SUPREME COURT OF WISCONSIN

Appeal No. 2008AP001868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

Dane Co. Circuit Court
Case No. 2007-CV-002657

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL FROM THE FINAL ORDER OF THE
DANE COUNTY CIRCUIT COURT DATED JUNE 9, 2008,
THE HONORABLE RICHARD G. NIESS, PRESIDING, AND
ON CERTIFICATION FROM THE COURT OF APPEALS

BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

CULLEN WESTON PINES
& BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
122 W. Washington Ave., #900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

EDWARD S. MARION
ATTORNEY-AT- LAW LLC

Edward S. Marion, SBN 1016190
716 Ottawa Trail
Madison, WI 53711
Telephone: (608) 334-9741

Dated: July 8, 2009.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. iv

ISSUES PRESENTED. 1

NECESSITY OF ORAL ARGUMENT AND PUBLICATION. 2

STATEMENT OF THE CASE. 3

STATEMENT OF FACTS 7

ARGUMENT. 10

I. INTRODUCTION. 10

II. THE ANTI-LOGROLLING POLICY BEHIND THE SINGLE SUBJECT RULE CONTAINED IN ARTICLE XII, SECTION 1. 14

III. THE TWO-PART TEST BY WHICH COURTS MUST ANALYZE PROPOSED AMENDMENTS. 19

IV. THE PURPOSE OF A PROPOSED AMENDMENT TO THE WISCONSIN CONSTITUTION IS DETERMINED BY REVIEWING THE TITLES PROVIDED BY TWO CONSECUTIVE LEGISLATURES TO THEIR JOINT RESOLUTIONS. . 25

A. Existing Case Law Under Article XII, Section 1 Does Not Direct Courts How To Identify A Proposed Amendment's Purpose.. 25

B. Current Practice For Titling Joint Resolutions. . 26

C. Purpose Is Identified From The Title Of A Bill In Single Subject Rule Challenges Under Article IV, Section 18. 28

D. Relying On The Legislature's Plain Language In The Title Of Its Joint Resolutions Is Also Consistent With Rules Of Statutory Interpretation.. 30

V. THE FORM IN WHICH ARTICLE XIII, SECTION 13 WAS SUBMITTED TO THE VOTERS VIOLATED ARTICLE XII, SECTION 1 OF THE WISCONSIN CONSTITUTION. 33

A. Article XIII, Section 13 Contains Two Distinct Propositions. 33

B. To Find That The Joint Resolution Proposed An Amendment With Two Separate Purposes Does Not Require A Substantive Interpretation Of The Meaning Of The Amendment. 39

C. The *Thomson* Case Should Be Used To Analyze This Ballet Question To Determine That It Violated The Second Prong Of The *Hudd* Test. . 40

D. The Ballot Question Addressed Two General Purposes, Not One. 43

VI. CONCLUSION.. 45

CERTIFICATION OF BRIEF. 48

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12). 49

TABLE OF AUTHORITIES

Page

Cases:

City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.,
171 Wis. 2d 400, 491 N.W.2d 484 (1992). . . . 17, 28-29, 43

Dairyland Greyhound Park v. Doyle,
2006 WI 107, 295 Wis 2d 1, 719 N.W.2d 408. 31

Helgeland v. Wisconsin Municipalities,
2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1
(Prosser J. dissenting). 18, 19

Loving v. Virginia,
388 U.S. 1 (1967). 45-46

McNally v. Tollander,
100 Wis. 2d 490, 302 N.W.2d 440 (1981). 10

Milwaukee Alliance Against Racist & Political Repression v. Elections Bd. of Wis.,
106 Wis. 2d 593, 317 N.W.2d 420 (1982). 19-22

State ex rel. Barber v. Circuit Court for Marathon County,
178 Wis. 468, 190 N.W. 563, (1922).. 10

State ex rel. Hudd v. Timme,
54 Wis. 318, 11 N.W. 785 (1882). 19-21

State ex rel. Kalal v. Circuit Court,
2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. 30

State ex rel. Thomson v. Zimmerman,
264 Wis. 644, 60 N.W.2d 416 (1953). . . 22-25, 37-38, 40-41

State ex rel Wisconsin Senate v. Thompson,
144 Wis. 2d 429, 424 N.W.2d 385 (1988). 16

Strauss v. Horton,
207 P.3d 48, (Cal. 2009). 40

Sturgis v. Town of Neenah Bd. of Canvassers,
153 Wis. 2d 193, 450 N.W.2d 481 (Ct. App. 1989). 10

Wesberry v. Sanders,
376 U.S. (1964).. 10

Yick Wo v. Hopkins,
118 U.S. (1886).. 10

Wisconsin Constitution

Article IV, Section 18.. . . . . 16, 28-29, 43

Article XII, Section 1. . . . . *passim*

Article XIII, Section 13. . . . . *passim*

Other Authorities

2003 Assembly Joint Resolution 66, designated
by the Secretary of State as 2003 Enrolled
Joint Resolution 29. . . . . 8, 27, 30, 32-33, 41, 43

2005 Senate Joint Resolution 53, designated
by the Secretary of State as 2005 Enrolled
Joint Resolution 30. . . . . 9, 27, 30, 32-33, 41, 43

History of 2003 Assembly Joint Resolution 66. 8

History of 2005 Senate Joint Resolution 53. 9

2005 Senate Joint Resolution 1.. 26

2005 Senate Joint Resolution 2.. 26

2005 Senate Joint Resolution 9.. . . . . *26*

2005 Senate Joint Resolution 10.. 26-27

2005 Senate Joint Resolution 12.. 26

2005 Senate Joint Resolution 19.. 26

2005 Senate Joint Resolution 21.. 26

2005 Senate Joint Resolution 25.. 26

2005 Senate Joint Resolution 33.. . . . . 26, 32

2005 Senate Joint Resolution 35.. 26

2005 Senate Joint Resolution 53.. 26

2005 Senate Joint Resolution 54.. 26

2005 Senate Joint Resolution 61.. 26

2005 Senate Joint Resolution 63.. 26

Robert Luce, *Legislative Procedure* 548-549 (1922). 16

Alice Smith, *From Exploration to Statehood* 654 (1985).. 15

Milo Quaife, *The Attainment of Statehood* 114 (1928).. 15

ISSUES PRESENTED

The issues presented are as follows:

Issue 1: When a referendum question to amend the Wisconsin Constitution is challenged under the single subject rule contained in Wisconsin Constitution Article XII, Section 1, may a court look beyond the legislature's stated purpose to determine the purpose of the proposed amendment?

The Circuit Court answered yes.

Issue 2: Did the submission of the single referendum question to the voters that led to the amendment to the Wisconsin Constitution creating Article XIII, Section 13 violate the single subject rule contained in Article XII, Section 1 of the Wisconsin Constitution thereby rendering the amendment unconstitutional and void?

The Circuit Court answered no.

NECESSITY OF ORAL ARGUMENT AND PUBLICATION

Plaintiff-Appellant-Cross-Respondent respectfully requests oral argument. This appeal involves a matter of significant public concern.

The decision in this case should be published because it will explain the manner in which the single subject rule contained in Article XII, Section 1 and the cases which have interpreted that rule should be applied.

STATEMENT OF THE CASE

This case was commenced by Plaintiff-Appellant-Cross-Respondent William C. McConkey (hereinafter "McConkey") by the filing of a petition for injunction and declaratory relief on July 27, 2007 challenging both the substance of the amendment creating Article XIII, Section 13 of the Wisconsin Constitution and the procedure that lead to its adoption. *(R. 1).* Specifically, McConkey requested the court to declare Article XIII, Section 13 of the Wisconsin Constitution unconstitutional because it was actually two distinct and separate amendments submitted to the voters in violation of a procedural requirement contained in Article XII, Section 1 of the Wisconsin Constitution: the requirement that constitutional amendments "be submitted in such a manner that the people may vote for or against such amendments separately." He also challenged the amendment substantively, claiming it violated the due process and equal protection guarantees enjoyed by the citizens of Wisconsin and the United States.

The Defendant moved to dismiss on August 13, 2007 claiming that McConkey lacked standing to bring the substantive and procedural challenges. *(R. 3).* On September 26, 2007 the court granted the motion to dismiss in part, ruling that McConkey did not have standing to challenge the substance of the amendment. However, the court allowed the parties to further brief the issue of whether McConkey had standing to bring the procedural challenge, i.e., whether he had standing to argue that the amendment was presented to the voters in violation of the single subject rule contained in Article XII, Section 1 of the Wisconsin Constitution. *(R. 18).*

In an oral ruling delivered on November 28, 2007, the court denied the Defendant's motion to dismiss the procedural challenge for lack of standing. (The formal order was entered on December 21, 2007.) *(R. 29 and 33).* The Defendant filed an answer on December 7, 2007. *(R. 30).*[1]

[1] Originally both J.B. Van Hollen, in his official capacity as Attorney General, and James Doyle, in his official capacity as Governor, were Defendants. By stipulation of the parties, Governor Doyle was dismissed as a Defendant on February 21, 2008. *(R. 36 and 37).*

The parties then briefed the merits of McConkey's single subject rule challenge. At a hearing on May 30, 2008, the court orally ruled against McConkey on his procedural challenge and thus denied McConkey's motion for declaratory judgment. *(R. 56, A-App. 1).* In particular, the circuit court first found that the purpose of the proposed amendment was "the preservation and protection of the unique and historical status of traditional marriage." *(R. 56, A-App. 7).* It also found that both propositions placed before the voters furthered that purpose, and concluded that the method by which the proposed amendment was put to the voters did not violate the single subject rule in Article XII Section 1. *Id.* The court formally dismissed the Complaint by order dated June 9, 2008. *(R. 52, A-App. 11).* McConkey appealed on the procedural challenge only and the Defendant cross-appealed on McConkey's standing to bring that challenge. *(R. 53 and 54).*[2] On April 9, 2009 the Court of Appeals certified the appeal to

[2]If the Defendant wishes to pursue its challenge to McConkey's standing, it will raise that in its Initial Brief, due along with its response to this Brief. Therefore, the question of standing will be addressed in future briefs, if necessary, but not in this one.

the Wisconsin Supreme Court, which accepted the certification on May 12, 2009.

STATEMENT OF FACTS

On November 7, 2006, a referendum was submitted to Wisconsin voters on this question:

> QUESTION 1: Marriage. Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?

Article XII, Section 1 of the Wisconsin Constitution sets forth the procedure that must be followed to amend the Wisconsin Constitution. Among other things, in order for an amendment to be effectively adopted, each house of the Legislature must agree by majority vote to the proposal. In the next legislative session, each house must again agree by majority vote to the proposal and submit the same proposal to the people for approval and ratification. In particular, Article XII, Section 1 provides:

> and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

There is no dispute that both houses of the 2003 Legislature agreed by majority vote to a Joint Resolution with the following title setting forth the purpose of the Resolution:

> ***To create*** section 13 of article XIII of the constitution; **relating to**: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (first consideration).

2003 Assembly Joint Resolution 66, lines 1-3 (A-App. 17), designated by the Secretary of State as 2003 Enrolled Joint Resolution 29, hereinafter referred to as "2003 J.R. 29." See History of 2003 Assembly Joint Resolution 66. (A-App. 19)

The Resolution itself contained two sections: the first section was to create section 13 of article XIII of the constitution to read "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."[3] The second section dealt with the numbering of the proposed new section. *2003 J.R. 29 (A-App. 18)*.

[3] "Unmarried individuals" presumably means those individuals in non-marital relationships with other unmarried individuals, i.e., unmarried couples.

Likewise, there is no dispute that both houses of the 2005 Legislature agreed by majority vote to a Resolution with the same first section and the same stated purpose: "***To create*** section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." *2005 Senate Joint Resolution 53, lines 1-3 (A-App. 13), designated by the Secretary of State as 2005 Enrolled Joint Resolution 30, hereinafter referred to as "2005 J.R. 30." See History of 2005 Senate Joint Resolution 53 (A-App. 15).* In the 2005 Joint Resolution, the 2005 Legislature also submitted to the people of Wisconsin by referendum on the November 2006 ballot the question posed at the beginning of this section. *2005 J.R. 30 (A-App. 14).*

The referendum passed and the proposed amendment to the Wisconsin Constitution was adopted as Article XIII, Section 13.

ARGUMENT

I. INTRODUCTION.

At its core, this is a voting rights case. In this Nation, as well as in this State, the right to vote is "a fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "The right to vote is the principal means by which the consent of the governed, the abiding principal of our form of government, is obtained." *McNally v. Tollander*, 100 Wis. 2d 490, 498, 302 N.W.2d 440 (1981). "It is a right which has been most jealously guarded and may not under our Constitution and laws be destroyed or even unreasonably restricted." *State ex rel. Barber v. Circuit Court for Marathon County*, 178 Wis. 468, 190 N.W. 563, 565 (1922). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In Wisconsin, "we adhere to the general principle that the individual has the fundamental, inherent right to have his or her vote counted . . ." *Sturgis v. Town of Neenah Bd. of Canvassers*, 153 Wis. 2d 193, 199, 450 N.W.2d 481 (Ct. App. 1989).

McConkey contends that his Constitutional right to vote in a fair election was violated when he and other voters were forced in November 2006 to vote on two separate and distinct proposed amendments to the Wisconsin Constitution, now commonly known as "the marriage amendment," with only a single answer. He requests that the Court reverse the decision of the circuit court and declare that the "marriage amendment" to the Wisconsin Constitution, Article XIII, Section 13, is unconstitutional because the process by which the amendment was submitted to the voters for approval and ratification violated the single subject rule of Article XII, Section 1 of the Wisconsin Constitution.

Article XII, Section 1 sets forth the process by which the Constitution may be amended. In particular, it requires that an election be held at which voters consider whether to approve and ratify proposed amendments, and that at the election, *"if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against*

such amendments separately."[4] An election which does not meet this single subject rule is, by definition, an unfair election.

Section II of this Brief addresses the policy and purpose behind the single subject rule, and why the framers found it important to prevent logrolling, particularly in direct democracy activities. Section III describes the test used by courts in Wisconsin for more than 100 years to determine whether Article XII, Section 1 has been violated, and discusses the three cases that have applied it in the past.

Because none of those three cases have directly stated how the courts are to determine the "purpose" yardstick by which proposed amendments are measured, Section IV offers a logical method consistent with and drawing on existing precedent. Specifically, courts should look to the purpose stated by the two consecutive Legislatures which have chosen to put the proposal to the voters. In this case, both the 2003 and 2005 Legislatures, when they agreed to the proposed amendment, described its purpose in the title of their

---

[4] Throughout this brief, references to Article XII, Section 1, unless otherwise noted, mean that phrase in Article XII, Section 1.

Resolutions as: "***to create*** *section 13 of article XIII of the constitution* ***relating to:*** *providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."* That is the "purpose" yardstick by which the question put to the voters should be measured to determine whether there was in fact more than one purpose in the ballot question, in violation of the single subject rule.

Finally, Section V of this Brief, will show that the ballot question presented to the voters in November 2006 actually contained two separate questions which merited separate consideration, discussion, and voting. When the electors were forced to answer both questions with a single answer, they were effectively denied the right to vote on half of the questions presented. In turn, the appearance of fairness in the election was undermined, as was the public's confidence in the integrity of the election, and Article XII, Section 1 was violated.

II. THE ANTI-LOGROLLING POLICY BEHIND THE SINGLE SUBJECT RULE CONTAINED IN ARTICLE XII, SECTION 1.

Article XII, Section 1 was enacted to ensure that the people had the opportunity to vote on the precise amendments that were proposed to be added to the Constitution. That basic principle is found in the words of the provision: *if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.* The inclusion of that principle in our Constitution was deliberate.[5]

While there is no record of debate on Article XII, Section 1 in the 1848 constitutional convention, the Court can readily determine from the structure of our Constitution that the framers were committed to a republican form of government and provided for very little direct democracy. They made it difficult to amend the Constitution by requiring both houses in two successive sessions of the Legislature to pass an identical resolution calling for a referendum on a

[5] When citing "Article XII, Section 1" this brief is referring to the last phrase of that section as quoted above.

proposed constitutional amendment before it could be submitted to the voters for approval and ratification. An editorial in the *Prairie du Chien Patriot* published during the campaign for adoption of the 1848 Constitution commented about the reasons that the framers sought to ensure that amendments were carefully considered:

> Thus we see that fundamental changes are placed beyond the reach of sudden ebullition of feeling, prompted by whatever motive; and the deliberate action of both legislature and people is required to effect a change so important.

Milo Quaife, *The Attainment of Statehood* 114 (1928).

The framers were "broad gauged men of affairs, intensely practical and hard headed," "a distinguished body of delegates . . [who] were past and future officials of high rank in Wisconsin--judges, legislators, congressmen and governors." Alice Smith, *From Exploration to Statehood* 654 (1985). They were familiar with a mechanism used by some legislative bodies whereby a controversial provision was combined with a more popular one in order to enhance the probability that the combined item would be approved, while the controversial provision, if considered separately, might

not. That process and the method by which to halt it had ancient roots:

> This device for compelling the people to choose between voting for something they did not approve or rejecting something they did approve became so mischievous in Rome by the year 98 B.C. that the *Lex Caecilia Didia* was enacted, forbidding the proposal of what was known as a *lex satura*; that is, a law containing unrelated provisions.

Robert Luce, *Legislative Procedure* 548-549 (1922).

Wisconsin framers' solution to this questionable practice was consistent with the Romans' *Les Caecilia Didia*, and they included similar provisions in our Constitution: Article IV, Section 18, as well as the final phrase of Article XII, Section 1. Article IV, Section 18 specifically prohibits the legislature from logrolling[6] in private or local bills:

> No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

As the Wisconsin Supreme Court observed, the anti-logrolling provision expressed in Article IV, Section 18:

---

[6] "[T]he generally accepted definition of logrolling includes the concept of joining unrelated provisions and creating a union of interests to secure passage of the legislation." *State ex rel Wisconsin Senate v. Thompson,* 144 Wis. 2d 429, 445, 424 N.W.2d 385 (1988).

> promotes independent legislative consideration of separate, unrelated, and distinct proposals. The framers trusted that if a bill affecting private or local interests had a single subject and a title which called attention to the subject matter, legislators and the people affected by the bill would be alerted and could intelligently participate in considering the bill.

City of Brookfield v. Milwaukee Metropolitan Sewerage Dist., 171 Wis. 2d 400, 425, 491 N.W.2d 484 (1992)(internal citation omitted).

The single subject rule expressed in Article XII, Section 1 articulates the same anti-logrolling policy and serves the same purpose for those circumstances where the legislature is proposing an amendment to the Constitution. That constitutionally-mandated policy is crucial to ensuring that amendments to the Constitution are subject to a clear decision by the people. When considering legislation, legislators can negotiate and compromise to pass a statute, and the governor, through the veto power, can force further improvement to a bill. Voters in a referendum, however, have no opportunity to engage in compromise or revision. Consequently, a referendum that does not rigorously follow the single subject rule creates a risk that through a logrolled joint resolution, the legislature will effectively push voters to adopt a more radical

outcome than (a) the legislative process, tempered by the threat of a gubernatorial veto, or (b) separate questions considered separately, might otherwise have produced. This is especially dangerous where the issue addressed in the proposed constitutional amendment is one subject to the "ebullition of feeling" as the issues of marriage and same-sex relationships have become. The wisdom behind Article XII, Section 1 is its command that the people not be forced to a single vote on a dual purpose measure.

In fact, determining whether or how to provide legal protections for same-sex relationships has provoked "one of the great social and political controversies of our time." *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶154, 307 Wis. 2d 1, 71, 745 N.W.2d 1(Prosser J. dissenting). The referendum submitted to the voters by 2005 J.R. 30, which combined a reservation of marriage to heterosexual couples with a prohibition on the legislature ever providing the obligations and benefits of marriage to unmarried individuals, deprived Wisconsin's voters of "the opportunity to slug it out in the

process leading to an ultimate decision," *id.* ¶*156,* because they were forced by the structure of the proposal to make an "all or nothing" decision. By finding that the presentation of the "marriage amendment" violates Article XII, Section 1, the Court will vindicate the right of the voters to debate all subjects presented in proposed amendments to our organic law and then have the opportunity to cast their vote on each and every one of them.

III. THE TWO-PART TEST BY WHICH COURTS MUST ANALYZE PROPOSED AMENDMENTS.

Judicial review of a ballot question to amend the Wisconsin Constitution has always required the same two-part test. Not only must the various propositions contained in a ballot question be (1) aimed at a single purpose, they must also be (2) interrelated and interdependent, such that if they had been submitted as separate questions, the defeat of one question would destroy the overall purpose of the multi-proposition proposal. *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785, 791 (1882); *Milwaukee Alliance Against Racist &*

Political Repression v. Elections Bd. of Wis., 106 Wis. 2d 593, 604-05, 317 N.W.2d 420 (1982).[7]

Only three decisions in Wisconsin's history have applied Article XII, Section 1. *Hudd* was the first. The *Hudd* court considered a ballot question that contained as many as four propositions arising from the change from annual to biennial legislative sessions. In applying the two-part test, the court found that the propositions were properly put to the voters in one question. Answering the first prong of the test, that all propositions be aimed at a single purpose, the court observed:

> It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the legislature.

Hudd, 11 N.W. at 791.

---

[7] *Hudd* formulates the test in terms of what qualities a ballot question must have to fail: it must contain two or more propositions which 1) "relate to more than one subject," and, 2) "have at least two distinct and separate purposes not dependent upon or connected with each other." *Milwaukee Alliance*, citing *Hudd*, states the test in terms of what qualities the ballot question must have to pass muster: a ballot question with more than one proposition may be submitted as a single amendment if: 1) the various propositions "relate to the same subject matter," and 2) the propositions "are designed to accomplish one general purpose." While these two decisions, written 100 years apart, do not use identical language to state the test, they state mirror images of the same test.

Addressing the second prong, that the propositions need be interrelated and interdependent, the court stated:

> To make that change it was necessary, in order to prevent the election of members of assembly, half of whom would never have any duties to perform, that a change should be made in their tenure of office as well as in the times of their election, and the same may be said as to the change of the tenure of office of the senators.

Id.

Commenting on the importance of the interrelatedness of the various propositions under the second prong, the *Hudd* court also noted that:

> the proposition to change from annual to biennial sessions is so intimately connected with the proposition to change the tenure of office of members of the assembly from one year to two years, that the propriety of the two changes taking place, or that neither should take place, is so apparent that to provide otherwise would be absurd.

Id. at 790.

In the *Milwaukee Alliance* case, the Supreme Court again found that the single-amendment procedural requirement in Article XII, Section 1 had been met. There, addressing the single purpose prong, the court found that the proposed amendment involved a single general purpose: to "change the constitutional provision from the limited concept of bail to the

concept of 'conditional release.'" *Milwaukee Alliance*, 106 Wis. 2d at 607. It also found, under the second prong, that the two propositions identified by the plaintiff contained in the ballot question–the issue of conditional release and the issue of non-monetary bail–were interrelated, such that the failure of one of those propositions, if submitted as separate questions, would have defeated the overall general purpose of the multi-faceted proposal to "change the historical concept of bail . . . to a comprehensive plan for conditional release. . ." *Id.*

The various facets of that ballot question were integral parts of the overall scheme to fundamentally alter the state's management and control of those charged with crimes but not yet found guilty of those crimes. Such a change required a constitutional amendment, because prior to the amendment, the constitution required that bail be available for all persons criminally charged (except capital offenses). *Id.* at 600.

The final Wisconsin case that has addressed the single subject rule of Article XII, Section 1 is *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). There, the

Supreme Court found a ballot question to have violated the second prong of the single subject rule: the interdependent and interrelatedness prong. That question stated:

> Shall sections 3, 4 and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population?

Id. at 651.

The *Thomson* court first accepted for the sake of discussion that the single general purpose of the ballot question was to direct "the legislature to take area as well as population into account in apportioning the **senate** districts." *Id.* at 656 (emphasis added). It then analyzed one of the propositions contained in the ballot question under the second prong to determine whether it was sufficiently related to that claimed overall purpose.

The court observed that a portion of the amendment proposed changing the method of assigning **assembly** district boundaries, and that the change would be a "drastic, revolutionary alteration of the existing constitutional requirements on the subject." *Id.* Comparing that facet of the

ballot question to the overall general purpose for the question, that is, to direct the legislature to consider area as well as population in drawing senate districts, the court found that "the designation of the boundaries of assembly districts[ ] has no bearing on the main purpose of the proposed amendment, as that is stated by the attorney general[.]" *Id.* The court also found that the proposition relating to assembly boundaries did not "tend to effect or carry out that purpose." *Id.*

Having found a violation of the second prong of the *Hudd* test, the court circled back to the first prong of the test, the question of whether there truly was a single general purpose to the ballot question. The court found there were actually at least two purposes, observing that the proposition regarding assembly districts, "must have some different object or purpose" from the single general purpose regarding senate districts advanced by the attorney general. The court found that the ballot question failed to satisfy the *Hudd* test entitling several changes to be submitted as a single amendment, concluding "a separate submission was required of the

amendment changing the boundary lines of assembly districts." *Id.*

IV. THE PURPOSE OF A PROPOSED AMENDMENT TO THE WISCONSIN CONSTITUTION IS DETERMINED BY REVIEWING THE TITLES PROVIDED BY TWO CONSECUTIVE LEGISLATURES TO THEIR JOINT RESOLUTIONS.

A. Existing Case Law Under Article XII, Section 1 Does Not Direct Courts How To Identify A Proposed Amendment's Purpose.

As the Court of Appeals aptly noted in its Certification to this Court, the shortcoming of the three prior decisions applying the single subject rule test under Article XII, Section 1 is that none of them explicitly state how the courts are to determine the purpose by which proposed amendments are measured: "each of those cases simply asserted an intended purpose without discussion how the court would determine purpose." *(Certification by Wisconsin Court of Appeals, p. 6)*

It is unnecessary for the Court to newly-craft a methodology for determining purpose in an Article XII, Section 1 case. The purpose of a proposed constitutional amendment can be determined from the description of the

amendment in the title of the Joint Resolutions that approve it: both the first consideration Joint Resolution, as well as the second consideration Joint Resolution, which also submits the proposal to the voters. That method is consistent with and draws upon existing precedent, as will be shown below.

B. Current Practice For Titling Joint Resolutions.

All joint resolutions are drafted in the same form and each contains a description of its purpose in its title. Joint resolutions fall into three categories: (1) organizing the Legislative calendar, *see, e.g.,* 2005 Senate Joint Resolution 1 *(A-App. 21)*; (2) expressions by the Legislature of events it wants to note, such as birthdays of prominent individuals, deaths of soldiers and special days or weeks, *see, e.g.,* 2005 Senate Joint Resolution 12 *(A-App. 44)*; and (3) proposing constitutional amendments, s*ee, e.g.,* 2005 Senate Joint Resolutions 2, 9, 10, 19, 21, 25, 33, 35, 53, 54, 61, 63 *(all beginning at A-App. 30).*

The titles of all twelve Senate Joint Resolutions proposing constitutional amendments during the 2005 legislative session follow the same format: they contain a

description of the section of the Constitution to be created or amended, followed by the phrase "relating to," which is then followed by a statement of the purpose of the proposed amendment. For example, the title to 2005 Senate Joint Resolution 10 *(A-App. 40)* is:

> ***To amend*** so as in effect to repeal section 10 (2) of article XIII; to renumber section 10 (1) of article XIII; ***and to amend*** section 1 of article V, section 2 of article V, section 3 of article V, section 7 of article V, section 8 of article V and section 1 of article VII of the constitution; **relating to**: abolishing the office of lieutenant governor (first consideration).

The purpose of that proposed amendment is to abolish the office of lieutenant governor.

The titles to 2003 J.R. 29 and 2005 J.R. 30, the first and second considerations by the Legislature approving the proposed "marriage amendment," followed the exact same pattern. They described the section to be created and explained the purpose for doing so:

> ***To create*** section 13 of article XIII of the constitution; **relating to**: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

(A-App. 13 and 17).

The purpose of the proposed "marriage amendment" was to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

C. Purpose Is Identified From The Title Of A Bill In Single Subject Rule Challenges Under Article IV, Section 18.

Utilizing the "purpose" yardstick stated by the Legislature in the title of its joint resolution is consistent with how courts find a bill's purpose in single subject rule challenges under Article IV, Section 18. Just as with Article XII, Section 1, under Article IV, Section 18, "a bill has a single subject if all of its provisions are related to the same general purpose and are necessarily or properly incident to that purpose." *City of Brookfield v. Milwaukee Metropolitan Sewerage District*, 171 Wis. 2d 400, 427, 491 N.W.2d 484 (1992); *compare to* the test under Article XII, Section 1, discussed in Section III, *supra*. That is, the single subject test is the same under both of these constitutional provisions. The Wisconsin Supreme Court explained the policy behind Article IV, Section 18 this way:

> In adopting art. IV, sec. 18, the framers had two purposes: 1) to guard against combining distinct and unconnected matters in a single bill, thereby uniting various interests in support of the whole bill when they would not unite in favor of the individual matters if considered separately, and 2) to prevent legislators and the public from being misled by the title of a private or local bill. The constitutional amendment promotes independent legislative consideration of separate, unrelated, and distinct proposals. *Durkee v. City of Janesville*, 26 Wis. 697, 701 (1870); *Milwaukee County v. Isenring*, 109 Wis. 9, 23, 85 N.W. 131 (1901). The framers trusted that if a bill affecting private or local interests had a single subject and a title which called attention to the subject matter, legislators and the people affected by the bill would be alerted and could intelligently participate in considering the bill.

Id. (footnote omitted.)

Article IV, Section 18 requires that local and private bills embrace only a single subject and that the subject be expressed in the title. The legislature is used to following the mandate to express a single subject in the title of local and private bills. It is likewise capable, if a proposed constitutional amendment embraces only a single subject, of stating that subject in the title to the Joint Resolutions approving and proposing the amendment to the voters.

D. Relying On The Legislature's Plain Language In The Title Of Its Joint Resolutions Is Also Consistent With Rules Of Statutory Interpretation.

While the rules of statutory interpretation do not apply to joint resolutions because they are not statutes, the principles of statutory interpretation provide guidance as to why the Court should not deviate from focusing on the language describing the purpose of a proposed amendment found in a joint resolution's title when determining its purpose. Statutory interpretation in Wisconsin requires a court to focus first on the plain meaning of the statute.[8] From the plain meaning of the words in the titles of 2003 J.R. 29 and 2005 J.R. 30, the Court can determine the purpose of the proposed amendment: "***to create*** *section 13 of article XIII of the constitution;* ***relating to:*** *providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state*."[9]

---

[8]The methodology for determining plain meaning was fully elucidated in *State ex rel. Kalal v. Circuit Court,* 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

[9]Most certainly, the Court should not apply the test used to substantively construe a constitutional provision when a statute or other

Constitutional amendments are not hurried items slipped into a bill by amendment in the dead of night. They begin as legislative proposals that are considered by each house in two consecutive legislative sessions. Each member of the Assembly and the Senate of at least two Legislatures sees the stated purpose for the proposed amendment before voting on it. If there truly is a single purpose to a proposed amendment, the legislature will have enunciated it. Conversely, if there is more than a single purpose, the legislature's statement of only one will make the absence of a single purpose apparent, as it is in this case.

Were the Court to base its determination of a proposed amendment's purpose on something other than the one found in the Enrolled Joint Resolutions, for instance, by determining purpose from statements made by those participating in the public debate surrounding the amendment, it would be

---

official act has been challenged as violating that constitutional provision. *See Dairyland Greyhound Park v. Doyle,* 2006 WI 107 ¶19, 295 Wis 2d 1, 28, 719 N.W.2d 408. This paradigm has never been applied to a single subject rule challenge, and the Court must guard against ruling on matters not before it.

deviating from the determination of purpose already made by the Legislature and legislating from the bench. That is what the circuit court did, when it found that the purpose of the amendment was "the preservation and protection of the unique and historical status of traditional marriage." *(R. 1, A-App. 7),* 2003 J.R. 29 and 2005 J.R. 30 say nothing about preservation, protection, uniqueness, traditional marriage or historical status.

Would the Court look beyond the plain meaning of words of 2005 Senate Joint Resolution 33, which proposed an amendment to the Constitution "**relating to:** prohibiting partial vetoes from creating new sentences" to determine, for example, that its purpose was "to restore the balance of power between the legislature and the Governor?" Of course it would not, because the purpose can readily be determined from the meaning of the words that the Legislature chose to use in its description.

Likewise, the purpose of the proposed "marriage amendment" is derived from the meaning of the words that

the Legislature chose to use in its description: to provide "that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." 2003 J.R. 29; 2005 J.R. 30 *(A-App. 13 and 17).*

The next question for the Court is whether both portions of the referendum put to the voters are sufficiently related to that expressed purpose, as required by Article XII, Section 1 of our Constitution.

V. THE FORM IN WHICH ARTICLE XIII, SECTION 13 WAS SUBMITTED TO THE VOTERS VIOLATED ARTICLE XII, SECTION 1 OF THE WISCONSIN CONSTITUTION.

A. Article XIII, Section 13 Contains Two Distinct Propositions.

The "marriage amendment" contains two distinct propositions:

1. "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." and,

2. "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

The first portion of the ballot question, "to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state," plainly related to the

2003 and 2005 Legislatures' stated purpose of "providing that only a marriage between one man and one woman shall be valid or recognized in the state." Indeed, the virtual identity of the language between the purpose and the first proposition shows that the purpose was fully met with the first proposition. It begs the question: what room existed for any further provision? The second provision, to provide "that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state," was not referred to or referenced at all in the Legislature's stated purpose, and had an additional and distinctly separate purpose. That separate purpose was to deny the legislature the power to provide unmarried individuals access to all of the rights and responsibilities of civil marriage.

Asking voters to limit the legislature's power to decide how the law should treat non-marital relationships in the context of a proposal with a stated overall objective of identifying whose marriages will be recognized as valid

creates precisely the dilemma that the single-amendment requirement in Article XII, Section 1, was designed to prevent. Under the first proposition contained in the ballot question, a voter need only consider whether marriages involving same-sex couples should be denied validity and recognition by the state of Wisconsin. That can be answered "yes" or "no."

However, to answer the second proposition, whether the legislature should be foreclosed from providing unmarried individuals all of the legal protections, rights, and responsibilities of civil marriage, the voter was required to consider the numerous constituencies who could be affected by the proposal and the large number of rights and responsibilities that could be foreclosed by the second proposition. It is possible to decide that same-sex couples should not be allowed marriage, and at the same time decide that at least some unmarried couples should have access to all of the legal protections, rights and responsibilities associated with marriage.

For instance, a voter might view marriage as a primarily religious institution and based on their faith's teachings regarding homosexuality feel that same-sex couples should not be allowed to marry, but at the same time might recognize that the legal incidents to the civil contract of marriage would benefit the community as a whole if they were available to same-sex couples. Such a voter should have been allowed to vote "yes" on the first proposition and "no" on the second. Similarly, another voter might find it appropriate to deny same-sex couples access to the legal status of marriage, yet wish to leave the door open for the legislature to protect heterosexual elderly couples who, if they were to marry, would lose substantial income based on the Social Security record or pension of a deceased wage-earning spouse. This voter, too, should have been allowed to vote "yes" on the first proposition but "no" on the second. The referendum allowed only two classes of voters: "yes, yes" voters and "no, no" voters. It foreclosed anyone who wanted to vote "yes, no" (or "no, yes") from so voting, thus skewing the results.

Article XII, Section 1 protects the rights of Wisconsin voters to hold all of these views and reflect all of these judgments in their votes. Under our Constitution, voters cannot legitimately and constitutionally be presented with a ballot question that compels them to sacrifice 50% of their true convictions, simply in order to preserve and express another conviction.

The inclusion of the second provision by the Legislature in an amendment the purpose of which was to provide that "only a marriage between one man and one shall be valid or recognized in this state" is directly analogous to the inclusion of the provision regarding assembly apportionment in the amendment found unconstitutional in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953). As discussed in Section III, *supra*, in that case, the proposed amendment included a provision directing the legislature to apportion assembly districts according to population without regard to county boundaries, while the purpose of the amendment was to direct "the legislature to take area as well as population into

account in apportioning the senate districts." *Id.* at 656. Most certainly, apportionment of assembly and senate districts can be said to be related; the senate and assembly together make up the Legislature, and the district boundaries of each are related to those of the other. However, the *Thomson* court perceived the provision relating to assembly apportionment insufficiently related to the stated purpose regarding senate apportionment, especially where the change in assembly boundaries was a "drastic, revolutionary alteration of the existing constitutional requirements on the subject."

Here the Legislature, in the face of "one of the great social and political controversies of our times" attached the second provision, not to state whose marriages are recognized as valid in Wisconsin, as was the stated purpose, but to restrict future legislatures from ever confronting the crux of the controversy: what comprehensive legal protections will be given to relationships that exist outside of marriage? That is a purpose separate and apart from the Legislature's stated purpose.

B. To Find That The Joint Resolution Proposed An Amendment With Two Separate Purposes Does Not Require A Substantive Interpretation Of The Meaning Of The Amendment.

Recognizing that the joint resolution submitted two separate amendments to the people in one question involves only the narrow issue of whether the form of the proposed constitutional amendment put to the voters violates the single subject rule of Article XII, Section 1. This dispute does not call upon the Court to determine the exact meaning and reach of the second sentence, a question best left to be answered if and when the legislature creates a new legal status for unmarried individuals that someone contends is identical or substantially similar to that of marriage.

Such a determination is also unnecessary. Even if the second proposition is viewed narrowly as prohibiting "marriage by another name," that is a separate and distinct proposition from reserving the legal status of marriage to opposite-sex couples. As the California Supreme Court recognized in its decision upholding the recent amendment to the California Constitution limiting marriage to opposite-sex

couples (i.e., Proposition 8, codified as California Constitution Article I, Section 7.5), the official designation of "marriage" is, in and of itself, a significant right, separate and apart from the core set of basic substantive legal rights and attributes traditionally associated with marriage. *Strauss v. Horton,* 207 P.3d 48, 74-77 (Cal. 2009):

> Accordingly, although the wording of the new constitutional provision reasonably is understood as limiting the use of *the designation of "marriage"* under California law to opposite sex couples . . . the language of article I, section 7.5, on its face, does not purport to alter or affect the more general holding in the *Marriage Cases* that same sex couples, as well as opposite-sex couples, enjoy the constitutional right, under the privacy and due process clauses of the California Constitution, to establish an officially recognized family relationship.

Strauss, 207 P.3d at 75 (*emphasis in the original*).

C. The *Thomson* Case Should Be Used To Analyze This Ballet Question To Determine That It Violated The Second Prong Of The *Hudd* Test.

The *Thomson* case provides an excellent model by which the Court may analyze the ballot question here. *See State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) and discussion in Section III at pp. 22 - 25, *supra*. The two propositions in the "marriage amendment" ballot question should first be measured against the single general purpose

stated in 2003 J.R. 29 and 2005 J.R.30: "***to create*** Article XIII, Section 13 of the Constitution **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." If the defeat of one of the two propositions found in the proposed amendment would not destroy that asserted overall purpose, *see Thomson*, 264 Wis. at 651, the Court should then consider whether the ballot question has in fact more than one purpose. *See, id.* As explained below, applying that methodology, the referendum question submitted to the voters on November 7, 2006 does not pass the single-amendment procedural requirement of our Constitution.

Assuming that the purpose stated in the joint resolution is a "single purpose," the question under the second prong of the *Hudd* test, which the *Thomson* court applied, becomes: whether, if the two propositions in a referendum had been submitted to the voters separately, and one failed but the other passed, would the overall general purpose have been

defeated. The answer to that question with regard to the second proposition in the referendum is a resounding "no."

Clearly, the first proposition of the ballot question, "only a marriage between one man and one woman shall be valid or recognized as a marriage in this state," that is, stating *whose marriages are valid and recognized by this state,* is directly tied to the asserted general purpose. The stated purpose of the proposed amendment is fully met with the first sentence of the proposed amendment.

As to the relationship between the stated purpose and the second proposition, "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state," there is nothing inherent in a statement of whose marriages will be recognized as valid by the state that requires the determination of whether and to what extent the legislature should be foreclosed from crafting a legal status identical or substantially similar to marriage for unmarried individuals. However, no one could reasonably deny that forcing such a

determination upon the voters is the intent of the second proposition. Likewise, deciding whether to limit the legislature's power to create a scheme through which "unmarried individuals" in Wisconsin may gain most or all of the legal protections provided to married couples in this state does not require a determination of whose marriages are considered valid by the state in the first place.

The latter is the purpose set forth in the titles to 2003 J.R. 29 and 2005 J.R. 30, putting the proposed constitutional amendment to the voters. That stated purpose is constitutionally insufficient because, drawing from Article IV, Section 18 jurisprudence, "a reading of the [proposed amendment] with the full scope of its title in mind discloses a provision clearly outside the title." *City of Brookfield v. Milwaukee Metropolitan Sewerage District*, 171 Wis. 2d 400, 430, 491 N.W.2d 484 (1992).

D. The Ballot Question Addressed Two General Purposes, Not One.

To complete the analysis required by *Hudd,* the Court must finally consider whether there are actually at least two

purposes behind the ballot question. As shown above, while the first proposition of the ballot question is interconnected with the stated purpose of the ballot question, the second proposition is not so related. This Court should find, as the *Thomson* court did, that the second proposition, being insufficiently related to the purpose advanced by the legislature, must have some different object or purpose, and therefore there was more than one purpose to the proposed amendment. Thus, the proposed amendment as submitted to the voters violated Article XII, Section 1.

The circuit court concluded that the two propositions were "two sides of the same coin." *(R. 56, A-App. 7)* That is incorrect. Had the second portion of the ballot question merely proposed that "marriage between any other individuals shall not be allowed, recognized or valid in this state," the circuit court's observation would be true. But the second proposition was not so limited. It was not the obverse of the first.

Rather, the first proposition stated *whose* marriages would be recognized as valid by the state, and the second proposition limited the legislature's power to provide to unmarried people a status that is "identical or substantially similar" to marriage. That is a far different purpose than the first.

The Legislature erred by trying to accomplish two separate and distinct things through one ballot question. By having those two distinct purposes, the ballot question violated the single general purpose prong of the single-amendment requirement set out in Article XII, Section 1 of the Wisconsin Constitution. Having done so, Article XIII, Section 13 is unconstitutional.

VI. CONCLUSION.

In *Loving v. Virginia,* 388 U.S. 1 (1967), the United States Supreme Court said that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man' fundamental to our very

existence and survival." 388 U.S. at 12. (Internal citation omitted.) As such, the determination of who should be allowed access to marriage is a topic that citizens should be permitted to carefully examine. As a separate and distinct consideration, citizens should be allowed to consider whether it is appropriate to tie the hands of the Legislature from creating for any couples, including same-sex couples and elderly heterosexual couples, a legal status "identical or substantially similar" to "one of the basic civil rights of man." The voters were denied the opportunity to consider those two separate and distinct questions separately.

The framers of our Constitution adopted Article XII, Section 1 to ensure that the citizens of this state would not be manipulated into adopting an amendment to the Constitution that coupled an emotionally laden and more popular provision with one that did not necessarily have the same appeal. Applying the wisdom of the framers of our Constitution, the judgment of the circuit court should be reversed and this Court should declare that Article XIII,

Section 13 of the Wisconsin Constitution is unconstitutional and void because the form by which it was submitted to the voters for consideration violated Article XII, Section 1 of the Wisconsin Constitution.

Dated this 8th day of July, 2009.

CULLEN WESTON PINES & BACH LLP

By: /s/ Tamara B. Packard
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111

EDWARD S. MARION ATTORNEY-AT-LAW LLC

By: /s/ Edward S. Marion
Edward S. Marion, SBN 1016190

Attorneys for Plaintiff-Appellant-Cross-Respondent William C. McConkey

Certification of Brief

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,024 words.

/s/ Tamara B. Packard
Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

Certificate of Compliance with Rule 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

/s/ Tamara B. Packard
Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

SUPREME COURT OF WISCONSIN

Appeal No. 2008AP001868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

Dane Co. Circuit Court
Case No. 2007-CV-002657

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

APPENDIX OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

CULLEN WESTON PINES
& BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
122 W. Washington Ave., #900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

EDWARD S. MARION
ATTORNEY-AT- LAW LLC

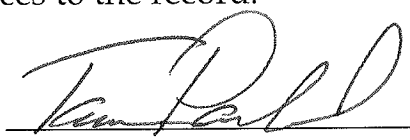
Edward S. Marion, SBN 1016190
716 Ottawa Trail
Madison, WI 53711
Telephone: (608) 334-9741

Dated: July 8, 2009.

Certification of Appendix

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.



Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111

Certificate of Compliance with Rule 809.19(13)

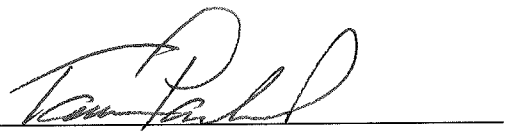
I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §809.19(13).

I further certify that:

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

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



Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111

TABLE OF CONTENTS
Appendix

Page

Excerpts of Transcript of Oral Argument Containing Circuit Court's Decision dated May 30, 2008 ..... A-App. 1

Final Order in Action for Declaratory Judgment ... A-App. 11

2005 Senate Joint Resolution 53 (now 2005 Enrolled Joint Resolution 30) ..... A-App. 13

History of 2005 Senate Joint Resolution 53 ..... A-App. 15

2003 Assembly Joint Resolution 66 (now 2003 Enrolled Joint Resolution 29) ..... A-App. 17

History of 2003 Assembly Joint Resolution 66 ..... A-App. 19

2005 Senate Joint Resolution 1 ..... A-App. 21

2005 Senate Joint Resolution 2 ..... A-App. 30

2005 Senate Joint Resolution 9 ..... A-App. 35

2005 Senate Joint Resolution 10 ..... A-App. 40

2005 Senate Joint Resolution 12 ..... A-App. 44

2005 Senate Joint Resolution 19 ..... A-App. 47

2005 Senate Joint Resolution 21 ..... A-App. 51

2005 Senate Joint Resolution 25 ..... A-App. 54

2005 Senate Joint Resolution 33 ..... A-App. 56

2005 Senate Joint Resolution 35 . . . . . A-App. 58

2005 Senate Joint Resolution 54 . . . . . A-App. 61

2005 Senate Joint Resolution 61 . . . . . A-App. 63

2005 Senate Joint Resolution 63 . . . . . A-App. 65

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

WILLIAM C. McCONKEY,

Plaintiff,

-VS-

J.B. VAN HOLLEN,

Defendant.

CASE NO. 07-CV-2657

COPY

PROCEEDINGS: Oral Arguments

BEFORE: The Honorable RICHARD G. NIESS

DATE: May 30, 2008

APPEARANCES: LESTER PINES and TAMARA PACKARD,
Attorneys at Law,
CULLEN, WESTON, PINES & BACH,
Madison, Wisconsin,
appearing on
behalf of Plaintiff;

THOMAS J. BALISTRERI,
Assistant Attorney General,
WISCONSIN DEPARTMENT OF JUSTICE,
Madison, Wisconsin,
appearing on
behalf of Defendant.

Sarah Finley Pelletier
Official Court Reporter

THE COURT: Well, I'm prepared to rule, Counsel. First of all, I thank you very much for your argument, and I'm sure, Mr. Pines, that the Supreme Court will have the opportunity to develop a model of clarity here because I imagine this will not be the final stop for this case.

Plaintiff William McConkey has filed this action seeking judgment from this court declaring that the marriage amendment to the Wisconsin Constitution Article XIII Section 13 adopted by statewide referendum in November 2006 is unconstitutional because the amendment as submitted to the voters violated a particular procedural provision of Article XII Section 1 of the Wisconsin Constitution. That provision reads, "If more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such amendments separately."

The referendum question considered and adopted by the voters in November of 2006 was worded thus: "Question 1, Marriage. Shall Section 13 of Article XIII of the constitution be created to provide that only a marriage

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

Now, it's important to remember what is not at issue in this lawsuit. Whether or not the marriage amendment Article XIII Section 13 is a wise amendment or sound public policy is not a matter for this court to decide, nor is it a matter for this court to decide whether or not the amendment accomplishes whatever purpose the legislature had in formulating the question. These are purely matters that are political for the legislature and for the citizens of this state to determine.

Similarly, whether the amendment is substantively constitutional under the equal protection clause or other provisions of the United States Constitution is not before this court. That issue was earlier dismissed on an issue of standing in this case without a resolution of that issue on the merits. At issue here today is a discrete, limited and

purely procedural challenge to the marriage amendment.

Now, as background it should be noted that the Wisconsin Constitution Article XII Section 1 expressly delegates to our legislature the authority to determine the method of placing proposed constitutional amendments before the people. It reads in relevant part, "It shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such a manner and at such time as the legislature shall prescribe."

While substantial discretion is granted to the legislature in drafting amendments to be placed before the electorate, its constitutional grant of authority and discretion is strictly limited by the procedural requirements in Article XII Section 1, which are many. In other words, legislative discretion is not so broad that it may ignore the numerous express procedural limits on its authority contained in Article XII Section 1. Only one of these procedural limitations is at issue in this lawsuit. That is, the requirement that if more than one amendment is submitted to the voters,

they must be submitted in a manner that the voters may vote on each amendment separately.

The central question in this lawsuit then is whether or not the marriage amendment in fact consisted of two amendments rather than one, in violation of this separate amendment requirement of Article XII Section 1. As the parties and amicus point out, our Supreme Court has been faced with this issue only three times in its history and it is these three cases which form the precedent which binds this court. One of the critical inquiries the Supreme Court has identified on this issue is this: What is meant by the word "amendment"?

In 1982 -- or in 1882, excuse me, the Supreme Court rejected a narrow definition of the term "amendment," holding that it did not mean that every proposition or sentence which standing alone changes or abolishes or adds any new provision to the constitution requires a separate amendment. In that case, which is the Hudd case, against a single amendment challenge, the Supreme Court upheld a constitutional amendment that was submitted to the voters with at least four separate propositions relating to

the change from annual to biennial sessions of the legislature, including one related to compensation and legislative perquisites.

The court held, "We think amendments to the constitution, which the section above quoted required shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the proposition submitted must relate to more than one subject and have at least two distinct and separate purposes and not dependent upon or connected with each other." This is the test that has been consistently applied in subsequent case law: Do the propositions submitted relate to more than one subject and have at least two distinct and separate purposes not dependent upon nor connected with each other.

In its most recent pronouncement on this issue, a unanimous supreme court stated the Hudd test thus. "It is within the discretion of the legislature to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose." This was the

1982 Milwaukee Alliance case in which the supreme court reaffirmed that a single amendment may cover several propositions all tending to effect and carry out one general object or purpose and all connected with one subject.

Applying the Supreme Court's test to our case, the marriage amendment as submitted to the voters did not violate the single amendment requirement set forth in Article XII Section 1 of the Wisconsin Constitution. The two propositions, the first sentence which defines the only valid marriage recognized in Wisconsin as being between a man and a woman, and the second sentence which pronounces that any legal status for unmarried individuals identical or substantially similar to a marriage is not valid or recognized in Wisconsin, are two sides of the same coin. They clearly relate to the same subject matter and further the same purpose: the preservation and protection of the unique and historical status of traditional marriage.

Plaintiff McConkey argues that this single amendment requirement is violated where two propositions are placed before the voters in one proposed amendment, in those cases where the

defeat of one would not destroy the purpose or object of the other. This he says is the case here. But this narrow test was rejected in Milwaukee Alliance and, moreover, the Rudd court specifically upheld the biennial session amendment even though it included a provision relating to legislator salaries and perks which, while related to the purpose of the amendment, was in no way necessary to effect its purpose or object, which was to change legislative sessions from annual to biennial.

Moreover, even if Plaintiff McConkey's argument were correct, this court cannot conclude that the narrow test was not satisfied here. Accordingly, judgment is entered in favor of Defendant J.B. Van Hollen in his role as attorney general for State of Wisconsin and against Plaintiff William C. McConkey, dismissing Plaintiff's complaint upon a declaration that the marriage amendment complies with the single amendment requirement of Article XII Section 1 of the constitution.

Mr. Balistreri, you may draft the appropriate paperwork. Anything further, Counsel?

MR. PINES: No.

MR. BALISTRERI: Nothing from us.

THE COURT: Thank you. We're adjourned.

(End of proceedings)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, SARAH FINLEY PELLETTER, a Registered Professional Reporter and Official Court Reporter, do hereby certify that I reported in stenographic machine shorthand the above-entitled proceedings had before the Court on the 30th day of May, 2008, and that the foregoing transcript is a true and correct copy of all such notes and proceedings.

Dated this 10th day of June, 2008.

_____

Sarah Finley Pelletter, RPR
Official Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 9 DANE COUNTY

WILLIAM C. McCONKEY,

Plaintiff,

v. Case No. 07-CV-2657

J.B. VAN HOLLEN, in his role as Attorney General of Wisconsin,

Defendant.

FINAL ORDER IN ACTION FOR DECLARATORY JUDGMENT

This case having come on for hearing May 30, 2008, and the Court having considered the pleadings, the record and the arguments of the parties, William C. McConkey, who appeared by his attorneys, Lester A. Pines and Tamara B. Packard, and J.B. Van Hollen, who appeared by his attorney, Assistant Attorney General Thomas J. Balistreri, and having found, for the reasons stated on the record at the hearing, that the ballot question authorized by 2005 AJR 67, regarding the proposal to amend the Wisconsin Constitution to create art. XIII, § 13, fully complied with the requirements of Wis. Const. art. XII, § 1, in that it properly included two propositions that both related to the same subject matter, and were designed to accomplish the same general purpose,

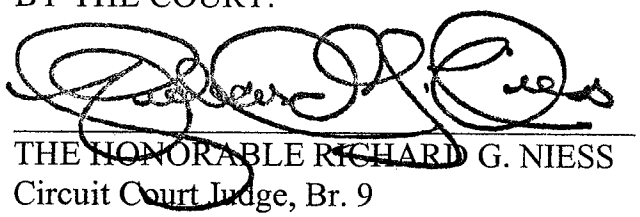
It is hereby DECLARED that Wis. Const. art. XIII, § 13, is not procedurally invalid in violation of Wis. Const. art. XII, § 1, and

It is ORDERED that the complaint of the plaintiff, William C. McConkey, is dismissed.

This is a final order disposing of all remaining matters in controversy between the parties. No further order of the Court is contemplated in this case.

Dated this 9 day of June, 2008.

BY THE COURT:



THE HONORABLE RICHARD G. NIESS
Circuit Court Judge, Br. 9

State of Wisconsin

2005 Senate Joint Resolution 53

ENROLLED JOINT RESOLUTION

To create section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (2nd consideration).

Whereas, the 2003 legislature in regular session considered a proposed amendment to the constitution in 2003 Assembly Joint Resolution 66, which became 2003 Enrolled Joint Resolution 29, and agreed to it by a majority of the members elected to each of the 2 houses, which proposed amendment reads as follows:

SECTION 1. Section 13 of article XIII of the constitution is created to read:

[Article XIII] Section 13. 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.

SECTION 2. **Numbering of new provision.** The new section 13 of article XIII of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 13 of article XIII of the constitution of this state. If one or more joint resolutions create a section 13 of article XIII simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that

are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Now, therefore, be it resolved by the senate, the assembly concurring, That the foregoing proposed amendment to the constitution is agreed to by the 2005 legislature; and, be it further

Resolved, That the foregoing proposed amendment to the constitution be submitted to a vote of the people at the election to be held on the Tuesday after the first Monday in November 2006; and, be it further

Resolved, That the question concerning ratification of the foregoing proposed amendment to the constitution be stated on the ballot as follows:

QUESTION 1: "**Marriage.** Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?"

Representative John G. Gard
Speaker of the Assembly

Senator Alan J. Lasee
President of the Senate

Date

Robert J. Marchant
Senate Chief Clerk

History of Senate Joint Resolution 53

SENATE JOINT RESOLUTION 53
To create section 13 of article XIII of the constitution; relating to: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (2nd consideration).
2005

11-22. S. Introduced by Senators S. Fitzgerald, Stepp, Roessler, Lazich, Leibham, Kanavas, Schultz, A. Lasee, Reynolds, Grothman and Zien; cosponsored by Representatives Gundrum, Nischke, Krawczyk, Suder, J. Fitzgerald, Towns, Owens, Gard, Huebsch, McCormick, Hundertmark, M. Williams, Van Roy, Bies, LeMahieu, Honadel, Pettis, Nass, Ott, F. Lasee, Hahn, Kestell, Lothian, Hines, Gottlieb, Townsend, Gunderson, Kreibich, Petrowski, Meyer, Jeskewitz, Freese, Vos, Kleefisch, Nerison, Ballweg, Moulton, Kerkman, Loeffelholz, Albers, Mursau, Pridemore and Montgomery.
11-22. S. Read first time and referred to committee on Judiciary, Corrections and Privacy 462
11-29. S. Representative Strachota added as a cosponsor 467
11-29. S. Public hearing held.
12-05. S. Executive action taken.
12-05. S. Report adoption recommended by committee on Judiciary, Corrections and Privacy, Ayes 3, Noes 2 474
12-05. S. Available for scheduling.
12-05. S. Placed on calendar 12-6-2005 by committee on Senate Organization.
12-06. S. Read a second time 484
12-06. S. Senate substitute amendment 1 offered by Senators Hansen, Decker, Breske, Jauch, Erpenbach, Lassa and Robson 484
12-06. S. Senate substitute amendment 1 rejected, Ayes 19, Noes 14 484
12-06. S. Senate substitute amendment 2 offered by Senator Carpenter 485
12-06. S. Senate substitute amendment 2 rejected, Ayes 19, Noes 14 485
12-06. S. Senate substitute amendment 3 offered by Senator Carpenter 485
12-06. S. Senate substitute amendment 3 rejected, Ayes 20, Noes 13 485
12-06. S. Senate substitute amendment 4 offered by Senator Carpenter 485
12-06. S. Senate substitute amendment 4 laid on table 485
12-06. S. Senate substitute amendment 5 offered by Senator Carpenter 485
12-06. S. Senate substitute amendment 5 rejected, Ayes 19, Noes 14 485
12-06. S. Senate substitute amendment 6 offered by Senator Carpenter 485
12-06. S. Senate substitute amendment 6 rejected, Ayes 27, Noes 6 485
12-06. S. Senate substitute amendment 7 offered by Senator Carpenter 485
12-06. S. Senate substitute amendment 7 rejected, Ayes 26, Noes 7 485
12-06. S. Senate substitute amendment 8 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 8 rejected, Ayes 25, Noes 8 486
12-06. S. Senate substitute amendment 9 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 9 laid on table 486
12-06. S. Senate substitute amendment 10 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 10 rejected, Ayes 21, Noes 12 486
12-06. S. Senate substitute amendment 11 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 11 rejected, Ayes 21, Noes 12 486
12-06. S. Senate substitute amendment 12 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 12 rejected, Ayes 20, Noes 13 486
12-06. S. Senate substitute amendment 13 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 13 rejected, Ayes 19, Noes 14 486
12-06. S. Senate substitute amendment 14 offered by Senator Carpenter 486
12-06. S. Senate substitute amendment 14 rejected, Ayes 20, Noes

13 486
12-06. S. Senate substitute amendment 15 offered by Senator Carpenter 487
12-06. S. Senate substitute amendment 15 rejected, Ayes 20, Noes 13 487
12-06. S. Senate substitute amendment 16 offered by Senator Carpenter 487
12-06. S. Senate substitute amendment 16 rejected, Ayes 20, Noes 13 487
12-06. S. Senate substitute amendment 17 offered by Senator Carpenter 487
12-06. S. Senate substitute amendment 17 rejected, Ayes 21, Noes 12 487
12-06. S. Senate amendment 1 offered by Senator Carpenter 487
12-06. S. Senate amendment 1 rejected, Ayes 19, Noes 14 487
12-06. S. Senate amendment 2 offered by Senator Carpenter 487
12-06. S. Senate amendment 2 rejected, Ayes 20, Noes 13 487
12-06. S. Senate amendment 3 offered by Senator Carpenter 487
12-06. S. Senate amendment 3 withdrawn and returned to author 487
12-06. S. Senate amendment 4 offered by Senator Plale 488
12-06. S. Senate amendment 4 rejected, Ayes 20, Noes 13 488
12-06. S. Ordered to a third reading 488
12-06. S. Rules suspended 488
12-06. S. Read a third time and adopted, Ayes 19, Noes 14 488
12-06. S. Ordered immediately messaged 488

2006

02-23. A. Received from Senate 837
02-23. A. Read first time and referred to committee on Rules 837
02-23. A. Placed on calendar 2-28-2006 by committee on Rules.
02-28. A. Rules suspended to withdraw from calendar and take up 861
02-28. A. Read a second time 861
02-28. A. Assembly substitute amendment 2 offered by Representatives Molepske, Cullen, A. Williams, Gronemus and Nelson 861
02-28. A. Assembly substitute amendment 2 laid on table, Ayes 57, Noes 38 861
02-28. A. Assembly substitute amendment 1 offered by Representative Underheim 861
02-28. A. Assembly substitute amendment 1 withdrawn and returned to author 862
02-28. A. Ordered to a third reading 862
02-28. A. Rules suspended 862
02-28. A. Read a third time and concurred in, Ayes 62, Noes 31, Paired 6 862
02-28. A. Ordered immediately messaged 862
03-01. S. Received from Assembly concurred in 653
03-03. S. Report correctly enrolled on 3-3-2006 681
03-22. S. Deposited in the office of the Secretary of State on 3-22-2006. Enrolled Joint Resolution 30. 757
03-30. S. Not published 757

Search for another history

Legislation Back to Legislation Page

Back to Legislature Home Page

2003 ASSEMBLY JOINT RESOLUTION 66

February 9, 2004 – Introduced by Representatives GUNDRUM, W. WOOD, VUKMIR, NISCHKE, WEBER, KRAWCZYK, SUDER, J. FITZGERALD, TOWNS, OWENS, LADWIG, MCCORMICK, HUNDERTMARK, M. WILLIAMS, SERATTI, VAN ROY, GROTHMAN, BIES, LEMAHIEU, HONADEL, PETTIS, NASS, OTT, VRAKAS, F. LASEE, HAHN, KESTELL, LOTHIAN, HINES, OLSEN, GOTTLIEB, TOWNSEND, GUNDERSON, KREIBICH, PETROWSKI, D. MEYER and HUEBSCH, cosponsored by Senators S. FITZGERALD, STEPP, ROESSLER, LAZICH, LEIBHAM, ZIEN, KANAVAS and SCHULTZ. Referred to Committee on Judiciary.

To create section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2003 legislature on first consideration, provides that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the assembly, the senate concurring, That:

SECTION 1. Section 13 of article XIII of the constitution is created to read:

[Article XIII] Section 13. 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.

SECTION 2. Numbering of new provision. The new section 13 of article XIII of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 13 of article XIII of the constitution of this state. If one or more joint resolutions create a section 13 of article XIII simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

History of Assembly Joint Resolution 66

ASSEMBLY JOINT RESOLUTION 66
To create section 13 of article XIII of the constitution; relating to: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (first consideration).
2004

02-09. A. Introduced by Representatives Gundrum, W. Wood, Vukmir, Nischke, Weber, Krawczyk, Suder, J. Fitzgerald, Towns, Owens, Ladwig, McCormick, Hundertmark, M. Williams, Seratti, Van Roy, Grothman, Bies, LeMahieu, Honadel, Pettis, Nass, Ott, Vrakas, F. Lasee, Hahn, Kestell, Lothian, Hines, Olsen, Gottlieb, Townsend, Gunderson, Kreibich, Petrowski, D. Meyer and Huebsch; cosponsored by Senators S. Fitzgerald, Stepp, Roessler, Lazich, Leibham, Zien, Kanavas and Schultz.
02-09. A. Read first time and referred to committee on Judiciary 690
02-11. A. Representative Gard added as a coauthor 699
02-11. A. Representative Albers added as a coauthor 699
02-12. A. Public hearing held.
02-24. A. Executive action taken.
02-25. A. Report adoption recommended by committee on Judiciary, Ayes 6, Noes 1 734
02-25. A. Referred to committee on Rules 734
03-02. A. Made a special order of business at 9:00 A.M. on 3-4-2004 pursuant to AR 35 779
03-04. A. Read a second time 792
03-04. A. Refused to reject, Ayes 28, Noes 69 792
03-04. A. Assembly amendment 1 offered by Representatives Cullen and Molepske 792
03-04. A. Assembly amendment 1 laid on table, Ayes 61, Noes 36 792
03-04. A. Assembly amendment 2 offered by Representative Colon 792
03-04. A. Assembly amendment 2 withdrawn and returned to author 792
03-04. A. Assembly amendment 3 offered by Representative Colon 792
03-04. A. Point of order that Assembly amendment 3 not germane well taken 792
03-04. A. Decision of the Chair appealed 792
03-04. A. Decision of the Chair upheld, Ayes 59, Noes 38 792
03-04. A. Call of the Assembly lifted, Ayes 70, Noes 26 794
03-04. A. Call of the Assembly lifted, Ayes 65, Noes 32 794
03-04. A. Refused to refer to joint committee on Finance, Ayes 35, Noes 62 794
03-04. A. Ordered to a third reading 797
03-04. A. Refused to suspend rules to read a third time, Ayes 68, Noes 28 797
03-04. A. Read a third time and adopted, Ayes 68, Noes 27, Paired 4 798
03-04. A. Ordered immediately messaged 798
03-05. S. Received from Assembly 680
03-05. S. Read first time and referred to committee on Judiciary, Corrections and Privacy 681
03-08. S. Executive action taken.
03-09. S. Report concurrence recommended by committee on Judiciary, Corrections and Privacy, Ayes 3, Noes 2 685
03-09. S. Available for scheduling.
03-09. S. Placed on calendar 3-10-2004 by committee on Senate Organization.
03-11. S. Placed on calendar 3-11-2004 by committee on Senate Organization.
03-11. S. Considered for action at this time 715
03-11. S. Senate substitute amendment 1 offered by Senator Carpenter 715
03-11. S. Senate substitute amendment 1 laid on table, Ayes 19, Noes 14 715
03-11. S. Senate amendment 1 offered by Senator Carpenter 715
03-11. S. Senate amendment 2 offered by Senator Carpenter 715
03-11. S. Senate amendment 3 offered by Senator Carpenter 715
03-11. S. Senate amendment 4 offered by Senator Carpenter 715
03-11. S. Senate amendment 5 offered by Senator Carpenter 715
03-11. S. Senate amendment 6 offered by Senator Carpenter 716
03-11. S. Senate amendment 7 offered by Senator Carpenter 716
03-11. S. Senate amendment 8 offered by Senator Carpenter 716
03-11. S. Senate amendment 9 offered by Senator Carpenter 716
03-11. S. Senate amendment 10 offered by Senator Carpenter 716
03-11. S. Senate amendment 11 offered by Senator Carpenter 716
03-11. S. Senate amendment 12 offered by Senator Carpenter 716
03-11. S. Senate amendment 1 laid on table, Ayes 19, Noes 13

..... 716
03-11. S. Senate amendment 2 laid on table, Ayes 19, Noes 14
..... 716
03-11. S. Senate amendment 3 laid on table, Ayes 19, Noes 14
..... 716
03-11. S. Senate amendment 4 laid on table, Ayes 19, Noes 14
..... 716
03-11. S. Senate amendment 9 considered for action at this time 716
03-11. S. Senate amendment 9 laid on table, Ayes 19, Noes 14
..... 716
03-11. S. Senate amendment 5 laid on table, Ayes 20, Noes 13
..... 716
03-11. S. Senate amendment 6 laid on table, Ayes 19, Noes 14
..... 716
03-11. S. Senate amendment 7 laid on table, Ayes 19, Noes 14
..... 717
03-11. S. Senate amendment 8 laid on table, Ayes 19, Noes 14
..... 717
03-11. S. Senate amendment 10 laid on table, Ayes 19, Noes 14
..... 717
03-11. S. Senate amendment 11 laid on table 717
03-11. S. Senate amendment 12 laid on table 717
03-11. S. Ordered to a third reading 717
03-11. S. Rules suspended 717
03-11. S. Read a third time and concurred in, Ayes 20, Noes 13
..... 717
03-11. S. Ordered immediately messaged 720
03-15. A. Received from Senate concurred in 894
03-18. A. Report correctly enrolled 905
04-06. A. Deposited in the office of the Secretary of State. Enrolled Joint Resolution 29 915
04-06. A. Published 4-16-2004, 8-3-2004, 9-7-2004, 10-5-2004
..... 915

Search for another history

Legislation Back to Legislation Page

Back to Legislature Home Page

LRB–0700/3
JK&RAC:kjf/jd:ch

2005 SENATE JOINT RESOLUTION 1

January 3, 2005 – Introduced by JOINT COMMITTEE ON LEGISLATIVE ORGANIZATION.

To amend joint rule 83 (4); and ***to create*** joint rule 81r and joint rule 83 (4) (b); **relating to:** the session schedule for the 2005–2006 biennial session period and providing for a limited–business floorperiod to consider bills introduced by the Joint Committee for Review of Administrative Rules.

Analysis by the Legislative Reference Bureau

This joint resolution establishes a session schedule for the 2005–2006 biennial session of the legislature.

Proposed 2005–2006 Session Schedule at a Glance

January 3, 2005	(Monday)	2005 Inauguration
Jan. 12, 2005	(Wednesday)	Floorperiod
Jan. 25 to 27, 2005	(Tu – Th)	Floorperiod
February 8, 2005	(Tuesday)	Floorperiod
Feb. 15 to 24, 2005	(Tu – Th)	Floorperiod
March 8 to 17, 2005	(Tu – Th)	Floorperiod
April 5 to April 14, 2005	(Tu – Th)	Floorperiod
April 28, 2005	(Thursday)	Bills sent to Governor
May 3 to 12, 2005	(Tu – Th)	Floorperiod
May 31 to July 1, 2005, **OR** budget passage	(Tu – Fri)	Floorperiod
August 11, 2005	(Thursday)	Nonbudget Bills sent to Governor
August 11, 2005 (or later)	(Thursday)	Budget Bill sent to Governor
Sept. 20 to 29, 2005	(Tu – Th)	Floorperiod

Oct. 25 to Nov. 10, 2005	(Tu – Th)	Floorperiod
December 6 to 15, 2005	(Tu – Th)	Floorperiod
January 5, 2006	(Thursday)	Bills sent to Governor
Jan. 17 to Feb. 2, 2006	(Tu – Th)	Floorperiod
Feb. 21 to March 9, 2006	(Tu – Th)	Floorperiod
April 13, 2006	(Thursday)	Bills sent to Governor
April 25 to May 4, 2006	(Tu – Th)	Last general–business Floorperiod
May 16 to 18, 2006	(Tu – Th)	Limited–business Floorperiod
May 23, 2006	(Tuesday)	Bills sent to Governor
May 30 and 31, 2006	(Tu – W)	Veto Review Floorperiod
June 1, 2006, to Jan. 3, 2007	(Th – W)	Interim, committee work
June 14, 2006	(Wednesday)	Bills sent to Governor
Dec. 27 and 28, 2006	(W – Th)	Limited–business Floorperiod
Dec. 29, 2006	(Friday)	Bills sent to Governor
January 3, 2007	(Wednesday)	2007 Inauguration

The Joint Committee on Legislative Organization is required by s. 13.02 (3), stats., and by Joint Rule 81 (1) to develop a proposed biennial session schedule early in each biennial session period and submit it to the legislature for approval in the form of a joint resolution. This session schedule must include at least one meeting of the legislature in January of each year to implement the requirements of s. 13.02, stats., and Joint Rule 83 (3) of annual meetings and the carry–over of measures from the regular annual session of the odd–numbered year to the regular annual session held in the even–numbered year.

Under Joint Rule 81 (2), by majority action of the 2 houses or of the organization committees of the 2 houses, any floorperiod may be extended by convening earlier than its scheduled convening date or later adjournment after its scheduled ending date. Under this joint resolution, by majority action of the 2 houses or of the organization committees of the 2 houses, any floorperiod may be adjourned earlier than its scheduled ending date, except that the floorperiod that commences on May 31, 2005, is not authorized to be adjourned until the general fund executive budget bill has passed both houses.

Under Joint Rule 83 (2), during the periods of committee work preceding the last general–business floorperiod (the floorperiod that commences on April 25, 2006), bills, joint resolutions, resolutions, and amendments may be introduced.

The joint resolution creates a new Joint Rule 81r that permits the biennial session schedule to provide for a limited–business floorperiod after the last general–business floorperiod scheduled by the session schedule for the spring of the even–numbered year that is limited to action on bills introduced by the Joint Committee for Review of Administrative Rules (JCRAR) for the purpose of objecting to proposed administrative rules.

Under Joint Rule 83 (4), May 4, 2006, the last day of the last general–business floorperiod (the floorperiod that commences on April 25, 2006), is the day on which proposals die for the session, unless, under Joint Rule 81 (2), that floorperiod is extended and the proposals to be carried forward for consideration during the extension are specified. The joint resolution, however, creates a new Joint Rule 83

(4) (b) that provides that if a limited–floorperiod is included in the biennial session schedule for action on bills introduced by JCRAR, then any bills introduced by JCRAR that are not yet agreed to by both houses are adversely disposed of for the biennial session at the conclusion of the limited–business floorperiod under Joint Rule 81r and are recorded as "failed to pass."

Under Joint Rule 83 (5), no new proposals (except proposals pertaining to a veto review session or to any special or extraordinary session) may be introduced after May 4, 2006, the last day of the final general–business floorperiod.

The joint resolution also contains a schedule regarding adjournment, submission of bills to the governor, and veto review for special and extraordinary sessions and extends the deadline for the governor's budget message to February 8, 2005.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Joint rule 81r is created to read:

JOINT RULE 81r **Limited–business floorperiod; bills introduced by the joint committee for review of administrative rules.** In addition to the floorperiod required under Joint Rule 81m, the biennial session schedule may provide for a floorperiod after the last general–business floorperiod scheduled by the session schedule for the spring of the even–numbered year that is limited to action on bills introduced by the joint committee for review of administrative rules under section 227.19 (5) (e) of the statutes.

SECTION 2. Joint rule 83 (4) is renumbered Joint rule 83 (4) (a) and amended to read:

JOINT RULE 83 (4) (a) ~~At~~ Except as provided in par. (b), at the conclusion of the last general–business floorperiod scheduled by the session schedule for the spring of the even–numbered year, any bill or joint resolution not yet agreed to by both houses, and any resolution not yet passed by the house of origin, is adversely disposed of for the biennial session and recorded as "failed to pass," "failed to adopt," or "failed to concur."

SECTION 3. Joint rule 83 (4) (b) is created to read:

JOINT RULE 83 (4) (b) If the biennial session schedule provides for a limited–business floorperiod under Joint Rule 81r, any bills introduced by the joint committee for review of administrative rules that are not yet agreed to by both houses are adversely disposed of for the biennial session at the conclusion of the limited–business floorperiod under Joint Rule 81r and are recorded as "failed to pass."

SECTION 4. 2005–2006 Session schedule. (1) BIENNIAL SESSION PERIOD. The legislature declares that the biennial session period of the 2005 Wisconsin legislature began on Monday, January 3, 2005, and that the biennial session period ends at 12 noon on Wednesday, January 3, 2007.

(2) BUDGET DEADLINE EXTENDED. The deadline of Tuesday, January 25, 2005, set by section 16.45 of the statutes for introduction of the executive budget bill or bills, submittal of the state budget report, and delivery of the governor's budget message, is extended to Tuesday, February 8, 2005.

(3) SCHEDULED FLOORPERIODS AND COMMITTEE WORK PERIODS. (a) *Unreserved days.* Unless reserved under this subsection as a day to conduct an organizational meeting or to be part of a scheduled floorperiod of the legislature, every day of the biennial session period is designated as a day for committee activity and is available to extend a scheduled floorperiod, convene an extraordinary session, or take senate action on appointments as permitted by joint rule 81.

(b) *Inauguration.* Pursuant to section 13.02 (1) of the statutes, the inauguration of the members of the 2005 legislature, and the organizing for business of the 2 houses, commences at 2 p.m. on Monday, January 3, 2005.

(c) *Floorperiod.* A floorperiod commences on Wednesday, January 12, 2005, at 10 a.m., and ends on January 12, 2005.

(d) *Floorperiod.* A floorperiod commences on Tuesday, January 25, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, January 27, 2005.

(e) *Floorperiod.* A floorperiod commences on Tuesday, February 8, 2005, at 10 a.m., and ends on February 8, 2005.

(f) *Floorperiod.* A floorperiod commences on Tuesday, February 15, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, February 24, 2005.

(g) *Floorperiod.* A floorperiod commences on Tuesday, March 8, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, March 17, 2005.

(h) *Floorperiod.* A floorperiod commences on Tuesday, April 5, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, April 14, 2005.

(i) *Bills to governor.* No later than Thursday, April 28, 2005, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all enrolled bills originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before April 22, 2005.

(j) *Floorperiod.* A floorperiod commences on Tuesday, May 3, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, May 12, 2005.

(k) *Floorperiod.* A floorperiod commences on Tuesday, May 31, 2005, at 10 a.m., and, unless adjourned earlier, ends on Friday, July 1, 2005, but this floorperiod may not be adjourned until the general fund executive budget bill has been passed by both houses.

(L) *Nonbudget bills to governor.* No later than Thursday, August 11, 2005, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all enrolled bills, except the general fund executive budget bill,

originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before August 5, 2005.

(m) *Budget bill to governor.* No later than the later of Thursday, August 11, 2005, at 4:30 p.m., or 4:30 p.m on the 4th Thursday after the general fund executive budget bill is passed by both houses in identical form, the chief clerk of each house shall submit to the governor for executive action thereon any enrolled general fund executive budget bill originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session.

(n) *Floorperiod.* A floorperiod commences on Tuesday, September 20, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, September 29, 2005.

(o) *Floorperiod.* A floorperiod commences on Tuesday, October 25, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, November 10, 2005.

(p) *Floorperiod.* A floorperiod commences on Tuesday, December 6, 2005, at 10 a.m., and, unless adjourned earlier, ends on Thursday, December 15, 2005.

(q) *Bills to governor.* No later than Thursday, January 5, 2006, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all enrolled bills originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before December 30, 2005.

(r) *Floorperiod.* A floorperiod commences on Tuesday, January 17, 2006, at 10 a.m., and, unless adjourned earlier, ends on Thursday, February 2, 2006.

(s) *Floorperiod.* A floorperiod commences on Tuesday, February 21, 2006, at 10 a.m., and, unless adjourned earlier, ends on Thursday, March 9, 2006.

(t) *Bills to governor.* No later than Thursday, April 13, 2006, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all

enrolled bills originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before April 7, 2006.

(u) *Last general–business floorperiod.* The last general–business floorperiod commences on Tuesday, April 25, 2006, at 10 a.m., and, unless adjourned earlier, ends on Thursday, May 4, 2006.

(v) *Limited–business floorperiod.* A floorperiod commences on Tuesday, May 16, 2006, at 10 a.m., and, unless adjourned earlier, ends on Thursday, May 18, 2006, which is limited to matters allowed under Joint Rule 81m (2) and to considering resolutions offered for the purpose of extending the commendations, condolences, or congratulations of the legislature to a particular person, group, or organization, or of recognizing a particular event or occasion.

(w) *Bills to governor.* No later than Tuesday, May 23, 2006, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all enrolled bills originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before May 19, 2006.

(x) *Veto review floorperiod.* A floorperiod, limited to matters allowed under Joint Rule 82 (1) (a) to (f), commences on Tuesday, May 30, 2006, at 10 a.m., and, unless adjourned earlier, ends on Wednesday, May 31, 2006.

(y) *Bills to governor.* No later than Wednesday, June 14, 2006, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all enrolled bills originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before June 9, 2006.

(zh) *Limited–business floorperiod; consideration of bills introduced by the joint committee for review of administrative rules.* A floorperiod commences on Wednesday, December 27, 2006, at 10 a.m., and, unless adjourned earlier, ends on

Thursday, December 28, 2006, which is limited to matters allowed under Joint Rule 81r.

(zr) *Bills to governor.* No later than Friday, December 29, 2006, at 4:30 p.m., the chief clerk of each house shall submit to the governor for executive action thereon all enrolled bills originating in the chief clerk's house and having been passed by both houses, in regular, extraordinary, or special session, on or before December 28, 2006.

(4) INTERIM PERIOD OF COMMITTEE WORK; NO FURTHER INTRODUCTIONS. Upon the adjournment of the May veto review floorperiod, there shall be an interim period of committee work ending on Wednesday, January 3, 2007, and a limited–business floorperiod commencing on Wednesday, December 27, 2006, at 10 a.m. and, unless adjourned earlier, ending on Thursday, December 28, 2006, to consider matters allowed under Joint Rule 81r. Unless the legislature is convened in one or more extraordinary or special sessions, no additional 2005 legislation may be offered during this interim period of committee work.

(5) SPECIAL AND EXTRAORDINARY SESSIONS. (a) *Adjournment.* Except for consideration of executive vetoes or partial vetoes, a motion adopted in each house to adjourn a special or extraordinary session pursuant to this joint resolution shall constitute final adjournment of the special or extraordinary session.

(b) *Bills to governor.* No later than 4:30 p.m. on the first Thursday occurring 2 full weeks after the day a bill is passed by both houses in identical form after June 9, 2006, in special or extraordinary session, the chief clerk of the house in which it originated shall submit it to the governor for executive action thereon.

(c) *Veto review.* A special or extraordinary session shall reconvene upon a call of a majority of the members of the joint committee on legislative organization solely for the consideration of executive vetoes or partial vetoes if an enrolled bill passed

by both houses during the special or extraordinary session was vetoed or partially vetoed.

(6) END OF TERM. The biennial term of the 2005 legislature ends on Wednesday, January 3, 2007. Pursuant to section 13.02 (1) of the statutes, the inauguration of the members of the 2007 legislature will be on Wednesday, January 3, 2007.

SECTION 5. Notice of 2007 session organization. Notice is hereby given that the biennial session of the 2007 legislature will hold its first meeting, pursuant to section 13.02 (1) of the statutes, on Wednesday, January 3, 2007, and that the meeting will begin at 2 p.m.

(END)

LRB–0137/1
PJD:wlj:rs

2005 SENATE JOINT RESOLUTION 2

January 11, 2005 – Introduced by Senators BROWN, SCHULTZ, KAPANKE, HARSDORF, STEPP, ROESSLER, LAZICH, DARLING, KEDZIE, HANSEN, OLSEN, LASSA and RISSER, cosponsored by Representatives M. WILLIAMS, KRAWCZYK, VAN ROY, SEIDEL, GRONEMUS, KERKMAN, HAHN, OWENS, PETTIS, OTT, HUNDERTMARK, FREESE, WOOD, BALLWEG, MURSAU, ALBERS, DAVIS, STRACHOTA, NERISON, WIECKERT, VRAKAS, MOLEPSKE, VAN AKKEREN, RHOADES, F. LASEE, MONTGOMERY, AINSWORTH, MUSSER, TOWNS, MCCORMICK, JESKEWITZ, BIES, SHERMAN, NISCHKE, KESTELL, GOTTLIEB, STONE, KREIBICH and PRIDEMORE. Referred to Committee on Veterans, Homeland Security, Military Affairs, Small Business and Government Reform.

To amend so as in effect ***to repeal*** section 4 (3) (c) of article VI; ***to renumber and amend*** section 4 (1) of article VI and section 12 of article VII; ***to amend*** section 4 (4) of article VI; and ***to create*** section 4 (1) (b) and (c) of article VI and section 12 (2) of article VII of the constitution; **relating to:** 4–year terms of office for certain county officers (2nd consideration).

Analysis by the Legislative Reference Bureau

EXPLANATION OF PROPOSAL

This proposed constitutional amendment, to be given 2nd consideration by the 2005 legislature for submittal to the voters in April 2005, was first considered by the 2003 legislature in 2003 Assembly Joint Resolution 10, which became 2003 Enrolled Joint Resolution 12.

It requires counties to elect county clerks and treasurers every 4 years, and changes the terms of office from 2 years to 4 years for district attorneys, coroners, elected surveyors, registers of deeds, treasurers, county clerks, and clerks of circuit court. For clerks of circuit court and coroners, the first elections to 4–year terms will be held concurrently with the first gubernatorial election following ratification, which is when the constitution provides that sheriffs are to be first elected to 4–year terms. For district attorneys, elected surveyors, registers of deeds, treasurers, and county clerks, the first elections to 4–year terms will be held concurrently with the first presidential election following ratification.

The proposal does not change the times for holding regular elections for any county offices, and does not affect the terms of office of elected county chief executive

officers (they already serve 4–year terms), or the terms of office of county supervisors or sheriffs.

PROCEDURE FOR 2ND CONSIDERATION

When a proposed constitutional amendment is before the legislature on 2nd consideration, any change in the text approved by the preceding legislature causes the proposed constitutional amendment to revert to first consideration status so that 2nd consideration approval would have to be given by the next legislature before the proposal may be submitted to the people for ratification [see joint rule 57 (2)].

If the legislature approves a proposed constitutional amendment on 2nd consideration, it must also set the date for submitting the proposed constitutional amendment to the people for ratification and must determine the question or questions to appear on the ballot.

SUBMITTAL TO PEOPLE

Section 8.37, stats., provides that this joint resolution must be filed with the elections board no later than 42 days prior to the spring election (February 24, 2005), in order for the question of ratification to be submitted at the April 2005 spring election.

Whereas, the 2003 legislature in regular session considered a proposed amendment to the constitution in 2003 Assembly Joint Resolution 10, which became 2003 Enrolled Resolution 12, and agreed to it by a majority of the members elected to each of the 2 houses, which proposed amendment reads as follows:

SECTION 1. Section 4 (1) of article VI of the constitution is renumbered section 4 (1) (a) of article VI and amended to read:

[Article VI] Section 4 (1) (a) Except as provided in pars. (b) and (c) and sub. (2), coroners, registers of deeds, district attorneys, and all other elected county officers, except judicial officers, sheriffs, and chief executive officers, shall be chosen by the electors of the respective counties once in every 2 years.

SECTION 2. Section 4 (1) (b) and (c) of article VI of the constitution are created to read:

[Article VI] Section 4 (1) (b) Beginning with the first general election at which the governor is elected which occurs after the ratification of this paragraph, sheriffs shall be chosen by the electors of the respective counties, or by the electors of all of the respective counties comprising each combination of counties combined by the legislature for that purpose, for the term of 4 years and coroners in counties in which there is a coroner shall be chosen by the electors of the respective counties, or by the electors of all of the respective counties comprising each combination of counties combined by the legislature for that purpose, for the term of 4 years.

(c) Beginning with the first general election at which the president is elected which occurs after the ratification of this paragraph, district attorneys, registers of deeds, county clerks, and treasurers shall be chosen by the electors of the respective counties, or by the electors of all of the respective counties comprising each combination of counties combined by the legislature for that purpose, for the term of 4 years and surveyors in counties in which the office of surveyor is filled by election shall be chosen by the electors of the respective counties, or by the electors of all of the respective counties comprising each combination of counties combined by the legislature for that purpose, for the term of 4 years.

SECTION 3. Section 4 (3) (c) of article VI of the constitution is amended so as in effect to repeal said paragraph:

[Article VI] Section 4 (3) (c) ~~Beginning with the first general election at which the governor is elected which occurs after the ratification of this paragraph, sheriffs shall be chosen by the electors of the respective counties once in every 4 years.~~

SECTION 4. Section 4 (4) of article VI of the constitution is amended to read:

[Article VI] Section 4 (4) The governor may remove any elected county officer mentioned in this section except a county clerk, treasurer, or surveyor, giving to the officer a copy of the charges and an opportunity of being heard.

SECTION 5. Section 12 of article VII of the constitution is renumbered section 12 (1) of article VII and amended to read:

[Article VII] Section 12 (1) There shall be a clerk of ~~the~~ circuit court chosen in each county organized for judicial purposes by the qualified electors thereof, who, except as provided in sub. (2), shall hold ~~his~~ office for two years, subject to removal as ~~shall be~~ provided by law~~; in~~.

(3) In case of a vacancy, the judge of the circuit court ~~shall have power to~~ may appoint a clerk until the vacancy ~~shall be~~ is filled by an election~~; the~~.

(4) The clerk ~~thus elected or appointed~~ of circuit court shall give such security as the legislature ~~may require~~ requires by law.

(5) The supreme court shall appoint its own clerk, and may appoint a clerk of ~~the~~ circuit court ~~may be appointed a~~ to be the clerk of the supreme court.

SECTION 6. Section 12 (2) of article VII of the constitution is created to read:

[Article VII] Section 12 (2) Beginning with the first general election at which the governor is elected which occurs after the ratification of this subsection, a clerk of circuit court shall be chosen by the electors of each county, for the term of 4 years, subject to removal as provided by law.

SECTION 7. Numbering of new provisions. (1) The new paragraph (b) of subsection (1) of section 4 of article VI of the constitution

created in this joint resolution shall be designated by the next higher open paragraph letter in that subsection in that section in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a paragraph (b) of subsection (1) of section 4 of article VI of the constitution of this state. If one or more joint resolutions create a paragraph (b) of subsection (1) of section 4 of article VI simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the paragraphs created shall be numbered and placed in a sequence so that the paragraphs created by the joint resolution having the lowest enrolled joint resolution number have the letters designated in that joint resolution and the paragraphs created by the other joint resolutions have letters that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the paragraphs.

(2) The new paragraph (c) of subsection (1) of section 4 of article VI of the constitution created in this joint resolution shall be designated by the next higher open paragraph letter in that subsection in that section in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a paragraph (c) of subsection (1) of section 4 of article VI of the constitution of this state. If one or more joint resolutions create a paragraph (c) of subsection (1) of section 4 of article VI simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the paragraphs created shall be lettered and placed in a sequence so that the paragraphs created by the joint resolution having the lowest enrolled joint resolution number have the letters designated in that joint resolution and the paragraphs created by the other joint resolutions have letters that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the paragraphs.

(3) The new subsection (2) of section 12 of article VII of the constitution created in this joint resolution shall be designated by the next higher open whole subsection number in that section in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a subsection (2) of section 12 of article VII of the constitution of this state. If one or more joint resolutions create a subsection (2) of section 12 of article VII simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the subsections created shall be numbered and placed in a sequence so that the subsections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the subsections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the subsections.

Now, therefore, be it resolved by the senate, the assembly concurring, ***That*** the foregoing proposed amendment to the constitution is agreed to by the 2005 legislature; and, be it further

Resolved, That the foregoing proposed amendment to the constitution be submitted to a vote of the people at the election to be held on the first Tuesday of April 2005; and, be it further

Resolved, That the question concerning ratification of the foregoing proposed amendment to the constitution be stated on the ballot as follows:

QUESTION 1: **"4–year terms of office for certain county officers.** Shall section 4 of article VI and section 12 of article VII of the constitution be amended to provide that district attorneys, coroners, elected surveyors, registers of deeds, treasurers, county clerks, and clerks of circuit court be elected to 4–year terms?"

(END)

LRB–1867/2
PJD:kjf:pg

2005 SENATE JOINT RESOLUTION 9

March 8, 2005 – Introduced by Senators A. LASEE, ROESSLER, BROWN and GROTHMAN, cosponsored by Representatives SUDER, PETTIS, KERKMAN, KREIBICH, BIES, VOS, TOWNSEND, GUNDRUM, VAN ROY, HAHN, JENSEN, F. LASEE, NASS, PETROWSKI, OWENS, PRIDEMORE, ZIEGELBAUER, NISCHKE, OTT, ALBERS and KESTELL. Referred to Committee on Judiciary, Corrections and Privacy.

To amend so as in effect ***to repeal*** section 2 of article VI; ***to amend*** section 8 of article V, section 1 of article VI, sections 7 and 8 of article X and section 4 of article XIII; and ***to create*** section 17 of article XIV of the constitution; **relating to:** deleting from the constitution the office of secretary of state (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, deletes from the constitution the office of secretary of state.

Secretary of state

Currently, the constitution assigns 4 duties to the secretary of state; all other duties are prescribed by law. The 4 duties prescribed by the constitution are: 1) to serve as governor when there is a vacancy in the office of lieutenant governor and the governor dies, resigns, or is removed from office, or to serve as acting governor when there is a vacancy in the office of lieutenant governor and the governor is absent from the state, impeached, or incapable of performing the duties of office; 2) to keep a fair record of the official acts of the legislature and executive department of the state; 3) to serve as a member of the board of commissioners for the sale of public lands; and 4) to keep the great seal of Wisconsin.

Under this proposal, the secretary of state is replaced by the attorney general in the line of gubernatorial succession. The proposal deletes the requirement that the secretary of state keep legislative and executive records. The proposal also removes the secretary of state as a member of the board of commissioners. Under the proposal, the constitution continues to provide for a great seal, but its placement is determined by law.

Terms of incumbent

The last election for secretary of state required by the constitution will be the one held in November 2006. The incumbent will continue to serve until the first Monday in January 2011.

Board of commissioners

The three–member board of commissioners for the sale of public lands presently consists of the secretary of state, state treasurer, and attorney general. Under this proposal, the state superintendent of public instruction becomes a member.

Second consideration and ratification

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 8 of article V of the constitution is amended to read:

[Article V] Section 8 (1) If there is a vacancy in the office of lieutenant governor and the governor dies, resigns, or is removed from office, the ~~secretary of state~~ attorney general shall become governor for the balance of the unexpired term.

(2) If there is a vacancy in the office of lieutenant governor and the governor is absent from this state, impeached, or from mental or physical disease becomes incapable of performing the duties of the office, the ~~secretary of state~~ attorney general shall serve as acting governor for the balance of the unexpired term or until the governor returns, the disability ceases, or the impeachment is vacated.

SECTION 2. Section 1 of article VI of the constitution is amended to read:

[Article VI] Section 1. ~~The~~ At the 2010 general election and every 4 years thereafter, the qualified electors of this state~~, at the times and places of choosing the members of the legislature,~~ shall ~~in 1970 and every 4 years thereafter~~ elect a ~~secretary of state,~~ treasurer and attorney general ~~who shall hold their offices~~ for 4 ~~years~~ 4–year terms.

SECTION 3. Section 2 of article VI of the constitution is amended so as in effect to repeal said section:

[Article VI] Section 2. ~~The secretary of state shall keep a fair record of the official acts of the legislature and executive department of the state, and shall, when required, lay the same and all matters relative thereto before either branch of the legislature. He shall perform such other duties as shall be assigned him by law. He shall receive as a compensation for his services yearly such sum as shall be provided by law, and shall keep his office at the seat of government.~~

SECTION 4. Sections 7 and 8 of article X of the constitution are amended to read:

[Article X] Section 7. The ~~secretary of state,~~ treasurer, the state superintendent of public instruction, and the attorney general, shall constitute a board of commissioners ~~for~~. The board shall administer the sale of the school and university lands and ~~for~~ the investment of the funds arising therefrom. Any ~~two of said commissioners~~ 2 members shall be a quorum for the transaction of all business pertaining to the duties of ~~their office~~ the board.

Section 8. ~~Provision shall be made by law for the~~ The sale of all school and university lands, after they ~~shall~~ have been appraised~~; and when~~, shall be regulated by law. Whenever any portion of such lands ~~shall be~~ is sold and the purchase money ~~shall~~ is not ~~be~~ paid at the time of the sale, the ~~commissioners~~ board of commissioners shall take security by mortgage upon the lands sold for the sum remaining unpaid, with ~~seven per cent~~ 7 percent interest thereon, payable annually at the office of the treasurer. The ~~commissioners shall be authorized to~~ board may execute a good and sufficient conveyance to all purchasers of such lands~~, and to~~. The board may discharge any mortgages taken as security~~,~~ when the sum due thereon ~~shall have~~ has been paid. The ~~commissioners shall have power to~~ board may withhold from sale any

portion of such lands when ~~they shall deem~~ the board considers it expedient~~, and~~. The board shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in ~~such~~ the manner ~~as the legislature shall provide, and shall~~ provided by law. The members of the board shall give such security for the faithful performance of their duties as ~~may be~~ required by law.

SECTION 5. Section 4 of article XIII of the constitution is amended to read:

[Article XIII] Section 4. ~~It shall be the duty of the~~ The legislature ~~to~~ shall, by law, provide a great seal for the state~~, which shall be kept by the secretary of state, and all~~. All official acts of the governor, ~~his approbation of the laws excepted~~ except the governor's approval of bills that have passed the legislature, shall be ~~thereby~~ authenticated with the great seal.

SECTION 6. Section 17 of article XIV of the constitution is created to read:

[Article XIV] Section 17. The secretary of state holding office on the date of ratification of the 2005–07 amendment providing for the deletion of that office from the constitution shall continue to hold that office until the first Monday of January in 2011. Any vacancy in that office occurring before that date shall be filled in the manner provided by law.

SECTION 7. Numbering of new provision. The new section 17 of article XIV of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 17 of article XIV of the constitution of this state. If one or more joint resolutions create a section 17 of article XIV simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections

created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution, and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB–1868/1
PJD:kjf:jf

2005 SENATE JOINT RESOLUTION 10

March 8, 2005 – Introduced by Senator A. LASEE, cosponsored by Representatives PETTIS, KERKMAN, BIES, F. LASEE, PRIDEMORE, ZIEGELBAUER, NISCHKE and KESTELL. Referred to Committee on Judiciary, Corrections and Privacy.

To amend so as in effect ***to repeal*** section 10 (2) of article XIII; ***to renumber*** section 10 (1) of article XIII; and ***to amend*** section 1 of article V, section 2 of article V, section 3 of article V, section 7 of article V, section 8 of article V and section 1 of article VII of the constitution; **relating to:** abolishing the office of lieutenant governor (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, abolishes the office of lieutenant governor.

Presently, the constitution provides that, upon the governor's death, resignation, or removal from office, the lieutenant governor becomes governor. It also provides that, if the governor is absent from the state, impeached, or, from mental or physical disease, becomes incapable of performing the duties of the office, the lieutenant governor serves as acting governor. This joint resolution provides that the speaker of the assembly, instead, shall become governor or acting governor under those circumstances.

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 1 of article V of the constitution is amended to read:

[Article V] Section 1. The executive power shall be vested in a governor who shall hold office for 4 years~~; a lieutenant governor shall be elected at the same time and for the same term~~.

SECTION 2. Section 2 of article V of the constitution is amended to read:

[Article V] Section 2. No person except a citizen of the United States and a qualified elector of the state shall be eligible to the office of governor ~~or lieutenant governor~~.

SECTION 3. Section 3 of article V of the constitution is amended to read:

[Article V] Section 3. The governor ~~and lieutenant governor~~ shall be elected by the qualified electors of the state at the times and places of choosing members of the legislature. ~~They shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices beginning with the general election in 1970.~~ The ~~persons respectively having~~ person for whom the highest number of votes is cast ~~jointly for them~~ for governor ~~and lieutenant governor~~ shall be elected; but in case two or more ~~slates~~ persons shall have an equal and the highest number of votes for governor ~~and lieutenant governor~~, the two houses of the legislature, at its next annual session, shall forthwith, by joint ballot, choose one of the ~~slates~~ persons so having an equal and the highest number of votes for governor ~~and lieutenant governor~~. The returns of election for governor ~~and lieutenant governor~~ shall be made in such manner as shall be provided by law.

SECTION 4. Section 7 of article V of the constitution is amended to read:

[Article V] Section 7 (1) Upon the governor's death, resignation or removal from office, the ~~lieutenant governor~~ speaker of the assembly shall become governor for the balance of the unexpired term.

(2) If the governor is absent from this state, impeached, or from mental or physical disease, becomes incapable of performing the duties of the office, the ~~lieutenant governor~~ speaker of the assembly shall serve as acting governor for the balance of the unexpired term or until the governor returns, the disability ceases or the impeachment is vacated. But when the governor, with the consent of the legislature, shall be out of this state in time of war at the head of the state's military force, the governor shall continue as commander in chief of the military force.

SECTION 5. Section 8 of article V of the constitution is amended to read:

[Article V] Section 8 (1) If there is a vacancy in the office of ~~lieutenant governor~~ speaker of the assembly and the governor dies, resigns or is removed from office, the secretary of state shall become governor for the balance of the unexpired term.

(2) If there is a vacancy in the office of ~~lieutenant governor~~ speaker of the assembly and the governor is absent from this state, impeached, or from mental or physical disease becomes incapable of performing the duties of the office, the secretary of state shall serve as acting governor for the balance of the unexpired term or until the governor returns, the disability ceases or the impeachment is vacated.

SECTION 6. Section 1 of article VII of the constitution is amended to read:

[Article VII] Section 1 (1) The court for the trial of impeachments shall be composed of the senate. The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors; but a majority of all the members elected shall concur in an impeachment. ~~On the trial of an impeachment against the governor, the lieutenant governor shall not act as a member of the court.~~ No judicial officer shall exercise ~~his~~ that office, after ~~he shall have~~ the judicial officer has been impeached, until ~~his acquittal~~ acquitted.

(2) Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to evidence; and no person shall be convicted without the concurrence of two–thirds of the members present.

(3) Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold any office of honor, profit or trust under the state; but the party impeached shall be liable to indictment, trial and punishment according to law.

SECTION 7. Section 10 (1) of article XIII of the constitution is renumbered section 10 of article XIII.

SECTION 8. Section 10 (2) of article XIII of the constitution is amended so as in effect to repeal said subsection:

[Article XIII] Section 10 ~~(2) Whenever there is a vacancy in the office of lieutenant governor, the governor shall nominate a successor to serve for the balance of the unexpired term, who shall take office after confirmation by the senate and by the assembly.~~

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

CORRECTED COPY

2005 – 2006 LEGISLATURE

LRB–2178/2
PJD:wlj:jf

2005 SENATE JOINT RESOLUTION 12

March 8, 2005 – Introduced by Senators BROWN, DARLING, ERPENBACH, HANSEN, HARSDORF, KAPANKE, KEDZIE, LAZICH, OLSEN, RISSER and ROESSLER, cosponsored by Representatives SUDER, ALBERS, GIELOW, GRONEMUS, HAHN, HINES, HUNDERTMARK, JESKEWITZ, KERKMAN, MEYER, GUNDERSON, VRUWINK, SHERIDAN, VRAKAS, PETTIS, VAN ROY, TOWNSEND, POPE-ROBERTS, VOS and M. WILLIAMS. Referred to Committee on Senate Organization.

Relating to: declaring March 2005 American Red Cross Month.

Whereas, the American Red Cross has an unparalleled record of helping Wisconsin residents prevent, prepare for, and respond to life–threatening emergencies; and

Whereas, last year, Red Cross volunteers throughout the state responded to 1,006 disasters and provided direct emergency assistance to 1,429 Wisconsin families. Major responses included flooding and tornadoes that impacted 44 counties throughout the state. Another 69,867 state residents took action to prepare for emergencies by participating in American Red Cross community disaster education programs; and

Whereas, the American Red Cross taught 113,790 Wisconsin residents to save lives last year in first aid, CPR, and automated external defibrillator training. Another 128,433 state residents participated in American Red Cross aquatic programs; and

Whereas, Red Cross Armed Forces Emergency Services caseworkers transmitted 3,124 emergency messages for Wisconsin families of U.S. military members, and provided informational briefing for 6,456 Wisconsin members of the armed forces and their families in 2004; and

Whereas, the American Red Cross served 528,268 Wisconsin residents last year through various community programs including transportation services, and initiatives for low–income, elderly, and special–needs populations; and

Whereas, American Red Cross services for Wisconsin residents were provided in 2004 by 16,633 dedicated volunteers working to carry out the Red Cross mission. In addition, American Red Cross blood donors throughout the state donated 175,689 units of blood, plasma, and platelets, which helped patients in 52 Wisconsin hospitals last year; and

Whereas, joining the American Red Cross as a volunteer, course participant or instructor, financial contributor, or blood donor can help make Wisconsin safer; now, therefore, be it

Resolved by the senate, the assembly concurring, That the members of the Wisconsin legislature proclaim the month of March 2005 as American Red Cross Month in the state of Wisconsin, and commend this observance to all citizens; and, be it further

Resolved, That as we celebrate American Red Cross Month, the members of the legislature call upon all our citizens to become partners in emergency preparedness with their local American Red Cross chapters and to become active participants by giving time, financial contributions, and blood to support this worthy organization's mission to prevent and relieve suffering and save lives; and, be it further

Resolved, That the senate chief clerk shall provide a copy of this joint resolution to the American Red Cross.

(END)

LRB–2232/1
PJD:cjs:pg

2005 SENATE JOINT RESOLUTION 19

April 1, 2005 – Introduced by Senator A. LASEE, cosponsored by Representatives KERKMAN, JESKEWITZ, KREIBICH, FREESE, BIES, OWENS, VAN ROY, HINES and PRIDEMORE. Referred to Committee on Judiciary, Corrections and Privacy.

To amend so as in effect ***to repeal*** section 2 of article VI; ***to amend*** section 8 of article V, section 1 of article VI, section 3 of article VI, sections 7 and 8 of article X and section 4 of article XIII; and ***to create*** section 17 of article XIV of the constitution; **relating to:** deleting from the constitution the office of state treasurer (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, deletes from the constitution the office of state treasurer.

State treasurer

Currently, the only duty assigned to the state treasurer by the constitution is to serve as a member of the board of commissioners for the sale of public lands; all other duties are prescribed by law. The proposal removes the state treasurer as a member of the board of commissioners and substitutes the governor or the lieutenant governor, if designated by the governor.

The last election for state treasurer required by the constitution will be the one held in November 2006. The incumbent will continue to serve until the first Monday in January 2011.

Second consideration and ratification

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 1 of article VI of the constitution is amended to read:

[Article VI] Section 1. ~~The~~ At the 2010 general election and every 4 years thereafter, the qualified electors of this state~~, at the times and places of choosing the members of the legislature,~~ shall ~~in 1970 and every 4 years thereafter~~ elect a secretary of state~~, treasurer~~ and an attorney general ~~who shall hold their offices~~ for ~~4 years~~ 4–year terms.

SECTION 2. Section 3 of article VI of the constitution is amended to read:

[Article VI] Section 3. The powers, duties, and compensation of the ~~treasurer and~~ attorney general shall be prescribed by law.

SECTION 3. Sections 7 and 8 of article X of the constitution are amended to read:

[Article X] Section 7. The secretary of state~~, treasurer~~, the governor or the lieutenant governor if designated by the governor, and the attorney general~~,~~ shall constitute a board of commissioners ~~for~~. The board shall administer the sale of the school and university lands and ~~for~~ the investment of the funds arising therefrom. Any ~~two of said commissioners~~ 2 members shall be a quorum for the transaction of all business pertaining to the duties of ~~their office~~ the board.

Section 8. ~~Provision shall be made by law for the~~ The sale of all school and university lands, after they ~~shall~~ have been appraised~~; and when~~, shall be regulated by law. Whenever any portion of such lands ~~shall be~~ is sold and the purchase money ~~shall~~ is not ~~be~~ paid at the time of the sale, the ~~commissioners~~ board of commissioners shall take security by mortgage upon the lands sold for the sum remaining unpaid,

with ~~seven per cent~~ 7 percent interest thereon, payable annually ~~at the office of the treasurer~~ as provided by law. The ~~commissioners shall be authorized to~~ board may execute a good and sufficient conveyance to all purchasers of such lands~~, and to~~. The board may discharge any mortgages taken as security~~,~~ when the sum due thereon ~~shall have~~ has been paid. The ~~commissioners shall have power to~~ board may withhold from sale any portion of such lands when ~~they shall deem~~ the board considers it expedient~~, and~~. The board shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in ~~such~~ the manner ~~as the legislature shall provide, and shall~~ provided by law. The members of the board shall give such security for the faithful performance of their duties as ~~may be~~ required by law.

SECTION 4. Section 17 of article XIV of the constitution is created to read:

[Article XIV] Section 17. The state treasurer holding office on the date of ratification of the 2005–07 amendment providing for the deletion of that office from the constitution shall continue to hold that office until the first Monday of January in 2011. Any vacancy in the office occurring before that date shall be filled in the manner provided by law.

SECTION 5. Numbering of new provision. The new section 17 of article XIV of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 17 of article XIV of the constitution of this state. If one or more joint resolutions create a section 17 of article XIV simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections

created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution, and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB-1009/4
PJD:wlj:rs

2005 SENATE JOINT RESOLUTION 21

April 5, 2005 – Introduced by Senators BRESKE, HARSDORF and GROTHMAN, cosponsored by Representatives HINES, HAHN, MUSSER, KREIBICH, AINSWORTH, BIES, GUNDERSON, JESKEWITZ, BALLWEG, WOOD, F. LASEE and PRIDEMORE.

To create section 11 of article VIII of the constitution; **relating to:** the creation of state funds and accounts and prohibiting the state from changing the purpose of any state fund or program revenue appropriation account (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, permits the creation of a state fund, or program revenue appropriation account thereof, other than a fund or account related solely to the issuance or payment of public debt or other obligation, only if two–thirds of all the members elected to each house concur therein.

Any state fund, or program revenue appropriation account thereof, created by law before, on, or after the date of ratification of this amendment remains in effect until abolished by law, and the purpose for which the fund or account was created may not be changed by law.

The proposal also provides that a state fund, or program revenue appropriation account thereof, created before, on, or after the date of ratification of this amendment may not be lapsed, transferred, or expended in any manner that would conflict with the purpose of the fund or account. If a state fund, or program revenue appropriation account thereof, is abolished, all unencumbered moneys in the fund or account as of the date the fund or account is abolished are transferred to the general fund of the state.

A proposed constitutional amendment requires adoption by two successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 11 of article VIII of the constitution is created to read:

[Article VIII] Section 11 (1) Beginning on the date of ratification of this subsection, the legislature may create by law a state fund, or program revenue appropriation account thereof, other than a fund or account related solely to the issuance or payment of public debt or other obligation, only if two–thirds of all the members elected to each house concur therein.

(2) Any state fund, or program revenue appropriation account thereof, created by law before, on, or after the date of ratification of this subsection remains in effect until abolished by law, and the purpose for which the fund or account was created may not be changed by law.

(3) Moneys in any state fund, or program revenue appropriation account thereof, created before, on, or after the date of ratification of this subsection may not be lapsed, transferred, or expended in any manner that would conflict with sub. (2). If a state fund, or program revenue appropriation account thereof, is abolished, all unencumbered moneys in the fund or account as of the date the fund or account is abolished are transferred to the general fund of the state.

SECTION 2. Numbering of new provision. The new section 11 of article VIII of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 11 of article VIII of the constitution of this state. If one or more joint resolutions create a section 11 of article VIII simultaneously with

the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB–2299/1
PJD&JTK:wlj:rs

2005 SENATE JOINT RESOLUTION 25

May 18, 2005 – Introduced by Senator RISSER, cosponsored by Representative KESSLER. Referred to Committee on Labor and Election Process Reform.

To amend section 4 of article IV and section 5 of article IV of the constitution; **relating to:** standards for redistricting assembly and senate districts (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, provides that assembly districts, when redistricted, must be as nearly equal in population and as politically competitive as practicable. It provides that, when redistricted, senate districts must be in as compact a form and as politically competitive as practicable.

The proposal also requires that assembly and senate districting plans must enable, to the extent practicable, the election of an assembly and of a senate that is reflective of the racial diversity of the state as a whole.

A proposed constitutional amendment requires adoption by two successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 4 of article IV of the constitution is amended to read:

[Article IV] Section 4. The members of the assembly shall be chosen biennially, by single districts, on the Tuesday succeeding the first Monday of November in

even–numbered years, by the qualified electors of the several districts, such districts to be bounded by county, precinct, town, or ward lines, to consist of contiguous territory and to be as nearly equal in population, in as compact a form, and as politically competitive as practicable. The assembly districting plan shall enable, to the extent practicable, the election of an assembly that is reflective of the racial diversity of the state as a whole.

SECTION 2. Section 5 of article IV of the constitution is amended to read:

[Article IV] Section 5. The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district; the senate districts to be in as compact a form and as politically competitive as practicable. The senate districting plan shall enable, to the extent practicable, the election of a senate that is reflective of the racial diversity of the state as a whole. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even–numbered districts for the term of 4 years.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB–3432/1
PJD:kjf:jf

2005 SENATE JOINT RESOLUTION 33

August 19, 2005 – Introduced by Senators HARSDORF, S. FITZGERALD, DARLING, GROTHMAN, OLSEN, A. LASEE, STEPP, SCHULTZ, LEIBHAM, ZIEN, KEDZIE and REYNOLDS, cosponsored by Representatives FRISKE, STONE, ALBERS, PRIDEMORE, KERKMAN, GUNDRUM, LOTHIAN, PETTIS, BALLWEG, STRACHOTA, KRAWCZYK, MUSSER, BIES, AINSWORTH, J. FITZGERALD, TOWNSEND, VOS, GUNDERSON, NERISON, GOTTLIEB, KESTELL, MONTGOMERY, SUDER, HAHN, JESKEWITZ, MOULTON, VAN ROY, KLEEFISCH, MURSAU, RHOADES, NISCHKE, F. LASEE, HONADEL and WOOD. Referred to Committee on Veterans, Homeland Security, Military Affairs, Small Business and Government Reform.

To amend section 10 (1) (c) of article V of the constitution; **relating to:** prohibiting partial vetoes from creating new sentences (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, prohibits partial vetoes from creating new sentences by combining parts of 2 or more sentences of the enrolled bill.

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 10 (1) (c) of article V of the constitution is amended to read:

[Article V] Section 10 (1) (c) In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill, and may not create a new sentence by combining parts of 2 or more sentences of the enrolled bill.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB–2724/3
PJD:kjf:rs

2005 SENATE JOINT RESOLUTION 35

September 7, 2005 – Introduced by Senators REYNOLDS and LAZICH, cosponsored by Representative LOTHIAN. Referred to Committee on Veterans, Homeland Security, Military Affairs, Small Business and Government Reform.

To amend section 1 of article IV and section 17 (2) of article IV; and ***to create*** section 35 of article IV of the constitution; **relating to:** providing for the approval or rejection of gubernatorial vetoes by the people by referendum (first consideration).

Analysis by the Legislative Reference Bureau

Currently, under the constitution, the power to enact state laws is vested solely in the senate and assembly, subject to rejection by the governor pursuant to his veto or partial veto authority. A law may be enacted only by bill passed by a majority of the members present in each house, unless the governor rejects the bill, in which case the approval of two–thirds of the members present in each house is required for enactment. Currently, under the constitution, the power of the electors to approve or reject state laws is limited to: 1) extending the right of suffrage to additional classes of persons; 2) authorizing the legislature to exceed the constitutional state general obligation bonding limit; 3) dividing a county of less than 900 square miles; and 4) removing a county seat. In addition, the electors must approve amendments to the constitution and the calling of constitutional conventions.

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, reserves to the people, for use at their option, the power to approve or reject at the polls, by referendum, rejections by the governor of whole acts or whole, or parts of, appropriation acts. The referendum does not decrease the authority of the legislature to enact laws, but it subjects laws, other than emergency laws, to the power of the people to approve or reject at the polls rejections by the governor of whole acts or whole, or parts of, appropriation acts.

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 1 of article IV of the constitution is amended to read:

[Article IV] Section 1. The legislative power of this state shall be vested in a senate and assembly, but, subject to other provisions of this constitution, the people reserve to themselves the power to approve or reject at the polls, by referendum, rejections by the governor of whole acts or whole, or parts of, appropriation acts.

SECTION 2. Section 17 (2) of article IV of the constitution is amended to read:

[Article IV] Section 17 (2) No law shall be enacted except by bill. No law shall be in force until published. No law shall be in force before the first January 1 or July 1 occurring at least 90 days after enactment of the law, except a law that requires an earlier date to preserve the public peace, health, or safety; that states in a separate section the emergency and the reasons for the earlier date; and that is passed by a two–thirds vote of all the members elected to each house of the legislature.

SECTION 3. Section 35 of article IV of the constitution is created to read:

[Article IV] Section 35 (1) The legislature may order a referendum, except as to laws necessary for the immediate preservation of the public peace, health, or safety and appropriations for the support and maintenance of the existing state departments and institutions, against a rejection by the governor pursuant to section 10 of article V of a whole act or whole, or part of, an appropriation act passed by the legislature, if the rejected whole act or whole, or part of, an appropriation act has not become law pursuant to section 10 of article V.

(2) If a majority of the electors voting upon the referendum submitted at the election votes disapproval of the rejection by the governor of the whole act or whole,

or part of, the appropriation act, the whole act or whole, or part of, the appropriation act becomes law notwithstanding the objections of the governor. If a majority of the electors vote approval of the rejection by the governor of the whole act or whole, or part of, the appropriation act, the whole act or whole, or part of, the appropriation act is void.

SECTION 4. Numbering of new provision. The new section 35 of article IV of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 35 of article IV of the constitution of this state. If one or more joint resolutions create a section 35 of article IV simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB–0229/1
PJD:wlj:rs

2005 SENATE JOINT RESOLUTION 54

December 6, 2005 – Introduced by Senators CARPENTER, COGGS, MILLER, BRESKE and RISSER, cosponsored by Representatives BENEDICT, BERCEAU, BOYLE, MOLEPSKE, SINICKI and FIELDS. Referred to Committee on Health, Children, Families, Aging and Long Term Care.

To create section 27 of article I of the constitution; **relating to:** the right of the residents of Wisconsin to adequate, accessible, and affordable health care (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, provides that the right of the residents of Wisconsin to adequate, accessible, and affordable health care shall be ensured by the state as one of its necessary duties, and the legislature shall provide by law for the provision of such health care.

A proposed constitutional amendment requires adoption by 2 successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 27 of article I of the constitution is created to read:

[Article I] Section 27. The health and well–being of the people having been determined to be fundamental to the enjoyment of the rights of life, liberty, and the pursuit of happiness, the right of the residents of Wisconsin to adequate, accessible,

and affordable health care shall be ensured by the state as one of its necessary duties, and the legislature shall provide by law for the provision of such health care.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

LRB-4365/1
RAC:jld:jf

2005 SENATE JOINT RESOLUTION 61

February 6, 2006 – Introduced by Senators KANAVAS, LEIBHAM, ZIEN, A. LASEE, KAPANKE, OLSEN, REYNOLDS and LAZICH, cosponsored by Representatives KLEEFISCH, LEMAHIEU, LOTHIAN, ALBERS, HAHN, BIES, KREIBICH, VOS, GUNDERSON and TOWNSEND. Referred to Committee on Job Creation, Economic Development and Consumer Affairs.

To create section 11 of article V of the constitution; **relating to:** senate approval of certain agreements negotiated by the governor (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, prohibits the governor from entering into, amending, extending, or renewing any agreement with a foreign nation, an Indian tribe or band, the federal government, or another state until the governor submits the proposed agreement to the senate and the senate, by a majority of members present, approves the proposed agreement. Under the proposed amendment, if the senate does not approve the proposed agreement, the agreement shall be returned to the governor for renegotiation.

A proposed constitutional amendment requires adoption by two successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 11 of article V of the constitution is created to read:

[Article V] Section 11. The governor may not enter into, amend, extend, or renew any agreement with a foreign nation, an Indian tribe or band, the federal government, or another state until the governor submits the proposed agreement to the senate and the senate, by a majority of members present, approves the proposed

agreement. If the senate does not approve the proposed agreement, the agreement shall be returned to the governor for renegotiation.

SECTION 2. Numbering of new provision. The new section 11 of article V of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 11 of article V of the constitution of this state. If one or more joint resolutions create a section 11 of article V simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

2005 SENATE JOINT RESOLUTION 63

February 14, 2006 – Introduced by Senators GROTHMAN, LAZICH, DARLING, S. FITZGERALD, A. LASEE, KEDZIE, KANAVAS, ZIEN, LEIBHAM, REYNOLDS, SCHULTZ and STEPP, cosponsored by Representatives WOOD, HONADEL, HUEBSCH, GARD, PRIDEMORE, STRACHOTA, KERKMAN, NASS, LOTHIAN, F. LASEE, J. FITZGERALD, GUNDRUM, HUNDERTMARK, JENSEN, MUSSER, PETTIS, NISCHKE, LEMAHIEU, VOS, KLEEFISCH, GUNDERSON, NEWCOMER, KESTELL, VUKMIR, SUDER and MONTGOMERY. Referred to Select Committee on Taxpayer Protection Amendment.

To create section 11 of article VIII of the constitution; **relating to:** creating a revenue limit for the state and local governmental units, depositing excess revenue into an emergency reserve, returning excess revenue to taxpayers, elector approval for exceeding the revenue limit, state and local governmental approval for reducing the revenue limit, allowing local governmental units to raise revenue to compensate for reductions in state aid, requiring the state to reduce its revenue limit in conjunction with reduction in state aid, reimbursing the reasonable costs of imposing state mandates, standing to bring a suit to enforce the revenue limits, and requiring the approval of only one legislature to amend the revenue limit provisions (first consideration).

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2005 legislature on first consideration, limits the amount of revenue from taxes and fees that the state or a special purpose district, school district, technical college district, county, city, village, or town may receive in any year to the amount it received in the previous year, for the year in which the limit takes effect, or the maximum amount it could have received in the previous year, for subsequent years, increased by the percentage

that is the average of the annual percentage increases, if any, in the consumer price index for each of the three years preceding the previous year, but not to exceed the annual percentage increase, if any, in state personal income for the year preceding the previous year, plus the percentage increase in population for the state, a special purpose district, a county, or a technical college district; the percentage that is the average of the annual percentage increases, if any, in student enrollment for a school district in each of the three years preceding the previous year; and 60 percent of the percentage increase from the first to the second of the two previous years in property values related to new construction for a city, village, or town.

Under the proposed amendment, a "special purpose district" is defined as any entity other than the state, a school district, a technical college district, a county, a city, a village, or a town that is authorized to collect taxes or fees.

The proposed amendment defines "revenue," generally, as all moneys received from taxes, fees, licenses, permits, assessments, fines, and forfeitures imposed by the state or a special purpose district, school district, technical college district, county, city, village, or town, lottery proceeds less the amount of any prizes, tribal gaming proceeds, and all moneys received from bonds not including moneys generated from municipal economic development bonds, from the refinancing of bonds, or from short–term cash flow borrowing. However, for the base year upon which the revenue limit is calculated, "revenue" does not include moneys generated from bonds.

Generally, all revenue from taxes and fees that the state receives in excess of the limit must be placed in an emergency reserve fund. Any remaining excess revenue must be returned to the taxpayers. In addition, all revenue from taxes and fees that a special purpose district, school district, technical college district, county, city, village, or town receives in excess of the entity's limit must be returned to the taxpayers.

Under the proposed amendment, generally, if a special purpose district, school district, technical college district, county, city, village, or town receives state aid in any year in an amount that is less than the amount of state aid that the entity received in any previous year beginning, generally, after the ratification of the proposed amendment, the entity may collect additional revenue in the current year in an amount not to exceed the greatest amount of state aid received by the entity in any previous year beginning, generally, after the ratification of the proposed amendment, minus the current year's state aid. The additional revenue is not included in determining the entity's revenue limit. Furthermore, the state must reduce its revenue limit by the amount of any aggregate reduction in state aid. However, if a program or function for which the state aid is provided is eliminated or commensurately reduced in scope or applicability, as determined by the legislature, the state is not required to reduce its revenue limit by the amount of the reduction in state aid, and an entity may not collect additional revenue to compensate for the reduction in state aid.

The state may make expenditures from its emergency reserve fund with the approval of a majority of the members of each house of the legislature for tax relief or in a year in which the amount of the state's revenue limit is greater than the

amount of its revenue. The expenditures are included in the calculation of the state's revenue limit.

Under the proposed amendment, the state, or a special purpose district, school district, technical college district, county, city, village, or town may reduce the revenue limit imposed under this section by a majority vote of the governing body of the entity or, in the case of the state, by the vote of a majority of the members elected to each house of the legislature; and may exceed the revenue limit only with the approval of the electors of the state, county, special purpose district, school district, technical college district, city, village, or town, respectively, at a referendum as prescribed by the legislature by law. The referendum must specify whether the increase in the revenue limit is on a recurring or nonrecurring basis.

Under the proposed amendment, the legislature may, by law, adjust the revenue limit for any governmental unit to accommodate the transfer of services from one governmental unit to another. In addition, generally, a state law or administrative rule that requires a special purpose district, school district, technical college district, county, city, village, or town to expend money may not be enacted or adopted after the ratification of this proposed amendment unless the state provides for the payment to the entity of an amount that is equal to the reasonable costs incurred by the entity to comply with the law or rule, as determined by the legislature.

The proposed amendment allows any individual or class of individuals residing in this state to bring a suit to enforce the revenue limits imposed on the state or on the local governmental unit where the individual or class of individuals resides or pays property taxes. In addition, the provisions created in the amendment may be amended with the approval of one legislature, rather than two, and ratification by the people.

A proposed constitutional amendment requires adoption by two successive legislatures, and ratification by the people, before it can become effective.

Resolved by the senate, the assembly concurring, That:

SECTION 1. Section 11 of article VIII of the constitution is created to read:

[Article VIII] Section 11 (1) In this section:

(a) "Calendar year entity" means a local governmental unit that has a calendar year as its fiscal year.

(b) "Fiscal year entity" means the state or a local governmental unit that has a fiscal year that is not a calendar year.

(c) "Local governmental unit" means a county, municipality, special purpose district, school district, or technical college district.

(d) "Municipal economic development bond" means a bond issued to finance real property improvement that is directly related to economic developments, as defined by the legislature by law.

(e) "Municipality" means a city, village, or town, not including a town whose budgeted revenue is less than $1,000,000 for the 2009 calendar year or, in subsequent calendar years, less than $1,000,000 increased by the percentage increase, if any, in the consumer price index for Milwaukee–Racine or its successor index from the 2007 calendar year to the calendar year preceding the previous calendar year. "Municipality" includes a district, utility, or other entity that receives moneys from taxes or fees and that is authorized, created, or established by a city, village, or town, regardless of whether the governing body of the city, village, or town retains any authority or control over the district, utility, or other entity. For purposes of this section, the moneys received by such a district, utility, or other entity from taxes or fees shall be considered revenue of the city, village, or town that authorized, created, or established the district, utility, or other entity, unless such moneys would not be revenue under this section if received by the city, village, or town or unless considering them revenue would result in the inclusion of such moneys twice in revenue.

(f) "Population" means annual population estimates adjusted by the most recent federal decennial census, as determined by the state.

(g) "Revenue" means all moneys received from taxes, fees, licenses, permits, assessments, fines, and forfeitures imposed by the state or a local governmental unit, lottery proceeds net of prizes, tribal gaming proceeds, and all moneys received from bonds, but not including moneys generated from municipal economic development bonds, from the refinancing of bonds, or from short–term cash flow borrowing.

"Revenue" includes revenue transferred or spent from a fund under sub. (3), not including moneys transferred or spent for refunds or relief from taxes imposed by the state, and, in the case of the state, the amount of any tax credit enacted into law after December 31, 2008, if the credit percentage exceeds the applicable highest marginal tax rate. "Revenue" does not include excess revenue deposited into a fund under sub. (3), moneys used for debt service on a municipal economic development bond, moneys used to pay a damage award, or moneys received from the federal government, from the state or a local governmental unit providing governmental services to governmental entities, from gifts, from damage awards, or from real property sales to taxable entities, moneys received for the operation of a telephone, gas, electric, or water utility, or moneys received for medical care provided by hospitals, nursing homes, assisted living facilities, or other medical facilities operated by any entity that is subject to the limits imposed under this section, from unemployment insurance taxes, from insurance assessments or premiums, from employee payments for fringe benefits, from governmental property insurance, from investment trusts, from private purpose trusts, from college savings programs, from fees imposed for airport or mass transportation systems, or from tuition or fees imposed on students to support university or technical college functions. The legislature, by law, may exclude from "revenue" moneys generated by a local governmental unit from any source other than taxes, except that the legislature may not exclude any amount of money generated from licenses that exceeds the cost of issuing the license or any amount of money generated by a fee that exceeds the cost of providing the service associated with the fee. For the 2008 calendar year, for calendar year entities, and for the 2009 fiscal year, for fiscal year entities, "revenue" does not include moneys generated from bonds.

(h) "Special purpose district" means any entity other than the state, a school district, a technical college district, a county, or a municipality that is authorized to collect taxes or fees.

(i) "State aid" means all of the following, as defined by the legislature by law, but does not include a one–time grant:

1. Shared revenue.

2. Equalization aids.

3. Community aids that are used to provide social services.

4. General transportation aids.

5. Categorical school aids.

6. Aid to technical college districts.

(2) (a) Subject to subs. (3), (4), and (6) to (8), for the 2009 calendar year, for calendar year entities, and for the 2010 fiscal year, for fiscal year entities, the state or a local governmental unit may not collect more in revenue than the amount it collected in the previous calendar year, for calendar year entities, or in the previous fiscal year, for fiscal year entities, increased by the percentage that is the average of the annual percentage increases, if any, in the consumer price index for Milwaukee–Racine, or its successor index, for each of the 3 calendar years preceding the previous calendar year, for calendar year entities, or for each of the 3 fiscal years preceding the previous fiscal year, for fiscal year entities, but not to exceed the annual percentage increase, if any, in state personal income from the 2006 calendar year to the 2007 calendar year, for calendar year entities, or from the 2007 calendar year to the 2008 calendar year, for fiscal year entities, plus:

1. For the state, a special purpose district, a county, or a technical college district, the percentage increase from the first to the 2nd of the 2 years preceding the

previous year in the population of the state, special purpose district, county, or technical college district, respectively.

2. For a school district, the percentage that is the average of the annual percentage increases, if any, for each of the 3 years preceding the previous year in enrollment of students in 5–year–old kindergarten through the 12th grade.

3. For a municipality, 60 percent of the percentage increase from the first to the 2nd of the 2 previous years in property values attributable to new construction, less the value of any property removed or demolished, in the municipality.

(b) Subject to subs. (3), (4), and (6) to (8), for calendar years beginning in 2010, for calendar year entities, and for fiscal years beginning in 2011, for fiscal year entities, the state or a local governmental unit may not, in any calendar year or in any fiscal year, as applicable, collect more in revenue than the maximum amount that it was permitted to collect in the previous calendar year, for calendar year entities, or in the previous fiscal year, for fiscal year entities, under this subsection, increased by the percentage that is the average of the annual percentage increases, if any, in the consumer price index for Milwaukee–Racine, or its successor index, for each of the 3 calendar years preceding the previous calendar year, for calendar year entities, or for each of the 3 fiscal years preceding the previous fiscal year, for fiscal year entities, but not to exceed the annual percentage increase, if any, in state personal income from the 3rd calendar year preceding the current calendar year, for calendar year entities, or preceding the end of the current fiscal year, for fiscal year entities, to the 2nd calendar year preceding the current calendar year, for calendar year entities, or preceding the end of the current fiscal year, for fiscal year entities, plus the applicable percentage increase under par. (a) 1., 2., or 3.

(3) (a) If the revenue received by the state in any state fiscal year exceeds its limit under this section, the state shall deposit into an emergency reserve fund all of the excess revenue, except that the total amount in the emergency reserve fund may not exceed an amount that is equal to 8 percent of the state's total revenue in the previous state fiscal year.

(b) The state may make expenditures from its emergency reserve fund only by a majority vote of the members of each house of the legislature, and only for relief from taxes imposed by the state or in a fiscal year in which the amount of the state's limit determined under this section is greater than the amount of the state's revenue.

(4) If a local governmental unit receives state aid in any calendar year, in the case of calendar year entities, or in any fiscal year, in the case of fiscal year entities, in an amount that is less than the amount of state aid that it received in or after the 2008 calendar year, for calendar year entities, or in or after the 2009 fiscal year, for fiscal year entities, the local governmental unit may collect additional revenue in the current calendar year or current fiscal year, as applicable, in an amount not to exceed the greatest amount of state aid received by the local governmental unit in or after the 2008 calendar year, for calendar years entities, or in or after the 2009 fiscal year, for fiscal year entities, minus the current year's state aid. Any additional revenue collected under this paragraph shall not be included in determining the local governmental unit's limit under this section. A local governmental unit may not collect additional revenue under this paragraph for a reduction in state aid if a program or function for which the state aid is provided is eliminated or commensurately reduced in scope or applicability, as determined by the legislature.

(5) (a) The state shall return to the taxpayers the amount of any excess revenue received in any fiscal year that is not deposited into an emergency reserve fund under sub. (3) (a).

(b) If the revenue received by a local governmental unit in any calendar year, for calendar year entities, or in any fiscal year, for fiscal year entities, exceeds the local governmental unit's limit under this section, it shall return to the taxpayers the amount of the excess revenue received in that calendar year or fiscal year, as applicable.

(c) A refund made under this subsection shall be made in the calendar year, for calendar year entities, or in the fiscal year, for fiscal year entities, immediately following the calendar or fiscal year in which the state or the local governmental unit has the excess revenue.

(6) The state or a local governmental unit may reduce the revenue limit imposed under this section by a majority vote of the governing body of the local governmental unit or, in the case of the state, by the vote of a majority of the members elected to each house of the legislature; and may exceed the revenue limit imposed under this section only with the approval of the electors of the state or local governmental unit, respectively, at a referendum. The referendum shall be held in such manner and at such time as the legislature shall prescribe and shall specify whether the increase in the revenue limit is on a recurring or nonrecurring basis. The revenue limit imposed under this section may not be increased on a recurring basis by referendum in any year by more than the greater of $50,000 or 15 percent of the amount of the revenue limit that is in effect prior to the increase.

(7) The legislature may, by law, adjust any limit imposed under this section to accommodate the transfer of services from any entity subject to a limit under this

section to any other such entity, including the transfer of services that results from annexation. Any increase to a entity's limit under this subsection shall be offset with a corresponding decrease to the limit of other entities affected by the transfer of services.

(8) The state revenue limit under this section for a fiscal year shall be reduced by the amount of any reduction in that fiscal year in the aggregate amount of state aid to local governmental units, as compared to the previous fiscal year. This subsection does not apply to a reduction in state aid if a program or function for which the state aid is provided is eliminated or commensurately reduced in scope or applicability, as determined by the legislature.

(9) A state law or administrative rule that requires the expenditure of money by a local governmental unit may not be enacted or adopted on or after the ratification of this subsection unless the state provides for the payment to the local governmental unit of an amount that is equal to the reasonable costs incurred by the local governmental unit to comply with the law or rule. For purposes of this subsection, the legislature shall be the sole determiner of the reasonable costs incurred by a local governmental unit to comply with any law or administrative rule. This subsection does not apply to any state law or administrative rule that is enacted or adopted in order to comply with a requirement of federal law, including a requirement related to receiving federal aid.

(10) Any individual or class of individuals residing in this state has standing to bring a suit to enforce this section as it relates to the state or to the local governmental unit in which the individual or class of individuals resides or pays property taxes. A court of record shall award a successful plaintiff costs and reasonable attorney fees in the suit, but may not allow the state or a local

governmental unit to recover costs and reasonable attorney fees unless a suit against it is ruled frivolous.

(11) Any amendment or amendments to this section that are directly related to the revenue limits under this section may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon; notwithstanding section 1 of article XII, it shall then be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become part to the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

SECTION 2. **Numbering of new provision.** The new section 11 of article VIII of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 11 of article VIII of the constitution of this state. If one or more joint resolutions create a section 11 of article VIII simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the

other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Be it further resolved, That this proposed amendment be referred to the legislature to be chosen at the next general election and that it be published for 3 months previous to the time of holding such election.

(END)

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-
Cross-Respondent,

v.

J.B. VAN HOLLEN, in his
role as Attorney General
of Wisconsin,

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

COMBINED BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT-CROSS APPELLANT

J.B. VAN HOLLEN
Attorney General

RAYMOND P. TAFFORA
Deputy Attorney General
State Bar #1017166

LEWIS W. BEILIN
Assistant Attorney General
State Bar #1038835

Attorneys for Defendant-
Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076
(608) 267-2223 (fax)
beilinlw@doj.state.wi.us

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES.....2

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 8

I. INTRODUCTION. 8

II. STANDARD OF REVIEW.....9

III. THE LEGISLATURE HAS DISCRETION TO SUBMIT SEPARATE PROPOSITIONS IN A SINGLE BALLOT QUESTION, PROVIDED THE PROPOSITIONS RELATE TO THE SAME SUBJECT AND ARE DESIGNED TO ACCOMPLISH THE SAME GENERAL PURPOSE.....10

A. The Separate Amendment Rule.....10

B. The Wisconsin Standard. 14

C. This Court Accords Deference to the Legislature's Wording of Proposed Constitutional Amendments. 18

Page

D. MCCONKEY'S PROPOSED STANDARD IS THAT OF A SMALL NUMBER OF STATES WHOSE CONSTITUTIONAL STRUCTURES SIGNIFICANTLY DIFFER FROM THAT OF WISCONSIN. 20

IV. THE BALLOT QUESTION PROPOSING THE MARRIAGE AMENDMENT COMPLIED WITH THE SEPARATE AMENDMENT RULE. 23

A. The General Purpose of the Amendment Was To Preserve and Protect the Unique and Historical Status of Traditional Marriage As A Union between One Man and One Woman. 24

B. The Two Parts of the Marriage Amendment Are Both Related to the Subject Matter of the Amendment and Designed to Accomplish Its General Purpose. 30

Page

C. Courts In Other States Have Reached The Same Conclusion With Respect to Similar Ballot Questions and Similar or Identical Separate Amendment Requirements. 40

CONCLUSION.....45

CASES CITED

Albano v. Attorney General,
769 N.E.2d 1242 (2002) 44

Andrews v. Governor of Md.,
449 A.2d 1144 (Md. 1982)..... 17

Arizona Together v. Brewer,
149 P.3d 742 (Ariz. 2007) 43

Armatta v. Kitzhaber,
959 P.2d 49 (Or. 1998) 21

Advisory Opinion to the
Attorney General re Florida
Marriage Protection Amendment,
926 So.2d 1229 (Fla. 2006) 41, 42

Baker v. State of Vermont,
744 A.2d 864 (1999) 29

Brockelhurst v. State,
111 S.W.2d 527 (Ark. 1937)..... 17

Page

Californians for An Open Primary,
et al. v. McPherson,
134 P.3d 299 (Cal. 2006)..... 10, 19, 22, 23

Cambria v. Soaries,
776 A.2d 754 (N.J. 2001) 21

Carter v. Burson,
198 S.E.2d 151 (Ga. 1973) 17

City of Raton v. Sproule,
429 P.2d 336 (N.M. 1967) 17

Curry v. Laffoon,
88 S.W.2d 307 (Ky. 1935) 16

Dairyland Greyhound Park, v. Doyle,
2006 WI 107, 295 Wis. 2d 1,
719 N.W.2d 408..... 24, 25, 29

Forum for Equality PAC v. McKeithen,
893 So. 2d 715 (La. 2005) 19, 40, 41

Fugina v. Donovan,
104 N.W.2d 911 (Minn. 1960) 17

Gabbert v. Chicago, R.I. & P. Ry. Co,
70 S.W. 891 (Mo. 1902)..... 16

Goodridge, et al. v. Dep't of Public Health,
798 N.E.2d 941 (2003) 29

Gottstein v. Lister,
153 P. 595 (Wash. 1915) 19

Idaho Endowment Fund Inv. Bd. v. Crane,
23 P.3d 129 (Idaho, 2001)..... 21

Page

In re Opinion of Supreme Court,
71 A. 798 (R.I. 1909) 12

Kayden Indus., Inc. v. Murphy,
34 Wis. 2d 718, 150 N.W.2d 447 (1967) 24

Korte v. Bayless,
16 P.3d 200 (Ariz. 2001) 43

Lee v. State,
367 P.2d 861 (Utah 1962) 21

Lobaugh v. Cook,
102 N.W. 1121 (Iowa 1905) 16, 19

Marshall v. State ex rel. Cooney,
975 P.2d 325 (Mont. 1999) 21

Milwaukee Alliance v. Elections Board
106 Wis. 2d 593,
317 N.W.2d 420 (1982) 9, 14, 15, 16
18, 23, 33, 34, 35

Moore v. Shanahan,
486 P.2d 506 (1971) 16

Nankin v. Village of Shorewood,
2001 WI 92,
245 Wis. 2d 86, 630 N.W.2d 141 9

Penrod v. Crowley,
356 P.2d 73 (Idaho 1960) 17

People v. Sours,
74 P. 167 (Colo. 1903) 16

Perdue v. O'Kelley,
632 S.E.2d 110 (Ga. 2006) 42, 43

Page

Sadler v. Lyle,
176 S.E.2d 290 (S.C. 1970) 19

In re Opinions of the
Justices to the Senate,
802 N.E.2d 565 (Mass. 2004)..... 30

State ex rel. Clark v. State Canvassing Bd.,
888 P.2d 458 (N.M. 1995) 19

State ex rel. Hudd v. Timme,
54 Wis. 318, 11 N.W. 785 (1882) 14, 15,
16, 23, 31, 32, 33

State ex rel. Roahrig v. Brown,
282 N.E.2d 584 (Ohio 1972) 17

State ex rel. Thomson v. Zimmerman,
264 Wis. 644,
60 N.W.2d 416 (1953)..... 14, 23, 24, 35, 36, 37, 38

State v. Cole,
2003 WI 112, 264 Wis. 2d 520,
665 N.W.2d 328 (2003) 24

State v. Cook,
185 N.E. 212 (Ohio 1932)..... 16

State v. Wetz,
168 N.W. 835 (N.D. 1918)..... 16

Swett v. Bradbury,
67 P.3d 391 (Or. 2003) 21

Thompson v. Craney,
199 Wis. 2d 674, 546 N.W.2d 123 (1996)... 24

Page

CONSTITUTIONAL PROVISIONS CITED

Ariz. Const. art. 21, § 1 12

Ark. Const. art. XIX, § 22 12

Cal. Const. art. 11, § 8, Sub. d 13

Cal. Const. art. 18, § 1, 8 12

Colo. Const. art. XIX, § 2 12

Fla. Const. art. XI, § 3 ..... 12, 42

Ga. Const. art. X, § 1, ¶ 2 ..... 12, 42

Idaho Const. art. XX, § 2 12

Ind. Const. art. 16, § 2 12

Iowa Const. art. X, § 2 12

Kan. Const. art. 14, § 1 12

Ky. Const. § 256 ..... 12, 13

La. Const. art. XII, § 15 40

La. Const. art. XIII, § 1, ¶ B 12, 41

Mass. Const. art. 48, Pt. 2, § 3 12

Md. Const. art. XIV, § 1 12

Minn. Const. art. IX, § 1 12

Miss. Const. art. 15, § 273 ..... 12, 13

Mo. Const. art. XII, § 2(b) 12, 13

Mont. Const. art. 14, § 11 ..... 12, 21

N.J. Const. art. 4, § 7, ¶ 4 21

Page
N.J. Const. art. 9, § 5 ..... 12, 21
N.J. Const. art. IX, § 5 ..... 10, 12
N.M. Const. art. XIX, § 1 12
Neb. Const. art. XVI, §§ 1, 2 12
Ohio Const. art. XVI, § 1 12
Okla. Const. art. XXIV, § 1 ..... 12, 13
Or. Const. art. XVII, § 1 ..... 12, 13
Or. Const. art. IV, § 1(2)(d) 13, 21
Or. Const. art. IV, § 1 12
Or. Const. art. XVII, § 1 ..... 13, 21
Pa. Const. art. XI, § 1 12
S.C. Const. art. XVI, §§ 1, 2 ..... 12, 13
S.D. Const. art. XXIII, § 1 ..... 12, 13
Utah Const. art. XXIII, § 1 ..... 12, 13
W. Va. Const. art. XIV, § 2 ..... 12, 13
Wash. Const. art. XXIII, § 1 12
Wis. Const. art. IV, § 8 33
Wis. Const. art. IV, § 31 ..... 32, 33
Wis. Const. art. IV, § 3 35
Wis. Const. art. IV, § 4 35
Wis. Const. art. IV, § 5 35
Wis. Const. art. XII 10

Page
Wis. Const. art. XII, § 1 ..... 2, 3, 4, 7, 9, 12, 45

Wis. Const. art. XIII, § 13..... 2, 8

Wyo. Const. art. 20, § 2..... 12

LEGISLATIVE BILLS AND RESOLUTIONS CITED

2000 VT. Laws P.A. 91 (H. 847), § 2 29

2003 Assembly Bill 955 28

2003 Senate Joint Resolution 63..... 5

2005 Assembly Bill 824 28

2005 Assembly Joint Resolution 67 5

2005 Joint Resolution 30 26

2005 Senate Bill 397 28

2005 Senate Joint Resolution 67..... 5, 27

2005 Senate Joint Resolution 53
(2005 Enrolled Joint Resolution 30) 4, 5

Assembly Amendment 1 to
2003 Assembly Joint Resolution 66 5

Senate Amendment 9 to
2003 Assembly Joint Resolution 66 5

Senate Amendment 4 to
2005 Senate Joint Resolution 53..... 5

Senate Substitute Amendments 1, 4, 6
to 2005 Senate Joint Resolution 53 5

Page

OTHER AUTHORITIES CITED

Book of the States 2008, Table 1.2 11

Cody Hoesly, [Comment]
Reforming Direct Democracy:
Lessons From Oregon,
93 Cal. L. Rev. 1191 (2005) 22

"Different Views But Equal Passion,"
Milw. Journal Sentinel, November 29, 2005 5

Michael D. Gilbert,
Single Subject Rules and
the Legislative Process,
67 U. Pitt. L. Rev. 803 (2006) 13

Ray A. Brown,
The Making of the Wisconsin Constitution,
1949 Wis. L. Rev. 648 (1949) 10

"Referendum closer on gay Marriage ban,"
Mil. Journal Sentinel
December 7, 2005 28

Wis. Legis. Council Memo,
February 4, 2006, to Rep. Gundrum 29

Wisconsin Blue Book 2007-2008 7

Page

STATUTES CITED

Alaska Stat. § 15.50.010 12

Vt. Stat. Ann. tit. 15, § 1201-1207 28-30

Wis. Stat. § 10.01(2)(c) 6

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-
Cross-Respondent,

v.

J.B. VAN HOLLEN, in his
role as Attorney General
of Wisconsin,

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

RESPONDENT'S BRIEF

The respondent, Attorney General J.B. Van Hollen, hereby submits his brief in the above captioned action.

STATEMENT OF THE ISSUES

Issue 1: What is the appropriate standard for evaluating compliance of a constitutional amendment with the separate amendment rule of article XII, section 1 of the Wisconsin Constitution?

The circuit court, adhering to this Court's precedents, answered that it is within the discretion of the Legislature to submit several distinct propositions to the voters as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose.

Issue 2: Did the submission of proposed article XIII, section 13 of the Wisconsin Constitution to the voters violate the separate amendment rule contained in article XII, section 1?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Attorney General concurs with McConkey that holding oral argument and publishing the Court's decision in this case are appropriate.

STATEMENT OF THE CASE

The central question in McConkey's appeal is whether article XIII, section 13 of the Wisconsin Constitution—what will be referred to here as the "marriage amendment"—in fact consists of two

amendments rather than one, thereby violating the constitutional rule that amendments must be presented separately to voters. (Wis. Const. art. XII, § 1). The circuit court held that the amendment complied with the separate amendment rule and dismissed McConkey's complaint. The question in the Attorney General's cross-appeal is whether McConkey's factual concessions before the circuit court demonstrate that he lacks standing to challenge the amendment under article XII, section 1.

STATEMENT OF FACTS

The Attorney General does not dispute the accuracy of the facts presented in McConkey's Brief, but he does challenge the significance McConkey attaches to some of those facts. McConkey's statement is also incomplete.

On November 7, 2006, voters in Wisconsin approved a referendum that added article XIII, section 13 to the Wisconsin Constitution. Known as the "marriage amendment," the amendment was proposed to the voters in a ballot question that read as follows:

> QUESTION 1: Marriage. Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that 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 for this amendment had been introduced and voted on by two successive sessions of both houses of the state Legislature, as required by Wis. Const. art. XII, § 1. The legislative resolution triggering the presentment of the question to voters was 2005 Senate Joint Resolution 53 (2005 Enrolled Joint Resolution 30). The Legislative Reference Bureau ("LRB") explained the proposal contained in 2005 Senate Joint Resolution 53 in the following way: "This proposed constitutional amendment . . . provides that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." (R. 47, R-Ap. 101)[1]

The relationship between the first and second parts of the marriage amendment was a topic of significant discussion and debate both inside and outside the Legislature. Legislative sponsors of the marriage amendment said in a memo to their colleagues that the second part of the amendment would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." (Memo from Representatives Gundrum, Wood, *et al.* to Legislators, January 29, 2004; R-Ap. 104). ""The proposal preserves 'marriage' as it has always been in this state, as a union between one man

[1]References to the circuit court record are abbreviated "R.," with additional references to the Appellant's Appendix (A-Ap.) or Respondent's Appendix (R-Ap.), as appropriate.

and one woman.'" (*Id.*) In an article about the hearing on 2005 Assembly Joint Resolution 67 (the Assembly companion resolution to 2005 SJR 53), one of the authors of the proposed amendment said that it was drafted to prevent the state from creating "a new kind of marriage." ("Different Views But Equal Passion," *Milw. Journal Sentinel*, November 29, 2005; R. 47; R-Ap. 105-08).

Attempts to delete or modify the second part of the proposed amendment failed both in the Senate and in the Assembly. (*See* Assembly Amendment 1 to 2003 AJR 66; Senate Amendment 9 to 2003 AJR 66; Senate Amendment 4 to 2005 SJR 53; Senate Substitute Amendments 1, 4, 6 to 2005 SJR 53; R. 47, App. 114, 117.)

On March 1, 2004, the Senate Judiciary, Corrections and Privacy Committee held a public hearing on SJR 63, the companion resolution to AJR 66, regarding the marriage amendment. On March 4 and 5, the Assembly debated AJR 66, and it passed the Assembly on a 68-27 vote. The Senate then took up the measure, considering a substitute amendment as well as 12 separate amendments to the resolution, all of which were tabled. SJR 63 passed the Senate on a vote of 20-13.

On November 23, 2005, the Legislature took up its second consideration of the marriage resolution in the form of AJR 67 and SJR 53, which were textually identical to the resolution voted out of the previous session of the Legislature. A joint public hearing was held on the resolutions on November 29, 2005. The

Senate passed the resolution by a vote of 19-14, with 21 amendments having been offered, all of which were either voted down, withdrawn, or tabled. On February 28, 2006, the joint resolution cleared the Assembly on a vote of 62-31.

The Legislature then published a Notice of Referendum Election for three months prior to the November 7, 2006, general election. (R-Ap. 109-10). The Notice contained the full text of 2005 Enrolled Joint Resolution 30, as well as an "Explanation" of the effect that "yes" and "no" votes would have, prepared by the Attorney General, which read as follows:[2]

> Under present Wisconsin law, only a marriage between a husband and a wife is recognized as valid in this state. A husband is commonly defined as a man who is married to a woman, and a wife is commonly defined as a woman who is married to a man.
>
> A "yes" vote would make the existing restriction on marriage as a union between a man and a woman part of the state constitution, and would prohibit any recognition of the validity of a marriage between persons other than one man and one woman.
>
> A "yes" vote would also prohibit recognition of any legal status which is identical or substantially similar to marriage for unmarried persons of either the same sex or different sexes. The constitution would not further specify what is, or what is not, a legal

[2]Wisconsin Stat. § 10.01(2)(c) requires the inclusion of an explanation of the effect of "yes" and "no" votes on state referenda, to be prepared by the Attorney General.

> status identical or substantially similar to marriage. Whether any particular type of domestic relationship, partnership or agreement between unmarried persons would be prohibited by this amendment would be left to further legislative or judicial determination.
>
> A "no" vote would not change the present law restricting marriage to a union between a man and a woman nor impose restrictions on any particular kind of domestic relationship, partnership or agreement between unmarried persons.

(R-Ap. 109-10).

The referendum passed on November 7, 2006, by a vote of 1,264,310 to 862,924. *See* WISCONSIN BLUE BOOK 2007-2008, at 246.

Seven months later, on July 27, 2007, McConkey filed a "Petition for Injunction and Declaration of Unconstitutionality," challenging the substance of the marriage amendment and the procedure leading to its adoption by voters. Upon the motion of the Attorney General, the circuit court held that McConkey lacked standing to challenge the substantive constitutionality of the marriage amendment, but further held that McConkey did have standing to litigate his claim that the ballot question submitted to voters violated the separate amendment rule embodied in article XII, section 1 of the Wisconsin Constitution.

The circuit court ultimately held that the ballot question and the marriage amendment fully complied with the requirements of article XII, section 1 in that it "properly included two

propositions that both related to the same subject matter and were designed to accomplish the same general purpose." (A-Ap. 7-8). An appeal and cross-appeal followed.

ARGUMENT

I. INTRODUCTION.

McConkey's challenge to article XIII, section 13 on separate-amendment grounds is based on a misreading of this Court's precedents, and seeks to adopt into Wisconsin law a legal standard that is used in only a tiny fraction of states with separate amendment rules, most of which have constitutional structures different from Wisconsin's. This Court has recognized and respected the Legislature's discretion in crafting the language of proposed constitutional amendments; McConkey's proposed standard would deprive the Legislature of discretion.

The marriage amendment, however, satisfies both the standard set forth by this Court, and the stricter standard proposed by McConkey. As this brief will show, the circuit court was correct in recognizing the close linkage between the two propositions contained in the amendment. One part confined marriage to unions of one man and one woman; the other part ensured that the limitation of the first part could not be nullified by the creation of new legal statuses identical or substantially similar to marriage.

To sustain his challenge, McConkey devises a conception of the purpose of the marriage amendment that ignores the procedure this Court uses to guide its interpretation of constitutional amendments and defies common sense.

McConkey ignores the abundant evidence that shows the amendment's purpose to have been, as the circuit court held, "the preservation and protection of the unique and historical status of traditional marriage" as a union of one man and one woman. (A-Ap. 49).

II. STANDARD OF REVIEW.

A claim that a ballot question violates the separate-amendment rule of article XII, section 1 poses the question "whether the legislature in the formation of the question acted reasonably and within their constitutional grant of authority and discretion." *Milwaukee Alliance v. Elections Board*, 106 Wis. 2d 593, 604, 317 N.W.2d 420 (1982). This is a question of law that imposes no presumption in favor of, nor burden of proof upon, either party. *Id*. at 602, 604. On appeal from the circuit court's ruling upholding the marriage amendment, this question of law is reviewed *de novo* by this Court. *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141.

III. THE LEGISLATURE HAS DISCRETION TO SUBMIT SEPARATE PROPOSITIONS IN A SINGLE BALLOT QUESTION, PROVIDED THE PROPOSITIONS RELATE TO THE SAME SUBJECT AND ARE DESIGNED TO ACCOMPLISH THE SAME GENERAL PURPOSE.

A. The Separate Amendment Rule.

Article XII of the Wisconsin Constitution dates to 1848 and has never been amended. It contains one of the first separate amendment rules to appear in an American state constitution.[3] In Wisconsin, a committee tasked with drafting the provision submitted what is now section 1, and the convention adopted the provision without any debate. Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 WIS. L. REV. 648, 691 (1949).

In the history of Wisconsin's constitution, there have been 191 amendments submitted to voters, 141 of which were adopted. *See* "History of Constitutional Amendments," WISCONSIN BLUEBOOK 2007-08, at 246. Though these numbers may seem large, they are average in

[3]New Jersey appears to have been the first to adopt such a rule, in 1844. *See* N.J. Const. art. IX, § 5; *Californians for An Open Primary, et al. v. McPherson*, 134 P.3d 299, 305 n.9 (Cal. 2006).

comparison with the constitutional histories of other states.[4]

All fifty state constitutions enable their Legislatures to begin the amendment process by legislative vote. BOOK OF THE STATES 2008, Table 1.2, at 12 (R-Ap. 113). Wisconsin is among 17 states that require only a simple majority vote in the Legislature before presentment to the electorate, but it is also one of only 11 states that require passage by two successive sessions. *Id*. Eighteen state constitutions also authorize amendment by voter initiative (*i.e.*, without prior proposal by the Legislature); Wisconsin's is not among them. Forty-two state constitutions, including Wisconsin's, also provide for the calling of constitutional conventions. In Wisconsin, no convention has been held since the constitution first was enacted in 1848.

A rule requiring constitutional amendments to be presented to voters so that they can be voted on separately appears in the law of 33 states, including Wisconsin's, often in terms identical or nearly-identical to Wisconsin's. Almost all these rules appear within the text of the state constitutions themselves. Alaska's rule is found in its statutes, and in Illinois the supreme court has

[4]Alabama, for instance, has adopted 799 amendments since its current constitution came into force in 1901, South Carolina has amended almost 500 times since 1896, and California 514 times since 1879. (R-Ap. 111).

read the rule into a constitutional requirement that "all elections shall be free and equal."[5]

Significantly, almost all of these rules, like Wisconsin's, are separate *amendment* rules. Indeed, a number of states use language identical to Wisconsin's, requiring not that each amendment be confined to a single subject, but simply that no two amendments be combined on

---

[5]*See* Alaska Stat. § 15.50.010; Ariz. Const. art. 21, § 1; Ark. Const. art. XIX, § 22; Cal. Const. art. 18, §§ 1, 8; Colo. Const. art. XIX, § 2; Fla. Const. art. XI, § 3 (amendment by initiative only); Ga. Const. art. X, § 1, ¶ 2; Idaho Const. art. XX, § 2; Ind. Const. art. 16, § 2; Iowa Const. art. X, § 2; Kan. Const. art. 14, § 1; Ky. Const. § 256; La. Const. art. XIII, § 1, ¶ B; Md. Const. art. XIV, § 1; Mass. Const. art. 48, Pt. 2, § 3; Minn. Const. art. IX, § 1; Miss. Const. art. 15, § 273; Mo. Const. art. XII, § 2(b); Mont. Const. art. 14, § 11; Neb. Const. art. XVI, §§ 1, 2 (separate amendment rule for legislature-proposed amendments; "one subject" limitation for amendments by voter initiative); N.J. Const. art. IX, § 5; N.M. Const. art. XIX, § 1; Ohio Const. art. XVI, § 1; Okla. Const. art. XXIV, § 1; Or. Const. art. XVII, § 1 (separate amendment rule for legislatively-proposed amendments); Or. Const. art. IV, § 1 ("one subject" rule for amendments by voter initiative); Pa. Const. art. XI, § 1; S.C. Const. art. XVI, §§ 1, 2 (separate amendment rule and distinct "germane to the subject" rule); S.D. Const. art. XXIII, § 1; Utah Const. art. XXIII, § 1; Wash. Const. art. XXIII, § 1; W. Va. Const. art. XIV, § 2; Wis. Const. art. XII, § 1; Wyo. Const. art. 20, § 2. *See also In re Opinion of Supreme Court*, 71 A. 798 (R.I. 1909) (giving Legislature discretion to submit several amendments separately to voters, in light of constitution's lack of any rule either mandating or limiting separate submission).

the ballot. In working out what is "an amendment," the state courts have introduced the "single subject" and "purpose" concepts to the analysis of the separate amendment rule, as will be further discussed below.

Of the 33 state constitutions referenced above, only 8 use the "subject" terminology in any fashion, and in 5 of those states, Kentucky, Mississippi, South Dakota, Utah, and West Virginia, the constitutions expressly *permit* multiple, related "subjects" in a single amendment. *See* Ky. Const. § 256; Miss. Const. art. 15, § 273; Mo. Const. art. XII, § 2(b); Okla. Const. art. XXIV, § 1; S.C. Const. art. XVI, § 1; S.D. Const. art. XXIII, § 1; Utah Const. art. XXIII, § 1; W. Va. Const. art. XIV, § 2.

Three state constitutions among the 33 include both a separate amendment (read: separate *vote*) rule, on the one hand, and a single subject rule on the other. *See* Cal. Const. art. 11, § 8, sub. d. (limiting amendments by initiative only to "one subject"); S.C. Const. art. § XVI, § 1 (two rules, both apply to all amendments); Or. Const. art. XVII, § 1, art. IV, § 1(2)(d). This is a significant feature of the legal landscape, as will be explained further below in the section addressing McConkey's argument for a heightened standard of review.

It is generally recognized that the separate amendment rule is intended to prevent logrolling and riding, and to encourage transparency. *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process,* 67 U. PITT. L. REV. 803, 813 (2006). Logrolling is the passage of more than one measure, each of which lacks majority support, by

combining them into a single proposal. A distinct purpose, often conflated with logrolling, is to prevent riding, whereby passage of a measure supported by only a minority of voters is obtained by hitching it to a measure supported by the majority.

The separate amendment rule also promotes transparency, in the sense that limiting the scope of each constitutional change will generally make it easier for voters to understand what is being proposed. The purpose of the separate amendment rule will be discussed further in the context of the appropriate standard to be applied when an amendment is challenged.

B. The Wisconsin Standard.

This Court has explained that "[i]t is within the discretion of the legislature to submit several distinct propositions as one amendment if they relate to the same subject matter and are designed to accomplish one general purpose." *Milwaukee Alliance*, 106 Wis. 2d at 604-05 (citing *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336, 11 N.W. 785 (1882)). This standard has been reaffirmed in each of the three Wisconsin cases involving single-amendment challenges. *See also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953).

In light of this standard, it is not necessary for the Legislature to submit separate ballot questions whenever it would be *possible* to do so. As this Court stated in *Hudd* with respect to the amendment at issue in that case,

> [w]e do not contend that the legislature, if it had seen fit, might not have adopted these

> changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose.

Hudd, 54 Wis. at 337; *see also Milwaukee Alliance*, 106 Wis. 2d at 608 (quoting a portion of the above language from *Hudd*).

McConkey acknowledges that there has been only one standard used by this Court in separate amendment cases, *see* Appellant's Brief at 19-25, but he relies on a logical fallacy, and a misreading of this Court's cases, to argue that the standard is more stringent than it really is. McConkey argues that in order to place multiple propositions before voters in a single proposed amendment, the propositions must be "interrelated and interdependent, such that if they had been submitted as separate questions, the defeat of one question would destroy the overall purpose of the multi-proposition proposal." (Appellant's Brief at 19).

However, to say that the Court will not require the Legislature to separate mutually-dependent propositions does not mean that whenever two propositions are *not* mutually-dependent, they *must* be separated. As will be more fully explained below, some of the amendments upheld by the Court contained multiple parts that were so closely interrelated that to present them separately to voters could have "destroy[ed] the usefulness of all the other

provisions when adopted." *Hudd*, 54 Wis. at 335. However, this Court has never required that all propositions in a given amendment be interdependent in order to survive constitutional scrutiny.

Indeed, this Court specifically rejected the standard that McConkey advocates here, in *Milwaukee Alliance*, 106 Wis. 2d at 607 ("The Alliance argues that the issues of conditional release and anti-monetary bail should have been submitted to the voters as separate questions, because the successful adoption of either one would not have destroyed the usefulness of the other. That is not realistic.")

The standard set forth in *Hudd* influenced the high courts of other states and eventually came to be the dominant standard in the United States. As noted in 1971 by the Supreme Court of Kansas, "[t]he question of duplicity of an amendment was decided by the Wisconsin Supreme Court in the early case of [*Hudd*], which has been followed by a vast majority of the courts of the country as stating a sound rule." *Moore v. Shanahan*, 486 P.2d 506, 516, (1971) (citation omitted); *People v. Sours,* 74 P. 167, 178 (Colo. 1903); *Lobaugh v. Cook*, 102 N.W. 1121, 1124, (Iowa 1905); *Curry v. Laffoon*, 88 S.W.2d 307, 308 (Ky. 1935); *see also Gabbert v. Chicago, R.I. & P. Ry. Co*, 70 S.W. 891, 895 (Mo. 1902); *State v. Wetz*, 168 N.W. 835, 846-48 (N.D. 1918) (though note that North Dakota repealed its separate-amendment rule in 1918); *State v. Cook*, 185 N.E. 212 (Ohio 1932);

In some states, a language of "germaneness" is used to express Wisconsin's "relate to the same

subject" and "designed to accomplish one general purpose" standard. *See, e.g.*, *Carter v. Burson*, 198 S.E.2d 151, 157 (Ga. 1973); *Penrod v. Crowley*, 356 P.2d 73, 79 (Idaho 1960); *Andrews v. Governor of Md.*, 449 A.2d 1144, 1150 (Md. 1982); *Fugina v. Donovan*, 104 N.W.2d 911, 914 (Minn. 1960); *State ex rel. Roahrig v. Brown*, 282 N.E.2d 584, 586 (Ohio 1972); *City of Raton v. Sproule*, 429 P.2d 336, 342 (N.M. 1967); Either under the "germaneness" language, or language close to Wisconsin's own, this standard has remained the basic analytic tool for almost all state courts enforcing a separate-amendment rule.[6]

In the final analysis, however, the Wisconsin marriage amendment passes muster under both this Court's established standard, and under the more stringent standard that McConkey erroneously derives from the case law. As the circuit court held, A-Ap. at 7-8, the two propositions contained in the marriage amendment are not only related to the same subject matter and designed to accomplish one general purpose, but they are also interdependent, such that separating them could have destroyed the overall purpose of the amendment.

[6]Some states apply a standard less stringent than Wisconsin's, such as Arkansas, which requires only that the parts of each amendment "relate to" the same subject. *Brockelhurst v. State*, 111 S.W.2d 527, 530 (Ark. 1937).

C. This Court Accords Deference to the Legislature's Wording of Proposed Constitutional Amendments.

The foregoing discussion shows that when a ballot question is challenged, as here, on the grounds that it includes multiple amendments that should have been submitted separately, this Court accords deference to the Legislature's formulation of the ballot question. As stated by this Court, "[t]he issue is whether the legislature in the formation of the question acted reasonably and within their constitutional grant of authority and discretion." *Milwaukee Alliance*, 106 Wis. 2d at 604. This Court has given substance to the Legislature's discretion by formulating a standard that leaves room for judgment and common sense. McConkey's stricter standard would leave the Legislature with almost none.

Wisconsin's constitution does not permit amendment by voter initiative; as McConkey recognizes, only the Legislature can initiate the process of constitutional amendment or revision. However, McConkey fails to appreciate the significance of this limitation for judicial review of separate amendment challenges. Since the framers of the constitution invested the power to initiate and draft proposed constitutional amendments in the Legislature, they made compliance with the separate amendment rule first and foremost the responsibility of the Legislature.

The amendment process, requiring as it does passage of identical resolutions by successive

sessions of the Legislature, allows significant time for the public and government leaders to raise concerns about separate-amendment compliance, if any exist. Significantly, the legislative history of Wisconsin's marriage amendment shows no indication of an articulated concern that the amendment could run afoul of the separate amendment rule.

Like Wisconsin, the high courts of many states have explicitly accorded deference to their Legislatures when evaluating compliance with the separate amendment rule. *See Californians for An Open Primary v. McPherson*, 134 P.3d at 318 ("[W]e long have construed our two single subject provisions in an accommodating and lenient manner so as not to unduly restrict the Legislature's or the people's right to package provisions in a single bill or initiative."); *Lobaugh*, 102 N.W. at 1124 ("some discretion is, of necessity, allowed the General Assembly"); *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005) (giving Legislature "substantial deference"); *State ex rel. Clark v. State Canvassing Bd.*, 888 P.2d 458, 461 (N.M. 1995) ("the standard of review to be applied is the reasonable or rational basis test . . . and the principal question to be answered is 'whether the legislature reasonably could have determined that a proposed amendment embraces but one object.'"); *Sadler v. Lyle*, 176 S.E.2d 290, 293, (S.C. 1970) ("Of course, the legislative construction is not necessarily controlling, but 'there is a strong presumption that it is correct and should be adopted by the court'"); *Gottstein v. Lister*, 153 P. 595, 598, (Wash. 1915) ("the question must be viewed in a broader aspect as one largely of common sense, and in a spirit of deference to the discretion of the Legislature.").

McConkey's standard would deprive the Legislature of the meaningful discretion that this Court has recognized under our constitutional framework. By requiring that only mutually-dependent propositions can be included in any one amendment, McConkey's standard would make compliance with the separate amendment rule extremely difficult. Under that standard, compliance with the rule would require prescience of what the courts will consider "necessary" to the accomplishment of any given purpose. In rare instances, this may be easy to predict, but in most matters of public policy it would not be. As the next section will show, state courts that have adopted McConkey's stricter standard have made it virtually impossible to amend their constitutions.

D. MCCONKEY'S PROPOSED STANDARD IS THAT OF A SMALL NUMBER OF STATES WHOSE CONSTITUTIONAL STRUCTURES SIGNIFICANTLY DIFFER FROM THAT OF WISCONSIN.

McConkey's heightened "interrelated and interdependent" standard is used in only a small number of states, most of which articulate and structure the separate amendment rule in a way significantly different from Wisconsin's. Moreover, McConkey's standard has been expressly rejected by some states, and has come under significant judicial criticism. This Court should avoid McConkey's invitation to alter its

longstanding approach to separate amendment challenges.

The highest courts of only a few states have articulated a standard stricter than Wisconsin's, requiring that each discernable part of an amendment be inter-dependent, so that if any part possibly could stand alone, it must do so. *See Idaho Endowment Fund Inv. Bd. v. Crane,* 23 P.3d 129, 133 (Idaho, 2001); *Marshall v. State ex rel. Cooney*, 975 P.2d 325, 330 (Mont. 1999); *Cambria v. Soaries*, 776 A.2d 754, 765 (N.J. 2001); *Armatta v. Kitzhaber*, 959 P.2d 49, 64 (Or. 1998) (*overruled on other grounds by Swett v. Bradbury*, 67 P.3d 391 (Or. 2003)); *Lee v. State*, 367 P.2d 861, 864 (Utah 1962).

However, in only 2 of these states, Idaho and Utah, do the constitutions have separate amendment rules like Wisconsin's. In the other three states, the constitutions contain both a separate amendment rule and a distinct single-subject (or single-object) rule. Mont. Const. art. 14, § 11; N.J. Const. art. 9, ¶ 5, art. 4, § 7, ¶ 4; Or. Const. art. XVII, § 1, art. IV, § 1(2)(d). The high courts in those three states have determined that the separate vote rule must place a stricter requirement on amendments than the single-subject rule, which they otherwise interpret as Wisconsin interprets its separate amendment rule.

So McConkey asks this Court to abandon its hundred-year old standard in favor of a standard used by only two states with constitutional structures like Wisconsin's. Such a change would be inadvisable and damaging. Since 1998, when Oregon adopted McConkey's preferred "interdependent" standard, only one Oregon

amendment subjected to the standard has survived judicial scrutiny. *See Californians for an Open Primary*, 134 P.3d at 323 and n.41 (noting that in only one Oregon appellate decision raising a separate-vote issue has a violation not been found, and reviewing cases). Studying the effects of the adoption of the Oregon/McConkey standard, one commentator has predicted that most constitutional amendments will fail if subjected to it. Cody Hoesly, [Comment] *Reforming Direct Democracy: Lessons From Oregon*, 93 CAL. L. REV. 1191, 1224 (2005).

The California Supreme Court, having carefully reviewing this recent history, and the longer-term history of the separate amendment rule in the United States, expressly rejected the Oregon/McConkey standard, even though California is a state that has both a separate

amendment and distinct single-subject rule for constitutional amendments. *Californians for an Open Primary*, 134 P.3d at 327-28.[7]

IV. THE BALLOT QUESTION PROPOSING THE MARRIAGE AMENDMENT COMPLIED WITH THE SEPARATE AMENDMENT RULE.

The ballot question proposing the marriage amendment complied with the separate amendment rule whether one applies the standard used by this Court in *Hudd*, *Thomson,* and *Milwaukee Alliance*, or the standard proposed by McConkey. McConkey attempts to distinguish the two propositions by positing that the sole purpose of the amendment was to limit the existing status of marriage to heterosexual unions. According to McConkey, anything other than modifying the definition of the word "marriage" constitutes a

---

[7]Further deviating from Wisconsin precedents, McConkey claims that the separate amendment rule is equivalent to the "single subject" test under article IV, section 18 of the Wisconsin Constitution, which provides, "No private or local bill may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." (Appellant's Brief at 28-29). McConkey finds language resembling his "interdependent" standard in the case law applying that latter rule. (Brief at 28). However, although article IV, section 18 has been part of the Wisconsin Constitution since 1848, this Court has never suggested that the standard applicable to that section should also be used in applying the separate amendment rule. McConkey offers no rationale for doing so now.

completely separate purpose requiring a separate vote. But McConkey's approach to determining the purpose of constitutional amendments is pure invention, unhinged from this Court's precedents, and his concept of "purpose" is unreasonably narrow, both in the abstract and in relation to the amendment at issue here.

A. The General Purpose of the Amendment Was To Preserve and Protect the Unique and Historical Status of Traditional Marriage As A Union between One Man and One Woman.

As the circuit court correctly put it, the purpose of the marriage amendment was "the preservation and protection of the unique and historical status of traditional marriage." (A-Ap. 7). The marriage amendment contains two propositions that together effectuate that purpose.

The goal in construing a constitutional amendment is "'to give effect to the intent of the framers and of the people who adopted it.'" *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967). This Court has held that the purpose of an amendment may be determined from the plain meaning of the provision, the debates and practices at the time, and the earliest legislative action following adoption. *Dairyland Greyhound Park, v. Doyle*, 2006 WI 107, ¶ 19, 295 Wis. 2d 1, 719 N.W.2d 408; *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996).

This methodology differs from that employed in the interpretation of statutes. Interpretation of constitutional provisions requires greater reliance on extrinsic sources because these provisions do not become law until they are approved by the voters, who are more likely to rely on extrinsic sources, such as press reports and the public statements of legislators, in forming a perception of what the provision is intended to accomplish. *See Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶ 115-16 (Prosser, J., concurring in part and dissenting in part).

The text of the marriage amendment shows that its purpose was to preserve and protect the unique and historical status of marriage as a union between one man and one woman, and not only to limit marriages to heterosexual unions. The first part of the amendment limits the existing legal status of "marriage" to unions between one man and one woman; the second part prohibits the recognition of any other legal status that would be identical or substantially similar to marriage but that, unlike marriage, could extend to unmarried individuals—*e.g.*, to same-sex couples. Taken together, the two propositions in the amendment come at the same purpose from two different directions: the first placing a constitutional limitation on who may enter into marriages; the second ensuring that entering into marriage is the only way to obtain the legal incidents now identified with marriage.

McConkey's approach is to ignore the text of the amendment and focus exclusively on the language contained in the preamble or title to the joint resolution containing the proposed

amendment. Thus, McConkey argues that the purpose of the amendment is described in the following, *and only* in the following, statement from 2005 Joint Resolution 30: "To create section 13 of article XIII of the constitution; **relating to**: providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." (Appellant's Brief at 28). According to McConkey, since this one sentence does not specifically mention preserving the unique status of marriage, that was not part of the amendment's purpose at all.

But to confine the Court's study of this or any constitutional amendment's purpose to that single sentence preceding the joint resolution, ignoring all other sources including text, legislative context, and public debates, is contrary to this Court's precedents and to commonsense. The purpose of the marriage amendment is made abundantly clear by the full text of the amendment, the explanatory material in the public notice of referendum, related sources such as legislators' public statements, press reports, and legislative bureau memoranda, all of which McConkey ignores. These sources confirm that the amendment was understood as being designed, not only to limit the existing legal status of marriage to opposite-sex unions, but to preserve marriage as a unique legal status so that the limitation prescribed in the first part of the amendment could not be rendered illusory through separate legislation.

The LRB's analysis summed up the proposal in the following way:

> This proposed constitutional amendment . . . provides that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." [R. 47, App. 101; R-Ap. 101.]

While this analysis apparently was not reproduced in the *enrolled* joint resolution, it appeared prominently in each of the Assembly and Senate resolutions preceding it. The LRB's statement of what the amendment provides is a relevant indicator of what its purpose is.

Sponsors of the marriage amendment said in a memo to their colleagues in the Legislature that the second part of the amendment would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." (R-Ap. 104). The proposal preserves "marriage' as it has always been in this state, as a union between one man and one woman.'" (R-Ap. 104). The sponsors of the amendment were motivated not only to confine the marriage status to opposite-sex couples but to ensure that this limitation could not be circumvented by the creation or recognition of other legal statuses that mimic marriage.

In an article about the Senate hearing on 2005 Assembly Joint Resolution 67, one of the authors of the amendment said that it was drafted

to prevent the state from creating a new kind of marriage. (R-Ap. 105-08).

Attempts to delete the second proposition in the proposed amendment failed both in the Senate and in the Assembly. This was known to the public through press reports that covered the legislative debate ("Referendum closer on gay marriage ban," *Milw. Journal Sentinel*, December 7, 2005; R-Ap. 115-18). To argue, as does McConkey, that the true purpose of the amendment was only to limit marriage to one man and one woman and that the prohibition on "marriage-like" legal statuses was essentially a surprise, is unrealistic and unreasonable.

The second portion of the Wisconsin amendment needs also to be considered in light of the fact that just as it was being proposed and voted on, the Legislature was also considering a proposed law which, if enacted, would have created a new legal status conferring *all* the statutory and other rights and responsibilities of marriage, a status it termed "domestic partnership." (*See* 2003 Assembly Bill 955; 2005 Senate Bill 397; 2005 Assembly Bill 824; R-Ap. 138-44).[8] The LRB explained that proposed new law in the following way: "The bill provides that any state statute or rule that applies to a married person or a formerly married person, such as a widow, applies in the same respect to a domestic partner or a person who was formerly a domestic partner." ("Analysis by the Legislative Reference Bureau of 2005 Senate Bill 397," R-Ap. 139).

[8]The text of all three bills was identical.

It was clear to proponents of a constitutional ban on same-sex marriage that such a ban could be circumvented by the creation of an alternative legal status that was like marriage in all but name, because such a proposed alternative status was being suggested at the very same time. The content of this separately-considered legislative proposal sheds light on the purpose of the marriage amendment. *Dairyland Greyhound Park*, 295 Wis. 2d 1, ¶ 19.

Finally, since the issue of same sex marriage was a topic of intense controversy and discussion around the United States at the time Wisconsin's amendment was being considered, the Court should consider relevant legal developments in the country as a whole when determining what the Wisconsin amendment was intended to accomplish.

The Wisconsin amendment, in fact, was motivated in significant part by developments in the law of other states. (*See* Wis. Legis. Council Memo, February 24, 2006, to Rep. Gundrum; R-Ap. 119-22). Sponsors of the amendment, and much of the public, had become aware of court decisions in other states invalidating marriage statutes on constitutional grounds. *See Baker v. State of Vermont*, 744 A.2d 864 (1999); *Goodridge, et al. v. Dep't of Public Health*, 798 N.E.2d 941 (2003). And it was public knowledge that in Vermont, the state Legislature had responded to *Baker* by enacting a civil union law that provided eligible same-sex couples the opportunity to "obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." (2000 VT. LAWS P.A. 91 (H. 847), § 2; *see* VT. STAT.

ANN. tit. 15, §§ 1201-1207).[9] The awareness that a legal status identical or substantially similar to marriage could be created legislatively, vitiating a limit on marriage to heterosexual unions, helps explain what the purpose of Wisconsin's amendment was.

B. The Two Parts of the Marriage Amendment Are Both Related to the Subject Matter of the Amendment and Designed to Accomplish Its General Purpose.

Marriage is not just a word, but a legal status conferring rights and responsibilities upon the individuals who enter into it. The marriage amendment limits marriage to a union between one man and one woman. But to ensure that this limitation could not be substantively avoided through legislation, it was within the Legislature's discretion to draft the amendment also to prohibit a legal status conferring the identical or substantially similar rights and responsibilities as marriage. The second sentence in the marriage amendment is the complement to the first. As the circuit court put it, "The two propositions . . . are two sides of the same coin." (A-Ap. 7).

---

[9]In Massachusetts, the Legislature sought an opinion from the state's highest court whether a civil union law conferring "a legal status equivalent to marriage and . . . treated under law as a marriage," would satisfy the court's constitutional ruling. The court said no. *See In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, (Mass. 2004).

This Court's three previous separate amendment rule cases show that the Legislature here acted well within its discretion in placing both the first and second propositions in the same ballot question.

In *Hudd*, this Court held that not only two, but four distinct propositions were properly placed in the same ballot question because they all related to the same general purpose. The amendment in question provided that: (1) members of the Assembly would serve two-year terms and be elected from single districts; (2) senators would serve four year terms and be chosen alternately in odd and even numbered districts every two years; (3) the Legislature would meet once every two years; and (4) the salaries of legislators would be increased to $500.00. *Hudd*, 54 Wis. at 326.

The Supreme Court held that all four propositions furthered the general purpose of the amendment, which the Court determined was to change the Legislature generally from annual to biennial sessions. *Id.* at 336. In reaching this conclusion, the *Hudd* court showed that the concept of "relatedness" as it is applied in the single subject rule context, is broader than McConkey portrays it, and easily encompasses the relation between the two parts of the marriage amendment at issue here.

The change from annual to biennial sessions of the Legislature was "so intimately connected" with the change of the tenure of office of legislators, that the *Hudd* court had no difficulty concluding that those propositions were properly placed within the same amendment. *Id.*

at 335-36. The first three propositions together enabled a smooth transition from the existing, annual Legislature to a biennial one. If all three changes were not made simultaneously, the Legislature could have had empty seats and some legislators could have been elected to terms longer than the session itself, leaving them without duties to perform. *Id*. at 336.

The *Hudd* court found that even the salary increase provision was properly included with the other three provisions, despite the fact that "[t]he question of compensation was, perhaps, less intimately and necessarily connected with the change to biennial sessions." *Id*. at 337. It found that since the legislators' terms were being lengthened, it made sense to raise their salaries. *Id*. The court made clear that the Legislature could have adopted the salary change in a separate amendment, but the fact it could have did not mean it must have. *Id*.

The *Hudd* court went on to offer some valuable comments on another, pre-existing constitutional provision that was not being challenged in that case, but which provides a useful example of the meaning of the single amendment rule.

The *Hudd* court pointed out that article IV, section 31 of the constitution, which had been adopted in a voter referendum in 1871 (it has since been amended twice), contained several propositions (nine, in fact) far less interrelated than those at issue before the court in *Hudd*, while noting that the court "has never questioned its validity." *Id*.

Indeed, the *Hudd* court went on to opine that article IV, section 31, which prohibits the Legislature from enacting nine different types of special or private laws, "was a single amendment, having for its purpose one thing, *viz.*, the prevention of special legislation in nine different classes of cases." *Id*. at 338.

If the Legislature could place a salary raise within the same proposed amendment as the session and tenure changes; if it could place bans on private laws in nine different types of cases in the same proposed amendment—related only in the sense that they are all private laws—then the Legislature surely was empowered to place both propositions of the marriage amendment together in the same ballot question.

In *Milwaukee Alliance* the Court applied the *Hudd* standard and again sustained an amendment containing multiple parts. The amendment in question made changes to article I, section 8 of the constitution, which among other things deals with the right to conditional release for persons accused of criminal conduct. In *Milwaukee Alliance*, a single ballot question proposed to amend the constitution to provide that: (1) the Legislature could permit courts to deny or revoke bail for certain accused persons; and (2) the courts could set conditions, including bail, for the release of accused persons to assure their appearance in court, protect members of the

community, or prevent intimidation of witnesses. *Milwaukee Alliance*, 106 Wis. 2d at 602.[10]

This Court held that submitting both propositions in the same ballot question was proper because the purpose of the amendment was to shift from the limited concept of bail to a more comprehensive concept of "conditional release." *Id*. at 607. The Court explained:

> The purpose of the amendment . . . was to continue the guarantee of bail to those entitled to it, to allow release of some persons without requiring money bail but with other reasonable conditions, and at the same time, under a structured system, to hold persons for limited periods without the option of bail when a court determines that such action is necessary to protect . . . society's interest in the administration of justice by preventing the intimidation of witnesses.

Id at 608. The two propositions were related to that general purpose, indeed they were "integral and related aspects of the amendment's total purpose." *Id*. at 608.

McConkey passes over *Milwaukee Alliance* quickly (*see* Appellant's Brief at 21-22), and for good reason, because the plaintiffs in that case made exactly the same argument McConkey makes here, namely that because the two propositions on the ballot were not dependent

[10]These are paraphrases of the changes to the existing constitutional provision that were proposed; the actual textual changes were extensive and detailed. A reproduction of the full text presented to voters is provided by the court in *Milwaukee Alliance*, 106 Wis. 2d at 600.

upon one another, they should have been presented separately. This Court rejected the argument twenty years ago, and should do so again now.

The plaintiffs in *Milwaukee Alliance* argued that because one *could* adopt the idea of conditional release without adopting the idea of non-monetary bail, and vice-versa, the two ideas *should* have been separately offered to voters. *Id.* at 607. This Court rejected that argument as "unrealistic," *id.*, because the true purpose of the proposed changes was to institute a new scheme of conditional release; while both parts were not necessary to one another, they were nonetheless part of the same general plan, and could therefore be placed in the same amendment.

Under the holding of *Milwaukee Alliance*, which represents this Court's most recent articulation and application of the separate amendment rule, what the Legislature did with the marriage amendment was well within the limits of its permissible discretion. Under *Milwaukee Alliance*, even if the two parts of the marriage amendment were not mutually-dependent, as in fact they are, it would still have been appropriate to put them together in the ballot question, because together they serve the same general purpose.

The case of *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953), involved a challenge to the 1953 Rogan Act. The Rogan Act put before the voters a referendum on the amendment of article IV, sections 3, 4, and 5 of the constitution, dealing with apportionment of

legislative districts. The proposed ballot question was as follows:

> Shall sections 3, 4 and 5 of article IV of the constitution be amended so that the legislature shall apportion, along town, village or ward lines, the senate districts on the basis of area and population and the assembly districts according to population?

Thomson, 264 Wis. 2d at 651. At an election held in April 1953, the voters passed the referendum.

The Secretary of State thereafter announced that he would call the 1954 election in accordance, not with the new scheme of district apportionment, but with the pre-existing scheme, which determined the assembly and senate districts on the basis of population with no regard to area. *Id*. at 647-48.

In response to the Attorney General's complaint, which sought a declaration that the newly-enacted amendment required area and population-based apportionment, the Secretary of State argued that the ballot question violated the separate amendment rule and was therefore unconstitutional and void. The Supreme Court agreed.

McConkey contends that the facts and reasoning of *Thomson* require a similar declaration here, Appellant's Brief at 40-43, but that is incorrect. The ballot question in *Thomson* had numerous defects, only one of which was that it comprised multiple purposes and subjects. *Id*. at 660-62. More fundamentally, it completely misrepresented the actual constitutional amendment that was being proposed, failing even

to mention several specific changes to the apportionment scheme that were in the Joint Resolution setting forth the new constitutional language. *Id.* Nothing of the sort is at issue here.

The joint resolution proposing the constitutional changes in *Thomson* included the following alterations to the apportionment scheme: (1) drawing senate districts on the basis of area as well as population; (2) counting untaxed Indians and members of the armed forces when calculating population; (3) bounding assembly districts by town, village or ward lines; and (4) providing that assembly districts could be divided in forming senate districts, and leaving no direction or restriction as to the boundaries of senate districts. *Id.* at 654.

It is important to recognize that in *Thomson*, there was no dispute between the parties, and the Court assumed without discussion, that the purpose of the constitutional change simply was to introduce area into the formation of senate districts. *Id.* at 656. On that basis, the Court was quick to conclude that the amendment included multiple provisions that "ha[ve] *no bearing* on the main purpose of the proposed amendment." *Id.* at 656 (emphasis added). For instance, the Court found there was no connection between using area in apportionment and revoking the exclusion on untaxed Indians and the military when counting inhabitants, but the amendment did both. Similarly, there was no connection between permitting the division of assembly districts when forming senate districts and the introduction of area as a factor, yet the amendment did both. *Id.*

The *Thomson* Court did not consider whether all these parts could have furthered some common, general purpose other than "introducing area into the formation of senate districts." Without discussion or analysis it stated with that assumption and moved on. That is in stark contrast with this case, where a clear general purpose was articulated at the time of the marriage amendment's passage, and which ties together the amendment's two parts.

Relying on his implausible methodology for determining the marriage amendment's purpose, McConkey would have this court believe that the second proposition in Wisconsin's marriage amendment has *nothing to do with* the first. (Appellant's Brief at 37). But this is true only if one treats marriage as no more than a word, a name, a label.

If the state government were empowered to create or recognize a legal status identical or substantially similar to marriage, and make it available to same-sex couples, then the limitation on the marriage relation to opposite-sex couples could cease to have practical significance. Opposite sex couples could enter into "marriages" and same sex couples could enter into these other, identical or substantially similar statuses, and but for the different names applied to their status, everything else about their status would be the same or substantially similar. It is clear that this is precisely what the voters intended to prevent.

McConkey fails to acknowledge the correct legal standard when he writes that "it is possible to decide that same-sex couples should not be allowed marriage, and at the same time decide

that at least some unmarried couples should have access to all of the legal protections, rights and responsibilities associated with marriage." (Appellant's Brief at 35). McConkey's statement says nothing except that the two propositions were, in fact, two propositions. No one says otherwise, but this Court has repeatedly held that multiple propositions may be embraced in a single amendment.

In order to drive a wedge between the two parts of the amendment, McConkey misconstrues the meaning of the second proposition when he writes that it "restrict[s] future legislatures from ever confronting the crux of the controversy: what comprehensive legal protections will be given to relationships that exist outside of marriage?" (Appellant's Brief at 38). That was not what the voters were asked to decide in the November 2006 referendum.

Whether any particular legal status, hypothetical or existing, actually is "identical or substantially similar" to marriage is not an issue addressed by the marriage amendment. The amendment does not say what rights and responsibilities are forbidden to same-sex (or other unmarried) couples. It only says that a status identical or substantially similar *to marriage* will be unavailable to unmarried couples.

The two parts of the ballot question presented to voters in November 2006 related to and furthered the general purpose of the amendment: to preserve and protect the unique and historical status of traditional marriage as a union of one man and one woman. McConkey's

strained effort to conceptually dissociate the two propositions should be rejected.

C. Courts In Other States Have Reached The Same Conclusion With Respect to Similar Ballot Questions and Similar or Identical Separate Amendment Requirements.

Four other state high courts have rejected challenges to marriage amendments that are identical or nearly identical to Wisconsin's, under those states' respective iterations of the separate amendment rule. These cases, though not controlling on this Court, nonetheless are persuasive authority that the Court should reach the same result here.

In *Forum for Equality PAC v. McKeithen*, 893 So.2d 715 (La. 2005), the Supreme Court of Louisiana upheld a referendum that proposed to amend the state constitution by providing, among other things, that: "Marriage in the state of Louisiana shall consist only of the union of one man and one woman . . . A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." *Forum for Equality*, 893 So.2d at 717 (quoting from the joint resolution proposing submission of article XII, section 15 of the Louisiana Constitution, entitled "Defense of Marriage," to the voters).

Louisiana has what it calls a "single-object" requirement for constitutional amendments, which provides in relevant part that "a proposed amendment shall . . . be confined to one object. . . . When more than one amendment is submitted at

the same election, each shall be submitted so as to enable the electors to vote on them separately." La. Const. art. XIII, § 1(B), quoted in *Forum for Equality*, 893 So.2d at 724.

The Louisiana Supreme Court found that the purpose of the marriage amendment was to "protect or defend our civil tradition of marriage." *Id*. at 734. As with the Wisconsin amendment, the purpose was thus not merely to prohibit same-sex marriage, but to maintain the unique status of marriage in the legal system.

Like McConkey, the plaintiffs in *Forum For Equality* "dissect[ed] the amendment sentence by sentence and interpret[ed] every provision as advancing a separate and distinct plan or object." *Id*. at 734-35. The court rejected this effort, finding that all the elements of the amendment—both its ban on same-sex marriage, and its ban on legal statuses "identical or substantially similar to marriage" were integral parts of the plan to defend the state's civil tradition of marriage. *Id*. at 736.

In *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So.2d 1229 (Fla. 2006), the Supreme Court of Florida upheld a ballot question which read, "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." *Advisory Opinion*, 926 So.2d at 1232. Florida's constitution requires that proposed amendments to that constitution "shall embrace but one subject and matter directly connected

therewith." Fla. Const. art XI, § 3 (quoted in *Advisory Opinion*, 926 So.2d at 1233).

The intervening opponents of the amendment raised the same arguments against the Florida amendment that McConkey raises here, and the Florida court rejected them. The opponents claimed that the second proposition in the ballot question—dealing with "other legal unions"—was "beyond the subject of the definition of marriage." *Id.* at 1234. But the court held that "when the phrase challenged by the opponents is read in context and connection with the proposed amendment as a whole, it is clear that it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme'—the restriction of the exclusive rights and obligations traditionally associated with marriage to legal unions consisting of one man and one woman." *Id.*

The Supreme Court of Georgia in *Perdue v. O'Kelley*, 632 S.E.2d 110 (Ga. 2006) upheld a ballot question that contained 5 separate sentences relating to marriage. The first two sentences prohibited marriages between persons of the same sex. The second group of three sentences provided, in relevant part, that "[n]o union [of] persons of the same sex shall be recognized as entitled to the benefits of marriage." Georgia's single-subject rule requires that "[w]hen more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more new articles or related changes in one or more articles may be submitted as a single amendment." Ga. Const. art. X, § 1, ¶ 2, quoted in *Perdue*, 632 S.E.2d at 733 n.2.

The Georgia Supreme Court found that the purpose of the amendment was to establish that marriage and its attendant benefits belong only to union of man and woman. *Id.* at 734. The *exclusivity* of marriage, the court found, was central to the amendment's purpose. *Id.* On this basis, the court concluded that the prohibition against recognizing same-sex unions as entitled to the benefits of marriage "is not 'dissimilar and discordant' to the objective of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman," *id.*, and the amendment therefore complied with the single-subject rule.

Finally, in *Arizona Together v. Brewer*, 149 P.3d 742 (Ariz. 2007), the Supreme Court of Arizona upheld an amendment that provided "only a union between one man and one woman shall be valid or recognized as a marriage," and also "no legal status for unmarried persons shall be created or recognized by this state . . . that is similar to that of marriage." The court concluded that the purpose "of both provisions is to preserve and protect marriage," and that both provisions "are sufficiently related to a common purpose or principle that the proposal can be said to 'constitute a consistent and workable whole on the general topic embraced,'" *id.* at 749 (quoting *Korte v. Bayless,* 16 P.3d 200, 204 (Ariz. 2001)). In fact, the court went further, and held, as the circuit court held in this case, that the two propositions were interrelated to such a degree that they "should stand or fall as a whole." *Id.*

These cases[11] are persuasive authorities supporting the procedural correctness of the Wisconsin marriage amendment. Variations on McConkey's arguments have been presented to the high courts in several states that enacted amendments virtually identical to Wisconsin's, and in none of them were those arguments persuasive. This Court should reach the same result here.

[11]The Supreme Judicial Court of Massachusetts also upheld a marriage-related amendment, but the text of that amendment differed significantly from Wisconsin's. *See Albano v. Attorney General*, 769 N.E.2d 1242, 1245 n.4 (2002).

CONCLUSION

The circuit court correctly held that Wisconsin voters were presented with a procedurally correct ballot question, and enacted a constitutional amendment whose two parts "relate to the same subject matter and are designed to accomplish one general purpose," consistent with article XII, section 1 of the Wisconsin Constitution.

Therefore, the Attorney General respectfully requests that this Court affirm the circuit court's Final Order in Action for Declaratory Judgment entered June 9, 2008.

Dated this ___ of August, 2009.

Respectfully Submitted,

J.B. VAN HOLLEN
Attorney General

RAYMOND P. TAFFORA
Deputy Attorney General
State Bar #101766

LEWIS W. BEILIN
Assistant Attorney General
State Bar #1038835

Attorneys for Defendant-
Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076
(608) 267-2223 (fax)

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,156 words.

Dated this _____ day of August, 2009.

_____
LEWIS W. BEILIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

_____
LEWIS W. BEILIN
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant,
Cross-Respondent,

v.

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF CROSS-APPELLANT

J.B. VAN HOLLEN
Attorney General

RAYMOND P. TAFFORA
Deputy Attorney General
State Bar #1017166

LEWIS W. BEILIN
Assistant Attorney General
State Bar #1038835

Attorneys for Defendant-
Respondent-Cross-
Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076
(608) 267-2223 (fax)
beilinlw@doj.state.wi.us

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUE 1

ARGUMENT 2

I. STANDARD OF REVIEW. 2

II. HAVING STIPULATED THAT HE VOTED "NO" ON THE BALLOT QUESTION AND WOULD HAVE VOTED "NO" TO BOTH PROPOSITIONS WERE THEY PRESENTED SEPARATELY, MCCONKEY LACKS STANDING TO SUE. 2

A. Standing to Sue in Wisconsin. 2

B. Standing To Challenge Constitutional Amendments on Separate Amendment Grounds. 6

1. Requiring a Plaintiff Who Would Have Voted Differently On The Multiple Propositions Helps Further The Purpose of the Separate Amendment Rule. 6

Page

2. Cases In Other Jurisdictions Show That In Order to Have Standing To Raise Voting-Related Claims, Plaintiffs Must Show More Than That They Voted in The Election. 8

C. McConkey Was Not Injured By The Inclusion of Both Propositions in the Marriage Amendment, Even If Doing So Violated the Separate Amendment Rule.....11

CONCLUSION.....15

CASES CITED

American Civil Liberties Union v. Darnell,
195 S.W.3d 612 (Tenn. 2006)..... 9, 10

Carla S. v. Frank B.,
2001 WI App 97,
242 Wis. 2d 605, 626 N.W.2d 330 4

Chenequa Land Conservancy
v. Village of Hartland,
2004 WI App 144,
275 Wis. 2d 533, 685 N.W.2d 573 3

City of Madison v. Town of Fitchburg,
112 Wis. 2d 224,
332 N.W.2d 782 (1983) 3

Page

Flast v. Cohen,
392 U.S. 83 (1968) 4

Fox v. DHSS,
112 Wis. 2d 514,
334 N.W.2d 532 (1983) 2, 3

Hein v. Freedom from Religion
Foundation, Inc.,
551 U.S. 587 (2007) 4

Lake Country Racquet & Athletic Club,
Inc. v. Village of Hartland,
2002 WI App 301,
259 Wis. 2d 107, 655 N.W.2d 189 2-3

Lewis v. Casey,
518 U.S. 587 (2007) 4

Los Angels v. Lyons,
461 U.S. 95 (1983) 3

Mast v. Olsen,
89 Wis. 2d 12,
278 N.W.2d 205 (1979) 2, 4

Milwaukee Alliance Against Racist
and Political Repression v. Elections Bd.,
106 Wis. 2d 593,
317 N.W.2d 420 (1982) 6-7

Moedern v. McGinnis,
70 Wis. 2d 1056,
236 N.W.2d 240 (1975) 3, 4, 5

Mogilka v. Jeka,
131 Wis. 2d 459,
389 N.W.2d 359 (Ct. App. 1986) 3

State ex rel. 1st Nat.
Bank v. M&I Peoples Bank,
95 Wis. 2d 303,
290 N.W.2d 321 (1980) 2

State ex rel. Hudd v. Timme,
54 Wis. 318, 11 N.W. 785 (1882) 7

Page
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 4-5

Town of Eagle v. Christensen,
191 Wis. 2d 301,
529 N.W.2d 245 (Ct. App. 1995) 2

U.S. v. Hays,
515 U.S. 737 (1995). 10, 11

U.S. v. Richardson,
418 U.S. 166 (1974) 5

Village of Slinger v. City of Hartford,
2002 WI App 187,
256 Wis. 2d 859, 650 N.W.2d 81 2-3

OTHER AUTHORITIES CITED

Wis. Const. art. XII, § 1 ..... 6, 8, 12

STATE OF WISCONSIN
IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant,
Cross-Respondent,

v.

J.B. VAN HOLLEN, in his role as Attorney General of Wisconsin,

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF CROSS-APPELLANT

STATEMENT OF THE ISSUE

The issue presented by the Attorney General's cross-appeal is whether McConkey has standing to litigate the compliance of the marriage amendment with the separate amendment rule. Denying in part the Attorney General's motion to dismiss for lack of standing, the circuit court held that McConkey had standing to pursue his claim

under the separate amendment rule, and the Attorney General cross-appeals from that decision.

ARGUMENT

I. STANDARD OF REVIEW.

Whether a party has standing to seek declaratory relief is a question of law this Court reviews *de novo*. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 315, 529 N.W.2d 245 (Ct. App. 1995).

II. HAVING STIPULATED THAT HE VOTED "NO" ON THE BALLOT QUESTION AND WOULD HAVE VOTED "NO" TO BOTH PROPOSITIONS WERE THEY PRESENTED SEPARATELY, MCCONKEY LACKS STANDING TO SUE.

A. Standing to Sue in Wisconsin.

As a general rule, a party asserting a constitutional claim must have personally suffered a real and direct, actual or threatened injury resulting from the legislation under attack. *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983); *State ex rel. 1st Nat. Bank v. M&I Peoples Bank*, 95 Wis. 2d 303, 309, 290 N.W.2d 321 (1980); *Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205 (1979). This is no less true for declaratory judgment actions, such as McConkey's, than it is for other types of actions. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189 (citing *Village of Slinger v. City of*

Hartford, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81) ("In order to have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy.").

As formulated by the Wisconsin courts, a plaintiff must demonstrate that "[he] was injured in fact, [and that] the interest allegedly injured is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Mogilka v. Jeka*, 131 Wis. 2d 459, 467, 389 N.W.2d 359 (Ct. App. 1986). This standard is "conceptually similar" to the federal rule. *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1067, 236 N.W.2d 240 (1975).

"Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox,* 112 Wis. 2d at 525. (quoting *Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983)).

Standing also requires that the injury be to a legally protectable interest. *See City of Madison v. Town of Fitchburg,* 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983). A legally protectable interest is one arguably within the zone of interests that the law under which the claim is brought seeks to protect. *See Chenequa Land Conservancy, v. Village of Hartland,* 2004 WI App 144, ¶ 16, 275 Wis. 2d 533, 685 N.W.2d 573.

The purpose of the Court's inquiry into standing "is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of constitutional questions." *Moedern*, 70 Wis. 2d at 1064 (citing *Flast v. Cohen*, 392 U.S. 83 (1968). Enforcing the standing requirement ensures that a concrete case informs the court of the consequences of its decision, and that people who are directly concerned and are truly adverse will genuinely present opposing viewpoints to the court. *Carla S. v. Frank B.,* 2001 WI App 97, ¶ 5, 242 Wis. 2d 605, 626 N.W.2d 330.

It is a foundational assumption of our judicial system that true adversity of the parties improves the soundness of judicial outcomes. This Court adheres to the standing requirement, not because it is jurisdictional, but because as a matter of sound judicial policy "a court should not adjudicate constitutional rights unnecessarily and because a court should determine legal rights only when the most effective advocate of the rights, namely the party with a personal stake, is before it." *Mast,* 89 Wis. 2d at 16. As the following argument will show, McConkey is not such a party.

The standing requirement also furthers the separation-of-powers principle that underlies our constitutional system, and "'keeps courts within certain traditional bounds vis-a-ví̀s the other branches, concrete adverseness or not.'" *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 611 (2007) (quoting *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996)); *see also Steel Co. v.*

Citizens for a Better Environment, 523 U.S. 83, 125 n.20 (1998) (Stevens, J., concurring) ("our standing doctrine is rooted in separation-of powers-concerns.") Relaxing the standing requirement therefore is "'directly related to the expansion of judicial power.'" *Hein*, 551 U.S. at 611 (quoting *U.S. v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).[1] This is particularly important in a case involving Wisconsin's separate-amendment rule, where our state's constitution gives the Legislature discretion to craft the language of proposed amendments. (*See* Respondent's Brief at 10-20). Adopting the circuit court's standing analysis in this case would erode that discretion by authorizing a court challenge to every single proposed and adopted constitutional amendment, even when the plaintiff's real grievance is not with the language of the amendment but with the outcome of the referendum.

[1]The Supreme Court's jurisprudence on the issue of standing is relevant here, because the Wisconsin requirement is "conceptually similar" to the federal rule. *Modern,* 70 Wis. 2d at 1067.

B. Standing To Challenge Constitutional Amendments on Separate Amendment Grounds.

1. Requiring a Plaintiff Who Would Have Voted Differently On The Multiple Propositions Helps Further The Purpose of the Separate Amendment Rule.

As discussed in both the Attorney General's Respondent's Brief, and in McConkey's Appellant's Brief, the separate amendment rule furthers the goals of preventing logrolling and riding, and encouraging transparency at the polls. (Appellant's Brief at 16-18; Respondent's Brief at 13-14). To further these goals, the Court should require a plaintiff who raises a challenge under article XII, section 1 of the Wisconsin Constitution to allege that he or she would have voted differently on the multiple propositions in an amendment. If a plaintiff cannot make such an allegation, then he or she is outside the zone of interests protected by the constitutional rule.

The separate amendment rule is designed to ensure that two amendments, each lacking majority support, are not passed by combining them into one amendment. Similarly, it prevents an unpopular measure from passing by being hitched to a popular one. When propositions are combined into one amendment that do not "relate to the same subject matter and are [not] designed to accomplish one general purpose," *Milwaukee*

Alliance Against Racist and Political Repression v. Elections Bd., 106 Wis. 2d 593, 604-05, 317 N.W.2d 420 (1982) (citing *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336, 11 N.W. 785 (1882)), at least some voters are faced with an undesirable choice: either they vote "yes" for the amendment, and thereby accept one proposition that they oppose, or they vote "no" on the amendment and contribute to the potential loss of the proposition they support. Violation of the separate amendment rule requires some voters to decide whether their opposition to the part they disfavor is greater than their support for the part they favor. When forced to make such a choice, the results of the referendum may not accurately reflect the true preferences of the electorate.

Therefore, a plaintiff who raises a separate amendment challenge must allege that his or her true preferences were impeded by the combination of multiple propositions in a single amendment. If a plaintiff concedes, as McConkey here conceded, that he or she would have voted "no" to both propositions had they been separated, that shows the plaintiff's preferences were unimpaired by the manner in which the ballot was presented. It shows that the plaintiff is not within the zone of interests protected by the constitutional rule.

McConkey's opposition to the *result* of the referendum is insufficient to establish his standing. Let us imagine a voter who attests to voting "yes" on the marriage ballot question, and concedes that even if the two propositions had been separated, she would have voted "yes" to both. It seems indisputable that such a voter would lack standing. But that voter lacks standing, not because of her opposition to the outcome of the referendum in this example (she

supported the outcome), but because she, like McConkey, was not forced into the choice that the separate amendment rule is designed to prevent. Her voting preferences were perfectly well expressed in her single "yes" vote.

That same "yes" voter, however, would obtain standing if she actually wanted to vote "no" on one of the propositions, but was prevented from doing so because of an alleged violation of article XII, section 1. That voter would be within the zone of interests protected by the rule; even though in this example her actual vote is still consistent with the outcome of the referendum, her real preferences were stymied by the way the ballot was crafted. There is no meaningful distinction between McConkey and the "yes" voter who, like him, cannot claim to have been pressed into the choice that the rule guards against. Requiring a plaintiff whose voting preferences were actually affected by the conjoining of multiple propositions in an amendment helps ensure that a plaintiff truly interested in the legal issue is involved in the case.

2. Cases In Other Jurisdictions Show That In Order to Have Standing To Raise Voting-Related Claims, Plaintiffs Must Show More Than That They Voted in The Election.

McConkey has characterized this lawsuit as a "voting rights case." (Appellant's Brief at 10). However, voting rights cases show that simply

being a voter or elector is not enough to challenge any and all alleged irregularities in the way an election is conducted. As with standing in other areas of the substantive law, voters must allege a particularized, direct injury to *their* rights in order to bring suit.

In *American Civil Liberties Union v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), the Supreme Court of Tennessee held that plaintiffs challenging a marriage amendment on grounds of untimely publication lacked standing because, even though they voted in the referendum election, they failed to allege any discrete, concrete injury to them resulting from the alleged violation.

In *Darnell*, plaintiffs challenged the adoption of the Tennessee Marriage Amendment on the ground that it was not published in accord with a procedural provision of the state constitution. *Darnell*, 195 S.W.3d at 621. Plaintiffs alleged generally that their lives and their ability to seek future changes in the law would be greatly affected by the amendment, and the lesbian and gay individuals among them alleged that by specifically prohibiting same sex marriage the amendment directly affected their legal rights. *Id.*

The Tennessee court held that this was insufficient to establish standing, insofar as none of the plaintiffs had alleged that the late publication of the ballot question affected their own awareness of the election issues or their ability to participate in the public debate leading up to the vote. *Id.* at 622. Similar to McConkey, the plaintiffs in *Darnell* testified that they were aware of the ballot question, despite its alleged late publication. *Id.* As such, they all but

conceded their lack of standing; the Tennessee court required them to show actual injury from the alleged procedural irregularity, and they showed none. Whether other actual or potential voters in the referendum, or citizens generally, might have been injured by late publication was irrelevant, the court held. *Id*. at 624 ("Standing may not be predicated upon injury to an interest that a plaintiff shares in common with all citizens.")

Similarly, the United States Supreme Court has held that one's status as a voter, without more, in insufficient to confer standing on a plaintiff seeking to raise a claim under the federal Voting Rights Act and the federal and state constitutions. *U.S. v. Hays*, 515 U.S. 737, 746 (1995). In *Hays*, several Louisiana voters challenged the state's redistricting plan on the ground that one of the districts created thereunder was the result of racial gerrymandering. *Id*. at 744. The Court noted that "we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power," and the Court further held that "[t]he rule against generalized grievances applies with as much force in the equal protection context as in any other." *Id*. at 743.

Applying those principles, the Court held that the Louisiana voters lacked standing to challenge the redistricting scheme because they did not live in the district alleged to have been racially gerrymandered. *Id*. at 745. Recognizing that racial gerrymandering denies residents of gerrymandered districts equal treatment, the Court went on to say that "where a plaintiff does not live in such a district, he or she does not suffer those special harms." *Id*.

Notably, the Supreme Court specifically rejected the plaintiff's argument that even if they did not live in the district alleged to have been gerrymandered, they were nonetheless affected by the unlawful conduct since what is added to one district is, by definition, taken away from some other. *Id*. at 746. The Court explained, "The fact that Act 1 [the redistricting legislation] *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean—even if Act 1 inflicts race-based injury on *some* Louisiana voters—that every Louisiana voter has standing to challenge Act 1 as a racial classification." *Id*. (emphasis in original).

McConkey's admission puts him outside the zone of interests protected by the separate amendment rule, just as the *Hays* plaintiffs' place of residence put them outside the zone of interests protected by the Fourteenth Amendment. One must look beyond McConkey's status as a voter to the facts that would bring his vote within the zone of interests protected by the separate amendment rule. Here, no such facts exist.

C. McConkey Was Not Injured By The Inclusion of Both Propositions in the Marriage Amendment, Even If Doing So Violated the Separate Amendment Rule.

McConkey stipulated that if the ballot had included two questions, rather than one, corresponding to the two propositions contained in the actual ballot question, he would have voted

"no" to each question. (R. 55 at 7; R-Ap. 132).[2] McConkey therefore conceded that he lacks standing to sue for a violation of article XII, section 1, because even if the ballot question violated that constitutional provision (which the Attorney General denies), by McConkey's own admission he suffered no real, direct, actual injury. His "no" vote on the ballot question expressed his preferences as an elector and there was no injury to him.

The circuit court erred in denying the Attorney General's motion to dismiss. The court based its decision on the ground that every elector would have standing to litigate an alleged violation of article XII, section 1, regardless of how he or she intended, or did, vote on the challenged ballot. (R. 55 at 27; R-Ap. 134-36). The court stated that "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective." (R. 55 at 27; R-Ap. 134). The circuit court's rationale conflicts with the basic principles of standing in Wisconsin.

---

[2]

> THE COURT: Mr. Pines, do you concede that your client alleges that he would not have voted for either proposition if they had been broken out?
>
> MR. PINES: I can concede that for purposes of this discussion, yeah.
>
> THE COURT: All right. And I understand you don't think that makes a difference.
>
> MR. PINES: That's correct.

McConkey's complaint failed to allege facts sufficient to establish his standing. In his "Petition for Injunction and Declaration of Unconstitutionality," McConkey included a section entitled "Standing" that said nothing about how the alleged non-compliance with the separate amendment rule affected his interests. He alleged that he is a registered voter who lives in Wisconsin, that he does business in the state, and that he pays taxes in the state. (R. 1 at 2). At no point in his Petition did McConkey allege facts showing that the constitutional violation he complained of, the placement of two allegedly unrelated questions in a single ballot question, directly affected his vote.

At the hearing on the motion to dismiss it became plain that whether the two propositions on the ballot in November 2006 were contained in one amendment or two, it made no difference to McConkey's preferences as a voter, since McConkey expressly conceded that he would have voted "no" on each one. (R. 55 at 7; R-Ap. 132).

Whether *other* voters might have wished to vote differently on the separate propositions is immaterial to the question of McConkey's standing, since he must allege that he personally suffered a real and direct, actual or threatened injury. He acknowledges that he did not do so.

The circuit court in this case erred by reasoning that McConkey suffered an injury merely by having to participate in an election in which the ballot allegedly violated the separate amendment rule. "I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective. It may not be any different from any

other voter, but it may very well be." (R. 55 at 27; R-Ap. 134). The court essentially held that the potential existence of a constitutional violation creates the basis for standing.

The circuit court's rationale is contrary to how standing works. Even if the injury need only be "trifling," it must nonetheless exist, separate and apart from the constitutional violation itself. For the circuit court, merely casting a ballot subjected McConkey to possible injury, but the cases cited above show that it is not mere participation that confers standing, but objective, individualized behavior putting the plaintiff within the zone of interests. Moreover, under the circuit court's rationale, even the voter who said "yes" to the ballot and would have said "yes" to separate propositions would have standing, simply because he cast a ballot.

The separate amendment rule does not protect access to the voting booth. It protects voters against having to decide whether their support for one proposition is stronger than their opposition to another proposition. If a voter was indifferent to that decision, as McConkey was, then he lacks standing to sue.

The circuit court also rested its decision on the principle that standing is "liberally construed" in Wisconsin, *see* R-Ap. 134, but while the principle is quite correct, it was not properly applied here. Such liberality does not mean that standing exists even though it is apparent that no injury did or may occur to the plaintiff. By his own account, if the separate amendment rule was violated, McConkey lost nothing; his preferences were accurately expressed by his vote, regardless of any alleged procedural flaw.

CONCLUSION

McConkey acknowledges that he would have voted "no" on each proposition in the marriage amendment had they been presented as separate questions on the November 2006 ballot, and he therefore suffered no direct, personal injury as a result of any alleged failure of the Legislature to comply with the separate amendment rule. Under the traditional analysis of standing in Wisconsin, McConkey lacks standing to pursue his claim and the decision of the circuit court denying in part the Attorney General's motion to dismiss for lack of standing should be reversed.

Dated this ____ day of August, 2009.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

RAYMOND P. TAFFORA
State Bar #1017166

LEWIS W. BEILIN
Assistant Attorney General
State Bar #1038835

Attorneys for Defendant-Respondent-Cross-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076
(608) 267-2223 (fax)
beilinlw@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,349 words.

Dated this _____ day of August, 2009.

_____
LEWIS W. BEILIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

_____
LEWIS W. BEILIN
Assistant Attorney General

RECEIVED
08-18-2009
CLERK OF SUPREME COURT
OF WISCONSIN

CORRECTED APPENDIX TO BRIEFS OF RESPONDENT AND CROSS-APPELLANT

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of August, 2009.

LEWIS W. BEILIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this corrected supplemental appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

This electronic corrected supplemental appendix is identical in content to the printed form of the supplemental appendix, as corrected, filed as of this date.

A copy of this certificate has been served, in addition to paper copies of the corrected pages of the supplemental appendix filed with the court, on all opposing parties.

Dated this 18th day of August, 2009.

LEWIS W. BEILIN
Assistant Attorney General

INDEX TO APPENDIX

Item	Page
2005 Senate Joint Resolution 53	101-103
Memo dated January 29, 2004 re "Co-Sponsorship of LRB 4072/2, constitutional amendment affirming marriage"	104
www.jsonline.com "Different views but equal passion" (November 29, 2005)	105-108
"Notice of Referendum Election" dated November 7, 2006	109-110
The Book of the States 2008 (excerpts)	111-114
www.jsonline.com "Referendum closer on gay marriage ban" (December 7, 2005)	115-118
Wisconsin Legislative Council Memo dated February 24, 2006 re "2005 Assembly Joint Resolution 67 (Marriage Amendment)"	119-122
Circuit Court Minutes: *Williams C. McConkey v. James Doyle, et al.*, Dane County Circuit Court, Case No. 07-CV-2657, dated September 26, 2007	123-124
Order Denying Motion to Dismiss: dated December 21, 2007	125
Transcript of Motion Hearing (excerpts): dated November 28, 2007	126-137
2005 Senate Bill 397	138-144

2005 SENATE JOINT RESOLUTION 53

November 22, 2005 – Introduced by Senators S. FITZGERALD, STEPP, ROESSLER, LAZICH, LEIBHAM, KANAVAS, SCHULTZ, A. LASEE, REYNOLDS, GROTHMAN and ZIEN, cosponsored by Representatives GUNDRUM, NISCHKE, KRAWCZYK, SUDER, J. FITZGERALD, TOWNS, OWENS, GARD, HUEBSCH, MCCORMICK, HUNDERTMARK, M. WILLIAMS, VAN ROY, BIES, LEMAHIEU, HONADEL, PETTIS, NASS, OTT, F. LASEE, HAHN, KESTELL, LOTHIAN, HINES, GOTTLIEB, TOWNSEND, GUNDERSON, KREIBICH, PETROWSKI, MEYER, JESKEWITZ, FREESE, VOS, KLEEFISCH, NERISON, BALLWEG, MOULTON, KERKMAN, LOEFFELHOLZ, ALBERS, MURSAU, PRIDEMORE and MONTGOMERY. Referred to Committee on Judiciary, Corrections and Privacy.

To create section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (2nd consideration).

Analysis by the Legislative Reference Bureau

EXPLANATION OF PROPOSAL

This proposed constitutional amendment, to be given 2nd consideration by the 2005 legislature for submittal to the voters in November 2006, was first considered by the 2003 legislature in 2003 Assembly Joint Resolution 66, which became 2003 Enrolled Joint Resolution 29.

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

PROCEDURE FOR 2ND CONSIDERATION

When a proposed constitutional amendment is before the legislature on 2nd consideration, any change in the text approved by the preceding legislature causes the proposed constitutional amendment to revert to first consideration status so that 2nd consideration approval would have to be given by the next legislature before the proposal may be submitted to the people for ratification [see joint rule 57 (2)].

If the legislature approves a proposed constitutional amendment on 2nd consideration, it must also set the date for submitting the proposed constitutional

amendment to the people for ratification and must determine the question or questions to appear on the ballot.

Whereas, the 2003 legislature in regular session considered a proposed amendment to the constitution in 2003 Assembly Joint Resolution 66, which became 2003 Enrolled Joint Resolution 29, and agreed to it by a majority of the members elected to each of the 2 houses, which proposed amendment reads as follows:

SECTION 1. Section 13 of article XIII of the constitution is created to read:

[Article XIII] Section 13. 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.

SECTION 2. Numbering of new provision. The new section 13 of article XIII of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 13 of article XIII of the constitution of this state. If one or more joint resolutions create a section 13 of article XIII simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled joint resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Now, therefore, be it resolved by the senate, the assembly concurring, ***That*** the foregoing proposed amendment to the constitution is agreed to by the 2005 legislature; and, be it further

Resolved, That the foregoing proposed amendment to the constitution be submitted to a vote of the people at the election to be held on the Tuesday after the first Monday in November 2006; and, be it further

Resolved, That the question concerning ratification of the foregoing proposed amendment to the constitution be stated on the ballot as follows:

QUESTION 1: "Marriage. Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?"

(END)

TO: **All Legislators**
FROM: **State Representatives Mark Gundrum, Wayne Wood, Leah Vukmir and Ann Nischke, and State Senator Scott Fitzgerald**
DATE: **January 29, 2004**
RE: **Co-Sponsorship of LRB 4072/2, constitutional amendment affirming marriage.**

We are introducing LRB 4072/2 for first consideration. LRB 4072/2 is a proposed constitutional amendment that would preserve the institution of marriage in this state as it has always been -- between a man and a woman.

Last fall, the Massachusetts Supreme Judicial Court used the Massachusetts State Constitution to completely redefine marriage. In very activist fashion, that court brazenly disregarded all Massachusetts statutes and case law in that state to redefine marriage into its own concept. In doing so, it essentially ordered the Legislature to change the statutes and legislate same-sex marriage for that state. Significantly, the Massachusetts court gave the legislature only 180 days to fulfill this dictate, knowing that it would take until November of 2006, at the earliest, before an amendment to the Massachusetts Constitution could be approved by the voters.

Nothing in our state constitution presently protects against our State Supreme Court doing the same thing the Massachusetts Supreme Court did in 2003 (or Vermont Supreme Court did in 1999 or the Hawaii Supreme Court did in 1993, followed up by a state constitutional amendment there) and legislating from the bench to radically alter marriage in this state and judicially impose same-sex marriage on this state.

WHAT LRB 4072/2 DOES DO
This proposal would prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution. The proposal preserves "marriage" as it has always been in this state, as a union between one man and one woman. In addition, the proposal states that a legal status *identical or substantially similar* to that of marriage for unmarried individuals shall not be valid in this state, regardless of what creative term is used -- civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it -- it is a fundamental institution for our society.

WHAT LRB 4072/2 DOES NOT DO
LRB 4072/2 does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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.

Please refer to the non-partisan Wisconsin Legislative Council Memo dated January 28, 2004, from Don Dyke, Chief of Legal Services, for further details or clarification.

Ohio just became the 38th state to enact defense of marriage legislation. In fact, Ohio's legislation actually goes further in specifically prohibiting the extension of benefits to same-sex companions.

In 2000, the voters of Nebraska overwhelmingly approved (with 70% of the vote) a state constitutional amendment which also went much further than what is proposed here.

If you would like to sign on as a co-sponsor of LRB 4072/2, please contact Rep. Mark Gundrum or Senator Scott Fitzgerald's office no later than noon on Monday, February 9th.

JSOnline
MILWAUKEE
JOURNAL SENTINEL
www.jsonline.com | Return to regular view

Original Story URL:
http://www.jsonline.com/story/index.aspx?id=374049

Different views but equal passion

Dozens testify before state lawmakers on proposed constitutional measure

By STACY FORSTER
sforster@journalsentinel.com

Posted: Nov. 29, 2005

Madison - About the only time a Capitol committee room was filled with agreement Tuesday was during the minute when hundreds of attendees recited the Pledge of Allegiance before a hearing on a constitutional amendment to define marriage as a union between a man and a woman and to ban civil unions in Wisconsin.

After that, testimony - sometimes emotional - alternated between equally passionate supporters and opponents of the amendment.

The hearing began in the morning and ended in the evening, after about 675 people registered their position on the amendment. Dozens of them addressed the Senate's Committee on Judiciary, Corrections and Privacy and the Assembly's Judiciary Committee, which held a joint hearing on the measure, AJR 67.

The overflow crowd reflected a cross-section of Wisconsin residents. Representatives of many faiths, professions and ages came to speak in support of, or opposition to, the amendment - perhaps one of the most contentious measures lawmakers will consider this session.

Supporters say the amendment is necessary to protect the sanctity of marriage in Wisconsin. Without it, they say, a court decision could effectively change the institution and the message sent to children about marriage.

"I'm concerned the state is going to determine what is morally acceptable for my child to be taught in sex education and not allow me to be the ultimate authority," said Jenny Baierl of Evansville, who spoke for the amendment.

But Michael Thomas, a Health and Family Services administrator for Manitowoc County, choked back tears as he talked about his former partner who he said was shot - in front of Thomas - because he was gay; Thomas was kept from him in the hospital.

"He died alone in a room with me peering through the glass because they wouldn't let me be with him," Thomas said. After 20 years with a new partner, he said, "I don't want the same thing to happen again."

The Senate is expected to vote on the amendment next week, while the Assembly plans to consider it in early 2006.

The measure must pass both houses in two consecutive sessions of the Legislature before going to voters in a statewide referendum. It passed the Assembly and the Senate for the first time in March 2004.

If passed by the Legislature for a second time, the measure would be on the ballot for the Nov. 7, 2006, election, in which Democratic incumbents Gov. Jim Doyle and Attorney General Peg Lautenschlager are up for re-election.

In 2003, Doyle vetoed a "Defense of Marriage" bill that would have defined marriage as a union between a man and a woman, prompting the push for a constitutional amendment.

His Republican challengers, U.S. Rep. Mark Green of Green Bay and Milwaukee County Executive Scott Walker, both support the amendment.

The amendment's wording reads: "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."

Taking sides

Julaine Appling, executive director of the Family Research Institute of Wisconsin, gave lawmakers a 3 1/2 -foot-high stack of petitions supporting the amendment. Meantime, the Rev. Curt Anderson, head of Christians for Equality in Wisconsin, said dozens of religious groups - representing thousands of congregants - have lined up against the measure.

Sen. Scott Fitzgerald (R-Juneau) and Rep. Mark Gundrum (R-New Berlin), the amendment's authors, said it was important for Wisconsin to address the issue before it emerges in a courtroom, as it did in Massachusetts when that state's Supreme Court ruled that same-sex couples should be allowed to wed.

"This amendment simply redefines our statutes and requires that marriage be defined as the union of a man and a woman, and it protects our laws from activist judges and overzealous county clerks" who might allow couples to marry, Fitzgerald said.

Sen. Tim Carpenter (D-Milwaukee), who is gay, questioned the political timing of the referendum on the amendment. But supporters said voters must be the ones to decide the issue.

"Generally, Americans aren't interested in people's private sexual behavior and leave that to private decisions, but they are intensely interested in preserving the institution of marriage as a union of one man and one woman," said Christopher Wolfe, a professor of political science at Marquette University who spoke for the amendment.

Benefits for partners

The second sentence of the amendment regarding civil unions provided fodder for opponents, who said it might prevent private companies from providing benefits such as health insurance to same-sex partners or from allowing them the same rights as traditional couples in making medical decisions.

Elizabeth Feagles, a special agent for the state Department of Justice, said she's been frustrated that the state won't extend health care benefits to her partner of eight years.

"If I were to go to the Middle East and marry Osama bin Laden, the state

would provide health coverage for him - no questions asked," Feagles said.

Gundrum said the bill was drafted to address only "legal status" and didn't get into specific benefits, as laws and amendments in other states have. The intent was to prevent the state only from creating a new kind of marriage recognized in Wisconsin, Gundrum said.

"If a private hospital wants to have a policy allowing visitation for someone, there's nothing to prohibit that," he said.

Forcing the extension of benefits to same-sex couples also could prompt companies to scale back benefits they provide to all employees, said Sondra Streckert, a small-business owner from Abbotsford.

Testimony was personal and often emotional.

Rebekah Gantner, 19, a student from Watertown, said it's important that the amendment be added to the constitution because she doesn't want the definition of marriage in Wisconsin to change during her lifetime.

"The decisions you will make will affect this fine state for many years to come," she told lawmakers.

Those who oppose the amendment say the measure would write discrimination into the state constitution and could infringe on residents' civil rights. Ray Vahey, 67, testified with Richard Taylor, 80, his partner of 49 years. Vahey said they have been treated unfairly for decades.

"In thousands of ways, our dignity is attacked, and our humanity and right to exist are questioned," Vahey said.

From the Nov. 30, 2005 editions of the Milwaukee Journal Sentinel

NOTICE OF REFERENDUM ELECTION

NOVEMBER 7, 2006

NOTICE IS HEREBY GIVEN, that at an election to be held in the several towns, villages, wards, and election districts of the State of Wisconsin, on Tuesday, November 7, 2006, the following questions will be submitted to a vote of the people pursuant to law:

2005 ENROLLED JOINT RESOLUTION 30

To create section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state (2nd consideration).

Whereas, the 2003 legislature in regular session considered a proposed amendment to the constitution in 2003 Assembly Joint Resolution 66, which became 2003 Enrolled Joint Resolution 29, and agreed to it by a majority of the members elected to each of the 2 houses, which proposed amendment reads as follows:

> **SECTION 1.** Section 13 of article XIII of the constitution is created to read:
> [Article XIII] Section 13. 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.
>
> **SECTION 2. Numbering of new provision.** The new section 13 of article XIII of the constitution created in this joint resolution shall be designated by the next higher open whole section number in that article if, before the ratification by the people of the amendment proposed in this joint resolution, any other ratified amendment has created a section 13 of article XIII of the constitution of this state. If one or more joint resolutions create a section 13 of article XIII simultaneously with the ratification by the people of the amendment proposed in this joint resolution, the sections created shall be numbered and placed in a sequence so that the sections created by the joint resolution having the lowest enrolled join resolution number have the numbers designated in that joint resolution and the sections created by the other joint resolutions have numbers that are in the same ascending order as are the numbers of the enrolled joint resolutions creating the sections.

Now, therefore, be it resolved by the senate, the assembly concurring, That the foregoing proposed amendment to the constitution is agreed to by the 2005 legislature; and, be it further

Resolved, That the foregoing proposed amendment to the constitution be submitted to a vote of the people at the election to be held on the Tuesday after the first Monday in November 2006; and, be it further

Resolved, That the question concerning ratification of the foregoing proposed amendment to the constitution be stated on the ballot as follows:

> **QUESTION 1: "Marriage.** Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?"

EXPLANATION

Under present Wisconsin law, only a marriage between a husband and a wife is recognized as valid in this state. A husband is commonly defined as a man who is married to a woman, and a wife is commonly defined as a woman who is married to a man.

A "yes" vote would make the existing restriction on marriage as a union between a man and a woman part of the state constitution, and would prohibit any recognition of the validity of a marriage between persons other than one man and one woman.

A "yes" vote would also prohibit recognition of any legal status which is identical or substantially similar to marriage for unmarried persons of either the same sex or different sexes. The constitution would not further specify what is, or what is not, a legal status identical or substantially similar to marriage. Whether any particular type of domestic relationship, partnership or agreement between unmarried persons would be prohibited by this amendment would be left to further legislative or judicial determination.

A "no" vote would not change the present law restricting marriage to a union between a man and a

woman nor impose restrictions on any particular kind of domestic relationship, partnership or agreement between unmarried persons.

2005 ENROLLED JOINT RESOLUTION 58

Relating to: providing for an advisory referendum on the question of enacting the death penalty in this state.

Resolved by the senate, the assembly concurring, That the following question be submitted, for advisory purposes only, to the voters of this state at the November 2006 general election:

> QUESTION 2: **Death penalty in Wisconsin.** "Should the death penalty be enacted in the State of Wisconsin for cases involving a person who is convicted of first-degree intentional homicide, if the conviction is supported by DNA evidence?"

EXPLANATION

This is an advisory referendum only. Neither a "yes" vote nor a "no" vote will directly make any change in the law. The Legislature and the Governor are not legally bound by the results of this advisory referendum.

The present penalty for first-degree intentional homicide is life in prison. The court imposing a life sentence may also prohibit the defendant from ever being released from prison. This is commonly referred to as life without the possibility of parole.

A "yes" vote would advise members of the Legislature that you want them to change the penalty for first-degree intentional homicide so that the penalty would be death when a person is convicted of first-degree intentional homicide, and the conviction is supported by DNA evidence. The referendum question does not suggest what level of DNA evidence would be sufficient.

A "no" vote would advise members of the Legislature that you do not want them to change the present penalty for first-degree intentional homicide at this time.

DONE in the _____ of _____,

this _____ day of _____, 2006.

_____

(Signature of County Clerk)

(Type C)

Table 1.1
GENERAL INFORMATION ON STATE CONSTITUTIONS
(As of January 1, 2008)

State or other jurisdiction	Number of constitutions*	Dates of adoption	Effective date of present constitution	Estimated length (number of words)**	Number of amendments: Submitted to voters	Number of amendments: Adopted
Alabama	6	1819, 1861, 1865, 1868, 1875, 1901	Nov. 28, 1901	350,000 (a)(c)	1,093	799
Alaska	1	1956	Jan. 3, 1959	15,988 (b)	41	29
Arizona	1	1911	Feb. 14, 1912	45,783 (b)	254	141
Arkansas	5	1836, 1861, 1864, 1868, 1874	Oct. 30, 1874	59,500 (b)	190	92 (d)
California	2	1849, 1879	July 4, 1879	54,645	870	514
Colorado	1	1876	Aug. 1, 1876	74,522 (b)	315	150
Connecticut	4	1818 (f), 1965	Dec. 30, 1965	17,256 (b)	30	29
Delaware	4	1776, 1792, 1831, 1897	June 10, 1897	19,000	(e)	140
Florida	6	1839, 1861, 1865, 1868, 1886, 1968	Jan. 7, 1969	51,456 (b)	141	110
Georgia	10	1777, 1789, 1798, 1861, 1865, 1868, 1877, 1945, 1976, 1982	July 1, 1983	39,526 (b)	86 (g)	66 (g)
Hawaii	1 (h)	1950	Aug. 21, 1959	20,774 (b)	128	108
Idaho	1	1889	July 3, 1890	24,232 (b)	206	119
Illinois	4	1818, 1848, 1870, 1970	July 1, 1971	16,510 (b)	17	11
Indiana	2	1816, 1851	Nov. 1, 1851	10,379 (b)	78	46
Iowa	2	1846, 1857	Sept. 3, 1857	11,500 (b)	57	52 (i)
Kansas	1	1859	Jan. 29, 1861	12,296 (b)	123	93 (i)
Kentucky	4	1792, 1799, 1850, 1891	Sept. 28, 1891	23,911 (b)	75	41
Louisiana	11	1812, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921, 1974	Jan. 1, 1975	54,112 (b)	214	151
Maine	1	1819	March 15, 1820	16,276 (b)	203	171 (j)
Maryland	4	1776, 1851, 1864, 1867	Oct. 5, 1867	44,000 (b)	257	221 (k)
Massachusetts	1	1780	Oct. 25, 1780	36,700 (l)	148	120
Michigan	4	1835, 1850, 1908, 1963	Jan. 1, 1964	34,659 (b)	66	28
Minnesota	1	1857	May 11, 1858	11,547 (b)	214	119
Mississippi	4	1817, 1832, 1869, 1890	Nov. 1, 1890	24,323 (b)	158	123
Missouri	4	1820, 1865, 1875, 1945	March 30, 1945	42,600 (b)	170	109
Montana	2	1889, 1972	July 1, 1973	13,145 (b)	54	30
Nebraska	2	1866, 1875	Oct. 12, 1875	34,220 (b)	344 (m)	224 (m)
Nevada	1	1864	Oct. 31, 1864	31,377 (b)	226	134
New Hampshire	2	1776, 1784	June 2, 1784	9,200	287 (n)	145
New Jersey	3	1776, 1844, 1947	Jan. 1, 1948	22,956 (b)	76	42
New Mexico	1	1911	Jan. 6, 1912	27,200	284	155
New York	4	1777, 1822, 1846, 1894	Jan. 1, 1895	51,700	292	217
North Carolina	3	1776, 1868, 1970	July 1, 1971	16,532 (b)	42	34
North Dakota	1	1889	Nov. 2, 1889	19,130 (b)	262	149 (o)
Ohio	2	1802, 1851	Sept. 1, 1851	48,521 (b)	275	163
Oklahoma	1	1907	Nov. 16, 1907	74,075 (b)	340 (p)	175 (p)
Oregon	1	1857	Feb. 14, 1859	54,083 (b)	478 (q)	238 (q)
Pennsylvania	5	1776, 1790, 1838, 1873, 1968 (r)	1968 (r)	27,711 (b)	36 (r)	30 (r)
Rhode Island	3	1842 (f), 1986 (s)	Dec. 4, 1986	10,908 (b)	11 (s)	10 (s)
South Carolina	7	1776, 1778, 1790, 1861, 1865, 1868, 1895	Jan. 1, 1896	32,541 (b)	679 (t)	492 (t)
South Dakota	1	1889	Nov. 2, 1889	27,675 (b)	223	213
Tennessee	3	1796, 1835, 1870	Feb. 23, 1870	13,300	61	38
Texas	5 (u)	1845, 1861, 1866, 1869, 1876	Feb. 15, 1876	90,000	631 (v)	456
Utah	1	1895	Jan. 4, 1896	18,037	158	107
Vermont	3	1777, 1786, 1793	July 9, 1793	10,286 (b)	211	53
Virginia	6	1776, 1830, 1851, 1869, 1902, 1970	July 1, 1971	21,601 (b)	51	43
Washington	1	1889	Nov. 11, 1889	33,564 (b)	174	101
West Virginia	2	1863, 1872	April 9, 1872	26,000	121	71
Wisconsin	1	1848	May 29, 1848	14,749 (b)	193	144 (i)
Wyoming	1	1889	July 10, 1890	31,800	123	97
American Samoa	2	1960, 1967	July 1, 1967	6,000	14	7
No. Mariana Islands	1	1977	Jan. 9, 1978	11,000	57	53 (w)(x)
Puerto Rico	1	1952	July 25, 1952	9,281	6	6

See footnotes at end of table.

GENERAL INFORMATION ON STATE CONSTITUTIONS — Continued
(As of January 1, 2008)

Source: Based on surveys conducted in previous years by Janice May and updated by John Dinan in 2005–2007.

Key:

*The constitutions referred to in this table include those Civil War documents customarily listed by the individual states.

**Estimated word lengths are in some cases taken from the 2007 edition.

(a) The Alabama constitution includes numerous local amendments that apply to only one county. An estimated 70 percent of all amendments are local. A 1982 amendment provides that after proposal by the legislature to which special procedures apply, only a local vote (with exceptions) is necessary to add them to the constitution.

(b) Computer word count.

(c) The total number of Alabama amendments includes one that is commonly overlooked.

(d) Eight of the approved amendments have been superseded and are not printed in the current edition of the constitution. The total adopted does not include five amendments proposed and adopted since statehood.

(e) Proposed amendments are not submitted to the voters in Delaware.

(f) Colonial charters with some alterations served as the first constitutions in Connecticut (1638, 1662) and in Rhode Island (1663).

(g) The Georgia constitution requires amendments to be of "general and uniform application throughout the state," thus eliminating local amendments that accounted for most of the amendments before 1982.

(h) As a kingdom and republic, Hawaii had five constitutions.

(i) The figure includes amendments approved by the voters and later nullified by the state supreme court in Iowa (three), Kansas (one), Nevada (six) and Wisconsin (two).

(j) The figure does not include one amendment approved by the voters in 1967 that is inoperative until implemented by legislation.

(k) Two sets of identical amendments were on the ballot and adopted in the 1992 Maryland election. The four amendments are counted as two in the table.

(l) The printed constitution includes many provisions that have been annulled. The length of effective provisions is an estimated 24,122 words (12,400 annulled) in Massachusetts, and in Rhode Island before the "rewrite" of the constitution in 1986, it was 11,399 words (7,627 annulled).

(m) The 1998 and 2000 Nebraska ballots allowed the voters to vote separately on "parts" of propositions. In 1998, 10 of 18 separate propositions were adopted; in 2000, six of nine.

(n) The constitution of 1784 was extensively revised in 1792. Figure shows proposals and adoptions since the constitution was adopted in 1784.

(o) The figures do not include submission and approval of the constitution of 1889 itself and of Article XX; these are constitutional questions included in some counts of constitutional amendments and would add two to the figure in each column.

(p) The figures include five amendments submitted to and approved by the voters which were, by decisions of the Oklahoma or U.S. Supreme Courts, rendered inoperative or ruled invalid, unconstitutional, or illegally submitted.

(q) One Oregon amendment on the 2000 ballot was not counted as approved because canvassing was enjoined by the courts.

(r) Certain sections of the constitution were revised by the limited convention of 1967–68. Amendments proposed and adopted are since 1968.

(s) Following approval of the eight amendments and a "rewrite" of the Rhode Island Constitution in 1986, the constitution has been called the 1986 Constitution. Amendments since 1986 total eight proposed and eight adopted. Otherwise, the total is 106 proposals and 60 adopted.

(t) In 1981 approximately two-thirds of 626 proposed and four-fifths of the adopted amendments were local. Since then the amendments have been statewide propositions.

(u) The Constitution of the Republic of Texas preceded five state constitutions.

(v) The number of proposed amendments to the Texas Constitution excludes three proposed by the legislature but not placed on the ballot.

(w) By 1992, 49 amendments had been proposed and 47 adopted. Since then, one was proposed but rejected in 1994; all three proposals were ratified in 1996, and in 1998, of two proposals one was adopted.

(x) The total excludes one amendment ruled void by a federal district court.

Table 1.2
CONSTITUTIONAL AMENDMENT PROCEDURE: BY THE LEGISLATURE
Constitutional Provisions

State or other jurisdiction	Legislative vote required for proposal (a)	Consideration by two sessions required	Vote required for ratification	Limitation on the number of amendments submitted at one election
Alabama	3/5	No	Majority vote on amendment	None
Alaska	2/3	No	Majority vote on amendment	None
Arizona	Majority	No	Majority vote on amendment	None
Arkansas	Majority	No	Majority vote on amendment	3
California	2/3	No	Majority vote on amendment	None
Colorado	2/3	No	Majority vote on amendment	None (b)
Connecticut	(c)	(c)	Majority vote on amendment	None
Delaware	2/3	Yes	Not required	No referendum
Florida	3/5	No	3/5 vote on amendment (d)	None
Georgia	2/3	No	Majority vote on amendment	None
Hawaii	(e)	(e)	Majority vote on amendment (f)	None
Idaho	2/3	No	Majority vote on amendment (g)	None
Illinois	3/5	No	Majority vote on amendment	3 articles
Indiana	Majority	Yes	Majority vote on amendment	None
Iowa	Majority	Yes	Majority vote on amendment	None
Kansas	2/3	No	Majority vote on amendment	5
Kentucky	3/5	No	Majority vote on amendment	4
Louisiana	2/3	No	Majority vote on amendment (h)	None
Maine	2/3 (i)	No	Majority vote on amendment	None
Maryland	3/5	No	Majority vote on amendment	None
Massachusetts	Majority (j)	Yes	Majority vote on amendment	None
Michigan	2/3	No	Majority vote on amendment	None
Minnesota	Majority	No	Majority vote in election	None
Mississippi	2/3 (k)	No	Majority vote on amendment	None
Missouri	Majority	No	Majority vote on amendment	None
Montana	2/3 (i)	No	Majority vote on amendment	None
Nebraska	3/5	No	Majority vote on amendment (f)	None
Nevada	Majority	Yes	Majority vote on amendment	None
New Hampshire	3/5	No	2/3 vote on amendment	None
New Jersey	(l)	(l)	Majority vote on amendment	None (m)
New Mexico	Majority (n)	No	Majority vote on amendment (n)	None
New York	Majority	Yes	Majority vote on amendment	None
North Carolina	3/5	No	Majority vote on amendment	None
North Dakota	Majority	No	Majority vote on amendment	None
Ohio	3/5	No	Majority vote on amendment	None
Oklahoma	Majority	No	Majority vote on amendment	None
Oregon	(o)	No	Majority vote on amendment (p)	None
Pennsylvania	Majority (p)	Yes (p)	Majority vote on amendment	None
Rhode Island	Majority	No	Majority vote on amendment	None
South Carolina	2/3 (q)	Yes (q)	Majority vote on amendment	None
South Dakota	Majority	No	Majority vote on amendment	None
Tennessee	(r)	Yes (r)	Majority vote in election (s)	None
Texas	2/3	No	Majority vote on amendment	None
Utah	2/3	No	Majority vote on amendment	None
Vermont	(t)	Yes	Majority vote on amendment	None
Virginia	Majority	Yes	Majority vote on amendment	None
Washington	2/3	No	Majority vote on amendment	None
West Virginia	2/3	No	Majority vote on amendment	None
Wisconsin	Majority	Yes	Majority vote on amendment	None
Wyoming	2/3	No	Majority vote in election	None
American Samoa	2/3	No	Majority vote on amendment (u)	None
No. Mariana Islands	3/4	No	Majority vote on amendment	None
Puerto Rico	2/3 (v)	No	Majority vote on amendment	3

See footnotes at end of table.

CONSTITUTIONAL AMENDMENT PROCEDURE: BY THE LEGISLATURE—Continued
Constitutional Provisions

Source: Surveys conducted in previous years by Janice May and updated by John Dinan in 2005–2007.

Key:

(a) In all states not otherwise noted, the figure shown in the column refers to the proportion of elected members in each house required for approval of proposed constitutional amendments.

(b) Legislature may not propose amendments to more than six articles of the constitution in the same legislative session.

(c) Three-fourths vote in each house at one session, or majority vote in each house in two sessions between which an election has intervened.

(d) Three-fifths vote on amendment, except amendment for "new state tax or fee" not in effect on November 7, 1994, requires two-thirds of voters in the election.

(e) Two-thirds vote in each house at one session, or majority vote in each house in two sessions.

(f) Majority vote on amendment must be at least 50 percent of the total votes cast at the election (at least 35 percent in Nebraska); or, at a special election, a majority of the votes tallied which must be at least 30 percent of the total number of registered voters.

(g) Majority voting in election or three-fifths voting on amendment.

(h) If five or fewer political subdivisions of the state are affected, majority in state as a whole (and also in effected subdivisions) is required.

(i) Two-thirds of both houses.

(j) Majority of members elected sitting in joint session.

(k) The two-thirds must include not less than a majority elected to each house.

(l) Three-fifths of all members of each house at one session, or majority of all members of each house for two successive sessions.

(m) If a proposed amendment is not approved at the election when submitted, neither the same amendment nor one which would make substantially the same change for the constitution may be again submitted to the people before the third general election thereafter.

(n) Amendments concerning certain elective franchise and education matters require three-fourths vote of members elected and approval by three-fourths of electors voting in state and two-thirds of those voting in each county.

(o) Majority vote to amend constitution, two-thirds to revise ("revise" includes all or a part of the constitution).

(p) Emergency amendments may be passed by two-thirds vote of each house, followed by ratification by majority vote of electors in election held at least one month after legislative approval. There is an exception for an amendment containing a supermajority voting requirement, which must be ratified by an equal supermajority.

(q) Two-thirds of members of each house, first passage; majority of members of each house after popular ratification.

(r) Majority of members elected to both houses, first passage; two-thirds of members elected to both houses, second passage.

(s) Majority of all citizens voting for governor.

(t) Two-thirds vote senate, majority vote house, first passage; majority both houses, second passage. As of 1974, amendments may be submitted only every four years.

(u) Within 30 days after voter approval, governor must submit amendment(s) to U.S. Secretary of the Interior for approval.

(v) If approved by two-thirds of members of each house, amendment(s) submitted to voters at special referendum; if approved by not less than three-fourths of total members of each house, referendum may be held at next general election.

JSOnline
MILWAUKEE JOURNAL SENTINEL
www.jsonline.com | Return to regular view

Original Story URL:
http://www.jsonline.com/story/index.aspx?id=376010

Referendum closer on gay marriage ban

State Senate passes amendment; it could be factor for Doyle in '06

By STACY FORSTER
sforester@journalsentinel.com

Posted: Dec. 7, 2005

Madison - A constitutional amendment to define marriage as a union between a man and a woman and prevent the state from recognizing "substantially similar" relationships is one step away from a statewide referendum, after the Senate advanced the measure Wednesday.

The vote broke down along party lines, with the Senate's 19 Republicans voting for the amendment and 14 Democrats opposing it. The measure now heads to the Assembly, where it is expected to easily pass.

The vote marked a shift from the last time the Senate considered the amendment in March 2004, when it was approved 20-13 with some Democratic support. Wednesday's party-line vote reflects the increasing politicization of the issue, which would go before voters in next November's election, when Democratic Gov. Jim Doyle is on the ballot.

"In the end, it's very difficult to argue against letting the people of Wisconsin decide what they are comfortable with when it comes to marriage," said the measure's author, Sen. Scott Fitzgerald (R-Juneau).

Opponents of the amendment disagreed, saying the intent and timing are largely political.

"Gay couples are caught in the crossfire of trying to elect more Republican candidates and defeat a Democratic governor," said Sen. Jon Erpenbach (D-Middleton).

The amendment, SJR 53, reads: "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."

State law defines marriage as a union between a husband and a wife, but supporters of the amendment said the change is necessary to prevent courts from ruling that Wisconsin should recognize same-sex marriages.

Legislators launched the drive to amend the state constitution after Doyle vetoed a bill in 2003 that would have defined marriage as being between a man and a woman. Unlike regular bills, the governor does not have a say on constitutional amendments.

The measure must be approved by both houses of the Legislature in two consecutive sessions before being put to voters in a statewide referendum. If the amendment passes the Assembly as expected, voters would get to weigh in through a referendum in November 2006.

Doyle's Republican challengers, U.S. Rep. Mark Green of Green Bay and Milwaukee County Executive Scott Walker, have said they support the amendment.

Fitzgerald led the debate for the amendment on the Senate floor, and said the discussion began when the Massachusetts Supreme Court ruled in 2003 that same-sex couples should be allowed to wed. At that point, he said, Wisconsin lawmakers decided to protect the definition of marriage in the state from being interpreted differently by a court.

"This is not something we went looking for," Fitzgerald said.

A change of heart

Sen. Dave Hansen (D-Green Bay) was one of two Democrats who changed his mind on the issue. Since he first voted for the amendment, Hansen said, he's grown increasingly concerned that it would deny rights to individuals and is being used as an election tool.

Sen. Roger Breske (D-Town of Eland) also did a turnabout and voted against the amendment this time.

"In the last year, this has not been about celebrating marriage," Hansen said on the Senate floor. "I would support a constitutional amendment that simply defines marriage between a man and a woman, but I cannot vote for an amendment that codifies hatred."

Much 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.

Hansen failed to gain enough support for removing the second sentence. Sen. Tim Carpenter (D-Milwaukee), who is gay and an outspoken opponent of the amendment, also tried to change the language, but his attempts failed.

Fitzgerald said the proposed amendment's second sentence was necessary to clarify what kind of marriage would be recognized in Wisconsin. He said the amendment leaves open the possibility that the Legislature could someday define civil unions.

"The second clause sets the parameters for civil unions," Fitzgerald said. "Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could." He added that he wouldn't draft such legislation himself.

Legal experts said a handful of benefits could be extended under the amendment. Civil unions are ambiguous, and those containing most rights and benefits for married couples likely wouldn't be allowed under the amendment, they said.

"This is clearly designed to rule out civil unions as well as (gay) marriages," said Gordon Hylton, a law professor at Marquette University. "But, under this definition, there might be a way to play around with the language of

'substantially similar' to offer some sort of recognition of some sort of same-sex relationship carrying some sort of legal benefits."

Wisconsin wouldn't be alone in considering such a measure in 2006. Fitzgerald said four states already have referendums scheduled, with another four on track to vote on them, too.

No state has defeated such a constitutional amendment once it has gone before voters, Fitzgerald added.

Some believe having such an amendment on the ballot would bring out voters who wouldn't otherwise go to the polls - as such state measures are believed to have done in the November 2004 national election.

Mike Tate, campaign director for "No on the Amendment," said Wednesday's Senate vote signals that the vote in Wisconsin could be different from the results in other states.

"Every day, we pick up votes by people who are going to vote 'no' on this amendment," Tate said. "Wisconsin voters are independent, and they have a history of thinking clearly on issues and bucking the trend of national decisions."

Julaine Appling, executive director of the Family Research Institute of Wisconsin, which backs the amendment, said she believes most residents - and lawmakers - back the intent of the amendment, which she said would preserve the sanctity of marriage in Wisconsin.

"This issue supersedes any partisan designation," Appling said.

From the Dec. 8, 2005 editions of the Milwaukee Journal Sentinel

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE MARK GUNDRUM

FROM: Don Dyke, Chief of Legal Services

RE: 2005 Assembly Joint Resolution 67 (Marriage Amendment)

DATE: February 24, 2006

You have requested comment in response to certain concerns raised about the possible effect of 2005 Assembly Joint Resolution 67[1].

In particular, those concerns raise questions about the legal ramifications to unmarried persons of the language of 2005 Assembly Joint Resolution 67. That resolution is a proposed constitutional amendment, approved by both the Assembly and the Senate on first consideration during the 2003-04 Legislative Session,[2] that would provide that only a marriage between a man and a woman would be recognized or valid in this state. In addition, the proposed amendment would provide that a legal status identical or substantially similar to that of marriage for unmarried individuals would not be valid or recognized in this state. Specifically, the amendment would add the following language to the state constitution:

> 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.

As noted, the constitutional amendment proposed by Assembly Joint Resolution 67 passed both houses of the Legislature last session. The proposed amendment must pass in identical form this session before it can be submitted to the voters at a statewide referendum. If the voters approve the amendment, it would become part of the state constitution.

---

[1] This memorandum is based on the substantial contribution of Robert J. Conlin, a former Senior Staff Attorney with the Legislative Council staff.

[2] The Senate companion to Assembly Joint Resolution 67, 2005 Senate Joint Resolution 53, has been approved by the Senate in this legislative session.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

The concerns about the effect of Assembly Joint Resolution 67 addressed by this memorandum appear to arise from 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.

This memorandum attempts to help you better understand how a court might interpret the second sentence of the amendment. At the outset, though, it is noted that it is always difficult to predict how a court may ultimately interpret a constitutional provision. In addition, as noted above, the debate over the proposed amendment is not yet over and the measure is not yet a part of the constitution. Further, if the amendment passes on second consideration, the Attorney General will be expected to provide an official explanatory statement of the effect of either a "yes" or "no" vote on the measure. However, this memorandum will apply generally recognized principles of constitutional interpretation in order to give you a clearer picture of how a court may interpret the second sentence of the proposed amendment.

This memorandum suggests that a court could reasonably conclude that the second sentence of 2005 Assembly Joint Resolution 67 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status which is the same as, or is nearly the same as, marriage. Further, no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving individual benefits or protections or utilizing the law in such a way as to allow them to privately order their lives even though such benefits or use of the laws may result in the unmarried individuals sharing in benefits or protections that also happen to be offered to married persons.

BACKGROUND

To better understand the intent of Assembly Joint Resolution 67, it is necessary to understand the historical context into which the proposal was introduced on first consideration. In the early to mid-1990's, the Hawaiian courts were called upon to determine whether that state could constitutionally deny marriage licenses to persons of the same sex. [See, for example, *Baehr v. Lewin*, 74 Haw. 530 (1993).] Many believed that, at the time, Hawaii would be the first American state to recognize marriages between persons of the same sex.[3] Accordingly, states around the country, including Wisconsin, began to examine their marriage laws with respect to whether those laws permitted or authorized marriages between persons of the same sex and whether those laws would require the recognition of same-sex marriages performed in other states. At the time, the laws of many states, including Wisconsin, generally required the recognition of valid marriages performed in other states unless such marriage was contrary to the laws or public policy of the state. (Wisconsin's law has remained unchanged.) Additionally, the Full Faith and Credit Clause of the U.S. Constitution generally requires a state to recognize various official acts of other states. It was felt by some that those state laws and the U.S. Constitution might require states to recognize a marriage between persons of the same sex that was performed in another state unless state laws clearly prohibited such marriages.

In March of 1996, with about one month left in the legislative session, State Representative Lorraine Seratti introduced 1995 Assembly Bill 1042, relating to prohibiting marriage between persons

---

[3] Hawaii ultimately amended its constitution in 1998 to prohibit marriages between persons of the same sex.

of the same sex. It appears that this was the first bill introduced in Wisconsin to prohibit such marriages. That bill did not have a public hearing and failed to pass in the 1995-96 Legislative Session due to the ending of the session.

In September of 1996, Congress passed, and the President signed, the federal Defense of Marriage Act. [P.L. 104-199.] The Act defines "marriage," for the purposes of various federal benefits and other programs, to mean a legal union only between one man and one woman as husband and wife. In addition, the Act defines "spouse" as a person of the opposite sex who is a husband or wife. Additionally, the Act provides that no state or territory of the United States is required to give effect to any public act, record, or judicial proceeding of any other state or territory respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that state or territory, or a claim arising from such relationships.

In February of 1997, Representative Seratti reintroduced her bill from the previous session as 1997 Assembly Bill 104. The bill was the subject of considerable debate and public attention. It had a public hearing in March of 1997 and passed the full Assembly in May of that year. A public hearing was held on the bill in March of 1998 in the Senate, but the bill failed to pass due to the end of the legislative session.

In each legislative session since, legislation addressing the subject of marriage between persons of the same sex has been introduced but not enacted. [See, e.g., 1999 Assembly Bill 781 and Senate Bill 401, 2001 Assembly Bill 753, 2003 Assembly Bill 475 and Senate Bill 233.] 2003 Assembly Bill 475, the last of these bills to receive any legislative attention, passed both houses of the Legislature but was vetoed by the Governor in November of 2003. A veto override attempt was unsuccessful. Subsequently, 2003 Assembly Joint Resolution 66 was introduced and passed both houses of the Legislature on first consideration in the Spring of 2004.

The national debate on this issue was heightened during the above-described period by a number of legal decisions around the country. Two decisions are perhaps the most relevant to this memorandum. In 1999, the Vermont Supreme Court, in *Baker v. State of Vermont*, 744 A.2d 864 (1999), ruled that Vermont's exclusion of same-sex couples from the benefits of marriage violated Vermont's constitutional "Common Benefits Clause." The court concluded that same-sex couples were entitled to the same benefits and protections afforded by Vermont law to heterosexual marriages. After this decision, the Vermont Legislature enacted Vermont's Civil Union Law, which established a procedure for persons of the same sex to enter into a civil union in the State of Vermont. The purpose of the Civil Union Law was to provide eligible same-sex couples the opportunity to "obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." [See 2000 Vermont Laws 91.] The Civil Union Law specifically provides that "Parties to a civil union shall have the same benefits, protections and responsibilities under law...as are granted to spouses in a marriage." [See s. 1204 (a) of 15 VSA ch. 23.]

In November of 2003, shortly after 2003 Assembly Bill 475 failed in Wisconsin, the Massachusetts Supreme Judicial Court, in *Goodridge, et al. v. Department of Public Health,* 440 Mass. 309; 798 N.E.2d 941 (2003), struck down, on state constitutional grounds, Massachusetts' prohibition on marriage between persons of the same sex, opening the way for couples of the same sex to be married in Massachusetts. Subsequently, the Massachusetts Legislature sought an opinion from the court as to whether a proposed bill creating "civil union" status, similar to Vermont's Civil Union Law, would pass

constitutional muster in light of the court's decision in *Goodridge*. Significantly, the proposed law would have provided that "A civil union shall provide those joined in it with a legal status equivalent to marriage and shall be treated under law as a marriage. All laws applicable to marriage shall also apply to civil unions." [See Mass. Senate No. 2175.] In February of 2004, the court responded and concluded that the "civil union" bill would not satisfy the state's constitution and would, if enacted, be found unconstitutional. [See *Opinions of the Justices to the Senate*, SJC-09163 (February 3, 2004).] Since May of 2004, same-sex couples may legally marry in Massachusetts.

These and other developments have sparked considerable legislative activity across the country. From 1996 to 2004, many other states made statutory changes, constitutional changes, or both, to prohibit the recognition of marriages between persons of the same sex.

DISCUSSION – COURT INTERPRETATION OF THE LANGUAGE IN QUESTION

As noted above, concern has been raised regarding the breadth and vagueness of the second sentence of the proposed constitutional amendment. Thus, a court may be required to interpret its meaning. For Wisconsin courts, the purpose of construing a constitutional amendment is to "give effect to the intent of the framers and of the people who adopted it." [*State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328, 333 (2003), quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).] Wisconsin courts turn to three sources to aid in determining the meaning of a constitutional provision: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the Legislature as manifested in the first law passed following adoption of the provision. [*Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123, 127 (1996).] The remainder of this memorandum discusses the proposed amendment in a manner consistent with these interpretive principles to assist you in better understanding how the amendment may be interpreted. However, as the proposed amendment has not been adopted, resort to the third tool in determining constitutional intent--the examination of any implementing legislation--is not possible.

Again, the second sentence of the proposed amendment provides as follows:

> A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The Context

The gist of the concern over the above sentence appears to be the perceived breadth and vagueness of the phrase "legal status identical or substantially similar to that of marriage." It is true that the proposal does not define this phrase. When the phrase is considered in isolation, one might conclude that the phrase is referring to any legal status akin to the status enjoyed by a married couple. However, the intent of a constitutional provision 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" through recognition of the reasons which led to the framing and adopting of the amendment. Once that intent is ascertained, "no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion." [*Thompson v. Craney*, 546 N.W.2d at 131, citations omitted.] Courts may review the general history relating to a constitutional amendment as well as the legislative history of the amendment. [*Schilling v. Wisconsin Crime Victims Rights Board*, 2005 WI 17, 278 Wis.

2d 216, 692 N.W.2d 623 (2005).] The foregoing history concerning same-sex marriages, then, is important for gaining an understanding of how a court may interpret the proposed amendment should it be adopted and approved.

As noted, at the time of the introduction of the amendment, Vermont had enacted, and Massachusetts was considering enacting, a "civil union" law granting to couples of the same sex the opportunity to enter into a state-sanctioned relationship conferring "the same benefits, protections and responsibilities" granted to married couples or extending to those in a civil union "a legal status equivalent to marriage." While the first sentence of the proposed amendment would appear to address a legislative concern over marriages between persons of the same sex, it is quite conceivable that the intent of the Legislature in drafting the second sentence was to prohibit the creation or recognition of "civil unions" like those in Vermont or like those being proposed in Massachusetts. Support for this hypothesis is found in a memorandum circulated by you as the amendment's primary author, seeking co-sponsors of the proposed amendment on first consideration. In it, you explain that the proposal would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." You also noted:

> In addition, the proposal states that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid in this state, regardless of what creative term is used--civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it--it is a fundamental institution for our society, regardless of the particular term used to describe it.

[Memorandum from Representative Mark D. Gundrum, regarding co-sponsorship of LRB-4072/2, constitutional amendment affirming marriage.]

It appears, then, that the primary author of the proposed amendment intended the amendment to prohibit same-sex marriages and legal arrangements like civil unions and civil compacts that essentially confer a legal status identical or substantially similar to that of marriage. But is this expressed intent born out by the language of the second sentence of the amendment? A review of the relevant language is in order.

The Language

An understanding of the meaning of the second sentence of the proposed amendment includes an examination of the plain meaning of the words in the context used. To understand what is meant by a "legal status identical or substantially similar" to that of marriage, it seems reasonable to first understand the legal status of a civil marriage. In Wisconsin, a marriage, so far as its validity at law is concerned, is a civil contract that creates the legal status of husband and wife. [s. 765.01, Stats.] It is a legal relationship in which a husband and wife owe to each other mutual responsibility and support and each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support or maintenance of his or her minor children and of the other spouse. [s. 765.001, Stats.] Because the law recognizes the importance of marriage as the institution that is the "foundation of the family and of society," the consequences of marriage are important not just to the parties entering into marriage, but all of society. Thus, the state has an interest in seeing marriages succeed. [See s. 765.001 (2), Stats.] It is for this reason that it is often said that

there are three parties to a marriage contract--the husband, the wife, and the state. Similarly, it has been said that "the marriage contract, once entered into, becomes a relation, rather than a contract, and invests each party with a status toward the other, and society at large, involving duties and responsibilities which are no longer matter for private regulation but concern the commonwealth." [*Fricke v. Fricke*, 42 N.W.2d 500, 501, 502 (1950), internal citations omitted.] Arguably, this is part of the "legal status" of marriage in Wisconsin.

Aside from the obligations imposed upon parties to a marriage, states and the federal government, recognizing the importance and significance of marriage in society, have enacted laws which confer various rights and benefits upon married persons that are not typically automatically conferred on unmarried individuals. These rights and benefits are numerous. In 1997, for example, the U.S. General Accounting Office (GAO) identified over 1,000 federal laws in which marital status is a factor. Those laws identified by the GAO included tax laws, federal financial aid and benefits, immigration and naturalization laws, and many others. Wisconsin also has numerous laws that confer rights and benefits on married individuals such as tax laws, credit laws, probate, estate and inheritance laws, and various legal privileges and immunities. Accordingly, one might conclude that this bundle of rights and benefits conferred by law upon married persons is a necessary component of the "legal status" of marriage.

Many of these statutory rights and benefits, while automatically conferred on married persons, are not exclusive to marriage and can be completely or nearly replicated for unmarried individuals. For example, unmarried individuals may hold property jointly as joint tenants, which generally confers survivorship rights in the other joint tenant. They may create a joint tenancy by expressing an intent to do so. [See s. 700.19 (1), Stats.] A married couple, in comparison, if identified as husband and wife in the title to property, automatically holds property jointly, with survivorship rights, unless they express a different intention. [See s. 700.19 (2), Stats.] Thus, an unmarried couple can create a right of survivorship similar to that enjoyed by a married couple. Other examples of laws that authorize unmarried persons to claim rights and benefits similar to those conferred automatically upon married couples include inheritance rights via a will, health care decision-making via a durable power of attorney for health care, tax advantages through the use of trusts, and protections against domestic abuse. Private parties (and governmental units) can also assist unmarried individuals to enjoy rights or benefits similar to the rights and benefits traditionally afforded to married couples, or families. For example, an employer can choose to extend family status to unmarried persons for purposes of health care benefits. Similarly, a health club could extend family membership benefits to unmarried persons.

The concerns raised with Assembly Joint Resolution 67 seem to suggest that the validity of many of the tools used by unmarried individuals to secure rights and benefits that approximate those enjoyed by married couples might be called into question under the proposed amendment because they allow unmarried individuals to exercise rights and benefits substantially similar to the rights and benefits enjoyed by married persons. As previously mentioned, though, the proposed amendment addresses a "legal status," or standing in law, identical or substantially similar to that of marriage. "Identical," of course, means "exactly the same for all practical purposes" [Black's Law Dictionary], "being the same, having complete identity," "characterized by such entire agreement in qualities and attributes that identity may be assumed," or "very similar, having such close resemblance and such minor difference as to be essentially the same." [Webster's Third New International Dictionary.]

"Similar" is defined as "having characteristics in common, very much alike, comparable," "alike in substance or essentials," or "one that resembles another, counterpart" [Webster's Third New International Dictionary], or "nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference." [Black's Law Dictionary.] "Substantially" is defined as meaning "essentially; without material qualification." [Black's Law Dictionary.] Thus, something can be said to be "substantially similar" if it is essentially alike something else.

It does not seem reasonable to conclude that two unmarried individuals who title property as joint tenants or make health care decisions for each other under a durable power of attorney for health care, or who are offered family health insurance by an employer, have a legal status identical or substantially similar to that of husband and wife. Two brothers who own property jointly cannot be said to owe each other mutual responsibility and support as do a husband and wife or possess the rights and benefits of marriage simply because they own property together. Similarly, a person who is given the power via a durable power of attorney for health care to make medical decisions for an elderly neighbor cannot be said to have evolved a standing in the eyes of the law essentially like the legal status of husband and wife simply because husbands and wives can make the same sorts of decisions for each other. Finally, when an employer grants family health care benefits to unmarried individuals, it undoubtedly confers a benefit on the unmarried individual, and that benefit may be identical to the benefit provided to a married employee, but it seems unreasonable to conclude that the unmarried individual has been conferred a legal status substantially similar to marriage. In all of these cases, the unmarried person's legal status with respect *to the right or benefit sought* may be said to be identical or substantially similar to the legal status that a married person might have with regard to the same right or benefit, but that is not to say that the legal status is identical or substantially similar to *marriage.*

If a court adopted an interpretation of the amendment which would invalidate a legal right or benefit between unmarried persons merely because the right or benefit is identical or substantially similar to a right or benefit afforded to married couples, the result would be the invalidation of countless legal relationships in the state between numerous "unmarried individuals." It does not appear that there is any legislative history to support such intent. Moreover, had the Legislature intended such a result, it could have done so more simply by prohibiting unmarried individuals, or unmarried individuals of the same sex, from contracting for a right or benefit enjoyed by married couples or prohibiting the public or private conferring of such rights or benefits on unmarried individuals. It did not do this, though. Instead, it prohibited the recognition of a "legal status" identical or substantially similar to that of *marriage* between unmarried individuals. As suggested above, for a legal status to be identical or substantially similar to a marriage, it can be reasonably argued that the parties to such status must owe to each other some level of mutual responsibility and support and enjoy the rights and benefits conferred by law based upon the status of marriage. Their status under the law must rise above that of merely parties to a legal contract. A relation must result, one that is exactly the same as or nearly the same as the legal relation resulting from marriage. Accordingly, based upon the language chosen by the Legislature, a court could reasonably conclude that the proposed constitutional amendment is not intended to prohibit the recognition of private legal arrangements simply because those arrangements result in the parties enjoying a right or benefit that is the same as or similar to a right or benefit to which married couples have access.

The Expressed Intent

The above conclusion is further buttressed by the expressed intent of the primary author of the amendment. The co-sponsorship memo from you, referred to above, explains that the proposal:

> ...does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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.

The circulation memo accompanying the Senate version of 2005 Assembly Joint Resolution 67 (2005 Senate Joint Resolution 53) contains similar language:

> This proposal does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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 marriage, no particular privileges or benefits would be prohibited. [Memorandum, Senator Scott Fitzgerald and Representative Mark Gundrum, "Cosponsorship of 3729/1, Constitutional Amendment Affirming Marriage," dated November 17, 2005.]

In a similar vein, a Legislative Council staff memorandum to you dated January 29, 2004, discussed how the courts might interpret the proposed amendment.[4] The Legislative Council memorandum pointed out that it was reasonable to interpret the second sentence of the amendment as follows:

- The state Legislature and courts may not provide for the establishment of a civil union, or other arrangement, however designated, that confers or purports to confer on unmarried individuals the legal status of marriage or a status substantially similar to that of marriage.

- If another jurisdiction confers or purports to confer a legal status of marriage or a status substantially similar to that of marriage on unmarried individuals, that status is not valid under law in this state or recognized at law in this state.

- The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a

[4] It is noted that you referred to this memorandum in your co-sponsorship memorandum.

right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits, certain probate rights, or the ability to file joint tax returns.

- The conferring of a right or benefit traditionally associated with marriage to unmarried individuals in a private setting is not precluded; for example, benefits by a private employer for employees, visitation privileges by a hospital, or family membership status in a health club.

- The Legislature or a court (or the executive branch) is precluded from extending the rights and benefits of marriage to unmarried individuals to the extent those rights and benefits confer a legal status identical to that of marriage or substantially similar to that of marriage.

[Memorandum from Don Dyke, Chief of Legal Services, Legislative Council Staff, to Representative Mark Gundrum, regarding Assembly Joint Resolution __ (LRB-4072/2), Relating to Providing That Only a Marriage Between One Man and One Woman Shall be Valid and Recognized as a Marriage in This State, January 29, 2004.]

It is of interest to note that Assembly Joint Resolution 66 was introduced after the date of the Legislative Council memorandum and was introduced in identical form as the draft reviewed in that memorandum.

While perhaps not dispositive on its own, the above contemporary expressions of intent, combined with the historical context and plain language of the proposed amendment, lend strong support to the conclusion that the intent of the Legislature with respect to the second sentence of the proposed amendment is to prohibit the recognition of Vermont-style civil unions or a similar type of government-conferred legal status for unmarried individuals that purports to be the same as or nearly the same as marriage in Wisconsin.[5] Similarly, the above expressions of intent also appear to directly refute the notion that the authors of the amendment intend to eliminate the ability of unmarried individuals to arrange their private affairs in ways that may happen to approximate legal rights or benefits extended to married persons.

The Presumption of Constitutionality

Finally, it is noted that laws enacted by the Legislature are presumed by the courts to be constitutional and a person challenging the constitutionality of a statute must show that the statute is unconstitutional beyond a reasonable doubt. Where any doubt exists as to a law's unconstitutionality, it must be resolved in favor of constitutionality. [See, e.g., *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).] This presumption applies regardless of whether the

---

[5] It may be of interest to note that two bills introduced at the end of the 2003-04 Legislative Session and a bill introduced in the current session may have been affected by the proposed amendment had the bills and amendment become law. 2003 Assembly Bill 955 created a legally recognized relationship of domestic partnership. 2003 Assembly Bill 992 authorized marriage between persons of the same sex. 2005 Assembly Bill 824 (Senate Bill 397) creates a legally recognized relationship of domestic partnership.

statute was enacted before or after enactment of a constitutional amendment. [*State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328, 335-336 (2003).] Thus, a party arguing the invalidity of a right or benefit that unmarried individuals may avail themselves of under law that is similar to a right or benefit conferred on married couples would be required to show beyond a reasonable doubt that the law upon which the right or benefit is based violates the proposed amendment. The historical context, the plain language, and the expressed intent of the primary author would, it seems, make it difficult for a challenger to overcome the strong presumption of constitutionality that such laws would enjoy.

CONCLUSION

The above analysis suggests that a court could reasonably conclude that the second sentence of 2005 Assembly Joint Resolution 67 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status which is the same as, or is nearly the same as, marriage. Further, no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving benefits or utilizing the law in such a way as to allow them to privately order their lives even though such benefits or use of the laws may result in the unmarried individuals sharing in benefits or protections that also happen to be offered to married persons.

The concerns raised cannot be entirely laid aside, however. Parties might raise claims in a court or elsewhere that may, at least temporarily, cast doubt on the validity of benefits and other legal rights that unmarried persons seek to avail themselves of. In addition, while this memorandum has suggested that a legal status identical or substantially similar to marriage would need to encompass some level of mutual obligation and support, it is conceivable that a court could construe the accumulation by unmarried individuals of a number of rights and benefits that married persons enjoy as a "legal status identical or substantially similar to marriage." Consequently, although this memorandum has attempted to offer a reasonable, and perhaps likely, interpretation of the proposed amendment, it cannot be concluded with certainty that a court will draw the same conclusions about the intent of the proposed amendment should it pass this session of the Legislature and be ratified by the people.

Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment. The foregoing is one attempt to do so, but it is likely that final resolution of this matter will ultimately fall to the courts if the proposed amendment is enacted.

Should you have any questions regarding this memorandum, please contact me at the Legislative Council staff offices.

DD:jal:tlu:rv:ksm

STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

William C McConkey vs. James Doyle et al

Minutes

Case No.: 2007CV002657

Clerk: [signature]

Activity: Motion hearing re: Constitution Amendment on Gay marriage

Date: 09-26-2007

Reporter: Sarah Finley-Pelletter

Time: 09:30 am

Court Official: Richard G. Niess, Judge

FILED
SEP 26 2007
STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

- [x] William C McConkey, Plaintiff
- [ ] James Doyle, Defendant
- [ ] J B Van Hollen, Defendant
- [ ] Angie McConkey, Intervenor
- [ ] Diann Thumser, Intervenor

Appearances

- [ ] _____
- [x] Thomas J. Balistreri - Defendant's Attorney
- [ ] _____
- [ ] _____
- [ ] _____

- [ ] Other: Motion to Dismiss:

Atty. Balistreri - gives brief argument and stands on his motion.

Mr. McConkey - Responds to Motion to dismiss, giving his reasons for having standing.

CT - Mr. McConkey lacks standing on the amendment challenge but reserves his standing on the procedure of how the Amendment was presented to the voters within the State of Wi.

- Motion to dismiss is held in abeyance. Motion to intervene is held in abeyance.

→ further briefing 10-3-07, response 10-17-07; reply 10-24-07 on procedure issue. CT to set for O.A.

Next Activity: _____ Date: _____

STATE OF WISCONSIN | CIRCUIT COURT | DANE COUNTY

William C McConkey vs. James Doyle et al

Minutes

Case No.: 2007CV002657

Clerk: Alford

Date: 11-28-2007

Reporter: Sarah Finley-Pelletter

Activity:

Oral arguments — Standing on ballot procedure

Time: 09:30 am

Court Official: Richard G. Niess, Judge

FILED
NOV 28 2007
STATE OF WISCONSIN
CIRCUIT COURT FOR DANE COUNTY

Appearances

- ☐ William C McConkey, Plaintiff
- ☐ James Doyle, Defendant
- ☐ J B Van Hollen, Defendant
- ☐ Angie McConkey, Intervenor
- ☐ Diann Thumser, Intervenor
- ☒ Lester Pines
- ☒ Thomas J. Balistreri - Defendant's Attorney
- ☐ _____
- ☐ _____
- ☐ _____
- ☒ Other: Amy Sulberg

Ct Questions if Mr. McConkey had standing if only objecting to one issue on the ballot.

- Atty. Balistreri - makes a statement.
- Atty. Pines - Concedes that Mr. McConkey's options were when he voted.

Atty. Balistreri — gives argument

Atty. Pines — gives argument.

Atty Balistreri — gives rebuttal argument.

Motion to dismiss for lack of Standing is denied.

Atty. Pines to draft order

Next Activity: TSC set for _____ Date: _____

CF-130(CCAP) 4/93 Minutes

This form may not be modified. It may be supplemented with additional material.

DEC 2 6 2007

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

WILLIAM C. MCCONKEY,

Plaintiff,

vs.

CASE NO.: 07-CV-2657

JAMES DOYLE, in his role as Governor of Wisconsin, and J.B. VAN HOLLEN, in his role as Attorney General of Wisconsin,

Defendants.

ORDER DENYING MOTION TO DISMISS

The Court heard an oral argument on the Defendants' Motion to Dismiss on November 28, 2007. The Plaintiff appeared by Attorney Lester A. Pines of Cullen Weston Pines & Bach LLP and the Defendants appeared by Assistant Attorney General Thomas Balistreri.

NOW, THEREFORE, on the submissions of the parties and the files and records herein,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss be and hereby is denied.

Dated this 21 day of December, 2007.

BY THE COURT:

Honorable Richard Niess
Circuit Judge, Branch 9

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

WILLIAM C. McCONKEY,

Plaintiff,

-VS-

CASE NO. 07-CV-2657

JAMES DOYLE, in his role as Governor of Wisconsin, and J.B. VAN HOLLEN, in his role as Attorney General of Wisconsin,

Defendants.

ORIGINAL

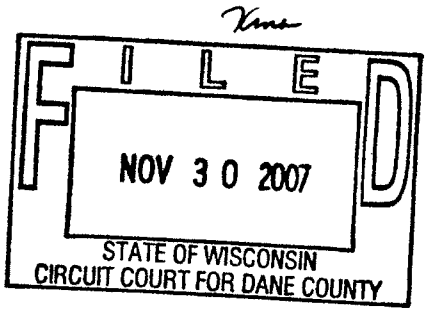
PROCEEDINGS: Motion Hearing

BEFORE: The Honorable RICHARD G. NIESS

DATE: November 28, 2007

APPEARANCES: LESTER PINES and TAMARA PACKARD, Attorneys at Law, CULLEN, WESTON, PINES & BACH, Madison, Wisconsin, appearing on behalf of Plaintiff;

THOMAS J. BALISTRERI, STATE OF WISCONSIN, DEPARTMENT OF JUSTICE, Madison, Wisconsin, appearing on behalf of Defendants.



Sarah Finley Pelletter
Official Court Reporter

55-1

THE CLERK: William C. McConkey v. James Doyle, et al., 07-CV-2657. Appearances, please.

MR. PINES: The defendant -- excuse me, the plaintiff appears by Lester Pines and Tamara Packard.

MR. BALISTRERI: And on behalf of James Doyle and J.B. Van Hollen, Thomas J. Balistreri, B-a-l-i-s-t-r-e-r-i, Assistant Attorney General.

THE COURT: We're here on the issue of whether plaintiff has standing to challenge the procedural validity of the enactment of Article XIII, Section 13 of the Wisconsin Constitution under Article XII, Section 1, in particular whether the combination of two separate issues into one proposed amendment is constitutionally defective in terms of what was presented to the voters.

I have reviewed the briefs submitted not only by the State and by Mr. Pines on behalf of Mr. McConkey, but the brief of amicus curiae, Wisconsin Family Council, which is limited to this issue, and I appreciate the assistance here. I gather for the most part -- will you be

arguing, Mr. Pines, or --

MR. PINES: I will be arguing.

THE COURT: I gather that there is very little law that guides us here other than the general law regarding standing?

MR. PINES: I think that's a fair statement.

THE COURT: Mr. Balistreri, if Mr. McConkey had wanted to vote on one of the two propositions in the amendment and not the other, would he have standing?

MR. BALISTRERI: He wanted to refrain from voting on the other one altogether?

THE COURT: Right. If he supported one half of the amendment but not the other half, but had to vote on the whole amendment as is, does he have standing as opposed to what everybody is assuming here is that he opposed both prongs of the amendment?

MR. BALISTRERI: Under your hypothetical, I don't think he would have standing because he would not be substantially injured by merely -- merely by having his vote count toward the proposition that he didn't want to vote on it. There's no injury. He didn't

want to vote on it anyway, so what difference did his vote make.

THE COURT: What if he wanted to vote no on it and he didn't have the opportunity? Or vote yes on one and no on the other?

MR. BALISTRERI: If he wanted to vote yes on one and no on the other, he would have standing.

THE COURT: All right. So do we have to presume for purposes of your standing argument that he would have voted no on both?

MR. BALISTRERI: I don't think that's a presumption that we have to make at all. I think that's rather clear from the pleadings in this case that Mr. McConkey opposed both propositions.

THE COURT: All right. Where in the pleadings as opposed to the brief does he specifically say that he doesn't like both propositions? And the reason why I ask this is because aren't we required at this stage to favorably construe the complaint in favor of Mr. McConkey?

MR. BALISTRERI: Well, I think everything that has been filed in this case

suggests that he opposes both of them. You know, he's made attacks not only on the first proposition, which deals with marriage per se, but he's also made attacks on the second proposition. And I don't think we're limited, I don't think we're limited in determining standing on the -- to the question of whether or not the complaint specifically says that. In determining the question of whether this court has jurisdiction, we're not limited to the complaint.

THE COURT: But standing isn't a jurisdictional issue, it's a competency issue.

MR. BALISTRERI: Well, it's a competency issue in Wisconsin, that's true enough.

THE COURT: And it's a public policy issue more than anything.

MR. BALISTRERI: But at any rate, we're certainly not limited to what is said in the complaint. I mean, you know, in the briefs and other statements Mr. McConkey has made absolutely clear that he is opposed to both of the propositions, I don't think we can ignore that.

THE COURT: Well, does that concede then that he did not make that clear in the pleading itself?

MR. BALISTRERI: No, I won't -- no, I wouldn't concede that.

THE COURT: Well, then can you tell me where he did say that he didn't like both prongs of this amendment?

MR. BALISTRERI: You'll have to give me a minute to haul out the complaint. I'm sorry, you know, I can't answer your question off the top of my head.

THE COURT: Well, and I don't expect you to. You're good, but you're not that good.

MR. BALISTRERI: Well, I think if you look in the section entitled "Arguments," he is attacking both of them. He's attacking the first part of it, which is -- which deals with the marriage section, and he is also attacking the second part, which deals with relationships that are identical or substantially similar to marriage and he wanted -- well, originally he wanted a declaration that both of them were unconstitutional. I think that's, you know, it's pretty fairly indicated in his complaint

that he didn't like either one of them.

THE COURT: Mr. Pines, do you concede that your client alleges that he would not have voted for either proposition if they had been broken out?

MR. PINES: I can concede that for purposes of this discussion, yeah.

THE COURT: All right. And I understand you don't think that makes a difference.

MR. PINES: That's correct.

THE COURT: So we don't need to look any further, it's conceded that that's what Mr. McConkey's position would have been for the purposes of the standing argument.

Then let me turn to you, Mr. Pines. How is he damaged if he got the chance to vote no on both, which he did?

MR. PINES: First of all, he didn't have the opportunity to vote no on both questions. He had the opportunity to vote no on one single unified question that we have alleged contained two questions that should not have been mixed together. So there wasn't -- and I want the record just to be clear on this, there

weren't two questions that were posed. There was one constitutional amendment that was posed to the voters. And for purposes of the discussion here today, we have to assume that the issues in the one constitutional amendment were improperly mixed together, because that's what was pled.

THE COURT: We're beyond that point for purposes of today.

MR. PINES: All right. So the problem with approaching the analysis in the way that the State has done, and really the problem inherent in the question that the Court has asked, is there's a supposition that the only damage and the only interest that can be damaged by a violation of Article XII, Section 1 is the actual act of voting on the amendment. And for standing purposes, our position is that limiting the analysis to such a narrow scope is too slight. Yes, it is true that by voting no on the amendment, he was voting no on all the propositions contained in the amendment. I mean, that has to be conceded. He did not want the amendment to be passed in that form or in any form. But the problem, and I did address

harmless error after you've been in court and you've said, Hey, I was harmed, and the Court says, Oh, well, it wasn't so much of a harm, good-bye. You don't have to come in and say, Hey, I need to prove to you in advance that this was a harmless error before I can have a lawsuit? I don't think so.

Yeah, there isn't a lot of law on standing in Wisconsin. The reason there isn't a lot of law on standing in Wisconsin is because the law is liberally construed and people have standing to bring lawsuits where they have even a trifling interest that's been impinged, which is exactly the case here.

THE COURT: Okay. The motion to dismiss for lack of standing is denied. I agree that standing is to be liberally construed. I believe that, absent the guidance of Supreme Court precedent precisely on point, I have to kind of reach out and look at the policy reasons behind standing. Here I believe that there is a demonstrated injury to any voter who is required to vote on an amendment that is constitutionally defective. It may not be any different from any other voter, but it may very well be.

But I don't believe that we need to distinguish one voter from another, and the reason for that is that voting is the bedrock, the very lifeblood of the democracy that we live in, and it needs to be protected above all, I think, and if we do not have a completely open and constitutionally valid voting process, then it sets all kinds of potential harms in play.

And so this isn't just a trifling interest because he could have voted no -- because he voted no or would have voted no on both of them. Every voter is entitled to a constitutionally, procedurally valid amendment and is harmed, has a civil right violated when that does not occur. And if I'm wrong, I'm sure the Court of Appeals and the Supreme Court will not hesitate to set me right, but at this point I believe that, while it is a close question because of the manner in which Mr. McConkey's participation in this lawsuit has unfolded, and because there is a lack of binding precedent that just decides the issue, if you take a step back and look at the stakes involved, I cannot say that Mr. McConkey's civil rights to vote on a constitutionally, procedurally valid amendment

is a trifling interest. And if he prevails in this lawsuit, and again, there is no decision being made here as to the merits of his position, simply whether or not he has the right to argue the merits of his position, if he is -- if he demonstrates that the merits of his position are correct, I think he has been clearly injured.

So that will be the ruling of the Court. Mr. Pines, you may draft an order to that effect, and then we'll notice this up for a scheduling conference from there.

MR. PINES: Thank you, Judge.

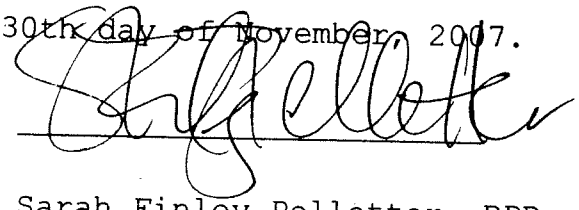
THE COURT: Thank you, Counsel, for your excellent argument. Notwithstanding the dearth of authority. We're adjourned.

(End of Proceedings)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, SARAH FINLEY PELLETTER, a Registered Professional Reporter and Official Court Reporter, do hereby certify that I reported in stenographic machine shorthand the above-entitled proceedings had before the Court on the 28th day of November, 2007, and that the foregoing transcript is a true and correct copy of all such notes and proceedings.

Dated this 30th day of November, 2007.



Sarah Finley Pelletter, RPR
Official Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

2005 SENATE BILL 397

October 21, 2005 – Introduced by Senators RISSER and CARPENTER, cosponsored by Representatives BOYLE, ZEPNICK, BERCEAU, BLACK, TURNER, RICHARDS and PARISI. Referred to Committee on Health, Children, Families, Aging and Long Term Care.

AN ACT ***to create*** chapter 770 of the statutes; **relating to:** domestic partnership.

Analysis by the Legislative Reference Bureau

Current law specifies the requirements for contracting and for dissolving a marriage, which is defined in the statutes as a civil contract creating the legal status of husband and wife. In addition, the statutes set out various rights and responsibilities that apply to married persons or that result from the legal status of marriage.

This bill provides requirements for forming a legal relationship of domestic partnership. Under the bill, a domestic partnership may be formed by two individuals who are at least 18 years old and who are not married or in another domestic partnership. The individuals must be living together in the same household and must consider themselves to be members of each other's immediate family. Individuals who actually are immediate family members may form a domestic partnership.

The procedure for obtaining a declaration of domestic partnership is similar to the procedure for obtaining a marriage license. The individuals apply for a declaration of domestic partnership to the county clerk of the county in which at least one of them has resided for at least 30 days. The application must be subscribed to by the parties, who must submit proof of identification to the county clerk. Just as with an application for a marriage license, the application must contain the social security numbers of the parties, as well as any other information that the Department of Health and Family Services directs. Just as with an application for a marriage license, a portion of the application for a declaration of domestic partnership contains information that is collected for statistical purposes only and

is not open to public inspection. If the parties fulfill all of the requirements for forming a domestic partnership, the clerk issues to the parties a declaration of domestic partnership. The parties must complete the declaration, sign it in front of a notary, and submit it to the register of deeds of the county in which the parties reside. After recording the declaration, the register of deeds must send the original to the state registrar of vital statistics.

The bill provides that any state statute or rule that applies to a married person or a formerly married person, such as a widow, applies in the same respect to a domestic partner or a person who was formerly a domestic partner; that any state statute or rule that applies to marriage or a marital relationship, including dissolution of a marriage, applies in the same respect to a domestic partnership; and that any state statute or rule that applies to a marriage document applies in the same respect to a declaration of domestic partnership. Thus, under the bill, for example, the statutory divorce procedure and property division would apply to the dissolution of a domestic partnership; the marital property provisions of current law would apply to domestic partners; a domestic partner would have the same intestate inheritance rights as a spouse and the same election rights under a will; domestic partners would be entitled to adopt; domestic partners could file joint state income tax returns; a domestic partner could consent to an autopsy on the body of his or her deceased domestic partner; a domestic partner could make a claim for loss of society and companionship in the event of the wrongful death of his or her domestic partner; domestic partners could obtain a combined fishing license; a domestic partner would have an evidentiary privilege to prevent his or her domestic partner from testifying as to any private communication between the two during their domestic partnership; and a domestic partner could receive death benefits under the worker's compensation law as the result of the employment–related death of his or her domestic partner.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Chapter 770 of the statutes is created to read:

CHAPTER 770

DOMESTIC PARTNERSHIP

770.01 Definitions. In this chapter:

(1) "Domestic partner" means an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides.

(2) "Domestic partnership" means the legal relationship that is formed between 2 individuals under this chapter.

770.05 Criteria for forming a domestic partnership. (1) Two individuals may form a domestic partnership if they fulfill all of the following criteria:

(a) Each individual is at least 18 years old and otherwise competent to enter into a contract.

(b) Neither individual is married to, or registered in a domestic partnership with, another individual.

(c) The 2 individuals live together in the same household.

(d) The 2 individuals consider themselves to be members of each other's immediate family.

(2) Notwithstanding sub. (1) (d), 2 individuals who are members of each other's immediate family, as defined in s. 23.33 (1) (h), may form a domestic partnership.

770.07 Application. (1) (a) Individuals who wish to form a domestic partnership shall apply for a declaration of domestic partnership to the county clerk of the county in which at least one of the individuals has resided for at least 30 days immediately before applying.

(b) 1. Except as provided in subd. 2., the county clerk may not issue a declaration of domestic partnership until at least 5 days after receiving the application for the declaration of domestic partnership.

2. The county clerk may, at his or her discretion, issue a declaration of domestic partnership less than 5 days after application if the applicant pays an additional fee

of not more than $10 to cover any increased processing cost incurred by the county. The county clerk shall pay this fee into the county treasury.

(c) No declaration of domestic partnership may be issued unless the application for it is subscribed to by the parties intending to form the domestic partnership; contains the social security number of each party who has a social security number; and is filed with the clerk who issues the declaration of domestic partnership.

(d) 1. Each applicant for a declaration of domestic partnership shall present satisfactory, documentary proof of identification and residence and shall swear to, or affirm, the application before the clerk who is to issue the declaration of domestic partnership. In addition to the social security number of each party who has a social security number, the application shall contain such informational items as the department of health and family services directs. The portion of the application form that is collected for statistical purposes only shall indicate that the address of an applicant may be provided by a county clerk to a law enforcement officer under the conditions specified under s. 770.18 (2).

2. Each applicant for a declaration of domestic partnership who is under 30 years of age shall exhibit to the clerk a certified copy of a birth certificate, and shall submit a copy of any judgment or death certificate affecting the applicant's domestic partnership status. If any applicable birth certificate, death certificate, or judgment is unobtainable, other satisfactory documentary proof may be presented instead. Whenever the clerk is not satisfied with the documentary proof presented, he or she shall submit the presented proof to a judge of a court of record in the county of application for an opinion as to its sufficiency.

(2) If sub. (1) and s. 770.05 are complied with, the county clerk shall issue a declaration of domestic partnership. With each declaration of domestic partnership,

the county clerk shall provide a pamphlet describing the causes and effects of fetal alcohol syndrome. After the application for the declaration of domestic partnership, the clerk shall, upon the sworn statement of either of the applicants, correct any erroneous, false, or insufficient statement in the application that comes to the clerk's attention and shall show the corrected statement, as soon as reasonably possible, to the other applicant.

770.10 Completion and filing of declaration. In order to form the legal status of domestic partners, the individuals shall complete the declaration of domestic partnership, sign the declaration, having their signatures acknowledged before a notary, and submit the declaration to the register of deeds of the county in which the individuals reside. The register of deeds shall record the declaration and forward the original to the state registrar of vital statistics.

770.15 Forms for declaration. (1) The application and declaration of domestic partnership under s. 770.07 shall contain such information as the department of health and family services determines is necessary. The form for the declaration of domestic partnership shall require both individuals forming a domestic partnership to sign the form and attest to fulfilling all of the criteria under s. 770.05 (1) (a) to (d) or s. 770.05 (1) (a) to (c) and (2).

(2) The department of health and family services shall prepare and distribute forms under sub. (1) in sufficient quantities to each county clerk.

770.17 Fee to county clerk. Each county clerk shall receive as a fee for each declaration of domestic partnership issued the same amount that the clerk receives for issuing a marriage license under s. 765.15. Of the amount that the clerk receives under this section, the clerk shall pay into the state treasury the same amount that the clerk pays into the state treasury from the fee collected for issuing a marriage

license. The remainder shall become a part of the funds of the county. For each declaration of domestic partnership issued, the clerk shall also receive a standard notary fee in the same amount that the clerk receives as a standard notary fee in connection with issuing a marriage license and that may be retained by the clerk if the clerk is operating on a fee or part–fee basis but which otherwise shall become part of the funds of the county.

770.18 Records. (1) The county clerk shall keep among the records in the office a suitable book called the declaration of domestic partnership docket and shall enter therein a complete record of the applications for and the issuing of all declarations of domestic partnership, and of all other matters that the clerk is required by this chapter to ascertain related to the rights of any person to obtain a declaration of domestic partnership. An application may be recorded by entering into the docket the completed application form, with any portion collected only for statistical purposes removed. The declaration of domestic partnership docket shall be open for public inspection or examination at all times during office hours.

(2) A county clerk may provide the name of a declaration of domestic partnership applicant and, from the portion of the application form that is collected for statistical purposes, as specified under sub. (1), may provide the address of the declaration of domestic partnership applicant to a law enforcement officer, as defined in s. 51.01 (11). A county clerk shall provide the name and, if it is available, the address, to a law enforcement officer who requests, in writing, the name and address for the performance of an investigation or the service of a warrant. If a county clerk has not destroyed the portion of the declaration of domestic partnership application form that is collected for statistical purposes, he or she shall keep the information on the portion confidential, except as authorized under this subsection. If a written

request is made by a law enforcement officer under this subsection, the county clerk shall keep the request with the declaration of domestic partnership application form. If the county clerk destroys the declaration of domestic partnership application form, he or she shall also destroy the written request.

770.20 Effect of forming domestic partnership. Except in ch. 765, all of the following apply:

(1) Any statute or rule that applies to a married person or a formerly married person, including but not limited to a spouse; husband, if appropriate; wife, if appropriate; widow, if appropriate; widower, if appropriate; or family member that includes a spouse, applies in the same respect to a domestic partner or a person who was formerly a domestic partner.

(2) Except for s. 48.14 (6), any statute or rule that applies to marriage or a marital relationship, including dissolution of a marriage, applies in the same respect to a domestic partnership.

(3) Except for ss. 46.03 (34), 69.01 (16), and 69.16 (1), any statute or rule that applies to a marriage license, certificate, or document or the application or applicant for such a document, applies in the same respect to a declaration of domestic partnership or the application or applicant for a declaration.

SECTION 2. Effective date.

(1) This act takes effect on the first day of the 13th month beginning after publication.

(END)

SUPREME COURT OF WISCONSIN

Appeal No. 2008AP001868

WILLIAM C. McCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

Dane Co. Circuit Court
Case No. 2007-CV-002657

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL AND CROSS APPEAL FROM THE
FINAL ORDER OF THE DANE COUNTY CIRCUIT COURT
DATED JUNE 9, 2008, THE HONORABLE
RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION
FROM THE COURT OF APPEALS

COMBINED BRIEF OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. McCONKEY

CULLEN WESTON PINES
& BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
122 W. Washington Ave., #900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

EDWARD S. MARION
ATTORNEY-AT- LAW LLC

Edward S. Marion, SBN 1016190
716 Ottawa Trail
Madison, WI 53711
Telephone: (608) 334-9741

Dated: August 28, 2009.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

ARGUMENT. 1

I. THE DEFENDANT HAS FAILED TO ARTICULATE A REASONABLE METHOD FOR DETERMINING THE PURPOSE OF A PROPOSED CONSTITUTIONAL AMENDMENT.. . . . 1

A. The Three-Part Test Set Out In *Dairyland Greyhound Park v. Doyle* Is Not Used To Determine Purpose.. 1

B. The Rules Of Statutory Interpretation Should Be Used To Determine Purpose. 4

II. MCCONKEY IS NOT PROPOSING A NEW STANDARD FOR ANALYZING WHETHER A REFERENDUM QUESTION VIOLATES ARTICLE XII, SECTION 1. 7

III. THE DEFENDANT HAS MISSTATED MCCONKEY'S ESSENTIAL ARGUMENT. 9

IV. CASES FROM OTHER STATES ARE IRRELEVANT.. 11

V. CONCLUSION.. 13

CERTIFICATION OF BRIEF. 14

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12). 15

TABLE OF AUTHORITIES

Page

Cases

Dairyland Greyhound Park v Doyle,
2006 WI 107, 295 Wis. 2d 1, 719 N.W. 2d 408. . . . . 1-3, 5

Milwaukee Alliance Against Racist & Political Repression v. Elections Bd. of Wis.,
106 Wis. 2d 593, 317 N.W.2d 420 (1982). 1, 8-9

State ex rel. Hudd v. Timme,
54 Wis. 318, 11 N.W. 785 (1882). 1, 8-9

State ex rel. Kalal v. Circuit Court for Dane County,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110.. 4

State ex rel. Thomson v. Zimmerman,
264 Wis. 644, 60 N.W.2d 416 (1953). 1, 8, 10

Thompson v Craney,
199 Wis 2d 674, 546 N.W.2d 123 (1996).. 2

Statutes

Wis. Stat. §765.01(1). 6

Wis. Stat. §765.01(2). 6

Wis. Stat. §765.001(2). 5-6

Wis. Stat. §990.01(19p). 6

Wisconsin Constitution

Article IV, Section 18.. 12

Article XII, Section 1. . . . . 1, 11, 13

Article XIII, Section 13. 13

Other Authorities

2003 Assembly Bill 475. 6

2003 Assembly Joint Resolution 66.. 7

2005 Enrolled Joint Resolution 30. . . . . 5, 7

http://www.legis.state.wi.us/2003/data/AB475hst.html. 6

I. THE DEFENDANT HAS FAILED TO ARTICULATE A REASONABLE METHOD FOR DETERMINING THE PURPOSE OF A PROPOSED CONSTITUTIONAL AMENDMENT.

A. The Three-Part Test Set Out In *Dairyland Greyhound Park v. Doyle* Is Not Used To Determine Purpose.

This case was certified to the Supreme Court in part because the Court of Appeals determined that the three previous cases interpreting Article XII, Section 1 of the Wisconsin Constitution stated the purpose of the proposed amendments before it, but did not explain how courts are to determine the purpose of a proposed amendment. The Court of Appeals stated:

> [W]e see a need for additional guidance as to the proper method for determining the purpose of a proposed amendment. Because it does not appear that the purpose of the amendments in Hudd, Thomson, or Milwaukee Alliance was at issue, each of those cases simply asserted an intended purpose without discussing how the court should determine purpose. Should a court look first at the language of the ballot question or the language of the legislative resolutions? What consideration should be given to materials from the legislative reference bureau and the notice provided to the public explaining the proposed amendment? Should other contemporaneous materials be considered only if there is an ambiguity in the text itself, as with determinations of legislative intent in the statutory construction context? Since the determination of

> purpose will often be dispositive, it is critical that guidance on this topic be provided.

Court of Appeals Certification, p. 6.

The Defendant implicitly dismisses the Court of Appeals concerns by claiming that our Supreme Court has already determined the issue, stating:

> This Court has held that the purpose of an amendment may be determined from the plain meaning of the provision, the debates and practices at the time, and the earliest legislative action following adoption. *Dairyland Greyhound Park v Doyle*, 2006 WI 107, ¶19, 295 Wis. 2d 1, 719 N.W. 2d 408; *Thompson v Craney*, 199 Wis 2d 674, 680, 546 N.W. 2d 123 (1996)

Defendant's Brief at 24.[1]

Dairyland Greyhound Park and *State ex rel. Thompson v. Craney* say nothing of sort.

The *Dairyland* test has never been used to determine the "purpose" of a proposed amendment. The three-part test set out in that case is used to interpret the substantive meaning of an adopted amendment to the state Constitution when a subsequently enacted statute is challenged as violative of that

[1]Formally titled "Combined Brief and Appendix of Defendant-Respondent-Cross Appellant," filed with the Court on August 13, 2009, hereinafter referred to as "Defendant's Brief."

constitutional provision. In fact, the purpose of an amendment is one aspect used to determine its meaning under the three-part test. *See Dairyland* at ¶¶19 and 24. If the Defendant's proposed method is adopted, the courts will become stuck in an infinite loop, using the three-part test to determine purpose and then using that test and the purpose determined already to determine meaning. That would force the courts to step out of their role of interpreting legislation and into the role of creating it.

After misstating the proper use of the "three-part test," the Defendant then cites selected newspaper articles, Legislative Reference Bureau documents and earlier statutory proposals to supposedly meet the second prong of the test. It is fair to infer that the Defendant did so in order to avoid more strict rules of statutory interpretation which generally do no allow extrinsic materials to be used to interpret unambiguous legislative statements.

B. The Rules Of Statutory Interpretation Should Be Used To Determine Purpose.

An amendment to the Constitution is proposed to the voters by the legislature through passage of a joint resolution. Recognizing that a legislative joint resolution is more akin to a statute than an adopted constitutional amendment, McConkey asserts that the Court should adopt a simple rule for the determination of the purpose of a proposed constitutional amendment: rely on what the joint resolution that submitted it to the voters says. That is, McConkey urges this Court to answer "yes" to this question posed by the Court of Appeals:

> Should other contemporaneous materials be considered only if there is an ambiguity in the text itself, as with determinations of legislative intention the statutory construction context?

Court of Appeals Certification, p. 6.

Doing so is consistent with the rules of statutory construction:

> [I]n interpreting a statute, the court focuses on "statutory meaning" as opposed to "legislative intent." *See State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶36-52, 271 Wis. 2d 633, 681 N.W.2d 110. In doing so, the court relies heavily on "intrinsic" sources such as the words of the statute, including dictionary definitions, plus statutory context, scope, and purpose. As a rule, Wisconsin courts do not consult "extrinsic" sources of statutory interpretation unless the statute is ambiguous, *id.,*

> ¶50, although extrinsic sources may be used to confirm or verify plain statutory meaning. *Id.*, ¶51.
>
> The plain meaning rule of statutory interpretation prevents courts from tapping legislative history to show that an unambiguous statute is ambiguous. *Id.*

Dairyland Greyhound Park v. Doyle, *supra,* ¶ 114.

Because 2005 Enrolled Joint Resolution 30 is legislation, to determine its purpose, the Court should focus on the intrinsic expression of its purpose, not extrinsic descriptions of what the purpose might be. 2005 Enrolled Joint Resolution 30 says its purpose is: "***To create*** section 13 of article XIII of the constitution; **relating to:** providing that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." Because that stated purpose is clear and unambiguous, the Court need not resort to any extrinsic materials to verify it. It means precisely what it says.

Were the Court, however, to look to an extrinsic source to verify the plain meaning of the stated purpose, the truly important legislative history, which the Defendant failed to provide the court, is determinative. In 2003, §765.001(2) stated: "Under the laws of this state, marriage is a legal

relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support." That year, the Legislature passed 2003 Assembly Bill 475 adding this sentence to §765.001(2), the "intent" language relating to the Family Code:

> It is the public policy of this state that marriage may be contracted only between one man and one woman.

It also amended §765.01(1) to state that:

> Marriage, as far as its validity at law is concerned, *is a civil contract between one man and one woman.*

And, it added §765.01(2) to read:

> Regardless of whether s. 765.04 applies and regardless of whether a marriage takes place in another jurisdiction in which marriage other than one man and one woman is defined as valid, only marriage between one man and one woman shall be recognized as valid in this state.

Finally, it created §990.01(19p) to the statutes:

> "Marriage" means a civil contract between one man and one woman that creates the legal status for the parties of husband and wife.

Those statutory changes were vetoed on November 7, 2003 and the veto was sustained on November 12, 2003. *http://www.legis.state.wi.us/2003/data/AB475hst.html.* (last viewed 8/28/09). As a response to the veto of the statutory

changes, less than three months later, on February 9, 2004, 2003 Assembly Joint Resolution 66 was introduced, proposing the "marriage amendment" for the first time. (A-App. 19) Thus, the legislative history confirms that by proposing the marriage amendment and later adopting 2005 Enrolled Joint Resolution 30 submitting the amendment to the voters, the Legislature had the purpose of ensuring that in Wisconsin marriage was between one man and one woman, nothing more and nothing less.

II. MCCONKEY IS NOT PROPOSING A NEW STANDARD FOR ANALYZING WHETHER A REFERENDUM QUESTION VIOLATES ARTICLE XII, SECTION 1.

The Defendant argues that McConkey has urged the Court to deviate from virtually every other state and adopt a test for the single purpose rule that would make it almost impossible for the state Constitution to be amended. *Defendant's Brief at 21-22.* The Defendant reached that conclusion by creating a straw man and then knocking it down by stating: "McConkey . . . argue[s] that the standard is more stringent than it really is. McConkey argues that in

order to place multiple propositions before voters in a single proposed amendment, the propositions must be 'interrelated and interdependent, such that if that had been submitted as separate questions, the defeat of one question would destroy the overall purpose of the multi-proposition proposal.'" *Defendant's Brief at 15.* He continues by saying that "this Court has never required that all propositions in a given amendment be interdependent in order to survive constitutional scrutiny." *Defendant's Brief at 16.*

McConkey has not made the argument that the Defendant attributes to him. He has merely asked the Supreme Court to apply the rules it set out in *State ex rel. Hudd v. Timme,* 54 Wis. 318, 11 N.W. 785 (1882), *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) and *Milwaukee Alliance Against Racist & Political Repression v. Elections Bd. of Wis.,* 106 Wis. 2d 593, 317 N.W.2d 420 (1982), to the referendum question submitted to the voters on the marriage amendment.

In fact, the Wisconsin Supreme Court has explained in that proposed amendments to our Constitution,

interrelatedness and interdependence are necessary to allow an amendment with multiple parts to meet the single purpose requirement. In *Milwaukee Alliance,* upholding the submission of a comprehensive change of the concept of bail to one of conditional release, the Court said that:

> When the purpose of the proposed amendment was to change the historical concept of bail with its exclusive purpose of assuring one's presence in court, as defined by common law, to a comprehensive plan for conditional release, the defeat of either proposition would have destroyed the overall purpose of the total amendment. The Hudd court held that a single amendment may "cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject." *Hudd, supra,* 54 Wis. at 339, 11 N.W. 785. That is exactly what the amendment question in this case did.

Milwaukee Alliance, *supra*, at 607.

"Interrelatedness and interdependence" is by no means "foreign" to Wisconsin constitutional amendment jurisprudence. It is integral to it.

III. THE DEFENDANT HAS MISSTATED MCCONKEY'S ESSENTIAL ARGUMENT.

The Defendant asserts that "McConkey passes over *Milwaukee Alliance* quickly . . ., and for good reason, because

the plaintiffs in that case made exactly the same argument here, namely that because the two propositions on the ballot were not dependent on one another, they should have been presented separately." *Defendant's Brief at 34-35.* The problem is this: that is not the argument that McConkey made.

McConkey asserted, and reasserts here, that the analysis done in *State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 60 N.W.2d 416 (1953) is most closely applicable to an analysis of the marriage amendment. In *Thomson* the Court articulated what it must do to determine if there is more than one purpose to the proposed amendment, explaining that if the defeat of one of the two propositions found in the amendment would not destroy the overall purpose asserted by the Legislature, the Court should then consider whether the ballot question has in fact more than one purpose. *Thomson*, *supra* at 651.

As explained in McConkey's Brief[2] at pages 40-45, when that analysis is applied to the marriage amendment, the Court will find that it was submitted to the voters in violation of Article XII, Section 1 of the Wisconsin Constitution.

IV. CASES FROM OTHER STATES ARE IRRELEVANT.

The Defendant has directed the Court to other states whose supreme courts have addressed the single subject rule as it applies under their laws and constitutions, claiming that the Wisconsin Supreme Court ought to follow their lead in interpreting Wisconsin's marriage amendment. While those cases are interesting, ultimately, they are irrelevant for numerous reasons but primarily for this one: Wisconsin has its own history regarding its own constitution and its own line of cases from which the Wisconsin Supreme Court must derive the basis for its decision in this case. Moreover, as McConkey's Brief explained in detail, the Wisconsin Constitution contains two articles that address the framers deep concern with logrolling: Article XII, Section 1, and

[2]Formally titled "Brief of Plaintiff-Appellant-Cross-Respondent William C. McConkey," filed with this Court on July 8, 2009, hereinafter referred to as "McConkey's Brief."

Article IV, Section 18. It is within that constitutional context that the Court must make its decision.

Finally, it is impossible for this Court to know the political traditions of other states. The political traditions of this state, however, are well-known: Wisconsin has been and continues to be committed to open government, a high level of participation by its citizens in elections, and a full and fair presentation to the people by their representatives about the issues its government confronts. As a part of that tradition, Wisconsin voters had a right to expect that a crucial issue like the potential rights and obligations of unmarried individuals who are in a relationship that is not marriage would be discussed and considered fully. Instead, it was coupled with a definition of marriage that was emotionally compelling and presented to the voters in a logrolled resolution that stymied debate and restricted the voters' right to directly discuss and then address in the voting booth all of the issues before them.

V. CONCLUSION.

The judgment of the circuit court should be reversed and Article XIII, Section 13 of the Wisconsin Constitution should be declared unconstitutional because it was submitted to the voters in violation of Article XII, Section 1 of the Wisconsin Constitution.

Dated this 28th day of August, 2009.

CULLEN WESTON PINES & BACH LLP

By: */ s/ Tamara B. Packard*
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111

EDWARD S. MARION ATTORNEY-AT-LAW LLC

By: */ s/ Edward S. Marion*
Edward S. Marion, SBN 1016190

Attorneys for Plaintiff-Appellant-Cross-Respondent William C. McConkey

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,275 words.

/ s/ Tamara B. Packard
Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

/ s/ Tamara B. Packard

Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

SUPREME COURT OF WISCONSIN

_____

Appeal No. 2008AP001868

WILLIAM C. McCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs. Dane Co. Circuit Court
Case No. 2007-CV-002657

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL AND CROSS APPEAL FROM THE
FINAL ORDER OF THE DANE COUNTY CIRCUIT COURT
DATED JUNE 9, 2008, THE HONORABLE
RICHARD G. NIESS, PRESIDING, AND ON
CERTIFICATION FROM THE COURT OF APPEALS

RESPONSE BRIEF OF CROSS-RESPONDENT

CULLEN WESTON PINES
& BACH LLP

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
122 W. Washington Ave., #900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883

EDWARD S. MARION
ATTORNEY-AT- LAW LLC

Edward S. Marion, SBN 1016190
716 Ottawa Trail
Madison, WI 53711
Telephone: (608) 334-9741

Dated: August 28, 2009.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. ii

STATEMENT OF THE ISSUE. 1

ARGUMENT. 2

I. McCONKEY HAS STANDING TO BRING THIS CASE. 2

A. The General Standing Analysis. 2

B. McConkey's "No" Vote On The Second Question Was Diluted, And Therefore He Has Standing To Bring This Case. 4

C. McConkey Also Has Standing Because His Constitutional Right To Engage In Political Speech Was Impaired. 8

D. This Is A Rare Case Where Voter Status Alone Provides Standing. 10

E. Cases Cited By The Defendant, Finding No Standing Due To No Injury, Have No Bearing Here. 13

II. CONCLUSION. 15

CERTIFICATION OF BRIEF. 17

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12). 18

TABLE OF AUTHORITIES

Page

Cases

American Civil Liberties Union v. Darnel,
195 S.W.3d 612 (Tenn. 2006). 13-14

Baker v. Carr,
369 U.S. 186 (1962). 5-7

Dalton v. Meister,
52 Wis. 2d 173, 188 N.W.2d 494 (1971). 9

Department of Commerce v. United States House of Representatives,
525 U.S. 316 (1999). 7

Elections Board of Wisconsin v. Wisconsin Manufacturers and Commerce,
227 Wis. 2d 650, 597 N.W.2d 721 (1991). 8

Elrod v. Burns,
427 U.S. 347 (1976). 9

Fox v. Wis. Dep't of Health and Soc. Servs.,
112 Wis.2d 514, 334 N.W.2d 532 (1983).. 2-3

Harman v. Forssenius,
380 U.S. 528 (1965). 11

Jones'El v. Berge,
164 F. Supp. 2d 1096 (W.D. Wis. 2001). 9

Lance v. Coffman,
549 U.S. 437 (2007). 6

Largess v. Supreme Judicial Court for the State of Massachusetts,
373 F.3d 219 (1st Cir. 2004),
cert. denied, 125 S.Ct. 618 (2004). 10-11

Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown,
2005 WI App 103, 282 Wis.2d 458, 698 N.W.2d 301. . . . *3*

Milwaukee Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs.,
130 Wis. 2d 56, 387 N.W.2d 245 (1986). 2

Milwaukee County Pavers Ass'n. v. Fiedler,
707 F.Supp. 1016 (W.D. Wis. 1989). 9

New York Times v. Sullivan,
376 U.S. 254 (1964). 8

State ex rel. 1st Nat. Bank v. M & I Peoples Bank,
95 Wis. 2d 303, 290 N.W.2d 321 (1980). 3

Thirty Voters of the County of Kauai v. Do,
599 P.2d 286 (Haw. 1979). 12

U.S. v. Hays,
515 U.S. 737 (1995). 13-14

Williams v. Rhodes,
393 U.S. 23 (1968). 8

Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.,
69 Wis. 2d 1, 230 N.W.2d 243 (1975). 2-3

Wisconsin Constitution

Article VII, Section 8. 3

Article XII, Section 1. . . . . 1, 4, 6, 8, 12

United States Constitution

Article I, Section 3, Cl. 3. 6

STATEMENT OF THE ISSUE

Plaintiff-Appellant-Cross-Respondent William McConkey ("McConkey") disagrees with the standing issue as stated by the Defendant-Appellee-Cross-Appellant Attorney General J.B. Van Hollen ("Defendant") in his Brief. The Cross-Appellant's issue for appeal is more properly stated as follows:

> Does a voter who challenges the constitutionality of an amendment to the Wisconsin Constitution on the basis that the amendment was actually two distinct and separate amendments submitted to the voters as a single question in violation of the procedural "single subject" requirement contained in Article XII, Section 1 of the Wisconsin Constitution have standing to bring such a challenge when, had the questions been submitted to the voters in two referenda, he would have voted "no" on each question, and also would have been able to engage in electioneering to persuade other voters to at least vote "no" on the second question, even if they felt it necessary to vote "yes" on the first question?

The Circuit Court answered yes.

ARGUMENT

I. McCONKEY HAS STANDING TO BRING THIS CASE.

A. The General Standing Analysis.

The Defendant describes the general standing rules for Wisconsin courts relatively fairly. That is, to satisfy the standing requirement in Wisconsin, a plaintiff must allege that the action at issue directly caused injury to a legally protected interest of the plaintiff. *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health and Soc. Servs.*, 130 Wis. 2d 56, 65, 387 N.W.2d 245, 248-49 (1986); *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n of Wis.*, 69 Wis. 2d 1, 10, 230 N.W.2d 243, 248 (1975). The law of standing is construed liberally, and even a "trifling interest" may be sufficient where actual injury is demonstrated. *Milwaukee Brewers Baseball Club*, 130 Wis. 2d at 64, 387 N.W.2d at 248; *Fox v. Wis. Dep't of Health and Soc. Servs.*, 112 Wis.2d 514, 524, 334 N.W.2d 532, 537 (1983).

Wisconsin courts are not jurisdictionally confined to consider only "cases and controversies" like Federal courts are; rather, they have jurisdiction over "all matters civil and

criminal." *Wis. Const. Art. VII, Sec. 8.* However, Wisconsin courts have applied a similar standing doctrine, and have drawn from Federal cases on standing, as a matter of "sound judicial policy." *See State ex rel. 1st Nat. Bank v. M & I Peoples Bank*, 95 Wis. 2d 303, 308, n. 5, 290 N.W.2d 321 (1980); *Fox v. Wisconsin Dept. of Health and Social Services*,112 Wis. 2d 514, 524-25, 334 N.W.2d 532 (1983). Thus, Wisconsin courts find Federal case law to be persuasive as to what the standing rules should be. *See Metropolitan Builders Association of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, ¶14, n. 3, 282 Wis.2d 458, 467, 698 N.W.2d 301, *citing Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975).

In this case, the Defendant challenges McConkey's standing soley based on the claim that he has suffered no injury. This brief shows that McConkey has been injured in several different and important ways by the Legislature's logrolling activities, and therefore has standing to pursue his case.

B. McConkey's "No" Vote On The Second Question Was Diluted, And Therefore He Has Standing To Bring This Case.

Article XII, Section 1 of the Wisconsin Constitution guarantees each voter the opportunity to vote on each proposed amendment to the Constitution. As the Defendant acknowledges at pages 6-7 of his Standing Brief,[1] it is designed to protect against logrolling and ensure that the will of the voters on each proposition is accurately reflected in election results. Defendant then makes the logic-leap that those and only those who would have voted "yes"on the definition of marriage as "one man and one woman" (the first question) and "no" on the denial of marriage and any legal status "identical to or substantially similar" to marriage for unmarried individuals (the second question), i.e., only those voters who were themselves literally "logrolled," would have standing to bring this suit. He contends that because McConkey would have voted "no" on both questions, he does

---

[1]Formally titled "Brief of Cross-Appellant," filed on August 13, 2009 as the second portion of the "Combined Brief and Appendix of Defendant-Respondent-Cross-Appellant," and hereinafter referred to as the Defendant's Standing Brief.

not.

The Defendant's position is narrow, legally unsupported, and reflects a failure to consider the very real and substantial injury to the effectiveness of McConkey's vote caused by the Legislature's logrolling activities. McConkey's claim in this case is that he and other voters as an electorate were deprived of the right to express their true collective will on each question when the two proposed amendments were presented as a single question, and thus their right to vote in accordance with Constitutional requirements was impaired. McConkey's own Constitutionally-protected right to vote was impaired when his "no" vote was diluted, as explained further below.

A citizen's right to vote without arbitrary impairment by the state has long been recognized as a legally protected interest conferring standing. *Baker v. Carr*, 369 U.S. 186, 208 (1962). A court need not decide whether a plaintiff challenging state action relating to voting rights will ultimately prevail in order to find that the plaintiff has

standing. *Id.* Instead, an action to protect a citizen's right to vote is sufficient to establish standing because the plaintiff is asserting a direct and adequate interest in maintaining the effectiveness of his vote. *Id.* Had the legislature complied with Article XII, Section 1, the Wisconsin electorate would have voted on each question separately, and the true will of the electorate would have been reflected in the results.

By forcing a "yes/no" voter to vote "yes" on both questions in order to indicate her support for the first question, the influence of McConkey's "no" vote on the second question was diluted. Dilution of a citizen's vote is an impairment sufficient to confer Article III standing, whether that dilution is the result of a "false tally," by refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box. *See Baker v. Carr*, 369 U.S. 186, 208 (1962).[2]

Article XII, Section 1 is just like the Apportionment Clause of the United States Constitution, Art. 1 sec. 3, cl. 3,

---

[2]The viability of the *Baker v. Carr* standing rule for voters in voting cases has been reaffirmed by the Supreme Court on numerous occasions, most recently in *Lance v. Coffman*, 549 U.S. 437 (2007).

which ensures that the people are represented in the House of Representatives "according to their respective Numbers," in that both provisions ensure each voter "the effectiveness of their votes." *See Baker v. Carr*, 369 U.S. at 208. A claim by a voter that the effectiveness of his vote has been impaired is not, as the Defendant would have it, a generalized grievance that does not confer standing. Rather, the assertion of vote dilution "satisfies the injury-in-fact, causation, and redressibility requirements" of Article III standing. *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 334 (1999).

Department of Commerce involved a challenge under the Apportionment Clause to the Census Bureau's plan to use statistical sampling to determine the population for purposes of congressional apportionment. Under that method, Indiana would likely lose a seat in the House of Representatives. Merely by virtue of his status as an Indiana resident and voter, Plaintiff Hofmeister was found to have standing because "with one fewer Representative, Indiana residents' votes will

be diluted." Likewise in this case, with the ballot box on the second question effectively being "stuffed" with "yes" votes by voters who would have voted "no" if the two questions had been posed separately, McConkey's "no" vote on that question was diluted. Hence, he has standing to pursue this case.

C. McConkey Also Has Standing Because His Constitutional Right To Engage In Political Speech Was Impaired.

By failing to comply with Article XII, Section 1's command to submit each proposed amendment to the voters as a separate question, the legislature also hindered McConkey from engaging in full debate on each of the questions. Political debate is one of the most jealously guarded, fundamental constitutional rights protected by both the Wisconsin and United States Constitutions. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("debate on public issues should be uninhibited, robust, and wide open."); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process."); *see also Elections Board of Wisconsin v. Wisconsin*

Manufacturers and Commerce, 227 Wis. 2d 650, 597 N.W.2d 721 (1991); *Dalton v. Meister,* 52 Wis. 2d 173, 184-186, 188 N.W.2d 494 (1971).

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion). Any alleged violation of fundamental constitutional rights constitutes injury as a matter of law, particularly when more than merely money is at stake. *Milwaukee County Pavers Ass'n. v. Fiedler*, 707 F.Supp. 1016, 1031-32 (W.D. Wis. 1989); *see also Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1123 (W.D. Wis. 2001) ("the violation of a fundamental constitutional right constitutes irreparable harm, even if it is temporary.").

By combining the two questions into one, the debate over the two proposed amendments was necessarily truncated. McConkey and other electors were unable to discuss compromise. It was impossible for voters like McConkey to try and persuade those concerned about

"defending marriage" to accept the first amendment but reject the second. The debate on the amendment was telescoped into an "all or nothing" proposition. The single subject rule is designed to avoid just such effects. That restriction on debate, discussion and compromise, exactly the political speech protected as a fundamental right under the Wisconsin and United States Constitutions, caused injury to McConkey.

D. This Is A Rare Case Where Voter Status Alone Provides Standing.

Regardless of whether McConkey was injured by dilution of his vote, infringement on his free speech rights, or some other specific injury, this is also one of the rare cases where his status as a voter, otherwise undifferentiated, is sufficient to meet the standing criteria.

In another "marriage case," *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 618 (2004), the First Circuit Court of Appeals held that plaintiffs, seeking to enjoin implementation of the Massachusetts Supreme Court's order directing the State of Massachusetts to recognize the marriage of same-sex

couples, had standing to pursue their claim that the order deprived them of their federal right to a republican form of government under the Guarantee Clause. The plaintiffs asserted standing purely on the basis that they were citizens of Massachusetts; others asserted standing as members of that state's legislature acting as individuals. The defendants challenged the plaintiffs' standing, alleging, much as the Defendant does here, that "at most, they share an undifferentiated harm with other voters." The First Circuit Court rejected this argument:

> [T]he circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim. If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry–which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated–might well be adjusted to the nature of the claimed injury.

Id. at 224-25.

Similarly, a voter who had registered and paid a required poll tax was found to have standing to challenge the poll tax, in *Harman v. Forssenius*, 380 U.S. 528, 534, n. 6 (1965). Likewise, the Hawaii Supreme Court found the electorate as a

whole to have sufficient interest to confer standing on plaintiff voters in an action seeking to set aside election results in a challenge based on procedural irregularities. *Thirty Voters of the County of Kauai v. Do*, 599 P.2d 286, 288 (Haw. 1979).

Article XII, Sec. 1 provides a guarantee to all Wisconsin voters and the electorate as a whole that they will be given the opportunity to separately vote on each proposed amendment to the Wisconsin Constitution. By its terms, a violation of that provision is a violation of each and every voter's rights, and thus each and every voter who would wish to pursue vindication of those rights through a lawsuit like this one would have standing to do so. The "usual" standing inquiry, which distinguishes between injuries unique to a plaintiff and "undifferentiated" injuries, must be adjusted to fit the scope of the class of people and protections under the constitutional provision claimed to be violated. That is, if all voters are protected from logrolling by the legislature, as here, all voters must have standing to seek vindication.

E. Cases Cited By The Defendant, Finding No Standing Due To No Injury, Have No Bearing Here.

The Defendant cites *American Civil Liberties Union v. Darnel*, 195 S.W.3d 612 (Tenn. 2006) and *U.S. v. Hays*, 515 U.S. 737 (1995) at pages 9 to 11 of his Standing Brief to stand for the proposition that being a voter is not enough to challenge election "irregularities." In *Darnel*, the Tennessee Supreme Court rejected a challenge to Tennessee's marriage amendment. The only similarity between McConkey and the plaintiffs in *Darnel* is that they both challenged a marriage amendment. *Darnel* is completely inapposite here.[3]

In *Darnel*, the plaintiffs challenged a constitutional amendment after the state legislature failed to follow constitutional publication requirements. 195 S.W.3d at 622. The court found that the plaintiffs lacked standing because the purpose of the publication requirement was to give notice of the proposed amendment to voters; the plaintiff-voters had learned of the amendment through other means, had thus

---

[3]Furthermore, *Darnel* is a decision by a foreign state court which is not mandatory authority in this court.

received notice, and therefore suffered no injury protected by the constitutional provision. *Id.*

In contrast, in this case and as shown above, McConkey was injured through dilution of his "no" vote: others who desired to vote "yes" on one amendment and "no" on another were deprived of that opportunity, thus reducing the number of "no" votes for one or both amendments and diluting the strength of McConkey's vote. That was not the situation in *Darnell*, where the plaintiffs still received notice of the proposed amendment; McConkey's "no" vote did not carry the same weight as it would have if others had been able to vote "yes" on one amendment and "no" on the other. Accordingly, his legally protected interest in voting was directly injured through the failure of the Legislature to comply with the Wisconsin Constitution.

Hays is similarly distinguished by the absence of injury. In that case, the plaintiffs did not live in either of the gerrymandered districts, and hence they could not claim injury: their votes were not limited in their effectiveness by

the legislature's action. McConkey's injuries, described in the previous subsections are clear. *Hays* provides no guidance here.

II. CONCLUSION.

Judge Niess was correct when he found that McConkey had standing. As he explained:

> . . . voting is the bedrock, the very lifeblood of the democracy that we live in, and it needs to be protected above all, I think, and if we do not have a completely open and constitutionally valid voting process, then it sets all kinds of potential harms in play.
>
> And so this isn't just a trifling interest because he could have voted no - - because he voted no or would have voted no on both of them. Every voter is entitled to a constitutionally, procedurally valid amendment and is harmed, has a civil right violated when that does not occur.

R-Ap. at 135.

Based on the arguments presented herein, McConkey asks that the Court find that he has standing to pursue this case.

Dated this 28th day of August, 2009.

CULLEN WESTON PINES & BACH LLP

By: */ s/ Tamara B. Packard*
Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111

EDWARD S. MARION ATTORNEY-AT-LAW LLC

By: */ s/ Edward S. Marion*
Edward S. Marion, SBN 1016190

Attorneys for Plaintiff-Appellant-Cross-Respondent William C. McConkey

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,627 words.

/ s/ Tamara B. Packard
Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

I further certify that:

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

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

/ s/ Tamara B. Packard

Lester A. Pines, SBN 01016543
Tamara B. Packard, SBN 1023111

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-
Cross-Respondent,

v.

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

REPLY BRIEF OF CROSS-APPELLANT

J.B. VAN HOLLEN
Attorney General

RAYMOND P. TAFFORA
Deputy Attorney General
State Bar #101766

LEWIS W. BEILIN
Assistant Attorney General
State Bar #1038835

Attorneys for Defendant-
Respondent-Cross Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. MCCONKEY'S VOTE WAS NOT DILUTED. 2

II. MCCONKEY'S SPEECH RIGHTS ARE NOT AT ISSUE IN THIS CASE, AND IN ANY EVENT HIS SPEECH RIGHTS WERE NOT IMPAIRED.....5

III. MERE PARTICIPATION AS A VOTER DOES NOT CONFER STANDING UNDER THE SEPARATE AMENDMENT RULE. 7

CONCLUSION.....10

CASES CITED

Baker v. Carr,
369 U.S. 186 (1962)..... 3

Dep't of Commerce v. U.S. House of Representatives,
525 U.S. 316 (1999)..... 3

Ex Parte Siebold,
100 U.S. 371 (1879)..... 3

Largess v. Supreme Judicial Court for the State of Massachusetts,
373 F.3d 219 (1st Cir. 2004) 2, 8

Page

Thirty Voters of the County of Kauai v. Doi,
599 P.2d 286 (Haw. 1979) 9

U.S. v. Mosley,
238 U.S. 383 (1915) 3

OTHER AUTHORITIES CITED

Wis. Const. art. XII, § 1 ..... 1, 7

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-
Cross-Respondent,

v.

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-
Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, HONORABLE RICHARD G. NIESS, PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

REPLY BRIEF OF CROSS-APPELLANT

INTRODUCTION

To support his standing in this case, McConkey tries to associate his rights under Wis. Const. art. XII, § 1 (the separate amendment rule), with rights arising under the federal Voting Rights Act, the First and Fourteenth Amendments,

and even the Guarantee Clause of the federal constitution. In so doing, McConkey achieves no more than to make the very point the Attorney General urges on this Court, namely that the standing inquiry must be "adjusted to the nature of the claimed injury." *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219, 225 (1st Cir. 2004) (quoted in Response Brief of Cross-Respondent at 11). However, McConkey's argument on standing in this case ignores the nature of the claimed injury.

In order to have standing in this case, McConkey must show that he wanted to vote differently on the two parts of the marriage amendment, because if he did not have that preference, then any alleged violation of the separate amendment rule did not affect him. His stipulation to voting "no" to both parts of the marriage amendment shows he suffered no injury, and that he lacks standing.

I. MCCONKEY'S VOTE WAS NOT DILUTED.

McConkey tries to bring this case within the scope of the holdings in certain federal cases that have conferred standing on plaintiffs on the basis of alleged "vote dilution." (Response Brief of Cross-Respondent at 4-7). McConkey contends that his "no" vote on the second part of the marriage amendment was diluted because if the two parts of the amendment had been presented separately, then some voters who voted "yes" on the ballot would have been able to vote "no" to the second part, adding to his "no" vote. (Response Brief of Cross-Respondent at 7-8). McConkey writes, "with the ballot box on the second question effectively

being 'stuffed' with 'yes' votes by voters who would have voted 'no' if the two questions had been posed separately, McConkey's 'no' vote on that question was diluted." (Response Brief of Cross-Respondent at 8).

This line of argument distorts the meaning of the vote dilution concept as it has been used in the cases McConkey relies on. Unlike the dilution injury described in those cases, the injury McConkey claims is too speculative to support standing in this case.

When ballot boxes are "stuffed" with illegal votes, *Ex Parte Siebold*, 100 U.S. 371 (1879); when the state refuses to count votes from arbitrarily selected districts, *U.S. v. Mosley*, 238 U.S. 383 (1915)[1]; or when a legislature apportions electoral districts on the basis of an unconstitutional method of population enumeration, *Baker v. Carr*, 369 U.S. 186 (1962); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), then it is not the individual voter's preferences on a given ballot that are compromised, it is his right to have his vote counted in a manner consistent with the constitution or other laws. What is at stake in those cases is the integrity of each elector's vote, and the imperative to treat electors equally in light of constitutional imperatives.

Even though this case relates to a ballot and involved voting, the interest—and hence the injury

---

[1]*Ex Parte Siebold*, 100 U.S. 371 and *Mosley*, 238 U.S. 383 are two cases relied upon by the Supreme Court in its analysis of the standing issue in *Baker*, 369 U.S. at 208, which is relied upon by McConkey. (Response Brief of Cross-Respondent at 5-7).

that must be alleged—are different. This case is not about alleged interference with the counting of votes or access to the ballot box. McConkey voted on the same ballot question that every other elector who participated did. His vote was not diluted, because everyone who decided to vote "no" could vote "no" and have that vote counted; everyone who decided to vote "yes" could vote that way and be counted. What matters in this case is whether McConkey's own vote was impaired, not whether his position on the issues could have prevailed had the alleged constitutional error not occurred.

McConkey's use of the dilution idea is really another way of saying that he objects to the result of the referendum. However, while it is axiomatic that the voting may have been different if the two parts of the marriage amendment were presented separately, that is not the relevant issue.

The relevant issue is that McConkey himself, who acknowledges that he would have voted "no" to both propositions if they had been presented separately, Response Brief of Cross-Respondent at 11-12, was not injured by any alleged violation of the separate amendment rule. The law of standing requires a plaintiff who is truly interested in the controversy by virtue of having allegedly suffered a direct harm from the complained-of violation, and not a hypothetical, speculative harm. In his response brief, McConkey has done no more than point out that there may be other voters in Wisconsin who, unlike him, would have had standing to pursue a separate amendment claim here—voters who would have voted differently on the two parts of the amendment. But McConkey does not represent any other voters in this case, he represents himself alone.

As McConkey acknowledges, Response Brief of Cross-Respondent at 11, the standing analysis must be tailored to the nature of the substantive right being asserted. One has a right to vote on a referendum ballot that presents separate amendments as distinct questions, so that one is not forced to vote "yes" or "no" to a combined question when in fact one wishes to vote differentially. The only issue here is whether McConkey himself, not anyone else, was deprived of that right (assuming, for purposes of this discussion, that there was a deprivation). The possibility that the outcome of the referendum would have been different if a different ballot had been presented is not a viable basis for standing.

II. MCCONKEY'S SPEECH RIGHTS ARE NOT AT ISSUE IN THIS CASE, AND IN ANY EVENT HIS SPEECH RIGHTS WERE NOT IMPAIRED.

McConkey tries to buttress his claim to standing under the separate amendment rule by suggesting that the alleged violation of the rule also impaired his constitutional right to free speech. (Response Brief of Cross-Respondent at 8-10). McConkey contends vaguely that his political speech in regard to the marriage amendment was unlawfully hindered. Yet McConkey offers no evidence whatsoever that his speech was affected in any way.

McConkey says that "[b]y combining the two questions into one, the debate over the two proposed amendments was necessarily truncated." (Response Brief of Cross-Respondent at 9). He

complains that by combining the two propositions into one referendum question, he was unable to "discuss compromise" with supporters of a ban on same-sex marriage. *Id.* By "compromise" he means trying to convince such persons to agree to vote "no" on the second part of the amendment.

This Court has never suggested that the constitution's separate amendment rule implicates the constitution's distinct protection for freedom of speech. Indeed, McConkey's discussion of speech rights conflicts with his own argument that the purpose of the separate amendment rule is to prevent logrolling. (Appellant's Brief at 14-19; *see also* Respondent's Brief at 10-14). Since McConkey himself was not "logrolled," he tries to suggest that other constitutional interests were impaired, but there is no basis in this Court's precedents for linking the separate amendment rule with other, distinct constitutional rights.

In any event, McConkey's claim to have suffered an injury to his speech rights is without any basis in fact. McConkey was able to speak freely about the marriage amendment at every stage of its progress through the Legislature and referendum process. He has not said otherwise. All McConkey is really saying now is that if the two propositions were separately presented, then public debate somehow would have been different. Perhaps so, but that hardly means the debate that never happened is constitutionally acceptable, whereas the one that did happen is not.

Nothing prevented McConkey, or anyone else, from criticizing the proposed amendment in terms of its combining of two propositions. There was discussion of the second part of the amendment, as

the record shows. (*See* Respondent's Brief at 4-5, and documents cited therein). McConkey could have participated in that debate, and perhaps did so, but he has failed to explain how separating the propositions would have liberated him to speak to the issues freely, when in the event he was otherwise constrained. The Attorney General presented examples of actual public debate on the marriage amendment in support of his Respondent's Brief, yet McConkey offers no comment on how those examples show that the debate was "truncated."

What McConkey's argument indirectly highlights is the fact that no one during the long public discussion of the marriage amendment questioned its compliance with Wis. Stat. art. XII, § 1. McConkey himself might even have voiced public concern about a violation of the separate amendment rule, but apparently did not do so. Yet McConkey now would have this lack of concern with the issue form the very basis of his standing to sue. If anything, it is an indication that no one was aggrieved here with respect to the separate amendment rule, including McConkey.

III. MERE PARTICIPATION AS A VOTER DOES NOT CONFER STANDING UNDER THE SEPARATE AMENDMENT RULE.

Picking up on part of the circuit court's rationale in partially denying the Attorney General's motion to dismiss based on lack of standing, *see* R.-Ap. 134, McConkey contends that he has standing because any voter, regardless of his or her preferences on the referendum question,

would have standing. (Response Brief of Cross-Respondent at 10-12). To support this idea, McConkey relies on a case from Massachusetts and one from Hawaii. The cases McConkey cites, however, do not support his position.

Largess, 373 F.3d 219, which McConkey relies on, was a marriage-related case, but it did not concern an election nor voting rights more generally. In *Largess*, the plaintiffs sought to restrain implementation of the Massachusetts court's order that the state legislature recognize same-sex marriages, and they cited the Guarantee Clause of the federal constitution as the basis for their claim. *Largess*, 373 F.3d at 222-23. The First Circuit assumed that the plaintiffs had an individual cause of action under the Guarantee Clause (something the Supreme Court had never recognized, *see id.* at 224 n.5), and concluded that if the plaintiffs had such a claim, then *as citizens of the state* (not as voters), they would have standing to bring a claim under that clause. *Id*. at 225.

In reaching that conclusion, the First Circuit said nothing more than what the Attorney General is saying here: the standing inquiry must be "adjusted to the nature of the claimed injury." *Id.* (quoted in Response Brief of Cross-Respondent at 11). Here, the claimed injury is the injury of being deprived of a choice to vote separately on propositions that should have been presented separately. The Attorney General asks this Court only to consider how McConkey chose to vote, and would have voted in the event the propositions were separated. Since McConkey stipulated he would have voted the same way regardless of how the questions were presented, we know that he suffered no injury.

McConkey's reliance on *Thirty Voters of the County of Kauai v. Doi*, 599 P.2d 286 (Haw. 1979) is also unavailing. (Response Brief of Cross-Respondent at 11-12). In *Thirty Voters*, plaintiffs brought suit to challenge the form of a ballot question that had been modified, before presentment to the electorate, such that the choice given to voters was changed from a choice between "Yes" and "No" to one between "For" and "Against" (the text of the question itself having remained the same). *Thirty Voters*, 599 P.2d at 180. The plaintiffs alleged that the amended ballot was unclear and misleading and that it had not been shown to them prior to the election as required by statute. *Id*. at 182. Without any discussion whatsoever, the Hawaii court noted that "the electorate as a whole has sufficient interest in the outcome of these proceedings to confer standing upon it as a party plaintiff." *Id*. at 181.

The holding in *Thirty Voters* does not support McConkey's standing in this case, because McConkey is not suing on behalf of the electorate, but on his own behalf alone. Were other voters involved in this case, then McConkey's stipulation that he would have voted the same way on both propositions might not resolve the standing question. However, since McConkey is the only plaintiff, the stipulation is dispositive. Furthermore, the ballot in *Thirty Voters*, unlike the ballot here, was challenged on multiple grounds, including that it was unclear and misleading, a defect that, if proven, would affect all voters regardless of how they cast their ballot. *Id*. at 183. A violation of the separate amendment rule, however, affects voters differently depending upon their voting preferences. McConkey's expressed

preferences show that he was not injured by any alleged violation of the rule.

CONCLUSION

A claim under the separate amendment rule is a claim that the combination of two (or more) propositions in a single referendum question forced voters to make a constitutionally unacceptable choice between the propositions they support and those they do not. It is not a broad guarantee that the wording of each proposed amendment will be satisfactory to all voters. Thus, a voter who wishes to sue under the separate amendment rule must allege that he wanted to vote differently on the multiple propositions but was deprived of that opportunity by a violation of the rule. By his own admission, McConkey did not want to vote differently, so he lacks standing here.

For the foregoing reasons, and the reasons stated in his Cross-Appellant's Brief, the Attorney General respectfully requests that the Court reverse the circuit court's order denying in part the Attorney General's motion to dismiss for lack of standing.

Dated this ____ day of September, 2009.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

RAYMOND P. TAFFORA
Deputy Attorney General
State Bar #101766

LEWIS W. BEILIN
Assistant Attorney General
State Bar #1038835

Attorneys for Defendant-
Respondent-Cross Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3076

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,375 words.

Dated this _____ day of September, 2009.

_____
LEWIS W. BEILIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. (Rule) § 809.19(12).

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

_____
LEWIS W. BEILIN
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2008AP1868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

v.

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM
FINAL ORDERS OF THE DANE COUNTY
CIRCUIT COURT, THE HONORABLE RICHARD G. NIESS
PRESIDING, AND ON CERTIFICATION
FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF *AMICUS CURIAE* WISCONSIN FAMILY COUNCIL IN SUPPORT OF DEFENDANT-RESPONDENT-CROSS-APPELLANT J.B. VAN HOLLEN

Brian W. Raum*
James A. Campbell*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
Tel: (480) 444-0020
Fax: (480) 444-0028

**Pro hac vice* admission pending

Samuel R. Taylor, Jr.
WI State Bar No. 1044678
SAMUEL R. TAYLOR JR. LLC
6501 3rd Ave., 2nd Fl., # 11
Kemper Center
Kenosha, WI 53143
Tel: (262) 475-7717
Fax: (224) 944-0083

Attorneys for Wisconsin Family Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF AMICUS 2

ARGUMENT 3

I. MCCONKEY LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE MARRIAGE AMENDMENT UNDER ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION 3

II. THE MARRIAGE AMENDMENT DOES NOT VIOLATE ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION 5

A. The Provisions Of The Marriage Amendment Constitute A Single Amendment 6

B. This Court's Precedent Demonstrates That The Enactment Of The Marriage Amendment Did Not Violate Article XII, Section 1 12

III. EVERY STATE SUPREME COURT THAT HAS ADDRESSED A SIMILAR SINGLE-AMENDMENT CHALLENGE TO A MARRIAGE AMENDMENT HAS REJECTED THAT CLAIM. 18

CONCLUSION 24

TABLE OF AUTHORITIES

WISCONSIN CASES

Mast v. Olsen,
89 Wis. 2d 12 (1979) 4

Milwaukee Alliance Against Racist and Political Repression v. Elec. Bd. of Wisconsin,
106 Wis. 2d 593 (1982) 6, 7, 9, 10, 12, 14, 15

Hudd v. Timme,
54 Wis. 318 (1882) 6, 7, 10, 12, 13

Thomson v. Zimmerman,
264 Wis. 644 (1953) 6, 12, 15, 16, 17

OTHER STATE CASES

Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment,
926 So. 2d 1229 (Fla. 2006) 21, 22

Albano v. Attorney General,
769 N.E.2d 1242 (Mass. 2002) 19, 20

Arizona Together v. Brewer,
149 P.3d 742 (Az. 2007) 23, 24

Forum for Equality PAC v. McKeithen,
893 So. 2d 715 (La. 2005) 20, 21

Lewis v. Harris,
908 A.2d 196 (N.J. 2006) 11

Perdue v. O'Kelley,
632 S.E.2d 110 (Ga. 2006) 22, 23

Wood v. Commonwealth ex rel. Grayson,
No. Civ.A. 04-CI-01537,
2005 WL 1258921 (Ky. Cir. Ct. May 26, 2005) ... 18, 19

FEDERAL CASES

Baker v. Carr,
369 U.S. 186 (1962) 4

STATUTES AND CONSTITUTIONAL PROVISIONS

GA. CONST. art. 1, § 4, ¶ 1 22

KY. CONST. § 233A 18

WIS. CONST. art. XII, § 1 ..... 5, 6, 12, 13, 17, 24

WIS. CONST. art. XIII, § 13 1

VT. STAT. ANN. Tit. 15, § 1204(a) 11

INTRODUCTION

William C. McConkey ("McConkey") brought this legal challenge against the Wisconsin Marriage Amendment ("Marriage Amendment" or "Amendment"). That constitutional provision, which was approved in November 2006 by 59% of Wisconsin voters, 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.

WIS. CONST. art. XIII, § 13. McConkey asserts what is known as a single-amendment or single-subject procedural challenge, contending that the Marriage Amendment violates Article XII, Section 1 of the State Constitution because its provisions serve distinct and separate purposes not dependent upon or connected with each other. This claim finds no

support in either Wisconsin law or in the law of other states, and thus should be rejected by this Court.

INTEREST OF AMICUS

Amicus Curiae Wisconsin Family Council ("WFC" or "*Amicus*") was founded in 1986 to educate the public and encourage the legislature to affirm Judeo-Christian principles and values in the areas of marriage, family, and religious liberty. To further its mission, WFC actively supported the Marriage Amendment challenged in this case. Initially, WFC worked closely with state legislators to place the Amendment on the ballot. Then, once the legislators submitted the Amendment to the people, WFC worked tirelessly educating the public about the Amendment and advocating for its enactment.

Because of its direct and extensive involvement in the Marriage Amendment's enactment, WFC has a heightened interest in ensuring that the Amendment

is not improperly invalidated. Moreover, WFC's first-hand knowledge about the purpose of and the procedure surrounding the Amendment will benefit the Court in resolving the legal issues in this case.

ARGUMENT

I. MCCONKEY LACKS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE MARRIAGE AMENDMENT UNDER ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION.

The Circuit Court incorrectly concluded that McConkey had standing to challenge the constitutionality of the Marriage Amendment. Van Hollen's brief succinctly and persuasively addresses the standing question. So rather than restate the eloquent arguments expounded therein, *Amicus* joins and supports Van Hollen's arguments.

Amicus nevertheless emphasizes one point about the standing question. The Circuit Court found that "[e]very voter is entitled to a constitutionally, procedurally valid amendment and

is harmed . . . when that does not occur." *See* R-Ap. 135. In effect, the Circuit Court concluded that all voters have standing to challenge the procedural propriety of all constitutional amendments. This reasoning fundamentally transforms standing analysis in the voting context, *see Mast v. Olsen*, 89 Wis. 2d 12, 16 (1979), essentially permitting any voter to assert a procedural challenge to any constitutional amendment. That result conflicts sharply with precedent.

Neither federal nor Wisconsin law permits standing, as the Circuit Court has, based solely on a litigant's status as voter. Instead, voters have standing only to the extent that they allege facts showing a particular "disadvantage to themselves as individual[] [voters]." *Baker v. Carr*, 369 U.S. 186, 206 (1962). But as demonstrated in Van Hollen's brief, McConkey has failed to show that he suffered a

particularized injury. That requirement does not evaporate simply because McConkey's claim arises in the voting context. In short, affirming the Circuit Court's decision would greatly expand the doctrine of standing by permitting any disgruntled voter to bring a procedural challenge to any amendment he substantively dislikes.

The Court should thus find that McConkey lacks standing to bring this legal challenge.

II. THE MARRIAGE AMENDMENT DOES NOT VIOLATE ARTICLE XII, SECTION 1 OF THE STATE CONSTITUTION.

Article XII, Section 1 of the Wisconsin Constitution states, in pertinent part, that "if more than one amendment be submitted [to the voters], they shall be submitted in such manner that the people may vote for or against such amendments separately." WIS. CONST. art. XII, § 1. The enactment of a constitutional provision violates

Article XII, Section 1 only where the newly enacted provision contains more than one "amendment."

A. The Provisions Of The Marriage Amendment Constitute A Single Amendment.

A single amendment may include "several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject." *State ex rel. Hudd v. Timme*, 54 Wis. 318, 339 (1882); *see also State ex rel. Thomson v. Zimmerman*, 264 Wis. 644, 655 (1953). "In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *Hudd*, 54 Wis. at 336.

"It is within the discretion of the legislature to submit several distinct propositions as one amendment if they relate to the same subject matter

and are designed to accomplish one general purpose." *Milwaukee Alliance Against Racist and Political Repression v. Elec. Bd. of Wisconsin*, 106 Wis. 2d 593, 604-05 (1982). The legislature is "not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose." *Hudd*, 54 Wis. at 337. Instead, the legislature may bundle multiple propositions in one amendment so long as they all relate to the same subject and further the same "general object or purpose." *Milwaukee Alliance*, 106 Wis. 2d at 607.

The Marriage Amendment is composed of only two short sentences, containing a mere forty-three words. The first sentence—*i.e.*, the definitional provision—relates directly to the second sentence—*i.e.*, the imitation provision—and these inextricably intertwined provisions together constitute just one amendment. Both provisions address the subject of

marriage: the definitional provision defines marriage; and the imitation provision prohibits marriage counterfeits. Both provisions further the same general purpose: to preserve the unique institution of marriage as the union of one man and one woman. The definitional provision achieves that goal by defining marriage as the union of one man and one woman. The imitation provision furthers that purpose by preventing the indirect reconfiguration or imitation of marriage through alternative unions. In short, the Amendment protects the institution of marriage from redefinition or restructuring, by either direct or indirect means.

McConkey's analysis attempts to distort the Marriage Amendment's purpose. By focusing only on language from the Amendment's joint resolution, McConkey tries to limit its purpose to defining the institution of marriage in Wisconsin. *See* McConkey

Brief at 30-33. *Amicus*, however, as a first-hand participant in the Amendment's enactment, strenuously refutes McConkey's narrow characterization of its purpose. As Van Hollen's brief demonstrates and the Circuit Court found, the general purpose of the Marriage Amendment is much broader: to preserve and protect the unique institution of marriage. The Court should thus reject McConkey's self-serving characterization of the Amendment's purpose.

McConkey also attempts to create a more demanding legal standard, contending that the provisions of an amendment must be so "interrelated" that "the defeat of one question would destroy the overall purpose of the . . . proposal." *See* McConkey Brief at 19. While this Court has found that such a close relationship between provisions satisfies the single-amendment rule, *see Milwaukee Alliance*, 106

Wis. 2d at 607, it has never required that the relationship between provisions reach such a heightened level of interrelatedness. In fact, this Court has upheld a measure against a single-amendment challenge even though one of the provisions was not "intimately and necessarily connected" to the other provisions or the overall purpose. *See Hudd*, 54 Wis. at 336-37. This Court should thus reject McConkey's attempt to erect a stringent legal requirement not supported by precedent.

Nevertheless, McConkey's more rigorous standard, while not legally mandated, is satisfied here, because the enactment of the definitional provision without the imitation provision would "destroy the overall purpose" of the Amendment. As stated, the purpose of the Amendment is to preserve the unique institution of marriage. The two-sentence

Amendment recognizes that "marriage-by-another-name" relationships—such as civil unions or domestic partnerships—undermine the institution of marriage by offering simulated alternatives. While the term "marriage" is preserved by the first sentence of the Amendment, without the second provision, this protection would be merely grammatical because the institution itself would be susceptible to change and restructuring through imitation unions.[1] A marriage amendment without the imitation provision would be an insufficient protection for society's most important institution.

---

[1] For example, a legislature could duplicate the concept of marriage, give it a new name like a "civil union," and offer that replica institution to whomever it chooses. *See* VT. STAT. ANN. Tit. 15, § 1204(a) ("Parties to a civil union shall have all the same benefits . . . as are granted to spouses in a marriage."). Or a court, as a judicial remedy, could force the legislature to create an imitation marital structure. *See Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006) (requiring the legislature, among other options, to "create a separate statutory structure [of marital unions], such as a civil union").

B. This Court's Precedent Demonstrates That The Enactment Of The Marriage Amendment Did Not Violate Article XII, Section 1.

Wisconsin law demonstrates that the enactment of the Amendment did not violate Article XII, Section 1. This Court has broadly defined the term "amendment," *see Milwaukee Alliance*, 106 Wis. 2d at 607; *Thomson*, 264 Wis. at 655; *Hudd*, 54 Wis. at 339, expansively interpreted the "general object or purpose" of challenged amendments, *see Milwaukee Alliance*, 106 Wis. 2d at 608, and accepted tenuous connections between an amendment's provisions and its general purpose, *see Hudd*, 54 Wis. at 36-38. This Court has thus repeatedly rejected single-amendment challenges, finding only one such violation throughout this State's long history.

The first Wisconsin case addressing a single-amendment challenge was *Hudd*, 54 Wis. at 318. In that case, this Court considered whether the

enactment of a constitutional amendment changing the legislative sessions from an annual to a biennial term violated Article XII, Section 1. That amendment included four separate provisions, one of which increased the legislators' salaries.

The *Hudd* Court found that, despite the joining of these four distinct provisions, a single-amendment violation had not occurred. This Court reasoned that "the whole scope and purpose of the matter submitted to the electors . . . was the change from annual to biennial sessions of the legislature." *Id.* at 336. The Court then concluded that all four provisions furthered that general purpose, specifically finding that the salary provision, while "perhaps[] less intimately and necessarily connected with the change to biennial sessions," was nevertheless connected with the amendment's overall purpose. *Id.* at 336-37. *Hudd* plainly demonstrates that this Court will

accept even a tenuous connection between an amendment's individual provisions and its general purpose. Here, however, the connection is direct: the imitation provision is clearly connected to—and, indeed, is an integral part of—the Marriage Amendment's purpose of preserving and protecting marriage as a unique institution.

Milwaukee Alliance, 106 Wis. 2d at 604-05, involved an amendment creating a "conditional release" system for those accused of crimes. The amendment included five substantive provisions, each involving distinct issues ranging from conditions of release to post-arrest hearings. *Id.* at 600-01.

This Court held that the expansive amendment at issue in *Milwaukee Alliance* did not violate the single-amendment requirement. In reaching that conclusion, this Court broadly defined the purpose of the amendment and concluded that its provisions

were "integral and related aspects of the amendment's total purpose of adopting the concept of conditional release." *Id.* at 608. Likewise, in this case, both the definitional provision and the imitation provision constitute "integral and related aspects" of the Marriage Amendment's purpose of preserving the unique institution of marriage as the union of one man and one woman.

Thomson, 264 Wis. at 654-57, is the only case where this Court has found a single-amendment violation. That case involved a constitutional amendment authorizing the legislature to consider physical area, in addition to population, when drafting senatorial voting districts. This Court found a single-amendment violation because the challenged amendment implemented two unrelated substantive changes in the law. *Id.* at 654. First, a provision changing the boundaries of assembly (rather than

senate) districts "ha[d] no bearing on the main purpose of the proposed amendment . . . , nor [did] it tend to effect or carry out that purpose." *Id.* at 656. Second, a provision adding Native-Americans to the population calculation was "not a detail of a main purpose to consider area in senate districts[,] but [was] a separate matter [that] must be submitted as a separate amendment." *Id.* at 657. For those reasons, this Court found a single-amendment violation.

Contrary to McConkey's suggestions, the redistricting amendment in *Thomson* is unlike the Marriage Amendment at issue here. Even though the purpose of the amendment in *Thomson* was merely to "direct[] the legislature to take area as well as population into account in apportioning the senate districts," *id.* at 656, that amendment made "drastic, revolutionary" changes in the assembly-district

boundaries and population computations, *id.* at 656-57. Thus, the *Thomson* amendment significantly impacted topics unrelated to its purpose. In contrast, the Marriage Amendment's purpose is to protect the unique institution of marriage. The definitional provision prevents the direct redefining of marriage, and the imitation provision prevents the restructuring of marriage through indirect means. Unlike in *Thomson*, both provisions of the Marriage Amendment further its overall purpose.

In sum, both provisions of the Marriage Amendment relate to the same subject and further the same purpose; thus, they together constitute one amendment whose enactment did not violate Article XII, Section 1.

III. EVERY STATE SUPREME COURT THAT HAS ADDRESSED A SIMILAR SINGLE-AMENDMENT CHALLENGE TO A MARRIAGE AMENDMENT HAS REJECTED THAT CLAIM.

Five state supreme courts have rejected legal challenges similar to the single-amendment challenge raised here. Each court found that the purpose of the challenged marriage amendment was to preserve marriage and its unique status (although each articulated that purpose in slightly different ways). And, most importantly, each court agreed that its state's marriage amendment did not violate single-amendment principles.[2]

---

[2] A Kentucky trial court also addressed this question in an unpublished decision. *See Wood v. Commonwealth ex rel. Grayson*, No. Civ.A. 04-CI-01537, 2005 WL 1258921, at *5-8 (Ky. Cir. Ct. May 26, 2005). The language of the Kentucky marriage amendment is identical to the Marriage Amendment at issue here. *See* KY. CONST. § 233A. In rejecting that single-amendment challenge, the Kentucky court concluded:

> It cannot be said that the second clause of the amendment pertaining to [a] legal status "identical to or similar to marriage for unmarried individuals" [*i.e.*, the imitation provision] is so foreign that it has no bearing upon a constitutional definition of marriage. Nor can this [c]ourt conclude that the two clauses of the

The Massachusetts Supreme Judicial Court found that a proposed marriage amendment did not violate the single-amendment rule. *See Albano v. Attorney General*, 769 N.E.2d 1242, 1247 (Mass. 2002). The broadly worded amendment proposed in Massachusetts, which was far more intricate than the Amendment at issue here, contained both a definitional provision and an imitation provision (in addition to many others). *See id.* at 1245 n.4. An amendment does not violate Massachusetts' single-amendment rule "[so] long as the provisions of the [amendment] are related by a common purpose." *Id.* at 1247. The Massachusetts Supreme Judicial Court found that the proposed amendment did not violate the single-amendment rule because all of its

---

> amendment at issue are essentially unrelated to one another.

Wood, 2005 WL 1258921, at *7. Following the *Wood* court's lead, this Court should likewise conclude that the two provisions of the Marriage Amendment are sufficiently related to constitute a single amendment.

provisions "relate[d] to the common purpose of restricting the benefits and incidents of marriage to opposite-sex couples." *Id.* at 1247.

Similarly, the Louisiana Supreme Court held that its state's marriage amendment did not violate the single-amendment rule. *See Forum for Equality PAC v. McKeithen*, 893 So. 2d 715, 729-37 (La. 2005). That state's lengthy amendment includes both a definitional provision and an imitation provision (in addition to a few others). *Id.* at 717. Louisiana law permits multiple provisions to "be submitted as one amendment" so long as all the provisions "may be logically viewed as parts of a single plan." *Id.* at 732. The Louisiana Supreme Court rejected the single-amendment challenge to its marriage amendment because that measure "contain[ed] a single plan to defend [the] civil tradition of marriage" and "each

provision [therein] constitute[d] an element of [that] plan." *Id.* at 736.

Moreover, the Florida Supreme Court also rejected a single-amendment challenge to its state's proposed marriage amendment. *See Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 926 So. 2d 1229, 1233-35 (Fla. 2006). The proposed Florida amendment contained nearly identical language to that found in the Amendment challenged here. *See id.* at 1232. Florida law allows multiple provisions to be submitted as one amendment so long as they are "logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme." *Id.* at 1234. The court determined that the single plan of the proposed marriage amendment was "the restriction of the exclusive rights and obligations traditionally

associated with marriage to legal unions consisting of one man and one woman as husband and wife." *Id.* (quotations omitted). The court thus held that this common plan satisfied the requirements of the single-amendment rule. *Id.*

The Georgia Supreme Court also rejected a single-amendment challenge to its state's marriage amendment. *See Perdue v. O'Kelley*, 632 S.E.2d 110, 113 (Ga. 2006). Georgia's extensive marriage amendment contains both a definitional and imitation provision (in addition to many others). *See* GA. CONST. art. 1, § 4, ¶ 1. In that state, "whether . . . a constitutional amendment violates the multiple subject matter rule [depends on] whether all . . . parts of the . . . constitutional amendment are germane to the accomplishment of a single objective." *Perdue*, 632 S.E.2d at 112. The Georgia Supreme Court determined that the amendment's purpose was

to "reserv[e] marriage and its attendant benefits to unions of man and woman," and held that all the provisions were logically related to that purpose and, thus, did not violate the multiple-subject rule. *Id.* at 113.

Furthermore, the Arizona Supreme Court also rejected a single-amendment challenge to a proposed marriage amendment. *See Arizona Together v. Brewer*, 149 P.3d 742, 749 (Az. 2007). The amendment at issue in that case was nearly identical to the Amendment challenged here. *See id.* at 744 n.2. Arizona's single-amendment rule requires that provisions of a proposed amendment be "sufficiently related to a common purpose or principle that the proposal can be said to constitute a consistent and workable whole on the general topic embraced[.]" *Id.* at 745 (quotations and alterations omitted). The Arizona Supreme Court determined that the common

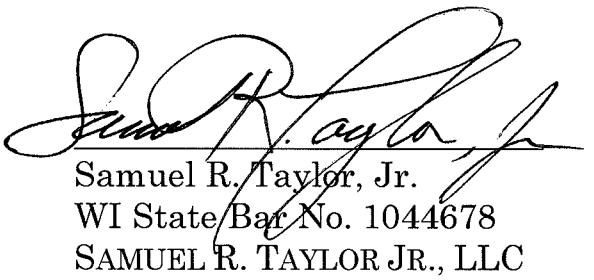
purpose of the proposed amendment was "to preserve and protect marriage" and that the provisions related directly to that purpose. *Id.* Thus, the court concluded that the proposed marriage amendment satisfied the single-amendment rule.

CONCLUSION

For the foregoing reasons, the enactment of the Wisconsin Marriage Amendment did not violate the single-amendment requirement in Article XII, Section 1 of the State Constitution.

Dated this 22 day of August, 2009.

Respectfully submitted,



Samuel R. Taylor, Jr.
WI State Bar No. 1044678
SAMUEL R. TAYLOR JR., LLC
6501 3rd Avenue
2nd Floor, Suite 11
Kemper Center
Kenosha, WI 53143
Tel: (262) 478-7717
Fax: (224) 944-0083

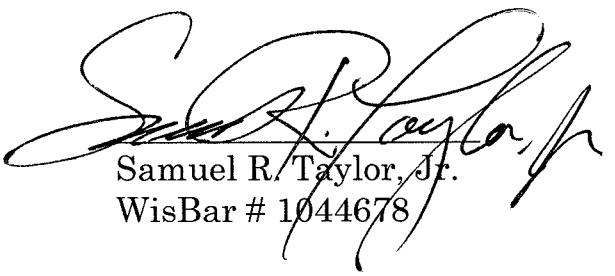
Brian W. Raum*
James A. Campbell*
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
Tel: (480) 444-0020
Fax: (480) 444-0028

**Pro hac vice* admission pending

Attorneys for Wisconsin Family Council

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,910 words as calculated by the word-count feature in Microsoft Word.



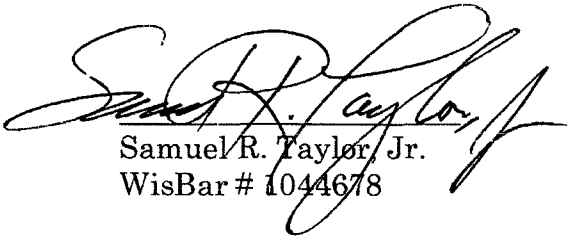
Samuel R. Taylor, Jr.
WisBar # 1044678

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I am unable to submit an electronic copy of this brief, as required under Wisconsin Statutes § 809.19(12), until the Motion for Permission to File an *Amicus Curiae* Brief posts to the Court's docket. But I certify that I will submit an electronic copy of the brief once that Motion posts to the docket.

I further certify that the electronic brief will be identical in content and format to the printed form of the brief.

A copy of this certification has been served with the paper copies of this brief filed with the Court and served on all parties.



Samuel R. Taylor, Jr.
WisBar # 1044678

SUPREME COURT OF WISCONSIN
Case No. 2008AP001868

William C. McConkey,
Plaintiff-Appellant-Cross-Respondent,
v.

J.B. Van Hollen, in his role as
Attorney General of Wisconsin,
Defendant-Respondent-Cross Appellant.

BRIEF AND APPENDIX OF AMICUS CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., FAIR WISCONSIN, AND ACLU OF WISCONSIN, IN SUPPORT OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT

On Appeal from the Circuit Court of Dane County,
Honorable Richard G. Neiss Presiding,
Circuit Court Case No. 2007CV002657

David B. Goroff
Foley & Lardner LLP
321 N. Clark St., Suite 2800
Chicago, IL 60654-5313
(312) 832-4500
Of Counsel for Lambda Legal Defense and Education Fund, Inc. Fair Wisconsin, and the ACLU of Wisconsin

Christopher R. Clark
Lambda Legal Defense
and Education Fund, Inc.
11 East Adams, Suite 1008
Chicago, IL 60603
(312) 663-4413
Of Counsel for Lambda Legal Defense and Education Fund, Inc.

William M. Conley (WBN 1009504)
Callie M. Bell (WBN 1047590)
Katherine C. Smith (WBN 1065796)
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035
Attorneys for Lambda Legal Defense and Education Fund, Inc. Fair Wisconsin, and the ACLU of Wisconsin

Laurence J. Dupuis (WBN 1029261)
ACLU of Wisconsin Foundation, Inc.
207 E. Buffalo Street, #325
Milwaukee, WI 53202
(414) 272-4032
Of Counsel for ACLU of Wisconsin

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE COURT SHOULD NOT INTERPRET THE MARRIAGE AMENDMENT PREMATURELY OR OVER-BROADLY. 1

A. The Plain Language Of The Amendment's Second Sentence Prohibits Only Legal Statuses That Are Exactly The Same As Or Essentially Alike Marriage..3

B. The Electoral Debate Regarding The Amendment And The Practices To Which It Responded Confirm That It Was Not Intended To Bar A Status That Provides Fewer Legal Protections Than Marriage. 8

C. Subsequent Legislation Confirms The Amendment's Narrow Reach. 12

II. THE AMENDMENT WOULD VIOLATE THE SEPARATE-AMENDMENT RULE IF THE PROHIBITION AGAINST A "LEGAL STATUS SUBSTANTIALLY SIMILAR TO THAT OF MARRIAGE" WERE INTERPRETED TO APPLY TO MORE THAN A LEGAL STATUS PROVIDING ALL OF THE RIGHTS AND RESPONSIBILITIES OF MARRIAGE BY ANOTHER NAME. 14

CERTIFICATION AS TO FORM

CERTIFICATION OF APPENDIX

TABLE OF AUTHORITIES

STATE CASES

Baker v. State of Vt.,
744 A.2d 864 (Vt. 1999) 9

Dairyland v. Doyle,
2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 10-12

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 5

In re Opinions of the Justices,
802 N.E.2d 565 (Mass. 2004) 5

In re Termination of Parental Rights to Max G.W.,
2006 WI 93, 293 Wis. 2d 530, 716 N.W.2d 845 1

Kerrigan v. Comm'r of Pub. Health,
957 A.2d 407 (Conn. 2008) 5

Lewis v. Harris,
908 A.2d 196 (N.J. 2006) 9

Norquist v. Zeuske,
211 Wis. 2d 241, 564 N.W.2d 748 (1997) 2

State v. Cole,
2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328 8

State v. Timme,
54 Wis. 318 11 N.W. 785 (Wis. 1882) 14

Thompson v. Craney,
199 Wis. 2d 674, 546 N.W.2d 123 (1996)..... 2, 13

Wis. Citizens v. Dep't of Natural Res.,
2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612 3

STATE STATUTES

2009 N.H. Laws Ch. 59 6

Vt. Stat. Ann., tit. 15, §1204(a) (1999) 6

Wis. Stat. ch. 766 13

Wis. Stat. ch. 767 13

Wis. Stat. § 765.001(2) 4, 13

Wis. Stat. § 766.55(2)(a) 13

CONSTITUTIONAL PROVISIONS

Tex. Const., art. I, §32(b) 7

TREATISES

Black's Law Dictionary 1428-9 (9th ed. 2009) 7, 9

I. THE COURT SHOULD NOT INTERPRET THE MARRIAGE AMENDMENT PREMATURELY OR OVER-BROADLY.

This lawsuit asks whether a ballot question that amends the Wisconsin Constitution to limit marriage to different-sex couples may also include a separate provision prohibiting recognition of any legal status for same-sex couples that is "identical or substantially similar" to marriage ("Amendment") without violating Article XII, Section 1 of that Constitution ("separate-amendment rule"). This *amicus* brief is submitted to assist this Court in construing what the Amendment's terms "identical or substantially similar" mean. Although it is unclear whether those terms can be interpreted in ***any*** manner that would keep the Amendment from violating the separate-amendment rule (a question beyond this brief), it ***is*** clear that interpreting these terms too broadly would violate the separate-amendment rule and should be avoided.[1] Additionally, should the Court conclude that the Amendment does not violate the separate-amendment rule -- regardless of how the terms "identical or substantially

[1] *See In re Termination of Parental Rights to Max G.W.*, 2006 WI 93, ¶ 20, 293 Wis. 2d 530, 716 N.W.2d 845 (courts should avoid interpretations that create constitutional infirmities).

similar" are interpreted -- the Court should avoid prematurely construing the terms because the Amendment's effect on Wisconsin's recently-adopted domestic partnership law, 2009 Wis. Act 28 (June 30, 2009) ("Domestic Partnership Law"), is now the subject of separate litigation that merits its own full consideration.[2]

No one disputes that the plain language of the Amendment's first part limits marriage in Wisconsin to different-sex couples. The question is what the Amendment's second part prohibits. This Court examines three sources in construing a constitutional provision: the plain meaning of the words in their context; the constitutional debates and the existing practices when the provision was written; and "the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption [of the provision]." *Thompson v. Craney*, 199 Wis. 2d 674, 680, 546 N.W.2d 123 (1996). Here, each of these three sources compels the same construction – the Amendment's second part was meant to prohibit only (1) recognition of marriages

[2] *See Norquist v. Zeuske*, 211 Wis. 2d 241, 252, 564 N.W.2d 748 (1997) (questions regarding statute's constitutionality should not be decided prematurely, particularly where the record is insufficiently developed).

lawfully entered into elsewhere by same-sex couples (which are "identical" to marriage) and (2) same-sex legal relationships "essentially alike" marriage (which are "substantially similar" to marriage). The Amendment never was intended to prohibit the State from extending legal rights and protections to unmarried couples through a legal status that differs materially from marriage.

A. The Plain Language Of The Amendment's Second Sentence Prohibits Only Legal Statuses That Are Exactly The Same As Or Essentially Alike Marriage.

Under the plain meaning rule, "[w]ords and phrases are generally accorded their common everyday meaning, while technical terms or legal terms of art are given their accepted legal or technical definitions." *Wis. Citizens v. Dep't of Natural Res.*, 2004 WI 40, ¶ 6, 270 Wis. 2d 318, 677 N.W.2d 612. The terms "identical" and "substantially similar" are narrow and specific in meaning. When the Amendment was proposed, the Chief of Legal Services at the Wisconsin Legislative Council ("WLC") explained:

> 'Identical,' of course, means 'exactly the same for all practical purposes', 'being the same, having complete identity,' 'characterized by such entire agreement in qualities and attributes that identity may be assumed,' or 'very similar, having such close resemblance and such minor difference as to be essentially the same.' 'Similar' is defined as 'having characteristics in

> common, very much alike, comparable,' 'alike in substance or essentials,' or 'one that resembles another, counterpart', or 'nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference.' 'Substantially' is defined as meaning 'essentially; without material qualification.' Thus, something can be said to be 'substantially similar' if it is essentially alike something else.

WLC Letter regarding 2005 Assembly Joint Resolution 67 (Feb. 24, 2006) (App. 101-10.) (citations omitted; emphasis added).

The plain meaning of a legal status for same-sex couples that is "identical" to marriage cannot refer to anything other than marriages lawfully entered by same-sex couples in another jurisdiction. No legal status known by any term other than "marriage" can be considered exactly the same as marriage because no other status has the same consequences, is as meaningful to couples, carries the same ties to marriage's history, traditions, and celebrations or is accorded equal respect by society. Indeed, Wisconsin Statutes expressly recognize that "[t]he consequences of the marriage contract are more significant to society than those of other contracts." Wis. Stat. § 765.001(2).

The unique character of marriage has been recognized by courts across the country in ruling that legal

statuses such as civil unions or domestic partnerships fail to provide what marriage confers. For example, Massachusetts' high court ruled in *In re Opinions of the Justices*, 802 N.E.2d 565, 570 (Mass. 2004), that civil unions do not provide the same status as marriage, which "is specially recognized in society and has significant social and other advantages." Likewise, the California Supreme Court ruled in *In re Marriage Cases*, 183 P.3d 384, 445-46 (Cal. 2008), that even a comprehensive domestic partnership law denies same-sex couples marriage's "symbolic importance" and "dignity and respect" and provides a status of "lesser stature" than marriage and is unlikely to be treated the same as it. *See also Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (explaining that "the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody").

A number of states that have enacted civil union laws likewise have recognized that civil unions are far from identical to marriage. Even though they allowed civil unions providing all the same legal benefits, protections and

responsibilities as marriage,[3] both Vermont and New Hampshire this year enacted laws allowing same-sex couples to marry[4] because civil unions turned out not to be identical to marriage. *See* Report of the Vt. Comm'n On Family Recognition and Prot. at 26-27 (Apr. 21, 2008) (App. 111-44.) (civil unions unequal to marriage in practice, nor similar in terminology, social, cultural and historical significance or portability); *see also* Final Report of the N.J. Civil Union Review Comm'n at 1 (Dec. 10, 2008) (App. 145-223.) (providing same-sex couples civil unions rather than marriage "invites and encourages unequal treatment of same-sex couples and their children" and has "negative effect[s] … [on their] physical and mental health").

It is easy to see that a relationship other than marriage cannot be considered identical to it. Were a married couple told that they were no longer married but instead were in a civil union or domestic partnership, they unquestionably would feel that they had lost something precious. Even though the legal rights and responsibilities might be the same

[3] Vt. Stat. Ann., tit. 15, §1204(a) (1999); N.H. Rev. Stats. Ann. § 457A:6 (2008).

[4] 2009 Vt. Laws 3; 2009 N.H. Laws Ch. 59.

as before, they would lose the status of marriage. Thus, when the Amendment refers to a legal status identical to marriage, it cannot be referring to anything other than the marriages same-sex couples are allowed to enter in other states – which are identical to other marriages in those states – but which Wisconsin does not recognize because of the Amendment. *See* Memorandum, David S. Schwartz, Professor, to Jim Dole, Wisconsin Governor at 1-2, 9 (June 4, 2009) (App. 224-37) .

Less clear and indeed premature, particularly on this limited record, is what relationship other than marriage is "substantially similar." While some constitutional amendments barring marriage have also barred any legal status "similar" to marriage,[5] Wisconsin's Amendment is narrower than that and only prohibits a status that is "s*ubstantially* similar" to marriage. The lead definition of "substantially" contained in Black's Law Dictionary is "essentially." Black's Law Dictionary 1428-9 (9th ed. 2009). Accordingly, a plain reading of such a relationship would be one "essentially" similar to a marriage, in that they provide

[5] *E.g.*, Tex. Const., art. I, §32(b).

the same rights and responsibilities under a different name. The plain meaning of the phrase "substantially similar," however, cannot refer to any lesser status, which would not be essentially the same as marriage. Since the rights and responsibilities of a "civil union" or "domestic partnership" vary from state to state, it is premature for this Court to opine what relationship is "essentially alike" marriage in all but name.

B. The Electoral Debate Regarding The Amendment And The Practices To Which It Responded Confirm That It Was Not Intended To Bar A Status That Provides Fewer Legal Protections Than Marriage.

A second source important in construing a constitutional provision is the debate surrounding its adoption and the practices existing at the time. As explained *State v. Cole*, 2003 WI 112, ¶ 10, 264 Wis. 2d 520, 665 N.W.2d 328 (citations omitted), Wisconsin courts construe constitutional amendments to "give effect to the intent of the framers and of the people who adopted it."

In reviewing the Amendment's history, the Attorney General correctly observes that the prohibition against recognition of any legal status that is "substantially similar" to marriage had a specific and narrow intended

meaning – to "prevent same-sex marriages from being legalized in this state regardless of the name used by a court or other body to describe the legal institution." Att'y Gen. Br. at 27. This particular language was aimed, in part, at a pending bill that "would have created a new legal status conferring ***all*** the statutory and other rights and responsibilities of marriage" under a different name. *Id*. at 28 (emphasis added). The Amendment's proponents intended the "substantially similar" language to ensure the Amendment could not be "circumvented by the creation of an alternative legal status that was like marriage ***in all but name***." *Id*. at 29 (emphasis added).

The proponents apparently intended, at least in part, to respond to national marriage litigation developments where parallel institutions were created to provide ***all*** statutory rights, benefits and obligations of marriage, but under a different name. *E.g., Baker v. State of Vt.*, 744 A.2d 864, 886-7 (Vt. 1999) (permitting the legislature to create a status with all the same rights and responsibilities as marriage under the name "civil union"); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006) (same). Indeed, the Amendment's legislative sponsors unequivocally stated that the Amendment would not

prohibit extending legal benefits to same-sex couples, only legal relationships that conferred marriage by another name. State Senator Fitzgerald, who introduced the Amendment through 2005 Senate Joint Resolution 53, noted "Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could." (App. 240.)

Likewise, Representative Gundrum, in introducing the Amendment through 2003 Assembly Joint Resolution 66, wrote that it:

> does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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.

(App. 243.) (emphasis supplied.)

It therefore has to be assumed that legislators voting for the Amendment did not intend it to prohibit a legal status conferring anything less than all legal rights of marriage. *See Dairyland v. Doyle*, 2006 WI 107, ¶¶ 33-36, 295 Wis. 2d 1, 719 N.W.2d 408 (when Wisconsin's legislators are told that an amendment will have a specific reach, they are assumed to have voted with that in mind).

This meaning of the Amendment is confirmed by "the information used to educate the voters during the ratification campaign," which also "provides evidence of the voters' intent." *Id.,* 2006 WI 107, ¶ 37. The organizations that conducted voter outreach supporting the Amendment stated that it would not prohibit extending domestic partnership benefits to same-sex couples. (App. 245 ("the bottom line is this: the marriage amendment is not about benefits. It is about preserving one-man/one-woman marriage and giving children the best opportunity to have a mother and a father.")) Julaine Appling, President of Vote Yes for Marriage in Madison, dismissed fears that the Amendment would affect domestic partner benefits as a "chicken little" scare tactic meant to distract voters from the proposal's real aim – preventing same-sex marriage.[6] (App. 247; *see also* Wisconsin Coalition for Traditional Marriage *Answers to Commonly Asked Questions* (App. 250-51)[7] ("nothing in the second sentence . . . would prohibit currently existing benefit

[6] Curiously, Ms. Appling is a petitioner in *Appling v. Doyle*, *supra*, where she now asserts the Amendment has precisely the effect she disclaimed.

[7] *See* http://www.savemarriagewi.org/faq.html.

arrangements such as hospital visitations or private property transfer, nor prevent such arrangements in the future").)

C. Subsequent Legislation Confirms The Amendment's Narrow Reach.

Finally, the "legislature's subsequent actions are a crucial component of any constitutional analysis because they are clear evidence of the legislature's understanding of that amendment." *Dairyland*, 2006 WI 107, ¶45. As the first Wisconsin law passed after the Amendment's adoption that directly affects the legal rights of same-sex couples, the Domestic Partnership Law provides certain benefits to same-sex couples who register as domestic partners, but unquestionably does not afford them the full scope of rights provided to spouses in marriage,[8] confirming that the Amendment only bans a legal status "essentially alike" marriage, but not one short of that.

By way of example only, domestic partnership status under the Wisconsin law does not include:

---

[8] *See* Letter from Don Dyke to Bob Lang, Director, Legislative Fiscal Bureau, (May 6, 2009) ("Fiscal Bureau Letter") (explaining that Domestic Partnership Act provides those who register as domestic partners only certain rights regarding health care, real property, and estate law, such as hospital visitation rights, health care decision-making, standing to sue for wrongful death, family leave eligibility, and the ability to hold property as joint tenants) (App. 273-280).

(1) the mutual obligation of support that spouses have in a marriage (*e.g.*, Wis. Stat. §§ 765.001(2) and 766.55(2)(a));

(2) the comprehensive marital property system applicable to spouses. (*see generally* Wis. Stat. ch. 766); or

(3) the availability of divorce law for terminating a marriage (*see generally* Wis. Stat. ch. 767).

Likewise "[t]he above legal aspects of marriage are comprehensive, core aspects of the legal status of marriage that are not generally included as part of the legal status conferred by a domestic partnership." (App. 275)

The Legislature's enactment of the Domestic Partnership Law evidences no impediment to providing unmarried couples benefits that were less comprehensive than those provided to those who legally marry. As "the first law passed following adoption [of the Amendment]" *Thompson,* 199 Wis. 2d at 680, the Domestic Partnership Law puts beyond doubt that only marriages of same-sex couples entered in other states, and perhaps an as yet undefined status "essentially alike" marriage by another name, can be considered legal statuses that the Amendment forbids as identical or substantially similar to marriage.

II. THE AMENDMENT WOULD VIOLATE THE SEPARATE-AMENDMENT RULE IF THE PROHIBITION AGAINST A "LEGAL STATUS SUBSTANTIALLY SIMILAR TO THAT OF MARRIAGE" WERE INTERPRETED TO APPLY TO MORE THAN A LEGAL STATUS PROVIDING *ALL* OF THE RIGHTS AND RESPONSIBILITIES OF MARRIAGE BY ANOTHER NAME.

"In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *State v. Timme*, 54 Wis. 318, 336 11 N.W. 785, 791 (Wis. 1882).[9] As the foregoing sections demonstrate, the language, purpose, and history of the Amendment all confirm it was intended to prohibit only recognition of marriages lawfully entered by same-sex couples in other states and relationships conferring all the rights and responsibilities of marriage under another name. This is a different subject than denying same-sex couples a lesser status under which they may receive more limited rights or benefits. Furthermore, the Amendment's purpose of not allowing marriage by same-sex couples – whatever name is conferred on that status – is not

[9] The two-subject test is discussed in McConkey's brief and not repeated here.

dependent upon or connected with denying same-sex couples more limited rights. Were the Amendment construed to have such a broad reach that it would prohibit more limited rights, like those just enacted in the Domestic Partnership Law, it would violate Wisconsin's separate-amendment rule. As demonstrated above, marriage (and marriage by a different name) are viewed as a vastly different subject than domestic partnership benefits by the Amendment's drafters and proponents, Wisconsin's legislature, and other states, including California, Massachusetts, New Jersey and Vermont.

Perhaps as important, these different statuses were seen as quite distinct by Wisconsin's voters when the Amendment was enacted. A 2006 statewide poll showed that Wisconsin's electorate understood that marriage was unique and fundamentally different than other types of relationship recognition. (App. 281-83.) The poll revealed that 59% of then-likely voters at least leaned "yes" on the Amendment, while 38% were at least leaning "no." (*Id.*)[10] In the same

[10] The Amendment ultimately was approved by 59% of the electorate. (Id.)

poll, however, 44% of likely-voters at least leaned "no" when presented with *only* the second sentence of the Amendment, while only 40% at least leaned "yes." (*Id.*).

The Attorney General correctly notes in his cross-appeal that "The separate amendment rule … prevents an unpopular measure from passing by being hitched to a popular one." Br. of Cross-Appellant at 6. That is precisely what the Amendment would have done if it actually barred not only marriage, but also less protective legal statuses. The Amendment therefore should not be construed so broadly that it would violate Wisconsin's separate amendment rule.

Dated this 27th day of August, 2009

/s/ Katherine C. Smith

David B. Goroff
Foley & Lardner LLP
321 N. Clark St., Suite 2800
Chicago, IL 60654-5313
(312) 832-4500
Of Counsel for Lambda Legal Defense and Education Fund, Inc. Fair Wisconsin, and the ACLU of Wisconsin

Christopher R. Clark
Lambda Legal Defense
and Education Fund, Inc.
11 East Adams, Suite 1008
Chicago, IL 60603
(312) 663-4413
Of Counsel for Lambda Legal Defense and Education Fund, Inc.

William M. Conley (WBN 1009504)
Callie M. Bell (WBN 1047590)
Katherine C. Smith (WBN 1065796)
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035
Attorneys for Lambda Legal Defense and Education Fund, Inc. Fair Wisconsin, and the ACLU of Wisconsin

Laurence J. Dupuis (WBN 1029261)
ACLU of Wisconsin Foundation, Inc.
207 E. Buffalo Street, #325
Milwaukee, WI 53202
(414) 272-4032
Of Counsel for ACLU of Wisconsin

CERTIFICATION AS TO FORM

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(7) for an amicus brief and appendix produced using the following font:

□ Monospaced font: 10 characters per inch; double spaced; 1.5-inch margin on left side, and 1 inch margins on the other 3 sides. The length of this brief is _____.

■ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2970 words.

I hereby certify that the text of the e-brief is identical to the text of the paper brief.

Dated this 27th day of August, 2009

/s/ Katherine C. Smith

William M. Conley (WBN 1009504)
Callie M. Bell (WBN 1047590)
Katherine C. Smith (WBN 1065796)
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035

Attorneys for LAMBDA Legal Defense and Education Fund, Inc., Fair Wisconsin and ACLU of Wisconsin

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings of opinions of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I hereby certify that the text of the e-appendix is identical to the text of the paper appendix.

Dated this 27th day of August, 2009

/s/ Katherine C. Smith

William M. Conley (WBN 1009504)
Callie M. Bell (WBN 1047590)
Katherine C. Smith (WBN 1065796)
Foley & Lardner LLP
150 East Gilman Street
Madison, WI 53703-1481
(608) 257-5035

Attorneys for LAMBDA Legal Defense and Education Fund, Inc., Fair Wisconsin and ACLU of Wisconsin

APPENDIX TABLE OF CONTENTS

February 24, 2006 Wisconsin Legislative Council Memo from Don Dyke, Chief of Legal Services, to Representative Mark Gundrum re: 2005 Assembly Joint Resolution 67 (Marriage Amendment)	App. 101-10
April 21, 2008 Report of the Vermont Commission on Family Recognition and Protection	App. 111-44
December 10, 2008 Final Report of the New Jersey Civil Union Review Commission, "The Legal, Medical, Economic & Social Consequences of New Jersey's Civil Union Law"	App. 145-223
June 4, 2009 University of Wisconsin Law School Letter from Professor David S. Schwartz to Governor Jim Doyle Regarding Constitutionality of Domestic Partner Benefit Provisions in the Governor's 2009-11 Executive Budget, AB 75	App. 224-37
December 8, 2005 Milwaukee Journal Sentinel Article by Stacy Forster, "Referendum Closer on Gay Marriage Ban State Senate Passes Amendment; It Could be Factor for Doyle in '06"	App. 238-42
January 29, 2004 Memo to All Legislators From State Representatives Gundrum, Wood, Vukmir, Nischke and State Senator Fitzgerald re: Co-Sponsorship of LRB 4072/2, Constitutional Amendment Affirming Marriage	App. 243
The Family News Connection, a Publication by the Family Research Institute of Wisconsin, Volume 2, Issue 1 Special Marriage Edition Fall 2006, "Marriage Amendment Lingo – Get it Straight!"	App. 244-46
October 15, 2006 Wisconsin State Journal Article by Jason Stein, "What About Unmarried Male-Female Couples?"	App. 247-49
Wisconsin Coalition for Traditional Marriage, Inc. FAQ (http://www.savemarriagewi.org/faq.html)	App. 250-52

May 19, 2009 Joint Committee on Finance Paper #391, "Establishment of Domestic Partnership and Related Rights and Benefits (General Provisions)	App. 253-72
May 6, 2009 Letter, Dan Dyke, Chief of Legal Services, to Bob Lang, Director, Legislative Fiscal Bureau	App. 273-80
April 18-23, 2006 Wisconsin Statewide Election Issues Survey, Fairbank, Maslin, Maullin & Associates, 220-2044 WFT, pp. 1, 4-5	App. 281-83

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE MARK GUNDRUM

FROM: Don Dyke, Chief of Legal Services

RE: 2005 Assembly Joint Resolution 67 (Marriage Amendment)

DATE: February 24, 2006

You have requested comment in response to certain concerns raised about the possible effect of 2005 Assembly Joint Resolution 67[1].

In particular, those concerns raise questions about the legal ramifications to unmarried persons of the language of 2005 Assembly Joint Resolution 67. That resolution is a proposed constitutional amendment, approved by both the Assembly and the Senate on first consideration during the 2003-04 Legislative Session,[2] that would provide that only a marriage between a man and a woman would be recognized or valid in this state. In addition, the proposed amendment would provide that a legal status identical or substantially similar to that of marriage for unmarried individuals would not be valid or recognized in this state. Specifically, the amendment would add the following language to the state constitution:

> 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.

As noted, the constitutional amendment proposed by Assembly Joint Resolution 67 passed both houses of the Legislature last session. The proposed amendment must pass in identical form this session before it can be submitted to the voters at a statewide referendum. If the voters approve the amendment, it would become part of the state constitution.

---

[1] This memorandum is based on the substantial contribution of Robert J. Conlin, a former Senior Staff Attorney with the Legislative Council staff.

[2] The Senate companion to Assembly Joint Resolution 67, 2005 Senate Joint Resolution 53, has been approved by the Senate in this legislative session.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

The concerns about the effect of Assembly Joint Resolution 67 addressed by this memorandum appear to arise from 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.

This memorandum attempts to help you better understand how a court might interpret the second sentence of the amendment. At the outset, though, it is noted that it is always difficult to predict how a court may ultimately interpret a constitutional provision. In addition, as noted above, the debate over the proposed amendment is not yet over and the measure is not yet a part of the constitution. Further, if the amendment passes on second consideration, the Attorney General will be expected to provide an official explanatory statement of the effect of either a "yes" or "no" vote on the measure. However, this memorandum will apply generally recognized principles of constitutional interpretation in order to give you a clearer picture of how a court may interpret the second sentence of the proposed amendment.

This memorandum suggests that a court could reasonably conclude that the second sentence of 2005 Assembly Joint Resolution 67 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status which is the same as, or is nearly the same as, marriage. Further, no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving individual benefits or protections or utilizing the law in such a way as to allow them to privately order their lives even though such benefits or use of the laws may result in the unmarried individuals sharing in benefits or protections that also happen to be offered to married persons.

BACKGROUND

To better understand the intent of Assembly Joint Resolution 67, it is necessary to understand the historical context into which the proposal was introduced on first consideration. In the early to mid-1990's, the Hawaiian courts were called upon to determine whether that state could constitutionally deny marriage licenses to persons of the same sex. [See, for example, *Baehr v. Lewin*, 74 Haw. 530 (1993).] Many believed that, at the time, Hawaii would be the first American state to recognize marriages between persons of the same sex.[3] Accordingly, states around the country, including Wisconsin, began to examine their marriage laws with respect to whether those laws permitted or authorized marriages between persons of the same sex and whether those laws would require the recognition of same-sex marriages performed in other states. At the time, the laws of many states, including Wisconsin, generally required the recognition of valid marriages performed in other states unless such marriage was contrary to the laws or public policy of the state. (Wisconsin's law has remained unchanged.) Additionally, the Full Faith and Credit Clause of the U.S. Constitution generally requires a state to recognize various official acts of other states. It was felt by some that those state laws and the U.S. Constitution might require states to recognize a marriage between persons of the same sex that was performed in another state unless state laws clearly prohibited such marriages.

In March of 1996, with about one month left in the legislative session, State Representative Lorraine Seratti introduced 1995 Assembly Bill 1042, relating to prohibiting marriage between persons

---

[3] Hawaii ultimately amended its constitution in 1998 to prohibit marriages between persons of the same sex.

of the same sex. It appears that this was the first bill introduced in Wisconsin to prohibit such marriages. That bill did not have a public hearing and failed to pass in the 1995-96 Legislative Session due to the ending of the session.

In September of 1996, Congress passed, and the President signed, the federal Defense of Marriage Act. [P.L. 104-199.] The Act defines "marriage," for the purposes of various federal benefits and other programs, to mean a legal union only between one man and one woman as husband and wife. In addition, the Act defines "spouse" as a person of the opposite sex who is a husband or wife. Additionally, the Act provides that no state or territory of the United States is required to give effect to any public act, record, or judicial proceeding of any other state or territory respecting a relationship between persons of the same sex that is treated as a marriage under the laws of that state or territory, or a claim arising from such relationships.

In February of 1997, Representative Seratti reintroduced her bill from the previous session as 1997 Assembly Bill 104. The bill was the subject of considerable debate and public attention. It had a public hearing in March of 1997 and passed the full Assembly in May of that year. A public hearing was held on the bill in March of 1998 in the Senate, but the bill failed to pass due to the end of the legislative session.

In each legislative session since, legislation addressing the subject of marriage between persons of the same sex has been introduced but not enacted. [See, e.g., 1999 Assembly Bill 781 and Senate Bill 401, 2001 Assembly Bill 753, 2003 Assembly Bill 475 and Senate Bill 233.] 2003 Assembly Bill 475, the last of these bills to receive any legislative attention, passed both houses of the Legislature but was vetoed by the Governor in November of 2003. A veto override attempt was unsuccessful. Subsequently, 2003 Assembly Joint Resolution 66 was introduced and passed both houses of the Legislature on first consideration in the Spring of 2004.

The national debate on this issue was heightened during the above-described period by a number of legal decisions around the country. Two decisions are perhaps the most relevant to this memorandum. In 1999, the Vermont Supreme Court, in *Baker v. State of Vermont*, 744 A.2d 864 (1999), ruled that Vermont's exclusion of same-sex couples from the benefits of marriage violated Vermont's constitutional "Common Benefits Clause." The court concluded that same-sex couples were entitled to the same benefits and protections afforded by Vermont law to heterosexual marriages. After this decision, the Vermont Legislature enacted Vermont's Civil Union Law, which established a procedure for persons of the same sex to enter into a civil union in the State of Vermont. The purpose of the Civil Union Law was to provide eligible same-sex couples the opportunity to "obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." [See 2000 Vermont Laws 91.] The Civil Union Law specifically provides that "Parties to a civil union shall have the same benefits, protections and responsibilities under law...as are granted to spouses in a marriage." [See s. 1204 (a) of 15 VSA ch. 23.]

In November of 2003, shortly after 2003 Assembly Bill 475 failed in Wisconsin, the Massachusetts Supreme Judicial Court, in *Goodridge, et al. v. Department of Public Health,* 440 Mass. 309; 798 N.E.2d 941 (2003), struck down, on state constitutional grounds, Massachusetts' prohibition on marriage between persons of the same sex, opening the way for couples of the same sex to be married in Massachusetts. Subsequently, the Massachusetts Legislature sought an opinion from the court as to whether a proposed bill creating "civil union" status, similar to Vermont's Civil Union Law, would pass

constitutional muster in light of the court's decision in *Goodridge*. Significantly, the proposed law would have provided that "A civil union shall provide those joined in it with a legal status equivalent to marriage and shall be treated under law as a marriage. All laws applicable to marriage shall also apply to civil unions." [See Mass. Senate No. 2175.] In February of 2004, the court responded and concluded that the "civil union" bill would not satisfy the state's constitution and would, if enacted, be found unconstitutional. [See *Opinions of the Justices to the Senate*, SJC-09163 (February 3, 2004).] Since May of 2004, same-sex couples may legally marry in Massachusetts.

These and other developments have sparked considerable legislative activity across the country. From 1996 to 2004, many other states made statutory changes, constitutional changes, or both, to prohibit the recognition of marriages between persons of the same sex.

DISCUSSION – COURT INTERPRETATION OF THE LANGUAGE IN QUESTION

As noted above, concern has been raised regarding the breadth and vagueness of the second sentence of the proposed constitutional amendment. Thus, a court may be required to interpret its meaning. For Wisconsin courts, the purpose of construing a constitutional amendment is to "give effect to the intent of the framers and of the people who adopted it." [*State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328, 333 (2003), quoting *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).] Wisconsin courts turn to three sources to aid in determining the meaning of a constitutional provision: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the Legislature as manifested in the first law passed following adoption of the provision. [*Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123, 127 (1996).] The remainder of this memorandum discusses the proposed amendment in a manner consistent with these interpretive principles to assist you in better understanding how the amendment may be interpreted. However, as the proposed amendment has not been adopted, resort to the third tool in determining constitutional intent--the examination of any implementing legislation--is not possible.

Again, the second sentence of the proposed amendment provides as follows:

> A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

The Context

The gist of the concern over the above sentence appears to be the perceived breadth and vagueness of the phrase "legal status identical or substantially similar to that of marriage." It is true that the proposal does not define this phrase. When the phrase is considered in isolation, one might conclude that the phrase is referring to any legal status akin to the status enjoyed by a married couple. However, the intent of a constitutional provision 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" through recognition of the reasons which led to the framing and adopting of the amendment. Once that intent is ascertained, "no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion." [*Thompson v. Craney*, 546 N.W.2d at 131, citations omitted.] Courts may review the general history relating to a constitutional amendment as well as the legislative history of the amendment. [*Schilling v. Wisconsin Crime Victims Rights Board*, 2005 WI 17, 278 Wis.

2d 216, 692 N.W.2d 623 (2005).] The foregoing history concerning same-sex marriages, then, is important for gaining an understanding of how a court may interpret the proposed amendment should it be adopted and approved.

As noted, at the time of the introduction of the amendment, Vermont had enacted, and Massachusetts was considering enacting, a "civil union" law granting to couples of the same sex the opportunity to enter into a state-sanctioned relationship conferring "the same benefits, protections and responsibilities" granted to married couples or extending to those in a civil union "a legal status equivalent to marriage." While the first sentence of the proposed amendment would appear to address a legislative concern over marriages between persons of the same sex, it is quite conceivable that the intent of the Legislature in drafting the second sentence was to prohibit the creation or recognition of "civil unions" like those in Vermont or like those being proposed in Massachusetts. Support for this hypothesis is found in a memorandum circulated by you as the amendment's primary author, seeking co-sponsors of the proposed amendment on first consideration. In it, you explain that the proposal would "prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution." You also noted:

> In addition, the proposal states that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid in this state, regardless of what creative term is used--civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it--it is a fundamental institution for our society, regardless of the particular term used to describe it.

[Memorandum from Representative Mark D. Gundrum, regarding co-sponsorship of LRB-4072/2, constitutional amendment affirming marriage.]

It appears, then, that the primary author of the proposed amendment intended the amendment to prohibit same-sex marriages and legal arrangements like civil unions and civil compacts that essentially confer a legal status identical or substantially similar to that of marriage. But is this expressed intent born out by the language of the second sentence of the amendment? A review of the relevant language is in order.

The Language

An understanding of the meaning of the second sentence of the proposed amendment includes an examination of the plain meaning of the words in the context used. To understand what is meant by a "legal status identical or substantially similar" to that of marriage, it seems reasonable to first understand the legal status of a civil marriage. In Wisconsin, a marriage, so far as its validity at law is concerned, is a civil contract that creates the legal status of husband and wife. [s. 765.01, Stats.] It is a legal relationship in which a husband and wife owe to each other mutual responsibility and support and each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support or maintenance of his or her minor children and of the other spouse. [s. 765.001, Stats.] Because the law recognizes the importance of marriage as the institution that is the "foundation of the family and of society," the consequences of marriage are important not just to the parties entering into marriage, but all of society. Thus, the state has an interest in seeing marriages succeed. [See s. 765.001 (2), Stats.] It is for this reason that it is often said that

there are three parties to a marriage contract--the husband, the wife, and the state. Similarly, it has been said that "the marriage contract, once entered into, becomes a relation, rather than a contract, and invests each party with a status toward the other, and society at large, involving duties and responsibilities which are no longer matter for private regulation but concern the commonwealth." [*Fricke v. Fricke*, 42 N.W.2d 500, 501, 502 (1950), internal citations omitted.] Arguably, this is part of the "legal status" of marriage in Wisconsin.

Aside from the obligations imposed upon parties to a marriage, states and the federal government, recognizing the importance and significance of marriage in society, have enacted laws which confer various rights and benefits upon married persons that are not typically automatically conferred on unmarried individuals. These rights and benefits are numerous. In 1997, for example, the U.S. General Accounting Office (GAO) identified over 1,000 federal laws in which marital status is a factor. Those laws identified by the GAO included tax laws, federal financial aid and benefits, immigration and naturalization laws, and many others. Wisconsin also has numerous laws that confer rights and benefits on married individuals such as tax laws, credit laws, probate, estate and inheritance laws, and various legal privileges and immunities. Accordingly, one might conclude that this bundle of rights and benefits conferred by law upon married persons is a necessary component of the "legal status" of marriage.

Many of these statutory rights and benefits, while automatically conferred on married persons, are not exclusive to marriage and can be completely or nearly replicated for unmarried individuals. For example, unmarried individuals may hold property jointly as joint tenants, which generally confers survivorship rights in the other joint tenant. They may create a joint tenancy by expressing an intent to do so. [See s. 700.19 (1), Stats.] A married couple, in comparison, if identified as husband and wife in the title to property, automatically holds property jointly, with survivorship rights, unless they express a different intention. [See s. 700.19 (2), Stats.] Thus, an unmarried couple can create a right of survivorship similar to that enjoyed by a married couple. Other examples of laws that authorize unmarried persons to claim rights and benefits similar to those conferred automatically upon married couples include inheritance rights via a will, health care decision-making via a durable power of attorney for health care, tax advantages through the use of trusts, and protections against domestic abuse. Private parties (and governmental units) can also assist unmarried individuals to enjoy rights or benefits similar to the rights and benefits traditionally afforded to married couples, or families. For example, an employer can choose to extend family status to unmarried persons for purposes of health care benefits. Similarly, a health club could extend family membership benefits to unmarried persons.

The concerns raised with Assembly Joint Resolution 67 seem to suggest that the validity of many of the tools used by unmarried individuals to secure rights and benefits that approximate those enjoyed by married couples might be called into question under the proposed amendment because they allow unmarried individuals to exercise rights and benefits substantially similar to the rights and benefits enjoyed by married persons. As previously mentioned, though, the proposed amendment addresses a "legal status," or standing in law, identical or substantially similar to that of marriage. "Identical," of course, means "exactly the same for all practical purposes" [Black's Law Dictionary], "being the same, having complete identity," "characterized by such entire agreement in qualities and attributes that identity may be assumed," or "very similar, having such close resemblance and such minor difference as to be essentially the same." [Webster's Third New International Dictionary.]

"Similar" is defined as "having characteristics in common, very much alike, comparable," "alike in substance or essentials," or "one that resembles another, counterpart" [Webster's Third New International Dictionary], or "nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference." [Black's Law Dictionary.] "Substantially" is defined as meaning "essentially; without material qualification." [Black's Law Dictionary.] Thus, something can be said to be "substantially similar" if it is essentially alike something else.

It does not seem reasonable to conclude that two unmarried individuals who title property as joint tenants or make health care decisions for each other under a durable power of attorney for health care, or who are offered family health insurance by an employer, have a legal status identical or substantially similar to that of husband and wife. Two brothers who own property jointly cannot be said to owe each other mutual responsibility and support as do a husband and wife or possess the rights and benefits of marriage simply because they own property together. Similarly, a person who is given the power via a durable power of attorney for health care to make medical decisions for an elderly neighbor cannot be said to have evolved a standing in the eyes of the law essentially like the legal status of husband and wife simply because husbands and wives can make the same sorts of decisions for each other. Finally, when an employer grants family health care benefits to unmarried individuals, it undoubtedly confers a benefit on the unmarried individual, and that benefit may be identical to the benefit provided to a married employee, but it seems unreasonable to conclude that the unmarried individual has been conferred a legal status substantially similar to marriage. In all of these cases, the unmarried person's legal status with respect *to the right or benefit sought* may be said to be identical or substantially similar to the legal status that a married person might have with regard to the same right or benefit, but that is not to say that the legal status is identical or substantially similar to *marriage*.

If a court adopted an interpretation of the amendment which would invalidate a legal right or benefit between unmarried persons merely because the right or benefit is identical or substantially similar to a right or benefit afforded to married couples, the result would be the invalidation of countless legal relationships in the state between numerous "unmarried individuals." It does not appear that there is any legislative history to support such intent. Moreover, had the Legislature intended such a result, it could have done so more simply by prohibiting unmarried individuals, or unmarried individuals of the same sex, from contracting for a right or benefit enjoyed by married couples or prohibiting the public or private conferring of such rights or benefits on unmarried individuals. It did not do this, though. Instead, it prohibited the recognition of a "legal status" identical or substantially similar to that of *marriage* between unmarried individuals. As suggested above, for a legal status to be identical or substantially similar to a marriage, it can be reasonably argued that the parties to such status must owe to each other some level of mutual responsibility and support and enjoy the rights and benefits conferred by law based upon the status of marriage. Their status under the law must rise above that of merely parties to a legal contract. A relation must result, one that is exactly the same as or nearly the same as the legal relation resulting from marriage. Accordingly, based upon the language chosen by the Legislature, a court could reasonably conclude that the proposed constitutional amendment is not intended to prohibit the recognition of private legal arrangements simply because those arrangements result in the parties enjoying a right or benefit that is the same as or similar to a right or benefit to which married couples have access.

The Expressed Intent

The above conclusion is further buttressed by the expressed intent of the primary author of the amendment. The co-sponsorship memo from you, referred to above, explains that the proposal:

> ...does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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.

The circulation memo accompanying the Senate version of 2005 Assembly Joint Resolution 67 (2005 Senate Joint Resolution 53) contains similar language:

> This proposal does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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 marriage, no particular privileges or benefits would be prohibited. [Memorandum, Senator Scott Fitzgerald and Representative Mark Gundrum, "Cosponsorship of 3729/1, Constitutional Amendment Affirming Marriage," dated November 17, 2005.]

In a similar vein, a Legislative Council staff memorandum to you dated January 29, 2004, discussed how the courts might interpret the proposed amendment.[4] The Legislative Council memorandum pointed out that it was reasonable to interpret the second sentence of the amendment as follows:

- The state Legislature and courts may not provide for the establishment of a civil union, or other arrangement, however designated, that confers or purports to confer on unmarried individuals the legal status of marriage or a status substantially similar to that of marriage.

- If another jurisdiction confers or purports to confer a legal status of marriage or a status substantially similar to that of marriage on unmarried individuals, that status is not valid under law in this state or recognized at law in this state.

- The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a

[4] It is noted that you referred to this memorandum in your co-sponsorship memorandum.

right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits, certain probate rights, or the ability to file joint tax returns.

- The conferring of a right or benefit traditionally associated with marriage to unmarried individuals in a private setting is not precluded; for example, benefits by a private employer for employees, visitation privileges by a hospital, or family membership status in a health club.

- The Legislature or a court (or the executive branch) is precluded from extending the rights and benefits of marriage to unmarried individuals to the extent those rights and benefits confer a legal status identical to that of marriage or substantially similar to that of marriage.

[Memorandum from Don Dyke, Chief of Legal Services, Legislative Council Staff, to Representative Mark Gundrum, regarding Assembly Joint Resolution __ (LRB-4072/2), Relating to Providing That Only a Marriage Between One Man and One Woman Shall be Valid and Recognized as a Marriage in This State, January 29, 2004.]

It is of interest to note that Assembly Joint Resolution 66 was introduced after the date of the Legislative Council memorandum and was introduced in identical form as the draft reviewed in that memorandum.

While perhaps not dispositive on its own, the above contemporary expressions of intent, combined with the historical context and plain language of the proposed amendment, lend strong support to the conclusion that the intent of the Legislature with respect to the second sentence of the proposed amendment is to prohibit the recognition of Vermont-style civil unions or a similar type of government-conferred legal status for unmarried individuals that purports to be the same as or nearly the same as marriage in Wisconsin.[5] Similarly, the above expressions of intent also appear to directly refute the notion that the authors of the amendment intend to eliminate the ability of unmarried individuals to arrange their private affairs in ways that may happen to approximate legal rights or benefits extended to married persons.

The Presumption of Constitutionality

Finally, it is noted that laws enacted by the Legislature are presumed by the courts to be constitutional and a person challenging the constitutionality of a statute must show that the statute is unconstitutional beyond a reasonable doubt. Where any doubt exists as to a law's unconstitutionality, it must be resolved in favor of constitutionality. [See, e.g., *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).] This presumption applies regardless of whether the

---

[5] It may be of interest to note that two bills introduced at the end of the 2003-04 Legislative Session and a bill introduced in the current session may have been affected by the proposed amendment had the bills and amendment become law. 2003 Assembly Bill 955 created a legally recognized relationship of domestic partnership. 2003 Assembly Bill 992 authorized marriage between persons of the same sex. 2005 Assembly Bill 824 (Senate Bill 397) creates a legally recognized relationship of domestic partnership.

statute was enacted before or after enactment of a constitutional amendment. [*State v. Cole*, 264 Wis. 2d 520, 665 N.W.2d 328, 335-336 (2003).] Thus, a party arguing the invalidity of a right or benefit that unmarried individuals may avail themselves of under law that is similar to a right or benefit conferred on married couples would be required to show beyond a reasonable doubt that the law upon which the right or benefit is based violates the proposed amendment. The historical context, the plain language, and the expressed intent of the primary author would, it seems, make it difficult for a challenger to overcome the strong presumption of constitutionality that such laws would enjoy.

CONCLUSION

The above analysis suggests that a court could reasonably conclude that the second sentence of 2005 Assembly Joint Resolution 67 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status which is the same as, or is nearly the same as, marriage. Further, no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving benefits or utilizing the law in such a way as to allow them to privately order their lives even though such benefits or use of the laws may result in the unmarried individuals sharing in benefits or protections that also happen to be offered to married persons.

The concerns raised cannot be entirely laid aside, however. Parties might raise claims in a court or elsewhere that may, at least temporarily, cast doubt on the validity of benefits and other legal rights that unmarried persons seek to avail themselves of. In addition, while this memorandum has suggested that a legal status identical or substantially similar to marriage would need to encompass some level of mutual obligation and support, it is conceivable that a court could construe the accumulation by unmarried individuals of a number of rights and benefits that married persons enjoy as a "legal status identical or substantially similar to marriage." Consequently, although this memorandum has attempted to offer a reasonable, and perhaps likely, interpretation of the proposed amendment, it cannot be concluded with certainty that a court will draw the same conclusions about the intent of the proposed amendment should it pass this session of the Legislature and be ratified by the people.

Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment. The foregoing is one attempt to do so, but it is likely that final resolution of this matter will ultimately fall to the courts if the proposed amendment is enacted.

Should you have any questions regarding this memorandum, please contact me at the Legislative Council staff offices.

DD:jal:tlu:rv:ksm

Report of the

Vermont Commission on Family Recognition and Protection

April 21, 2008

Prepared by

The Office of Legislative Council
115 State Street
Montpelier, VT 05633-5301
802-828-2231

TABLE OF CONTENTS

Introduction 1

The Public hearings 4

Testimony and Letters in Support of Allowing Gay and Lesbian Couples to Marry 6

Civil unions are separate, but unequal 6

Civil union status is not "portable" to other states 7

Civil unions are less likely than marriage to be recognized by the federal government 8

The differences in language between civil union and marriage are powerful 9

Civil union couples experience more governmental and health care paperwork and hurdles 10

Children thrive in civil union families 10

The "sky didn't fall" when civil unions were enacted; there is no harm extending marriage to all couples 11

Civil marriage should be a secular legal right for everyone 12

Vermont is ready to take the next step 13

Testimony and Letters in Opposition to Allowing Gay and Lesbian Couples to Marry 15

Civil unions granted legal benefits to same-sex couples, and Vermont should not invite another divisive debate on this issue 15

Same-sex marriage fundamentally misunderstands the institution and role of marriage 15

Traditional marriage derives from biblical truths and values and should be protected 16

Legal Issues Symposium 17

Professor Greg Johnson 18
Professor Peter Teachout 20
Monte N. Stewart, Esq. 21

Professor Michael Mello 22

Additional Submissions 24

Jacqueline S. Weinstock, Ph.D. 24
Vermont Secretary of State Deborah L. Markowitz 24
Beth Robinson, Esq 25
Report of the Vermont Civil Union Review Commission 25

The Commission's Findings 26

The Commission's Recommendations 28

Acknowledgements 30

Endnotes 31

Appendices

Letter from Speaker Gaye Symington and Senate President Pro Tem Peter Shumlin to William Russell, July 24, 2007 and Press Release, July 25, 2007 ..... A

Memo from the Chair to Members of the Public Attending Hearings ..... B

Testimony of Professor Greg Johnson C

Testimony of Professor Peter Teachout ..... D

Testimony of Mr. Monte N. Stewart, Esq. ..... E

Testimony of Professor Michael Mello ..... F

Letter from Jacqueline Weinstock, Ph.D., March 4, 2008 ..... G

Letter from Vermont Secretary of State Deborah Markowitz, November 2, 2007 ..... H

Letter from Beth Robinson, Esq., February 27, 2008 I

Memorandum from Michele Childs, Esq. Regarding Recognition of Out-of-state Same-Sex Marriages in Vermont, December 10, 2007 ..... J

Introduction

The Vermont Commission on Family Recognition and Protection (the "Commission") was established July 24, 2007, by joint action of the Speaker of the Vermont House of Representatives, Gaye Symington, and the President Pro Tempore of the Vermont Senate, Peter Shumlin, for the purpose of reviewing and evaluating Vermont's laws relating to the recognition and protection of same-sex couples and the families they form. The Commission was charged with addressing, at a minimum, three particular issues:

1. The basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples.

2. The social and historical significance of the legal status of being "married" versus "joined in civil union."

3. The legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples."

The Commission was asked to invite the input of a range of Vermonters on these questions, including scholars and experts, and the general public, as well, through a series of at least six public hearings. The Commission was directed to report its findings and recommendations to the Vermont House and Senate Committees on Judiciary by the end of April 2008. A copy of the Commission's charge is at Appendix A.

The Commission consisted of 11 members:

Tom Little of Shelburne (chair), attorney and former member of the Vermont House of Representatives
John Bloomer, Jr. of Rutland, attorney and former member of the Vermont Senate
Sen. John Campbell of Windsor County, attorney
Mary Ann Carlson of Arlington, counselor and former member of the Vermont Senate
Berton R. Frye of West Danville, quarry owner
Governor Phil Hoff of Burlington, former governor of Vermont
Rep. Johanna Leddy Donovan of Burlington
Barbara Murphy of Johnson, President of Johnson State College
Helen Riehle of South Burlington, Executive Director of Vermont Program for Quality in Health Care, former member of the Vermont Senate and Vermont House of Representatives
Michael Vinton of East Charleston, polygrapher, retired state trooper, and former member the Vermont House of Representatives
The Rev. Nancy Vogele of White River Junction, Episcopal priest

The Commission held an organizational meeting on August 23, 2007, at the Vermont State House to discuss its charge, the format for its public hearings, and its work plan. At this meeting, the Commission discussed the scope and meaning of its charge and the charge's implications for the Commission's process, hearings, and the content of its report. The members also discussed what kind of hearings should be held, and whether the Commission should hold facilitated small group discussions as part of its work. The members reached a consensus that conventional "listening" sessions should form the basis of the hearing process, and that the hearings should be held in all corners of the state.

In September, the Commission announced a schedule of eight public hearings around the state:

October 10, 2007: Johnson, at Bentley Auditorium, Johnson State College
November 19, 2007: Lyndonville, at Lyndon State College
December 5, 2007: Brattleboro, at Brattleboro Middle School
December 10, 2007: St. Albans, at Bellows Free Academy
December 18, 2007: Montpelier, at the State House
January 12, 2008: Bennington, at Mount Anthony Union Middle School
February 2, 2008: Rutland, at the Godnick Adult Center
February 11, 2008: Williston, at Williston Central School Auditorium

The Commission also held a legal issues symposium at Vermont Law School in South Royalton on October 29, 2007. The Commission invited legal scholars to present testimony on the issues posed to the Commission in its charge. Presenters included:

Professor Peter Teachout, Vermont Law School
Professor Gregory Johnson, Vermont Law School
Mr. Monte Neil Stewart, President, Marriage Law Foundation
Professor Michael Mello, Vermont Law School

The Commission established a webpage on the General Assembly's website in order to post information about the Commission and its work.[1] Notice of the meetings and hearings was sent to all Vermont media outlets on two occasions prior to each event. Vermont Public Television aired the first organizational meeting of the Commission and broadcast the Lyndonville public hearing as part of its Public Square program, which was accompanied by an online stream and live web chat. News articles, editorials, and op-eds concerning the work of the Commission appeared in news outlets throughout the state, including: The Bennington Banner, The Brattleboro Reformer, The Burlington Free Press, The Castleton Spartan, The Barre-Montpelier Times-Argus,

The Rutland Herald, The St. Albans Messenger, Vermont Public Radio, WCAX TV, WPTZ TV, and a number of local cable television public access channels.

The Commission received over 100 written comments submitted through mail or e-mail in addition to the testimony received at the public hearings. These submissions and all documents submitted for the Commission's consideration are part of the Commission's record and are available for viewing at the Office of Legislative Council in Montpelier.[2]

The Public Hearings

The Commission held eight public hearings. Attendance ranged from 80 (St. Albans) to 200 (Rutland), and roughly 30 persons testified at each hearing. As discussed below in this report, supporters of same-sex marriage outnumbered opponents by roughly 20 to one. The Commission began each meeting by handing out a memo describing the content of the hearings and the hearing format and courtesies. (Appendix B)

Each hearing was divided into two parts. The first part was an hour-long informative session on the history of recognition of the legal rights of gays and lesbians in Vermont. After the presentations, the public was invited to ask questions or discuss any of the issues raised.

Chair Little addressed the issues of adoption and anti-discrimination legislation in the 1990s. Based on the state's tradition of equality under the law and of strong families, for over 30 years, Vermont probate courts have qualified gay and lesbian individuals as adoptive parents. In addition, Vermont was one of the first states to adopt comprehensive legislation prohibiting discrimination on the basis of sexual orientation.[3] As the basis for our current discussion of marriage, Little reviewed the Vermont Supreme Court's 1999 decision in *Baker v. State*[4] which required the state to provide same-sex couples with the same legal benefits and protections afforded to married opposite-sex couples. In the opinion, Chief Justice Amestoy wrote:

> *The extension of the Common Benefits Clause[5] to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.[6]*

The Court deferred to the General Assembly to fashion a remedy to the constitutional violation found in *Baker* and Little, chair of the House Committee on Judiciary in 2000, explained the legislative process and response to *Baker*. After months of debate, the civil union act was signed into law by Governor Howard Dean on April 26, 2000.[7]

Legislative counsel Michele Childs reviewed the work of the Civil Union Review Commission which was created by the General Assembly to facilitate implementation of the civil union law and monitor and evaluate the impact of the new law.[8] In its final report, the Commission concluded:

> *The Commission's examination of the first eighteen months following the effective date of the civil union law reveals that the law is working as intended in Act 91. Act 91 satisfies the constitutional mandate of the Baker decision by providing to eligible same-sex couples who choose to join in civil union the benefits, protections and responsibilities that married couples have under Vermont law. In addition, Act 91 has brought no material adverse impacts on state government, on Vermonters, on the Vermont economy or the state generally.[9]*

Childs also provided a summary of the legal status and recognition of same-sex relationships in other states. Ten states and one district currently permit establishment of legally recognized same-sex relationships:

- Massachusetts is the only state that permits same-sex couples to marry.
- Vermont, Connecticut, New Jersey, and New Hampshire allow civil unions which provide all the benefits of marriage.
- California and Oregon have domestic partnerships that provide most all of the benefits of marriage.
- Hawaii has reciprocal beneficiary relationships, and Maine, Washington, and Washington, D.C. have domestic partnerships that provide some marital benefits.[10]

In contrast, Childs said that 41 states have state statutes defining marriage as the union of one man and one woman, and 27 states have added that definition of marriage to their state constitutions.[11] Only six states have no prohibition against same-sex marriage.[12] In addition to these laws, there are court decisions and attorney generals' opinions in various states that address whether an individual state will recognize a same-sex relationship celebrated in another state,[13] as well as the federal Defense of Marriage Act (DOMA) which was enacted in 1996 by Congress and signed into law by President Bill Clinton. It consists of two parts: 1) States that no state need recognize a marriage between persons of the same sex, even if the marriage was legally established or recognized in another state; and 2) Defines marriage for federal purposes to include only the union of one man and one woman.[14] According to Childs, this has created a complicated legal patchwork for determining the current and future rights of Vermont same-sex couples outside the borders of Vermont.

The second part of the hearings was devoted to taking testimony from members of the public. Anyone in attendance who wished to speak was given the opportunity, and testimony at each hearing averaged approximately two hours. The Commission suggested a time limit of three minutes per person and heard from over 240 people. Of those who testified, supporters of same-sex marriage outnumbered opponents by approximately 20 to one. With rare exceptions, the witness testimony and audience behavior were civil and respectful. Both sides commented that the hearings were a good opportunity to express their views on the issues.

The testimony of Vermonters at the Commission's hearings was broad in scope and presented many deeply personal descriptions of living with our state's civil union law. Some themes emerged from the public comments received through both personal testimony before the Commission and letters sent to the Commission. We have tried to summarize these comments for this report while acknowledging that it is impossible to cover all the concerns raised with the detail and nuances with which they were presented. Audio copies of the hearings and copies of correspondence are available at the Office of Legislative Council.

Testimony and Letters in Support of
Allowing Gay and Lesbian Couples to Marry

As mentioned above, the testimony and correspondence received by the Commission was overwhelmingly in favor of inclusion of gay and lesbian couples within the marriage laws. The following were the principally recurring themes from the testimony and letters.

Civil unions are separate, but unequal.

The single, most common theme in the testimony around the state was that true equality cannot be achieved when there are two separate legal structures for conferring state benefits to couples based upon sexual orientation. According to many witnesses, denying same-sex couples access to the widely recognized institution of marriage while conferring the legal benefits under a parallel system with different terminology sends the message that same-sex couples are different from or inferior to opposite-sex couples and unworthy of inclusion in the marriage laws.

One woman who grew up on a dairy farm in Franklin as the youngest of 12 children, three of whom are gay or lesbian, wrote of how within her family all the siblings are treated the same, yet the community treats them differently.

> *All of my siblings are either married or engaged to be married with the exception of the three siblings who do not have marriage as the option. This does not seem fair in this great country of opportunity and prosperity. The question of "why" enters my mind frequently. Why is it that nine of my siblings can share in all that marriage has to offer and yet, we (the gay/lesbian portion of the family) cannot? What is it about my [heterosexual] siblings that the three of us do not possess? We are all of similar make-up, educational backgrounds, family values, success in careers, and love for our children. The answer can only be that we (my two brothers and I) are not as valued by our fellow citizens as my heterosexual siblings. How can this be?. . .This is an astonishing realization.*[15]

Testimony urged that a separate system of recognition for same-sex couples violates fairness values deeply and widely held in Vermont and also violates the Vermont Constitution's Common Benefits Clause. While the civil union law requires that "[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage,"[16] in an attempt to create a separate but equal status, many who testified stressed that the very existence of a separate track for same-sex couples is unfair and creates an inferior status for same-sex couples and their families.

> *In my experience with children [as a licensed psychologist-master], the fact that their parents cannot marry and have to have an alternative to marriage sends a*

very bad message. It is no different than water fountains for "negroes" and "whites" 45 years ago. The message is, "your family isn't good enough and therefore your parents are unable to marry." No child should feel inferior because of the gender combination of their parents.[17]

Witnesses often drew analogies between the civil union law and the U.S. Supreme Court's 1896 decision, *Plessy v. Ferguson*,[18] in which the Court upheld the constitutionality of a state law imposing racial segregation in public accommodations (specifically, railroad passenger cars), provided the accommodations were equal. Frequently during this testimony, the Commission heard comments about second class citizenship, stigmatization, and "separate cannot be equal." Bishop Thomas C. Ely of the Episcopal Diocese of Vermont urged civil marriage equality for all Vermonters as a matter of civil rights.

In the reality of our having lived with civil unions in Vermont for seven years now, we know that, as was true with school segregation, so too with civil unions and civil marriage: separate is not equal. Discrimination does continue, and while making provision for marriage equality for all couples here in Vermont will not end the discrimination against gay and lesbian couples in other states and in the federal laws, it will be an important step in the right direction. [19]

Bishop Ely continued, explaining a position asserted by many of the clergy who testified before the Commission.

The other point I want to emphasize tonight is that providing the civil right of civil marriage to heterosexual and homosexual couples alike would not compel any religious community to perform marriages of same-sex couples. The state allows ordained clergy and certain other designated religious persons to act as agents of the state with regard to civil marriage, but no clergyperson is required by the state to do so. Different religious communities have different theological views on the subject of matrimony. The privilege and religious freedom to express and act upon those convictions is not compromised by the state providing civil marriage and the subsequent civil rights of marriage to all couples. It is my conviction that the church can and should support civil marriage for all - even if, at this time we are not of one mind about the church's involvement in these ceremonies.[20]

Civil union status is not "portable" to other states.

Many witnesses with civil union licenses described the challenges, frustrations, and fears that the laws of most other states do not recognize their civil union status as the equivalent to marriage. The nonrecognition by other states (and countries) of the new and relatively uncommon legal status of civil union was often referred to by witnesses

as the lack of portability of civil unions. Civil union couples testified that when traveling outside Vermont, they take powers of attorney and other legal documents to prove their legal status but still have encountered confusion, disagreement, and nonrecognition in a variety of situations, some presenting significant risks. For example, there was testimony that government agencies, courts, and hospitals in other states fail, neglect, or refuse to understand or recognize civil union status. A witness at the Bennington hearing testified that a national employer with a Vermont operation denied employment benefits to an employee in a civil union while conceding that if the employee were married, the benefits would be provided.

A woman from Springfield told the Commission that she and her civil union partner went to great lengths to ensure that when her partner experienced problems during her pregnancy and delivery, she was treated in Vermont hospitals even though similar specialists were available in much closer proximity in a neighboring state. After the birth of the child, even though Vermont law provides that a child born during a civil union is presumed to be the child of both the civil union partners,[21] the woman who was not the biological mother of the child legally adopted her son to ensure that she would be recognized as his mother when traveling outside Vermont.

> *No family should have to worry about which state to be in when a baby is born. No parent should have to worry that his or her infant could be considered parentless in a foreign state because that state does not recognize the civil union. Navigating medical emergencies is stressful enough for families without having to worry about these kinds of issues! Civil unions have gone a long way toward providing rights and benefits, but it has not made it possible to travel the country freely without being terrified that someone might not let you near in an emergency or might even refuse to recognize you as a parent.*[22]

While there is no guarantee that another state would recognize a Vermont same-sex marriage under similar circumstances, from the consistent testimony received at the hearings, it is clear that many gay and lesbian couples would feel less vulnerable when trying to assert their legal rights outside this state if they could say they are married rather than in a civil union.

<u>Civil unions are less likely than marriage to be recognized by the federal government.</u>

Federal law specifically denies recognition of same-sex marriages or unions that are treated like a marriage. Many witnesses shared experiences about how their civil union partners would not be entitled to Social Security or veteran's survivorship benefits because they were not recognized as spouses under federal law. Others shared complicated stories of immigration issues that would not have been a problem if the civil union partner were recognized as the married spouse. While it is unlikely at this time that the federal government will recognize a same-sex marriage any more than a civil union, many couples believe that they would be on firmer ground to assert such

rights and that gaining marital status in Vermont would allow them to establish standing to challenge federal law in court.

The differences in language between civil union and marriage are powerful.

A significant number of witnesses testified that the differences in language between marriage and civil union status perpetuate treating gays and lesbians and their families as different, as "other," with stigmatizing results.[23]

A man from Randolph wrote about how his father refused to attend his civil union ceremony while he happily attended the marriage of the man's gay brother in Massachusetts a short time later.

> *My father emphatically would not attend a civil union ceremony. In his mind, a civil union was something for and about gay people. Not gay himself, he felt apart from it, and was unable to conceptualize a role for himself in this gay ceremony. . . [In attending my brother's wedding, my] father understood what marriage means, and he understood his social role in welcoming a new son into his family through marriage. A marriage meant something to my father that a civil union could in no way replicate. . .I urge you to consider the deep social significance that marriage has, and to acknowledge in your report to the State Legislature the inability of civil unions to replicate that.* [24]

Witnesses stressed that words and how words are used in our language are very important, symbolic, and powerful. Marriage is the "gold standard" for many couples and a term which everyone understands. A justice of the peace in Coventry said he has certified several civil unions and his participation in those ceremonies led him to believe that gay and lesbian couples should be afforded the right to marry:

> *The civil union ceremony itself is discriminatory for several reasons. It does not allow the use of the words marry, marriage, wed, wedding, husband, and wife. All these words have deep personal value to all who are united in a committed relationship. The pronouncement at the conclusion of a civil union is weak in comparison to that of a marriage ceremony. It is clear to me as a justice of the peace who was instructed by the secretary of state that we must not discriminate against gays and lesbians, that I was doing exactly that by being restricted to a ceremony that was void of valued word.* [25]

Many witnesses who have civil union licenses described situations, in Vermont and elsewhere, when seeking the benefit of the civil union law, in which they were forced to explain their civil union status, what a civil union is, and how a civil union by law secures a legal status and consequences equal to marriage. The consequences of these conversations include: (i) "outing" oneself as gay or lesbian in situations where this is unnecessary, irrelevant, or a breach of privacy; (ii) the frustration of the additional time it often takes to explain successfully what a civil union is; and (iii) the difficulties

encountered when using government, business, employer, and health care forms and documents that do not contemplate or appropriately deal with the status of being in a civil union.

A woman who worked for a business in central Vermont told the Commission that her employer, a self-insured company, denied health benefits to her civil union partner while providing such benefits to all the other employees with spouses. When the woman inquired about the disparate treatment, she said the CEO compared civil union couples to employees who live with their boyfriend or girlfriend, but did not equate them with married couples.

> *We believed that part of the CEO's failure to take civil unions seriously was his unfamiliarity with them and that the term "civil union" was nebulous enough to allow him to automatically dismiss our relationship. Had full marriage rights been accorded to lesbian and gay couples in Vermont, it is still possible that we would have been excluded from coverage, but we still believe that it would have been much harder for the CEO. . . to dismiss our relationship as insubstantial and casual.* [26]

Civil union couples experience more governmental and health care paperwork and hurdles.

Many witnesses testified that civil union couples face more complicated income tax filing requirements than do married couples, resulting in higher tax preparation fees for them and often higher taxes. For example, for purposes of Vermont income tax, civil union partners are treated as if married and must file their Vermont income tax return as either "Civil Union Filing Jointly" or "Civil Union Filing Separately." However, because federal tax law does not recognize civil unions, this is a filing status for Vermont only. To complete the Vermont return, civil union partners are instructed to prepare a federal return, apply the federal rules as if they were married, and complete the standard Vermont return using income based upon the specially prepared federal return, rather than the one actually filed with the IRS. Civil union couples must attach both the "dummy" federal return and the real federal return to the Vermont tax return.

Witnesses also mentioned how, due to lack of recognition of civil union partners as spouses by federal tax law, an employer's health care contribution to coverage of an employee's civil union partner or the partner's dependents must be considered imputed income for federal tax purposes. While Vermont does not consider the employer's contribution to be income, and the employee is not taxed at the state level for the employer's contribution, these types of inconsistencies between state and federal law create additional costly burdens that married couples do not have to endure.

Children thrive in civil union families.

Witnesses at every hearing testified about the ability of gay and lesbian couples to raise healthy, happy children in a stable, safe, and loving family environment. These

witnesses included couples, their friends and families, their children, school teachers, and clergy. These witnesses' experience, dating back prior to the enactment of the civil union law, is that children who are raised in same-sex couple families are as well adjusted as children of heterosexual couples. A school administrator wrote:

> *[In my professional role] I have seen the loving home and rich opportunities that have been available to students regardless of whether they have two moms, two dads, or a mom and a dad. I have observed that commitment and a loving home are not gender based – but correlate highly with stability. Granting same-sex couples the right to marry would enhance a healthy sense of belonging and stability for all children in our schools.* [27]

Many witnesses spoke of the evolving nature of the family structure. Many children are raised today by single parents or in "blended" families with one biological parent and a stepparent and step- or half-siblings. Extended families are making a comeback with older generations living closer to children and grandchildren and participating in one another's daily lives. These witnesses asserted that failure to recognize the changing family dynamics by favoring a traditional-looking "Leave it to Beaver" family while not supporting a less traditional family when both are looking for a stable environment in which to raise children does a disservice not only to families but to communities as well.

> *The legal concept of family is only broadened, made more flexible, when we open our hearts and minds by thinking outside of the traditional box. From what I can see, traditional views of marriage do not offer a guarantee of stability to the family. We all know too many dissolved marriages, broken homes, and fractured families. . . We need to give equal rights to these "non-traditional" couples. Having stable, non-traditional families in our neighborhoods can only increase the value of our more traditional one and strength our communities.* [28]

Witnesses uniformly testified that while civil union status has improved the legal structure supporting these families, there are significant shortcomings compared to the legal status of marriage.

<u>The "sky didn't fall" when civil unions were enacted; there is no harm extending marriage to all couples.</u>

This testimony asserted that the dire consequences predicted by many for Vermont upon enactment of the civil union law did not come to pass. They observed that tourism did not disappear, state government was not overburdened, Vermont did not become a "gay mecca," and "traditional" families were not harmed. Similarly, these witnesses testified about their experience in that there is no basis to support the fear that there would be

any real harm from granting full marriage access. Frequently mentioned by both heterosexual and homosexual witnesses was the belief that same-sex marriage presents no threat to heterosexual marriage.

> *My wife, Donna, and I have been together for 25 years. . . The idea that same-sex marriage would hurt opposite-sex marriage makes no sense to me. As human beings, we live in a community and rely on one another. During [a health care] crisis, friends took care of our house, colleagues filled in at business, and the hospital honored our relationship. If our friends who are same-sex partners are denied the same right to marry which we enjoy, then their strength, well-being and stability are undermined, which compromises the entire fabric of the community we rely on.* [29]

Civil marriage should be a secular legal right for everyone.

Many supporters of extending the right to marry to same-sex couples emphasized that the debate before us now is about civil marriage, not religious marriage.

> *As a member of the clergy, I experience and "witness" this issue from a religious perspective, but I am able to distinguish between my religious preferences and what should be the rights of all Vermont citizens. Religious recognition (or non-recognition, for that matter) of same-sex unions is a separate issue. I do believe that my experience as a minister gives me a unique and valuable vantage point on this issue, but speaking as a plain citizen of Vermont, shedding my clerical robes, I would argue simply that civil marriage is an issue of civil rights.* [30]

These witnesses felt strongly and testified with passion that individuals' personal religious beliefs about homosexuality and marriage should not play a part in determining who should have the protection of state-granted legal rights. Witnesses were respectful of the fact that people of different faiths may have very divergent beliefs on this topic, and that it was valid for members of a particular faith to determine whether they would acknowledge or sanction same-sex unions or marriage within their faith. However, according to these witnesses, religious beliefs should not dictate whether secular state laws are applied equally to all families, gay or straight. A member of the clergy from Enosburg testified:

> *It goes without saying that the laws of the state should not be dictated by the principles of any one religion. State laws are for the good order of the state and the benefit of its citizens, and must not favor one group over another. So I think it is not valid to argue that marriage should be only between a man and woman because the Bible or other religious tradition says it must be so.* [31]

Our marriage laws are an anomaly. We proclaim separation of church and state, yet in this one instance we make ministers of religion, by the very fact of their ordination, officers of the state. As my colleague John Morris has pointed out in his history of marriage, I baptize children, but I do not sign their birth certificates. I preside at funerals, but I do not sign death certificates. But when I officiate at a wedding, I am obligated to sign the marriage certificate in order for the couple to be legally married – unless they have had a prior ceremony. As an officer of the state, I am constrained by the laws of the state in performing an action that is simultaneously a matter of state law and of religious practice. [32]

Witnesses, especially clergy, frequently commented that the combination of the civil and the religious within the marriage laws is a significant obstacle to equal protection under the law. They stated their belief that separation of church and state is imperative to a well-functioning government and community.

Why do we not separate the legal contract of marriage from the religious blessing of the couple? The sanctity of marriage is on tension with the legality of marriage. Since 50% of all marriages end in divorce, I would argue the reality of that "sanctity." Although I continue to support religious marriages, including those of the GLBT community, I desire a more realistic understanding of the contract and a more grounded understanding of the covenant. [33]

Vermont is ready to take the next step.

Some witnesses observed that what Vermont has learned since enactment of civil unions is not what problems it created, but rather that a civil union license is not as good as and is not equal to a marriage license. Many said that the civil union law was a step in advancing the civil rights of gay and lesbian Vermonters, but not a sufficient step and certainly, for them, not the last step. For these witnesses, and there were many of them, Vermont is now "ready" to move to full access to marriage for lesbian and gay couples.

We say that parties to a civil union have all the same sights as parties to a marriage – but there is one right that is missing – the right to call that legal contract a marriage. The civil union law was a good step at a time when many Vermonters were not ready for a bigger change. We tried it out, it has worked fine and now I say that it is time for us to take off the training wheels. . . We already have a perfectly good word to describe the pact between two people who pledge to live their lives together. The word is marriage. Let's use it. We don't need civil unions anymore. [34]

We live in changing times and must move forward, state by state, in giving all family members the rights they deserve. Let Vermont be the next state to move forward and set an example for others to follow. [35]

Similar testimony came from the youngest witnesses, those in high school and college, many of whom asked the Commission and the General Assembly to focus on the loving nature of a relationship and not the sexual orientation involved.

The Commission believes this testimony reflects the evolution of attitudes in Vermont since the enactment of Act 91 toward greater and more open acceptance of gays and lesbians in Vermont society, community, and public life.

Testimony and Letters in Opposition to Allowing Gay and Lesbian Couples to Marry

While the testimony and correspondence received by the Commission in opposition to inclusion of gay and lesbian couples within the marriage laws was in the minority, people who did express their thoughts did so with conviction. The following were themes from these submissions.

Civil unions granted legal benefits to same-sex couples, and Vermont should not invite another divisive debate on this issue.

This testimony urged that the civil union law has done everything compelled by the *Baker v. State* court decision, arguing that any deficiencies are caused by federal laws, which are beyond the control of Vermont law. The testimony clearly suggested that a legislative effort to establish gay marriage in Vermont would be an unwelcome and deeply divisive experience for Vermonters who oppose it.

> *Gay marriage would. . . continue to drive a wedge between left and right – making something that should no longer be an issue another point of contention. . . [I]f we are ever to enjoy a state of compromise in this country, I think this issue is one that calls for it. It is time to leave well enough alone.* [36]

Same-sex marriage fundamentally misunderstands the institution and role of marriage.

This testimony presented the institution of marriage as having a meaning and role in society prior to, above, and beyond the legalities of marriage. One witness stated that "marriage is absolute," meaning that the General Assembly cannot, and should not, alter or attempt to alter the fundamental meaning and structure of marriage as a heterosexual, one man–one woman relationship. Several witnesses observed that the institution of marriage has served the common good of the people of the state well, is proven to be safe and nurturing for children, and should not be tinkered with on account of asserted individual rights. Several of these witnesses characterized or defined homosexuality, or homosexual behavior, as a lifestyle choice that should not be endorsed by the state.

> *I am vehemently opposed to homosexual marriage on the basis that marriage is ordained by God between one man and one woman. Marriage has been defined as between one man and one woman throughout history and it has served our civilization perfectly and will continue to do so. To allow the same sex to marry would be only to make the real meaning of marriage change to suit a small minority's desires. . . I believe this is not a civil rights issue, but a lifestyle choice that is trying to be made acceptable to the mainstream population.* [37]

Traditional marriage derives from biblical truths and values and should be protected.

A majority of the witnesses opposed to same-sex marriage included comments or arguments relying on their understanding of the meaning and authority of Christian scripture, in both Old and New Testaments of the Bible. These witnesses urged the state to not stray from the Christian truths and values that, in their judgment, have guided this country for so long.

> *I realize that a union between two consenting males or two consenting females does not at first view seem abusive or harmful as some other forms of sexual behavior which are legally prosecuted, but for our government to officially and legally open the door to accept and promote a behavior that goes against God's warnings is clearly to invite distress in days to come.* [38]

> *We are Biblically opposed to homosexual marriage and civil unions, not because we hate homosexuals but because we do hate the sin they are in, because God does. What they are doing is in complete opposition to God's moral laws as stated in the Bible in many places. It also erodes the country, as families fall apart and there is more crime and heartbreak, kids committing suicide[,] using drugs[,] having sex and babies out of wedlock – all because we are not following God's moral laws.* [39]

Legal Issues Symposium

In order to address the legal issues implicit within the Commission's charge, the Commission contacted Vermont Law School to request the assistance of Vermont legal scholars. The law school offered Professor Greg Johnson and Professor Michael Mello, both of whom have written extensively on the issue of civil unions, and Professor Peter Teachout, a scholar of the Vermont Constitution. The Commission also invited Mr. Monte N. Stewart, Esq., former law professor and current president of the Marriage Law Foundation, who has published numerous articles on marriage.

The Commission provided the presenters with five questions, derived from the three components of the Commission's charge and asked that the attorneys focus their testimony on these questions:

1. What are the legal consequences between marriage and civil union in Vermont? In terms of legal benefits, protections, rights, and obligations, what does a marriage license deliver you that a civil union license does not? Do these differences raise any statutory, common law, or constitutional law issues?

2. Which states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts or Canada?

3. In terms of tangible legal consequences, including recognition by other states or the federal government, what identifiable advantages or disadvantages would a lesbian couple with a Vermont marriage license have that it does not have with a Vermont civil union license?

3. What decided cases and/or pending litigation (including challenges to state or federal Defense of Marriage Act laws) are there which bear on these questions? What do the reported DOMA cases tend to say?

4. Why did the Massachusetts court reach a different conclusion from the Vermont court? Was there any significance for these reasons for the Vermont civil union law?

5. As posed by the charge to the Commission, what is "the basis for Vermont's separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?"

The Commission spent an afternoon at Vermont Law School hearing from the four legal scholars. The afternoon provided the Commission with valuable information and an interesting range of views and opinions. The Commission members had the opportunity to ask questions of each scholar, and this clarified certain points and enabled the speakers to delve into some areas in greater detail.

The following are short synopses of the presentations at Vermont Law School. Copies of written submissions of the presenters are available at the office of legislative council.

Professor Greg Johnson

Professor Johnson began his testimony by informing the Commission that he is a gay rights advocate and supports permitting same-sex couples to marry. However, he said that he saw his role that day as informative rather than persuasive and hoped to be of assistance in helping the Commission understand the changes across the country since the civil union law was enacted in 2000.

In response to the first question about the legal consequences between marriage and civil union, Professor Johnson testified that extending marriage to same-sex couples in Vermont would not deliver any new legal rights and benefits to those couples. The civil union act specifically grants same-sex couples "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[40] He noted that there are some 1,096 federal rights and benefits of marriage that civil union couples cannot enjoy because of the federal Defense of Marriage Act (DOMA),[41] which defines marriage for purposes of federal law as only the union between one man and one woman. Professor Johnson explained that the few judicial and administrative decisions regarding DOMA have held that the act prohibits same-sex couples from accessing federal benefits whether they are in a civil union or a marriage, and, thus, he did not believe that granting Vermont same-sex couples the right to marry would provide them with the federal legal benefits of marriage.

Professor Johnson testified that the question that is currently being debated in the courts is whether the establishment of a separate system to deliver marital rights to gay and lesbian couples is inherently unequal and therefore violative of constitutional guarantees of equal protection under the laws. The Court in *Baker* did not require the state to issue marriage licenses to same-sex couples and deferred to the General Assembly to determine how the benefits could be granted to same-sex couples. The Court left open the possibility that a later case may establish that anything but a marriage license falls short and is, therefore, unconstitutional. Johnson explored whether a gay or lesbian couple's lack of access to the word "marriage" is, under the *Baker* decision's analysis by Chief Justice Amestoy, a violation of the Vermont's Commission's Common Benefits Clause and suggested that this is a close call.

Johnson said that the Massachusetts Supreme Judicial Court considered this exact issue and when asked by the Massachusetts Senate whether civil unions were permitted under the decision in *Goodridge v. Dept. of Health.*[42] "In a 4-3 vote, that court, citing *Brown v. Board of Education*, said flatly that separate is never equal.[43] The court used language drawn from the civil rights movement of the 1960's:

> *The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is considered a choice of language that reflects a demonstrable*

assigning of same-sex, largely homosexual, couples to a second-class status... The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits... The history of our nation has demonstrated that separate is seldom, if ever, equal."[44]

However, according to Johnson, in *Kerrigan v. Connecticut* a Connecticut Superior Court addressed the same question and came to a different conclusion, stating that it had "been unable to find any case in which the mere difference in nomenclature applied to two groups" who otherwise received the same legal benefits raised equal protection issues. Thus, the Connecticut Superior Court found no constitutionally significant differences between civil unions and marriage.[45]

With respect to recognition of Vermont civil unions in other jurisdictions, Johnson said there are eight states that have recognized the legal rights of such unions: New Hampshire and California through statute; Connecticut, New Jersey, and New York through a state attorney general's opinion; and Massachusetts, Iowa and West Virginia through a judicial decision. Massachusetts same-sex marriages are legally recognized in four states: as civil unions in New Hampshire by statute and in New Jersey by attorney general opinion, and as marriages in Rhode Island and New York by attorney general opinion. According to the Vermont Attorney General's Office, Vermont would most likely recognize a Massachusetts marriage as a civil union.[46]

In response to the question of whether a civil union might have a better chance than a same-sex marriage of being recognized in another state, Professor Johnson said that while there are arguments for both sides, "the bottom line is that whatever the same-sex relationship is called, the chance of it being recognized in other states is slim." The general rule of marriage recognition is called the "place of celebration" rule which is the idea that a marriage is valid everywhere if it is valid where it was celebrated. However, a state does not have to recognize the marriage if it violates the strong public policy of that state.[47] Additionally, the federal DOMA specifically states that no state is required to recognize a same-sex relationship treated as a marriage in the state in which it was celebrated.[48]

Johnson told the Commission that as of today, 26 states have amended their constitutions to limit marriage to one man and one woman and 19 states have enacted statutes to that effect, while 17 states have amended their constitutions to prohibit the recognition of any same-sex relationship, including civil unions. These state prohibitions are commonly referred to as "state DOMAs" or "mini-DOMAs." According to Johnson, litigation to overturn state DOMAs faces substantial challenges based on current court precedents, except where a state DOMA prohibits recognition of any same-sex relationship and lacks any rational basis for the discrimination.

In addressing the reasons for the separate legal structure for recognizing and protecting same-sex couples versus heterosexual couples, Johnson told the Commission that the concerns in 1999 expressed by both the Court in *Baker* and the General Assembly with respect to making a sudden change in the marriage laws were legitimate at the time,

considering that no state had come close to recognizing same-sex marriage or the equivalent of civil unions. Johnson praised the Court and the legislature for taking the incremental approach as the best way to address a divisive issue. "Yet," said Johnson, "times have changed dramatically in just seven short years. What was once radical is now blasé."

Professor Johnson concluded his presentation by suggesting that the civil union law may be a good transition law for Vermont, but if Vermont enacts same-sex marriage, in his judgment the civil union law should remain as an option for those who want its legal protections and status but who cannot embrace the institution of marriage for a variety of historical and other reasons. "I ascribe to a model which would give couples a wide range of choices...The fullest flowering of freedom in relationship and family choices would come when we break away from the limited binary view of marriage or nothing." *(Professor Johnson's written testimony can be found at Appendix C.)*

Professor Peter Teachout

Professor Teachout opened his remarks with a discussion of his view that the General Assembly has the right and responsibility, independent of the Vermont Supreme Court, to make judgments on what the Vermont Constitution means and requires.

He observed that the *Baker* decision did not decide that marriage, per se, for gay and lesbian couples, is compelled by the Common Benefits Clause. Rather, the decision was fundamentally about the legal consequences of marriage, its protections, benefits, and responsibilities. In his judgment, this bundle of legal incidents is what *Baker* compels for same-sex couples. He distinguished this from the Massachusetts case, *Goodridge*, which focused on marriage in a holistic, all-encompassing way.

Teachout contrasted the *Opinion of the Justices*, in which the Massachusetts Supreme Judicial Court found civil unions are not equal to marriage, and *Kerrigan*, in which a Connecticut Superior Court found no significant difference between civil unions and marriage, in an effort to ascertain why two courts which were presented with the same question would come to different conclusions. Differences in state constitutional provisions, different modes of analysis, and different approaches to constitutional philosophy and judicial functions all may have played a part. This is why, according to Teachout, it is not only permissible but appropriate for the Vermont General Assembly to come to its own conclusion about what the constitution requires in terms of equality.

Professor Teachout concluded his remarks by noting that, in his opinion, *Baker* requires equality between those with marriages and those with civil unions. He said that the General Assembly and the Court each have their own role and authority to determine what constitutes "equality" and that the General Assembly is provided with far greater latitude in which to make that determination. He urged the General Assembly to evaluate the civil union law by looking at Article 7 of Chapter I of the Vermont Constitution and

to make its own judgment about equality and fairness, perhaps with the result of a voter advisory referendum as part of a public education process.
(Professor Teachout's written testimony can be found at Appendix D.)

Monte N. Stewart, Esq.

Mr. Stewart presented the case for marriage as a vital social institution whose meaning and value are intrinsically, inseparably, and universally (across time and geography) bound to the traditional legal and social union of one man and one woman. Mr. Stewart said that this meaning of marriage yields important and valuable "social goods" for our society, including the optimum family structure for nurturing and raising of children. He spoke of the right of a child to grow up with and bond with his or her biological mother and father as interwoven with the social goods derived from traditional marriage.

For Stewart, "the man/woman meaning [of marriage] is essential to the production of these social goods. ... If the union of a man and woman ceases to be a core constitutive meaning of marriage, that institution, probably sooner rather than later, will cease to provide those particular social goods." Stewart said that even if the Vermont legislature were to enact same-sex marriage, same-sex couples would not be brought into the social institution of traditional marriage. The enactment of "genderless marriage" would, however, suppress or de-institutionalize the established meaning of marriage, and result, in time, in a loss of the social goods associated with traditional marriage.

> *Vermont will certainly not be the happy home of many different marriage norm communities, each doing its own marriage thing, each equally valid before the law, and each equally secure in its own space. Rather, Vermont will have one marriage norm community (genderless marriage) officially sanctioned and officially protected; all other marriage norm communities will be officially disdained, and sharply curtailed. Moreover, there are profound problems with the notion that supporters of the old marriage institution can, if they want, just huddle together in some linguistic, social, or religious enclave to preserve the old institution and its meanings.*

Stewart agreed with the other presenters that a Vermont marriage license would not afford a gay or lesbian couple any more legal rights at the state level and that Vermont has no authority to alter a couple's federal benefits, protections, rights, and obligations. The only "non-speculative 'advantage'" of a marriage license would be to grant a couple legal standing to seek recognition of that Vermont same-sex marriage in another jurisdiction. He said the "real reason for the marriage battle in Vermont" is the *social* benefits, protections, rights, and obligations and that proponents of same-sex marriage are incorrect when they assert that inclusion of gay and lesbian couples within the marriage laws will enhance the social status and well-being of those families.

> *Vermont law has no power to usher same-sex couples into the venerable man/woman marriage institution; all Vermont law can do is suppress the man/woman institution, fabricate in its place the radically different genderless*

regime, and then assure that the marriage of no couple in this State (whether man/woman or same-sex) is legitimate unless sanctioned by that regime.

Stewart said that with respect to the federal DOMA, all legal challenges to date have failed and that he believes the law would be upheld if it were before the U.S. Supreme Court. In regard to the state DOMAs, Stewart said 20 of 21 appellate courts that have addressed the issue have upheld bans against same-sex marriage, including nine decisions
post-*Goodridge*. In addressing both the *Goodridge* and *Baker* decisions, Stewart indicated that these cases were an anomaly and said that both courts used a similarly flawed approach to reach a predetermined result.

Stewart referred the Commission to his published law review articles on the subject for a more detailed explanation of his position on same-sex marriage and subsequently provided the members with copies of his article "Marriage Facts."[49]
(Mr. Stewart's written testimony can be found at Appendix E.)

Professor Michael Mello

Professor Mello told the Commission that the thesis of his presentation would be that "[t]he time has come to give civil unions a respectful burial."

The burial must be respectful: recognizing that, in 2000, civil unions were a courageous and pioneering step in the journey toward marital equality between same-sex and opposite-sex couples, and recognizing as well that a legislator's vote for civil unions in 2000 was nothing short of heroic...But it must be a burial. Same-sex marriage in Vermont is an idea whose time has come.

Professor Mello said that "political reality" in 2000 was, in his judgment, the only reason for the separate legal status of civil unions. He recounted the "backlash" to the *Baker* decision and the political fallout for legislators who supported civil unions. It was a tumultuous time that he believes "unleashed an avalanche of homophobia in Vermont...Gay marriage was perceived to have been not politically possible."

Mello discussed the evolution of gay marriage in Massachusetts and why the Massachusetts Supreme Judicial Court rejected civil unions. He explained that after that Court ruled that the state constitution required same-sex marriage, the Massachusetts Senate began considering a bill to enact civil unions. The Senate requested an advisory opinion from the Court as to whether such an enactment would satisfy its decision in *Goodridge*. As Professor Johnson had noted earlier, the Court concluded that creating a separate system for delivering marital benefits to gay and lesbian couples would be unconstitutional because "separate is seldom, if ever, equal."

Mello believes that the Massachusetts court was correct in its analysis and that Vermont's civil union law fails the Common Benefits Clause's mandate for equality

under the law as well. The inequalities include the stigmatization, or "badge of inferiority," experienced by civil union couples compared to their heterosexual colleagues who have access to marriage and its history and social status. Mello noted that during the civil union debates in the legislature, supporters of the compromise made a point of telling opponents that civil unions were not the same as marriage and went further to define marriage as the union of "one man and one woman" three times in Act 91. Mello said that

> *because this demarcation was at the core of the arguments made by the statute's legislative supporters, the new law sends same-sex couples the same message of second-class matrimonial citizenship that the separate-but-equal doctrine sent to racial minorities in the six decades before Brown v. Board of Education.*

Permitting gay and lesbian couples to marry in Vermont would provide those couples with legal and practical benefits, specifically as they relate to the issue of portability, said Mello, in part because same-sex marriage in Massachusetts is limited to residents of that state. Mello hypothesized that because Vermont civil unions are open to out-of-state couples, perhaps Vermont same-sex marriages would be as well, which would provide those out-of-state couples the opportunity to test the issue of portability in their home states and in the U.S. Supreme Court.

In conclusion, Professor Mello said that he would encourage the general assembly to take up the issue and to try to enact full access to marriage for gay and lesbian couples. If the legislature fails to take action, he suggested that he expects the constitutionality of civil unions will be before the Vermont Supreme Court again and that the Court would ultimately find that Act 91 violates the Vermont Constitution for the same reasons the Massachusetts Court found civil unions to be inadequate under its constitution. *(Professor Mello's written testimony can be found at Appendix F.)*

Additional Submissions

In addition to the many letters and email messages expressing "pro" and "con" views on the ultimate question of whether Vermont should open its marriage laws to gay and lesbian couples, the Commission received a few submissions of note that impact the Commission's consideration of its charge with respect to the legal and practical challenges faced by same-sex couples joined in civil union as compared to heterosexual married couples. We address these here in brief and include copies of them in the appendix.

Jacqueline S. Weinstock, Ph.D.

University of Vermont Professor Jacqueline S. Weinstock sent a letter to the Commission on behalf of herself and sixteen University social sciences and education faculty members. In it she reviewed the last 20 years of social science research on same-sex parented families and took issue with sampling and data analysis methods of studies that "demonstrate negative outcomes to children raised in same-sex parented families."

The letter addresses five common concerns of those who oppose extending marriage to same-sex couples and asserts that children raised by same-sex parents are, by and large, no different than their peers who are raised by opposite-sex parents. The letter's conclusion is that the peer-reviewed studies support the conclusion that the quality of family life is more important than family structure. (Appendix at G). She said:

> *If we as Vermonters are mainly concerned with the welfare of all children, we would take heed of the broadly accepted conclusion among social scientists based upon the available knowledge to date, that "family structure, in itself, makes little difference to children's psychological development. Instead, what really matters is the quality of family life."*

Vermont Secretary of State Deborah L. Markowitz

Deborah L. Markowitz explained in a letter to the Commission that she is one of the state officials who respond to inquiries about civil unions because of her office's regulation of town clerks who issue civil union licenses and justices of the peace who perform civil union ceremonies. She said she has responded to numerous telephone calls and emails from people inquiring about the validity of a Vermont civil union in other states and to "many questions about whether individuals who were not resident[s] of Vermont could dissolve their Vermont civil unions." In order to obtain a dissolution of a civil union or a divorce in a marriage, one of the parties must be a resident of Vermont for at least one year. Because marriages are universally recognized in all jurisdictions, a couple who marries in Vermont can get a divorce anywhere. However,

because recognition of civil unions is limited outside of Vermont, a couple who obtains a civil union in Vermont is significantly restricted in its ability to have its union dissolved and may have to move to Vermont or another jurisdiction that recognizes the union to do so. Ms. Markowitz wrote that she has concluded that "individuals who have obtained a civil union in Vermont do not experience the same benefits as those individuals who have a Vermont marriage. Specifically, a [civil union] couple who leaves the state often ends up in legal limbo." (Appendix at H).

Beth Robinson, Esq.

Attorney Beth Robinson testified at the Commission's Bennington hearing and submitted a letter dated February 27, 2008. Ms. Robinson was co-counsel to the plaintiffs in *Baker v. State* and chairs the Vermont Freedom to Marry Task Force, an advocacy organization. Ms. Robinson identified six areas in which she finds the civil union law deficient, and in each she cited specific examples where the status of civil marriage would bring tangible, positive changes to civil union couples, including:

1. A host of privately conferred financial benefits and protections awarded by third parties on the basis of marriage (including health insurance).
2. Security in traveling from state to state (sometimes called "portability").
3. Critical federal protections (including social security survivor benefits, family-friendly immigration laws, and benefits for military spouses).
4. Participation in an institution that carries considerable personal significance for many, and undeniable social significance.
5. A legal status that is widely understood throughout the country and the world, communicating familial commitment.
6. Inclusion and equality. (Appendix at I).

The Commission notes that one of the key issues before it is whether, and to what extent, tangible changes would occur simply with the enactment of same-sex marriage in Vermont. The unambiguous testimony of over 240 Vermonters around the state is that they want an opportunity to show that such a change in law would make a difference in their daily lives.

Report of the Vermont Civil Union Review Commission

Although the final report of the Vermont Civil Union Review Commission was released six years ago, we mention it here as a reminder that a good deal of careful work was done in 2000-2001 to examine the implementation of Act 91 and its impacts on the state during that period. That report contains findings and recommendations that may give perspective to this report. Among its conclusions was that Vermonters with civil unions should expect continued nonrecognition of their status under federal law.

The Commission's Findings

Although the Commission did not undertake a scientific public opinion poll, the Commission's careful listening process lays the foundation for certain findings, or conclusions, with a strong degree of credibility. In some cases, the findings are statements to which the witnesses testified. In other cases, the findings are statements of fact about the legal consequences of civil unions in Vermont.

1. Those who testified in support of full access to marriage for gay and lesbian couples far outnumbered those who testified in favor of maintaining the civil union status quo or against same-sex marriage.

2. Vermonters who chose to attend the Commission's hearings on the equality of civil unions and whether Vermont should permit same-sex marriage have strong feelings about the issues. At first blush, this may seem obvious or inconsequential but the Commission believes that it bears further comment. While the civility of the hearings was evident, both "sides" continue to believe passionately in their respective judgments and understandings.

3. Vermonters with civil union licenses testified that they are being denied the full promise of Act 91. They have encountered a multitude and variety of instances where they find the promise of equality to be unfulfilled. They find many of these instances to be significant, if not substantial, deficits in the civil union law, with clear and negative financial, economic, and social impacts on their lives and the lives of their children and families. In addressing the Commission's charge, these witnesses find "legal and practical challenges [with civil union]... as compared to heterosexual marriage couples."

4. The legal recognition of same-sex relationships varies greatly from state to state. Eight states currently recognize a Vermont civil union, while four states recognize a Massachusetts same-sex marriage. Recognition of these relationships has taken the form of statute, judicial decision, and attorney general opinion, but it has been outnumbered by the legislative and electoral efforts to prohibit such recognition. Forty-four states and the federal government have adopted various "Defense of Marriage" statutes, constitutional amendments, or both to deny legal recognition to same-sex marriages.[50] An additional 17 states prohibit recognition of a civil union.

5. Regardless of formal recognition in some states, the legal status of parties to a civil union is generally foreign and difficult to explain when Vermonters travel to other states. These hurdles to the "portability" of civil unions can be either a minor or major inconvenience but can also present more dire consequences when the health and welfare or fundamental legal rights of a member of a civil union couple is at stake.

6. While the testimony identified clear, significant differences between the benefits, privileges, and responsibilities attached to a civil union versus a heterosexual marriage,

the extent to which enactment of same-sex marriage would eliminate these differences is not clear. That is, a Vermont same-sex marriage could share many, perhaps most, of the deficiencies of a Vermont civil union, considering the non-recognition of both by federal law and by the laws of all but a handful of the states. However, the Commission finds that such a change in the law would give access to less tangible incidents of marriage, including its terminology (e.g., marriage, wedding, married, celebration, divorce), and its social, cultural and historical significance. This also would likely enhance the portability of the underlying legal consequences of the status. Further, providing statutory access to marriage would be a clearer and more direct statement of full equality by the state, a statement of full inclusion of its gay and lesbian residents in the bundle of rights, obligations, protections, and responsibilities flowing from the status of civil marriage. The tangible same-sex marriage benefits described by Beth Robinson in her testimony and letter raise serious questions about the operation of the civil union law and warrant additional research and serious attention.

7. As requested in the Commission's charge, we find that the basis for Vermont's separate legal structures – marriage and civil union – is a combination of the passionate, volatile political dynamics prevailing in the General Assembly in 2000 and the belief that a separate legal structure in the form of Act 91 remedied the constitutional flaw declared in the *Baker v. State* decision.

8. The two legal statuses have different social and historical significance. "Marriage" evolves and carries the benefits and burdens of thousands of years of human experience unique to a male-female social institution. The testimony underscored why lesbian and gay couples desire access to the word "marriage," its current and historical meaning and significance, and how they and many others believe that it is their constitutional right. The testimony from the small number of persons who testified to the contrary revealed the passion with which they wish to exclude same-sex couples from access to this word. This testimony, in nearly every case, was based expressly on religious beliefs and faith.

9. The social science of the relative benefits or harms of heterosexual versus homosexual marriage for families and children is beyond the scope of the Commission's charge. There is credible social science research supporting the conclusion that raising children in a gay or lesbian coupled family, per se, has no negative impacts on the well-being of children. As noted below, the Commission believes that this area deserves further study.

The Commission's Recommendations

1. Areas for Additional Study and Review.

The Commission's hearing process provided a forum around the state for Vermonters to express their views on how the civil union law is working and on whether Vermont should permit gay and lesbian couples access to civil marriage. The process was a simple and straightforward one of asking Vermonters to testify and of listening to their thoughts, views, and concerns. The Commission took best advantage of the time available from its volunteer membership, and while our methods were not scientific, the Commission believes this report fairly reflects what is in the hearts and minds of Vermonters.

Nonetheless, the Commission recommends further study and review of the following areas:

- What has been the experience of the Massachusetts lesbian and gay couples who have married under Massachusetts law? Are these couples successfully obtaining all of the rights, privileges, and benefits of marriage – under Massachusetts law, federal law, and the laws of other states? Are their marriages more readily understood and more portable than a Vermont civil union?

- Can the Vermont income tax system be revised by statute or administrative action to ease the burden that civil union couples face in preparing and filing their returns?

- What is the best science available today on the different impacts on children raised in different family structures? Is there a consensus in the research community? How should social science affect the debate over same-sex marriage? How can the research be scrupulously and objectively evaluated before it influences policy-making and legislative action?

- If Vermont were to move to full access to marriage for Vermont's lesbian and gay couples, how should the state address the many civil union licenses already issued? Should civil union status remain for those who may want it? Should a civil union couple seeking marriage be required to waive or rescind that license at the time of joining in civil marriage? Or should a civil union couple's license be automatically converted by statute to a marriage license? These are only a few of what are likely to be many such transition questions should Vermont enact same-sex marriage.

2. The Commission's charge does not ask it to make a specific recommendation on whether Vermont should grant gay and lesbian couples access to civil marriage. The

Commission believes that making such a recommendation would undercut the purpose and usefulness of its work and this report. Simply put, we were asked to listen to the testimony of Vermonters on these issues, to look at the legal issues, and to report on what we found. It is the role of Vermont's policy-makers and elected officials to read and reflect on this report and in their best judgment determine what steps to take in their role as public servants of the people of Vermont. Accordingly, the Commission does not reach that recommendation.

3. The Commission recommends that Vermont take seriously the differences between civil marriage and civil union in terms of their practical and legal consequences for Vermont's civil union couples and their families. Their testimony and the testimony of their friends and supporters was sincere, direct, impassioned, and compelling. Act 91 represents Vermont's commitment to the constitutional equality and fairness for these citizens, and Vermont should preserve and protect that commitment.

Acknowledgements

The Commission expresses its gratitude for the diligent and cheerful support of two persons. Michele Childs is the attorney from the General Assembly's Office of Legislative Council who provided research, drafting, and all-purpose assistance to the Commission and its members as the Commission toured Vermont. Her assistance was conscientious, insightful, and cheerfully given. Rosalind Daniels of the Legislative Council's administrative staff provided staff and administrative support to the Commission, keeping us organized and scheduled. She also compiled the record of the Commission's work, including the volumes of materials submitted over the last eight months.

The Commission members also are grateful for the opportunity to engage in the Commission's work, around the state in public hearings, in dialogue and debate with each other, and in careful reflection in preparing this report. We are hopeful that the Commission's work will be a guide to Vermonters now and in the future.

Respectfully submitted on behalf of the entire Commission, April 21, 2008.

Thomas A. Little, Chair

Endnotes

[1] http://www.leg.state.vt.us/workgroups/FamilyCommission
[2] 115 State Street, Montpelier, VT 05633; 802-828-2231.
[3] Act No. 135 of the 1991 Adjourned Session (1992).
[4] 744 A.2d 864 (1999).
[5] The Common Benefits clause states: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal." Chapter I, Article 7, Vermont Constitution. See also the discussion of the Common Benefits Clause at pages 8-22 in the Vermont Supreme Court's decision, *Baker v. State* (Docket no, 98-032), December 20, 1999 (170 Vt. 194, 744 A. 2d 864).
[6] *Baker*, supra note 3, at 889.
[7] Act No. 91 of the 1999 Adjourned Session (2000).
[8] Id. at Sec. 40.
[9] 2002 Report of the Civil Union Review Commission. Copies may be obtained at http://www.leg.state.vt.us/misc/issues.htm
[10] *Same Sex Marriage, Civil Unions and Domestic Partnerships*, National Conference of State Legislatures, March 2008.
[11] Id.
[12] Connecticut, Massachusetts, New Jersey, New Mexico, New York, Rhode Island.
[13] Eight states have recognized a civil union from another jurisdiction and four states have recognized a same-sex marriage from another jurisdiction.
[14] 28 U.S.C. §1738C and 1 U.S.C.§ 7.
[15] Letter of Martha R. Rainville, March, 2008. The author of this letter noted that she is not the former Vermont National Guard Adjutant General.
[16] 15 V.S.A. § 1204(a).
[17] Letter of Kristin Williams Propp, M.A., Bennington, Vt., February 28, 2008.
[18] 163 U.S. 537; *overruled, Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) (separate educational facilities for black and white students are inherently unequal and therefore violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution).
[19] Testimony of the Right Reverend Thomas C. Ely, Episcopal Bishop of Vermont, Montpelier, Vt., December 18, 2007.
[20] Id.
[21] 15 V.S.A. § 1204(f).
[22] Letter of Lisa Rae, March, 2008.
[23] Marriages are "solemnized," while civil unions are "certified." Individuals in a marriage are "spouses," while individuals in a civil union are "parties to a civil union." Spouses get a "divorce," while parties to a civil union get a "dissolution."
[24] Letter of Bennett E. Law, Randolph, Vt., March 3, 2008.
[25] Letter of Ala B. Fletmarch, Coventry, Vt., March 2, 2008.
[26] Testimony of Madeleine and Naomi Winterfalcon, Monkton, Vt., February 11, 2008.
[27] Letter of Michael Freed-Thall, March 3, 2008.
[28] Letter of Jon J. Wittenbecher, Pownal, Vt.
[29] Testimony of Steven K-Brooks, Brattleboro, Vt., December 5, 2007.
[30] Letter of Reverend Bruce Johnson, Norwich, Vt., March 4, 2008.
[31] Testimony of Linda M. Maloney, Priest in Partnership, St. Matthew's Episcopal Church, Enosburg Falls, Vt., October 10, 2007.
[32] Id.
[33] Letter of Rev. Adrianne Carr, The First Congregational Church, Burlington, Vt., December 14, 2007.
[34] Testimony of Colleen Montgomery, Burlington, Vt., February, 2008.

THE LEGAL, MEDICAL, ECONOMIC & SOCIAL

CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW

Final Report of the New Jersey
Civil Union Review Commission

December 10, 2008

Members of the Commission

J. Frank Vespa-Papaleo, Esq., Chairman

Steven Goldstein, Esq., Vice-Chairman

Stephen J. Hyland, Esq., Secretary

Barbara G. Allen, Esq.

AnnLynne Benson

Robert Bresenhan, Jr.

Joseph A. Komosinski

Erin O'Leary, Esq.

Rev. Charles Blustein Ortman

Melissa H. Raksa, AAG

Barbra Casbar Siperstein

Linda Schwimmer, Esq.

Elder Kevin E. Taylor

Table of Contents

SUMMARY AND INITIAL STATEMENT OF URGENCY FOR EQUALITY 1
Overview of the New Jersey Civil Union Review Commission 3
I. CONSISTENT THEMES OF TESTIMONY BEFORE THE COMMISSION 8
A. A separate legal structure is never legal 8
B. The word "marriage" conveys a universally understood and powerful meaning 9
C. Children would benefit by society's recognition that their parents are married. 9
D. There is uncertainty about the recognition of civil unions in other states. 9
II. THE EFFECT OF THE CIVIL UNION ACT ON SAME-SEX FAMILIES 11
A. Civil unions perpetuate economic harm to same-sex couples. 11
B. Civil unions create challenges to equal health care access. 14
C. Civil unions perpetuate psychological harm. 15
D. A marriage law would make a positive impact. 20
III. FISCAL IMPACT OF CIVIL UNIONS VS. MARRIAGE 25
A. Studies suggest that marriage would enhance the State's revenues and economy. 25
B. Marriage would not result in increased costs to the State. 27
C. Civil Unions and Federal Impediments to Equality. 28
IV. RECOGNITION AND TREWATMENT OF CIVIL UNIONS BY OTHER STATES AND JURISDICTIONS 33
A. Vermont 33
B. California 34
C. Connecticut 36
D. New Hampshire 37
E. Oregon 37
F. International 37
G. Summary of Other States and Jurisdictions 38
V. TESTIMONY AND LETTERS IN OPPOSITION 39
A. The institution of marriage as between a man and a woman should be preserved. 39
B. Traditional marriage derives from biblical teachings and should be protected. 40
C. Civil unions provide sufficient equality. 40
D. Marriage should be put to a public vote. 41
VI. DOMESTIC PARTNERSHIPS SHOULD BE MAINTAINED 42
CONCLUSION 45
Endnotes 46
Appendix A -- First Interim Report of the New Jersey Civil Union Review Commission

Summary And Initial Statement Of Urgency For Equality

We, the thirteen members of the New Jersey Civil Union Review Commission, unanimously issue this final report, containing a set of recommendations to the Governor and the Legislature of the State of New Jersey. After eighteen public meetings, 26 hours of oral testimony and hundreds of pages of written submission from more than 150 witnesses, this Commission finds that the separate categorization established by the Civil Union Act invites and encourages unequal treatment of same-sex couples and their children. In a number of cases, the negative effect of the Civil Union Act on the physical and mental health of same-sex couples and their children is striking, largely because a number of employers and hospitals do not recognize the rights and benefits of marriage for civil union couples.

In one case, a doctor's delay in understanding the nature of a couple's civil union exacerbated an already difficult situation. During the summer of 2008, Gina Pastino, a Montclair resident, was admitted to the emergency room because she was at risk for a potentially fatal cardiac arrhythmia. She describes her experience:

> I gave them all of my relative information, including the fact that... Naomi and I are civil union partners, please give her all of the information when she does arrive, here is my consent...By the time that Naomi arrived at the hospital, I was in a state where I really couldn't talk to her... I really couldn't tell her what was happening to me, what any of the test results were.... So, [Naomi] asked the attending emergency room physician to tell her what was happening with me.... And he said, "who are you?" And she said, "well, I'm her partner." And he said, "I can't give you any information, you know, I need her consent." And I wasn't in any state of mind to give my consent.... And she had to explain to him what civil unions were. And he wasn't, you know, quite sure at first. He was reluctant to give my information. He did not understand, and hadn't heard of civil unions before. [1]

Before getting any information about Gina's condition, Naomi was forced to spend time educating the doctor about what civil unions are, while standing in the corridor, rather than either of them being at the patient's bedside. In Gina's

testimony to the Commission, her frustration was palpable: "So...once again, we were faced with an emergency medical crisis that was potentially life-threatening, and here she is having to...justify who we are to each other."[2]

This is but one of many examples derived from the testimony before the Commission during the past 18 months. The experience of this couple amply demonstrates that the provisioning of the rights of marriage through the separate status of civil unions perpetuates the unequal treatment of committed same-sex couples. Even if, given enough time, civil unions are understood to provide rights and responsibilities equivalent to those provided in marriage, they send a message to the public: same-sex couples are not equal to opposite-sex married couples in the eyes of the law, that they are "not good enough" to warrant true equality.

This is the same message that racial segregation laws wrongfully sent. Separate treatment was wrong then and it is just as wrong now.

The Commission is compelled to issue its final report now because of the overwhelming evidence that civil unions will not be recognized by the general public as the equivalent of marriage in New Jersey with the passage of time.

Since the Commission issued its February 2008 report, a similar commission in Vermont has issued a report detailing how the Vermont civil union law – in effect since July 1, 2000 – still does not provide the legal, medical and economic equality of marriage. Nearly a decade later, civil union couples in Vermont report the same obstacles to equality that New Jersey civil union couples face today.

The Commission has also heard additional evidence that a marriage law in New Jersey would make a significant difference in providing equality and dignity to same-sex couples and their children. Though federal law fails to recognize same-sex relationships as marriage, the Commission finds that a marriage law in New Jersey would help to alleviate the disparate treatment of same-sex couples, including denial of benefits, as testimony to the Commission has shown to be the case in Massachusetts.

Equally important is psychological harm that same-sex couples and their children endure because they are branded with an inferior label. An associate professor of psychiatry at Harvard Medical School told the Commission:

> Based on research and my years of working with gay people who have experienced stigma or discrimination on the basis of sexual orientation, I believe that second-class citizenship, now institutionalized in some states in the form of civil unions, contributes to increased rates of anxiety, depression and substance-use disorders in marginalized populations.[3]

Other mental health experts, as well as a number of same-sex couples in New Jersey and their children, have underscored before the Commission the significant psychological damage caused by not recognizing marriage for same-sex couples. Their heartbreaking testimony, some of which is included in this report, brings to life their struggle in a way that no numbers – whether complaints filed with government agencies or advocacy organizations – can encapsulate on their own.

As a result of the overwhelming evidence presented to the Commission, we unanimously recommend that:

The Legislature and Governor amend the law to allow same-sex couples to marry;

The law be enacted expeditiously because any delay in marriage equality will harm all the people of New Jersey; and

The Domestic Partnership Act should not be repealed, because it provides important protections to committed partners age 62 and older.

Overview of the New Jersey Civil Union Review Commission

On December 12, 2006, the Legislature enacted Public Law 2006, Chapter 103, establishing civil unions for same-sex couples effective February 19, 2007 (hereinafter the "Civil Union Act"). The intent of the Civil Union Act is to provide all the benefits and responsibilities of marriage to same-sex couples in civil unions.[4] It also established the New Jersey Civil Union Review Commission ("the Commission" or "CURC"), to evaluate the effectiveness of the law and report to the Legislature and Governor.[5]

The Commission is an independent body consisting of ex-officio government members and public members. The seven public members are appointed as follows: five appointed by the Governor with the Advice and Consent of the Senate, one appointed by the Senate President, and one appointed by the Speaker of the General Assembly. The six ex-officio members consist of the Attorney General, the Director of the Division on Civil Rights, and the Commissioners of the Departments of Human Services, Banking and Insurance, Children and Families, and Health and Senior Services.[6] The members of the Commission are as follows:

Public Members:

- Rev. Charles Blustein Ortman - Appointed by Senate President
- Steven Goldstein, Esq. - Appointed by the Speaker of the General Assembly

- Robert Bresenhan, Jr. - Appointed by Governor
- Stephen J. Hyland, Esq. - Appointed by Governor
- Barbra Casbar Siperstein - Appointed by Governor
- Elder Kevin E. Taylor - Appointed by Governor
- AnnLynne Benson - Appointed by Governor

Ex-Officio Members:

- J. Frank Vespa-Papaleo, Esq. - Director of the Division on Civil Rights
- Melissa H. Raksa, AAG - Designee of the Attorney General
- Barbara G. Allen, Esq. - Designee of the Department of Human Services
- Linda Schwimmer, Esq. - Designee of the Department of Banking & Insurance
- Joseph A. Komosinski - Designee of the Department of Health & Senior Services
- Erin O'Leary, Esq. - Designee of the Department Children and Families

For purposes of convenience and operational consistency, the Commission has been formally placed in, but not of, the Department of Law & Public Safety. As of the date of this report, the Legislature has not issued any appropriation for the costs of operating the Commission, which include the costs of transcription services, certified interpreters, advertising associated with public notices, mileage reimbursement for public members attending meetings, and other operational and administrative costs. Since there has been no legislative appropriation for the operations of the Commission, it receives substantial fiscal and staff support from the Division on Civil Rights.[7] Additionally, the Division provides to the Commission other in-kind support such as website services, photocopying and conference-calling expenses, and other necessary operational costs. Because the Commission does not have its own appropriation, it has been unable to commission any independent studies of the issues and instead has relied upon the testimony of experts and studies prepared independently by academic or governmental institutions.

The Commission is charged with studying all aspects of the Civil Union Act including, but not limited to the following:

> (1) To evaluate the implementation, operation and effectiveness of the Civil Union Act;
>
> (2) To collect information about the Act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations;
>
> (3) To determine whether additional protections are needed;

(4) To collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution;

(5) To evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage;

(6) To evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage; and

(7) To review the "Domestic Partnership Act," and make recommendations as to whether this act should be repealed.[8]

According to the Civil Union Act, the Commission "shall report semi-annually its findings and recommendations to the Legislature and the Governor." This final report is unanimously endorsed by the members of the Commission.

Since issuing its report in February 2008, the Commission held eight public hearings, taking testimony from individuals and families affected by the Act, representatives of various advocacy organizations and experts in a number of professional disciplines including psychology, social work, finance, law and statistics. Notice of all public meetings and hearings was advertised in newspapers throughout the State, on the Commission's website located at www.NJCivilRights.org/curc, and distributed widely by community organizations, website hosts and others. The Commission website also serves as a repository for Commission meeting dates, reports, transcripts, agendas, commissioner biographies, contact information and other items.

This report will not recite all the testimony provided at public hearings or submitted in writing to the Commission. Rather, this report will highlight relevant testimony that corresponds to the Commission's legislative charge. In taking public testimony, the Commission followed the same procedures and practices utilized by the Legislature and other commissions and state boards when permitting individuals to testify, and the Commission formally approved all written submissions as part of the Commission's official record. For anyone interested in reviewing all the public testimony, all transcripts of the public hearings are available at the Commission's website located at www.NJCivilRights.org/curc.

In its interim report, the Commission reached the following conclusions:

1. For the overwhelming majority of civil union couples who testified, the federal Employment Retirement Income Security Act, commonly known by its acronym ERISA, is the reason employers have given for not recognizing their civil unions.

2. In Massachusetts, a marriage law has prompted many employers to provide equal benefits to same-sex wives or husbands.

3. The testimony presented by many civil union couples indicated that their employers continue to discriminate against them, despite their familiarity with the law.

4. Civil union status is not clear to the general public, which creates a second-class status.

5. The Civil Union Act has a deleterious effect on lesbian, gay, bisexual, transgender, and intersex youth and children being raised by same-sex couples.

6. Many witnesses testified about the unequal treatment and uncertainties they face during a health care crisis, particularly in hospital settings.

7. Institutional interaction with civil union couples has been less than optimal.

8. Testimony indicates that the Civil Union Act has a particularly disparate impact on people of color.

9. The requirement that same-sex couples declare civil union status, a separate category reserved for same-sex couples, exposes members of the United States military to the "Don't Ask, Don't Tell" policy.

10. The classification of civil union may place marital status in question when one of the partners is transgender.

Since the Commission issued its interim report, there have been a number of national developments advancing marriage for same-sex couples. On May 15, 2008, the Supreme Court of California, citing, in part, the New Jersey Civil Union Review Commission's First Interim Report, ruled that excluding same-sex couples from civil marriage is unconstitutional. On November 4, 2008, a majority of California voters voted for passage of Proposition 8, which denies marriage for same-sex couples. As of the date of this report, the validity of Proposition 8 rests with the courts. In July 2008, the Massachusetts Legislature repealed a 1913 law that had prohibited non-residents from marrying in Massachusetts if their marriage would be void in their home states. Thus, couples from other states are permitted the right to marry within Massachusetts. And, on October 10, 2008, the Supreme Court of Connecticut ruled that failing to give same-sex couples the full rights, responsibilities and name of marriage was against the equal protection

clause of that state's constitution. In so doing, the Court recognized that marriage carries with it a status and significance that the classification of civil unions does not and that segregating opposite-sex and same-sex couples into separate institutions is constitutionally impermissible.

I. CONSISTENT THEMES OF TESTIMONY BEFORE THE COMMISSION

Since its formation in 2007, the Commission has taken oral testimony and received written submissions from more than 150 people. The testimony has focused primarily on the implementation and impact of the Act and whether additional legal protections are necessary. The testimony generally falls into two categories. The first is testimony critical of the Act's ability, in practice, to provide civil union couples with all of the same benefits, protections and responsibilities of marriage and corresponding testimony in support of marriage. The second is testimony opposing marriage, and in some cases, criticizing the existence of the Act itself. The Commission received testimony, both oral and written, overwhelmingly indicating the necessity of marriage. The following summarizes the recurring themes of this testimony.

A. A separate legal structure is never equal.

The most common theme in the testimony was that true equality cannot be achieved when there are two separate legal structures for conferring benefits on couples based upon sexual orientation. According to many witnesses, denying same-sex couples access to the widely recognized civil institution of marriage while conferring the legal benefits under a parallel system using different nomenclature, imposes a second-class status on same-sex couples and sends the message that it is permissible to discriminate against them. In assessing the inequitable nature of civil unions, many witnesses alluded to the African-American community's struggle for equal rights. One witness observed:

> [T]he issue before you is nothing more than the old issue of separate but equal. We know from the tragic story of segregation that there is no such thing as separate but equal. Just as people should not be forced to ride in the back of the bus because of race, people should not be forced to ride in the back of the legal relationship bus because of sexual orientation. Civil unions ... are the back of the legal relationship bus.[9]

B. The word "marriage" conveys a universally understood and powerful meaning.

Many witnesses testified that the difference in terminology, between "marriage" and "civil union," stigmatizes gays and lesbians and their families because they are singled out as different. Witnesses stressed that words are incredibly important and powerful and that marriage is a term of "persuasive weight" that everyone understands and respects. As one witness observed, "marriage is still the coin of the realm."[10]

Many witnesses who are in civil unions described situations in which they were forced to explain their civil union status, what a civil union is, and how it is designed to be equivalent to marriage. These conversations include the indignities of having to explain the legal nature of their relationship, often in times of crisis, and the obstacles and frustrations encountered when using government, employer, or health care forms that do not address or appropriately deal with the status of being in a civil union. Many expressed surprise and dismay at the lack of recognition despite the Act's having been in effect since February 2007.

C. Children would benefit by society's recognition that their parents are married.

Numerous witnesses testified that Lesbian, Gay, Bisexual and Transgender (LGBT) couples raise happy, healthy children in a loving family environment. These witnesses included couples, their friends and families, their children, and clergy.

Many witnesses noted that the labeling of civil union couples, not as married but in a civil union, has a detrimental effect on their families, showing children that their parents are different or somehow less than others, which can lead to teasing and bullying. Many witnesses observed that when the government treats people differently, it emboldens private citizens of any age to follow suit. As a lesbian high school teacher testified, "I don't hear racist remarks, but I hear the, 'Oh, he's so gay, that's so gay'...I think ... if the laws were changed, it would give that much more oomph to not expressing prejudice."[11]

D. There is uncertainty about the recognition of civil unions in other states.

A number of witnesses testified that civil unions put same-sex couples at a disadvantage while traveling, for they bear a categorization that is misunderstood or not understood at all either at home or abroad. Civil union couples testified that when traveling outside New Jersey, they take powers of attorney and other

legal documents to prove their legal relationship to one another and to their children. Confusion as to the labels applied to same-sex relationships and resulting misunderstandings can lead to both intentional and unintentional discrimination and hardship.

As an increasing number of jurisdictions recognize a same-sex marriage, much of the testimony suggests that New Jersey couples would feel less vulnerable when trying to assert their legal rights in the remaining states if they could say they are married rather than in a civil union.

II. The Effect of the Civil Union Act on Same-Sex Families

A central mandate of the Commission is to "evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage."[12] The Commission heard considerable testimony addressing this issue.

A. Civil unions perpetuate economic harm to same-sex couples.

In its interim report, the Commission reported that the federal Employee Retirement Insurance Security Act (ERISA) is the most common reason that employers cite when refusing to provide the same benefits to employees' civil union partners as are provided to married employees' spouses. The Commission reaffirms that finding. The Commission also gathered evidence from Massachusetts' experience that the term "marriage," were it applied to the relationships of same-sex couples, could overcome a number of the challenges presented by ERISA and would therefore make a significant difference in providing equality even with no change in federal law.

Under ERISA, "self-insured" companies - companies which create their own insurance plans but may hire outside agencies to administer them - are governed by federal law rather than state law. In turn, because of the federal Defense of Marriage Act (DOMA), any federal statute or regulation that provides benefits to spouses, husbands, wives, or married couples applies only to marriages between one man and one woman, thus resulting in covered employers continuing to discriminate against same-sex couples.

Practically speaking, companies covered by ERISA, which comprise an estimated fifty percent of all companies in New Jersey, have an option, rather than a requirement, to offer equal benefits under the state's Civil Union Act. Many companies are not exercising that option, even if State law, as is the case in New Jersey, provides that spouses and civil union partners are entitled to identical treatment.

As the Commission conveyed in its interim report, being in a civil union can have a negative economic impact on couples whose civil unions are not recognized by their employers. In that report, the Commission cited as an example a registered nurse from Commercial Township who testified that she received a letter from her employer, telling her that the hospital where she works would not be providing health insurance for her partner, citing the ERISA loophole. Because of the lack of insurance coverage, the nurse told the Commission:

> [M]y partner and I have seriously considered dissolving our civil union, because it has put us in a tremendously precarious financial position. Because now in the event that something happens with her and she has no insurance coverage, our entire estate is in jeopardy, rather than just half.[13]

Among the many witnesses who have appeared before the Commission have been civil union couples who spoke of similar economic hardship because employers have invoked ERISA to decline to provide benefits.

Since its first report, the Commission has gathered evidence that employers' invocation of ERISA has not lessened with the passage of time. If anything, the worsening economy seems to be encouraging employers to cut corners wherever they can, with equality for LGBT employees and their same-sex partners being among the casualties.

For example, the Commission heard testimony from a retired employee of Johnson & Johnson. When he sought to access retirement benefits for his civil union partner, J&J invoked ERISA as a reason for denying his partner's application for health benefits although they would offer such benefits to the spouses of retirees. Ironically, if the witness were currently employed by J&J, his partner would be eligible for benefits.[14] Testimony has indicated that this is not an isolated case.

The uncertain economy is also increasing the invocation of ERISA by employers who provide health care coverage to employees through collective bargaining agreements.

> Rosemarie Cipparulo, Esq., a labor attorney at Weissman & Mintz, teaches collective bargaining at the Rutgers University School of Management and Labor Relations. She represents labor unions and employees throughout the state, including a New Jersey-based employee of the shipping company DHL, which has invoked ERISA to deny equal benefits to the employee's partner. Cipparulo testified that:
>
> The sluggish economy and the high unemployment rate combine to reduce any union's bargaining and strike leverage.... Simply maintaining

> health and pension benefits in collective bargaining at this time is the labor movement's number one task, and it's difficult just to maintain the status quo.
>
> Because a legislative compromise resulted in civil unions rather than marriage for same-sex couples, unions are now put in the position of having to negotiate the extension to an additional class of people in this most difficult of times, and it's not easy. Given the escalating costs, employers are simply not willing to add anyone and most often are trying to scale back the provision of health and pension benefits.
>
> Adding civil union partners is virtually impossible to do at this time in this climate at the bargaining table. However, we already have benefits for married couples in our agreements. The key here, as is often in contracts, as you all know, is the language. Simply calling the joining of two people 'marriage' rather than 'civil unions' means we don't have to negotiate or rewrite the contract language....
>
> The fact is that just changing the language 'civil union' to 'marriage' changes the situation, because everyone agrees that married people and their spouses are entitled to health insurance and pensions. It's already in our agreements. We wouldn't have to expend any leverage on society's failure.[15]

When asked about whether the anti-discrimination clauses in many collective bargaining agreements would apply, Cipparulo testified:

> The problem there is that the insurance provider does not recognize the civil union to be the equivalent of marriage. The result is a refusal to extend the benefits.[16]

The testimony suggests that employers may decline to provide insurance and health benefits to civil union partners not because of an objection to the government recognition of same-sex couples, but because of the term used by statutes establishing government sanctioned, same-sex relationships. In fact, the Commission heard no testimony from civil union couples indicating that employers have refused to comply with the Civil Union Act because of personal objections to the law.

Some witnesses commented on the psychological impact in the workplace of separate legal status. They noted it is demoralizing for LGBT employees working side by side with straight employees to receive different benefits.[17]

Unequal benefits are not the only economic hurdles same-sex couples face. Dr. Leslie Gabel-Brett, Director of Education and Public Affairs for Lambda Legal,

noted that an economic burden falls on the shoulders of same-sex couples and their children who cannot afford legal representation when things go wrong.[18] As the Commission recognized in its interim report based upon the testimony it heard, these economic challenges disparately impact people of color and members of other traditionally marginalized communities. The State Public Advocate acknowledged the particular difficulty for lower-income same-sex couples who encounter discrimination because they have fewer resources with which to seek legal counsel and redress and who have difficulty meeting expenses if faced with reduced healthcare benefits.[19] Many witnesses confirmed they had expenses associated with preventative actions designed to protect them despite having entered civil unions. For example, many couples in civil unions had legal documents such as Medical Powers of Attorney prepared for out-of-state travel or medical emergencies.[20]

B. Civil unions create challenges to equal health care access.

Testimony received prior to and since this Commission's interim report confirms that many civil union couples receive unequal treatment in health care, particularly during medical crises. As noted in this report's summary, Gina Pastino testified before the Commission on October 15, 2008 about difficulties that arose when she was admitted for emergency medical treatment in the summer of 2008. At an earlier Commission hearing, Ms. Pastino testified about similar challenges she and her civil union partner experienced when faced with having to explain their family relationship while dealing with medical emergencies. As examples, Ms. Pastino described an incident when their son developed a dangerously high fever that would not respond to medication, and another when her partner needed emergency medical treatment. She echoed the sentiments of other witnesses, noting that she and her civil union partner "also had to take the time before we left to go to the emergency room to make sure we had our healthcare power-of-attorney, our power-of-attorney, all the necessary documents."[21]

In her testimony cited in the Commission's interim report, Laurin Stahl expressed her shock and frustration when staff at two different New Jersey hospitals questioned whether her civil union partner was her "legal" partner, and staff at one of those hospitals asked her for a copy of her civil union certificate. Although she advised hospital staff that her civil union partner had authority to make medical decisions on her behalf, she was not convinced that staff would consult her partner if such decisions were needed. [22]

In another case, a witness from Plainfield testified that when he was admitted to a New Jersey hospital for emergency surgery in April 2007, his civil union partner was not allowed to see him, and was removed by hospital security.[23]

In yet another case, a woman from Central New Jersey wrote to the Commission about her experience on the internet in trying to get health care for her partner

of 19 years. This couple would be particularly harmed by a deprivation in health care coverage, for they are raising one child with multiple disabilities and another child with Asperger's Syndrome, a form of autism.

> I'm just writing to add to the saga of "civil unions not being marriages." I recently changed jobs and my new employer has us enroll for insurance via the internet. The only choice offered in the system was "domestic partners" and apparently dental/vision coverage wasn't an option here. The system refused to take 'spouse' since we were of the same gender.... It sent up a "Warning: This can't be your spouse because employee and dependent are of the same gender" message.[24]

Such challenges for same-sex couples persist despite directives from the New Jersey Department of Health and Senior Services (DHSS) regarding the implementation of the Civil Union Act. John Calabria, Director of the DHSS unit that, among other things, oversees licensure of health care facilities, testified that in February 2007, the DHSS Commissioner issued a memo regarding the Civil Union Act to all licensed health care facilities in New Jersey. As Calabria explained, that memo notified all facilities that, as of February 19, 2007:

> [T]he act requires that all persons in a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage....[A]ll licensed healthcare facilities are required to have policies in place implementing protections of patient rights and to treat partners in a civil union as spouses in a marriage.[25]

Another witness aptly summed up the problem with civil unions:

> In times of crisis, it is unfair and unreasonable to ask people in a state licensed relationship to have to explain that relationship [civil union relationship]; to explain why they are legally entitled to hospital visitation rights, to explain why they are legally entitled to make final arrangements for their deceased spouse. Yet, as a practical matter, civil unions impose this unreasonable burden.[26]

C. Civil unions perpetuate psychological harm.

Since the interim report, the Commission has heard testimony from mental health experts. They described the deep psychological harm that civil union laws can inflict on LGBT youth, as well as on straight youth being raised in same-sex families. The Commission also heard from affected youth themselves.

Marshall Forstein, M.D., an associate professor of psychiatry at Harvard University Medical School and a Distinguished Fellow of the American Psychiatric Association, told the Commission:

> For young people coming out, which is about 5 to 15 percent of the overall U.S. population, the presence of role models who have equal status via marriage in society has significant meaning both internally and socially and has potential for reducing their isolation [and] sense of stigma that gay teens face in their everyday lives. And I point out here the data on suicide among gay and lesbian teens which is about three times that of the general teenage population.
>
> Same-sex marriages provide stability for couples in terms of public acknowledgment of their commitment and provide legitimacy for the children being raised by gay and lesbian parents.
>
> * * *
>
> The socially sanctioned right of gay marriage which is qualitatively different than civil unions, the right to choose one's spouse, has a positive impact on self-esteem, sense of being validated in the eyes of the community, and on the internalization of ideas of commitment and responsibility to others, something that is sorely needed in our society currently.
>
> * * *
>
> Nothing is more basic from a mental health perspective to happiness and liberty than the right to love another human being with the same privileges and responsibilities as everyone else.[27]

Judith Glassgold, Psy.D. is President of the New Jersey Psychological Association and a licensed psychologist who has provided psychotherapy to children, adolescents and their families, including same-sex individuals and families, for 17 years. She is a faculty member at the Graduate School of Applied and Professional Psychology at Rutgers University, and a past president of the Society for the Psychological Study of Lesbian, Gay and Bisexual Issues of the American Psychological Association. Dr. Glassgold testified before the Commission:

> Children of same-sex relationships must cope with the stigma of being in a family without the social recognition that exists through marriage. Children of same-sex relationships are the secondary target of the stigma directed at their parents because of their parents' sexual orientation. Such stigma may be indirect such as the strain due to lack of social support and acceptance. Also, some children may be targeted due to teasing in school or from peers.

> Further, although the children from civil unions are legally legitimate, children born into these relationships are born outside of marriage and still may be faced with the stigma of illegitimacy in the eyes of their peers.
> * * *
>
> Civil unions can be perceived as society's judgment that committed intimate relationships with people of the same sex are inherently different and potentially inferior to heterosexual relationships, and that the participants in the same-sex marriage are inherently less deserving than heterosexual couples of society's full recognition.
>
> As a result of the lack of marriage equality, both lesbian, gay and bisexual adolescents and children of same-sex relationships face continued stigma. The stigma has negative mental health effects. Children of same-sex families and lesbian, gay and bisexual adolescents would benefit from their reduction of the stigma and having any future threat of discrimination and stigma removed from their lives.[28]

Meredith Fenton is national program director of Children of Lesbians and Gays Everywhere (COLAGE) and is herself the daughter of a lesbian parent. She told the Commission:

> Many youth we work with have reported that one of the common ways that they have been teased by other kids is that kids have questioned the validity of their families because their parents aren't able to get married. Young people often equate the notion of a real family with the idea of a family that has married parents. A recent study that COLAGE co-published with GLSEN (the Gay, Lesbian, and Straight Education Network) showed that around 43 percent of students with one or more LGBT parents experienced verbal harassment from their peers in their schools on a regular basis. And denying families marriage equality merely gives more fodder to those bullies who can say, "Your family is not a real family, your parents can't get married."
>
> We also find youth in COLAGE who report that hearing that their family can't have the same rights as other families leads them to feeling scared or confused when they hear that folks are against their families being married. They say that they think somebody is going to come and break up their family. Youth have also shared that they're confused about the idea of civil unions and why there needs to be this separate category for their family.[29]

Caitlin, a college student who grew up in Northwestern New Jersey, told the Commission:

> When...my father came out of the closet...that changed a lot of things. Shortly thereafter he found his life partner...who is a second father to me and who I love very much and who my entire family loves....I was very proud of my father for finally finding his voice and being able to be true to himself.
>
> * * *
>
> If the law says that someone is equal, people are going to recognize it. And if the law is not willing to say that, why should the common person out on the street, in the schools, the teacher, students, recognize that family as being the same?
>
> So the State of New Jersey sent me a very clear message that while my old family was great and fabulous and wonderful, my new family was second rate. And it was really, really difficult for me ...because I grew up in an area where there wasn't a lot of diversity and I really needed someone to affirm me, and unfortunately the state failed me in that.[30]

Miriam, a 16-year-old from central New Jersey with two moms, testified:

> High school is definitely difficult for anyone, but it's really difficult for someone who stands out as much as I do, especially in this town where everyone is so similar. And people still come up to me sometimes and be like, "Oh, are you the girl, you have two moms, right?"...And now since they had a civil union a year ago, which, you know, was nice, it was a nice ceremony, it was beautiful, but I kind of had to explain to people, to my friends,...my parents are...having a wedding but they're not getting married, they're having a civil union. I would say maybe like 0.01 percent of high schoolers know what a civil union is. Like, no one knows what that is. So I have to...explain that.[31]

These are only a few of the first-hand stories the Commission heard from young people being raised by same-sex couples.

Among the most poignant testimony this Commission has heard since issuing its first interim report has been the stories of LGBT youth. They described the pain they have suffered because of the stigma associated with their not being able to envision marriage in their future.

Ashley, a high school student in Essex County, testified:

> Today (a classmate) asked me, "Do you have a boyfriend?" I said, "No, actually, I have a girlfriend. You might know her." And he said, "You have a girlfriend? That's wrong, that's a disease. You need to go get help for that." And I was like, "Why is it a disease?" And he was like, "You

> can't get married. Well, that's why, you can't get married. Obviously something is wrong with it."[32]

Tom, a 17-year old gay teen from Essex County, testified before the Commission about what the difference between civil unions and marriage means to him:

> [B]esides the obvious legality issues, [civil union is] a separate word. It's totally different. It's like if my two brothers can be married and have their relationship with their...wife be called a marriage and I can't that puts me in a second-class citizen state which I never want to be in, which I currently am in right now but I am desperately trying to get out of.
>
> * * *
>
> I'm just tired of having my future be in jeopardy because certain people don't feel comfortable giving equal rights to gays and lesbians alike. And I'm not really sure what to say, but it's just the emotional damage that's been done by knowing that it's not – that I don't have the equal rights that both my brothers have,...[i]t's just a confusing situation to be in, and the more I think about it, the more angry I get, the more confused and upset.
>
> * * *
>
> I want to be able to, in the future, talk to my brothers and say, "Nick, you have a wife, you love her very much. David, you have a wife, you love her very much. But I have a husband and I love him too."... Even if I'm allowed to have marriage now, which would be an amazing thing, the damage that's been done since I was really little to now, I don't think it can ever be undone. But being able to be married now would be such an amazing feeling, to know that some time in my life I can be equal to everyone I know, to both my brothers and all my friends that I have.[33]

Finally, the Act also has an adverse psychological impact on couples where one of the partners is transgender. The Commission affirms its finding from the interim report that the classification of civil union may place marital status in question for these couples. These couples, who were married legally in New Jersey, now find themselves questioning how their relationships will be labeled in light of the Act.

Heather Shulack, a male to female transgender individual, who has been married to Karen for over 20 years, testified:

> The most important fact that I would like to bring to your [at]tention is how our lives have impacted our sons....[I]f the civil union legislation

> evolved into same-sex marriage equality there would be less of a stigma on our family structure. Basically the state would in effect legitimize our family structure.[34]

Denise and Fran Brunner, who have been married for 28 years and who have three children, reported that they feel as if they are in legal limbo and are concerned that they could be relegated to second class status if their marriage is deemed a civil union.[35] They fear that separately labeling their relationship would negatively affect their children by sending the message that their parents are something less than a legally married couple.

Audrey and Robin Bazlin-Weglarz also fear that the legality of their marriage could be subject to challenge some day. Robin noted that their relationship did not change because of the surgery; they still feel the same love for one another they always did.[36] They, too, are concerned that their marriage may be viewed as a civil union because of the perception that civil unions are not equivalent to marriages.

D. A marriage law would make a positive impact.

The Commission must "evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage." Inherent in that charge is the need to examine whether a marriage law would remedy the shortcomings of the Civil Union Act.

The Commission concludes that a marriage law would provide that remedy, despite the existence of a federal prohibition on the recognition of same-sex relationships.

As the Commission reported in its interim report, the marriage law in Massachusetts has led many employers in that state to ignore the ERISA loophole and provide equal benefits to same-sex wives or husbands. The Massachusetts experience dispels any notion that so long as federal law does not recognize same-sex relationships, it would make no difference whether a particular state uses the term "marriage" or "civil union" to describe a same-sex couple's relationship. In fact, the word "marriage" can and does make a difference to employers, even within the constraints of federal law.

Tom Barbera, a Massachusetts labor leader who works for the Service Employees International Union and served as Vice President of the Massachusetts AFL-CIO, told the Commission:

> From the immediate weeks after May 17, 2004, when marriage equality took effect in Massachusetts, right on through today, ERISA has barely been an issue in Massachusetts.... In the first weeks of marriage equality,

> only a few companies chose not to provide retirement benefits under ERISA to same-sex married couples.
>
> * * *
>
> It is not that ERISA-covered employers in Massachusetts don't understand that federal law allows them to refrain from providing benefits to same-sex married couples. It's that employers also understand that without the term 'civil union' or 'domestic partner' to hide behind, if they don't give equal benefits to employees in same-sex marriages, these employers would have to come forth with the real excuse for discrimination. Employers would have to acknowledge that they are discriminating against their employees because they are lesbian or gay. And employers in a progressive state like Massachusetts are loathe to do that, as they would be in a similarly progressive state like New Jersey were you to enact a marriage equality law.
>
> Therefore, the existence of ERISA makes it all the more important to change the nomenclature of civil unions to marriage. As we've seen time and again in Massachusetts, the word 'marriage' has great persuasive weight in getting companies to offer benefits notwithstanding ERISA.[37]

Lee Swislow and Gary Buseck, respectively the executive director and legal director of Gay and Lesbian Advocates and Defenders (GLAD), the legal organization serving the LGBT community across New England, describe how the word "marriage" places a heavy burden on employers thinking of invoking ERISA, which the term "civil union" does not. As Swislow and Buseck wrote to this Commission:

> A company that makes coverage available to the spouses of heterosexual employees has to depart from its general rule covering married employees and draw a new line of discrimination in order to deny benefits to some married employees but not others. There are a number of companies that have been unwilling to draw that line of discrimination and do, indeed, provide the same benefits to both their same-sex and opposite-sex married employees.[38]

After issuing its interim report on February 19, 2008, this Commission heard more testimony from same-sex couples in Massachusetts - and their children - on the extraordinary psychological benefit of the couples' being able to marry.

Laura Patey and Leigh Powers, a married couple in Massachusetts, are the mothers of two children who were adopted at age 11. Both children had been placed for adoption and returned, snffering heartbreaking loss before Patey and Powers adopted them into a secure home. The story of these children is not

dissimilar to those of children being raised by same-sex parents in New Jersey, a pioneer in allowing same-sex couples to adopt.

Laura Patey, who grew up in New Jersey, told this Commission:

> After our civil marriage, you know, I'd be in the car with Alex and he'd say, "You know what?" And I'd say, "What?" And he'd go, "You're married." And it would just come up for weeks. He'd say, "You know what? You're married." It was a big deal. It was always in the forefront of his thinking...You know, kids who have not had family, haven't had that sort of connection and real understanding, attachment issues are huge. And a sense of validation of being part of a real family.[39]

Leigh Powers added:

> I cannot tell you the impact that 15 minutes and the marriage license had on our two young guys....Don't misunderstand me but I think it almost meant more to them in some ways because our commitment had been solidified through our church service and through our life together for 16 years. But to them it made all the difference in the world. And for at least two, three, four weeks later we would get teased about finally not living in sin any longer, so it was such a profound impact.[40]

Raised by his moms Susan Shepherd and Marsha Hams in Massachusetts, Peter Hams-Shepherd went on to become a hockey star in high school and college. He testified before the Commission:

> [A]s a kid, if your parents are different,...you don't want to talk about your family....I was very guarded with my friends, my teammates, my coaches....When they don't understand what your parents are, that puts you in a scary situation as a kid, because kids are extremely mean to each other and that's just the way kids are....[I]t put huge pressure on me....I was afraid to ask my teammates or friends to stay at the house because I was afraid that they would see that my parents have one ... bedroom, but I was also afraid that my coach would either cut me from the team or bench me, and that was something that happened all the way up until my parents got married.
>
> Every time I let somebody in and I said, "Hey, I have to tell you something," I'd say, "My parents are gay," and no matter what they said, my next reaction was, "Don't tell anybody." And that's no way to grow up.
>
> After my parents got their marriage license, all that changed. For the first time in my life I could stand there and I had a word to describe my family and that word could describe it to everybody because everybody

> already knew what a marriage was. You know, they didn't have to question.
>
> It's been the biggest thing in my life. You know, I can't stop talking about my parents. It's easier for me to go around and talk to friends that I've had for 20 years, to go up to them and speak about my family openly now and they get it. When you say that your family is married, they just get it and there's not a question. I just wish it would have happened when I was little, so I didn't have to go through all this stuff.
>
> It was just the best feeling I ever had. And part of it, too, I think was I felt like finally I was protected. My parents' fears probably creeped into my subconscious mind too as a kid, that they would lose me for some reason.
>
> I've watched young gay couples, teenagers, 15 year olds, walk up to my parents and say, "You guys are heroes." And you can see in their eyes that finally there's hope that their relationship is just as good as anybody else's. There's a future in their relationship. I was happy for every other little kid out there, that they didn't have to go through the same stuff.
>
> I see the huge weight lifted off my parents' shoulders. When they talk to their co-workers at work or their boss, it's huge. To not tell your lifelong friends or your boss for 20 years about your spouse, it's a tough thing to live with, and it's something that people shouldn't have to live with, especially the kids.[41]

Peter's parents also testified before the Commission. In contrast to civil union couples in New Jersey who have struggled for acceptance at hospitals and for equality in the workplace, this Massachusetts couple told the Commission a different story.

Marsha Hams testified:

> If you have a car crash and you end up in a hospital you don't know, or an ER, you know you're going to be treated like anybody else, and that's a huge relief.[42]

Susan Shepherd added:

> I do health and safety work with...big construction unions. I went down to the labor training center a few weeks after [we got married]....All these big burly guys come and say, "Well, I guess we should say congratulations, huh?" And I'm like, "Oh, oh, yeah. Thanks." Then another guy walks in and says, "How does it feel to be married

> now? How's married life?" You know, because that's what people understand....What are they going to say, "How is your partner? How is your... No. My wife." And they get it.[43]

Contrast this with the testimony before the Commission by civil union couples in New Jersey, who report they have had to explain their status repeatedly to employers, doctors, nurses, insurers, and teachers, among so many others.

One partner in a civil union couple in New Jersey showed the Commissioners a "flash drive" that both he and his partner keep on key chains. The flash drives contain living wills, advanced health care directives, and powers of attorney for the couple, as they fear being unable to adequately explain their relationship to emergency room personnel during a medical crisis. The witness testified that opposite-sex married couples need not live with this uncertainty because a mere declaration that someone is the "wife," "husband," or "spouse" of someone who is ill will provide immediate access and decision-making rights.

Most New Jersey civil union couples who testified about difficulties in having their rights recognized told the Commission that they believe they would not have encountered the same level of resistance, or any resistance at all, had they been able to identify themselves as married. As the Commission noted in its interim report, they called the separate system created by the Act "an invitation to discriminate" and a "justification to employers and others" to treat same-sex couples as "less than" married couples. Several witnesses offered their view that relatives, medical caregivers, and individuals in positions of authority take cues from the government's decision to categorize same-sex couples differently.

This testimony demonstrates that the civil union law has resulted in economic, medical and psychological harm for a number of same-sex couples and their children. This Commission believes that as long as New Jersey maintains two separate systems to recognize the unions of same-sex couples and opposite-sex couples, same-sex couples and their children will face a challenge in receiving equal treatment. Under a dual system, these and future families will suffer economic, medical and psychological harm.

The Commission finds that even if all employers in New Jersey were suddenly to provide benefits to employees in civil unions equal to the benefits provided to married employees - an unlikely proposition in itself - such compliance would not cure much of the inequality perpetuated by the civil union law.

Further, even if some employers were to continue to invoke the federal ERISA loophole under a prospective marriage statute - notwithstanding the evidence from Massachusetts that fewer employers would invoke that loophole - a marriage statute would cure much of the harm perpetuated by the existing civil union law as reflected in the collected testimony.

III. Fiscal Impact of Civil Unions vs. Marriage

The Legislature tasked the Commission to "evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage."[44] To this end, the Commission heard considerable testimony about the financial impact of the civil union law on the State as well as the potential fiscal impact of marriage.

A. Studies suggest that marriage would enhance the State's revenues and economy.

The Commission reviewed testimony about the impact marriage would have on the State budget. A Williams Institute[45] study of the impact of marriage for same-sex couples on New Jersey's economy and a study by the New York City Comptroller's Office suggest that the introduction of marriage would likely result in increased revenue to the State and would have a positive impact on the State's economy, primarily through increased tourism.

The Williams Institute studied the impact of marriage on New Jersey's budget, and Professor Brad Sears, J.D., Executive Director of the Institute and an Adjunct Professor of Law at UCLA Law School testified about the report's findings.[46] The Institute conservatively concluded that extending marriage to same-sex couples could boost New Jersey state and local government revenues by approximately $19 million over the next three years.[47] In addition, spending on weddings and tourism could boost the New Jersey economy by approximately $248 million over three years and create or sustain over 800 new jobs.[48]

The Institute relied on a number of variables in calculating the figures. First, based upon U.S. Census Bureau data and the experience of Massachusetts and other states, the Institute estimates that approximately one half, or 10,589, of New Jersey's same-sex couples would marry over the next three years.[49] Second, based upon a number of assumptions including tourism data and the recognition of same-sex marriage by other jurisdictions, the Institute also estimates that 45,831 same-sex couples from other states would travel to New Jersey to marry.[50] Almost half of those couples would come from New York.[51] Third, the Institute conservatively estimated that both in-state and out-of-state couples would spend less than the average cost of a wedding.[52]

As noted, marriage could increase government revenue by almost $19 million. These revenues are comprised of $17.3 million in local sales taxes and occupancy fees and $1.6 million in marriage license fees.[53] Notably, $25 of each marriage license fee is designated for domestic violence programs in New Jersey.[54] While some fee revenue will be offset by costs of processing additional marriage licenses, it will be minimal given the experiences in other states, and New Jersey's own Fiscal Estimate of the impact of civil unions which also require a license.[55]

The Institute also identified other potential revenues that could not be easily quantified, including increases in motor fuels tax, excise tax on alcoholic beverages, property tax revenues or increased earnings taxes.[56]

Mr. Sears testified that the positive fiscal impact of marriage to New Jersey will diminish as more states ratify marriage, and Massachusetts abolishes the law preventing non-residents from marrying there.[57]

The Comptroller for New York City conducted a similar study of the financial impact marriage would have on both the City's and New York State's economy.[58] Marcia Van Wagner, Deputy Comptroller for Fiscal & Budget Studies, appeared before the Commission to testify about the findings.[59] The Comptroller conservatively estimated that marriage would add a net of $142 million to the City's economy during the three years after enactment and $184 million to the State's economy over the same period.[60] The City's figures consisted of $175 million in revenues from weddings less $33 million from increased costs for employee health insurance within the State.[61] The State's figures were comprised of $247 million in revenue from weddings minus $63 million in increased health insurance costs.[62] Significantly, the Comptroller estimated that New Jersey residents crossing the border would generate revenue of over $30 million in New York State and over $17 million New York City.[63] The Commission believes that much of that revenue would remain in New Jersey if marriage were enacted in both states.

Over the first three years after enactment, the net fiscal benefit to New York State was estimated at $117.6 million and the fiscal benefit to the City for the same period was $6.9 million.[64] The positive fiscal impact on the State resulted from increased sales and hotel occupancy taxes, increased personal income taxes[65] and savings from certain publicly funded health programs.[66] The positive impact on the City derives from increased sales and hotel occupancy taxes and marriage licensing fees.[67]

The Commission also heard testimony that marriage would make New Jersey attractive to same- sex couples and others who are looking for a progressive environment in which to live. The New York Comptroller noted a number of salutary financial benefits ranging from positive impacts on businesses which may face lower recruiting costs or an expanded pool of qualified job applicants[68]

or increases in home purchases leading to more tax revenue.[69] The Comptroller testified that changes in behavior with regard to home ownership could lead to increased real estate taxes of as much as $40 million over a multi-year period.[70]

Similarly, Marc Solomon, Executive Director of MassEquality, testified to the positive economic impact of marriage on Massachusetts because same-sex couples are moving there and bringing their talents and financial contributions.[71] Martha Livingston, founder and CEO of Inclusive Recruitment, LLC, a Boston-based staffing firm that places LGBT professionals in workplaces, confirmed this observation. She testified that she has observed LGBT professionals moving to Massachusetts, contributing to the community and bringing their expectations, credentials, children, parents and money - for the culture of acceptance.[72] She has further found that companies have been "rolling out the red carpet" to the LGBT community in terms of recruitment practices.[73] She also noted that marriage in Massachusetts is not only appealing to the gay community but also to all who want to live in an inclusive and accepting environment.[74] Allison Kemper, a Graduate Student in the University of Toronto Business School, echoed this view. She noted that attracting the best and the brightest is accomplished in part by a positive living environment, and a place where human rights are respected will draw not only the gay community but those who want a happy and respectful place to live.[75]

The Boston Business Journal wrote of the Massachusetts experience that "some observers see the influx of same-sex couples as a boon for the state's economy," and a "trend that runs counter to the talent drain" particularly in light of Massachusetts' "dubious reputation for losing talented workers to less pricey markets."[76]

B. Marriage would not result in increased costs to the State.

After the Civil Union bill was introduced, the Office of Legislative Services estimated that the state and local costs associated with the new law would be minimal "as similar functions are currently being undertaken."[77] The State Departments testifying before the Commission unanimously confirmed that the implementation of the Civil Union Act has resulted in minimal costs to the State. Most of the costs have been associated with changes in forms, programming and training on the law.[78]

Moreover, the State government's implementation of the Act has gone smoothly. David Anderson of the Administrative Office of the Courts noted that the Judiciary's implementation of the Civil Union Act has been "seamless."[79] Ronald Marino, Director of Unemployment Insurance for the Department of Labor & Workforce Development cited a smooth transition of civil unions into the normal flow of the Department's business.[80] Maureen Adams, Director of the Division of Taxation, echoed these comments, noting a smooth transition.[81]

However, one Commissioner noted that, more than a year after the effective date of the Act, the State Ethics Commission had not changed its financial disclosure forms to include civil union as an option.[82] This, however, appears to be an isolated problem. None of the State Departments testifying received any complaints relating to the State's implementation of the Act.[83] Further, none of the verified complaints received by the Division on Civil Rights relates to State government operations, and advocacy groups received few complaints emanating from government's implementation of the Act.[84]

Because the Act grants same-sex couples "all of the same benefits, protections and responsibilities" as "are granted to spouses in a marriage," the Departments testified that enactment of marriage would result in little or no financial impact on the State.[85] Indeed, marriage may lead to reduced costs in some instances. Joseph A. Komosinski, the State Registrar of Vital Statistics, testified that money would be saved because there would be no need to print alternative forms, and there would be one standard procedure for the Bureau of Vital Statistics.[86] Dr. Gabel-Brett noted:

> In these financial times, ... why or how can we waste state money, taxpayers' money, making forms, making changes, making a separate structure that has to be administered, for no other purpose than to set people apart?....
>
> Every time you change a state program, whatever it might be, some benefit, some program, some eligibility requirement, you are going to have to change it in two parallel structures. You are going to have to spend more time sending out notices, changing websites, changing computer forms. So it is not going to end."[87]

The Commission concludes that the civil union law has had minimal negative impact on the operations of state government. Most agencies expended time and resources dedicated to civil unions within the first few months after enactment. Since then, there have been few new costs associated with the Act. The testimony suggests that implementation of the civil union law by state government was timely and efficient. Overall, agencies are fulfilling their obligations under the Act, and civil union couples are being provided the benefits and protections afforded by State programs.

The State would have little, if any, cost associated with the enactment of marriage, as any such costs would already have been realized as a result of the implementation of the Civil Union Act.

C. Civil Unions and Federal Impediments to Equality.

As noted previously in this report, the Commission finds that a marriage law in New Jersey would make a significant difference in providing equality and dignity

to same-sex couples and their children. Even if federal law fails to recognize same-sex relationships as marriage, the Commission finds that a marriage law in New Jersey would help to alleviate the disparate treatment of same-sex couples, including denial of benefits, as testimony to the Commission has shown to be the case in Massachusetts. However, it is worth reviewing what federal impediments do exist in providing equality to same-sex couples in New Jersey.

Federal DOMA continues to obstruct access to equal financial benefits of marriage for civil union couples, and would continue to do so even if New Jersey were to enact marriage. There are over 1,000 federal rights and benefits of marriage that civil union couples cannot enjoy because of DOMA, which defines marriage for purposes of federal law as the union between one man and one woman.[88] As noted in the Commission's first report, DOMA permits employers to discriminate against same-sex couples in the provision of health insurance benefits. Moreover, the Commission has heard testimony that DOMA precludes federal reimbursement for certain federally subsidized programs such as Medicaid,[89] and it may impact the amount of financial aid for which a child of a same-sex couple qualifies.

The Commission heard from the Department of Human Services concerning two federally funded programs - Medicaid and public entitlements - which may be impacted by the recognition of government sanctioned same-sex relationships.

Medicaid is a federal program funded jointly by the federal government and the State. In the context of Medicaid, because DOMA controls the definition of "spouse," "husband" and "wife" as these terms are used in federal laws and because federal law does not recognize state-sanctioned same-sex relationships like civil unions, the State Medicaid program cannot claim federal funds for civil union couples, nor could it do so for same-sex married couples so long as DOMA exists.[90]

Currently, Medicaid eligibility for couples in civil unions is based upon each individual's eligibility including a consideration of any jointly held assets.[91] Pursuant to written guidance given to Vermont by the Centers for Medicare and Medicaid Services (CMS), New Jersey has two options.[92] The State may (1) establish a separate state-financed and administered program for which federal funds cannot be used, or (2) elect to apply its Civil Union statute in the context of its Medicaid program so long as it separately identifies any service and administrative expenditures that result from the difference between its definition of spouse from the DOMA definition and does not submit any claims for federal funds for those expenditures. For New Jersey to choose the first option, the State's Medicaid law would have to be changed to create a state-only funded program for these couples.[93] The Department has not prepared an analysis of

the fiscal impact of such a program.[94] The second option would also require statutory changes. Both options would require a budgetary analysis.[95]

The Department also evaluated the impact on public entitlements such as Temporary Assistance to Needy Families (TANF), General Assistance (GA), food stamps and child support. The Civil Union Act did not have a major financial impact in those areas.[96] In the TANF, GA and food stamp programs, eligibility is determined by household income.[97] Thus, a couple's civil union or marital status is irrelevant for purposes of determining eligibility. Some aspects of the child support program may be affected by DOMA's definition of spouse, and the Department is seeking guidance from the federal Department of Health and Human Services.[98]

The Commission also heard testimony from the New Jersey Commission on Higher Education and the Higher Education Student Assistance Authority (HESAA) concerning the impact of civil unions on student financial aid. Eligibility for federal and state student financial aid is determined through the FAFSA form, which, because it is a federal form, does not recognize civil union status.[99] While there is no federal law requiring the use of the FAFSA, the creation and implementation of a parallel State system for student aid applicants would cost between $5-10 million annually, including creation of a database and infrastructure, printing and mailing costs, additional staff salary/benefits, and leasing additional workspace.[100] Currently, the state receives results of the FAFSA processed by the federal government which the State then uses to implement its own student aid program.[101] Michael Angulo, Executive Director of HESAA testified: "The reason why it [aid application process] became centralized through the federal form is, number one, because the federal database could be checked against the IRS database, but also because it's a uniform process nationally. Each state used to have a dual system and that was extremely burdensome on families, on the kids filling out those forms."[102] Mr. Angulo noted that $265 million in State-funded grants and loans is apportioned based upon the FAFSA data which is problematic because it does not take civil union status into account.[103] Thus, State funds are not available to children of civil union couples on the same basis as married couples. Either a change to the FAFSA form to recognize same-sex relationships or a parallel State financial aid process with accompanying costs would rectify the situation.

Consequently, in this regard the Commission finds the State in noncompliance with the Civil Union Act. Mr. Angulo noted that this is so because the costs that would be incurred if the State were to implement any alternative application system have not been budgeted. It should also be noted that for the State to be in compliance regarding financial aid to students would require additional expenditures regardless of the extension of marriage.

The lack of recognition of a couple's civil union status could have either a positive or negative impact on a child's eligibility for student aid. It may be

positive if the parents' incomes are not considered jointly. For example, if both parents work, the student can list the parent with the lower income and thus potentially qualify for higher loan amounts.[104] The effect may be negative if one partner's financial dependency on the other partner is not considered for eligibility.[105] Lacking that dependent status, they may not qualify for unsubsidized loans, or in some cases grants.[106] The problem with regard to student aid is one that is also encountered in Massachusetts, because of DOMA, despite marriage.[107] Delegations from New Jersey, Vermont and Massachusetts are working to change the FAFSA form to correct the problem.[108]

DOMA also impacts civil union couples in the area of taxation. Often, these couples are burdened with additional expenses and time spent preparing extra paperwork to complete their tax forms.[109] One such example is in the area of earned income tax credits. Because same-sex couples are ineligible for a federal earned income tax credit (EITC) and eligibility for New Jersey's EITC is calculated upon one's eligibility for the federal EITC, civil union couples are required to prepare a federal worksheet and apply those calculations to state filings.[110] These additional steps result in couples' having to shoulder costs beyond those borne by married couples.

Civil union couples also face an unequal tax burden associated with their receipt of employee health benefits. A Williams Institute study issued in December 2007 estimated that same-sex couples who are in same-sex domestic partnerships (or in New Jersey's case, civil unions), lose $178 million per year to additional taxes and that employers who offer benefits to employees' domestic or civil union partners pay an additional $57 million per year in additional payroll taxes because of this unequal tax treatment.[111] The reason for this inequality for partners is that the Internal Revenue Code treats the value of the benefits as taxable or "imputed" income to the employee, unless the partner qualifies as a dependent of the employee.[112] Employers who offer equal benefits to same-sex couples must also pay taxes on this imputed income for their share of the employee's payroll tax while benefits for an employee's spouse are not considered taxable income regardless of the dependence or independence of the spouse.[113] Another tax disadvantage is that employees cannot use pre-tax dollars to pay for a partner's coverage.[114]

Given the non-recognition by federal law and by the laws of many states, the marriage of a New Jersey same-sex couple could share many of the financial inadequacies of a civil union. However, the Commission believes that such a change in the law could afford LGBT couples the less tangible, but nonetheless fundamental, benefits of marriage, including its social, historical and cultural recognition and its powerful nomenclature. As discussed earlier in this report, the use of the term marriage could also enhance recognition of the underlying legal consequences of the relationship especially in times of crisis. Further, the State's amendment of the marriage laws to provide access to civil marriage for

same-sex couples would be an unequivocal and affirmative recognition of equality because it would depart from maintaining a separate scheme that singles people out based upon their sexual orientation.

Finally, even in the event that DOMA is repealed, civil unions would still not be recognized, since the term civil union appears nowhere in federal law.

IV. RECOGNITION AND TREATMENT OF CIVIL UNIONS BY OTHER STATES AND JURISDICTIONS

The Legislature directed the Commission to collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution.[115] The New Jersey Legislature defined the term "civil union" to be the "legally recognized union of two eligible individuals of the same sex" who "receive the same benefits and protections and are subject to the same responsibilities as spouses in a marriage."[116] Consequently, the Commission has surveyed government-sanctioned relationships from states and foreign jurisdictions which provide all of the rights and obligations of marriage. Five states besides New Jersey have created legal relationships available to same-sex couples which propose to be the equivalent of marriage.

A. Vermont

Vermont enacted its civil union law in 2000.[117] Parties to a civil union in Vermont are intended to enjoy all the same benefits, protections and responsibilities under Vermont law as are granted to spouses in a marriage. Under the law, civil union partners are intended to have equal access to state separation, divorce, child custody, child support and property division laws if the civil union ends. Civil unions can be dissolved in Vermont family court in exactly the same manner as divorce of married couples.

The Commission heard testimony that even eight years after enactment, Vermont's Civil Union Law has not resulted in true equality although it purports to provide protections equal to marriage.[118] "Time cannot and does not mend the inequality inherent in the two separate institutions."[119] On July 24, 2007, House and Senate leaders in the Vermont State Legislature announced the creation of the Vermont Commission on Family Recognition and Protection for the purpose of reviewing and evaluating Vermont's laws relating to the

recognition and protection of same-sex couples and the families they form. The Vermont Commission issued its report in April 2008.[120] Many of their findings mirror those of this Commission.

B. California

In 1999, California created domestic partnerships, which provided only a handful of rights to same-sex couples (as well as to opposite-sex couples in which one or both parties were at least 62 years of age). Effective in 2005, the California Legislature expanded the scope of the law to afford domestic partners all of the same rights, privileges and responsibilities as spouses under state law.[121] In most cases, a domestic partnership must be dissolved through filing a court action identical to an action for dissolution of marriage.[122]

On May 15, 2008, the Supreme Court of California ruled in a 4-3 decision that California's law limiting marriage to opposite-sex couples violates the state constitutional rights of same-sex couples and may not be used to preclude same-sex couples from marrying.[123] The Court ruled that laws directed at sexual orientation are subject to strict judicial scrutiny and that marriage is a fundamental right under Article 1, Section 7 of the California Constitution, thereby striking down as unconstitutional the previously existing legislative ban on same-sex marriage embodied in two statutes, one enacted by the Legislature in 1977, and the other through the initiative process in 2000.

Considering whether the separate institution of domestic partnerships passed constitutional muster, the Court recognized that:

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of "marriage" exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.[124]

Assessing the favorable impact of the institution of marriage on the children of same-sex couples, the Court noted:

[T]he institution of civil marriage affords official governmental sanction and sanctuary to the family unit, granting a parent the ability to afford his or her children the substantial benefits that flow from a stable two-parent family environment, a ready and public means of establishing to others the legal basis of one's parental relationship to one's children, and the additional security that comes from the knowledge that his or her parental relationship with a child will

be afforded protection by the government against the adverse actions or claims of others. (Citation omitted).[125]
The Court also recognized the intangible and powerful meaning of the term marriage:

> [B]ecause of the long and celebrated history of the term 'marriage' and the widespread understanding that this term describes a union unreservedly approved and favored by the community, there clearly is a considerable and undeniable symbolic importance to this designation. Thus, it is apparent that affording access to this designation exclusively to opposite-sex couples, while providing same-sex couples access to only a novel alternative designation, realistically must be viewed as constituting significantly unequal treatment to same-sex couples.[126]

Finally, citing this Commission's first interim report, the Court recognized that the fundamental infirmity of the domestic partnership law was in the lack of a universally understood meaning of the term applied to the relationship:

[A]lthough the meaning of the term 'marriage' is well understood by the public generally, the status of domestic partnership is not. While it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term 'domestic partnership' is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.[127]

On November 4, 2008, a majority of California voters voted for passage of Proposition 8, which denies marriage for same-sex couples. As of the date of this report, the validity of Proposition 8 rests with the courts.

C. Connecticut

In 2005, Connecticut passed a civil union law which offers same-sex couples all the same benefits, protections and responsibilities under law as are granted to spouses in a marriage.[128] In Connecticut, both marriages and civil unions are subject to dissolution.

On October 10, 2008, in a 4-3 decision, the Supreme Court of Connecticut struck down Connecticut's statutory prohibition against marriage between same-sex couples, finding that it violated the Connecticut constitution.[129] Addressing Connecticut's civil union law, the Court held that "in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm."[130] Specifically:

Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.' As we have explained, the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not. Even though the classifications created under our statutory scheme result in a type of differential treatment that generally may be characterized as symbolic or intangible, this court correctly has stated that such treatment nevertheless 'is every bit as restrictive as naked exclusions' because it is no less real than more tangible forms of discrimination, at least when, as in the present case, the statute singles out a group that historically has been the object of scorn, intolerance, ridicule or worse. (Citations omitted).[131]

Thus, the Court determined, "In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior to marriage. We therefore agree with the plaintiffs that '[m]aintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.'" (emphasis in original).[132]

The Court also noted the deleterious effect the han on same-sex marriage is likely to have on the children of same-sex couples. "A primary reason why many same-sex couples wish to marry is so that their children can feel secure in knowing that their parents' relationships are as valid and as valued as the marital relationships of their friends' parents."[133] Quoting the Supreme Court of Massachusetts' decision in Goodridge v. Dept. of Public Health, the Court recognized that:

Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which the children will be reared, educated, and socialized.[134]

Finding that sexual orientation is a "quasi-suspect" classification for equal protection purposes, the Court, applying intermediate scrutiny, determined that the state scheme discriminates on the basis of sexual orientation. The Court further found that the state failed to provide sufficient justification for excluding same-sex couples from the institution of marriage. Thus, the Court concluded:

Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same-sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same-sex couples cannot be denied the freedom to marry.[135]

Connecticut began issuing marriage licenses to same-sex couples on November 12, 2008.

D. New Hampshire

In 2007, the New Hampshire Legislature passed a bill that created the legal status of civil unions.[136] Parties to a civil union are entitled to all state-level spousal rights and responsibilities. Civil unions and marriages in New Hampshire are terminated by divorce.

E. Oregon

In 2008, Oregon created domestic partnerships that provide the same privileges, rights, benefits, and responsibilities as marriage under state law to same-sex couples.[137] In Oregon, both marriages and domestic partnerships are terminated by a judgment of dissolution.

F. International

Belgium, Canada, the Netherlands, Norway, South Africa and Spain all offer same-sex marriage. Further, Great Britain, New Zealand, Iceland, and Sweden offer relationships with rights that match those offered to married couples in those respective countries.[138] Civil partnerships in Great Britain are terminated through a dissolution order. In New Zealand, both marriages and civil unions are terminated by dissolution orders. Registered Partnerships in Iceland are terminated by divorce in accordance with the procedures and provisions of Iceland's Marriage Act. Finally, the Swedish registered partnership is dissolved by a court applying the provisions of the Marriage Code.

G. Summary of other States and jurisdictions

The recognition of civil unions, domestic partnerships and the like and the rights associated with them outside of the state or country in which the relationship is established can be unclear.[139] Twenty states have either statutes or constitutional amendments that would preclude the recognition of these relationships.[140] Of the five states that have created legal relationships with rights, benefits and responsibilities equal to marriage, three, Connecticut, New Jersey and New Hampshire, will recognize out of state same-sex relationships.[141] Two states' civil union and domestic partnership statutes, Vermont and Oregon respectively, make no mention of recognizing out-of-state same-sex relationships.[142] None of the states' laws explicitly recognize relationships formed in foreign countries, although some states, like New Jersey and New Hampshire, recognize them as civil unions if they offer the same rights and benefits of marriage.

Although the Act has been in effect for less than two years, the Commission has heard no testimony suggesting that New Jersey's experience with its Civil Union law will be any different from Vermont's. Testimony has demonstrated that despite being in effect for over eight years, Vermont's law has not delivered equality to LGBT couples in that State. Extending marriage to same-sex couples in New Jersey would not deliver any new legal rights and benefits to those couples because the Act specifically grants same-sex couples the same protections and responsibilities under law that are granted to spouses in a marriage. But as the Commission has heard repeatedly, and as the Supreme Courts of California and Connecticut recognized earlier this year, a separate scheme does not create equality. Marriage in New Jersey would grant LGBT couples the universal recognition that accompanies the long-standing concept of civil marriage. Such recognition would eliminate confusion over the status of a couple's relationship when they are in a civil union.

V.

TESTIMONY AND LETTERS IN OPPOSITION

Of the more than 150 witnesses who appeared before or submitted written testimony to the Commission, ten expressed varying degrees of concern or opposition. In an effort to seek divergent viewpoints, the Commission specifically solicited the testimony of the New Jersey Family Policy Council, the New Jersey Catholic Conference, the League of American Families and PFOX (Parents and Friends of Ex-Gays and Gays). Of these groups, only the New Jersey Catholic Conference provided testimony in response to the invitation. The Commission further notes that a representative of the New Jersey Family Policy Council had previously testified at one of the Commission's hearings in 2007 although the Commission had hoped the Council would submit additional testimony.

A. The institution of marriage as between a man and a woman should be preserved.

Most of the testimony opposed to marriage presented the institution of marriage as having a meaning in society that transcends the legal concept of marriage. One witness, Len Deo of the New Jersey Family Policy Council, referring to the *Lewis v. Harris* decision, observed that:

> The social understanding of marriage is the union of a husband and wife, is associated in the minds of many New Jerseyans with important social and public goods, to alter that meaning would render a profound change in the public consciousness for social institutions of ancient origin.[143]

Another asserted that children are better off being raised in a household with "traditional" marriage.[144] These witnesses urged that marriage should be defined as between a man and woman consistent with historical precedent.

The Commission believes that it is precisely because marriage has a meaning in society beyond the legal concept of marriage that it should be offered to same-sex couples. The Commission has heard time and again how permitting same-sex couples to marry would make a qualitative difference in their lives and the lives of their families and has heard no testimony that allowing these couples to marry would harm opposite-sex couples who are married. Moreover, the

testimony of experts who appeared before the Commission supports the notion that children raised in LGBT households have equivalent upbringings to their counterparts raised by opposite-sex parents.

B. Traditional marriage derives from biblical teachings and should be protected.

Some witnesses opposed to same-sex marriage testified concerning their understanding of the meaning and authority of Biblical scripture. One witness characterized sexual orientation as a lifestyle choice that should not be endorsed by the state.

While the Commission also heard considerable testimony to the contrary, it is not the role of this Commission to comment on the merits of religious tenets or faiths of any of the witnesses who testified. This Commission recommends that the civil institution of marriage be extended to same-sex couples.

C. Civil unions provide sufficient equality.

A representative of the New Jersey Catholic Conference testified that the implementation of the Civil Union Act has been successful because only eight verified complaints have been filed with the Division on Civil Rights since the Act's implementation. He suggests that the answer is not to eliminate the Act, but rather to increase educational and enforcement efforts. According to this witness, "Not only is the Civil Union Act not broken, it appears to be working quite well."[145]

Another witness submitted written testimony suggesting that marriage equality would undermine the struggle for equal rights for same-sex couples. He cites to societal backlash when the phrase "civil union" is changed to "marriage" leading to the enactment of constitutional amendments across the country precluding the recognition of same-sex marriage or civil unions within those states. He believes the next step should be federally recognized civil unions.[146]

The Commission has heard considerable testimony that the Act perpetuates financial, social, psychological, and health inequities for same-sex couples. The Commission has also heard from witnesses who described concerns about coming forward to file complaints, particularly with government entities. Moreover, many of the consequences of the Act, such as psychological or social harm, do not necessarily lend themselves to a formal complaint process. As this Commission noted in its first report, advocacy organizations have received, and newspaper investigations have reported, many more cases of the Act's ineffectiveness than have been filed with the Division on Civil Rights. Consequently, the Commission does not believe that the number of formal complaints filed with the Division on Civil Rights is an accurate barometer of the Act's effectiveness. The overwhelming majority of the testimony establishes that

the Act, in application, did not accomplish what it was supposed to, that is, to provide equality for same-sex couples.

D. Marriage should be put to a public vote.

Other witnesses submitted written testimony advocating that voters have the opportunity to weigh in on a constitutional amendment or a law in this State akin to DOMA which defines a marriage as between a man and a woman. [147]

The Commission is not a legislative body; rather, it is a body established to make recommendations to the Legislature regarding, among other things, the efficacy of the Civil Union Act.

VI.

Domestic Partnerships Should be Maintained

The Legislature has directed that the Commission review the Domestic Partnership Act (DPA), N.J.S.A. 26:8A-1, et seq., and consider whether it should be repealed.[148] We don't believe the Domestic Partnership Act should be repealed.

New Jersey's domestic partnership law, L. 2003, c. 246, took effect on July 10, 2004, and was continued when the law authorizing civil unions took effect. Couples who enter a domestic partnership are afforded some, but not all, of the rights and obligations accorded to married couples. For instance, domestic partners enjoy protections related to the provision of health care, including:

- Guaranteed visitation rights at all licensed health care facilities for a patient's domestic partner, the children of the patient's domestic partner, and the domestic partner of the patient's parent or child, unless certain conditions not related to domestic partnership status are present;[149]

- Inclusion of a patient's domestic partner within the definition of "immediate family" for purposes of the statutes regulating nursing, convalescent and boarding homes;[150]

- The ability to consent to the release of medical records relating to the death of a domestic partner with AIDS or HIV infection;[151]

- The ability to consent to the performance of an autopsy on the body of a domestic partner;[152]

- The power to permit donation of all or portions of a deceased domestic partner's organs for statutorily approved purposes;[153] and

- The right to authorize a domestic partner to make mental health care decisions in certain circumstances.[154]

Domestic partners also enjoy certain tax benefits including (1) an exemption from the New Jersey transfer inheritance tax for property and pension contributions inherited by an individual from that person's deceased domestic

partner;[155] (2) the inclusion of a domestic partner as a dependent for New Jersey gross income tax purposes;[156] and (3) a $1,000 personal exemption for New Jersey gross income tax purposes for a domestic partner that does not file a separate return.[157]

Domestic partners may share in pension and other benefits. For example, the domestic partner of an individual who is a State-employee member of a State-administered retirement system is entitled to all of the benefits provided by that system to spouses of employees,[158] and an employer other than the State that is a participant in the State Health Benefits Program may adopt a resolution providing for benefits for the domestic partners of employees.[159] Further, private insurance companies that provide dependent coverage for health, hospital, medical and dental expense benefits under a contract delivered, issued, executed or renewed in this State, or approved for issuance or renewal in this State by the Commissioner of Banking and Insurance, must provide such coverage for a covered person's domestic partner.[160] Finally, a surviving domestic partner has the same intestacy rights as a surviving spouse and the authority to make funeral arrangements for the deceased domestic partner.[161]

Over 4,800 same-sex couples and 100 opposite-sex couples (age 62 or older) registered as domestic partners in New Jersey prior to the effective date of the civil union law. New Jersey domestic partnerships were affected in a number of ways when the law authorizing civil unions took effect. Same-sex couples in domestic partnerships may enter into a civil union with each other. For those who elect to do so, their domestic partnerships are terminated automatically when their civil union comes into being. Those who elect not to enter into a civil union remain in a domestic partnership. As of February 19, 2007, the effective date of the civil union law, the only new domestic partnerships that are authorized are for couples, either same-sex or opposite-sex, both of whom are age 62 or older. Since that time, 52 couples have become domestic partners.

The Commission heard testimony addressing the continued viability of the DPA. The New Jersey Public Advocate, whose Department houses the Division of Elder Advocacy[162], strongly favors maintaining the Act.[163] The Public Advocate recognizes that domestic partnerships provide "important advantages to senior citizens related to medical treatment, State taxes and public employee benefits."[164] Specifically, as outlined above, domestic partners can make medical decisions and have visitation rights as if they were spouses. One partner can claim the other as a dependent on state tax returns, and in cases where one partner transfers property to the other as a gift or as part of an estate, the domestic partnership qualifies them to receive beneficial tax treatment. For many public employees, a domestic partnership entitles partners to pension and retirement benefits. Moreover, domestic partners do not risk losing social security benefits as they would under some circumstances if they were to marry.[165] While acknowledging that "there have not been overwhelming

numbers of seniors registering as domestic partners" to date, the Public Advocate believes that the number will increase over time as more seniors become aware of the availability of the option.[166]

An elder law practitioner, who represents a number of senior clients in estate planning, acknowledged tax and estate benefits and healthcare rights enjoyed by domestic partners, as well as the protection of certain social security benefits that would be eliminated if a senior remarried.[167] She echoed the comment of the Public Advocate suggesting that more seniors would opt for domestic partnerships if they knew it was an alternative.[168]

The Commission also received one recommendation for amendment of the DPA. A family law practitioner submitted written testimony proposing that the DPA be amended to add a cause of action for irreconcilable differences applicable to terminations of domestic partnerships.[169]

As to the financial impact of continuing domestic partnerships, the testimony confirms that the State has already shouldered the costs of implementing the Act, and there would be minimal future cost to the State associated with maintaining the Act given its limited application. Such costs are attributable to maintaining forms necessary for domestic partners in areas including Vital Statistics[170], State pension and benefits[171] and insurance.[172] Notably, because those who entered domestic partnerships prior to the effective date of the civil union law can choose to remain in the partnership, forms, system upgrades and employee education on the Act would have to be maintained in any event. Additional costs may arise if local governments and Boards of Education vote to extend coverage to domestic partners, but these potential costs are too speculative to estimate with any degree of certainty. However, such costs would likely be negligible because the only new domestic partnerships which may be formed are those between couples age 62 or older.

Because domestic partnerships offer another option to couples age 62 or older that provides them with some of the rights of marriage but does not interfere with certain benefits they may receive, the Commission recommends that the DPA be maintained.

CONCLUSION

In conclusion, as a result of the overwhelming evidence presented, the New Jersey Civil Union Review Commission unanimously recommends that:

(1) The Legislature and Governor amend the law to allow same-sex couples to marry;

(2) The law be enacted expeditiously because any delay in marriage equality will harm all the people of New Jersey; and

(3) The Domestic Partnership Act should not be repealed, because it provides important protections to committed partners age 62 and older.

Endnotes

1. Testimony of Gina Pastino, October 15, 2008, pp. 41-42.

2. Ibid.

3. Testimony of Marshall Forstein, M.D., Associate Professor of Psychiatry, Harvard Medical School, April 16, 2008, pp.63-65.

4. N.J.S.A. 37:1-30, et seq.

5. N.J.S.A. 37:1-36.

6. N.J.S.A. 37:1-36b.

7. The Commission acknowledges the assistance of the following individuals from the Division on Civil Rights staff: Estelle Bronstein, Esq., Benn Meistrich, Esq., Ralph Menendez, Esther Nevarez, Nancy Reinhardt, and former staff member Bear Atwood, Esq. The Commission also acknowledges the assistance of Department of Law and Public Safety Summer Intern Kristen Schenk, from Columbia University.

8. N.J.S.A. 37:1-36.

9. Written Testimony of Gary Konecky, October 14, 2007.

10. Testimony of Anthony Giarmo, October 24, 2007, p. 43.

11. Testimony of Sally Sharp-Fried, April 16, 2008, p. 154.

12. N.J.S.A. 37:1-36c(5).

13. Testimony of Judith Ford, October 10, 2007, p. 24.

14. Testimony of Roger Asperling, October 15, 2008, pp. 54-55.

15. Testimony of Rosemarie Cipparulo, May 21, 2008, pp. 92-93, 97.

16. Id. at 95.

17. Testimony of Carla Katz, May 21, 2008, p. 74; Testimony of Carol Gay, Executive Officer of the N.J. Industrial Union Council, May 21, 2008, p. 85.

18. Testimony of Dr. Leslie Gabel-Brett, Director of Education and Public Affairs for Lambda Legal,,March 19, 2008, p. 123.

19. Testimony of Nicole Sharpe, Esq., Counsel to Public Advocate Ronald Chen,, p. 65.

20. See, e.g., Testimony of Jesse Thompson Adams, September 26, 2007, p 100; Testimony of Gina Pastino, October 24, 2007, p. 28.

[21]. Pastino Testimony, October 24, 2007, pp. 27-28.

[22]. Testimony of Laurin Stahl, October 10, 2007, pp. 35-36.

[23]. Testimony of Paul Beckwith, October 24, 2007, pp. 101 -102.

24. Written Testimony of Louise Walpin, submitted September 21, 2008.

[25]. Testimony of John Calabria, Director of Certificate of Need and Health Care Facility Licensure, Department of Health & Senior Services, May 21, 2008, pp. 40-41.

26. Konecky Testimony, id. at note 9.

27. Forstein Testimony, pp. 66-67, 69.

28. Testimony of Dr. Judith Glassgold, April 16, 2008, pp. 87-90.

29. Testimony of Meredith Fenton, April 16, 2008, pp. 75-76.

30. Testimony of Caitlin, April 16, 2008, pp. 83-85.

31. Testimony of Miriam, April 16, 2008, pp. 145-146.

32. Testimony of Ashley, April 16, 2008, p. 160.

33. Testimony of Tom, April 16, 2008, pp. 133,139.

[34]. Written Testimony of Heather Shulack, dated November 1, 2008.

[35]. Testimony of Denise & Fran Brunner, November 5, 2008, pp. 32-33.

[36]. Testimony of Audrey & Robin Bazlin Weglarz, November 5, 2008, p. 90.

37. Written Testimony of Tom Barbera, Pride at Work, AFL-CIO, Massachusetts, submitted September 26, 2007.

38. Written Testimony of Lee Swislow, Executive Director, and Gary Buseck, Legal Director, GLAD, submitted September 26, 2007.

39. Testimony of Laura Patey, April 16, 2008, p. 121.

40. Testimony of Leigh Powers, April 16, 2008, p. 120.

41. Testimony of Peter Hams-Shepherd, April 16, 2008, pp. 91-96.

42. Testimony of Marsha Hams, April 16, 2008, p. 103.

43. Testimony of Susan Shepherd, April 16, 2008, p. 99.

44. N.J.S.A. 37:1-36c(6).

44. The Williams Institute is a national think tank of the UCLA School of Law. According to its website, the Institute's mission is to advance sexual orientation law and public policy through rigorous independent research and scholarship.

46. Testimony of Brad Sears, J.D., Executive Director of The Williams Institute and an Adjunct Professor of Law at UCLA Law School, June 18, 2008, pp. 50-89.

47. Sears & Badgett, "The Impact of Extending Marriage to Same-Sex Couples on the New Jersey Budget", *The Williams Institute*, UCLA School of Law, June 2008.

48. Ibid.

49. Id. at 4.

50. Id. at 5-8.

51. Id. at 6.

52. Id. at 8.

53. Id. at 7.

54. Id. at 10.

55. Ibid., see also, note 77.

56. Ibid.

57. Sears Testimony, June 18, 2008, pp. 76-77.

58. Office of New York City Comptroller, "Love Counts: The Economic Benefits of Marriage Equality for New York," June 2007.

59. Testimony of Marcia Van Wagner, Deputy Comptroller for Fiscal & Budget Studies, June 18, 2008, pp. 89-107.

60. Comptroller Report at 2. The Comptroller arrived at these figures through a number of assumptions. First, he only considered the first three years after enactment. Id. at 3. Second, he relied on a 2005 American Community Survey (ACS) which estimated that 51% of same-sex couples would marry if that option were available. Ibid. Third, considering the average cost of a wedding in the State, $32,000, and the City, $37,000, he assumed that same-sex couples will spend far less on weddings on average. Id. at 4. The Comptroller estimated that 56,000 couples would travel from out-of-state to wed, some of whom would make day trips and others who would stay overnight with a number of guests staying overnight for one or more nights. Ibid.

61. Id. at 4-7.

62. Ibid. Increased health insurance costs would primarily impact smaller businesses as most large corporations and non-profits already provide health coverage to domestic partners. Van Wagner Testimony, p 46.

63. Comptroller Report at 5-6. Estimates of New Jersey residents traveling to New York to marry is based on ACS data and rank of leisure visitors to the State. Id. at 4.

64. Id. at 3.

65. The Comptroller estimated $5.5 million in increased sales tax to New York State, and $2.1 million in personal income tax as couples began filing jointly. However, the Comptroller estimated a $1 million loss in estate taxes.

66. The Comptroller concluded that the public sector would not incur additional costs due to spousal health benefits because under the State's Domestic Partnership Law, State and City employees are eligible for health benefits. Id. at 10. With regard to publicly-funded, means-tested programs, the Comptroller estimated a savings resulting from ineligibility due to an increased household income. Id. at 11-12.

67. Sales taxes would add $4.3 million while occupancy taxes would add $767,000. Marriage licensing fees would add $1.8 million. Id. at 3, 9.

68. Id. at 2.

69. Id. at 10.

70. Id. at 10.

71. Testimony of Marc Solomon, Director of Mass Equality, March 19, 2008, pp. 111-113.

72. Testimony of Martha Livingston, June 18, 2008, p. 31.

73. Id. at 35.

74. Id. at 33-34.

75. Testimony of Allison Kemper, June 18, 2008, p. 13.

76. Boston Business Journal, February 29, 2008 at http://www.bizjournals.com/boston/stories/2008/03/03/story1.html. An opponent of marriage equality in Massachusetts is quoted in the article, "There's anecdotal evidence that (there has been) an exodus of families from Massachusetts because of the same-sex marriage law. So there's two sides to the story."

77. New Jersey Office of Legislative Services, S2407 Legislative Fiscal Estimate (January 5, 2007).

78. Testimony of Bob Grill, Director of Field Operations, Motor Vehicle Commission, March 19, 2008, pp. 39-43 (training and update to brochures); Testimony of Erin O'Leary, Esq., Department of Children & Families, April 16, 2008, p. 13; Testimony of Brooke Stolting, Special Assistant to the Commissioner of the Department of Education, April 16, 2008, p. 56; Testimony of Ronald Marino, Director of Unemployment Insurance, Department of Labor & Workforce Development, May 21, 2008, p. 21 (updated forms); Testimony of Joseph A. Komosinski, State Registrar of New Jersey, May 21, 2008, pp. 35-36 ($175,000 spent to reprogram software and print new forms; also Department conducted statewide training); Testimony of Fred Beaver, Director of Division of Pensions and Benefits, June 18, 2008, p. 20 ($160,00 in systems update and paper costs spent to reflect domestic partnerships and civil unions); Testimony of Linda Schwimmer, Director of Legislation and Policy, Department of Banking and Insurance, June 18, 2008,

p. 121; Testimony of Maureen Adams, Director, Division of Taxation, Department of Treasury, November 5, 2008, p 25.

79. Testimony of David Anderson, Administrative Office of the Courts, March 19, 2008, p. 5.

80. Marino Testimony, pp. 24, 26.

81. Adams Testimony, p. 10.

82. Testimony of J. Frank Vespa-Papaleo, Esq., Director of New Jersey Division on Civil Rights, March 19, 2008, pp. 133-135.

83.Testimony of Barbara Allen, Esq., Department of Human Services, March 19, 2008, p. 33; Grill Testimony, March 19, 2008, pp. 40-42; Testimony of Melissa Raksa, DAG, Department of Law & Public Safety; March 19, 2008, p.50; Calabria Testimony, p 41; Sharpe Testimony, May 21, 2008, p. 64; Schwimmer Testimony, p. 121.

84. Written report of J. Frank Vespa-Papaleo, submitted November 5, 2008; Testimony of Steven Goldstein, Garden State Equality, March 19, 2008, p. 64-65.

85. Anderson Testimony, pp. 6-7; Grill Testimony, p. 43; Raksa Testimony, pp. 49-50; O'Leary Testimony, p. 13; Stolting Testimony, p. 56; Marino Testimony, pp. 26-27; Komosinski testimony, pp. 37-38; Beaver Testimony, p. 27 (some system changes would be necessary to implement); Schwimmer Testimony, p. 120 (though some additional training may be necessary, pp. 123-24); Adams Testimony, p. 25.

86. Komosinski Testimony, May 21, 2008, p. 37.

87. Gabel-Brett Testimony, pp. 127-128.

88. http://www.gao.gov/new.items/d04353r.pdf

89. Allen Testimony, pp. 16-17.

90. Allen Testimony, p. 16.

91. Testimony of Meredith Van Pelt, Division of Medical Assistance and Health Services, Department of Human Services, March 19, 2008, pp. 18, 22.

92. Correspondence from Ginni Hain, Director, Division of Eligibility, Enrollment and Outreach, Centers for Medicare and Medicaid Services, to

Theo Kennedy, Esq., Director, Division of Policy Planning and Evaluation, Department of Prevention, Assistance, Transition and Health Access, dated August 28, 2003.

93. Van Pelt Testimony, p. 24.

94. Allen Testimony, p. 23.

95. Van Pelt Testimony, p. 24.

96. Allen Testimony, p. 31.

97. Ibid.

98. Id. at p. 32.

99. Testimony of Jane Oates, Executive Director, Commission on Higher Education, April 16, 2008, p. 26.

100. Testimony of Michael Angulo, Executive Director, New Jersey Higher Education Student Assistance Authority, April 16, 2008, pp. 39-46.

101. Angulo Testimony, pp. 36-37.

102. Angulo Testimony, p. 53.

103. Angulo Testimony, pp. 43, 47.

104. Angulo Testimony, pp. 39-40.

105. Ibid.; Oates Testimony, p. 27.

106. Oates Testimony, p. 26.

107. Oates Testimony, p. 32.

108. Angulo Testimony, pp. 42-43.

[109]. Testimony of Brad Sears, J.D., November 5, 2008, pp. 68-69.

[110]. Adams Testimony, pp. 13-14.

[111]. Badgett, "Unequal Taxes on Equal Benefits," *The Williams Institute* (December 2007), p. 1.

[112]. Id. at 4,

[113]. Ibid.

[114]. Id. at 5..

115. N.J.S.A. 37:1-36c(4).

116. N.J.S.A. 37:1-29.

117. See Vt. Stat. Ann. tit. 15, §1204, et seq.

118. Testimony of Beth Robinson, Esq., attorney in private practice and Chair of Vermont Freedom to Marry, September 26, 2007, pp. 33-36.

119. Written Testimony of Beth Robinson, Esq., September 26, 2007.

120. http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf.

121. Cal. Fam. Code §297.5. This legislation also removed the age restriction for opposite sex couples.

122. In limited instances, a domestic partnership may be terminated by filing an application for termination with the Secretary of State. This procedure is available when the domestic partnership has not been in force for more than five years, and the couple also meets other requirements. Cal. Fam. Code §299.

123. In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384 (2008).

124. Id. at 782-83.

125. Id. at 817-18.

126. Id. at 845.

127. Id. at 846.

128. Conn. Gen. Stat. Ann. §46b-38nn.

129. Kerrigan, et al. v. Commissioner of Public Health, et al., 289 Conn. 135, 957 A.2d 407 (2008).

130. Id. at 141-42.

131. Id. at 152-53.

132. Id. at 151.

133. Id. at 249.

134. Ibid.

135. Id. at 262-63.

136. N.H. Rev. Stat. Ann. §457:A-1, et seq.

137. 2007 Ore. ALS 99.

138. See Laws of Great Britain 2004, c. 33; Laws of New Zealand 2004, No. 102; Laws of Iceland No. 87 12 June 1996; Laws of Sweden 1994.1117, c. 3, §1.

139. Gates, Badgett and Ho, "Marriage, Registration and Dissolution by Same-sex Couples in the U.S.," *The Williams Institute*, (July 2008) at p. 4.

140. Ibid.

141. Id. at Appendix 3, pp. 26-28.

142. Ibid.

143. Testimony of Len Deo, New Jersey Family Policy Council, October 24, 2007, p. 71.

144. Written Testimony of Loretta Yin, Esq., December 18, 2007.

145. Written Testimony of Patrick Brannigan, New Jersey Catholic Conference, November 5, 2008, p 2.

146. Written Testimony of Leland Trainan, January 17, 2008.

147. Written Submission of the New Jersey Family Policy Council, undated, submitted September 2008.

148. N.J.S.A. 37:1-36c(7).

139. N.J.S.A. 26:2H-12.22.

140. N.J.S.A. 26:2H-32(d).

141. N.J.S.A. 26:5C-12(b).

142. N.J.S.A. 26:6-50.

143. N.J.S.A. 26:6-58(b)(1).

144. N.J.S.A. 26:2H-102, et seq.

145. N.J.S.A. 54:34-2(a); N.J.S.A. 54:34-1(f); N.J.S.A. 54:34-4(j).

146. N.J.S.A. 54A:1-2(e).

147. N.J.S.A. 54A:3-1(b)(1).

148. N.J.S.A. 52:14-17.26(d)(1).

149. N.J.S.A. 52:14-17.26(d)(2).

150. L. 2004, c. 246, §§48-56.

151. L. 2005, c. 331.

162. The Division of Elder Advocacy works to secure, preserve and promote the health, safety and welfare of New Jersey's elderly population, through investigations of abuse and neglect, legislative and regulatory advocacy, policy work, education and outreach. http://www.state.nj.us/publicadvocate/seniors/themission.html.

163. Sharpe Testimony , p. 65.

164. Id. at 66.

165. Id. at 65-67.

166. Id. at 66.

167. Testimony of Mary Wanderpolo, Esq., June 18, 2008, pp. 109-114.

168. Id. at 109. Nevertheless, calling it a "tough question," she expressed a personal opinion that the DPA be repealed, noting that those who qualified for domestic partnership also had the option of marriage or civil union. She felt that the government does "not need to protect those people 62 and over who,

for personal reasons, are not going to marry" or enter a civil union. Id. at 114-116. The Commission also received written testimony Loretta H. Yin, Esq. calling for the repeal of the DPA. She, however, did not provide any reason for her recommendation.

169. Written Testimony of Debra E. Guston, Esq., Guston & Guston, L.L.P., dated January 7, 2008.

170. Komosinski Testimony,,p. 36.

171. Beaver Testimony, pp. 18-19. As of the date of the testimony, the coverage was being provided at the State level for 433 domestic partners. Id. at 19. Of approximately 1900 local employers and Boards of Education, 111 had adopted a resolution to extend coverage to domestic partners and there are 98 domestic partners in the pension and benefits system employed by local governments. Ibid.

172. Schwimmer Testimony, pp. 124-125.

New Jersey Civil Union Review Commission

FIRST INTERIM REPORT
OF THE
NEW JERSEY
CIVIL UNION REVIEW COMMISSION

February 19, 2008

Members of the Commission
J. Frank Vespa-Papaleo, Esq., *Chairman*
Steven Goldstein, Esq., *Vice Chairman*
Stephen J. Hyland, Esq., *Secretary*
Barbara G. Allen, Esq.
Rev. Charles Blustein Ortman
Robert Bresenhan, Jr.
Barbra Casbar Siperstein
Sheila Kenny, Esq.
Joseph A. Komosinski
Erin O'Leary, Esq.
Elder Kevin E. Taylor
Melissa H. Raksa, Deputy Attorney General (DAG)

www.NJCivilRights.org/curc

INTRODUCTION

On December 21, 2006, in response to the holding of the Supreme Court of New Jersey in Lewis v. Harris, 188 N.J. 415 (2006), the Legislature enacted Public Law 2006, Chapter 103, establishing civil unions for same-sex couples effective February 19, 2007. The intent of the Civil Union Act ("the Act") is to provide all the benefits and responsibilities of marriage to same-sex couples in civil unions.[1] The Act also established the New Jersey Civil Union Review Commission ("the Commission" or "CURC"), to evaluate the effectiveness of the law and issue semi-annual reports to the Legislature and Governor.[2]

The Commission is an independent body consisting of both public members and governmental ex-officio members, consisting of six ex-officio members and seven public members, appointed as follows: five appointed by the Governor with the Advice and Consent of the Senate, one appointed by the Senate President, and one appointed by the Speaker of the General Assembly. The six ex-officio members consist of the Attorney General, the Commissioners of the Departments of Human Services, Banking and Insurance, Children and Families, and Health and Senior Services, and the Director of the Division on Civil Rights.[3]

As of the date of the issuance of this report, one public member nominee has not yet been approved by the Senate. Therefore, the members of the Commission are as follows:

Public Members (7):

Appointed by Senate President:	Rev. Charles Blustein Ortman
Appointed by Assembly Speaker:	Steven Goldstein, Esq.
Appointed by Governor:	Robert Bresenhan, Jr.
	Stephen J. Hyland, Esq.
	Barbra Casbar Siperstein
	Elder Kevin E. Taylor
	Vacant[4]

Ex-Officio Members (6):

Director of the Division on Civil Rights:	J. Frank Vespa-Papaleo, Esq.
Designee of Attorney General:	Melissa H. Raksa, DAG
Designee of Department of Human Services:	Barbara G. Allen, Esq.
Designee of Department of Banking & Insurance:	Sheila Kenny, Esq.
Designee of Department of Health & Senior Services:	Joseph A. Komosinski
Designee of Department Children and Families:	Erin O'Leary, Esq.

For purposes of convenience and operational consistency, the Commission has been formally placed in, but not of, the Department of Law & Public Safety. As of the date of this report, the Legislature has not issued any appropriation for the costs of operating the Commission, which includes the costs of transcription services, certified interpreters, advertising costs associated with public notices, and other operational and administrative costs. Since there has been no legislative appropriation for the operations of the Commission, it receives substantial fiscal and staff support from the Division on Civil Rights.[5]

According to the Act, this Commission "shall report semi-annually its findings and recommendations to the Legislature and the Governor." The Commission will continue to study and evaluate the Civil Union Act, and may issue legislative recommendations in any of its semi-annual reports, in accordance with the Act. This First Interim Report is unanimously endorsed by the members of the Commission.[6]

According to the Act[7] it is the duty of the Commission to study all aspects of the Civil Union Act—which authorizes civil unions—including, but not limited to the following:

(1) To evaluate the implementation, operation and effectiveness of the Civil Union Act;

(2) To collect information about the Act's effectiveness from members of the public, State agencies and private and public sector businesses and organizations;

(3) To determine whether additional protections are needed;

(4) To collect information about the recognition and treatment of civil unions by other states and jurisdictions including the procedures for dissolution;

(5) To evaluate the effect on same-sex couples, their children and other family members of being provided civil unions rather than marriage;

(6) To evaluate the financial impact on the State of New Jersey of same-sex couples being provided civil unions rather than marriage; and

(7) To review the "Domestic Partnership Act," and make recommendations as to whether this act should be repealed.

The Commission cannot yet issue a final report because it continues to examine all seven areas as required by the Act. For example, at this time we have not evaluated the financial impact of the Act on the State of New Jersey, in comparison to marriage,[8] nor have we reviewed the

Domestic Partnership Act,[9] as required by the Act. Other areas need further review as well. These will be studied and reported on in the coming months.

The Commission held its organizational meeting in Trenton on June 18, 2007, and subsequent public business meetings on July 18, 2007, August 15, 2007, November 14, 2007, December 19, 2007 and January 16, 2008.

In order to maximize the opportunity for public participation in the Commission's evaluation process, the body held three nighttime public hearings, on September 26, 2007 in New Brunswick, Middlesex County; October 10, 2007 in Blackwood, Camden County; and October 24, 2007 in Nutley, Essex County. Together, the three hearings lasted nearly eight hours and featured testimony from ninety-six people, including couples affected by the Act and expert witnesses.

Notice of all public business meetings and public hearings were advertised in newspapers throughout the State, on the Commission's website located at www.NJCivilRights.org/curc, and distributed widely by community organizations, website hosts and others. Additionally, a media alert and press release was distributed on September 19, 2007 by the New Jersey Office of Attorney General announcing the public hearings. The Commission website also serves as a repository for Commission reports, transcripts, agendas, commissioner biographies, contact information and other items.

At the public hearing on September 26, 2007, Lynn Fontaine Newsome, President of the New Jersey State Bar Association,[10] testifying on behalf of its nearly 17,000 members, concluded that the New Jersey Civil Union Act is "a failed experiment."[11]

> We believe the civil union law created a burdensome and flawed statutory scheme that fails to afford same-sex couples the same rights and remedies provided to heterosexual married couples as required ... by the New Jersey Supreme Court and its landmark Lewis v. Harris decision.
>
> From the Bar's perspective, civil unions are a failed experiment. They have shown to perpetuate unacceptable second-class legal status. Members of the Bar Association tell me more stories of the countless additional hours of work that must go into representing gays, lesbians, bisexual clients and their families.[12]

At the public hearing on October 24, 2007, Ed Barocas, Legal Director of the American Civil Liberties Union of New Jersey[13] stated in unequivocal terms that:

> By creating a separate system of rights and by injecting language and titles not understood or easily incorporated into existing real life events and transactions, the civil union law has failed to fulfill its promise of equality.[14]

Additionally, the Commission heard testimony that New Jersey's Civil Union Act is likely not to provide equality with the passage of time. An expert from Vermont, which in 2000 became the first jurisdiction in the United States to enact a civil union law, testified that civil union couples there still face problems with the law today. In fact, as a result of the inequities, Vermont has established a new commission to study whether to amend its state law to now provide full marriage equality to its same-sex committed couples.

This Commission also heard testimony that the term "marriage," were it applied to the relationships of same-sex couples, could remedy the shortcomings of the Civil Union Act and make a significant difference in providing equality to same-sex couples in New Jersey, even with the challenges of federal law not recognizing same-sex relationships. An expert from Massachusetts, which in 2004 became the first U.S. state to allow same-sex couples to marry, testified that same-sex married couples there do not face many of the problems that New Jersey and Vermont civil union couples face today, even in the context of federal law.

This Commission also recognizes that the number of complaints filed to date by civil union couples with the state Division on Civil Rights — the agency responsible for investigating non-compliance with the Civil Union Act — cannot by itself be considered an accurate barometer of the Act's effectiveness. Compared to the number of couples who have filed complaints with the Division on Civil Rights—six as noted by the New Jersey Family Policy Council[15]—a significantly higher number of couples testified at the Commission's public hearings about how employers refuse to recognize their civil unions. In addition, advocacy organizations have received, and newspaper investigations have reported, many more cases of the Act's ineffectiveness than have been filed with the Division. So, while the Division does investigate all verified complaints of discrimination filed with its offices, it is clear that many more complaints have been filed with third-party advocacy organizations.

Among those who participated in the hearings were representatives of:

- New Jersey State Bar Association
- Garden State Equality[16] (GSE)

- New Jersey Family Policy Council (NJFPC)
- Lambda Legal[17]
- American Civil Liberties Union of New Jersey (ACLU-NJ)
- National Black Justice Coalition[18] (NBJC)
- Parents, Families and Friends of Lesbians and Gays[19] (PFLAG)
- Gay, Lesbian and Straight Education Network[20](GLSEN)
- Counsel and plaintiff couples from Lewis v. Harris
- Attorneys who represent same-sex couples
- Leaders of numerous faith communities
- Lawyers and community leaders from Vermont[21] and from Massachusetts[22]
- Same-sex couples, their children and families
- Parents of lesbian, gay, bisexual, transgender, and intersex youth
- Public officials, among others

This report will not recite all the testimony provided at public hearings or submitted in writing to the Commission. Rather, this report will highlight relevant testimony that will assist the Commission in answering its Legislative charge. For anyone interested in reviewing all the public testimony, note that a copy of all transcripts of the public hearings is available at the Commission's website located at www.NJCivilRights.org/curc.

CONSISTENT THEMES

1. **FOR THE OVERWHELMING MAJORITY OF CIVIL UNION COUPLES WHO TESTIFIED, THE FEDERAL EMPLOYMENT RETIREMENT INCOME SECURITY ACT, COMMONLY KNOWN BY ITS ACRONYM ERISA, IS THE REASON EMPLOYERS HAVE GIVEN FOR NOT RECOGNIZING THEIR CIVIL UNIONS.**

Under ERISA,[23] "self-insured" companies – companies which create their own insurance plans but may hire outside agencies to administer them – claim governance by federal law rather than state law. In turn, because of the federal Defense of Marriage Act,[24] any federal statute or regulation that provides benefits to spouses, husbands, wives, or married couples applies only to marriages between one man and one woman, thus resulting in covered employers continuing to discriminate against same-sex couples.

Practically speaking, companies covered by ERISA, which comprise an estimated 50 percent of all companies in New Jersey, have an option, rather than a requirement, to offer equal benefits under the state's Civil Union Act. Many companies are not exercising that option, even if State law, as is the case in New Jersey, provides that spouses and civil union partners are entitled to identical treatment.

Additionally, being in a civil union can have a broad negative impact on couples whose civil unions are not recognized by their employers.

A registered nurse from Commercial Township told the Commission she received a letter from her employer, telling her that the hospital where she works would not be providing health insurance for her partner:

> It falls under the federal ERISA program, as someone else stated. Our hospital is self-insured. Therefore, there is a loophole and they do not provide her with health insurance.
>
> So I wrote them a letter, a lengthy letter, reminding them of some of the things that I had provided for the hospital through the years and asked them to reconsider their decision. They never answered my letter.
>
> So when I made the decision to come here tonight, I again called my human resources director and I said, 'You know, I'm going to go up and I'm going to testify in front of this Commission.' Well, you can't imagine how fast my phone rang. I don't know where this is going to go, but I know that my partner and I have seriously considered dissolving our civil union, because it has put us in a tremendously precarious financial position. Because now in the event that something happens with her and she has no insurance coverage, our entire estate is in jeopardy, rather than just half.[25]

2. IN MASSACHUSETTS, A MARRIAGE EQUALITY LAW HAS PROMPTED MANY EMPLOYERS TO PROVIDE EQUAL BENEFITS TO SAME-SEX WIVES OR HUSBANDS.

Tom Barbera, a Massachusetts labor leader who works for the Service Employees International Union and served as Vice President of the Massachusetts AFL-CIO, testified:

> From the immediate weeks after May 17, 2004, when marriage equality took effect in Massachusetts, right on through today, ERISA has barely been an issue in Massachusetts. In the first weeks of marriage equality, only a very few companies chose not to provide retirement benefits under ERISA to same-sex married couples. And from the day our marriage equality law took effect through today, civil rights organizations in Massachusetts, as well

> as our state government, have received virtually no complaints about companies not providing health care benefits to same-sex married couples.
>
> It's not that ERISA-covered employers in Massachusetts don't understand that federal law allows them to refrain from providing benefits to same-sex married couples. It's that employers also understand that without the term 'civil union' or 'domestic partner' to hide behind, if they don't give equal benefits to employees in same-sex marriages, these employers would have to come forth with the real excuse for discrimination. Employers would have to acknowledge that they are discriminating against their employees because they are lesbian or gay. And employers in Massachusetts are loathe to do that, as they would be in New Jersey were you to enact a marriage equality law.
>
> Therefore, the existence of ERISA makes it all the more important to change the nomenclature of civil unions to marriage. As we've seen time and again in Massachusetts, the word 'marriage' has great persuasive weight in getting companies to offer benefits notwithstanding ERISA.[26]

An Essex County electrician gave the Commission a preview of the potential effect of a marriage equality statute in New Jersey. She testified that when she first sought benefits for her civil union partner from her union, the union declined, citing ERISA. But when she later revealed she and her partner had gotten married in Massachusetts, the union reversed itself and granted benefits.

The electrician told the Commission:

> We can all talk about how the civil union law is supposed to work just like marriage. But in my case and others, it doesn't work that way in the real world. When you tell your employer or union you are married, there's something about that word that makes them recognize your relationship in a way they don't recognize it when you tell them you are civil union. And because of their respect for the word marriage, which is something they understand, they are much less likely to invoke the federal law loophole. That's what happened with us.[27]

The testimony suggests that numerous employers decline to provide insurance and health benefits to civil union partners not because of an objection to the government recognition of same-sex couples, but because of the term used by statutes establishing government sanctioned, same-sex relationships. In fact, this Commission heard no testimony from civil union couples indicating that employers have refused to comply with the Civil Union Act because of personal objections to the law. Early indications suggest that recognition of marriage for same-sex couples in New Jersey could make a meaningful difference in the area of spousal benefits.

3. **THE TESTIMONY PRESENTED BY MANY CIVIL UNION COUPLES INDICATED THAT THEIR EMPLOYERS CONTINUE TO DISCRIMINATE AGAINST THEM, DESPITE THEIR FAMILIARITY WITH THE LAW.**

Beth Robinson, Chair of Vermont Freedom to Marry and a lawyer who works with same-sex couples in her state, testified to significant problems with the implementation of Vermont's civil union law, more than seven years after its enactment.

> I have seen first-hand, both in my law practice and as an advocate, that a civil union law, even when it's been on the books for seven years, too often deprives same-sex couples and their families the protections that married heterosexual couples take for granted. Based on the Vermont experience, I can tell you that it's just not true that if enough time passes, civil unions will achieve parity with marriage. Time does not fully mend the inequality inherent in two separate institutions.
>
> Even now, I field phone calls from individuals whose employers decline to provide spousal health insurance coverage for their civil union partners even though those same employers provide spousal health insurance coverage for heterosexual employees' spouses. As you know, some self-insured employers cite the federal law known as ERISA as a basis for their not recognizing same-sex relationships.
>
> To this day, we still encounter glitches arising from the creation of a new legal status that forces employers and others to try to fit a square peg, civil union, into a round hole, systems relating to marriage. Just this summer, a same-sex couple joined in civil union who owned a Limited Liability Company (LLC) business together had to appeal for intervention by legislators to resolve a

> misunderstanding with the tax department regarding their eligibility for a tax exemption provided to LLC owners who are married to one another.
>
> Two weeks ago, I was on a call-in show, and heard from a state employee who had discovered that her employer—the state—had been withholding from her paycheck as if she were liable for a state tax on the health insurance benefit provided to her partner, even though the law clearly prohibits such taxation. When she brought the matter to her employer's attention, she was told that her department's software would not allow for the appropriate non-withholding.
>
> Who knows how many glitches like this, in both the public and private sphere, go undetected because people don't fully understand their rights, or don't realize what's happening.
>
> Judging from our having had a civil unions law on the books for seven years in Vermont, and still having problems today, I can tell you that civil unions will likely never provide the equality that marriage does. It would be incorrect for you, as Commissioners, or for the elected officials who appointed you, to assume that if we just give civil unions time, they will work just like marriage.[28]

4. CIVIL UNION STATUS IS NOT CLEAR TO THE GENERAL PUBLIC, WHICH CREATES A SECOND-CLASS STATUS.

A common theme in the testimony gathered by the Commission was that while marriage is universally recognized by the public, civil union status must be explained repeatedly to employers, doctors, nurses, insurers, teachers, soccer coaches, emergency room personnel and the children of civil union partners.

The testimony suggests that the need to explain the legal significance of civil union status to decision makers and individuals who provide vital services is more than a mere inconvenience. One witness showed the Commissioners a "flash drive" that he and his partner keep on key chains. The flash drives contain living wills, advanced health care directives, and powers of attorney for the couple, as they fear being unable to adequately explain their relationship to emergency room personnel during a medical crisis. The witness testified that mixed-gender, married couples need not live with this uncertainty because a mere declaration that someone is

the "wife," "husband," or "spouse" of someone who is ill will provide immediate access and decision-making rights.

This testimony mirrored comments provided by many witnesses regarding medical personnel, school officials and government workers who denied access and decision-making authority to civil union partners, either initially or completely, because of a lack of understanding of the rights that flow from civil unions. Many witnesses said they would not have encountered the same level of resistance, or no resistance at all, had they been able to identify themselves as married.

Witnesses called the two-tier system created by the Civil Union Act "an invitation to discriminate" and a "justification to employers and others" to treat same-sex couples as "less than" married couples. Many witnesses testified that without the governmental endorsement of differential treatment, many employers with ERISA-covered plans would be less inclined to deny benefits to same-sex couples. In addition, several witnesses offered their view that relatives, medical caregivers, and individuals in positions of authority take cues from the government's decision to place same-sex couples outside of the institution of marriage. According to the testimony, the Civil Union Act amounts to a tacit endorsement of discriminatory treatment.

5. THE CIVIL UNION ACT HAS A DELETERIOUS EFFECT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) YOUTH AND CHILDREN BEING RAISED BY SAME-SEX COUPLES.

Several clergy members and parents of LGBTI children testified that the statutory designation of same-sex couples as "other than" and, impliedly, "less than" mixed-gender couples interferes with the ability of LGBTI youth to accept their sexuality.

According to the witnesses, gay and lesbian youth are harmed by the reality that their heterosexual siblings and age mates may expect to enter into marriages, but that the government has declared that LGBTI people cannot have that expectation and must settle for a secondary status as civil union couples.

A Montclair resident, the parent of three sons, one of whom is gay, testified that her gay son told her when he was sixteen: "You know, all I really want is to get married and have children."

She continued:

> 'Well,' I said, 'you have several friends whose parents are gay, ... Montclair is a pretty good place to be gay.' And he looked up at me. He kind of stared at me. He said, 'But they're not married.' And suddenly I got it. In a flash I knew my son is acutely and perpetually aware that he is a second-class citizen and that he cannot attain the status that the rest of us treasure.[29]

A Bergen County couple, who have adopted five young children, testified:

> Our children have asked many questions. One of the questions ... asked of us was, 'If all men are created equal, why can't you and Poppy get married?' I can't answer that question at this time. One of the most recent questions that came up by one of my children was, 'I don't understand how someone on TV who has murdered someone can get married, but you and Poppy cannot.'[30]

An attorney and partner in a small law firm in Springfield testified about a family discussion in which his partner's young nephew, to whom he is godfather, asked his mom:

> 'If you and daddy are married and Uncle Timmy and Aunt Nancy are married and Aunt Debby and Uncle Bruce are married, why can't Uncle Bob and Uncle Chris get married?'
>
> Lucas' mother told him 'Because it's against the law.' Lucas' reply was, 'Does that mean they're criminals, mommy?'[31]

6. **MANY WITNESSES TESTIFIED ABOUT THE UNEQUAL TREATMENT AND UNCERTAINTIES THEY FACE DURING A HEALTH CARE CRISIS, PARTICULARLY IN HOSPITAL SETTINGS.**

A woman from South Jersey testified about her experiences at two local hospitals:

> I was asked, 'Are you married, single, widowed, divorced?' I said, 'I'm partnered.' Then I was asked, 'Legally?' Again, I was shocked. I said, 'Well, do you ask the married folks that?' 'No, I don't.' 'So why are you asking me?'

> Another incident was when I was going for a test, when I had to be put under. I was telling the nurse that my partner was in the waiting room. If any decisions had to be made while I was unconscious, she was to make those decisions. Again I was asked, 'Is she your legal partner?' 'Yes, she is.' 'Do you have your certificate with you?'
>
> I wasn't convinced she would go out and grab my partner should something have happened to me.[32]

An Episcopal clergy-member from northern New Jersey who is in a civil union testified:

> I've had to go through some medical testing and hospitalizations for surgery. In our own UMDNJ right in Newark, when I got there, they asked if I had a spouse. I said 'yes' and I told them. They didn't know where to list him, because there was nothing on the form that said anything about civil unions.
>
> Just about two weeks ago I went to the new doctor I was referred to. There was no place on the form for civil unions. My experience, in general, most people in our communities look at this as a second-class marriage, sort of. I don't even know if we would use the term 'marriage,' it is below marriage. It is another form and they know that is not the same.[33]

7. INSTITUTIONAL INTERACTION WITH CIVIL UNION COUPLES HAS BEEN LESS THAN OPTIMAL.

Several witnesses spoke of the lack of a "married/civil unioned" or "civil unioned" option on government agency forms, leaving civil union couples in a quandary as to which box to check, "married" or "single." These couples expressed anger at having to consider checking off "single." In addition, some testimony suggested that civil union partners have experienced some difficulty in obtaining government services which are required by law to be available to civil union partners.

Ed Barocas, Legal Director of the American Civil Liberties Union of New Jersey, and an attorney in the Lewis v. Harris case, testified that:

> A quick example, last week I went to a bank to open a line of credit. In so doing, I was asked whether I was single or married. A married man would simply say, 'Well, I'm married.' I asked the employee what I should do if I was in a civil union. The employee responded that he didn't think New Jersey allowed civil unions.
>
> So after explaining the law, I asked again what I was required to put down. He said that civil unions were simply not contemplated in the bank's computer system and he didn't know what the proper answer would be or how he could proceed.[34]

A woman who purchased real estate in Brick, New Jersey and Florida stated the following:

> I had to explain to my own insurance company and send them a copy of our civil union from Vermont to have my name or to even speak to them with regard to purchasing insurance for our home here in New Jersey. I didn't have to do that in Florida.[35]

A man who entered into a civil union testified:

> And also when I went to the DMV to change my name, our names, we both want the same last name. And at first they wouldn't do it. They said either I had to take his last name or we could both hyphenate our names with our married husband's name at the end. But we couldn't both have the same name.
>
> And finally, the manager of the DMV we went and got him. Coincidentally, the same day as our civil union, he was at a civil union. He said his friends are having the same problem. He said, 'Well, no one's told me that I can't do this. So I'll do it until they tell me I can't.' Still I had—we were there like an hour trying to get it done.[36]

A state employee who lives in Mount Laurel testified about being called to jury duty and having a judge ignore the possibility that some New Jersey residents are in civil unions. She told this Commission:

> So I'm sitting there waiting for my turn to be called up and be asked all the questions that the judge was going through. I felt like

> I was hit with a ton of bricks, because the judge repeatedly asked every person, 'Are you single, are you married?' I'm thinking, how do I answer that, because I am not. I'm not single, I'm not married. I'm in a court of law and here is a judge qualifying candidates for the jury, and what I am is not represented in any way.[37]

8. **TESTIMONY INDICATES THAT THE CIVIL UNION ACT HAS A PARTICULARLY DISPARATE IMPACT ON PEOPLE OF COLOR.**

Dr. Sylvia Rhue, Director of Religious Affairs for the National Black Justice Coalition, testified:

> Fourteen percent of lesbian, gay, bisexual, transgender and intersex Americans are African-American. Forty-five percent of African-American same-sex couples reported stable relationships of five years or longer on the United States census.
>
> When employers fail to recognize civil unions as equal to marriage, the couples who get hurt the most are poor couples who are often African-American couples, who cannot afford thousands of dollars to hire fancy lawyers to draft documents like wills, health care proxies, and powers of attorney.
>
> And when employers fail to recognize civil unions as equal to marriage and deny health care benefits to civil union partners, there's a profound effect on those families' health care. Who are among the families who can least afford cuts in their health care? African-American families. Approximately one in five African-Americans is currently without health insurance, some of whom are in same-sex relationships.[38]

Rev. Anahi Galante, an interfaith minister in Jersey City who works with many in the Latino and Latina community, testified:

> Latinos now compromise 13.3 percent of the New Jersey population. Same-sex couple households in which both partners are Latino or Latina earn at least $25,000 less on average per year than white same-sex couple households. Given the income and other disparities between Latino and Latina same-sex couples and

> much of the rest of the society, Latino and Latina people in New Jersey are among those being hurt most by our State's continued denial of marriage equality.[39]

9. **THE REQUIREMENT THAT SAME-SEX COUPLES DECLARE CIVIL UNION STATUS, A SEPARATE CATEGORY RESERVED FOR SAME-SEX COUPLES, EXPOSES MEMBERS OF THE UNITED STATES MILITARY TO THE "DON'T ASK, DON'T TELL" POLICY.**

Leslie Farber, an attorney in Montclair who chairs the GLBT[40] Rights Section of the New Jersey State Bar Association, spoke of one of her clients, whose partner serves in the United States military. With the couple's permission, she testified on their behalf, because they feared testifying in person:

> The serviceman will be called to duty overseas in the near future. My client wants to protect his committed life-partner, so that his partner leaves stateside with as many protections and benefits as he can. A New Jersey civil union may be able to provide many of those benefits and protections. But a designation of 'civil union' is a factual statement this serviceman is a gay man and thus violates the U.S. military's policy of 'Don't Ask, Don't Tell.'[41]

10. **THE CLASSIFICATION OF CIVIL UNION MAY PLACE MARITAL STATUS IN QUESTION WHEN ONE OR BOTH OF THE PARTNERS IS TRANSGENDER.**

Ms. Farber also testified on behalf of couples where one of the partners has had gender reassignment surgery:

> [A] client of my own, who wishes to remain anonymous for the same reasons, was a man who legally married a woman about 20 years ago and recently is transsexual. This client went through sexual reassignment surgery and is now legally a woman. However, the entire family remains together and is happy.
>
> However, even though the same two people remain married to each other because of her gender change this client is now married to another woman; in other words, a legally married same-sex couple in New Jersey. However, this client is concerned that she now is at risk of having her once valid marriage downgraded to a civil union. Is this what the legislation intended? Isn't it truly

> cruel to leave this family in legal limbo? And, of course, marriage equality would solve this problem instantly.[42]

A male-to-female transgender person from New Milford, New Jersey who married a woman 27 years ago testified:

> There is not one straight couple in this state who has been harmed because we are in a same-sex marriage. Nobody has been hurt.

When someone has gender reassignment surgery, the State of New Jersey considers that person to be of a new gender. Thus, if that person had been married before, he or she is now part of a same-sex married couple. But because New Jersey does not recognize same-sex married couples as married, are such couples still considered married under state law? The Commission will continue to study the effects of the Civil Union Act on transgender couples.

CONCLUSION

As a result of public hearings and testimony provided to the New Jersey Civil Union Review Commission in 2007, the Commission unanimously issues the herein first interim report, which reveals:

1. For the overwhelming majority of civil union couples who testified, the federal Employment Retirement Income Security Act, commonly known by its acronym ERISA, is the reason employers have given for not recognizing their civil unions.

2. In Massachusetts, a marriage equality law has prompted many employers to provide equal benefits to same-sex wives or husbands.

3. The testimony presented by many civil union couples indicated that their employers continue to discriminate against them, despite their familiarity with the law.

4. Civil union status is not clear to the general public, which creates a second-class status.

5. The Civil Union Act has a deleterious effect on lesbian, gay, bisexual, transgender, and intersex youth and children being raised by same-sex couples.

6. Many witnesses testified about the unequal treatment and uncertainties they face during a health care crisis, particularly in hospital settings.

7. Institutional interaction with civil union couples has been less than optimal.

8. Testimony indicates that the Civil Union Act has a particularly disparate impact on people of color.

9. The requirement that same-sex couples declare civil union status, a separate category reserved for same-sex couples, exposes members of the United States military to the "Don't Ask, Don't Tell" policy.

10. The classification of civil union may place marital status in question when one of the partners is transgender.

The Commission further recognizes the need for additional evaluation and review, in accordance with the New Jersey Civil Union Act. As such, it will be scheduling public meetings in 2008 to obtain further information and data from interested parties, including members of the public, State agencies, businesses, and others, in accordance with the Commission's statutory mission. The Commission will continue to study, evaluate and report its findings and recommendations until the issuance of a final report within three years of the creation of this Commission, in accordance with the Act.

J. Frank Vespa-Papaleo, Esq., *Chairman*
Steven Goldstein, Esq., *Vice Chairman*
Stephen J. Hyland, Esq., *Secretary*
Barbara G. Allen, Esq.
Rev. Charles Blustein Ortman
Robert Bresenhan, Jr.
Barbra Casbar Siperstein
Sheila Kenny, Esq.
Joseph A. Komosinski
Erin O'Leary, Esq.
Melissa H. Raksa, DAG
Elder Kevin E. Taylor

ENDNOTES

[1] N.J.S.A. 37:1-30, et seq.

[2] N.J.S.A. 37:1-36.

[3] N.J.S.A. 37:1-36b.

[4] On February 5, 2007, Governor Jon S. Corzine nominated a member of the public for membership to the Commission. To date, the position remains vacant.

[5] The Commission acknowledges the assistance of the following individuals from the Division on Civil Rights staff: Estelle Bronstein, Esq., Benn Meistrich, Esq., Ralph Menendez, Esther Nevarez, Nancy Reinhardt, and former staff member Bear Atwood, Esq.

[6] The Commission also wishes to acknowledge the invaluable work of its former member, the Honorable Patrick DeAlmeida, who resigned from the Commission upon his appointment to the State Judiciary.

[7] N.J.S.A. 37:1-36c.

[8] N.J.S.A. 37:1-36c(6).

[9] N.J.S.A. 37:1-36c(7).

[10] The New Jersey State Bar Association's mission is "[t]o serve, protect, foster and promote the personal and professional interests of its members; [t]o serve as the voice of New Jersey attorneys to other organizations, governmental entities and the public with regard to the law, legal profession and legal system; [t]o promote access to the justice system, fairness in its administration and encourage participation in voluntary pro bono activities; [t]o foster professionalism and pride in the profession and the NJSBA; [t]o provide educational opportunities to New Jersey attorneys to enhance the quality of legal services and the practice of law.; and [t]o provide education to the New Jersey public to enhance awareness of the legal profession and legal system." See www.njsba.com.

[11] Transcript 9/26/07, p. 7.

[12] Transcript 9/26/07, p. 8-9.

[13] The American Civil Liberties Union of New Jersey (ACLU-NJ) is the 15,000-member state chapter of a national organization which "is the leading organization dedicated to defending and extending civil liberties for all people in this country." See www.aclu-nj.org.

[14] Transcript 10/24/07, p. 8.

[15] The New Jersey Family Policy Council is an organization whose stated mission is "to intervene and respond to the breakdown that the traditional family, the cornerstone of a virtuous society, is experiencing." See www.njfpc.org.

[16] Garden State Equality, consisting of 22,000 members, is New Jersey's statewide organization advocating equality for the lesbian, gay, bisexual, transgender and intersex commnnity. See www.GardenStateEquality.org.

[17] Lambda Legal is a national organization "committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work." See www.lambdalegal.org.

[18] The National Black Justice Coalition is a "civil rights organization dedicated to empowering Black same-gender-loving, lesbian, gay, bisexual, and transgendered people. The Coalition works with our communities and our allies for social justice, equality, and an end to racism and homophobia." See www.nbjc.org.

[19] Parents, Families and Friends of Lesbians and Gays (PFLAG), with over 200,000 members, "promotes the health and well-being of gay, lesbian, bisexual and transgender persons, their families and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights." See www.pflag.org.

[20] The Gay, Lesbian & Straight Education Network (GLSEN) "strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression." See www.glsen.org.

[21] The Vermont Civil Union Law went into effect July 1, 2000. See 18 V.S.A. § 42 (2000).

[22] Massachusetts same sex marriages were recognized as of May 17, 2004 by the finding of the Supreme Judicial Court of Massachusetts in Goodridge v. Department of Public Health, 798 N.E. 2d 941 (Mass. 2003).

[23] The Employee Retirement Income Security Act, 29 U.S.C. Chapter 18.

[24]The Defense of Marriage Act, 28 U.S.C. § 1738C.

[25] Transcript 10/10/07, p. 21-24.

[26] Transcript 9/26/07, p. 37-40.

[27] Transcript 9/26/07, p. 43-45.

[28] Transcript 9/26/07, p. 33-36.

[29] Transcript 9/26/07, p. 59-60.

[30] Transcript 9/26/07, p. 57.

[31] Transcript 9/26/07, p. 76.

[32] Transcript 10/10/07, p. 35.

[33] Transcript 10/10/07, p. 11-14.

[34] Transcript 10/24/07, p. 9.

[35] Transcript 10/24/07, p. 50-51.

[36] Transcript 9/26/07, p. 98-99.

[37] Transcript 10/10/07, p. 64-67.

[38] Transcript 9/26/07, p. 53-57.

[39] Transcript 10/10/07, p. 49-53.

[40] Gay, Lesbian, Bisexual and Transgender.

[41] Transcript 9/26/07, p. 19-22.

[42] Transcript 9/26/07, p. 21-22.

UNIVERSITY of WISCONSIN LAW SCHOOL

DAVID S. SCHWARTZ
PROFESSOR OF LAW

TEL.: 608-262-8150
EMAIL: DSSCHWARTZ@WISC.EDU

June 4, 2009

The Honorable Jim Doyle
Governor, State of Wisconsin
115 East State Capitol
Madison, WI 53702

RE: Constitutionality of Domestic Partner Benefit Provisions in the Governor's 2009-11 Executive Budget, AB 75

Dear Governor Doyle:

I have been asked for an opinion on the constitutionality of the various domestic partner benefit provisions in the Governor's 2009-11 Executive Budget (AB 75). The primary issue is whether these provisions – which create a protocol for establishing a domestic partner relationship and go on to provide various legal rights and property protections to domestic partners – are incompatible with the second sentence of the Wisconsin Marriage Amendment, Art. XIII, § 13 of the Wisconsin Constitution:

> 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.*

(Emphasis added). The proposed domestic partnership provisions are constitutional under the Wisconsin Constitution, because they do not create "a legal status identical or substantially similar to that of marriage for unmarried individuals," within the meaning of Art. XIII, § 13.

Executive Summary

Construed in accordance with the intent of the voters who adopted it, the intent of legislature which drafted it, and the applicable principles of constitutional interpretation, Art. XIII, § 13 is intended to ban same-sex marriages and civil unions that exactly replicate the rights and obligations of marriage, but not civil unions or domestic partnerships that bear any significant difference from marriage. Construing the "identical or substantially similar" clause as a ban on domestic partnership would violate not only the intent of the voters, but also long-established principles of constitutional interpretation. Such an interpretation would also raise doubts about the validity of the Marriage Amendment in light of the Wisconsin and United States constitutions.

Properly interpreted, the phrase "a legal status *identical to*... that of marriage for unmarried individuals" refers to same-sex marriages formalized in other states. Since, in Wisconsin, "marriage" is valid only when between one man and one woman, the term "same-sex marriage" becomes a legal contradiction in terms, and requires another phrase to describe it:

hence, "a legal status identical to ... marriage[.]" The purpose of that clause is to deny legal recognition to same sex marriages formalized in other states.

The phrase "a legal status ... *substantially similar* to that of marriage for unmarried individuals" means a status entirely resembling marriage in substance, as opposed to form. An example of "a legal status substantially similar to that of marriage" would be a statutory scheme in which the phrase "or civil union" were added to each and every statutory provision in which the word "marriage" appears – such as that ordered by the Supreme Court of New Jersey,[1] or the "Vermont-style civil unions" objected to by some supporters of the Wisconsin Marriage Amendment.

Domestic partnerships may be established in Wisconsin, consistent with Art. XIII, § 13, so long as there is *any significant difference* between them and marriage in terms of the legal rights, benefits and obligations they entail. This "any significant difference" test is met by Section 97 of the Executive Budget, which provides a registration process for the establishment of a domestic partnership. This creates a significant and substantial difference from marriage, since the marriages of opposite-sex married couples moving into Wisconsin are automatically recognized by the state, with no formalities required. Similarly, opposite-sex couples residing in Wisconsin can get married while vacationing in other states and have their marriages automatically recognized on their return. In contrast, same-sex couples who have established domestic partnerships (or marriages) outside Wisconsin get no such automatic recognition: they bear the burden of having in all circumstances to register in-state to gain Wisconsin domestic partnership. There are numerous other significant differences between marriage and the proposed Wisconsin domestic partnerships – but even if they were in all other respects the same, the registration requirement of Section 97 would constitute a significant difference that would make domestic partnership permissible under the "substantially similar to ... marriage" prohibition.

Background

The questions of same-sex marriage and domestic partnerships are rapidly evolving, both in law and public opinion. For the past few years, public opinion has generally favored legal recognition of domestic partnerships, even as public opinion has leaned against same-sex marriage.[2] But even that is changing: according to one respected polling analyst, same-sex marriage is gaining an average of two percentage points of voter support each year.[3]

The legal responses to these questions are many and varied in the several states, playing out Justice Brandeis's famous ideal of the states as "laborator[ies]" for "social and economic

[1] *Lewis v. Harris*, 188 N.J. 415; 908 A.2d 196 (2006) (requiring New Jersey legislature to either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name, in which same-sex couples would enjoy the rights and benefits and bear the burdens and obligations of civil marriage).

[2] *See* http://pollingreport.com/civil.htm.

[3] Nate Silver, "Will Iowans Uphold Gay Marriage," FiveThirtyEight.com, http://www.fivethirtyeight.com/2009/04/will-iowans-uphold-gay-marriage.html.

experiments." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).[4] Five states have recognized full marriage rights to same-sex couples either by statute[5] or judicial interpretation of the state's constitution.[6] Five more states have created a status that exactly replicates the legal rights and obligations of marriage but applies another name to it, such as "civil union" or "domestic partnership."[7] Significantly, Vermont offered this latter type of "civil union" in the early 2000s, which became a point of reference in the debate over the Wisconsin marriage referendum.[8] Several states give a range of rights to committed same-sex couples, from, say, the extension of employee health care benefits to same-sex partners all the way up to a package of rights and responsibilities overlapping with most of the rights of married couples.[9]

These variations on state laws relating to same-sex couples can usefully be broken down into four categories arrayed across a spectrum based on their proximity to formal "marriage."

(1) Same-sex marriage	(2) Status exactly replicating marriage under another name	(3) Broad "domestic partnership" or "civil union" recognition	(4) Limited discrete benefits for "domestic partners" or "civil unions"

On November 7, 2006, the voters of Wisconsin approved the proposed constitutional amendment that became Art. XIII, § 13 of the Wisconsin Constitution. According to its principal drafters and proponents, the purpose of the Marriage Amendment was to prevent the state Supreme Court from deciding that the state constitution guarantees same-sex couples a right to marriage or to a civil union that exactly replicates marriage under another name.[10] Thus, as explained further below, Wisconsin Constitution Art. XIII, § 13 is properly understood as banning categories 1 and 2, but permitting categories 3 and 4.

The domestic partnership provisions of the Governor's Executive Budget fall somewhere between categories 3 and 4 (one might call them a "3.5" on this 4-point scale), well within the range of what Art. XIII, § 13 permits. The bill establishes a procedure by which same-sex

---

[4] *See* Lambda Legal, "Status of Same-Sex Relationships Nationwide," http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html.

[5] Vermont.

[6] Connecticut, Iowa, Maine and Massachusetts.

[7] California, New Hampshire, New Jersey, Oregon, Washington.

[8] *See infra.*

[9] Until its 2008 court decision, *In re Marriage Cases*, 43 Cal. 4th 757 (2008), California offered a broad domestic partnership law offering most of the legal rights of marriage to same-sex couples. *See* Lambda Legal, *supra.*

[10] *See, e.g.,* "Erpenbach predicts measure will advance," Wisconsin State Journal, Mar. 6, 2004: (quoting Sen. Scott Fitzgerald); Family Research Institute of Wisconsin, Questions and Answers About Wisconsin's Marriage Protection Amendment, p. 1 (May 2006)

couples can register for domestic partnership. It goes on to extend to domestic partners a limited subset of the kinds of benefits and legal protections currently given to married couples. Some illustrative example include: the right of a domestic partner to be informed when the other partner is a victim of a crime; the right of a surviving domestic partner to sue for wrongful death; a testimonial privilege to prevent a current or former domestic partner from testifying against the other; family leave to care for a domestic partner; the same treatment to spouses with respect to state pension benefits; the right to inherit property from a domestic partner who dies intestate; and the right to transfer real property between domestic partners free from real estate transfer tax.

At the same time, on passage of the Executive Budget domestic partner provisions, there would remain an extensive inventory of rights and benefits afforded married couples that would not be extended to domestic partners. In numerical terms, while approximately 35 state code sections would extend married-couple benefits to domestic partners, an additional 120 state code sections creating married-couple benefits would not be extended to domestic partners.[11]

Twenty-nine states have state constitutional amendments limiting legal recognition of same-sex relationships.[12] Some ban only same-sex marriage, while others place some further restriction. Among the latter group, there is considerable variation both in the language of the amendment, and in the procedural rules and political context of the referendum process. Therefore, while the experiences and approaches of other states may shed a certain amount of light, no judicial decision from a sister state can answer the constitutional question presented in Wisconsin. Even in states that have adopted same-sex marriage bans with language similar to Wisconsin's Art. XIII, § 13, the legal context differs in important ways that significantly limits the applicability of those decisions. As discussed below, Wisconsin's approach to interpreting voter-approved constitutional amendments combines a "single issue" rule with an "intent of the voters" test that appears to be unique among the states that have enacted same-sex marriage bans.

Discussion

I. Properly Construed, Art. XIII, § 13 Permits the Establishment of Domestic Partnership in Wisconsin So Long as there is "Any significant Difference" Between it and Marriage

The second sentence of Art. XIII, § 13 provides: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." The meaning of that provision is not clear on its face, and has given rise to questions and anxiety about the extent to which the state can extend legal support and recognition to committed same-sex couples.

I conclude that the soundest interpretation of that provision is that it permits the extension

[11] *See* Appendix A: March 4, 2009 memorandum from Scott B. Thornton and Caitlin Morgan Frederick of the State Budget Office to Cari Anne Renlund (Chief Legal Counsel of the Wisconsin Department of Administration).

[12] *See* Lambda Legal, "Text of State Constitutional Amendments and Revisions Targeting Same-Sex Relationships,"

of legal recognition and rights to unmarried committed couples (whether called "domestic partners" or anything else) so long as there remains ***any significant legal difference*** between the domestic partner status and that of marriage. This is the only interpretation, in my view, that honors the intent of the Wisconsin voters who enacted the amendment while, at the same time, conforms to established principles of constitutional interpretation and avoids raising doubts about Art. XIII, §13 under the Equal Protection clauses of the United States and Wisconsin constitutions.

The methodology for interpreting a constitutional amendment enacted by the Wisconsin voters is explained in *Dairyland Greyhound Park v. Doyle*, 295 Wis. 2d 1, 719 N.W.2d 408 (2006):

> The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. Constitutions should be construed so as to promote the objects for which they were framed and adopted. "The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]" We therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption.

Dairyland, 295 Wis. 2d at 28 (citations omitted). Since the Executive Budget provisions would represent the first significant legislative effort to apply the second sentence of Art. XIII, § 13, the slate is clean on this factor. Moreover, the Supreme Court's reliance on legislative activity in its own judicial construction of a constitutional amendment emphasizes what is implicit in the separation of powers scheme in Wisconsin's constitution: that the Governor and the Legislature have an independent right and duty to interpret the state constitution. Because such constitutional interpretation by the political branches informs judicial decisions, the constitutional interpretations should be the result of the Governor's or Legislatures own reasoned interpretation rather than merely trying to predict what a particular Supreme Court majority might do in deciding a future case.

Because the phrase "legal status identical or substantially similar to that of marriage" is ambiguous, and its meaning cannot be adequately determined through a "plain language" approach, my analysis begins with the intent of the voters and framers of the amendment.

A. The Voters and Framers of the Amendment Did Not Intend to Ban Civil Unions or Domestic Partnerships that Have a Significant Difference with Marriage

In interpreting a constitutional amendment, the Wisconsin Supreme Court

> presumes that, when informed, the citizens of Wisconsin are familiar with the elements of the constitution and with the laws, and that the information used to

> educate the voters during the ratification campaign provides evidence of the voters' intent. "[W]here such intention appears, the construction and interpretation of the acts must follow accordingly."

Dairyland, supra, 295 Wis. 2d at 38 (citations omitted). News reports, public opinion polls, campaign materials, and statements of supporters and opponents supply evidence relevant to determine the voters' intent. *See id.*

1. At the Time of Framing and Ratification of the Amendment, Wisconsin Voters Supported Civil Unions

The public debate and intent of the voters did not evince any particular limitation on the extent or kind of rights that might be extended to domestic partners. Throughout the ratification campaign, both supporters and opponents of the amendment made clear their understanding that the amendment would ban same-sex marriage, as well as exact replicas of marriage under another name, but not domestic partnerships or civil unions that differed from marriage. To be sure, opponents warned that the amendment, due to its ambiguous draftsmanship, could be misconstrued to have the affect of limiting or eliminating domestic partnership benefits; but this was more in the nature of a warning about how conservative activist judges could exploit the ambiguous wording of the second sentence rather than as a true reflection on its meaning and intent.

Polling data during that campaign showed that while a majority favored a ban on same-sex marriage, a majority also favored maintaining domestic partnerships. A "Badger Poll" of Wisconsin voters taken in early April 2004 showed that 64% of Wisconsin voters favored a constitutional amendment defining marriage as between one man and one woman. But the same poll showed that Wisconsin voters, by a margin of 50% to 45%, approved of "civil unions" that allowed committed same-sex couples to register for "partnerships that give them most of the legal advantages that husbands and wives now have."[13]

Other polling data, then and now, both in Wisconsin and nationwide, confirms that public opinion favors defining marriage as between one man and one woman, but also supports civil unions.[14] The split in public opinion not only shows that the opposition to same sex couples is limited to marriage, but also that in the public mind, marriage and domestic partnership are two distinct socio-legal relationships. As much as domestic partnerships might bear similarities to traditional marriage – that it is a committed relationship based on mutual support and love, carrying a number of legal benefits and merged property relationships – in the public mind, the two are not "identical or substantially similar."

---

[13] "No On Gay Marriage, But Many Support Allowing Civil Unions" Capital Times, April 12, 2004.

[14] *See supra* notes 2 and 3.

2. The Voters were Informed by the Marriage Amendment's Drafters and Supporters that Only Same-Sex Marriage and "the Exact Replica of Marriage" Would be Banned

Spokespeople for interest groups that spearheaded the election campaign for the Marriage Amendment made clear that the intent of the Amendment conformed to this aspect of public opinion: that is, the Marriage Amendment was not intended to prohibit domestic partnerships offering most of the legal advantages of marriage. The Wisconsin Coalition for Traditional Marriage, a leading lobby group supporting the amendment, published this statement in its campaign literature:

> Q.9: What is the purpose of the second sentence?
>
> A: The purpose is to protect the people of Wisconsin from having a court impose "look alike" or "Vermont-style" homosexual "marriage," which Vermont has legalized as "civil unions." These civil unions are simply marriage by another name. ***They are a legally exact replica of marriage, but without the title.*** The second sentence to Wisconsin's marriage amendment protects citizens from having a court impose, against their will, this type of arrangement here, regardless of the name given to it. (Emphasis added.)[15]

A leading spokesperson for the amendment, Julaine K. Appling, Executive Director of the Family Research Institute of Wisconsin, repeatedly emphasized that the second sentence of the amendment was aimed at "Vermont-style civil unions."[16] As she explained to the Capital Times, "only full-fledged civil unions or 'look-alike' marriages would be affected" by the amendment, not domestic partner benefits.[17] At the time of the referendum campaign, Vermont civil unions did, as described, provide same-sex couples a relationship substantively identical to marriage.[18]

The primary drafters of the joint resolution that became the Marriage Amendment, Sen. Scott Fitzgerald (R-Juneau) and Rep. Mark Gundrum (R-New Berlin) repeatedly advanced the same understanding. Thus, for example, in an interview with the Wisconsin State Journal, Sen. Fitzgerald "denied that his amendment would prohibit civil unions for gays and lesbians -- unless such unions offered virtually the same list of benefits that married people enjoy, he said." The second sentence of the amendment was to make clear that "civil unions such as those in Vermont would be prohibited from occurring here. Unions that offered a smaller list of benefits probably would be OK, he added."[19] The drafters also tried to make clear that the amendment was not

---

[15] Wisconsin Coalition for Traditional Marriage, Inc., "15 Most Commonly Asked Questions about Changing the Definition of Traditional Marriage."

[16] See also Family Research Institute of Wisconsin, Questions and Answers About Wisconsin's Marriage Protection Amendment, p. 2 (May 2006).

[17] "Critic questions gay marriage explanation," The Capital Times, pp. A1, A8, August 5, 2006.

[18] *See* http://www.sec.state.vt.us/otherprg/civilunions/civilunionlaw.html.

[19] "Erpenbach predicts measure will advance," Wisconsin State Journal, Mar. 6, 2004.

intended to roll back existing domestic partnership benefits or block the extension of domestic partner benefits in the future. In response to concerns that the second sentence would block domestic partner benefits, "Fitzgerald discounted that argument, saying the measure couldn't be used to dismantle any domestic-partner registries already in place," and stated that the amendment "is about marriage and what it should be, it's not about benefits packages."[20] According to Rep. Gundrum, "the amendment was carefully crafted to protect from benefits being taken away" from gay and lesbian domestic partners.[21] As Gundrum told the Milwaukee Jounral Sentinel, "The second sentence does and was designed to prevent activist judges from doing what they did in Vermont -- dictating that there be . . . marriage under a different name.... That's all it's intended to do."[22]

Other pertinent legislative materials lend support the idea that the amendment did not go beyond banning "the exact replica" of marriage for same sex couples. In a memo to Rep. Gundrum, Don Dyke, the Chief of Legal Services for the Wisconsin Legislative Council, stated that the second sentence "would bar civil unions or other arrangements that confer on unmarried individuals the legal status of marriage."[23] Attorney General Peggy Lautenschlager, in her statutorily required "explanatory statement" on the proposed amendment, stated that the amendment "would not further specify what is, or what is not, a legal status identical to or substantially similar to marriage. Whether any particular type of domestic relationship, partnership or agreement between unmarried persons would be prohibited by this amendment would be left to further legislative or judicial determination."[24]

In sum, the voters of Wisconsin did not favor a ban of domestic partnerships or civil unions that would afford committed same-sex couples "most of the legal advantages that husbands and wives now have." At the same time, the voters were repeatedly informed and assured by the Marriage Amendment's supporters that the amendment did not have that purpose. On the contrary, they were advised that the Marriage Amendment banned same-sex marriage as well as "Vermont-style civil unions" that exactly replicated marriage under another name. Thus, as measured by the intent of the voters and the framers of the Marriage Amendment, the amendment prohibits categories 1 and 2 in the scale mentioned above, but not categories 3 and 4.

B. The Plain Language of the "Substantially Similar" Clause Is Ambiguous, but Is Satisfied by the Proposed "Any Significant Difference" Test

The proper interpretation of the second sentence of the Marriage Amendment must follow the voters' intent. The *Dairyland* approach to interpreting a voter-approved constitutional

---

[20]"Senate Poised to pass ban on gay marriage" Milwaukee Journal Sentinal, Mar. 12, 2004.

[21]"Gay Marriage Sparks Heated Testimony," Milwaukee Journal Sentinal, Feb. 13, 2004.

[22]"Some dispute impact of marriage amendment on civil unions, benefits," Milwaukee Journal Sentinel, July 30, 2006, pp. 1B, 6B.

[23]Capital Times, Jan. 30, 2004.

[24]*Quoted in* Wisconsin Briefs from the Legislative Reference Bureau, Brief 06-12 (Sep. 2006).

amendment treats the "plain meaning" of the amendment's language as evidence of the voters intent. Here, however, the language of the second sentence is ambiguous. Given this ambiguity, the voters intent as found in the evidence arising out of the drafting and the referendum campaign should take precedence over a purely linguistic interpretation. Because the intent of the voters and the framers is consistent with one understanding of the language, that should be the preferred interpretation.

A standard canon of construction is to give every word meaning and avoid surplusage, which would weigh against construing "substantially similar" to mean "identical." In this context, the word identical is best understood as referring to same-sex marriages recognized by sister-states. Since the first sentence of the amendment defines marriage as between a man and a woman, the phrase "same-sex marriage" is a conundrum or oxymoron under Wisconsin law. In order to describe "same-sex marriage" for the purpose of stating Wisconsin's decisions to deny legal recognition to same-sex marriages sanctioned in other states, it is necessary to create a phrase that is not oxymoronic. The phrase "legal status identical to marriage" serves that purpose.

"The word "similar" can be understood in different ways by reasonable people," making it ambiguous in a legislative enactment. *State v. Hamilton*, 146 Wis. 2d 426, 431; 432 N.W.2d 108; (Wis. App. 1988). Its meaning can "run the gamut from 'same' or 'identical' to 'having a general likeness.'" *Id.* "Substantially" can mean "to a considerable degree," Webster's Third New International Dictionary 2280 (unabridged ed. 1986), so that the phrase "substantially similar" could arguably mean "very closely resembling." Wisconsin case law has often used the phrase "substantially similar" to mean "fundamentally the same." *See, e.g., Welin v. American Family Mut. Ins. Co.*, 292 Wis. 2d 73, 89, 717 N.W.2d 690 (2006). But "substantial" can also mean "pertaining to substance as opposed to mere 'form' or 'procedure.'" *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 60 (1990). For example, a merely "formal" or "procedural" difference between marriage and a civil union exactly replicating marital rights might be a requirement of different paperwork or the absence of a blood test requirement for civil unions.

The definitions of "substantially similar" tend to converge with the intent of the voters and the drafters discussed above. Whether viewed as "fundamentally the same," or "the same in substance if not form," the phrase "substantially similar" to marriage is best understood as prohibiting the creation of a "civil union" that is identical to marriage in all respects except perhaps in the name or an insignificant formality.

C. The "any significant difference" Interpretation of the "substantially similar" Clause is Necessary to Avoid Unconstitutionality or the Raising of Serious Constitutional Doubts

A cardinal rule in construing legislative enactments is that they be interpreted so as to avoid raising serious constitutional problems, so long as the interpretation is consistent with legislative intent. This principle is followed both by the United States and Wisconsin Supreme Courts. *See, e.g., Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *Baird v. LaFollette*, 72 Wis. 2d 1, 5, 239 N.W.2d 536 (1976). Just as "statutes should be construed so as to avoid constitutional objections," *State v. Fry*, 131

Wis. 2d 153, 165, 388 N.W.2d 565 (1986), so should constitutional amendments. This follows because, "in construing the constitution we are governed by the same rules of interpretation which prevail in relation to Statutes." *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 191, 204 N.W. 803 (1925).

There are at least two ways in which a state constitutional amendment could raise constitutional doubts or objections. One is that the amendment could create an internal conflict with other provisions of the constitution. Where that is the case, the court can and should construe the provisions, where necessary, to harmonize them. *See Kolupar v. Wilde Pontiac Cadillac*, 303 Wis. 2d 258, 279, 735 N.W.2d 93 (2007). The other is that the state constitutional amendment could violate the United States Constitution, in which case it is invalid. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down Colorado's Amendment 2, purporting to ban civil rights legislation on behalf of gays and lesbians).

The "any significant difference" interpretation is successful in, and indeed necessary to, avoiding two significant constitutional doubts. A broader interpretation, one that would restrict domestic partner benefits beyond a ban of an "exact replica of marriage by another name," is likely to violate the equal protection clause of the United States Constitution and create a needless conflict with the Wisconsin equal protection clause. At the same time, an interpretation banning domestic partnerships would violate the "single question" rule for Wisconsin amendments submitted to the voters under Art. XII, § 1.

1. An Interpretation That Restricts Domestic Partnerships Beyond the "Any Significant Difference" Test Would Raise Serious Constitutional Questions and Likely Violate Equal Protection

A ban on the sorts of domestic partnership benefits proposed in the 2009 Executive Budget -- taken individually or collectively -- raises serious constitutional doubts under the Equal Protection Clause of the United States Constitution. *Romer v. Evans*, 517 U.S. 620, 632 (1996), teaches that a state cannot erect state constitutional barriers to the ability of disfavored groups of citizens to seek the protection of its legislative processes. Amendment 2, struck down in *Romer*, would have not only eliminated non-discrimination laws protecting gays and lesbians, but also put gays and lesbians to the unique burden of having to amend the state constitution before pursuing the enactment of any state legislation benefitting them. Such "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence" and violates the Equal Protection clause. *Id.* at 633.

A general domestic partnership ban would have that same constitutionally impermissible effect. It would create a constitutional barrier to same-sex couples seeking legislative recognition of various rights or benefits short of, or legally and logically independent of, marriage. A constitutional ban on any particular rights or benefits, whatever overlap they may have with rights or benefits extended to married couples, would be exceedingly unlikely to withstand Equal Protection scrutiny, whether under a rational basis test or an intermediate level of scrutiny. Requiring a same-sex domestic partner to be notified when his or her partner is the victim of a crime, or affording a domestic partner the right to use family leave to care for a sick partner, or allowing a domestic partner to sue for wrongful death or inherit through intestacy,

bear no rational relationship to any legitimate state interest. None of those kinds of rights, individually or collectively, threaten traditional marriage. Simply put, the connection between the denial of any particular benefit, or even a substantial package of benefits, to same-sex couples and the "protection" of marriage is too attenuated to withstand equal protection scrutiny.

At the end of the day, an objection to the legal capacity of a committed same-sex couple to form a relationship of mutual financial and emotional support, or to have that relationship recognized in law and sustained by a package of legal benefits, "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This [a state] cannot do. A State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635.

A provision that violates the equal protection clause of the United States Constitution would also violate Wisconsin's "equally free" clause. Article I, section 1 of the Wisconsin Constitution provides that "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." The "equally free" clause of the Wisconsin Constitution is "essentially the same" as the Equal Protection clause of the United States Constitution, *County of Kenosha v. C & S Management*, 223 Wis. 2d 373, 393 588 N.W.2d 236 (1999), though Wisconsin reserves the right to provide greater protections than under the United States Constitution. *Id.*

The Marriage Amendment should be construed in a manner that harmonizes it with the Equally Free clause. *Cf. Kolupar, supra*, 303 Wis. 2d at 279 (legislative enactments should be construed to harmonize potential internal conflicts). While construing the Marriage Amendment to ban or restrict domestic partner benefits creates such a conflict, the "any significant difference" interpretation harmonizes the Amendment with the Equally Free clause.

2. An Interpretation That Restricts Domestic Partnerships Beyond the "Any Significant Difference" Test Would Violate Wisconsin's "One Subject" Rule for Referenda

Article XII, section 1 of the Wisconsin Constitution provides

> [I]f the people shall approve and ratify such amendment or amendments [submitted by the legislature] by a majority of the electors voting thereon, such amendment or amendments shall become part of the constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately.

This provision has been interpreted to mean that a valid amendment must relate to a "single question." *See Milwaukee Alliance v. Elections Board*, 106 Wis. 2d 593, 317 N.W.2d 420 (1982). "In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." *Id.* (quotations omitted).

If the Marriage Amendment is properly interpreted to ban same-sex marriage and "exact

replicas of marriage under another name," then the amendment plainly deals with a single question, as required by Art. XII, §1. The question or subject is the entitlement of same-sex couples to the same rights as married couples.

However, if the second sentence of the Marriage Amendment were construed more broadly, it arguably runs afoul of the single-subject rule, addressing (1) the entitlement of same-sex couples to the same rights as married couples; ***and*** (2) the entitlement of same-sex couples to domestic partner rights short of marriage. To be sure, the notion of "one subject" is malleable, and susceptible to semantic games: the two subjects could be made to look like one by using a broader descriptive phrase, such as "the legal rights of same-sex couples to state recognition." While a handful of state courts have taken such a view, [25] those judicial decisions are not viable in Wisconsin because they do not apply anything akin to the *Dairyland* "intent of the voters" test in construing constitutional amendments.

Reading *Dairyland* and *Milwaukee Alliance* in conjunction, the voters' understanding of the proposed amendment becomes crucial to applying the single-subject rule. Again, the voters viewed same-sex marriage as a separate question from "civil unions with most of the legal advantages" of marriage: they opposed former but supported the latter. The Marriage Amendment's framers and supporters, also viewed marriage and "exact replica-marriage" as a different question from domestic partnership: Unions that offered a smaller list of benefits "probably would be OK," according to Sen. Fitzgerald. Or as he put it more tellingly, the Marriage Amendment "is about marriage and what it should be, it's not about benefits packages."[26]

Domestic partnership that does not exactly replicate marriage was thus a separate question. It would violate the "single question" rule to construe the "substantially similar" clause as designed to ban or significantly restrict the extension of domestic partnership rights. The purpose of this "single question" rule is to prevent the precise evil that is raised by the concern or argument that domestic partner benefits are prohibited – that is, to enact an amendment not favored by the electorate by bundling with one that is.

D. The Marriage Amendment's Second Sentence Should be Not Interpreted as an Empty Vessel to be Filled in by Judicial Lawmaking

An interpretation of the Marriage Amendment's second sentence as indeterminate, to be filled in by judicial interpretation, must also be rejected. Such an interpretation was at times argued for by Sen. Fitzgerald, who said at one point that the second sentence "is a place where a judge could step in and say what they believe the legislature meant. There are several reasons why such an interpretive approach is insupportable.

First, the *Dairyland* principle by implication prohibits the use of the referendum process as a means of sneaking hidden agendas past the voting public with after-the-fact reinterpetations

[25] *See, e.g., Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005).

[26] "Senate poised to pass ban on gay marriage" Milwaukee Journal Sentinal, Mar. 12, 2004.

of the amending language. It is likely that at least some political extremists involved in the political movement for the Marriage Amendment wished to eliminate domestic partner benefits. But the voters did not, and *Dairyland*'s "intent of the voter test" does not sanction a process in which advocates of such a stealth agenda can draft ambiguous language, campaign for it under the aegis of a mild or moderate interpretation, and then, after passage, insist on a "plain language" interpretation that differs from what they led the voting public to believe.

Second, the amendment was intended to leave the specific contours of domestic partnership to the "political" branches of Wisconsin government – the Legislature and the Governor -- rather than the courts. Interpreting the second sentence merely to leave it "up to the courts" to determine which specific benefits can and cannot be enacted, or to decide that a package of benefits to same sex couples crosses an invisible line that is "too much like marriage," makes the second sentence utterly standardless and arbitrary. Such a view of the Marriage Amendment is an open invitation to judicial lawmaking. This goes against the grain of interpretation of constitutional amendments in Wisconsin, where courts look to early legislative enactments for interpretive guidance. *See Dairyland*, 295 Wis. 2d at 28. Moreover, one of the stated purposes of the Marriage Amendment, according to its supporters, was precisely to prevent such lawmaking on the subject of same-sex marriages by "activist judges."[27]

II. The Domestic Partnership Provisions of the 2009-11 Executive Budget Bill Fit Well Within the Range of What Art. XIII, § 13 Permits

Any significant difference between marriage and domestic partnership or civil unions would make the latter fall outside the constitutional prohibition of "legal status substantially similar to marriage." Such a significant difference is established by Section 97 alone. Section 97 requires that all "individuals who wish to form a domestic partnership shall apply for a declaration of domestic partnership to the county clerk[.]" No exceptions are made for persons who have established civil unions or domestic partnerships in other states. The effect of this provision is to deny recognition to sister-state domestic partnerships or civil unions.

This is a significant and substantial difference between marriage and domestic partnerships. Married couples moving to Wisconsin are not required to undertake any formality to have their marriage fully recognized in Wisconsin. Likewise, couples residing in Wisconsin who get married while vacationing in other states benefit by having their out-of-state marriages automatically recognized. The domestic partnership statute does not give that automatic recognition to same-sex couples, who instead bear the burden of registering in Wisconsin in all circumstances. That difference alone would qualifies as a significant difference between Wisconsin domestic partnership and marriage even were domestic partners afforded all the other rights and obligations applicable to married couples.

Of course, the domestic partnership provisions in the Executive Budget do not go nearly

[27] *See, e.g.*, Sen. Scott Fitzgerald, "Vast majority of state's citizens want to protect traditional marriage," Wisconsin State Journal, Dec. 4, 2005, pp. B1, B4; "Some dispute impact of marriage amendment on civil unions, benefits," Milwaukee Journal Sentinel, July 30, 2006, pp. 1B, 6B (quoting Rep. Gundrum).

so far. The Executive Budget Bill leaves an extensive list of some 120 statutorily-recognized marital rights and benefits that are not extended to domestic partners, including various matters affecting insurance, health care, probate, property and tenancy, dependent support benefits and employment. This list is set forth in a March 4, 2009 memorandum from Scott B. Thornton and Caitlin Morgan Frederick of the State Budget Office to Cari Anne Renlund, which is attached as an appendix to this letter.

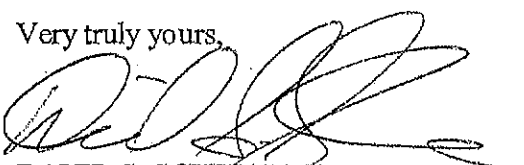
Conclusion

The Wisconsin Marriage Amendment prohibits same-sex marriage and only those civil unions that purport to create an exact replica of marriage by another name. It does not prohibit domestic partnerships or civil unions for same sex partners, so long as there remains any significant difference between that status and marriage. This "any significant difference" standard would be met entirely by the requirement that domestic partners register when moving into the state, in contrast to married couples whose out-of-state marriages are automatically recognized by the law. Nevertheless, the domestic partner provisions of the Executive Budget leave some 120 statutory rights and benefits for married couples that are not extended to domestic partners, many or most of which would by themselves create a significant difference with marriage.

The domestic partnership provisions of the 2009-11 Executive Budget Bill therefore fit comfortably within the restrictions of the Marriage Amendment and are constitutional under Wisconsin law.

Thank you for giving me the opportunity to offer this legal opinion. Please do not hesitate to contact me if I can provide any further information or clarification.

Very truly yours,



DAVID S. SCHWARTZ
Professor of Law
University of Wisconsin Law School

12/8/05 Milwaukee J. & Sentinel 1
2005 WLNR 19815733

Milwaukee Journal Sentinel (WI)

December 8, 2005

Section: A News

Referendum closer on gay marriage ban State Senate passes amendment; it could be factor for Doyle in '06

STACY FORSTER
Staff
Milwaukee Journal Sentinel

Madison A constitutional amendment to define marriage as a union between a man and a woman and prevent the state from recognizing "substantially similar" relationships is one step away from a statewide referendum, after the Senate advanced the measure Wednesday.

The vote broke down along party lines, with the Senate s 19 Republicans voting for the amendment and 14 Democrats opposing it. The measure now heads to the Assembly, where it is expected to easily pass.

The vote marked a shift from the last time the Senate considered the amendment in March 2004, when it was approved 20-13 with some Democratic support. Wednesday s party-line vote reflects the increasing politicization of the issue, which would go before voters in next November s election, when Democratic Gov. Jim Doyle is on the ballot.

"In the end, it s very difficult to argue against letting the people of Wisconsin decide what they are comfortable with when it comes to marriage," said the measure s author, Sen. Scott Fitzgerald (R-Juneau).

Opponents of the amendment disagreed, saying the intent and timing are largely political.

"Gay couples are caught in the crossfire of trying to elect more Republican candidates and defeat a Democratic governor," said Sen. Jon Erpenbach (D-Middleton).

The amendmeut, SJR 53, reads:

"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."

State law defines marriage as a union between a husband and a wife, but supporters of the amendment said the change is necessary to prevent courts from ruling that Wisconsin should recognize same-sex marriages.

Legislators launched the drive to amend the state constitution after Doyle vetoed a bill in 2003 that would have defined marriage as being between a man and a woman. Unlike regular bills, the governor does not have a say on constitutional amendments.

The measure must be approved by both houses of the Legislature in two consecutive sessions before being put to voters in a statewide referendum. If the amendment passes the Assembly as expected, voters would get to weigh in through a referendum in November 2006.

Doyle s Republican challengers, U.S. Rep. Mark Green of Green Bay and Milwaukee County Executive Scott Walker, have said they support the amendment.

Fitzgerald led the debate for the amendment on the Senate floor and said the discussion began when the Massachusetts Supreme Court ruled in 2003 that same-sex couples should be allowed to wed. At that point, he said, Wisconsin lawmakers decided to protect the definition of marriage in the state from being interpreted differently by a court.

"This is not something we went looking for," Fitzgerald said.

A change of heart

Sen. Dave Hansen (D-Green Bay) was one of two Democrats who changed his mind on the issue. Since he first voted for the amendment, Hansen said, he s grown increasingly concerned that it would deny rights to individuals and is being used as an election tool.

Sen. Roger Breske (D-Town of Eland) also did a turnabout and voted against the amendment this time.

"In the last year, this has not been about celebrating marriage," Hansen said on the Senate floor. "I would support a constitutional amendment that simply defines marriage between a man and a woman, but I cannot vote for an amendment that codifies hatred."

Much 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.

Hansen failed to gain enough support for removing the second sentence. Sen. Tim Carpenter (D-Milwaukee), who is gay and an outspoken opponent of the amendment, also tried to change the language, but his attempts failed.

Fitzgerald said the proposed amendment s second sentence was necessary to clarify what kind of marriage would be recognized in Wisconsin. He said the amendment leaves open the possibility that the Legislature could someday define civil unions.

"The second clause sets the parameters for civil unions," Fitzgerald said. "Could a legislator put together a pack of 50 specific things they would like to give to gay couples? Yeah, they could." He added that he wouldn t draft such legislation himself.

Legal experts said a handful of benefits could be extended under the amendment. Civil unions are ambiguous, and those containing most rights and benefits for married couples likely wouldn t be allowed under the amendment, they said.

"This is clearly designed to rule out civil unions as well as (gay) marriages," said Gordon Hylton, a law professor at Marquette University. "But, under this definition, there might be a way to play around with the language of substantially similar to offer some sort of recognition of some sort of same-sex relationship carrying some sort of legal benefits."

Wisconsin wouldn t be alone in considering such a measure in 2006. Fitzgerald said four states already have referendums scheduled, with another four on track to vote on them, too.

No state has defeated such a constitutional amendment once it has gone before voters, Fitzgerald added.

Some believe having such an amendment on the ballot would bring out voters who wouldn t otherwise go to the polls as such state measures are believed to have done in the November 2004 national election.

Mike Tate, campaign director for "No on the Amendment," said Wednesday s Senate vote signals that the vote in Wisconsin could be different from the results in other states.

"Every day, we pick up votes by people who are going to vote no on this amendment," Tate said. "Wisconsin voters are independent, and they have a history of thinking clearly on issues and bucking the trend of national decisions."

Julaine Appling, executive director of the Family Research Institute of Wisconsin, which backs the amendment, said she believes most residents and lawmakers back the intent of the amendment, which she said would preserve the sanctity of marriage in Wisconsin.

"This issue supersedes any partisan designation," Appling said.

HOW THEY VOTED

Here s how the Senate voted on whether there should be a constitutional amendment that would define marriage as a union between one man and one woman.

Republicans voting yes: (19) Ron Brown; Robert Cowles; Alberta Darling; Mike Ellis; Scott Fitzgerald; Glenn Grothman; Sheila Harsdorf; Ted Kanavas; Dan Kapanke; Neal Kedzie; Alan Lasee; Mary Lazich; Joe Leibham; Luther Olsen; Tom Reynolds; Carol Roessler; Dale Schultz; Cathy Stepp; Dave Zien.

Democrats voting yes: None.

Republicans voting no: None.

Democrats voting no: (14) Roger Breske; Tim Carpenter; Spencer Coggs; Russ Decker; Jon Erpenbach; Dave Hansen; Robert Jauch; Julie Lassa; Mark Miller; Jeff Plale; Fred Risser; Judy Robson; Lena Taylor; Robert Wirch.

Source: State Senate

WHAT S NEXT

The proposed marriage amendment goes to the Assembly, where passage is expected.

If passed by the Assembly, the measure would then go before voters next fall.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Social Issues (1SO05); Legislation (1LE97); Gay & Lesbian Issues

(1GA65); Health & Family (1HE30); Government (1GO80); Human Sexuality (1HU27))

INDUSTRY: (Science & Engineering (1SC33); Social Science (1SO92); Political Science (1PO69); Science (1SC89))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39); Wisconsin (1WI54))

Language: EN

OTHER INDEXING: (ALAN LASEE; ALBERTA DARLING; CAROL ROESSLER; CATHY STEPP; DALE SCHULTZ; DAN KAPANKE; DEMOCRATIC; FAMILY RESEARCH INSTITUTE OF WISCONSIN; FRED RISSER; GAY; GLENN GROTHMAN; JOE LEIBHAM; JOURNAL SENTINEL INC; JULIE LASSA; LENA; LUTHER OLSEN; MARQUETTE UNIVERSITY; MASSACHUSETTS SUPREME COURT; NEAL KEDZIE; SENATE; SHEILA HARSDORF; SJR; SPENCER COGGS; STATE SENATE; TAYLOR; TIM CARPENTER; VOTED) (Appling; Breske; Dave Hansen; Dave Zien; Democrats; Doyle; Erpenbach; Dave Hansen; Fitzgerald; Gordon Hylton; Hansen; Jim Doyle; Jon Erpenbach; Judy Robson; Julaine Appling; Madison; Mark Miller; Mary Lazich; Mike Ellis; Mike Tate; Republicans; Robert Cowles; Robert Jauch; Robert Wirch; Roger Breske; Ron Brown; Russ Decker; Scott Fitzgerald; Scott Walker; Tate; Ted Kanavas; Tom Reynolds; Wisconsin; Yeah)

EDITION: Final

Word Count: 1460
12/8/05 MLWK 1
END OF DOCUMENT

TO: All Legislators
FROM: State Representatives Mark Gundrum, Wayne Wood, Leah Vukmir and Ann Nischke, and State Senator Scott Fitzgerald
DATE: January 29, 2004
RE: Co-Sponsorship of LRB 4072/2, constitutional amendment affirming marriage.

We are introducing LRB 4072/2 for first consideration. LRB 4072/2 is a proposed constitutional amendment that would preserve the institution of marriage in this state as it has always been -- between a man and a woman.

Last fall, the Massachusetts Supreme Judicial Court used the Massachusetts State Constitution to completely redefine marriage. In very activist fashion, that court brazenly disregarded all Massachusetts statutes and case law in that state to redefine marriage into its own concept. In doing so, it essentially ordered the Legislature to change the statutes and legislate same-sex marriage for that state. Significantly, the Massachusetts court gave the legislature only 180 days to fulfill this dictate, knowing that it would take until November of 2006, at the earliest, before an amendment to the Massachusetts Constitution could be approved by the voters.

Nothing in our state constitution presently protects against our State Supreme Court doing the same thing the Massachusetts Supreme Court did in 2003 (or Vermont Supreme Court did in 1999 or the Hawaii Supreme Court did in 1993, followed up by a state constitutional amendment there) and legislating from the bench to radically alter marriage in this state and judicially impose same-sex marriage on this state.

WHAT LRB 4072/2 DOES DO

This proposal would prevent same-sex marriages from being legalized in this state, regardless of the name used by a court or other body to describe the legal institution. The proposal preserves "marriage" as it has always been in this state, as a union between one man and one woman. In addition, the proposal states that a legal status *identical or substantially similar* to that of marriage for unmarried individuals shall not be valid in this state, regardless of what creative term is used -- civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it -- it is a fundamental institution for our society.

WHAT LRB 4072/2 DOES NOT DO

LRB 4072/2 does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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.

Please refer to the non-partisan Wisconsin Legislative Council Memo dated January 28, 2004, from Don Dyke, Chief of Legal Services, for further details or clarification.

Ohio just became the 38th state to enact defense of marriage legislation. In fact, Ohio's legislation actually goes further in specifically prohibiting the extension of benefits to same-sex companions.

In 2000, the voters of Nebraska overwhelmingly approved (with 70% of the vote) a state constitutional amendment which also went much further than what is proposed here.

If you would like to sign on as a co-sponsor of LRB 4072/2, please contact Rep. Mark Gundrum or Senator Scott Fitzgerald's office no later than noon on Monday, February 9th.

Vol 2 Issue 1 ★ Special Marriage Edition ★ Fall 2006

Dedicated to **strengthening & preserving marriage, family life & liberty** in Wisconsin

Connecting you with important pro-family news and events.
A publication of The Family Research Institute of Wisconsin

★ FAMILY News Connection ★ ★ ★ ★ ★

Marriage - *Not so private after all!*

Our culture often views marriage as a private matter. The typical attitude towards marriage is personal satisfaction between two individuals, regardless of marital and societal implications. This attitude has spurred change in family law including no-fault and unilateral divorce, equivalence in cohabitation, and the current debate to redefine marriage to include same-sex couples.

These changes are fueled by an erroneous assumption. Marriage is not merely a private matter. The social consequence of marriage affects individuals, children and communities in tremendous ways. Evidence from the social and biological sciences overwhelmingly proves that families led by intact one-man/one-woman marriages are superior to alternative family arrangements.

Benefits to adults

Marriage benefits adults economically, physically and emotionally. Married men and women are more likely to own a home and accumulate wealth than are single or cohabitating adults. This fact is amplified among minorities, as married adults attain higher occupational prestige, suffer fewer financial hardships and have greater opportunity for home ownership than do their single or cohabitating peers.

Marriage encourages physical and emotional health among adults. On average, married adults live longer, experience less illness and lower levels of depression and are less likely to abuse substances than single or cohabitating adults. Men in particular are civilized by marriage, as they are less likely to commit crime, to be sexually promiscuous or to drink to excess. They attend church more often and spend more time with their families and at work.

Benefits to children

The strongest case for marriage, however, is the benefit it provides to children. Children from intact one-man/one-woman marriages have higher literacy levels and better records of school attendance. They are twice as likely to graduate from high school as children in single parent or stepfamilies.

Children raised in stable, married families are less likely to experience depression, anxiety, substance abuse and suicidal thoughts compared to children from divorced homes. Conclusive research finds that family structure is more far-reaching than poverty in predicting children's psychological and behavioral outcomes.

Girls who grow up with a single mother or a stepfather are significantly more likely to experience early sexual development and be sexually abused than girls raised in an intact married home. Boys who aren't raised in a stable, married family are more likely to have problems with aggression, attention deficit disorder, delinquency, and school suspension. Sadly, boys raised with a single parent or a stepfamily are twice as likely to end up in prison than are boys raised in an intact family.

Marriage is a public good

In a nation where 45 percent of all first marriages end in divorce and 1.5 million children are born to unmarried mothers every year (approximately 30 percent of all births), the public cost of marital breakdown is substantial. A recent study indicates that the increase in child poverty rates since the 1970s is due almost entirely to the increase in divorce and illegitimacy. Criminal justice expenditures have risen more than 350 percent in the last 20 years, from $36 billion in 1982 to $167 billion in 2001. Taxpayer dollars spent on social services have also increased by the billions since the 1960s and this too has a direct correlation to the increase in divorce and illegitimacy. The obvious link between marital breakdown and increase in government spending indicates that when the family fails to govern itself, the government will pick up the broken pieces.

Marriage is a public good that offers individuals and society greater health, safety, economic opportunities, and citizenship. When the ideal of marriage is not valued by our culture and reinforced through our legislative and judicial systems, marital breakdown occurs. We have seen the adverse affect of this on individuals and societies for the past fifty years. Now is the time to reinforce, not reinvent marriages in our state!

Resources: *The Future of Family Law, Law and the Marriage Crisis in North America* (Council on Family Law); *Why Marriage Matters: Second Edition, Twenty-Six Conclusions for the Social Sciences* (Family Scholars); *The Consequences of Marriage for African Americans* (Institute for American Values); *Marriage and the Public Good* (Witherspoon Institute).

THE Family ★ RESEARCH INSTITUTE OF Wisconsin ★ ★ ★ ★ ★

PO Box 2075, Madison WI 53701-2075
222 S. Hamilton St, Suite 23
Madison WI 53703-3201
(608) 256-3228 • Toll Free 888-37B-7395
Fax (608) 256-3370

A non-partisan, not-for-profit state family policy council associated with Focus on the Family.

Marriage Amendment Lingo - *Get it straight!*

"Shall section 13 of article XIII of the constitution be created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?"

Opponents of Wisconsin's Marriage Amendment claim that the amendment threatens benefit arrangements for unmarried Wisconsin couples. These claims are misleading and an attempt to sway votes against the amendment. As informed and responsible citizens, we must get the facts straight.

Legal experts in the area of Wisconsin's constitution aware that the second part does not take away benefits that have already been granted to unmarried persons by local units of government or by private companies or institutions. It does prevent these entities from giving such benefits in the future. The Family [illegible] this would be

protects the institution of marriage 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.). If such relationships are "identical or substantially similar to" marriage as it is defined and proscribed in this state, then they would not be given legal recognition as a marriage. The two parts of the amendment are a package deal. In order to fully protect traditional one-man/one-woman marriage in Wisconsin, we cannot allow the institution to be redefined by relationships that are called something other than marriage but are exactly like marriage.

The claims that cohabiting senior citizens or others cohabiting in a sexual relationship outside of marriage be denied "basic benefits" including health care, family leave, hospital visitations and estate transfers is absurd. Nothing in Wisconsin law prohibits two persons of the same or the opposite sex from co-owning a house or any other property, from making each other beneficiary of an estate, from making health care decisions for each other, from obtaining power of attorney for each other, from obtaining permission for hospital visits on and so on. The [illegible] these benefits [illegible]

orm of government doesn't work unless informed citizens participate!

THE Family
★ RESEARCH
INSTITUTE OF
Wisconsin
★ ★ ★ ★ ★
PO Box 2075, Madison WI 53701-2075

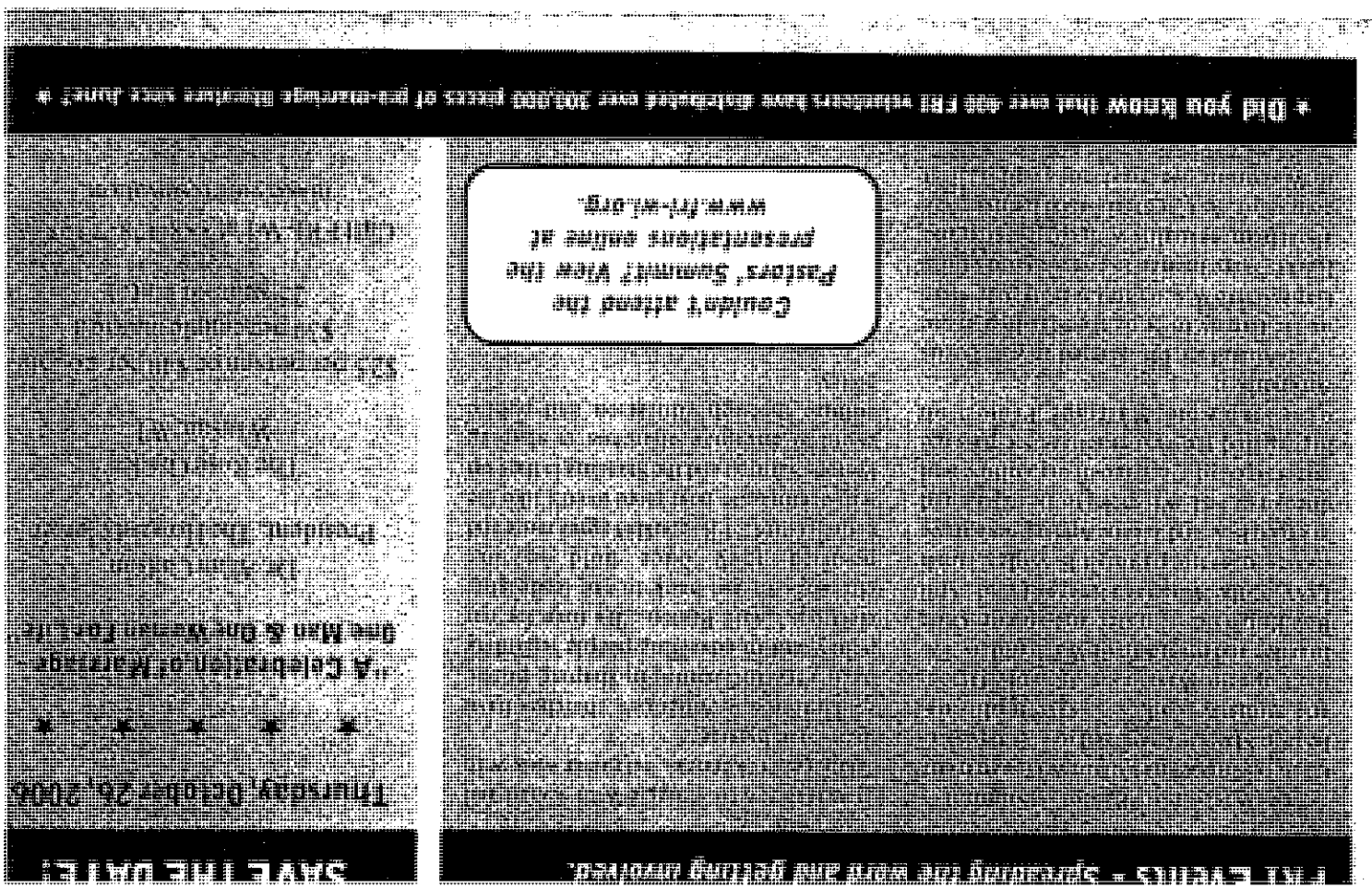
In This Issue:

Marriage...
Not so private after all!

Battle for Marriage...
Good and bad news across the country.

The Battle for Marriage in Wisconsin...
Update on the Constitutional Amendment.

Marriage Amendment Lingo...
Get it straight!



2>What About Unmarried Male-female Couples?

Wisconsin State Journal :: FRONT :: A9

Sunday, October 15, 2006
JASON STEIN jstein@madison.com 608-252-6129

Madison retiree Bill Benedict isn't gay. He isn't even married. But he is concerned by how a proposed constitutional ban on gay marriage and civil unions could affect him and his female partner.

Benedict, a 71-year-old retired social worker, receives health insurance and drug coverage through his partner Suzanne Bergen's employer -- so-called domestic partner benefits that he says save the couple thousands of dollars per year.

"This is really important," said Benedict, who believes passing the proposed amendment would leave the benefits in legal limbo. "We're both really concerned. We feel we have a personal stake in this."

Domestic partner benefits for unmarried couples, both gay and straight, face a likely court challenge if the proposed ban is approved by voters on Nov. 7, legal experts say. It's not clear what Wisconsin courts would decide, and so far cases in other states have yet to reach the highest courts there.

A state court would have to decide how broadly to interpret the amendment's ban on arrangements that are "substantially similar" to marriage, said Jane Schacter, a Stanford University law professor specializing in constitutional law.

The proposal's main opponent, Fair Wisconsin, has pressed this uncertainty in ads, saying the amendment might affect unmarried couples, both gay and straight, in unforeseen ways.

"I think that sentence is a very punitive sentence. I think that we're going to see a lot of voters in Wisconsin agreeing with that," said campaign manager Mike Tate, who argues the proposal could rule out domestic partnership benefits and limit the reach of laws against domestic violence.

Julaine Appling, president of Vote Yes for Marriage in Madison, dismissed the argument as a "Chicken Little" scare tactic that distracts voters from the proposal's real aim -- preventing same-sex marriage. Appling said the amendment is not intended to affect domestic partnership benefits.

One of the amendment's authors, Rep. Mark Gundrum, R-New Berlin, agreed.

"Employers don't even have the legal capacity to create something like marriage, only the state government has (that)," he said.

Polls have found that a majority in the state favor a constitutional ban on same-sex marriage. But voters are almost evenly divided on the question of allowing civil unions for gay and lesbian couples.

Several states have found compromises for gay and lesbian couples that stop short of allowing marriage. Vermont and Connecticut have approved civil unions and California has a statewide domestic partnership registry.

UW-Madison political science professor Katherine Cramer Walsh noted the issue may be important for swing voters. "There are more people opposed to the amendment than there are (in favor of) same-sex marriage, which makes me think people are somewhat leery of having an amendment to the state constitution."

In Michigan, proponents of a similar gay marriage and civil unions ban had predicted that the amendment would not affect domestic partnership benefits there, said Michigan State University law professor Glen Staszewski.

But after voters approved the amendment the Republican state attorney general issued an opinion called into question the domestic partnership benefits offered by public employers. The courts are still deciding the matter, he said. Similar benefits offered by private employers there seem less likely to be affected.

A Wisconsin Legislative Council memo sent to Rep. Mark Gundrum, R-New Berlin, in February concluded that lawmakers didn't intend for the proposed Wisconsin amendment to affect domestic partnership benefits. But the memo also noted courts might interpret the matter differently.

Difficult divorces

Benedict said he and Bergen, 59, both went through difficult divorces and are "wary of pursuing another marriage this late in our lives."

To cover treatment for several chronic medical conditions, Benedict said he relies on the benefits Bergen receives as a child therapist for the Mental Health Center of Dane County, a private agency receiving public money.

To qualify for domestic partnership benefits, couples like Benedict and Bergen generally must meet requirements such as living together in a long-term relationship and sharing their finances.

Benedict worries that the amendment might affect the couple in other areas, such as their rights to visit each other in the hospital.

Staszewski said that was less likely, but it remained to be seen "how the courts will even go about trying to interpret the measure."

Return to story

Q.1: Do Wisconsin residents need to be concerned that traditional marriage will be redefined through the legalization of so-called homosexual "marriage"?
A: Yes, absolutely.

Q.2: Why?
A: On May 17, 2004, Massachusetts became the first state in the history of the United States of America to redefine traditional marriage by legalizing so-called homosexual "marriage." This was done by a handful of elite judges who acted in opposition to the will of the majority of the people of Massachusetts.

Q.3: But that is Massachusetts; this is Wisconsin. Why does that affect us?
A: One provision of the United States Constitution generally requires states to recognize the valid actions taken in other states. In 1996, Congress was so concerned about the courts forcing one state to recognize the so-called homosexual "marriages" legalized in a different state that it passed the Federal Defense of Marriage Act (DOMA). DOMA allows states to refuse to recognize the so-called homosexual "marriages" from another state.

In addition, there is nothing in current Wisconsin law to prevent Wisconsin judges from doing what the Massachusetts' judges did.

Q.4: Since the Congress passed DOMA, what is the problem? Aren't Wisconsin citizens protected by DOMA?
A: No, Wisconsin citizens currently have no legal protection against court-imposed legal homosexual "marriage." DOMA requires the states to pass a law or a constitutional amendment making it clear that marriage is only between one man and one woman. As of summer 2006, Wisconsin is still among the 7 states in the nation that have not taken that action. We must act because lawsuits could be filed any day seeking Wisconsin recognition of a Massachusetts' sanctioned homosexual "marriage."

Q.5: So, what is the plan to quickly provide protection for Wisconsin?
A: Adopt an amendment to the Wisconsin constitution defining marriage as the union of one man and one woman.

Q.6: What is the process for adopting this state constitutional amendment?
A: In 2004, the state legislature passed a resolution to amend the constitution to define marriage as the union of one man and one woman. This resolution passed again in the state legislature in late 2005 and early 2006, on what is called "second consideration." The amendment will be on the November 7, 2006, statewide ballot so the people of Wisconsin can vote on it.

Q.7: What is the wording of the referendum that will beon the ballot in November?
A: "Marriage. Shall section 13 of article XIII of the constitution be
created to provide that only a marriage between one man and one woman shall be valid or recognized as a marriage in this state and that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state?"

Q.8: What is the purpose of the second part?
A: The purpose is to protect the people of Wisconsin from having a court impose "look-alike" or "Vermont-style" homosexual "marriage," which Vermont legalized as "civil unions." These civil unions are simply marriage by another name. They are a legally exact replica of marriage, but without the title. The second part to Wisconsin's marriage amendment protects citizens from having a court impose, against their will, this type of arrangement here, regardless of the name given to it.

Q.9: Homosexual "marriage" proponents say the second part means private domestic partnership benefits and local government benefit arrangements will be struck down under this language. Is that true?
A: No. This is a scare tactic designed to distract citizens from the issue of saving traditional marriage. There is nothing in the second sentence that would prohibit currently existing benefit arrangements, such as hospital

visitations or private property transfer, nor prevent such arrangements in the future.

Q.10: Is it still necessary to pass the Federal Marriage Amendment? What is the relationship between the state and federal marriage protection amendments?
A: Yes. It is still necessary to pass the Federal Marriage Amendment because the US Supreme Court could declare the federal Defense of Marriage Act unconstitutional and require all other states to recognize Massachusetts' legal homosexual "marriages." So the only 100% sure way to save traditional marriage is to pass the Federal Marriage Amendment. In order to do this, it must pass the US House and Senate by a 2/3 vote and be approved or ratified by 3/4 of the states. Experts tell us this could take up to 7 years.

That is why in the meantime, Wisconsin must pass our state constitutional amendment because without it we are among the few states currently most vulnerable to having in-state homosexual couples "married" in Massachusetts only to seek recognition back home. We must ensure traditional marriage has the strongest legal protection possible at the state level.

Q.11: How would so-called homosexual "marriage" hurt traditional marriage, children and families?
A: There are 4 main ways:

1) Marriage is about the next generation. Legal sanction of so-called homosexual "marriage" would always deny children either a mother or a father. A compassionate and loving society always comes to the aid of motherless and fatherless families. It never intentionally creates such families, and yet that is what homosexual "marriage" would do. These types of homosexual families are based on the desires of the adults, not the needs of the children. No child-development theory says children need parents of the same gender, but rather that children need their mothers and fathers.

2) Homosexual "marriage" is a vast, untested social experiment with children. No society, at any time, has ever raised a generation of children in homosexual families. In this instance, children are allowed to become the subject of sociological experiments for the sake of adult sexual desires.

3) If marriage is redefined to include two people of the same gender, where would it stop? How do we say no to group marriage? If marriage is simply about love and commitment, on what basis do we deny group marriage? There are already lawsuits underway challenging the laws that prohibit polygamy on the same grounds as used by homosexual "marriage" proponents. Is it bigotry and discrimination to oppose polygamy and group marriage? Of course not. Just like it is not bigotry or discrimination to protect the traditional and historical institution of marriage as one man and one woman.

4) If so-called homosexual "marriage" is legalized, school children will be taught it is the same as traditional marriage. The people of Wisconsin don't believe homosexual "marriage" is the same as traditional marriage. Yet if we allow the legalization of so-called homosexual "marriage," this will happen. There are already books written for small school children, such as *Heather Has Two Mommies*, *Daddy's Roommate* and *King and King*.

Q.12: Are either the state or federal constitutional amendments about "enshrining discrimination" into our Constitution?
A: No. Traditional marriage is a bedrock institution of our communities, state, nation and society. It is not discriminatory. It is foundational. Protecting its historic definition for the sake of our children and our future is both wise and courageous, not discriminatory. Most people in Wisconsin believe homosexuals have a personal right to live as they choose. But most people also believe homosexuals don't have a right to redefine marriage for all of society. Unless we pass the constitutional amendment protecting traditional marriage, that is what will happen.

Q.13: Where do the people stand on this issue?
A: Squarely on the side of traditional marriage. National and statewide polls have consistently shown solid

support among the majority of people for one-man, one-woman marriage.

Question #14:
I want to save traditional marriage in Wisconsin. What can I do?

Answer:

1) Distribute copies of the Coalition's brochure in your community, or at your church, civic or community organization or event (festival, parade, fair, etc.). **(Contact Wisconsin Coalition for Traditional Marriage via e-mail or by calling toll-free 1-866-478-9286.)**

2) Talk to friends, family members, co-workers, anyone in your sphere of influence about the importance of preserving traditional marriage in Wisconsin and about how they can help.

3) Contact your US Senators and Representative and ask them to support the Federal Marriage Amendment.

4) Consider a financial gift to Wisconsin Coalition for Traditional Marriage. The Coalition is a not-for-profit, 501(c)(3) organization. All gifts and contributions are tax deductible to the limit of the law.

Legislative Fiscal Bureau
One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

May 19, 2009 | Joint Committee on Finance | Paper #391

Establishment of Domestic Partnership and Related Rights and Benefits (General Provisions)

[LFB 2009-11 Budget Summary: Page 304, #2]

CURRENT LAW

Under current law, many state programs and civil processes include provisions relating to the status or rights of spouses and other family members.

GOVERNOR

Create requirements for the establishment of same-sex domestic partnerships and provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Define: (a) "domestic partner" as an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides; and (b) a "domestic partnership" as the legal relationship that is formed between two individuals under the following provisions.

Permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex.

A complete description of the Governor's provisions relating to same-sex domestic partner rights under Assembly Bill 75 is attached [Attachment 1].

DISCUSSION POINTS

1. Academic specialists tracking data on same-sex relationships based on U.S. Census Bureau and American Community Survey data indicate that the enumeration of same-sex partners in these data is imprecise. A report by the Williams Institute, at the University of California Los Angeles, indicates that approximately 160,700 gay, lesbian, and bisexual people were living in Wisconsin in 2005, which was 2.9% of the state's population in that year. The number of same-sex couples in the state was estimated to total 14,894, an increase of nearly 81% from the 8,232 couples reported in the 2000 data. [In contrast, a 2007 Census Bureau report, based on the American Community Survey, estimates the range of same-sex households in Wisconsin at 9,000 to 13,450.] Based on the 2005 data, approximately 19% of gay, lesbian, and bisexual people living in Wisconsin were living as same-sex couples. The counties reported to have the highest concentration of same-sex couples (five or more same-sex couple households per 1,000 households) were Bayfield, Dane, Iowa, Milwaukee, Menominee, Sawyer, and Vilas.

2. Assembly Bill 75 would permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex.

[For the purposes of the Wisconsin Retirement System and state employee benefits under Chapter 40 of the statutes, the bill provides a different set of criteria to define a domestic partnership that would include both same-sex and opposite-sex domestic partners. A separate budget paper, ETF -- "Domestic Partner Retirement and Group Insurance Benefits," has been prepared to address these provisions.]

3. The establishment of same-sex domestic partnerships would be provided in law through a newly created Chapter 770 of the statutes, which would: (a) define the required criteria for the formation of a domestic partner; (b) specify the process for declaring and registering a domestic partnership; (c) specify the process for terminating a domestic partnership; (d) require the Department of Health Services (DHS) to prepare and distribute the necessary forms for these purposes; (e) establish fees; and (f) establish requirements for records relating to domestic partnerships.

4. Some concerns have been raised about the administrative process under the bill to

establish a domestic partnership. Assembly Bill 75 would require the individuals applying for domestic partnership status to complete the declaration of domestic partnership, sign the declaration, having their signatures acknowledged before a notary, and submit the declaration to the register of deeds of the county in which they reside. The register of deeds would be required to record the declaration and forward the original to the State Registrar of Vital Statistics. Similarly, the bill requires that a domestic partner who is seeking a termination of the domestic partnership must submit a certificate of termination of domestic partnership to the register of deeds of the county in which the declaration of domestic partnership is recorded and the register of deeds would record the certificate and forward the original to the State Registrar of Vital Statistics.

However, the bill does not specify what type of record is represented by the declaration of domestic partnership or the termination of domestic partnership documents. As a result, the State Registrar of vital statistics and county registers of deeds would have no clear directive on what to do with the documentation. Neither Chapter 69 of the statutes, relating to the collection of statistics and the powers and duties of the State Registrar and registers of deeds, nor Chapter 59 relating to counties, including additional responsibilities of registers of deeds, are amended by the domestic partnership provisions under the bill. Without amendment, the State Registrar's and county registers of deeds' responsibilities for these documents are not enumerated. Further, there is no authorization under the bill's provisions for the State Registrar or county registers of deeds to charge a fee for certified copies of these records; such fees are typically charged for copies of records.

This issue could be addressed by including the domestic partnership documentation in the definition of "vital records" and "vital statistics" in Chapter 69, by adding provisions to the Chapter 69 sections relating to the powers and duties of the State Registrar and the duties of county registers of deeds, to reflect their responsibilities under the proposed requirements that would be specificd in newly created Chapter 770. The Committee could provide that the application and declaration of domestic partnership, the notice of termination of domestic partnership, and the certificate of termination of domestic partnership would contain such information as the State Registrar of Vital Statistics determines is necessary (rather than DHS). [While the State Registrar of Vital Statistics is part of DHS, if the domestic partnership documentation is deemed a vital record, the responsibility for the design of forms should specifically reside with the Registrar.] Provide that penalties for violations of Chapter 69 provisions as they relate to vital records [s. 69.24 of the statutes] would apply to domestic partnership records.

Designating this documentation as a vital record would also automatically clarify that the State Registrar or a county register of deeds may charge the same fees for certified copies of these records as are charged for other vital records. In addition, as a vital record, requests for copies of the record would generally be limited to those with a direct and tangible interest in a vital record, which may be viewed as an important privacy consideration. [Alternative 2]

Under current law, vital records are defined as any of the following: (a) certificates of birth, death, and divorce or annulment, and marriage documents; (b) worksheets that use forms that are approved by the state registrar and are related to documents specified under poiut (a); and (c) data related to the documents under point (a) or the worksheets under point (b). The term vital statistics

is defined in statute as the data derived from certificates of birth, death, divorce or annulment, marriage documents, fetal death reports or related reports. Vital records have a clear legal standing in the statutes and the State Registrar's and county registers of deeds responsibilities relating to vital records under the statutes is clear. Including this new area of vital records, however, would likely create workload issues and, in the case of the State Registrar, may result in additional costs for redesign work of the Office's technology systems.

5. County clerks have expressed a concern with their responsibility under the bill to process a termination of a domestic partnership. The bill would allow one or both domestic partners to file a completed notice of termination of domestic partnership form with the county clerk who issued the declaration of domestic partnership. The concern is that, in cases where only one domestic partner seeks a termination of the partnership, the other domestic partner may not desire a termination. These situations may be difficult to address and the county clerks do not feel that their staff have the training or background to deal effectively with disputing parties.

It is possible that the termination process could be handled more effectively by the county clerks of circuit court. The clerks of court are arguably more experienced in dealing with individuals involved in civil disputes and are better prepared to counsel individuals on the means available to deal with such disputes. The Committee may want to consider modifying the provisions relating to domestic partnership terminations to assign this responsibility to the county clerks of circuit court, rather than to county clerks. Under this alternative, the termination process would remain unchanged, except that it would be processed by the clerks of circuit court. [Alternative 3]

6. Other clarifications may be advisable with respect to the manner in which a termination of a domestic partnership is addressed under the bill. The bill would provide that, 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 on the date of the marriage. However, there is no requirement under this provision to have the Register of Deeds notified that the domestic partnership has been terminated. [The county register of deeds would only receive a certificate of termination, if one or both parties to the domestic partnership actually go through the termination process.]

The Committee may want to provide that any individual who is registered as a domestic partner and seeks to marry be required to terminate the domestic partnership prior to marriage to ensure that the county Register of Deeds can record the termination. [Alternative 4]

7. On a related issue, under current law, it is unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to marry again until six months after judgment of divorce is granted, and the marriage of any such person before the expiration of six months from the date of the granting of judgment of divorce is void. Under the bill, an individual could: (a) divorce and immediately enter into a domestic partnership; (b) terminate a domestic partnership and immediately enter into another domestic partnership; or (c) terminate a domestic partnership and immediately enter into a marriage.

It may be advisable to have consistency with respect to time requirements for reforming these legal relationships. The Committee could provide that it would be unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to enter into a domestic partnership until six months after judgment of divorce is granted, and the domestic partnership of any such person declared before the expiration of six months from the date of the granting of judgment of divorce would be void. Further, the Committee could provide that it would be unlawful for any person, who is or has been a party to an action to terminate a domestic partnership in this state, or elsewhere, to enter into a domestic partnership or a marriage until six months after the date the certificate of termination is submitted to the register of deeds, and the domestic partnership or marriage of any such person declared before the expiration of six months from the date the certificate of termination is submitted to the register of deeds would be void. [Alternative 5]

8. As drafted, AB 75 would have the domestic partner provisions be effective upon enactment. Local officials, however, indicate that county clerks and registers of deeds would have difficulty implementing these provisions immediately because time would be required to design or modify forms, develop procedures, and conduct staff training. The Committee could provide that the provisions take effect 30 days after the effective date of the bill, to provide the officials adequate time to properly implement the changes. [Alternative 6]

9. The bill would include domestic partners, in registered domestic partnerships, in an array of family-relationship rights under the statutes. These areas of law are listed in Table 1, in the same order as each item appears in the attached summary of the Governor's provisions in AB 75. The inclusion of domestic partners in these provisions does not appear to raise any substantive administrative concerns or result in any material state fiscal effect.

TABLE 1

Areas of Domestic Partner Rights

2009 Assembly Bill 75

1. Victim Notification by the Department of Corrections
2. Evidences - Privileges
3. Damages, Recovery, and Miscellaneous Provisions Regarding Actions in Court
4. Crime Victim Compensation Program
5. Ownership of Property-Joint Tenancy
6. Administration and Transfer of a Deceased Individual's Estate
7. Active State Duty National Guard Member Civil Relief
8. Private Employer Health Care Purchasing Alliance Program (PEHCPAP)
9. Rights of Residents in Care Facilities
10. Consent to Admissions to Nursing Homes, CBRFs, and Hospices
11. Mental Illness, Developmental Disability & Alcohol/Other Drug Abuse Treatment Records
12. Health Care Records
13. Power of Attorney for Property and Finances
14. Power of Attorney for Health Care
15. Consent to Autopsies
16. Consent to Make an Anatomical Gift
17. AIDS/HIV Health Insurance Premium Subsidy Program
18. Insurance Provided by Fraternal Organizations
19. Notifications Made to Family Members Following the Release of Certain Persons
20. Real Estate Transfer Fee
21. Family and Medical Leave
22. Worker's Compensation Death Benefits
23. Employee Cash Bonds Held in Trust
24. Wage Payments
25. Insurance for Employees of Local Governmental Units
26. Manufactured Home Title Transfer Fee
27. Motor Vehicle Titles

10. While the areas listed in Table 1 are fairly extensive, a review of the Wisconsin statutes reveals areas of law that include spousal or family-relationship rights or obligations that are unaffected by the domestic partnership provisions under the bill. Table 2 provides a selective list of such provisions and the associated statutory chapters.

11. Under Art. 13, s. 13, of the Wisconsin Constitution: "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 inclusion of domestic partner rights in the areas listed in Table 1 have raised some concerns that the provisions may create a status for domestic partnerships substantially similar to marriage.

TABLE 2

Selected Areas of Law Not Affected by Domestic Partner Provisions of AB 75

	Subject	Chapter
1.	Advance Directives Relating to Health Care and Final Disposition	154
2.	Campaign Financing	11
3.	Children's Code	48
4.	Consumer Transactions	421, 425, and 427
5.	Disclosure of Personal Medical Information.	610
6.	Discrimination in Education	36 and 38
7.	Discrimination in Housing	66, 106, 224, and 452
8.	Discrimination in Employment	15 and 111
9.	Discrimination in Credit	138
10.	Discrimination in Insurance	632
11.	Divorce, Including Support, Property Division, and Custody	767
12.	General Duties of Public Officials	19
13.	Insurance Contracts in Specific Lines	632
14.	Marital Property Laws	766
15.	Marriage Procedures	765
16.	Motor Vehicle and Traffic Law	341, 343, 344, and 346
17.	Natural Resources	23, 29, 30, and 33
18.	Patients' Claims Relating to Medical Malpractice	655
19.	Public Assistance and Children and Family Services	49
20.	Social Services	46
21.	Unemployment Insurance	108
22.	Veterans	45

12. This office requested that the Legislative Council Staff assess whether the domestic partner provisions under AB 75 confer to unmarried individuals a legal status identical or substantially similar to that of marriage, contrary to Art. XIII, s. 13 of the Constitution. The Staff's memorandum on this issue is attached [Attachment 2]. The memorandum notes that the legal status of domestic partnership under AB 75 would not include core aspects of the legal status of marriage, including requirements for the mutual obligation of support [ss. 765.001(2) and 766.55(2)(a)], the comprehensive property system under marital property law [Chapter 766], and the requirements for terminating a marriage [Chapter 767]. The Council Staff concludes their memorandum, as follows:

> The above analysis suggests that a court could reasonably conclude that the second sentence of art. XIII, s. 13 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status that is the same as, or nearly the same as, marriage. As further discussed above, under that interpretation, it is reasonable to conclude that the domestic partnership proposed in Assembly Bill 75 does not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13. This conclusion is

based on the language of the constitutional provision, evidence of legislative intent concerning the constitutional provision, on the presumption of constitutionality, and on the legal status conferred by a domestic partnership under Assembly Bill 75 contrasted with the current legal status of marriage conferred by Wisconsin Law. Comprehensive, core aspects of the legal status of marriage in Wisconsin are not conferred on domestic partners by Assembly Bill 75.

However, as noted previously, it cannot be concluded with certainty that a court would draw the came conclusions about the intent of art. XIII, s. 13 or the application of that provision to the domestic partnership proposal. Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment.

13. If the Committee believes that current law should be maintained, or that constitutional questions remain, the provision could be deleted [Alternative 7].

ALTERNATIVES

1. Approve the Governor's recommendation to create requirements for the establishment of same-sex domestic partnerships and provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Define: (a) "domestic partner" as an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides; and (b) a "domestic partnership" as the legal relationship that is formed between two individuals under the following provisions.

Permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex. [See Attachment 1 to this paper for a complete description of the Governor's provisions.]

2. Include the domestic partnership documentation (a declaration of a domestic partnership and a certificate of termination of a domestic partnership) in the definition of "vital records" and "vital statistics" in Chapter 69 of the statutes. Provide that the duties of the State Registrar of Vital Statistics and county registers of deeds include the responsibilities that would be created for these officials under Chapter 770 of the statutes. Provide that the application and declaration of domestic partnership, the notice of termination of domestic partnership, and the certificate of termination of domestic partnership would contain such information as the State Registrar of Vital Statistics determines is necessary (rather than DHS). Provide that penalties for violations of Chapter 69 provisions as they relate to vital records [under s. 69.24 of the statues]

would apply to domestic partnership records.

3. Modify the provisions relating to domestic partnership terminations to specify that a domestic partner may terminate the domestic partnership by filing a completed a completed notice of termination of domestic partnership form with the county clerk of circuit court (instead of the county clerk) in the county which issued the declaration of domestic partnership. Provide that, upon receiving a completed, signed, and notarized notice of termination of domestic partnership, the affidavit, if required, and the required fee, the county clerk of court (instead of the county clerk) would be required to issue to the domestic partner filing the notice of termination a certificate of termination of domestic partnership.

4. Provide that any individual who is registered as a domestic partner would be required to terminate the domestic partnership prior to marriage to another individual.

5. In addition to Alternative 4, provide that it would be unlawful for any person, who is or has been a party to an action for divorce in any court in this state, or elsewhere, to enter into a domestic partnership until six months after judgment of divorce is granted, and the domestic partnership of any such person declared before the expiration of six months from the date of the granting of judgment of divorce would be void. Further, provide that it would be unlawful for any person, who is or has been a party to an action to terminate a domestic partnership in this state, or elsewhere, to enter into a domestic partnership or a marriage until six months after the date the certificate of termination is submitted to the Register of Deeds, and the domestic partnership or marriage of any such person declared before the expiration of six months from the date the certificate of termination is submitted to the Register of Deeds would be void.

6. Provide that the provisions take effect 30 days following the effective date of the bill to provide state and local officials adequate time to properly implement the changes.

7. Delete provision.

Prepared by: Art Zimmerman
Attachments

ATTACHMENT 1

Establishment of Domestic Partnership and Related Rights and Benefits

Create requirements for the establishment of same-sex domestic partnerships and provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Define: (a) "domestic partner" as an individual who has signed and filed a declaration of domestic partnership in the office of the register of deeds of the county in which he or she resides; and (b) a "domestic partnership" as the legal relationship that is formed between two individuals under the following provisions:

Criteria for Forming a Domestic Partnership. Permit two individuals to form a domestic partnership if they satisfy all of the following criteria: (a) each individual is at least 18 years old and capable of consenting to the domestic partnership; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals share a common residence [even if only one of the individuals has legal ownership of the residence or one or both of the individuals have one or more additional residences not shared with the other individual, or one of the individuals leaves the common residence with the intent to return]; (d) the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and (e) the individuals are members of the same sex.

[Note: for the purposes of the Wisconsin Retirement System and state employee benefits under Chapter 40 of the statutes, and family or medical leave under s. 103.10 of the statutes, the bill provides a different definition of domestic partnership that would include both same-sex and opposite-sex domestic partners. For these statutes, the bill would define domestic partnership as a relationship between two individuals that satisfies all of the following criteria: (a) each individual is at least 18 years old and otherwise competent to enter into a contract; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals are not related by blood in any way that would prohibit marriage under state law; (d) the two individuals consider themselves to be members of each other's immediate family; and (e) the two individuals agree to be responsible for each other's basic living expenses. See the summary item under "Employee Trust Funds" for the provisions affecting the Wisconsin Retirement System and state employee benefits.]

Unless otherwise noted, the following provisions apply to same-sex domestic partnerships only.

Application. Require that individuals who wish to form a domestic partnership must apply for a declaration of domestic partnership to the county clerk of the county in which at least one of the individuals has resided for at least 30 days immediately before applying. The county clerk would not be authorized to issue a declaration of domestic partnership until at least five days after receiving the application for the declaration of domestic partnership, except that the county clerk may, at his or her discretion, issue a declaration of domestic partnership in less than five

days, if the applicant pays an additional fee of not more than $10 to cover any increased processing cost incurred by the county. Require the county clerk to pay this fee into the county treasury.

Under the bill, no declaration of domestic partnership would be issued unless: (a) the application for it is subscribed to by the parties intending to form the domestic partnership; (b) it contains the social security number of each party who has a social security number; and (c) it is filed with the clerk who issues the declaration of domestic partnership. Require that each party must present satisfactory, documentary proof of identification and residence and must swear, or affirm, to the application before the clerk who is to issue the declaration of domestic partnership. Require that, in addition to the social security number of each party who has a social security number, the application must contain such informational items as the Department of Health Services (DHS) directs. The portion of the application form that is collected for statistical purposes only would be required to indicate that the address of an applicant may be provided by a county clerk to a law enforcement officer under certain conditions specified below.

Require each applicant to exhibit to the clerk a certified copy of a birth certificate and any judgment, certificate of termination of domestic partnership, or death certificate affecting the domestic partnership status. If any applicable birth certificate, death certificate, notice of termination of domestic partnership, or judgment is unobtainable, other satisfactory documentary proof may be presented instead. Whenever the clerk is not satisfied with the documentary proof presented, he or she would be required to submit the proof, for an opinion as to its sufficiency, to a judge of a court of record in the county of application.

If these requirements are complied with, require the county clerk to issue a declaration of domestic partnership. With each declaration of domestic partnership the county clerk would be required to provide a pamphlet describing the causes and effects of fetal alcohol syndrome. After the application for the declaration of domestic partnership is filed, the clerk must, upon the sworn statement of either of the applicants, correct any erroneous, false, or insufficient statement in the application that comes to the clerk's attention and must notify the other applicant of the correction, as soon as reasonably possible.

Completion and Filing of Declaration. In order to form the legal status of domestic partners, the individuals would be required to complete the declaration of domestic partnership, sign the declaration, having their signatures acknowledged before a notary, and submit the declaration to the register of deeds of the county in which they reside. Require the register of deeds to record the declaration and forward the original to the State Registrar of Vital Statistics.

Termination of a Domestic Partnership. Under the bill, a domestic partner may terminate the domestic partnership by filing a completed notice of termination of domestic partnership form with the county clerk who issued the declaration of domestic partnership and paying a fee, as specified below. Require that the notice be signed by one or both domestic partners and notarized. If the notice is signed by only one of the domestic partners, that individual must also file with the county clerk an affidavit stating either of the following: (a) that

the other domestic partner has been served in writing [in accordance with civil procedure law relating to commencement of action and venue] that a notice of termination of domestic partnership is being filed with the county clerk; or (b) that the domestic partner seeking termination has been unable to locate the other domestic partner after making reasonable efforts and that notice to the other domestic partner has been made in a newspaper of general circulation in the county in which the residence most recently shared by the domestic partners is located. The notice would not need to be published more than one time.

Upon receiving a completed, signed, and notarized notice of termination of domestic partnership, the affidavit, if required, and the required fee, the county clerk would be required to issue to the domestic partner filing the notice of termination a certificate of termination of domestic partnership. Require that the domestic partner submit the certificate of termination of domestic partnership to the register of deeds of the county in which the declaration of domestic partnership is recorded. The register of deeds would record the certificate and forward the original to the State Registrar of Vital Statistics.

Under the bill, the termination of a domestic partnership would be effective 90 days after the certificate of termination of domestic partnership is recorded, except that, 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 on the date of the marriage.

Department of Health Services (DHS) Forms Development. Require that the application and declaration of domestic partnership, the notice of termination of domestic partnership, and the certificate of termination of domestic partnership contain such information as the DHS determines is necessary. The form for the declaration of domestic partnership must require both individuals forming a domestic partnership to sign the form and attest to satisfying all of the required criteria. Require DHS to prepare and distribute forms in sufficient quantities to each county clerk.

Fees. Require each county clerk to receive as a fee for each declaration of domestic partnership issued and for each certificate of termination of domestic partnership issued in the same amount that the clerk receives for issuing a marriage license ($49.50 under current law). Of the amount received, the clerk would be required to pay into the state treasury the same amount that the clerk pays into the state treasury from the fee collected for issuing a marriage license ($25). The remainder would be funds of the county. For each declaration of domestic partnership issued and for each certificate of termination of domestic partnership issued, the clerk would also receive a standard notary fee in the same amount as a standard notary fee in connection with issuing a marriage license ($0.50). Provide that the fee may be retained by the clerk, if the clerk is operating on a fee or part-fee basis, but would otherwise be funds of the county.

Records. Require the county clerk to maintain a suitable book, called the declaration of domestic partnership docket, as a complete record of the applications for, and the issuing of, all declarations of domestic partnership, and of all other matters which the clerk would be required

to ascertain related to the rights of any person to obtain a declaration of domestic partnership. Provide that an application may be recorded by entering into the docket the completed application form, with any portion collected only for statistical purposes removed. Provide that the declaration of domestic partnership docket would be open for public inspection or examination at all times during office hours.

Provide that a county clerk may provide the name of a declaration of domestic partnership applicant and, from the portion of the application form that is collected for statistical purposes, may provide the address of the declaration of domestic partnership applicant to a law enforcement officer. Require a county clerk to provide the name and, if it is available, the address, to a law enforcement officer who requests, in writing, the name and address for the performance of an investigation or the service of a warrant. If a county clerk has not destroyed the portion of the declaration of domestic partnership application form that is collected for statistical purposes, he or she would be required to keep the information on the portion confidential, except as authorized by law. Provide that, if a written request is made by a law enforcement officer, the county clerk must keep the request with the declaration of domestic partnership application form and, if the county clerk destroys the declaration of domestic partnership application form, he or she must also destroy the written request.

Upon the basis of the above provisions, the bill would establish certain rights and benefits for domestic partners. These provisions are summarized below.

Victim Notification by the Department of Corrections. Modify current law related to crime victim notification to include domestic partner in the definition of a "member of the family."

Under current law, Corrections is required to notify an adult member of a victim's family (if the victim died as the result of the crime) of an offender's release into the community in the following circumstances: (a) the offender was convicted of certain homicides, sexual assaults, and child-related crimes, and is being placed in the community residential confinement program, the intensive sanctions program, or has a sentence which is about to expire; (b) escape; (c) application for parole; and (d) request for pardon.

In addition, under the sex offender registration laws, notification is provided to a victim or a victim's family member of the initial registration of a sex offender or any change of information regard that offender, if the victim or family member requests the information.

Evidences - Privileges. In addition to "spouse," include domestic partner in all provisions related to husband-wife privilege. Under current law, a person has a privilege to prevent the person's spouse or former spouse from testifying against the person as to any private communication by one to the other during their marriage.

Damages, Recovery, and Miscellaneous Provisions Regarding Actions in Court. In addition to "spouse," include domestic partner in all provisions related to wrongful death actions.

Crime Victim Compensation Program. Expand the definition of "dependent" under the program to include a domestic partner and a parent of a domestic partner. Expand the definition of "family member" under the program to include a domestic partner and a parent or sibling of a domestic partner.

The crime victim compensation program compensates victims and their dependents for the cost of medical treatment (both physical and mental), lost wages, funeral and burial expenses, loss of support to dependents of a deceased victim, and replacement costs of any clothing or bedding that is held for evidentiary purposes. In addition, victim compensation awards may be made to family members of a victim of a homicide.

Ownership of Property-Joint Tenancy. In addition to "husband and wife" in situations where the marital property law does not apply, create a presumption for domestic partners named as owners in a document of title, transferees in an instrument of transfer, or buyers in a bill of sale, that they take ownership of the property as joint tenants if they are described in the document, instrument, or bill of sale as domestic partners, or if they are in fact domestic partners.

A joint tenancy is ownership of property by two or more persons in which each person owns an undivided interest in the whole property with a right of survivorship. An example of this situation would be one in which two people own a home as joint tenants and one dies, and upon the first person's death the remaining tenant is the sole owner of the home.

Administration and Transfer of a Deceased Individual's Estate.

a. *Definitions.* In addition to the previously defined terms domestic partner and domestic partnership, define a "surviving domestic partner" to mean a person who was in a domestic partnership with the deceased individual, at the time of the deceased individual's death.

b. *Revocation of Certain Provisions in Favor of a Former Spouse.* Under current law, a "divorce, annulment or similar event": (1) revokes any revocable transfer of property made by the deceased individual to his or her former spouse or a relative of the former spouse (such as under a will); (2) revokes any disposition created by law to the former spouse or a relative of the former spouse (such as the default rules for property distribution in the absence of a will discussed below); (3) revokes any revocable provision made by the deceased individual in a legal instrument conferring a power of appointment on the former spouse or a relative of the former spouse; (4) revokes the deceased individual's revocable nomination of the former spouse or a relative of the former spouse to serve in any fiduciary or representative capacity; and (5) severs the interests of the deceased individual and former spouse in property held by them as joint tenants with the right of survivorship or as survivorship marital property and transforms the interests of the decedent and former spouse into tenancies in common. [With a tenancy in common, on the deceased individual's death his or her interest in the property does not automatically transfer to the surviving former spouse as it would with either a joint tenancy or survivorship marital property.]

Provide that a "divorce, annulment or similar event" would include a termination of a

domestic partnership, or other event or proceeding that would exclude a person as a surviving domestic partner. Provide that a "former spouse" would include a person whose domestic partnership with the deceased individual had been the subject of a "divorce, annulment or similar event."

As with a remarriage between spouses under current law, these provisions do not apply if the deceased individual and his or her partner had entered into a new domestic partnership before the death of the deceased individual.

c. *Unintentional Exclusion from a Deceased Individual's Will.* As with a surviving spouse under current law, provide that a surviving domestic partner is generally entitled to a share of the deceased domestic partner's probate estate, notwithstanding the deceased partner's execution of a will prior to the recording of the domestic partnership that did not provide for the surviving domestic partner. The surviving domestic partner would receive the share he or she would have received had the deceased partner died without a will equal to the net estate, but the net estate would be reduced by the value of gifts to the deceased partner's children born prior to the domestic partnership and their heirs.

As with a surviving spouse under current law, a surviving domestic partner is not entitled to a portion of the deceased partner's estate under if it appeared from the will or other evidence that the will: (1) was made in contemplation of the domestic partnership with the surviving domestic partner; or (2) was intended to be effective notwithstanding any subsequent domestic partnership, or there was sufficient evidence that the deceased partner considered revising the will after the domestic partnership but decided not to.

d. *Default Rules for the Transfer of Property to Heirs in the Absence of a Will.* Provide that for purposes of distributing the assets of a deceased individual's net estate, a surviving domestic partner would be treated the same as a surviving spouse under current law. Under current law, these default rules determine who among the surviving spouse, children, parents, brothers and sisters, grandparents, and their descendants will receive the net assets of an estate if the deceased individual died without a will.

e. *Priority with Respect to Certain Personal Property.* In addition to a surviving spouse, provide that a surviving domestic partner may file with a probate court a written selection of the following personal property, which must then be transferred to the domestic partner: (1) wearing apparel and jewelry held for personal use by the deceased individual or the surviving spouse/domestic partner; (2) automobile; (3) household furniture, furnishings and appliances; and (4) other tangible personal property not used in trade, agriculture or other business, not to exceed $3,000 in inventory value. This selection of personal property may not include items specifically bequeathed to another individual, except that the surviving spouse/domestic partner may in every case select the normal household furniture, furnishings, and appliances necessary to maintain the home. [Antiques, family heirlooms, and collections that are specifically bequeathed are not classifiable as normal household furniture or furnishings.]

As with a surviving spouse under current law, provide that the "net estate" of a deceased individual be reduced by the selections of personal property made by a surviving domestic partner under the prior paragraph.

f. *Right to Purchase Deceased Individual's Interest in Joint Home.* In addition to a surviving spouse, provide that a surviving domestic partner also has the right to purchase the home in which he or she lived with his or her domestic partner prior to the domestic partner's death.

Under current law, if a deceased individual who was married had a property interest in a home, the deceased individual's entire interest in the home must be transferred to the surviving spouse if the surviving spouse petitions the probate court requesting the transfer, and if a legal document does not provide a specific transfer of the deceased individual's interest in the home to someone other than the surviving spouse. The court must transfer the interest in the home to the surviving spouse upon payment of the value of the deceased individual's interest in the home that does not otherwise pass to the surviving spouse.

g. *Exempting Certain Property Transferred to the Surviving Spouse or Surviving Domestic Partner from General Creditors' Claims.* As with a surviving spouse under current law, provide that once the amount of claims against the deceased individual's estate has been ascertained the surviving domestic partner may petition the probate court to set aside as exempt from general creditors' claims an amount of property reasonably necessary for the support of the domestic partner, not to exceed $10,000 in value, if it appears that the deceased individual's assets are insufficient to pay all claims and still leave the surviving domestic partner such an amount of property in addition to certain other allowances.

h. *Family Support During Administration of the Deceased Individual's Estate.* Provide that a probate court may order payment for the support of a surviving domestic partner. Under current law, a probate court may order payment of an allowance as the court determines necessary or appropriate for the support of the surviving spouse and any minor children of the deceased individual during the administration of the deceased individual's estate.

i. *Accelerated Distribution and Closure of Small Estates.* Expand these provisions to include a domestic partner. Under current law, a probate court may settle the estate of a deceased person under an accelerated process whenever the estate (less the amount of the debts for which any property in the estate is security) does not exceed $50,000 in value and the deceased individual is survived by a spouse or one or more minor children or both. When an estate is closed in this manner, any property not otherwise transferred must be transferred to the surviving spouse or minor children or both.

Active State Duty National Guard Member Civil Relief. Include a domestic partner as an individual who may not be evicted from a rented dwelling during a National Guard member's active state duty.

Private Employer Health Care Purchasing Alliance Program (PEHCPAP). Modify the definition of a "dependent" to include a domestic partner, as it relates to the requirement that an employer participating in the PEHCPAP provide health care coverage under one or more plans to at least 50% of its eligible employees who do not otherwise receive health care coverage as a dependent under any other plan that is not offered by the employer. Although the Department of Employee Trust Funds is authorized to administer PEHCPAP, the program is not in operation and all statutory provisions relating to the program will be repealed on January 1, 2010.

Rights of Residents in Care Facilities. Require adult family homes, residential care apartment complexes, community-based residential facilities (CBRF), nursing homes, hospitals, and hospices to extend the same visitation and accompaniment rights to domestic partners that are currently accorded to the spouse of a patient or resident of these facilities. Modify provisions relating to the rights of nursing home residents to include the right to privacy for visits by a domestic partner.

Consent to Admissions to Nursing Homes, CBRFs, and Hospices. Permit domestic partners of an incapacitated individual to consent to an individual's admission from a hospital to a nursing home or CBRF, or directly to a hospice, if the incapacitated individual does not have a valid power of attorney for health care and has not been adjudicated incompetent.

Mental Illness, Developmental Disability and Alcohol and Other Drug Abuse (AODA) Treatment Records. Include domestic partners as family members who may access treatment records in certain situations. Currently, a spouse, parent, adult child, or sibling who directly cares for or monitors the treatment of an individual for a mental illness or a developmental disability may access the individual's treatment records kept by the state, a county department, or a treatment facility. A parent, sibling, child, or spouse may also access information on whether an individual is a patient at an inpatient facility (and the individual's current location), unless the individual requested that the information be withheld.

Health Care Records. Include the domestic partner of a deceased patient in the definition of "person authorized by the patient" for the purposes of disclosure and release of health care records.

Power of Attorney for Property and Finances. In addition to spouse, include domestic partner under this provision. Under current law, an "agent" is a person assigned by an individual to act on their behalf in matters including finances and property. If a spouse is an agent and the marriage is terminated, the power of attorney document is terminated.

Power of Attorney for Health Care. Include domestic partner in the definition of "relative" for the purposes of designating a power of attorney for health care, and add domestic partner to the list of relatives prohibited from acting as a witness to the execution of power of attorney for health care. If an individual's domestic partner has power of attorney for health care, the power of attorney would be revoked upon termination of the domestic partnership. The bill would amend the written forms provided in statute to reflect these changes.

Consent to Autopsies. Allow a domestic partner who assumes custody of a deceased individual's remains to consent to the performance of an autopsy by a licensed physician.

Consent to Make an Anatomical Gift. Permit the domestic partner of an individual to donate the body or part of the body for transplantation, therapy, research, or education, if an individual who is near death or has died did not specify another agent. Current law specifies a priority order of individuals who can make an anatomical gift of the body or part of the individual, with first priority for the individual's agent under a health care power of attorney, second priority for the individual's spouse, and lower priority for other family members specified in statute. This provision would classify the decedent's domestic partner in the same priority as a spouse for this purpose.

AIDS/HIV Health Insurance Premium Subsidy Program. Include domestic partner in the definition of "dependent" as it relates to the AIDS/HIV health insurance premium subsidy program. Under the program, the Department of Health Services (DHS) pays for all or part of group or individual health insurance premiums for people whose employment has been terminated or reduced due to conditions related to HIV infection, and who have household income of less than 300% of the federal poverty level (FPL). The subsidy is provided to individuals whose policy also covers the individual's dependents.

In addition, DHS pays for all or part of group health insurance premiums for individuals who are on unpaid medical leave from employment due to a condition related to HIV infection, and who have household income of less than 300% of the FPL. The bill would require the subsidy be paid for any plan that also covers an individual's domestic partner.

This provision may slightly increase the total amount of subsidies DHS would be authorized to pay under the program, since DHS would begin paying subsidies for insurance that covers the person's domestic partner.

Insurance Provided by Fraternal Organizations. Allow a fraternal organization to provide insurance benefits to domestic partners of its employees. Currently, a fraternal organization may provide health insurance benefits to a spouse or dependent child of an employee.

Notifications Made to Family Members Following the Release of Certain Persons. Include domestic partners under the definition of "family member" as it relates to the requirements that: (a) a district attorney notify members of the victim's family if a court conditionally releases an individual who was found not guilty by reason of mental disease or mental defect; (b) DHS notify members of the victim's family if a court orders the termination or discharge of an individual who was found not guilty by reason of mental disease or mental defect; and (c) DHS notify family members after a court discharges or places on supervised release an individual who was committed as a sexually violent person.

Real Estate Transfer Fee. Provide an exemption from the real estate transfer fee for conveyances of real property between domestic partners. The provision would be first apply to

conveyances of property between domestic partners on the day after publication of the bill. It is estimated that the provision would reduce state real estate transfer fee revenues by a minimal amount.

Under current law, the real estate transfer fee is imposed on conveyances of real property at the rate of $3 per $1,000 of value. The county in which the property is located collects the fee when a conveyance of real estate is submitted for recording. The county retains 20% of the fee and remits the remaining 80% to the state. Current law exempts certain transfers between family members from the fee, such as conveyances between husband and wife, as well as conveyances for little or no consideration between parent and child, stepparent and child, parent and son-in-law, or parent and daughter-in-law.

Family and Medical Leave. Modify current law family and medical leave provisions related to care of family members for serious health conditions to include domestic partners. [As noted above, for the purposes of the Wisconsin Retirement System and state employee benefits under Chapter 40 of the statutes and family or medical leave under s. 103.10 of the statutes, the bill provides a different definition of domestic partnership that would include both same-sex and opposite-sex domestic partners.]

For employers of 50 or more, current law requires that an employee be allowed up to two weeks of leave in a twelve-month period for the care of a child, spouse, or parent with a serious health condition.

Worker's Compensation Death Benefits. Modify current law related to worker's compensation death benefits to provide a domestic partner with the same treatment as a spouse. Under current law, if a work-related accident or occupational disease causes death, or if a worker dies while entitled to permanent total disability benefits, death benefits are paid to a spouse, parent, or relative. Extra benefits are paid to dependent children. Burial expenses are also provided.

Employee Cash Bonds Held in Trust. Modify current law to provide a domestic partner with the same treatment as a spouse in payouts of employee cash bonds, in cases where the employee dies. Current law authorizes an employer to require an employee to furnish a cash bond. If the employee dies, the bond is repaid to the decedent's family in a specified order of priority.

Wage Payments. Modify current law to require an employer to pay a domestic partner an employee's unpaid wages, in cases where the employee dies. Current law establishes when an employee must be paid wages earned. In cases where the employee dies, unpaid wages are required to be paid to the decedent's spouse, children, and dependents.

Insurance for Employees of Local Governmental Units. Expand current law provisions to domestic partners and dependent children and include the Milwaukee Public Schools in the definition of a "local governmental unit" for this purpose. Under current law, the state or a local governmental unit may provide for payment of premiums for health, accident and life insurance

for municipal employees, their spouses, and dependent children.

Manufactured Home Title Transfer Fee. In addition to surviving spouse, add "or domestic partner" to the supplemental title fee exemption afforded when a mobile home title is transferred after death. The supplemental fee is currently $7.50. In 2007-08 manufactured home supplemental title fee revenue totaled $52,900, with 132 spousal exemptions (less than 2% exempt). Revenue is deposited in a Department of Commerce program revenue appropriation for operations of the Safety and Buildings Division.

Motor Vehicle Titles. Modify provisions that establish the procedures for the transfer of a decedent's interest in a motor vehicle to a surviving spouse, to specify that these provisions also apply to a surviving domestic partner. Modify a provision that waives the supplemental motor vehicle title transfer fee in cases where the title to a vehicle is being transferred to a surviving spouse from a deceased spouse, to specify that the fee waiver also applies in situations where a vehicle title is being transferred to a surviving domestic partner.

[AB 75 Sections: 1391 thru 1394, 1396, 1399, 1402, 1411, 1412, 1416, 1418, 1422 thru 1424, 1429 thru 1431, 1464, 1465, 1830, 2158 thru 2166, 2170 thru 2172, 2174 thru 2178, 2180 thru 2186, 2211 thru 2213, 2430, 2437 thru 2443, 2505, 2506, 2532, 2536, 2537, 2539, 2667, 2669, 2690, 2691, 2713, 2749, 2773, 2774, 2901, 2905, 3140, 3200, 3218, 3244 thru 3267, 3269, 3284, 3285, 3357, 3358, 3374, 3375, 3405, and 9343(16)]

ATTACHMENT 2

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: BOB LANG, DIRECTOR, LEGISLATIVE FISCAL BUREAU

FROM: Don Dyke, Chief of Legal Services

RE: Domestic Partnership in 2009 Assembly Bill 75 (Biennial Budget Bill) and Article XIII, Section 13, Wisconsin Constitution

DATE: May 6, 2009

You ask whether the domestic partnership provisions in 2009 Assembly Bill 75 (the Biennial Budget Bill) confer to unmarried individuals a legal status identical or substantially similar to that of marriage, contrary to art. XIII, s. 13, Wis. Const., which was adopted in November 2006. The latter constitutional provision provides in pertinent part: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

Based on a comparison of the legal status conferred by a domestic partnership under Assembly Bill 75 with the legal status conferred by a marriage; on the language of art. XIII, s. 13, Wis. Const.; on evidence of legislative intent concerning art. XIII, s. 13; and on the presumption of constitutionality, it is reasonable to conclude that the domestic partnership provisions proposed in Assembly Bill 75 do not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13.

It is recognized, however, that there is no Wisconsin appellate jurisprudence concerning the meaning of art. XIII, s. 13 and that others might reach a different conclusion concerning the application of art. XIII, s. 13, to the proposed domestic partnership. Thus, while this memorandum suggests that it is reasonable to conclude that the domestic partnership provisions in Assembly Bill 75 are not contrary to art. XIII, s. 13, Wis. Const., it cannot be concluded with certainty that a court would reach the same conclusion. Final resolution of the issue ultimately falls to the courts.

ESTABLISHMENT AND TERMINATION OF DOMESTIC PARTNERSHIP UNDER ASSEMBLY BILL 75

Assembly Bill 75 authorizes the legal relationship of domestic partnership to be entered into by two individuals who are at least 18 years old, who are not married or in another domestic partnership, who share a common residence, who are of the same gender, and who are not nearer of kin than second cousins. See, generally, SECTION 3218 of Assembly Bill 75 for detail of provisions summarized in this part.

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

Under the bill, application for a declaration of domestic partnership is made to the county clerk of the county in which at least one of the individuals has resided for at least 30 days. The application process requires submission of specified identifying information. If the parties are eligible to enter into a domestic partnership, the clerk issues a declaration of domestic partnership which the parties must complete, sign before a notary, and submit to the Register of Deeds of the county of residence.

To terminate a domestic partnership, at least one of the domestic partners is required to file with the county clerk a notice of termination of domestic partnership, which must be signed by one or both of the domestic partners and notarized. If only one domestic partner signs the notice, he or she must file an affidavit stating that he or she has notified personally or, if that is not possible, by publication, the other domestic partner of intent to file a termination. Upon receipt of notice of a termination, the county clerk issues a certificate of termination of domestic partnership, which is recorded in the Office of the Register of Deeds. Termination is effective 90 days after the certificate of termination is recorded.

LEGAL STATUS CONFERRED BY DOMESTIC PARTNERSHIP

Assembly Bill 75 defines the legal status of a domestic partnership by specifying what benefits and rights are extended to domestic partners. Generally stated, these rights and benefits include such areas as: health care, including access to treatment records, visitation rights, health care decision-making, 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 to care for a domestic partner; holding property as joint tenants if both partners are owners in a document of title; and exemption from real estate transfer fee for transfers of real property between domestic partners. Further, benefits to a surviving domestic partner generally include: rights to the estate of the deceased partner that does not pass by will (intestacy); qualified interest in deceased partner's interest in a home; ability to petition probate court for an allowance for support from deceased partner's estate; authority to select from deceased partner's estate designated personal and household items; limited exemption of deceased partner's estate from creditors' claims; and transfer of deceased partner's interest in motor vehicle. Finally, the bill provides that a local governmental unit may provide health and life insurance for a local employee's or officer's domestic partner and dependent children.

(Note that the bill also provides that domestic partners must be treated in the same manner as spouses with respect to all pension benefits provided public employees who are covered under the Wisconsin Retirement System, ch. 40, Stats., and all other ch. 40 benefits provided state employees. However, for these purposes, a definition of "domestic partnership" applies that is different than the more general domestic partnership provisions described in this memorandum. For purposes of ch. 40, "domestic partnership" is defined as a relationship between two individuals that satisfies the following criteria: (a) each individual is at least 18 years old and otherwise competent to enter into a contract; (b) neither individual is married to, or in a domestic partnership with, another individual; (c) the two individuals are not related by blood in any way that would prohibit marriage under state law; (d) the two individuals consider themselves to be members of each other's immediate family; and (e) the two individuals agree to be responsible for each other's basic living expenses. See SECTIONS 774 and 775 of the bill. This concept of domestic partnership is for limited purposes and may, but does not necessarily, include the more general concept of domestic partnership under the bill; for example, the more general concept does not require that both partners be responsible for each other's basic living expenses and the

ch. 40 definition is not limited to same gender partners. Note, also, that Assembly Bill 75 includes both definitions of domestic partner for purposes of family and medical leave. See SECTION 2170 of the bill.)

A more complete summary of the rights and benefits conferred by a domestic partnership under the bill is included in "Summary of Governor's Budget Recommendations, 2009-11 Wisconsin State Budget," Legislative Fiscal Bureau, March 2009, pp. 308 to 314 [http://www.legis.state.wi.us/lfb/2009-11Budget/Governor/general%20provisions.pdf].

WHAT THE LEGAL STATUS OF DOMESTIC PARTNERSHIP DOES NOT INCLUDE

Perhaps more important for the discussion in this memorandum is not what the legal status of domestic partnership includes but, rather, what that status does not include. Among other things, the legal status of domestic partnership does not include:

1. The mutual obligation of support that spouses have in a marriage. See, e.g., ss. 765.001 (2) and 766.55 (2) (a), Stats.
2. The comprehensive property system that applies to spouses under the marital property law. See, generally, ch. 766, Stats. That property system covers property ownership, management and control of property, access to credit, creditor and debtor rights and remedies, marriage agreements, and interspousal remedies.
3. The requirements of divorce law for terminating a marriage. See, generally, ch. 767, Stats. Among other things, divorce law covers the procedure for terminating a marriage, division of spouse's property, support requirements, and a six-month prohibition against remarriage.

The above represent a substantial body of codified law and interpreting case law. Because the legal status of domestic partnership does not generally include these legal aspects of marriage, it is arguably unnecessary to do a side-by-side comparison of all benefits, rights, and obligations conferred by each respective legal status. The above legal aspects of marriage are comprehensive, core aspects of the legal status of marriage that are not generally included as part of the legal status conferred by a domestic partnership under Assembly Bill 75.

DISCUSSION

The Wisconsin Supreme Court has said that the purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it. The intent of an amendment is to be determined in light of the circumstances in which the framers and people approving it were placed at the time. Thus, a court, in interpreting the meaning of a constitutional provision, will examine the following:

1. The plain meaning of the words and the context used.
2. The historical analysis of the constitutional debates.
3. The earliest interpretation of a particular provision by the Legislature as manifested in the first law passed following the adoption of the provision. [See *Dairyland Greyhound Park, Inc., v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 (2006).]

Also note that laws enacted by the Legislature are presumed by the courts to be constitutional and a person challenging the constitutionality of a statute must show that the statute is unconstitutional beyond a reasonable doubt. Where any doubt exists as to a law's unconstitutionality, it must be resolved in favor of constitutionality. [See, e.g., *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).] Thus, a party arguing the invalidity of the domestic partnership created by Assembly Bill 75 is required to show beyond a reasonable doubt that it violates art. XIII, s. 13. The historical context, the plain language, and the expressed intent concerning the constitutional provision arguably make it difficult for a challenger to overcome the strong presumption of constitutionality that the law creating the legal status of domestic partnership would enjoy.

The Plain Meaning of Article XIII, Section 13, Wisconsin Constitution

Article XIII, Section 13, Wisconsin Constitution, provides

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

The Context

The intent of a constitutional provision 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" through recognition of the reasons which lead to the framing and adopting of the amendment. Once that intent is ascertained, "no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion." [*Thompson v. Craney*, 446 N.W.2d at 131, citations omitted.] Courts may review the general history relating to a constitutional amendment as well as the legislative history of the amendment. [*Schilling v. Wisconsin Crime Victims Rights Board*, 2005 WI 17, 278 Wis. 2d 216, 692 N.W.2d 623 (2005).]

At the time of the introduction of the first joint resolution proposing the creation of art. XIII, s. 13 (2003 Assembly Joint Resolution 66), Vermont had enacted, and Massachusetts was considering enacting, a "civil union" law granting couples of the same gender the opportunity to venture into a state-sanction relationship conferring "the same benefits, protections, and responsibilities" granted to married couples or extending to those in a civil union "a legal status equivalent to marriage." It is arguable that the intent of the Legislature in drafting the constitutional provision's second sentence was to prohibit the creation or recognition of "civil unions" like those in Vermont or like those being proposed in Massachusetts. Support for this position is found in a cosponsorship memorandum circulated by the primary author of 2003 Assembly Joint Resolution 66, seeking cosponsors of the proposed amendment on first consideration. The cosponsorship memorandum explains that the proposal would "prevent same-sex marriages from being legalized in the state, regardless of the name used by a court or other body to describe the legal institution." The memorandum also notes: "In addition, the proposal states that a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid in the state, regardless of what creative term is used-civil union, civil compact, state sanctioned covenant, whatever. Marriage is more than just the particular eight letters used to describe it--it is a fundamental institution for our society, regardless of the particular term used to describe it."

[Memorandum from Representative Mark D. Gundrum, regarding cosponsorship of LRB-4072/2, constitutional amendment affirming marriage.]

It appears, than, that the primary author of the constitutional amendment intended the amendment to prohibit same gender marriages and legal arrangements like civil unions and civil compacts that essentially confer a legal status identical or substantially similar to that of marriage.

The Language

The second sentence of art. XIII, s. 13, addresses a "legal status," or standing in law, identical or substantially similar to that of marriage. "Identical," of course, means "exactly the same for all practical purposes" [Black's Law Dictionary], "being the same, having complete identity," "characterized by such entire agreement in qualities and attributes that identity may be assumed," or "very similar, having such close resemblance and such minor difference as to be essentially the same." [Webster's Third New International Dictionary.]

"Similar" is defined as "having characteristics in common, very much alike, comparable," "alike in substance or essentials," or "one that resembles another, counterpart" [Webster's Third New International Dictionary], or "nearly corresponding, resembling in many respects, somewhat like, having a general likeness, although allowing for some degree of difference." [Black's Law Dictionary.] "Substantially" is defined as meaning "essentially; without material qualification." [Black's Law Dictionary.] Thus, something can be said to be "substantially similar" if it is essentially alike something else. The Legislature could have adopted, but did not adopt, language that prohibits unmarried individuals, or unmarried individuals of the same gender, from contracting for a right or benefit enjoyed by married couples or that prohibits the public or private conferring of such rights or benefits on unmarried individuals. Instead, it prohibited the recognition of a "legal status" identical or substantially similar to that of *marriage* between unmarried individuals.

Because the legal relation of domestic partnership under Assembly Bill 75 does not include comprehensive, core aspects of the legal relation of marriage, the legal relation of domestic partnership is not the same as and arguably is not nearly the same as, the legal relation of marriage.

The Intent of Art. XIII, Section 13

There is evidence of intent regarding art. XIII, s. 13 to support the position that it is reasonable to conclude that the provision does not prohibit the domestic partnership proposal included in Assembly Bill 75. The intent of the second sentence of art. XIII, s. 13, Wis. Const., was discussed in a 2006 memorandum prepared by this office. [Memorandum to Representative Mark Gundrum 2005 Assembly Joint Resolution 67 (Marriage Amendment), from Don Dyke, Chief of Legal Services, dated February 24, 2006.] The memorandum cites the following from the co-sponsorship memorandum from Representative Mark Gundrum, author of 2003 Assembly Joint Resolution 66 (first consideration), creating art. XIII, s. 13, explaining that the proposal:

> ...does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem

> appropriate. As 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.
>
> [Memorandum from Representative Mark D. Gundrum, regarding co-sponsorship of LRB-4072/2, constitutional amendment affirming marriage.]

The 2006 Legislative Council staff memorandum continues:

> The circulation memo accompanying the Senate version of 2005 Assembly Joint Resolution 67 (2005 Senate Joint Resolution 53) contains similar language:
>
> This proposal does not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits, pension benefits, joint tax return filing, hospital visitation, etc. as those bodies are able and deem appropriate. As 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 marriage, no particular privileges or benefits would be prohibited. [Memorandum, Senator Scott Fitzgerald and Representative Mark Gundrum, "Cosponsorship of 3729/1, Constitutional Amendment Affirming Marriage," dated November 17, 2005.]
>
> In a similar vein, a Legislative Council staff memorandum dated January 29, 2004, discussed how the courts might interpret the proposed amendment. [Footnote omitted.] The Legislative Council memorandum pointed out that it was reasonable to interpret the second sentence of the amendment as follows:

- The state Legislature and courts may not provide for the establishment of a civil union, or other arrangement, however designated, that confers or purports to confer on unmarried individuals the legal status of marriage or a status substantially similar to that of marriage.

- If another jurisdiction confers or purports to confer a legal status of marriage or a status substantially similar to that of marriage on unmarried individuals, that status is not valid under law in this state or recognized at law in this state.

- The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits, certain probate rights, or the ability to file joint tax returns.

- The conferring of a right or benefit traditionally associated with marriage to unmarried individuals in a private setting is not precluded; for example, benefits by a private employer for employees, visitation privileges by a hospital, or family membership status in a health club.

- The Legislature or a court (or the executive branch) is precluded from extending the rights and benefits of marriage to unmarried individuals to the extent those rights and benefits confer a legal status identical to that of marriage or substantially similar to that of marriage.

[Memorandum from Don Dyke, Chief of Legal Services, Legislative Council Staff, to Representative Mark Gundrum, regarding Assembly Joint Resolution ___ (LRB-4072/2), Relating to Providing That Only a Marriage Between One Man and One Woman Shall be Valid and Recognized as a Marriage in This State, January 29, 2004.]

It is of interest to note that 2003 Assembly Joint Resolution 66 was introduced after the date of the Legislative Council memorandum and was introduced in identical form as the draft reviewed in that memorandum.

Staff memoranda such as those referred to above can provide a court a window into the intent of the Legislature when it adopted the successive joint resolutions that became art. XIII, s. 13, Wis. Const. For example, in the *Dairyland* case, *Id.*, both the majority opinion and the concurring and dissenting opinion of Justice Prosser reviewed legal memoranda prepared by Legislative Council staff, in order to determine what the Legislature believed would be the impact of constitutional amendments relating to gambling on the Indian gaming compacts entered into by the state and Wisconsin's Indian tribes.

Note, too, that media accounts of statements from supporters of the constitutional amendment that created art. XIII, s. 13, would be relevant in determining intent. In order to determine not only the legislative intent behind a constitutional amendment but also to determine the intent of the electorate in approving a constitutional amendment, a court will review expressions made in the media. [See, e.g., *Dairyland, Id.*, 719 N.W.2d, at 426-427.]

While perhaps not dispositive, the above contemporary expressions of intent, combined with the historical context and plain language of art. XIII, s. 13 support the conclusion that the intent with respect to the second sentence of the amendment is to prohibit the recognition of Vermont-style civil unions or a similar type of government-conferred legal status for unmarried individuals that purports to be the same as or nearly the same as marriage in Wisconsin. As previously discussed, the legal status conferred on domestic partners by Assembly Bill 75 is not the same as and arguably is not nearly the same as the legal status of marriage.

CONCLUSION

The above analysis suggests that a court could reasonably conclude that the second sentence of art. XIII, s. 13 is intended to prohibit the recognition of civil unions or other relationships recognized by law that confer or purport to confer a legal status that is the same as, or nearly the same as, marriage. As further discussed above, under that interpretation, it is reasonable to conclude that the domestic

partnership proposed in Assembly Bill 75 does not confer a legal status identical or substantially similar to that of marriage for unmarried individuals in violation of art. XIII, s. 13. This conclusion is based on the language of the constitutional provision, evidence of legislative intent concerning the constitutional provision, on the presumption of constitutionality, and on the legal status conferred by a domestic partnership under Assembly Bill 75 contrasted with the current legal status of marriage conferred by Wisconsin law. Comprehensive, core aspects of the legal status of marriage in Wisconsin are not conferred on domestic partners by Assembly Bill 75.

However, as noted previously, it cannot be concluded with certainty that a court would draw the same conclusions about the intent of art. XIII, s. 13 or the application of that provision to the domestic partnership proposal. Some uncertainty is inherent in attempting to determine how a court will interpret a constitutional amendment.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

DD:jal:ty

FAIRBANK, MASLIN, MAULLIN & ASSOCIATES 220-2044 APRIL 18-23, 2006

Interviewer_____ Station _____

Time Began _____ Time Finished_____ Total Time _____

WISCONSIN STATEWIDE ELECTION ISSUES SURVEY
JOB #220-2044
A/B AND C/D SPLIT
WFT N = 600

Hello, I'm_____ from FMA, a public opinion research firm. We're conducting a public opinion survey about issues which concern citizens of Wisconsin. May I speak with the youngest adult male in your household who is at least 18 years old? **(IF NOT AVAILABLE, ASK:)** May I speak to another adult member of your home who is 18 years old or older?

1. Are you registered to vote at this address?

Yes----------100%
No/Don't know---------- **TERMINATE AND DON'T COUNT TOWARD QUOTA**

2. A lot of times things come up and people are not able to vote. Do you recall whether you voted in the November 2004 general election for President, U.S. Senate, Congress, and other local offices?

Voted ----------97%
Did not vote----------3%
(DON'T KNOW/DON'T RECALL/NA)----0%

3. Do you remember whether you voted in the November 2002 general election for Governor, Congress, and other local offices?

Voted ----------81%
Did not vote----------10%
(DON'T KNOW/DON'T RECALL/NA)----9%

RESPONDENTS MUST HAVE VOTED IN 1 OF THE 2 ELECTIONS IN Q2 AND Q3. IF NOT OR DON'T KNOW, THEN ASK Q4:

4. Did you register to vote in Wisconsin after November 2004?

Yes----------100%
No----------**TERMINATE**
(DON'T KNOW/NA)----------TERMINATE

9. Now, I would like to ask your impressions of some people and groups in public life. As I read each name, please tell me whether your impression of that person or group is very favorable, somewhat favorable, somewhat unfavorable, or very unfavorable. If you don't recognize a name just say so. Here's the first one:

(ROTATE)		VERY FAV	S.W. FAV	(MIXED)	S.W. UNFAV	VERY UNFAV	(CAN'T RATE)	NEVER HEARD OF/DK
[ ]a.	George W. Bush	21%	22%	2%	11%	42%	1%	0%
[ ]b.	Herb Kohl	35%	33%	2%	11%	10%	5%	4%
[ ]c.	Jim Doyle	20%	35%	4%	19%	17%	4%	2%
[ ]d.	Russ Feingold	34%	24%	3%	13%	21%	3%	2%
[ ]e.	Mark Green	16%	17%	3%	8%	7%	13%	36%
[ ]f.	Tommy Thompson	22%	31%	4%	17%	21%	4%	2%
[ ]g.	Tammy Baldwin	11%	17%	2%	6%	7%	13%	44%
[ ]h.	Ed Thompson	3%	17%	3%	12%	11%	19%	35%

10. And if the general election for Wisconsin Governor were held today, for whom would you vote if the candidates were **(ROTATE)** [ ] Jim Doyle, the Democrat and [ ] Mark Green, the Republican? **(IF UNDECIDED, ASK)** "Toward whom would you lean?"

Jim Doyle	46%
(LEAN DOYLE)	4%
Mark Green	39%
(LEAN GREEN)	2%
(OTHER-SPECIFY)_____	0%
(DON'T READ) DK/NA	9%

NOW I WOULD LIKE TO ASK YOU ABOUT A STATEWIDE CONSTITUTIONAL AMENDMENT THAT WILL BE ON THE BALLOT IN WISCONSIN IN NOVEMBER.

11. The constitutional amendment reads 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.

If the election were held today, would you vote yes in favor or no to oppose this ballot measure? **(IF YES/NO ASK):** "Is that definitely (yes/no) or just probably (yes/no)?" **(IF UNDECIDED, ASK:)** Well, do you lean towards voting yes or no?"

Definitely yes	49%
Probably yes	9%
Undecided, lean yes	1%
Undecided, lean no	2%
Probably no	9%
Definitely no	27%
(DON'T READ) Need more info	1%
(DON'T READ) DK/NA	2%

(ASK Q12 ONLY IF YES/NO IN Q11)

12. Why would you vote **(YES/NO)** on this measure? **(OPEN-END; RECORD VERBATIM RESPONSE)**

a. Yes

Only men and women should be married	48%
Religious reasons	30%
That is how it should be/agree	20%
Raised that way	7%
It's anti-family	1%
Other	1%
No/none/nothing	1%
Don't know	2%
Refuse	9%

b. No

Should be allowed to marry	30%
Should not restrict rights/civil liberties	29%
Should have the same rights as married couples	14%
Should not be government's concern	9%
People are born that way/no choice	2%
Other	1%
No/none/nothing	0%
Don't know	3%
Refuse	21%

(RESUME ASKING ALL RESPONDENTS)
(SPLIT SAMPLE A ONLY)

13. Next, regardless of the opinion you just gave on the ballot measure I just read you, how would you vote if the language of the constitutional amendment read as follows?

A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.

Would you vote yes in favor or no to oppose this amendment? **(IF YES/NO ASK)**: "Is that definitely (yes/no) or just probably (yes/no)?" **(IF UNDECIDED, ASK:)** Well, do you lean towards voting yes or no?"

Definitely yes	26%
Probably yes	11%
Undecided, lean yes	3%
Undecided, lean no	2%
Probably no	16%
Definitely no	26%
(DON'T READ) Need more info	11%
(DON'T READ) DK/NA	6%

SUPREME COURT OF WISCONSIN

No. 2008AP001868

WILLIAM C. MCCONKEY,

Plaintiff-Appellant-Cross-Respondent,

vs.

J.B. VAN HOLLEN, in his role as
Attorney General of Wisconsin,

Defendant-Respondent-Cross-Appellant.

ON APPEAL AND CROSS-APPEAL FROM FINAL ORDERS OF THE DANE COUNTY CIRCUIT COURT, THE HONORABLE RICHARD G. NIESS PRESIDING, AND ON CERTIFICATION FROM THE COURT OF APPEALS, DISTRICT IV

BRIEF OF *AMICUS CURIAE* THE LEAGUE OF WOMEN VOTERS OF WISCONSIN EDUCATION FUND IN SUPPORT OF PLAINTIFF-APPELLANT-CROSS-RESPONDENT WILLIAM C. MCCONKEY

FRIEBERT, FINERTY & ST. JOHN, S.C.
Matthew W. O'Neill, SBN 1019269
Sara Elizabeth Dill, SBN 1042113
330 East Kilbourn Avenue, Suite 1250
Milwaukee, Wisconsin 53202
Telephone: (414) 271-0130
Facsimile: (414) 272-8191
Attorneys for League of Women Voters of Wisconsin Education Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES……ii

INTRODUCTION……..1

INTEREST OF AMICUS……1

ARGUMENT……2

I. MCCONKEY HAS STANDING TO BRING THIS CASE……..2

A. The General Standing Analysis……...2

B. McConkey's Status as a Voter Is Sufficient, By Itself, to Provide Standing……..4

C. McConkey Has Standing Based on His Suffering an Injury-in Fact, Namely, the Violation of His First Amendment Rights……..6

CONCLUSION……...……...9

CERTIFICATION OF FORM AND LENGTH……...10

CERTIFICATE OF MAILING……....11

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)……...12

TABLE OF AUTHORITIES

CASES

AFSCME Council 25 v. Land, 583 F.Supp.2d 840 (E.D. Mich. 2008) 5

Anderson v. Celebrezze, 460 U.S. 780 (1983) 8

Baker v. Carr, 369 U.S. 186 (1962) 4, 5

Bates v. Little Rock, 361 U.S. 516 (1960) 8

Bullock v. Carter, 405 U.S. 134 (1972) 5

Burdick v. Takushi, 937 F.2d 415 (9th Cir. 1991) 8

Burton v. Georgia, 953 F.2d 1266 (11th Cir. 1992) 4

Bush v. Gore, 531 U.S. 98 (2000) 4

Carroll v. Princess Anne, 393 U.S. 175 (1968) 7

Charles H. Wesley Educ. Found., Inc., v. Cox, 408 F.3d 1349 (11th Cir. 2005) 5

Coleman v. Miller, 307 U.S. 433 (1939) 4

Dep't of Commerce v. U.S. House of Rep., 525 U.S. 316 (1999) 4

Elrod v. Burns, 427 U.S. 347 (1976) 3

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) 4

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 5

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 3

Initiative and Referendum Institute v. Walker, 450 F.3d 1082 (10th Cir. 2006) (en banc), *cert. denied*, 549 U.S. 1245 (2007) 3

Kidd v. Cox, 2006 WL 1341302 (N.D. Ga. 2006) 5

Lance v. Coffman, 549 U.S. 437 (2007) 4

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7

Mast v. Olsen, 89 Wis. 2d 12, 278 N.W.2d 205 (1979) 2

Mills v. Alabama, 384 U.S. 214, 218-19 (1966) 7

Milwaukee County Pavers Assoc. v. Fiedler, 707 F. Supp. 1016 (W.D. Wis. 1989) 3

NAACP v. Alabama, 357 U.S. 449 (1958) 8

NAACP v. Button, 371 U.S. 415 (1963) 8

Nader v. Brewer, 2006 WL 1663032 (D. Ariz. 2006) 5

New Progressive Party v. Hernandez-Colon, 779 F. Supp. 646 (D.P.R. 1991) 4

New York Times v. Sullivan, 376 U.S. 254 (1964) 7

Nixon v. Herndon, 273 U.S. 536 (1927) 4, 5

North Dakota Family Alliance, Inc. v. Bader, 261 F. Supp. 2d 1021 (D. N.D. 2005) 8

Partnoy v. Shelley, 277 F. Supp. 2d 1064 (S.D. Cal. 2003) 7

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 7

Reynolds v. Simms, 377 U.S. 533 (1964) 4

Stanley v. Georgia, 394 U.S. 557 (1969) 7

State ex. rel. First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma, 95 Wis. 2d 303, 290 N.W.2d 321 (1980) 2

Storer v. Brown, 415 U.S. 724, 737 (1974) 5

Terry v. Adams, 345 U.S. 461 (1953) 5

United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) 2

Virginia v. Black, 538 U.S. 343, 365 (2003) 7

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 7, 8

Warth v. Seldin, 422 U.S. 490 (1975) 2, 3

Wesberry v. Sanders, 376 U.S. 1 (1964) 4

West Virginians for Life, Inc. v. Smith, 919 F. Supp. 954 (S.D. W.V. 1996) 6

Wood v. Georgia, 370 U.S. 375, 392 (1962) 7

Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) 4

STATUTES AND CONSTITUTIONAL PROVISIONS

Wisconsin Constitution

Wisconsin Constitution, Art. I, Section 3……6

Wisconsin Constitution, Art. XII, Section 1……..5

United States Constitution

Art. I, U.S. Constitution……6

INTRODUCTION

Amicus Curiae asserts that the Circuit Court was correct in finding that McConkey has standing and disagrees with the standing issue as stated by the Defendant-Appellee-Cross-Appellant Attorney General J.B. Van Hollen ("Defendant") in his Brief. As set forth below, standing to challenge a governmental act that implicates voting and First Amendment concerns is perforce an extremely low threshold. Courts do not delve into the merits of the constitutional challenge to determine whether standing exists; rather, it is the assertion of the constitutional right, and the threatened or actual alleged violation of that right, that provides standing to assert the challenge through to a decision on the merits.

The Defendant's position here is that the only person with any standing to assert a constitutional challenge to the Marriage Amendment under Article XII, Section 1 of the Wisconsin Constitution is one who would have voted "yes" to one separate question and "no" to another. This position lacks merit on many levels, but one fundamental defect stands out sharply: the alleged harm to First Amendment rights from the bundling of two separate issues into one extends not only within the voting booth but without – McConkey and other citizens have a protected First Amendment right to advocate for specific votes on separate constitutional amendments. The harm to this right of free speech and association provides standing to McConkey under well-established constitutional precedent.

INTEREST OF AMICUS

Amicus Curiae League of Women Voters of Wisconsin Education Fund, Inc., ("League" or "*Amicus*") is a nonpartisan, grassroots membership organization that encourages active and informed participation in government, works to increase understanding of major public policy issues and seeks to influence public policy through education and advocacy. The League works to protect the fundamental right to vote by providing general information to the public about the process of voter registration, produces voter guides with candidates' answers to questions, encourages citizen participation between elections, and takes positions on selected issues. The League publicly opposed the Marriage Amendment.

Based on its long-term involvement in fostering voter participation and protection of the fundamental right to vote, the League has a heightened interest in protecting the right to vote and the intertwined rights of freedom of speech and ability to petition the government by challenging violation of these rights through the judicial process. The League considers the ability to make a clear choice, free of confusion, to be a critical voting right.

Moreover, the League possesses ninety years of experience in developing case law and public policy concerning voter rights nationwide and in Wisconsin, which will benefit the Court in resolving the legal issues in this case.

ARGUMENT

I. MCCONKEY HAS STANDING TO PURSUE THIS CONSTITUTIONAL CHALLENGE

A. General Standing Analysis

Where a plaintiff has raised a constitutional challenge to legislative, executive, or administrative acts, the standing question is twofold: whether "the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action,'" and "whether the constitutional … provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (citation omitted). *See also Mast v. Olsen*, 89 Wis. 2d 12, 16, 278 N.W.2d 205, 207 (1979) ("A party has standing to challenge a statute if that statute causes that party injury in fact and the party has a personal stake in the outcome of the action.").

The magnitude of plaintiff's injury is not the issue. *State ex. rel. First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 309, 290 N.W.2d 321, 326 (1980). "'[A]n identifiable trifle is enough for standing to fight out a question of principle.'" *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14, (1973).

In fact, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (quoting *Warth*, 422 U.S. at 500). The violation of a fundamental constitutional right constitutes irreparable injury, even if only temporary. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Milwaukee County Pavers Assoc. v. Fiedler*, 707 F. Supp. 1016, 1031 (W.D. Wis. 1989) (where violations of constitutional rights are alleged, further showing of irreparable injury may not be required).

In evaluating a standing argument, courts should not delve into the underlying merits of the case. *See Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), *cert. denied*, 549 U.S. 1245 (2007). In *Walker*, groups desiring to mount a ballot initiative alleged that a state constitutional provision imposing a supermajority voting requirement violated their First Amendment right of free speech. Specifically, plaintiffs alleged that the constitutional provision had "a chilling effect on [the plaintiffs'] speech" in support of certain initiatives. *Id.* at 1088. The defense argued that the plaintiffs did not have standing because their claim on the merits was incorrect. The Tenth Circuit, in finding the plaintiffs had standing, declined to consider the merits arguments in the context of the standing review because the defendants had "confused[d] standing with the merits," and that, "[f]or purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest," because that would be a determination of the merits of plaintiffs' claim under the guise of an evaluation of their standing. *Id*. at 1092.

In this case, the Circuit Court correctly determined that McConkey had standing, and the Defendant's assertion otherwise is incorrect. McConkey alleged a violation of his Constitutional rights, which, by itself, represents an irreparable injury. The merits of the underlying claim are irrelevant to a finding of standing. McConkey has alleged constitutional injury and seeks to redress that injury through the judicial process. He has a personal stake in the outcome of this case, given the violation of his fundamental constitutional rights to vote and freedom of speech.

B. McConkey's Status as a Voter Is Sufficient, By Itself, to Provide Standing.

Voting is a "fundamental political right, because it is preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); and this right is a fundamental interest protected by the Constitution. *Reynolds v. Simms*, 377 U.S. 533, 554-55 (1964). A citizen's right to vote without arbitrary impairment by the state is a legally protected interest that confers standing. *Baker v. Carr*, 369 U.S. 186, 208 (1962); *Lance v. Coffman*, 549 U.S. 437 (2007); *Reynolds v. Simms*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate [or issue] of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). Equal protection requires heightened judicial scrutiny of an election law that burdens the right to vote. *See Bush v. Gore*, 531 U.S. 98, 105 (2000). Further, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

It is an "obligation of government" that the ballot be "balanced, impartial and neutral," with options that are clearly identified and free of confusion, as this can implicate due process concerns. *New Progressive Party v. Hernandez-Colon*, 779 F. Supp. 646, 660 (D.P.R. 1991); *Burton v. Georgia*, 953 F.2d 1266, 1269 (11th Cir. 1992); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) ("If the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated.").

Voters have standing to challenge laws that impact voting rights because "[t]hey are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" *Baker v. Carr*, 369 U.S. 186, 208 (1962); quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

Voters have standing, solely on the basis of their status as voters, to allege violations of First and Fourteenth Amendments and the Voting Rights Act and to seek redress of injury to voting rights. *Nixon v.*

Herndon, 273 U.S. 536 (1927); *Terry v. Adams*, 345 U.S. 461 (1953); *Baker v. Carr*, 369 U.S. 186 (1962); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Bullock v. Carter*, 405 U.S. 134 (1972); *AFSCME Council 25 v. Land*, 583 F. Supp. 2d 840 (E.D. Mich. 2008) (court finds standing of individual plaintiffs based on intent to campaign and allegations of a violation of voting rights).

In fact, the Supreme Court notes that "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737 (1974). In *Nader v. Brewer*, 2006 WL 1663032 (D. Ariz. 2006), the court found plaintiffs had standing solely on the basis of their contention that their vote and their free speech rights were diminished by limits placed on ballot choices. *See also Kidd v. Cox*, 2006 WL 1341302 (N.D. Ga. 2006).

Every Wisconsin voter has the opportunity to vote on each proposed amendment to the Constitution. Wis. Const. Article XII, Section 1. The legislature designed this provision to protect against logrolling and ensure that the opinion and intent of voters is accurately reflected in the results.

The deprivation of McConkey's right to separately express his will on the two amendments because these amendments were not part of a single purpose, resulting in vote dilution, is sufficient to confer standing. Courts frequently recognize that "[a] plaintiff need not have the franchise wholly denied to suffer injury." *Charles H. Wesley Educ. Found., Inc., v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). It is the process itself in which McConkey asserts his rights were violated. His possession of the fundamental right to vote grants him standing to challenge constitutional errors and violations in the process. This is the rule according to the United States Supreme Court, and federal and state courts throughout the nation.

The Defendant's allegation that McConkey lacks standing because he would have voted "no" on both parts of the Amendment, had they been submitted separately, is simply a misstatement of the law. McConkey has a right to a valid, constitutional ballot in the first place. How a person votes is irrelevant if the ballot itself is illegal. Additionally, the analysis of whether the Amendment was the result of log-rolling does not have a role

in a Court's determination of standing. These questions go to the very merits of the case, and as multiple courts have held, are irrelevant and improper to consider in determining standing.

Therefore, as a voter in Wisconsin, McConkey has standing to challenge the Constitutionality of the Marriage Amendment.

C. McConkey Has Standing Based On His Suffering An Injury-In-Fact, Namely, The Violation Of His First Amendment Rights.

The right to vote is deeply intertwined with First Amendment protections. For what good is the right to vote if governments are allowed to infringe upon an individual's ability to educate others about the meaning and impact of laws on which they are voting? The case at bar not only includes an alleged infringement on the right to vote, but a violation of the plaintiff's First Amendment right to free speech. The irreparable injury inflicted upon the plaintiff was the deprivation of freedom of speech. This alleged violation of First Amendment rights independently confers standing upon McConkey.

The First Amendment guarantees that "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Art. I, U.S. Const. Free speech is also guaranteed by Art. I, § 3 of the Wisconsin Constitution, which provides, "[e]very person may freely speak, write and publish his sentiments on all subjects … and no laws shall be passed to restrain or abridge the liberty of speech or of the press."

"First Amendment freedoms are designed to ensure the proper functioning of the democratic process and to protect the rights of individuals and minorities within that process." *West Virginians for Life, Inc. v. Smith*, 919 F. Supp. 954, 958 (S.D. W.V. 1996). "[T]he purpose of the First Amendment includes the need … to secure [the] right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of

the authority which the people have conferred upon them." *Wood v. Georgia*, 370 U.S. 375, 392 (1962). Speech involves the communication of information, expressing opinions, and seeking support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Supreme Court decisions have long held that the First Amendment protects the right to receive information and ideas, and that this right is sufficient to confer standing to challenge restrictions on speech. *See, e.g. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

"[P]olitical speech is at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966). The timeliness of political speech is also particularly important, and deprivation of free speech prior to an election or vote constitutes irreparable injury. *Carroll v. Princess Anne*, 393 U.S. 175, 182 (1968); *Wood*, 370 U.S. at 391-92.

Within the context of the First Amendment, justification exists to lessen the prudential limitations on standing. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well-established that the Constitution protects the right to receive information and ideas."). Individuals have standing as registered voters who stated their intention to vote or not to vote, or their opposition to being coerced into having to vote. *Partnoy v. Shelley*, 277 F. Supp. 2d 1064 (S.D. Cal. 2003); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In *Partnoy*, the Court found that not only did the state action unconstitutionally burden the right to vote, but it also violated the plaintiff's First amendment rights. *Partnoy*, 277 F. Supp. 2d at 1078.

A voter has a protected right to voice his opinion and attempt to influence others because a legitimate interest exists in fostering an informed electorate. *Burdick v. Takushi*, 937 F.2d 415, 420 (9th Cir. 1991) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 796 (1983)). A plaintiff has standing to sue based on the alleged deprivation of his First Amendment right to receive and publish protected speech during an election. *North Dakota Family Alliance, Inc. v. Bader*, 261 F. Supp. 2d 1021 (D. N.D. 2005) (finding that this injury is sufficiently actual, concrete, and particularized to satisfy the prudential standing and the constitutional "injury-in-fact" requirements). First Amendment claims may also be permitted by those who did not themselves intend to engage in speech, but instead wanted to challenge a restriction on speech they desired to hear. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976).

There exists a basic right of political association assured by the First Amendment which is protected against state infringement by the due process clause of the Fourteenth Amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). The right to have one's voice heard and one's views considered is at the core of the right of political association. *Id.*

Plaintiff suffered an injury at the time he chose to express his First Amendment rights and was impaired by not being able to effectively lobby other voters on the Marriage Amendment because, as alleged, it contained two separate issues improperly bundled into a single question. McConkey was limited to pursuit of a "vote no" campaign against the Amendment, when a more targeted approach would have been available if separate questions were presented. For example, a voter in favor of defining "marriage" as only between a man and a woman may very well be opposed to the notion of depriving same-sex partners economic, social, and other benefits. McConkey's ability to speak on these separate political issues was hindered by the single Amendment.

The injury stems from the restraints on his legally cognizable First Amendment right to free speech. The Framers sought to protect voting and the electoral process as one of the basic freedoms of American democracy. Coupled with the First Amendment, speech surrounding the voting process

is fundamentally protected, and McConkey's allegation that his free speech rights were violated is sufficient to confer standing.

CONCLUSION

For all of the foregoing, this Court should uphold the Circuit Court's finding that McConkey had standing to challenge the constitutionality of the Marriage Amendment.

Dated this 30th day of September, 2009.

Respectfully submitted,

Matthew W. O'Neill, SBN 1019269
Sara Elizabeth Dill, SBN 1042113
FRIEBERT, FINERTY & ST. JOHN, S.C.
330 East Kilbourn Avenue, Suite 1250
Milwaukee, Wisconsin 53202
Telephone (414) 271-0130
Facsimile (414) 272-8191

Attorneys for League of Women Voters of Wisconsin Education Fund

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,917 words.

_____

Matthew W. O'Neill, SBN 1019269
Sara Elizabeth Dill, SBN 1042113

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of September, 2009, pursuant to § 809.80(3)(b) and (4), Wis. Stats., twenty-two (22) copies of this Brief of *Amicus Curiae* The League of Women Voters of Wisconsin Education Fund were served upon the Wisconsin Supreme Court via first-class mail. Three (3) copies of the same were served upon counsel of record via first-class mail.

Dated at Milwaukee, Wisconsin this 30th day of September, 2009.

_____

Matthew W. O'Neill, SBN1019269
Sara Elizabeth Dill, SBN 1042113

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12), Wis. Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated at Milwaukee, Wisconsin this 30th day of September, 2009.

_____

Matthew W. O'Neill, SBN1019269
Sara Elizabeth Dill, SBN 1042113