 1999. *See* Cal. Assemb. B. 26, 1999 Leg., 1999-2000 Sess. (Cal. 1999). It thereafter expanded the rights attached to that status in 2001, 2002, and 2003. *See* Cal. Assemb. B. 25, 2001 Leg., 2001-2002 Sess.

add more rights and benefits to the legal status of domestic partnership until eventually some imaginary line will be crossed when too many rights or benefits have been afforded. But it is impossible for any court to know where to draw that line. Had the Marriage Amendment been concerned with the number of rights and benefits afforded, rather than the nature of the legal status created, it would have employed much different language compelling courts to engage in this analysis. Because the people did not select language requiring that analysis, the lower courts' approach should be avoided because it will never produce a settled result and is not a firm foundation for sound jurisprudence.

II. The Constitutional Debates and Practices Concerning the Marriage Amendment Establish That Chapter 770 is Unconstitutional.

Petitioners contend that the Marriage Amendment's plain language definitively establishes Chapter 770's unconstitutionality, and thus this Court need not consider other sources of interpretive guidance. But if this Court considers the constitutional debates surrounding the Marriage Amendment, the relevant inquiry focuses on what the Amendment's legislative "framers and the people approving of it . . . intended it to mean."

(Cal. 2001); Cal. Assemb. B. 2216, 2002 Leg., 2002-2003 Sess. (Cal. 2002); Cal. Assemb. B. 205, 2003 Leg., 2003-2004 Sess. (Cal. 2003).

See Dairyland, 2006 WI 107, ¶ 19. That historical context, as a whole, reinforces the conclusion compelled by the plain meaning analysis: that the Legislature and the people of Wisconsin intended to foreclose the creation of any legal status that is substantially similar to the legal status of marriage, and that the legal status of domestic partnership created by Chapter 770 is one such status.

The historical context surrounding the Marriage Amendment's enactment reveals this purpose. The legislative sponsors introduced the Marriage Amendment in February 2004, while the country was beginning to debate the fundamental definition of marriage. (*See* R. 130B:77-79.) The prior year, Massachusetts fundamentally altered its definition of marriage through a ruling by that state's high court. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003). A few years before that, Vermont became one of the first states to provide a new form of domestic union because of a ruling by that state's supreme court. *See Baker v. Vermont*, 744 A.2d 864, 888-89 (Vt. 1999); Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2000). Meanwhile, the people in many other states acted legislatively to preserve marriage as the union of one man and one woman, and, in some states (like Wisconsin) to enhance that preservation by

precluding competing domestic legal statuses. *See*, *e.g.*, Ky. Const. § 233A; Mich. Const. art. I, § 25. In light of this background, Wisconsin legislators and voters quickly came to understand that the purpose of the Marriage Amendment was to preserve marriage not only by securing its definition as the union of one man and one woman, but also by preventing the creation of legal statuses that mimic it.

Many legitimate and compelling reasons support Wisconsinites' decision to preserve marriage and preclude the creation of marriage substitutes. "The main stated concern" of citizens who support marriage and resist efforts to redefine or mimic it is the "likely harm to the institution of marriage." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Society 25, 25 (2004). Even scholars who support redefining marriage have observed that the ability of marriage to achieve its traditional social purposes—"regulation of sexual activity and provision for offspring that may result from it"—has been weakened by the gradual "blurring of the distinction between marriage as an institution and mere 'close relationships.'" *Id.* at 26. This undermining of marriage will, of course, only intensify if the government creates a marriage-look-alike legal status. Such legal developments will eventually reach their "logical conclusion"—

a social understanding of "marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple." *Id.* And these developments could culminate, as even scholars who do not support laws like the Marriage Amendment admit, in "the fading away of marriage" to the point that it becomes "just one of many kinds of interpersonal romantic relationships." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Family 848, 858 (2004). With these concerns as a backdrop, the people of Wisconsin chose to prevent marriage substitutes and thereby protect against this fading away of marriage as a vital social institution.

A. Opponents of the Marriage Amendment and the Media Flooded Voters with the Message that the Amendment Would Preclude Legal Statuses Like That Created by Chapter 770.

Well-funded opponents of the Marriage Amendment inundated voters with the message that the Amendment would prevent the Legislature from creating domestic partnerships like those established by Chapter 770. The Court of Appeals acknowledged that "the record . . . discloses . . . a consistent theme in the statements of . . . opponents": "that the second sentence . . . was inserted to accomplish a complete ban on domestic

partnerships." *Appling*, 2013 WI App 3, ¶ 46 n.11. Indeed, as the Court of Appeals recognized, "many opponents adopted the strategy of warning that the marriage amendment *would* ban domestic partnerships and civil unions." *Id.*

Opponents began trumpeting this message during the legislative debates regarding the Marriage Amendment. (*See* R. 66:49 (reporting in the Milwaukee Journal Sentinel that "[m]uch of the Senate discussion—dominated by Democrats against the amendment—focused on the second sentence of the amendment, which opponents say would ban civil unions and domestic partnerships in Wisconsin"); R. 66:63 (reporting in the Badger Herald that "[Representative] Pocan and other Democrats added [that] the resolution reaches far beyond banning gay marriage, by precluding civil unions and domestic partnerships").)[7]

Following the legislative discussions, opponents continued flooding voters with this messaging throughout the ratification debates. Defendant-Intervenor Fair Wisconsin, leader of the public opposition, spent $4.3 million (approximately 86% of the total money spent by *both sides*

[7] Opponents repeatedly tried to remove the Amendment's second sentence during the legislative process. (*See* R. 130B:85, 87, 91, 107-08, 128-29, 131, 139.) They attempted to do this because they wanted to keep the door open to create marriage-mimicking statuses. (*See* R. 130B:142 ("Democrats tried to change the language by removing the second sentence, which they argued could prevent civil unions from being recognized").)

combined) on a statewide campaign driven by a large paid staff conducting a massive grassroots effort that produced seven television advertisements and myriad radio advertisements. (*See* R. 130A:152-55 (four of Fair Wisconsin's seven television ads); R. 130B:149-51 (Fair Wisconsin had "over 7,000 volunteers, 28 local volunteer committees, 10 field offices, and over 50 paid staff members fighting the [civil union] ban every single day"); R. 130B:152-55 (stating that Fair Wisconsin "set in motion one of the largest grassroots voter mobilization efforts in Wisconsin history").)

Fair Wisconsin saturated voters with the promise that voting "yes" on the Amendment would be tantamount to a "ban on . . . the legal recognition of relationships that are similar to marriage—that includes *civil unions and domestic partnerships*[.]" (R. 101A:4 (emphasis added); *see, e.g.*, R. 101A:15 (stating that the Amendment was an attempt to "outlaw civil unions"); R. 130B:1608 ("If approved, the amendment would . . . prevent the state from allowing civil unions.").) Emphasizing this point, the group told the public that a "yes" vote would force "gay couples" to "lose the hope of civil unions—even ten or twenty years from now." (R. 101A:145-46.)

Lester Pines, the attorney who initially defended Chapter 770 in the Circuit Court, similarly told voters during a television debate that the Marriage Amendment would preclude legislation like Chapter 770:

> This amendment is directly going to threaten the ability of [government entities] to provide domestic partner benefits, there is no question about that, because domestic partners are a legal status, which have been described as substantially similar to marriage, and those relationship[s] shall not be recognized or they shall not be valid in this state if this amendment is adopted.

(R. 66:17.)

These consistent statements, in short, establish that Amendment opponents understood, and told voters, that the legal status of domestic partnership created by Chapter 770 would be substantially similar to marriage and therefore precluded by the Amendment. They succeeded in "refram[ing] the debate in the media and with voters[.]" (R. 130B:150.) The media, as a result, regularly publicized the opponents' message. (*See, e.g.*, R. 130B:116 ("Hundreds of people jammed into the joint Judiciary Committee hearing at the Capitol to argue over whether the Wisconsin Constitution should be amended to ban all legal recognition of unmarried couples regardless of sexual orientation."); R. 66:63 (reporting in the Badger Herald that "Wisconsin voters will now be asked to decide whether

the state's constitution should ban . . . civil unions").) The media even quoted the opinions of neutral legal commentators who echoed opponents' views. (*See, e.g.*, R. 66:49 (quoting Gordon Hylton, a law professor at Marquette University, as stating that "[t]his is clearly designed to rule out civil unions as well as (gay) marriages").)

Downplaying this evidence about the public debates, the Court of Appeals, after acknowledging that the opponents' statements are relevant, *Appling*, 2013 WI App 3, ¶ 44, proceeded to "place more weight on the statements of successful proponents" than the statements of the Amendment's opponents. *Id.*, ¶ 48.[8] It erred in doing so. To begin with, this Court need not dwell on the alleged distinctions between supporters' and opponents' messages because, as shown below, the public statements of both sides confirm that Chapter 770 contravenes the Marriage Amendment. In any event, the ubiquity of opponents' messaging necessitates that it be accorded substantial weight in the analysis. Opponents of the Marriage Amendment outspent supporters by a seven-to-one margin. (*See* R. 130B:146-48, 130B:196, 130B:241, 130B:395.)

[8] Notwithstanding the Court of Appeals' characterization of Petitioners' arguments below, Petitioners did not agree that under these circumstances opponents' public statements should be given less weight than supporters' public statements. *See Appling*, 2013 WI App 3, ¶¶ 44, 48.

Opponents employed popular media more than supporters did, with opponents broadcasting seven television advertisements over a long period of time (*see* R. 130A:152-55 (four of Fair Wisconsin's seven television ads)), compared to only one television advertisement by supporters during a much shorter timeframe (*see* R. 86:1). Opponents also engaged in statewide grassroots advocacy: Fair Wisconsin alone enlisted more than "7,000 volunteers" to publicize to voters across the state its views about the Marriage Amendment. (R. 130B:150.) Opponents' messaging thus reached far more voters than supporters' messaging. It is therefore reasonable to conclude that many voters heard primarily, if not exclusively, the opponents' messaging—including their unambiguous promise that the Marriage Amendment would prohibit the legal status of domestic partnership—and voted for the Amendment intending that it would prevent legislation like Chapter 770.

B. Supporters of the Marriage Amendment Confirmed that the Amendment Would Preclude Legal Statuses Like That Created by Chapter 770.

The Marriage Amendment's supporters, while they had far less money to spread their views or influence the public debate, confirmed the opposition's ubiquitous message that the Amendment would preclude legal

statuses like that established by Chapter 770. Both its legislative sponsors and its public supporters communicated this to the voters.

The legislative sponsors repeatedly indicated that the Marriage Amendment's legal status provision would prevent government entities from creating a marriage-mimicking legal status "regardless of what creative term is used—civil union, civil compact, state sanctioned covenant, whatever." (*See, e.g.*, R. 130B:1605 (Memorandum from legislative sponsors); R. 66:41 (stating the same message in a press release from legislative sponsor Mark Gundrum); R. 66:47 (stating the same message in a memorandum from legislative sponsors Gundrum and Scott Fitzgerald); R. 66:42 (stating in a press release from Gundrum and Fitzgerald that "[c]reating a technical 'marriage,' but just using a different name to massage public opinion doesn't cut it"); R. 66:66 (reporting in the Milwaukee Journal Sentinel Gundrum's statement that the second sentence of the Marriage Amendment would prevent "marriage under a different name"); R. 66:103 (reporting in an Associated Press article Gundrum's statement that "the amendment would . . . guarantee[] a judge could not legalize . . . civil unions"); R. 66:57 ("[T]he primary author . . . intended the amendment to prohibit . . . legal arrangements like civil unions and civil

compacts that essentially confer a legal status . . . substantially similar to that of marriage.").) The Amendment's public supporters reinforced this message to the voters. (*See, e.g.*, R. 66:35 (stating in an informational document from the Family Research Institute of Wisconsin (FRIW) that the Amendment "protects the institution itself from being undermined by 'look-alike' marriages or marriages by another name, regardless of what they may be called (e.g., civil unions, domestic partnerships, civil contracts, etc.)"); R. 89:166 (same); R. 66:72 (asserting in an article by public supporter Julaine Appling that "[t]he first phrase [of the Amendment] protects the word 'marriage,' while the second protects marriage from being undermined by 'look-alike marriages,' or marriage by another name").)

The legislative sponsors and public supporters also told voters that while the Marriage Amendment would prevent a "legal status 'identical or substantially similar to that of marriage,'" government entities would remain free to "set[] up their own legal construct to provide particular privileges or benefits" to unmarried individuals, couples, or groups. (*See, e.g.*, R. 66:41 (press release from Gundrum); R. 66:47 (stating the same message in a memorandum from Gundrum and Fitzgerald); R. 130B:1605

(stating in a memorandum from the legislative sponsors that "[a]s long as the legal construct designed by the state does not rise to the level of creating a legal status 'identical or substantially similar' to that of marriage (i.e. marriage, but by a different name), no particular privileges or benefits would be prohibited"); R. 130B:1607-08 (quoting Mike Levenhagen, consultant with FRIW, in the Appleton Post-Crescent as stating: "Marriage is not a benefits package. The (goal of the) constitution is to promote the general welfare of the state. . . . It's about protecting the institution of marriage, not about rights or benefits."); R. 66:18 (quoting public supporter Kevin Voss in a television debate as stating that the "amendment is about preserving [] one man, one woman marriage. It's not about benefits"); R. 130B:933 (asserting that the Amendment "is not about denying people benefits. It's about [preventing the creation of] a thing—a legal relationship or status—that is substantially like marriage").) In other words, these proponents told voters that although the government may extend benefits to unmarried individuals, couples, or groups, including same-sex couples, it may not do so through a legal status that mirrors the status of marriage.

Not surprisingly, these supporter-driven public messages are consistent with what this Court has already determined to be the overarching purpose motivating the Marriage Amendment's legislative sponsors: "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*." *McConkey*, 2010 WI 57, ¶ 55 (emphasis added).

The Court of Appeals, however, after mentioning only carefully selected statements from the public debate, opined that the Marriage Amendment's supporters "informed voters that domestic partnerships would be permitted and that some subset of the rights and obligations that go with marriage could similarly be accorded to such partnerships." *Appling*, 2013 WI App 3, ¶ 56; *see also id.* at ¶ 64. Yet this erroneous conclusion, even if it fairly depicted the public debates, does not undermine Petitioners' position. The Marriage Amendment, after all, does not prevent the Legislature from extending benefits to unmarried individuals, couples, or groups, including same-sex couples; the Legislature may afford any collection of rights or affix any label (other than marriage) to the vehicle

through which those rights are conferred. *See, e.g.*, *id.* at ¶¶ 49, 51-53, 58-59. But the Legislature may not do what it did in Chapter 770: create, as the means by which to distribute rights and benefits, a legal status that comprises the constituent elements of, and thus is substantially similar to, the legal status of marriage.

This understanding of the Marriage Amendment amply explains the supporter statements quoted by the Court of Appeals, including, for example, legislative sponsor Scott Fitzgerald's statements that the "second clause sets the parameters for civil unions," and that a legislator could "put together a pack of 50 specific things they would like to give to gay couples[.]" *Id.* at ¶ 51; R. 66:49. The mere fact that benefits *could* be accorded through a hypothetical legal status labeled a "civil union" does not mean that *any* civil union will pass constitutional muster. Such a legal status cannot stand, as previously explained, to the extent that it comprises the constituent elements of, and thus is substantially similar to, the legal status of marriage. Fitzgerald's statements are therefore consistent with the framers' intent to preclude marriage-like legal statuses.

The Court of Appeals, in any event, did not fairly characterize many of the public statements it mentioned. For example, it stated that the

Amendment supporters told voters that the "goal of the amendment [was] to stop Vermont-style civil unions that confer virtually all legal rights of marriage on gay couples." *Appling*, 2013 WI App 3, ¶ 58 (quotation marks omitted). But public supporters generally referenced "Vermont-style civil unions" not as the *only* type of legal status that the Marriage Amendment would prevent, but as just *one example*. (*See* R. 66:72 (Amendment supporter Appling wrote that "the second [sentence] protects marriage from being undermined by 'look-alike marriages,' or marriage by another name, *such as* Vermont-style civil unions") (emphasis added); R. 66:35 (Amendment supporter FRIW described the impact of the second sentence by stating that "Vermont-style civil unions, *for instance*, would not be valid") (emphasis added).) It is understandable that supporters referred to Vermont civil unions when explaining the meaning of the legal status provision because at the time of the public debate, Vermont had the only form of civil unions in the country. Transforming this illustrative example into an exhaustive embodiment of the legal status provision's purpose or effect is misleading and inaccurate.

The Court of Appeals, moreover, provided an incomplete and one-sided depiction of the legislative record. The court, for instance, relied

upon a memorandum that the Legislative Council drafted for legislators in 2004 "speculat[ing]" how "a court might" "interpret[] the language" of the Amendment. *Appling*, 2013 WI App 3, ¶ 50. But the memorandum's author candidly acknowledged that his "discussion" was particularly "speculative" and that "others might interpret the proposed language differently than the interpretation offered in th[e] memorandum." (R. 66:43.) The Court of Appeals also discussed a statement taken out of context from a 2006 Legislative Council memorandum. *See Appling*, 2013 WI App 3, ¶ 52. The court ignored that the memorandum did not opine on the constitutionality of a future domestic partnership law, but rather dismissed an unrelated "concern that the second sentence may be interpreted to preclude an unmarried individual from using certain *existing laws and practices* to protect and manage his or her financial, property, or other transactions and relationships." (R. 66:54 (emphasis added).)

Furthermore, pitting the public statements of the Amendment supporters against the public statements of its opponents, as the Court of Appeals did, is misguided and unnecessary under the circumstances. *See, e.g.*, *Appling*, 2013 WI App 3, ¶¶ 46-47. Because, as recounted above, the public statements of supporters and opponents *both confirm* that Chapter

770 contravenes the Marriage Amendment, a voter need not "disbelieve[]" supporters in order to "believe[]" opponents regarding the outcome of this case. *See id.* at ¶ 47. It is thus quite likely and logical—not "faulty," as the Court of Appeals claimed—to conclude that some Wisconsinites heard the basic arguments of one or both sides, agreed with what they heard, and voted for the Amendment intending that it would preclude legislation like Chapter 770. *See id.*

In contrast, it would be unreasonable to conclude that the voters purposefully created the hyper-technical incident-counting approach applied by the lower courts. Put differently, it would be unjustifiable to determine that the electorate intended to permit the legal status of domestic partnership created by Chapter 770 if the Legislature attached 50% of the incidents associated with marriage, but not if the Legislature attached 80% or 90% of those incidents. The voters generally understood that the Marriage Amendment's legal status provision would preclude a marriage-mimicking legal status like that established by Chapter 770. Notwithstanding the lower courts' attempts to reach a different result through an overly stilted and unworkable legal analysis, their conclusions cannot be squared with what the voters understood and intended.

At its core, the Court of Appeals' approach to analyzing the public debates was fundamentally flawed. Overlooking general themes in favor of selected individual statements cannot determine voter intent with any reasonable accuracy. Voters were presented with a cacophony of voices over many years discussing the Amendment and its likely effects. What one public supporter wrote in a student newspaper, or what one legislative sponsor was quoted as saying in a local newspaper, does not dictate the views or intentions of hundreds of thousands of voters statewide. This Court should thus decline to follow the Court of Appeals' myopic analysis, lest it too reach an assumption about voter intent built on a foundation of sand.

III. Relying on the Earliest Legislative Action Interpreting the Marriage Amendment is Inappropriate Here.

Courts "*may* scrutinize the earliest interpretations of [a constitutional] provision by the legislature as manifested in the first laws passed following adoption of the provision." *Dairyland*, 2006 WI 107, ¶ 117 (Prosser, J., concurring in part, dissenting in part) (emphasis added). But placing any probative weight on this potential source of interpretive guidance would be improper here, where the challenged statute itself is the first and only legislative action interpreting the constitutional provision at

issue. Indeed, the Court of Appeals declined to consider this potential interpretive source, *see Appling*, 2013 WI App 3, ¶¶ 72-74, and this Court should follow that course.

Notably, neither the lower courts nor the parties have uncovered any prior Wisconsin case that considered the earliest legislative enactment as interpretive guidance when the earliest legislative act was the very statute under review.[9] Consulting that factor under these circumstances would virtually insulate the challenged law from legal attack. More egregiously, it would effectively permit the Legislature to override any constitutional provision it deems objectionable. Principles of sound jurisprudence thus counsel against consulting the earliest legislative enactment as interpretive guidance when that enactment is the statute under review.

Considering this source of interpretive guidance is all the more problematic in this case because the Legislature that passed Chapter 770 was significantly different from the Legislature that approved the Marriage Amendment. During the three years between the enactment of the

[9] *See, e.g.*, *Dairyland*, 2006 WI 107, ¶¶ 45-48; *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶¶ 23-24, 278 Wis. 2d 216, 233, 692 N.W.2d 623, 631; *State v. Cole*, 2003 WI 112, ¶ 42, 264 Wis. 2d 520, 552-53, 665 N.W.2d 328, 344; *Thompson v. Craney*, 199 Wis. 2d 674, 693, 546 N.W.2d 123, 132 (Wis. 1996); *Payment of Witness Fees in State v. Brenizer*, 188 Wis. 2d 665, 674, 524 N.W.2d 389, 392-93 (Wis. 1994); *State v. Beno*, 116 Wis. 2d 122, 137-38, 341 N.W.2d 668, 676 (Wis. 1984); *Buse v. Smith*, 74 Wis. 2d 550, 571-72, 247 N.W.2d 141, 151 (1976).

Marriage Amendment and the passage of Chapter 770, the composition of the Legislature changed significantly, with power shifting from one political party to the other. *See* Wisconsin Legislative Spotlight, Dec. 1, 2008, http://legis.wisconsin.gov/spotlight/spotl354.htm (showing the political control of the 2009 Legislature). The Legislature that approved Chapter 770, therefore, was not a reliable interpreter of the Marriage Amendment.

Furthermore, the Legislature's *ipse dixit* that the "the legal status of domestic partnership as established in [Chapter 770] is not substantially similar to that of marriage," Wis. Stat. § 770.001, is entitled to no weight because Chapter 770 cannot vouch for its own constitutionality. Although the Legislature is a co-equal branch of government, entrusted with making "policy choices," it is this Court's duty to judge whether those policy choices comport with applicable "constitutional authority," to ensure that legislation "is consistent with constitutional restraints." *Flynn v. Dep't of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245, 248 (Wis. 1998); *see also State v. Williams*, 2012 WI 59, ¶83, 341 Wis. 2d 191, 232, 814 N.W.2d 460, 481 (Abrahamson, C. J., concurring) ("Relying too heavily on contemporaneous legislative action would be ill-advised in all instances

because this court, not the legislature, is the final arbiter of the meaning of the Wisconsin Constitution."). It is not this Court's task to merely acquiesce to, or place its imprimatur upon, the Legislature's self-serving declaration that Chapter 770 does not run afoul of the State Constitution. To do that would permit the Legislature to "arrogate to itself control over" the judicial branch. *See State v. Holmes*, 106 Wis. 2d 31, 42, 315 N.W.2d 703, 709 (Wis. 1982). It would also create a legal climate where shifts in political power not only usher in changes in public policy, but afford a license for constitutional mischief.

Furthermore, the Legislature's declaration of Chapter 770's constitutionality is neutralized by the executive branch's twice-made determination that the legislation is unconstitutional. The Legislature, to be sure, has an obligation to comply with the Wisconsin Constitution. But the Governor and Attorney General have the same duty, and they each have determined that Chapter 770 violates the State Constitution. (*See* R. 105:1-2, 106:9-11.) Under these circumstances—where the two co-equal branches of government, the Legislature and the Executive, have reached opposing conclusions about Chapter 770's constitutionality—the earliest legislative interpretation of the Marriage Amendment, namely the

enactment of Chapter 770 and the legislative declaration of its constitutionality, should not inform this Court's analysis.

IV. If the Incidents and Formation Procedures of Marriage and Domestic Partnerships Are Relevant to Resolving This Case, Chapter 770 is Nevertheless Unconstitutional.

Deciding whether the legal status of domestic partnership is substantially similar to the legal status of marriage is properly resolved by comparing the constituent elements of those legal statuses. As explained in Section (I) above, consulting the incidents that flow from those legal statuses or the procedural steps involved in forming those legal statuses is not relevant to the analysis. Nevertheless, if this Court considers those extraneous matters, Petitioners should still prevail.

A. The Incidents of Domestic Partnerships Are Bundled and Delivered Like the Incidents of Marriage.

The legal status of domestic partnership gives rise to a bundle of incidents ordinarily accorded only to marriage, and it delivers those incidents in a manner ordinarily reserved for marriage. The crucial question for this Court, if it considers these incidents when analyzing whether the legal status of domestic partnership is substantially similar to that of marriage, is not whether the Legislature has assigned to domestic partnerships all the rights and privileges that flow from marriage. Rather,

the relevant question is whether the type of rights assigned to domestic partnerships and the manner in which those rights are assigned to that status are substantially similar to the type of rights afforded, and the manner in which they are delivered, to marriage.

The legal status of domestic partnership, much like that of marriage, gives rise to a package of rights that includes provisions for health care benefits and decision making, *see* Wis. Stat. § 40.51, family and medical leave allowances, *see* Wis. Stat. § 103.10, long-term care coverage, *see* Wis. Stat. § 40.55, estate planning, *see* Wis. Stat. § 852.01(1)(a), property rights, *see* Wis. Stat. § 700.19, disability and death benefits, *see* Wis. Stat. § 40.65, wrongful death actions, *see* Wis. Stat. § 895.04, victim notification rights, *see* Wis. Stat. § 301.38, and the testimonial privilege, *see* Wis. Stat. § 905.05. These categories of rights are far from exhaustive. *See* Howard A. Sweet, *Understanding Domestic Partnerships in Wisconsin*, 82-NOV Wis. Law. 6, 6 (2009) ("[T]he words 'domestic partner' have been added in at least 368 places in the statutes."). But they amply illustrate the significant degree to which the Legislature attempted to mimic marriage by assigning the same type of incidents to domestic partnerships and marriage.

Moreover, through domestic partnerships, the Legislature established a legal status that delivers its incidents to the participants in the same manner that marriage does. Virtually *everywhere* that the Legislature has attached a right to domestic partnerships, that right simultaneously, and in the same manner, attaches to marriage; put differently, the statutes according these rights give them to a "spouse or domestic partner."[10] Some of these rights-affording statutes explicitly affirm the legal equivalency between the right accorded to both domestic partnerships and marriage.[11] In the end, it is telling indeed that *every incident* flowing from domestic partnerships is already attached to marriage—there are no legal rights exclusive to domestic partnerships.

Although the Legislature has not attached to domestic partnerships every incident associated with marriage, this minor difference does not

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[10] *See, e.g.*, Wis. Stat. § 50.06(3)(a) ("The following individuals, in the following order of priority, may consent to an admission . . . : The spouse or domestic partner under ch. 770 of the incapacitated individual"); Wis. Stat. § 101.9208(4m) (applying a provision regarding manufactured home title transfer fees to a "surviving spouse or domestic partner"); Wis. Stat. § 342.17(4)(b) (applying a provision regarding motor vehicle titles to a "surviving spouse or domestic partner"); Wis. Stat. §§ 859.25, 861.21, 861.41 (discussing property rights of a surviving spouse or domestic partner); Wis. Stat. § 905.05(1) (extending the husband-wife testimonial privilege to domestic partners and thereby applying the privilege to "any private communication by one to the other made during their marriage or domestic partnership").

[11] Entities operating an "adult family home," for instance, must "extend the *same right* of accompaniment or visitation to a patient's domestic partner under ch.770 as is accorded the spouse of a patient under the policy." Wis. Stat. § 50.032(2d) (emphasis added).

undercut the substantial similarity between domestic partnerships and marriage. That the legal incidents attached to domestic partnerships are packaged and delivered in the same manner as the incidents attached to marriage, and that all the rights that result from domestic partnerships are likewise associated with marriage, more than suffices to demonstrate that domestic partnerships fundamentally resemble, and thus are substantial similar to, marriage.

B. The Process for Creating a Domestic Partnership is Substantially Similar to the Process for Creating a Marriage.

The congruence between the procedural steps for creating a domestic partnership and the steps for creating a marriage, if this Court deems those formation procedures relevant to its analysis, further shows the substantial similarity between these legal statuses. Prospective domestic partners, just like prospective spouses, go to the clerk of the county where one of them has resided for at least 30 days, *see* Wis. Stat. §§ 770.07(1)(a), 765.05; provide the same identification and confidential information, *see* Wis. Stat. §§ 770.07(1), 765.09(2)-(3); make the same affirmation of accuracy, *see* Wis. Stat. §§ 770.07(1)(d), 765.09(3)(a); pay "the same amount" charged for a marriage license, *see* Wis. Stat. § 770.17; wait the same amount of

time to receive a declaration, *see* Wis. Stat. §§ 770.07(1)(b), 765.08(1) (or pay an additional fee to expedite a declaration, *see* Wis. Stat. §§ 770.07(1)(b)(2), 765.08(2)); and receive a declaration from the county clerk, *see* Wis. Stat. §§ 770.07(2), 765.12(1)(a). The county clerk must even provide domestic partners with the same information on fetal alcohol syndrome given to married couples. *See* Wis. Stat. §§ 770.10, 765.12(1)(a).

After obtaining their declaration, domestic partners validate before a notary public the signatures affirming their declaration. *See* Wis. Stat. § 770.10. Similarly, spouses make their declarations before two witnesses and an authorized official. *See* Wis. Stat. § 765.16. The completed documents for both legal statuses are then recorded by the register of deeds. *See* Wis. Stat. §§ 770.10, 765.19. The process for creating the legal status of domestic partnership is thus virtually identical to the process for entering the legal status of marriage.

* * * * * * *

In sum, Petitioners have shown that marriage and domestic partnership are substantially similar legal statuses: they are both legally recognized, consensual, exclusive domestic unions between two persons,

identified by their sex, who are of age and are not closely related by blood to each other. This remarkable congruence is seen nowhere else in the law.

Moreover, the substantial degree of similarity is confirmed by the Legislature's decision to attach to domestic partnerships only the types of incidents assigned to marriage and to deliver those rights and benefits in the same manner they are afforded to marriage. And the fundamental resemblance between domestic partnerships and marriage is reinforced by the virtually identical processes through which couples acquire those legal statuses.

When taken together, the parallel constituent elements, similar bundling and delivery of incidents, and nearly indistinguishable formation processes leave no doubt that Chapter 770 violates the Marriage Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the lower courts and grant summary judgment to Petitioners, finding that Chapter 770 is unconstitutional.

Respectfully submitted on this 12th day of August, 2013.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes Section 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif—13-point Times New Roman—font (and 11-point Times New Roman font for footnotes). This brief is 10,976 words, as calculated by Microsoft Word, the word processing software with which it was created.

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

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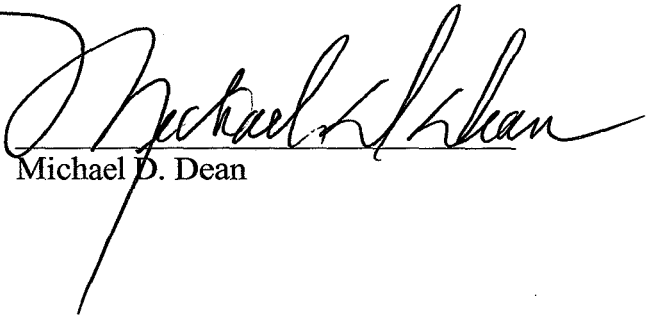

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CERTIFICATION OF FILING AND SERVICE

I hereby certify that pursuant to Wisconsin Statutes Section 809.80(3)(b), I have satisfied the requirements for timely filing of the foregoing brief in that I caused 22 copies and one original to be deposited with a third-party commercial carrier on August 12, 2013, for delivery to the Clerk of Court within three calendar days. The envelope was correctly addressed as follows:

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I further certify that three copies of the foregoing brief were served via U.S. First-Class Mail on August 12, 2013, on the following parties:

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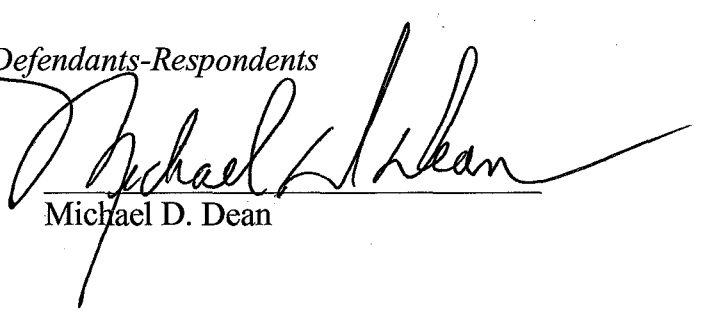

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