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STATE OF WISCONSIN
IN SUPREME COURT

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JULAINE APPLING,
222 S. Hamilton Street, Suite 24
Madison, WI 53703

JAREN E. HILLER,
222 S. Hamilton Street, Suite 24
Madison, WI 53703

EDMUND L. WEBSTER,
222 S. Hamilton Street, Suite 24
Madison, WI 53703

Petitioners,

v.

Original Action Case No. _____

JAMES E. DOYLE,
Wisconsin State Capitol
Room 115 East
Madison, WI 53707
In his official capacity as
Governor of the State of Wisconsin,

KAREN TIMBERLAKE,
1 W. Wilson Street
Madison, WI 53703
In her official capacity as
Secretary of the Wisconsin
Department of Health Services,

JOHN KIESOW,
1 W. Wilson Street
Madison, WI 53702
In his official capacity as
State Registrar of Vital Statistics,

Respondents.

PETITION TO TAKE JURISDICTION OF ORIGINAL ACTION JULAINE APPLING, JAREN E. HILLER, AND EDMUND L. WEBSTER

Petition to Take Jurisdiction of Original Action
Pursuant to Wis. Stat. § 809.70(1)

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* Motions for Admission *Pro Hac Vice* to be Submitted

NOW COME the Petitioners, by their attorneys, and petition this Court, pursuant to § 809.70, Wis. Stats., to take jurisdiction of and grant leave to commence this original action and allege and show to the Court as follows:

I. Statement of the Issues Presented by This Controversy.

1. This petition raises the question of whether Chapter 770, Wis. Stats., creating a domestic partner registry for same-sex couples, violates Art. XIII, sec. 13 of the Wisconsin Constitution by creating and requiring official recognition of a legal status "substantially similar to that of marriage."

II. Statement of the Facts Necessary to an Understanding of the Issues.

A. Parties.

2. The Petitioners are adult residents and taxpayers of the state of Wisconsin and are members of the board of directors of Wisconsin Family Action, which is located at 222 S. Hamilton Street, Suite 24, Madison, Wisconsin.

3. The Respondent James E. Doyle is Governor of the State of Wisconsin. Gov. Doyle is ultimately responsible for all executive department administration of the domestic partner registration system enacted under Chapter 770, Wis. Stats.

4. The Respondent Karen Timberlake is Secretary of the Wisconsin Department of Health Services. Through the Department's Office of Vital Records, Secretary Timberlake is responsible for administration of the domestic partner registration system enacted under Chapter 770, Wis. Stats.

5. The Respondent John Kiesow is Wisconsin Registrar of Vital Statistics, an office of the Wisconsin Department of Health Services. Registrar Kiesow is responsible for administration of the domestic partner registration system enacted under Chapter 770, Wis. Stats.

B. Challenge to Chapter 770 and Standing.

6. The Petitioners have been aggrieved by the enactment of Chapter 770 in that Respondents have already expended, and will continue to expend, tax revenues for payment of costs of the Department of Health Services and Registrar of Vital Statistics to implement the domestic partner registry and registration system created under Chapter 770.

7. The budget bill, through the status created by Chapter 770, further provides that tax revenues paid by Petitioners and other Wisconsin taxpayers shall be expended for payment of costs of the Department of Health Services and Registrar of Vital Statistics to implement the domestic partner registry and registration system created under Chapter 770. In addition, Chapter 770 and the status it creates will impose a heavier tax burden on the Petitioners through the provision of certain state benefits and the exemption of registered same-sex couples from certain taxes and fees. In addition, Chapter 770 and the status it creates have a cognizable fiscal effect by providing certain state benefits to registered same-sex couples and exempting those couples from payment of certain taxes and fees.

8. The illegal and unconstitutional expenditures of public funds and exemptions from taxes provided pursuant to Chapter 770 directly affect Petitioners and similarly situated taxpayers, and causes them to sustain a pecuniary loss, either because the State of Wisconsin has less money to spend for legitimate governmental objectives, or because the State of Wisconsin must levy additional taxes to make up for the loss resulting from the illegal and unconstitutional expenditures and exemptions. *S.D. Realty Co. v. Sewerage Commission of City of Milwaukee*, 15 Wis.2d 15, 21-22 (1961) (citing *Bechthold v. City of Wauwatosa*, 228 Wis. 544, 550 (1938)).

9. Therefore, Petitioners and other Wisconsin taxpayers are damaged and injured by Respondents' expenditure of tax revenues for the implementation and administration of the unconstitutional and illegal domestic partner registry and registration system and have standing to assert this challenge. *See Thompson v. Kenosha County*, 64 Wis.2d 673, 679-80 (1974).

C. The Marriage Amendment and Subsequently Created Domestic Partner Registry.

10. In 2006, the voters of the state of Wisconsin overwhelmingly approved an amendment to the state constitution. That amendment, now Article XIII, sec. 13, of the state constitution provides as follows:

> 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.

11. The 2009 state budget (2009 Act 28) enacts Chapter 770 of the Wisconsin statutes, establishing a statewide domestic partner registry and registration system for same-sex couples, and creating a new legal status of "domestic partner" for persons of the same sex who share the same household, are at least 18 years of age, are not more closely related than second cousins, and are not presently married or in another domestic partnership, all under Chapter 770, Wis. Stats.

12. The criteria for entry into a domestic partnership created under Chapter 770 mimic those for entry into marriage, with the exception of a requirement that the partners be of the same sex. *Compare* Wis. Stat. § 770.05(2) with § 765.03(1). Applicant must be at least 18 years of age and competent, which is the same requirement for a marriage license. *Compare* Wis. Stat. § 770.05(1) with § 765.02(1). Couples seeking to register as domestic partners must share a common residence, an integral quality of marriage. *Compare* Wis. Stat. § 770.05(3) with *Harris v. Kunkel*, 227 Wis. 435, 437-38 (1938). Additionally, the couple may not be of nearer kin than

is allowed for individuals seeking a marriage license. *Compare* Wis. Stat. § 770.05(4) with § 765.03.

13. If same-sex couples seeking to register as domestic partners under Chapter 770 meet these criteria, they must go to the county clerk's office, which also issues marriage licenses. *Compare* Wis. Stat. § 770.07 with § 765.05. Moreover, they must go to the clerk's office in a county in which one applicant has lived for at least thirty days, just as a couple seeking a marriage license. *Compare* Wis. Stat. § 770.07(1)(a) with § 765.05. Upon showing the same proof of identification required for marriage (*compare* Wis. Stat. § 770.07(d) with § 765.09(3)), applicants are required to pay the same fee required for a marriage license. Wis. Stat. § 770.17 (stating that the declaration fee will be the same as the marriage license fee). They must also sign an application to obtain a declaration of domestic partnership which requires their social security numbers and confidential data, the same as a couple seeking a marriage license. *Compare* Wis. Stat. § 770.01(c) with § 765.09(2). They must then wait the same number of days that a couple must wait to obtain a marriage license. *Compare* Wis. Stat. § 770.07(1)(b)(1) with § 765.08(1). Domestic partner applicants may accelerate the process by paying an additional fee to the clerk, in the same amount as it would cost a couple to accelerate a marriage license application. *Compare* Wis. Stat. § 770.07(1)(b)(2) with § 765.08(2).

14. Once these steps are completed, the domestic partnership is recorded and acknowledged in a way that mimics the process for recording and acknowledging marriage. Under Chapter 770, the county clerk issues a declaration of domestic partnership to a same-sex couple, just as the county clerk issues a marriage license to an opposite-sex couple. *Compare* Wis. Stat. § 770.10 with §§ 765.02(2) and 765.12. Newly enacted Chapter 770 even requires the county clerk to provide newly registered domestic partners with the same information on fetal

alcohol syndrome required to be given to married couples. *Compare* Wis. Stat. § 770.10 with § 765.12(1)(a)).

15. The domestic partners are then required to sign and acknowledge the declaration before a notary public. Similarly, married couples must sign the marriage certificate before an authorized minister or official. *Compare* Wis. Stat. § 770.10 with § 765.002(3). The domestic partners must then give the completed declaration for recording to the register of deeds, who is also the custodian of completed marriage documents. *Compare* Wis. Stat. § 770.10 with § 765.19. The register of deeds then forwards the original of the declaration to the state registrar of vital statistics, who also receives the completed marriage worksheet. *Compare* Wis. Stat. § 770.10 with § 765.13.

16. Once a domestic partnership is registered, it will share many of the core legal incidents of marriage. Newly enacted Chapter 770 embeds this new legal status throughout the statutes to provide domestic partners with a substantial number of the significant legal rights and obligations historically reserved to married couples.

17. Such legal rights and obligations include access to treatment records, visitation rights, decision-making for health care and anatomical gifts; ability to bring a wrongful death action; ability to invoke spousal evidentiary privilege in court proceedings; eligibility for victim's compensation; eligibility for Worker's Compensation death benefits; eligibility for family leave; holding property as joint tenants if both partners are owners in a document of title; and exemption from transfer fees for transfers of title between domestic partners. Surviving domestic partners are conferred rights to the estate of the deceased partner that does not pass by will (intestacy); a qualified interest in the deceased partner's interest in a home; the ability to petition a probate court for an allowance for support from the deceased partner's estate; authority

to select from the deceased partner's estate designated personal and household items; a limited exemption of the deceased partner's estate from creditors' claims; and the ability to transfer a deceased partner's interest in motor vehicle. Finally, 2009 Act 28 provides that a local unit of government may provide health and life insurance for a local employee's or officer's domestic partner and dependent children.

D. The Domestic Partner Registry is Unconstitutional.

18. The form of domestic partnership created by the domestic partnership registry is prohibited by Art. XIII, sec. 13 of the Wisconsin Constitution by creating and requiring recognition of a legal status substantially similar to that of marriage. Wisconsin statutes define marriage as a "legal relationship between 2 equal persons, a husband and wife . . . ." Wis. Stat. § 765.001(2). It is "a civil contract . . . which creates the legal status of husband and wife." Wis. Stat. § 765.01. A domestic partnership created under Chapter 770 is a civil contract between two persons creating a legal status that is substantially similar to the legal status of husband and wife. Such domestic partnerships are entered into by same-sex couples and are officially created and acknowledged in essentially the identical way that marriages are entered into by a man and woman and are officially created and acknowledged. Although not all of the legal incidents of marriage are legal incidents of domestic partnerships created under Chapter 770, they are mirror image legal statuses which share enough of the core legal incidents of marriage to be seen by a reasonable observer as a form of marriage for same-sex couples. The new domestic partner registry is designed to be limited to couples defined in a way and subject to the same limitations of kinship, exclusivity, age, etc., as marriage save for the requirement that this status, unlike marriage, is for persons of the same sex.

19. Thus, the status created is not only substantially similar, but virtually identical, to that of marriage.

20. This conclusion is confirmed by a consideration of the purposes that the amendment was intended to achieve. This Court has held that its purpose in the interpretation of a constitutional amendment is "to give effect to the intent of the framers and the people who adopted it . . . ." *State v. Cole*, 2003 WI 112, ¶ 10, quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis.2d 718, 729-30 (1967). It is this Court's practice to read each amendment as a whole, focusing on the general goal of the amendment in an effort to "promote the objects for which they were framed and adopted." *Id.* "[T]he intent," the Court has observed, "is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument..." *Thompson v. Craney*, 199 Wis.2d 674, 690 (1996), quoting *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 184 (1925).

21. In enacting Art. XIII, sec. 13, the people of this state intended to forbid the official recognition of a differently named legal status accorded to relationships other than those between one man and one woman that are intended to substantially serve the social and legal purposes of marriage. They intended to prohibit the creation of a marital-like status for relationships that, while similar in some ways, differ from marriage in ways that will, over time, alter key cultural and legal components of marriage stemming from the unique nature of opposite-sex relationships and, therefore, undermine the "conjugal model" of marriage. *See* Council on Family Law, *The Future Of Family Law: Law and The Marriage Crisis in North America* (2005). Thus, Article XIII, sec. 13 prohibits recognition not only of same-sex marriage, but legal statuses "substantially similar to that of marriage."

22. Marital status is understood to involve intimacy between the married partners and the creation of a family. This status is recognized by the law and becomes the basis for legal incidents thought necessary to support and enforce this status and the obligations assumed by the parties to one another. Chapter 770 does precisely the same for domestic partners.

23. During the campaign to ratify Article XIII, sec. 13, its proponents (including, in particular, Petitioner Appling who directed the principal organization supporting its overwhelming passage by the citizens of Wisconsin) argued in favor of the conjugal model of marriage and said that the recognition of same-sex "marriage" or a substantially similar legal status would undermine the conjugal model of marriage. Proponents argued that recognition of same-sex "marriage" or a legal status substantially similar to marriage would do so, not because recognition of committed same-sex relationships would itself affect the marriages of opposite-sex couples, but rather because officially acknowledging and sanctioning relationships in which the evolved legal and cultural assumptions underlying marriage do not have the same salience would place pressure on the legal and cultural incidents of conjugal marriage. The proponents argued that creation, official endorsement, and normalization of such a "look-alike" status would advance the notion that the purpose of forming a couple is more or less limited to facilitation of the close relationship between, and the felt needs of, its members for as long as it exists, rather than for purposes greater than the relationship itself and the self-directed needs of the individuals comprising it.

24. Thus, proponents of the amendment said that they were "saving," "preserving" or "defending" marriage. Proponents such as the Family Research Institute referred to the measure as the "Marriage Protection Amendment" and distributed a DVD entitled "The Battle for Marriage in Wisconsin." The organization formed to support the amendment was, in fact, called

"Vote Yes for Marriage." In the only television ad ran by the campaign, proponents emphasized retaining the public meaning of marriage as a relationship limited to one man and one woman.

25. In the view of the amendments' proponents, a view endorsed by the overwhelming majority of Wisconsin citizens which ratified the amendment, the threat to marriage from the recognition of same-sex "marriages" turns on whether the relationship granted official recognition is likely to be seen as an alternative form of marriage and, as a result, undermines marriage's traditional meaning and form.

26. According to the traditional or "conjugal model" of marriage that the amendment sought to preserve, marriage is structured in a way that accommodates the differing but inherently complementary natures of men and women and establishes a set of rules, norms and expectations that accommodate the fact that such relationships are potentially procreative – frequently unintentionally so.

27. Official recognition and endorsement of the conjugal model is rooted in the understanding that the optimal environment for raising children is with their biological mother and father.

28. The norm of conjugal marriage, then, is to endorse marriage as the preferred context for the opposite-sex relationships which lead naturally to childbirth. This unique status is designed to keep those mothers and fathers together for the benefit of children and society. It reflects a judgment that, in the great run of cases, children are best off when raised by their biological mother and father and, in fact, that mothers and fathers are complementary but not interchangeable. Expression of the love between marital partners and satisfaction of their emotional needs are certainly important but are not, in and of themselves, the fundamental purpose of or motivation for civil marriage.

29. Rather, official recognition and endorsement of marriage and the resulting set of legal incidents associated with it have developed because of cultural recognition of its inherent, potentially procreative nature. These include assumptions of exclusivity and permanence, duties of financial support and financial interdependence, and recognition of the need and right of children to the love and support of their biological mother and father.

30. By establishing marriage as the normative form of opposite-sex relationships (even for those couples who will not have children), society attempts to maximize the extent to which sex that can produce children takes place within the context that is most likely to allow children to flourish.

31. In contrast to the conjugal view is the "close relationship" model of marriage, *i.e.*, the notion that marriage is best seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. If the purpose of marriage is to facilitate close relationships, then it becomes about – and its norms are driven by – the idea of "pure relationship [*i.e.,*] . . . one that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the individuals involved." Daniel Cere, *The Experts' Story of Courtship* 6 (2000). In this "close relationship" view, there is nothing distinctive about marriage as opposed to other close and intimate relationships, and certainly nothing distinctive about opposite-sex relationships that is indispensable in understanding and defining the nature of marriage.

32. The voters, in enacting Article XIII, sec, 13 sought to prevent the recognition of other legal statuses that might offer a legally sanctioned, officially endorsed, normative, alternative to the conjugal model of marriage. Whether a newly created status, like the domestic partnership registry, falls within that prohibition turns on the new status' social meaning and public

perception - not on a detailed examination of what statutory benefits and duties associated with it are "in" or "out" (which are, in any event, likely to change over time, and no one of which is essential to the status).

33. In fact, a quantitative analysis of benefits is, in and of itself, largely irrelevant to whether "the general objective" of the amendment is achieved and "the evil which existed calling forth the framing and adopting of such instrument" is avoided. The purpose of the amendment was not to "hobble" same-sex relationships by making sure that at least some of the legal benefits of marriage were unavailable to them, but was instead to avoid the legal sanctioning and social normalization of an alternative, "look-alike" form of marriage which, Wisconsin citizens overwhelmingly believed, would, over time, necessarily alter the cultural and legal incidents of conjugal marriage.

34. Therefore, the central question presented by this petition is whether the domestic partnership status created by newly enacted Chapter 770 is "substantially similar to that of marriage." It is the legal recognition of differently named but "look-alike" statuses other than those between one man and one woman that is prohibited by the second sentence of Article XIII, sec. 13.

35. Consequently, when determining what constitutes a legal status "substantially similar to that of marriage" this Court should look deeper than the quantity of marital benefits accompanying the status. Rather, this Court should look at the underlying nature of the status - who it is for, how it is created, what it entails, its official endorsement, its "public" appearance and function – in order to determine whether it is substantially similar to marriage.

36. The domestic partnership status created under Chapter 770 is "for" exclusive, committed relationships between persons of the same sex. As stated above, such domestic

partnerships are a form of relationship between persons that is defined in a way that is identical to the form of relationship between persons eligible for marriage, except for the limitation that domestic partners must be members of the same sex. It is created in and memorialized in precisely the same way as marriage. While domestic partnerships created under Chapter 770 do not share all of the legal incidents of marriage, it bestows many of the most significant benefits which have historically applied only to the unique institution of marriage. In context, the latter limitation makes clear that this is a clear attempt to create a marital like status for same-sex couples, *i.e.*, it is the creation of a legal status which officially recognizes and promotes intimate relationships other than those between one man and one woman.

III. A Statement of the Relief Sought.

37. Petitioners seek a declaration that newly enacted Chapter 770 and the "domestic partner" status that it creates are unconstitutional.

38. Petitioners seek a permanent injunction prohibiting Respondents from enforcing Chapter 770, including, but not limited to, the provision of forms for the registration and dissolution of domestic partnerships or their recording with the Office of Vital Records or the provision of any state benefits or the enforcement by the State of Wisconsin of any obligations predicated upon domestic partnership status as defined in Chapter 770.

IV. A Statement of Reasons Why the Court Should Take Original Jurisdiction.

39. The Wisconsin Supreme Court may, in its discretion, accept original actions. Wis. Const. Art. VIII, § 3(2) and Wis. Stat. § 809.70. Over the course of its cases, the Court has enunciated a three-part test for its decision on whether to grant a petition for original action, recently summarized by the Chief Justice. *State v. City of Oak Creek*, 2000 WI 9, ¶ 108 (Abrahamson, C.J., dissenting). Each of these criteria is satisfied.

40. ***It is a "publici juris," a matter of law and public policy of statewide concern and impact.*** The Wisconsin Legislature has said that the health of the institution of marriage is "of vital interest to society and the state." Wis. Stat. § 765.001 and Wis. Stat. § 944.01. This Court has said that "the state unquestionably has an interest in the maintenance of the [marriage] relation which for centuries has been recognized as a bulwark of our civilization." *Fricke v. Fricke*, 257 Wis. 124, 126 (1950). Whether one agrees with the views of amendment proponents, a substantial majority of Wisconsin voters (in a high turnout election) agreed that the creation of a look-a-like marital status constitutes a threat to the traditional understanding of marriage and its legal and cultural norms. The question of whether domestic partnership status constitutes the type of status they sought to prohibit "significantly affects the community at large." *Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59, ¶ 4. If, in fact, domestic partnership status is a status "substantially similar to that of marriage" then, given the people's determination that such statuses not be recognized, this case is "of more than ordinary importance to the people of the state." *Panzer v. Doyle*, 2004 WI 52, ¶ 2.

41. ***The usual system of trial and appeal is insufficient.*** This is a question that "require[s] prompt and authoritative determination." *Panzer*, 2004 WI 52, ¶ 2. The statute requires county clerks to begin issuing declarations at the beginning of August, 2009. If the Petitioners ultimately prevail, the issuance of these declarations will have violated the constitution of this state and threaten to undermine the conjugal model of marriage in a way that the constitution prohibits.

42. While it not possible for this Court to act upon this petition, order and review briefing, entertain argument, and issue its decision within the thirty day period prescribed by 2009 Act 28 before Chapter 770 takes effect, granting Petitioners' petition for an original action

is the most expeditious means possible to consider and resolve the critical constitutional issues raised herein. Permitting continuing constitutional violations any longer than practically necessary is unacceptable. Domestic partners, moreover, would benefit from a prompt determination of whether the legal arrangements are valid which they may pursue in reliance upon Chapter 770.

43. This Court has often granted original action petitions seeking resolution of constitutional issues raised by provisions in a state budget act. *See, e.g., Wis. Prof'l Police Ass'n v. Lightbourn*, 2001 WI 59 (changes to the state employee retirement system), *Norquist v. Zeuske*, 211 Wis.2d 241 (1997) (changes to the assessment system for agricultural land), *Thompson v. Craney*, 199 Wis.2d 674 (1996) (creation of a new Secretary of Education position), *Joni B. v. State*, 202 Wis.2d 1 (1996) (prohibition on circuit court judges appointing counsel for parents in child protection hearings), and *Citizens Util. Bd. v. Klauser*, 194 Wis.2d 484 (1995) (appropriate use of the Governor's veto power).

44. ***The facts are simple, straightforward, and indisputable.*** The state budget has been passed and signed into law; the commands contained in the contested provisions are clear. This Court is being asked to resolve only a question of law: would these domestic partnerships constitute a legal status substantially similar to that of marriage? If so, then they violate the Wisconsin Constitution.

V. Claim.

45. Petitioners incorporate paragraphs 1 – 45 of this Petition as though fully set forth here.

46. Chapter 770, Wis. Stats. violates Art. XIII, sec. 13 of the Wisconsin Constitution as described herein.

WHEREFORE, Petitioners request an order permitting this matter to proceed as an original action before this Court, a declaration that the newly enacted domestic partner registry is unconstitutional, an injunction against its enforcement, and such other relief as the Court may deem proper.

Dated this 23rd day of July, 2009.

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