STATE OF WISCONSIN CIRCUIT COURT, BRANCH 11 DANE COUNTY

Julaine Appling, Jo Egelhoff, Jaren E. Hiller, Richard Kessenich, and Edmund L. Webster,

Plaintiffs,

vs.

James E. Doyle, Karen Timberlake, and John Kiesow,

Defendants,

and

FAIR WISCONSIN, Inc., Glenn Carlson & Michael Childers, Crystal Hyslop & Janice Czyscon, Kathy Flores & Ann Kendzierski, David Kopitzke & Paul Klawiter, Chad Wege & Andrew Wege,

Intervening Defendants.

Case No. 2010 CV 004434
Case Code: 30701, 30704
Honorable Daniel R. Moeser

BRIEF OF *AMICI CURIAE* KATHARINA HEYNING, JUDITH TRAMPF, WENDY WOODRUFF, JAYNE DUNNUM, JAYNE DUNNUM, ROBIN TIMM, VIRGINIA WOLF, CAROL SCHUMACHER, DIANE SCHERMANN, MICHELLE COLLINS, AMERICAN CIVIL LIBERTIES UNION AND ACLU OF WISCONSIN, INC. ON ISSUES RELATED TO PENDING MOTIONS FOR SUMMARY JUDGMENT

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INTEREST OF *AMICI CURIAE*

Amici Curiae are five Wisconsin same-sex couples who have registered as domestic partners as authorized under Ch. 770 (the "Couples"), along with the American Civil Liberties Union, and the ACLU of Wisconsin (jointly, the "ACLU").

The Couples have lived and worked for many years in different parts of Wisconsin. Some shared lives as families with children. All shared deeply committed and loving intimate relationships and rich family lives well before they were able to register as Wisconsin domestic partners in 2009. Because they are registered domestic partners, they have a direct personal experience and knowledge of the many ways in which a domestic partnership under Ch. 770 falls short of the central place their relationships have in their lives, contrasts with the respect their family and friends have for their relationships, *and* fails to approach the broad protections, public respect, and private significance of civil marriage. Still, it would cause the Couples serious concrete harm and unjustly stigmatize their relationships to take away from them the limited protections and respect offered by domestic partnerships as provided for by Chapter 770.

The ACLU is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance basic constitutional rights and civil liberties for all Americans. The national ACLU has more than 500,000 members nationwide. The ACLU of Wisconsin is the state affiliate of the national ACLU with nearly 6,500 members statewide. The national ACLU and ACLU of Wisconsin have fought for decades for the protection of the relationships of lesbian and gay couples. They worked in particular to persuade Wisconsin voters to oppose Article XIII, Sec. 13 of the Wisconsin Constitution (the "Marriage Amendment").

SUMMARY OF ARGUMENT

Plaintiffs agree, as they must, that Wisconsin courts look to three sources in order to interpret the meaning of a constitutional amendment: plain meaning, legislative and campaign

history, and first legislative interpretation of the amendment. Plaintiffs then misinterpret and misapply that test. In doing so, Plaintiffs largely ignore the legislative history and completely ignore the third component of the test of constitutionality – the legislature's earliest interpretation of the marriage amendment. Plaintiffs then make a number of unsupported and factually and legally unsupportable claims about the purported similarities between marriage and Ch. 770 domestic partnerships, the intent of voters for the Marriage Amendment, and the ways in which Ch. 770 domestic partnerships allegedly violate the amendment.

Although there are a host of reasons to reject Plaintiffs' claim that Ch. 770 violates the Marriage Amendment, *Amici* limit their brief to three topics. First, *Amici* Couples discuss how their personal experiences demonstrate the substantial differences between marriage and Ch. 770 domestic partnerships and they describe the concrete harms and stigma that will befall them if the limited protections domestic partnerships offer are taken away. Second, *Amici* show that couples-based domestic partnerships were the primary, if not the only, form of such benefits of which Marriage Amendment voters were aware. Therefore, because the Marriage Amendment's proponents assured voters that domestic partner benefits were safe, those who voted "yes" intended to preserve couples-based protections such as those offered by Ch. 770. Third, *Amici* show that the injunctive relief sought by Plaintiffs should be denied under the clean hands doctrine. Even if Plaintiffs' assertion that couples-based domestic partner protections violate the Marriage Amendment were to be accepted as true – and it should not be – then their statements during the course of the Amendment campaign were false, and the passage of the Marriage Amendment is the fruit of their own deceptive statements.

ARGUMENT

I. The Experiences of the Couples Show That Plaintiffs' Assertions Regarding "Close Relationship Marriage" And The Similarity Between Marriage And Domestic Partnerships Have No Merit.

A. Plaintiffs' Flawed Claims About "Close Relationship Marriage" Do Not Support Their Argument That Voters Intended To Deny Lesbian And Gay Male Couples Limited Domestic Partnership Protections.

Despite the fact that they have no support for their conclusory statements, Plaintiffs assert that passage of the Marriage Amendment "clearly implies affirmation of the model of conjugal marriage," which they define as "a sexual union of husband and wife, who promise each other sexual fidelity, mutual caretaking, and the joint parenting of any children they may have." (Pls.' Br. 31.) They assert that marriage is for "channeling the erotic and interpersonal impulses between men and women" and without it there will be "multiple failed relationships and millions of fatherless children." (*Id.* at 31-32.) They allege that marriage is "child-centered, involves "sexual exclusivity," and includes an "expectation of permanence." (*Id.* at 32.) Again, without support, Plaintiffs claim that the "close relationship model of marriage" is "a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it." (*Id.*) It is "stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved." (*Id.*) Despite the lack of any data supporting their view, Plaintiffs contend that voters for the Marriage Amendment purportedly intended to "save" "conjugal *marriage*" and reject "close relationship marriage" by preventing gays from entering into any couples-based *domestic partnerships*.

Intervenors have shown that the materials Plaintiffs rely on to support their claims about "conjugal marriage" and "close relationship marriage" are inadmissible hearsay. (Inter. Defs.' Br. 21-22.) Significantly, there is absolutely no support for the claim that the voters of Wisconsin even knew about the two marriage models described by Plaintiffs, and certainly nothing to

support the claim that the voters intended to support one model and reject the other. More importantly, these models have nothing to do with the *legal status* in Wisconsin of marriage or of Ch. 770 domestic partnerships or with the legislators and voters' purpose in voting for an amendment to prevent recognition of a "*legal status* identical or substantially similar to marriage." Article XIII, Sec. 13, Wis. Const. (emphasis added).

Plaintiffs have shown no connection at all between what they call "close relationship marriage" and the legal status of Ch. 770 domestic partner benefits. There is nothing in the criteria for entering into a domestic partnership that requires a couple to give up sexual fidelity, mutual caretaking, joint parenting of any children, and an expectation of permanence in favor of "the intrinsic emotional, psychological, or sexual satisfaction which the relationship brings to the individuals involved." (Pls.' Br 32.) Nor does this model do justice to the human relationships that will be injured by granting the relief Plaintiffs are seeking.

Amici Couples are five couples who have been in committed intimate relationships for many years, from more than six (Aff. of Michelle "Missy" Collins p. 2 ¶ 1; Aff. of Diane Schermann ¶ 4)[1] to thirty-five years (Aff. of Virginia Wolf ¶ 5; Aff. of Carol Schumacher ¶ 5). Each Couple has a unique story of love and commitment. All Couples draw a clear distinction between their personal relationships and the legal status of Ch. 770 domestic partnerships. (Aff. of Katharina "Katy" Heyning ¶ 3; Aff. of Judith "Judi" Trampf ¶ 3; Aff. of Mary Woodruff ¶ 8; Aff. of Wendy Woodruff ¶ 9; Aff. of Jayne Dunnum ¶ 10; Aff. of Robin Timm ¶ 10; Carol ¶ 22; Virginia ¶ 23; Missy ¶ 19; Diane ¶ 21.) Therefore, even if the Couples' relationships fit Plaintiffs' "close relationship marriage" model – and they do not – then providing them limited domestic partnership protections does not violate any alleged purpose of the Marriage

[1] Subsequent to the first reference to each, the affidavits of the *Amici* Couples are referenced by the first name of the affiant and the paragraph of the affidavit.

Amendment to protect "conjugal marriage." Stripping committed, loving same-sex couples of limited legal protections does not protect any heterosexual legal marriage in the state.

On a personal level, the Couples see themselves as married, even if they are not allowed to enter into civil marriage. Many of them have had marriage or commitment ceremonies, some according to their religious traditions, to celebrate privately and publicly their deep love for one another. (Diane ¶ 4; Missy p.2 ¶ 1; Jayne ¶ 3; Robin ¶ 3.) For example, Carol and Virginia were joined in a Unitarian Universalist marriage ceremony on December 21, 1990. (Virginia ¶ 5; Carol ¶ 5.) Mary and Wendy had a Holy Union Ceremony in 1999. (Mary ¶ 7; Wendy ¶ 8.) Some of the Couples describe a spiritual or religious component to their relationship that is founded in the religious tradition of the church of which they are a part. (Diane ¶ 4; Missy second ¶ 1; Virginia ¶ 5; Carol ¶ 5.) These ceremonies took place before and independently from the Couples' registration as domestic partners. (Mary ¶ 3,7, Wendy ¶3,8, Virginia ¶ 5, Carol ¶5, Judi 1,2, Katy ¶ 1,2) Domestic partnership does not fit the way the friends and family of *Amici* Couples view their relationships. (Carol, ¶ 23, Virginia ¶ 24) People who know Virginia and Carol tell them they have great respect for them as a couple, but that respect comes from the length and quality of their committed relationship, not from their registration as domestic partners. (Virginia ¶ 12; Carol ¶ 12.)

Amici Couples expect their personal relationships to last for their lifetimes and their expectations of permanence have not changed. (Carol ¶ 11; Virginia ¶ 11; Diane ¶ 12; Missy ¶ 9; Katy ¶ 1; Judi ¶ 1; Mary ¶ 1; Wendy ¶ 1.) For example, the deterioration of Diane's health because of debilitating rheumatoid arthritis has not changed, and if anything, has strengthened Missy's commitment to be with Diane for their entire lives. (Missy ¶ 3.) The Couples have remained faithful to one another in lives of emotional and sexual fidelity. (Carol ¶ 11; Virginia ¶

11; Diane ¶ 12; Missy ¶ 9; Katy ¶ 1; Judi ¶ 1; Mary ¶ 1; Wendy ¶ 1.)

Amici Couples have made significant sacrifices to support and care for one another. For example, Carol moved with Virginia to Wisconsin many years ago so that Virginia could accept a teaching job at the University of Wisconsin at Stout. Virginia supported Carol thirty years ago while Carol finished her undergraduate degree, and then Carol supported Virginia when Virginia attended seminary. (Carol ¶ 6; Virginia ¶ 6.) Diane supported Missy when she went to college to finish her social work degree, while Missy took primary responsibility for cooking, caring for the children, and running the household while Diane worked. (Diane ¶ 5; Missy p.2 ¶ 2.) All have nursed each other through illnesses and hard times. Diane cared for Missy after a severe back injury; Missy has cared for Diane as her rheumatoid arthritis has worsened, by driving her to appointments, helping her to dress, and taking over more and more responsibility for child care and housework. (Diane ¶ 6; Missy second ¶ 3.) Judi used her sick time and vacation time to help Katy after Katy had a seizure and was unable to drive. (Judi ¶ 22.) Katy helped Judi's father run his business when he was ill and unable to work. (Judi ¶ 20.)

Amici Couples describe how their relationships of mutual care and support allow them to contribute to the public good through their jobs and volunteer work in their communities. Knowing that each is there for the other has made, and continues to make, it possible for Virginia to teach and mentor approximately 2400 college students, lead a church as a minister, serve as President of the Affirmative Action Council for the City of Eau Claire and as a member of the board of directors for the free health clinic (Virginia ¶ 8); for Carol to serve as the Eau Claire City Clerk for fifteen years, to sponsor a Hmong family starting in 1988, and to help start the lesbian, gay, bisexual and transgender community center in Eau Claire; and for both to assist in founding a domestic violence shelter, to volunteer regularly at a homeless shelter, and to assist at

a community soup kitchen. (Carol ¶ 8.) For Judi and Katy, being in a committed relationship makes it possible for Katy to mentor students and junior faculty, and serve on boards of non-profit agencies (Katy ¶ 4), and for Judi to counsel children and families who experienced domestic abuse, and provide therapy for those who could otherwise not afford it. (Judi ¶ 6.)

Several of *Amici* Couples have jointly raised children and grandchildren. (Carol ¶ 4; Virginia ¶ 4; Diane ¶ 3; Missy first ¶ 3.) During their child-raising years, the Couples' children were the central focus of their lives and continue to be an important part of their lives even as they have grown up, moved away, and established lives and families of their own. The love and commitment on which the Couples' relationships are founded have provided support and served as models for their children and grandchildren. Carol and Virginia also believe that seeing the many ways in which their relationship was stigmatized helped their children to be more understanding of members of minority groups, kinder to those who are different from them, and generally more compassionate people. (Carol ¶ 10; Virginia ¶ 10.)

The personal relationships of *Amici* Couples do not fit into Plaintiffs' asserted models for marriage because they are relationships of mutual care-taking and sacrifice for one another. Sexual and emotional fidelity and long-term commitment have allowed them to raise children and grandchildren and serve their communities in a variety of commendable ways. Consequently, even if Plaintiffs had succeeded in showing that voters were rejecting "close relationship marriage" when they voted for the marriage amendment, they cannot show that Ch. 770's limited protections for *Amici* Couples and others like them undermines "conjugal marriage" by promoting "close relationship marriage." They cannot for many reasons, but also because the protections provided by Ch. 770 fail to promote any relationships that fit the disfavored "close relationship" model contrived by plaintiffs.

B. *Amici* Couples Know First-Hand The Vast Differences Between Domestic Partnerships And Marriage, But Losing Domestic Partner Protections Will Harm *Amici* Couples In Concrete Ways And Unjustly Stigmatize Their Relationships.

Amici Couples' experiences with domestic partnerships show that they do not come close to marriage either in the protections provided or in the public respect accorded them. The experience of entering into a domestic partnership was primarily a legal operation for most of the Couples, and had little personal significance. (Judi ¶ 3, Katy ¶ 3) The fact that there is no required ceremony to enter into a domestic partnership drove this point home for many of the *Amici* Couples, some of whom registered during their lunch hour, and then returned to work. (Katy ¶ 3; Judi ¶ 3.) Strangers express confusion about the protections offered by a domestic partnership. No one confuses domestic partnerships with marriage, because they know and respect the institution of marriage, while they have no comparable admiration or esteem for domestic partnerships. (Wendy ¶ 22, Mary ¶ 20, Virginia ¶ 26, Carol ¶ 25)

Virginia, Diane, and Wendy were married to men in the past, so they know first-hand the huge differences between marriage and domestic partnerships. They describe the understanding and respect strangers have for the marital relationship which they do not have for domestic partnerships. (Diane ¶ 25, Virginia ¶ 26, Wendy ¶ 28.) For all couples, a domestic partnership is vastly different from marriage, both in the protections provided *and* in the value and respect given to the different legal statuses.

Domestic partners under Ch. 770 receive limited but important protections that they do not wish to lose: intestacy and related protections to insure that one partner is taken care of financially when the other predeceases her (Mary ¶ 18, Wendy ¶ 19); the right to visit each other in the hospital or other medical care setting when either is struck by illness (Missy ¶ 18, Diane ¶20); the extra security offered domestic partners to be able to make important medical decisions for one another. (Judi ¶¶ 16-18, Katy ¶¶ 14-17.) There are dozens of state marriage protections in

addition to federal protections that domestic partnerships do not provide. For example, *Amici* Couples are denied the ability to protect both parents' parent-child relationships through a stepparent adoption. (Diane ¶¶ 3,23, Missy ¶ 23.) Even the few benefits available to domestic partners have serious limitations not shared by marriage benefits, such as lack of legal recognition in states outside of Wisconsin (Diane ¶ 28, Missy ¶ 25.)

In addition to the serious harms caused by losing the limited concrete protections offered by domestic partnerships, the loss of domestic partnerships would enhance the public stigma that already attaches to *Amici* Couples because they are denied access to marriage. (Diane ¶ 20, Missy ¶ 18, Judi ¶ 27.)

II. The Broad Availability Of Couples-Based Domestic Partnerships At The Time Of The Marriage Amendment Vote And The Decisions From Courts Outside Wisconsin Finding Vast Differences Between Marriage And Domestic Partnership Show The Weaknesses In Two Of Plaintiffs' Central Arguments.

A. Domestic Partner Benefits For Committed, Same-Sex Couples Were Common At The Time Of The Marriage Amendment Campaign, So Voters Intended To Preserve Such Limited Protections When They Voted For The Amendment.

Plaintiffs admit that the proponents of the Marriage Amendment repeatedly and consistently told voters that existing and future state and local domestic partnership programs would be permissible under the amendment. (Pls.' Br. 26, n.70.) However, they now insist that what they *meant* when they said "domestic partnerships" would be permissible is that "reciprocal beneficiary statutes that facilitate relationships of mutual support and dependency without conditioning them on the existence of an exclusive, intimate relationship" would pass muster under the Marriage Amendment (Pls.' Br. 12), but that domestic partnerships whose eligibility criteria included cohabitation, exclusivity or intimacy would not. (Pls.' Br. 12, 44.)

Plaintiffs' disingenuous distinction between permissible "reciprocal beneficiary" schemes and impermissible "domestic partnerships" is inconsistent not only with what they, as proponents

and others actually said about domestic partnerships during the campaign,[2] but is also inconsistent with common understandings of domestic partnerships as they actually existed at the time voters were considering the Marriage Amendment. When proponents of the Amendment stated that domestic partnerships would not be jeopardized by the ban on recognition of a status "substantially similar" to marriage, they made those statements against the backdrop of numerous existing domestic partnership plans that expressly made eligibility dependent upon the existence of an exclusive and committed relationship between two cohabiting adults, the very criteria to which Plaintiffs now object.

Plaintiffs object most strenuously to the following domestic partner eligibility criteria under Ch. 770, on the grounds they are too similar to the criteria for marriage: (1) the "consanguinity requirement" (*i.e.*, one cannot be a domestic partner of a family member), because it implies an "intimate relationship," rather than one of "common dependency" that could as easily exist between two persons related by blood (Pls.' Br. 7); (2) the shared residence requirement, because, although there is no *per se* requirement that married couples live together, sharing a residence is a "quintessential feature of marriage" (Pls.' Br. 8); and (3) the exclusivity requirement, because a person can marry only one other person, too. (Pls.' Br. 10.) According to Plaintiffs, "It is the existence of an exclusive, intimate relationship – clearly implicit in Chapter

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[2] Government Defendants and Intervening Defendants have extensively documented statements by Marriage Amendment proponents that clearly describe domestic partnerships for unmarried couples in intimate relationships. As the Family Research Institute, an organization headed by Plaintiff Appling, stated in its fall 2006 newsletter, "In fact, although the Family Research Institute thinks this would be very ill advised, *the amendment doesn't prevent the state legislature from taking up a bill that gives a limited number of benefits to people in sexual relationships outside of marriage*, should the legislature want to do so." Family Research Inst. of Wis., "Marriage Amendment Lingo – Get it Straight," *Family News Connection* at 2 (Fall 2006) (emphasis added); Aff. of Christopher R. Clark (March 7, 2011), Exhibit 13. These statements – and many others like them – simply cannot be reconciled with the Plaintiffs' assertion that the voters who approved the amendment intended to bar domestic partnerships for intimate but unmarried couples. Nothing in the record even mentions the "reciprocal benefits" meaning they now advance.

770 – that creates the substantially similar status prohibited by the Amendment." (Pls.' Br. 12).[3]

However, these three aspects of eligibility for domestic partnerships under Chapter 770 were also common criteria for the domestic partnership programs that existed during the debates leading up to the passage of the Marriage Amendment. In addition to the City of Madison Domestic Partner Ordinance and the Madison Metropolitan School District's domestic partner health insurance, discussed at length in the Government Defendants' brief and prominently held up by Amendment proponents as examples of the types of domestic partnerships that would not be forbidden by the Marriage Amendment (Gov. Br. 58-60), several other local governments in Wisconsin had similar domestic partner benefit plans at the time of the vote on the Amendment. Those programs established criteria that required that the partners not be related by blood, that they not be in a domestic partnership or marriage with any other person and either required shared residence or considered cohabitation one way of demonstrating the existence of a committed relationship.[4] They thus shared the features of Chapter 770 domestic partnerships that "imply" the existence of an "exclusive, intimate relationship."

For example, City of Milwaukee Ordinance Ch. 111, enacted in 1999 (and repealed in 2009 as superfluous after Ch. 770 was enacted), created a domestic partner registry, which permitted same-sex couples to register their partnerships with the City Clerk upon completion

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[3] Plaintiffs also object to certain "procedural" requirements, such as the signing of a declaration and filing it with the clerk's office. (Pls.' Br. 9.) It is difficult to see how any "reciprocal beneficiary" system of benefits could function without similar procedures for establishing and documenting eligibility. In any event, these sorts of documentation requirements were elements of existing domestic partnership programs that the Plaintiffs assured voters would be permissible.

[4] Plaintiffs' concern with Ch. 770's cohabitation requirement is odd. Cohabitation does not distinguish a marital relationship, which is clearly forbidden but does not require cohabitation, from the allegedly acceptable "reciprocal beneficiary" model, since siblings, for example, could live together in an economically dependent unit, but providing benefits to them as reciprocal beneficiaries would not offend Plaintiffs' reading of the Amendment. In any event, to the extent cohabitation does imprecisely signify intimacy, it was a very common, though not universal, criteria for domestic partnership programs existing in 2006.

and filing of a declaration that they: "Are not married . . . Are not related by kinship to a degree that would bar marriage in this state . . . Reside together in the City of Milwaukee . . . Have not been in a registered domestic partnership with another individual during the 12 months immediately prior to the application date." (first Aff. of Vintee Sawhney ¶ 2; Exhibit 2.[5]) Thus, the City of Milwaukee's domestic partnership program, with which many voters would have been familiar, had consanguinity, shared residence and exclusivity requirements.

Similarly, Dane County provided health insurance benefits to the domestic partners of their employees prior to the referendum on the amendment. In order to obtain the benefits, the employee and domestic partner had to sign an "Affidavit of Domestic Partnership" certifying that they "live in a committed relationship . . . [a]re each other's sole Domestic Partner and intend to remain so indefinitely . . . [a]re not legally married to anyone . . . [a]re not related by blood to a degree of closeness which would prohibit marriage in the state in which we legally reside," and demonstrate responsibility for one another's welfare by providing documentation of, *inter alia*, a "written evidence of common residence[.]" Aff. Linda Hansen ¶ 2, Ex. 1) The domestic partner criteria used by the Sun Prairie School District (second Aff. of Vintee Sawhney ¶ 2; Exhibit 11), the Middleton-Cross Plains School District (first Sawhney Aff. ¶ 5; Exhibit 9) and the LaCrosse School District in 2006 prior to the passage of the amendment had similar criteria of exclusivity, non-consanguinity and cohabitation.

In addition, the University of Wisconsin offered limited benefits to domestic partners of students and employees prior to 2006. The definitions of domestic partner in these benefit plans, too, included exclusivity, non-consanguinity and cohabitation requirements. The Affidavit of

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[5] City of Milwaukee Ordinance § 111-3-10, enacted in 2001, created a similar registry for city employees and their domestic partners, which became the basis for providing employment benefits to domestic partners. That ordinance, attached as Exhibit 6 (first Sawhney Aff. ¶ 2), used a nearly identical definition of domestic partner, except that the partner need not be of the same sex.

Domestic Partnership signed by University of Wisconsin-Madison students in 2000 defined domestic partners as two people eighteen years of age or older who "Are each other's sole domestic partner; Are not married to anyone nor have had another domestic partner within the previous one year; Are not related by blood closer than would bar marriage as recognized in any state; Share a regular and permanent residence, with the current intent to continue doing so indefinitely." (Aff. of Lawrence J. Dupuis ¶ 2; Exhibit 1.)

Prior to the passage of the Marriage Amendment, the State made dental insurance available to domestic partners of its employees. The definition of domestic partnership included exclusivity, non-consanguinity and cohabitation criteria. Couples seeking dental coverage were required to declare that they: "Are not legally married to, nor the domestic partner of, any other person. . . . Are not related by blood closer than permitted under marriage laws of the State. . . . [and] Have been living together as a couple for at least six (6) months prior to registration with the Employee's employer." (Dupuis Aff. ¶ 3; Exhibit 2: DentalBlue Agreement wit UW Bd. of Regents at 57-60 (Eff. January 1, 2003) ("Domestic Partner Benefits Rider").)

Many of Wisconsin's largest private employers also provided domestic partner benefits to couples who satisfied exclusivity, non-consanguinity and cohabitation requirements. For example, the Cray computer company, with manufacturing facilities located in Chippewa Falls, offered domestic partner benefits to couples who certified that they "are each other's sole domestic partner . . . [not] married to or legally separated from anyone else nor have had another domestic partner within the prior six months . . . are not related by blood to a degree of closeness that would prohibit legal marriage in the state in which we legally reside [and] cohabit and reside together in the same residence and intend to do so indefinitely. We have resided in the same household for at least six months." (first Vintee Aff. ¶ 4; Exhibit 8.) Voters who were

employed by these companies or lived near them would be likely to have understood "domestic partnership" to be defined by exclusivity, non-consanguinity and cohabitation.

Definitions of domestic partnership that included criteria of exclusivity, non-consanguinity and cohabitation were also common across the country at the time. A 1994 "Case Study" of domestic partner benefits by the College and University Personnel Association defined "domestic partnership" as "two individuals who live together in an intimate, long-term relationship of indefinite duration, with an exclusive mutual commitment similar to that of marriage, . . . are not married to anyone else, do not have another domestic partner, and are not related by blood, closer than would bar marriage in their state of residence." (Dupuis Aff. ¶ 5; Exhibit 4 at p.1; *see also* p.13.) After surveying the domestic partnership programs of other universities and public and private employers, the study also noted that "[m]ost employers offering some form of domestic partners' benefits have adopted the same basic requirements for a domestic partnership, with minor variations." (*Id.* at pp.6, 11-12.)

A 1994 article in *Employee Benefits Practices*, entitled "Domestic Partner Benefits: Employer Considerations," used a similar general definition: "an ongoing, personal, intimate and committed relationship between two persons of the same or opposite sex who, for whatever reason, are not legal spouses. Persons or entities recognizing domestic partnerships, as well as persons in domestic partnerships, generally agree on a core set of criteria common to and defining these relationships. These include, but are not limited to . . . neither person is related by blood closer than permissible by state law for marriage, [and] . . . the couple shares a residence with the intent to remain together indefinitely." (Dupuis Aff. ¶ 6; Exhibit 5 at p.1.) The article notes that the "primary decision [for an employer establishing a plan] in defining the term *domestic partnership* is whether eligibility will be limited to same-sex couples or if it will

include both same-sex and heterosexual couples." (*Id.* at p.5.) In either case, the relationship recognized is that of an exclusive, committed *couple*, not "reciprocal beneficiaries."

These and other definitions of "domestic partner" include variations on the core elements of exclusivity, intimacy (expressly and/or implied by the consanguinity prohibition) and cohabitation. When proponents of the amendment repeatedly assured voters that "domestic partnerships" were permissible under the amendment, these were the definitions with which people – including voters – would have been familiar. But the Plaintiffs, who were among the leading advocates for passage of the amendment, now ask this Court conclude that the very elements that were common to domestic partnerships as they were understood in 2005 and 2006 now make Ch. 770's definition unconstitutional, that what they *meant* to endorse was instead an obscure, previously unmentioned "reciprocal beneficiary" status for conveying benefits. Given the fact that the proponents never mentioned "reciprocal beneficiary" status as their definition of domestic partnership during the adoption process of the Marriage Amendment, and given the widely used definitions of domestic partnership common during the amendment debate, Plaintiffs' argument must be rejected as entirely implausible, if not willfully dishonest.

B. Many Courts Outside Of Wisconsin Have Relied On The Vast Differences In Protections Associated With Marriage As Compared To Domestic Partnership To Reject The Assertion That Limited Domestic Partnerships Are Substantially Similar To Marriage.

Numerous courts have rejected Plaintiffs' argument that domestic partner relationships are "substantially similar" or "substantially identical" to marriage. Many court decisions have found that the legal status of domestic partnerships is different from that of marriage.

Plaintiffs admit the many differences in the legal incidents of domestic partnerships as opposed to marriage, but dismiss them as not "the relevant question." (Pls.' Br. 12). Rather, Plaintiffs claim "[i]t is existence of an exclusive intimate relationship – clearly implicit in

Chapter 770 – that creates the substantially similar status prohibited by the Amendment." *Id.* Other courts that have considered this question disagree.

Several courts have rejected claims that laws offering limited protections for persons in a non-marital relationship violate constitutional amendments that prohibit recognition of non-marital marriage "substitutes" They have analyzed these claims by comparing the rights and duties of the non-marital relationship to those of marriage. In *State v. Carswell*, 114 Ohio St.3d 210, ¶¶ 2-3, 871 N.E.2d 547 (2007), the Ohio Supreme Court found that enforcing a domestic violence statute that makes it a crime to "knowingly cause or attempt to cause physical harm to" "a person living as a spouse," did *not* violate Ohio's marriage amendment: "This state and its political subdivisions shall not recognize a legal status for legal relationship of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." The court rejected the criminal defendant's argument that the statute's dependence on his "spousal" relationship with his victim violated the Ohio marriage amendment, because the statute did not create or recognize "a legal status for unmarried persons that bears *all* of the attributes of marriage – a marriage substitute," *id.* at ¶ 13 (emphasis added), such as "a civil union." *Id.* at ¶ 15. Because a legal status is "the sum total of a person's legal rights, duties, liabilities, and other legal relations," *id.* at ¶ 12 (quoting Black's Law Dictionary (8th Ed. 2004) 1447), the question whether cohabitation approximates marriage requires a comparison of *legal* attributes. A Kansas court also concluded that prosecuting a man for domestic battery against a woman with whom he was cohabiting did not violate the second sentence of that state's marriage amendment[6] because cohabiting "does not entitle them to all the benefits, rights, and obligations

[6] The second sentence of that amendment provides that: "(b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the right or incidents of marriage." Kan Const. art. 15, §16.

or marriage[.]" *State v. Curreri*, 213 P.3d 1084, 1090 (Kan. Ct. App. 2009). *See also Cleveland Taxpayers for Ohio Constitution v. City of Cleveland*, 2010-Ohio-4685, ¶¶ 9, 11, 15 (Ohio Ct. App. Sept. 30, 2010) (rejecting argument that domestic partnership registry violates Ohio marriage amendment "because it bestows legal recognition to domestic partnerships that are intended to approximate" marriage's design, qualities, significance or its effect, since marriage "provides instant access to an extensive legal structure designed to protect the couple's relationship and to support the family in a variety of ways," not provided to domestic partners, among other reasons); *Fitz v. Fitz*, 2009-Ohio-5236 (Ohio Ct. App. Oct. 1, 2009) (relying on cohabitation as a basis to modify spousal support does not violate marriage amendment).

Courts have repeatedly rejected claims that domestic partner benefits violate statutory bans on lesbians and gays marrying because of the differences between the legal incidents of domestic partnership versus marriage.[7] *Knight v. Superior Court*, 26 Cal. Rptr.3d 687, 699 (Cal Ct. App. 2005) (legislature did not grant "domestic partners a status equivalent to married spouses," because "domestic partners do not receive a number of marital rights and benefits" among other reasons); *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1244-45 (Pa. 2004) (rejecting argument that domestic partner registry created "a legal relationship between same-sex partners" in "the preempted area of marriage," since Life Partners are provided "only very limited rights that do not begin to mirror the extensive fabric of rights and obligation that the [state] has afforded to married couples"); *Tyma v. Montgomery County*, 801 A.2d 148, 158 (Md. 2002) (even though "the requirements for domestic partnership generally parallel those for

[7] Even though these courts were considering bans on marriage only, rather than marriage *plus* marriage substitutes such as civil unions, their conclusion that the number of legal incidents is a crucial factor to consider in determining whether a domestic partner law violates a ban same-sex marriage ban is equally applicable to the question whether a domestic partner law violates a ban on the recognition of a marriage substitute for lesbian and gay couples.

marriage," county's extension of limited employment benefits to domestic partners did not violate marriage statute as domestic partners are provided no "rights incident to a marriage ... beyond the employment benefits"); *Heinsma v. City of Vancouver*, 29 P.3d 709, 713 n.3 (Wash. 2001) ("Although these requisites [for domestic partnership benefits and marriage] may parallel each other, we conclude that fundamental differences exist between marriage and domestic partnership," since "the domestic partner only receives insurance benefits whereas a spouse receives many other legal rights and responsibilities"); *Lowe v. Broward Cty.*, 766 So.2d 1199, 1206 (Fla. App. 2000) (domestic partner act "does not create a 'marriage-like relationship,'" since the act "does not create that plethora of rights and obligations that accompany a traditional marriage."); *Crawford v City of Chicago*, 304 Ill App 3d 818; 710 N.E.2d 91, 98 (1999) (domestic partner ordinance "addresses only health benefits extended to City employees and those residing with them"); *Slattery v. City of New York*, 686 N.Y.S.2d 683, 688 (N.Y. Supreme Ct. 1999) ("[A]s compared to marital relationships, domestic partnerships are marked by their lack of formalization, lack of legal protections, and by the significantly fewer rights that are extended to the domestic partners"); *aff'd*, 266 A.D.2d 24, (N.Y. App. Div. 1999).[8]

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[8] One case reached a contrary conclusion, *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008), Def. Br. at 17, but that case is distinguishable. First, the language of the Michigan amendment differs from Wisconsin's. Michigan's marriage amendment banning recognition of a same-sex "marriage or similar union for any purpose," Const. 1963, art. 1, § 25, sweeps more broadly than Wisconsin's bar against recognizing a "*legal* status identical or substantially similar to that of marriage." Wis. Const. Art. XIII, § 13 (emphasis added). Wisconsin's Amendment makes clear its aim to prevent state recognition of marriage-like *legal* relationships, such as civil unions. Second, the *National Pride at Work* court refused to consider the extrinsic evidence showing that voters for Michigan's amendment did not intend to prevent public employers from providing domestic partner benefits to their employees. 748 N.W.2d at 540. As Plaintiffs recognize, Pltf. Br. at 13 & n. 11, Wisconsin courts, in contrast, consider extrinsic evidence in interpreting constitutional amendments even if they find the language unambiguous. *See Dairyland Greyhound Park*, 2006 WI 107, ¶¶ 114-117. Finally, the *National Pride at Work* court's reasoning is fundamentally flawed. A state recognizes a civil marriage by giving it all the legal attributes of marriage, so it is irrational to apply a different test, ignoring the legal attributes of domestic partnerships, in order to conclude that domestic partnership constitute a "similar union" to marriage.

III. Under The Clean Hands Doctrine Plaintiffs' Request That This Court Enjoin Ch. 770 Based On Their Assertions That The Marriage Amendment Renders Unconstitutional Any Couples-Based Domestic Partner Benefits Should Be Rejected, Because Plaintiffs' Contrary Statements During The Amendment Campaign Misled Voters.

Plaintiffs would not entitled to equitable relief, even if their claims were meritorious. Under the equitable doctrine of "clean hands," a party may not seek equitable relief from a harm that has resulted from that party's own wrongful conduct. During the run-up to the November 2006 election, Plaintiffs, through their leader Julaine Appling, consistently and emphatically assured the citizens of Wisconsin, in order to secure their vote for the marriage amendment, that the amendment would not affect ability of couples to receive domestic partnership benefits or of the state to enact legislation providing such benefits. Then, when the state enacted the type of domestic partner law Appling promised would not violate the amendment, she and the other Plaintiffs promptly filed suit claiming such a violation. Plaintiffs' claim should be denied because Ch. 770 does not, as they now claim, create a relationship that is substantially similar to marriage. But their attempt to perpetrate a fraud upon the public by reversing course from their unequivocal (and accurate) statements during the marriage amendment campaign, offers another reason to deny their claim. If they are correct now that ch. 770 violates the marriage amendment – and they are not – then their false assertions to the contrary during the amendment campaign should bar them from seeking relief in equity – an injunction.[9]

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[9] Legal commentators have raised a number of critiques of initiative campaigns,. *See, e.g.,* Phillip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 Ann. Sur. Am L. 477, 482-94 (1996) (summarizing critiques of two of the leading scholars, Julian Eule and Jane Schachter). The clean hands doctrine provides a response to one structural problem of ballot initiatives – "the lack of formal structural mechanisms for binding the initiative proponents to what they say." Glen Staszewski, *The Bait-And-Switch in Direct Democracy*, 2006 Wis. L. Rev. 17, 37. Unless this Court holds ballot proponents to their commitment that limited domestic partner benefits are safe through its interpretation of the Marriage Amendment or the Court refuses to grant Plaintiffs equitable relief because of their unclean hands, Plaintiffs will continue to benefit from their efforts to mislead voters. *See id.* at 37

Wisconsin courts have long recognized the equitable principle that a plaintiff who asks for affirmative relief must have "clean hands" before the court will entertain his plea. *Timm v. Portage County Drainage Dist.*, 145 Wis. 2d 743, 753 (Ct. App. 1988) (quoting *Huntzicker v. Crocker*, 135 Wis. 38, 41-42 (1908)). The *Huntzicker* court explained the principle:

> [H]e who has been guilty of substantial misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction shall not be afforded relief when he comes into court.

Id. So long as the equitable relief Plaintiffs are seeking is based on the fruit of their own wrongful or unlawful course of conduct, the court should deny plaintiff relief in equity under the clean hands doctrine. *Cf. S & M Rotogravure Service, Inc. v. Baer*, 77 Wis. 2d 454, 467 (1977).

A party's wrongful conduct need not be directed towards its opponent in litigation for the party to be barred from relief under the clean hands doctrine. *See Lebedinsky v. Akhmedov*, 321 Wis. 2d 748 (table) (Ct. App. Sept. 29, 2009). In *Lebedinsky*, the plaintiff transferred a condominium to her friend to keep it out of the marital estate in her contested divorce, then sued for title to the condominium when the friend refused to return it. *Id.* at ¶¶ 2-3. The trial court denied the plaintiff relief on the basis of unclean hands, recognizing that her loss of the property resulted from plaintiff's conduct in improperly keeping the property out of the divorce. *Id.* at ¶ 5. The court of appeals agreed, rejecting the plaintiff's contention that the clean hands doctrine should not apply because her ex-husband was the victim of her wrong, not her friend. *Id.* at ¶ 9.

("In the absence of some tangible basis for discouraging this type of behavior, the initiative proponents (and their allies) have structural incentives to change their position on potentially contentious interpretive issues – to 'flip-flop,' so to speak – once an election has occurred."). Addressing a similar issue in one of the challenges to the recent federal health care legislation, the district court reasoned that legislators should not be allowed to call the penalty for non-compliance with the individual mandate a "penalty" rather than a "tax" to secure the law's passage and "then reap a *legal advantage* by calling it a tax in court once it passes into law." *Florida v. U.S. Dep't. of Health & Human Servs.*, 716 F. Supp.2d 1120, 1143 (N.D. Fla. 2010). The court's reasoning applies equally here – "the integrity of the process must be guaranteed by the judiciary[.]" *Id.*

Where, as here, it is the public that is the victim of Plaintiff's malfeasance, the clean hands doctrine applies with even greater force. *See* 30A C.J.S. Equity § 116 (2011) (citing *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945)). In *Precision Instrument*, the plaintiff brought suit to enforce two patents, one of which it acquired despite knowledge that the original applicant had committed perjury when testifying about the origin of the patent. The clean hands doctrine is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Id.* at 814. "[W]hile equity does not demand that its suitors shall have led blameless lives as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." *Id.* at 814-15. The Court also made special note of the importance of the clean hands doctrine where public deceit is involved:

> [W]here a suit in equity concerns the public interest as well as the private interests of litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance.

Id. at 815 (citing *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492-94 (1942)). "The possession and assertion of patent rights are issues of great moment to the public," giving it "a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct." *Id.* at 816. Because of the plaintiff's knowledge of perjury related to the patent application, plaintiff's unclean hands barred it from seeking to enforce the patent. *Id.* at 819-20. *See also Intamin, Ltd. v. Magnetar Technologies Corp.*, 623 F. Supp. 2d 1055, 1072-78 (C.D. Cal. 2009) (recovery for patent infringement denied because of harm to the public interest by patent holder's fraudulent assignments filed with the Patent and Trademark Office).

Courts have applied the clean hands doctrine in numerous other contexts where public interests are implicated. For example, in *In re Casa Nova of Lansing, Inc.*, 146 B.R. 370 (Bankr. W.D. Mich. 1992), the court *sua sponte* disallowed the cross-plaintiffs' claims for fraud under the clean hands doctrine, because a tax evasion scheme and perjury were central to the claim. *Id.* at 381. "[T]he interests protected by the clean hands doctrine are wide ranging, but the essence of the inquiry in each case is whether the public is the victim of the inequitable conduct rather than one of the parties," and "perjury to the detriment of the public was an underlying assumption of the parties throughout this transaction." *Id.* at 380-81. *See also Packers Trading Co v. Commodities Futures Trading Comm'n*, 972 F.2d 144, 150 (7th Cir. 1992) (reparations denied brokerage firm because owner's dishonest conduct "affects the operation and integrity of the commodities exchange in which the public has substantial interest."); *International Union, Allied Indus. Workers of America, AFL-CIO v. Local Union No. 589, Allied Industrial Workers of America, AFL-CIO*, 693 F.2d 666 (7th Cir. 1982) (International union's bad faith in appointing father-in-law of employer's assistant manager as regional representative and administrator over local union barred most of its claims for relief from local affiliate); *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961) (parties' agreement to conceal signing of professional football contract to circumvent NCAA eligibility rule against post-season play barred enforcement of contract). "We think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity with a pleas that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout." *Id.* at 474.

As in the other cases cited, Plaintiffs' conduct here in assuring the public that domestic partner benefits were safe (while they apparently believed otherwise), involves a fraud on the

public from which this Court should not allow them to benefit. Julaine Appling, speaking on behalf of all Plaintiffs as the president of their political organization,[10] made numerous public statements during the months leading up to the November 2006 amendment referendum either strongly implying or outright stating that the amendment would not affect domestic partnership benefits. As early as December 2005, Appling stated that "[i]f the state Legislature wants to take up adoption and inheritance rights [for gay couples], it can do that. . . Nothing in the second sentence [of the Marriage Amendment] prohibits that."[11] A couple of months later, Appling stated that she was "certain courts will uphold domestic partner benefits for" gay couples, because domestic partner benefits weren't "similar to the dozens and even hundreds of benefits marriage can provide."[12] Appling called the concerns of same-sex couples about domestic partner benefits "a smoke screen."[13] In June of 2006, Appling again claimed that the Amendment would not imperil the rights of same-sex couples, saying that "the amendment passing won't result in anyone losing domestic partner benefits."[14] In September, she again claimed that "the proposed amendment is not about benefits."[15] Later that same month, Appling again claimed that benefits would not be affected by the Amendment, stating: "[w]e are not

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[10] Appling is president of Wisconsin Family Action, Inc., which advocated for the Marriage Amendment under the name Family Research Institute. Stacy Forster, *Doyle says domestic partner proposal does not violate marriage amendment*, Milwaukee Journal Sentinel (Feb. 23, 2009) available at http://www.jsonline.com/news/statepolitics/40064357.html. Each Plaintiff sits on the board of directors of Wisconsin Family Action, Inc. Wisconsin Family Action press release, Aug. 18, 2010, available at http://www.wifamilyaction.org/files/ trya.campaigntoolbox.org/downloads/PR_081810_0.pdf.

[11] J.R. Ross, *Senate approves amendment to ban gay marriage, civil unions*, Associated Press, Dec. 7, 2005.

[12] Jason Stein, *Domestic partner puzzle; if the marriage amendment passes, couples' insurance status is vague*, Wisconsin State Journal, Feb. 28, 2006, at A1.

[13] *Id.*

[14] Ben Jones and J.E. Espino, *Battle even for civil unions*, The Post-Crescent, June 4, 2006, at 1A.

[15] Judith Davidoff, *Human face of gay marriage ban; TV spot shows how discrimination hurts couple when one gets cancer*, The Capital Times, Sept. 18, 2006, at B1.

going to see benefit structures currently in place taken away by this amendment, nor will local units of government or companies be prohibited from creating such benefits in the future should they choose to."[16] Appling continued making such statements as election day neared, telling reporters in October 2006 that domestic partnership benefits would not be barred under the Amendment as long as they did not parallel marriage rights.[17] And, at a public debate less than a month before the vote on the Amendment, Appling "said that the amendment would not jeopardize domestic partner benefits or other legal protections for gay couples and their children."[18] She again called the legitimate concerns of same-sex couples "a smokescreen."[19]

The irony of Plaintiffs' underhandedness is that Appling's statements that the Marriage Amendment does not conflict with the provision of domestic partner benefits were accurate. However, by saying that domestic partnership benefits would be permissible to induce the public to support the Amendment, then arguing the opposite in court, Plaintiffs have perpetrated a deceit upon both the public and the Court.[20] Plaintiffs should not be permitted to seek equitable relief here, because Plaintiffs engaged in wrongful conduct that led to the passage of the Amendment that provides the basis for their claimed "relief" – invalidation of domestic partnerships. Application of the doctrine of clean hands to bar Plaintiffs' claims both prevents

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[16] *Debate focuses on amendment on Wis. ballot Nov. 7*, Associated Press State & Local Wire, Sept. 27, 2006.

[17] David Crary, *Wis activists hope to end streak for gay-marriage amendments*, Associated Press, Oct. 2, 2006.

[18] Judith Davidoff, *Gay Wed Foe: Church-State Wall is Fiction; Amendment Backer, Opponent Spar*, The Capital Times, Oct. 13, 2006, at B1.

[19] *Id.*

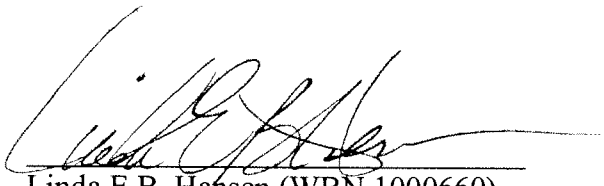
[20] Plaintiffs have argued that opponents of the amendment misled the public, but even if this were accurate the doctrine of clean hands closes the doors of equity to misbehaving plaintiffs "however improper may have been the behavior of the defendant." 324 U.S. at 814. The conduct of the Fair Wisconsin defendants or of any other opponents of the marriage amendment is irrelevant as concerns the question of whether Plaintiffs should be barred from seeking equitable relief under the clean hands doctrine.

the wrongdoers from enjoying the fruits of their transgressions and prevents injury to the public.[21] *See Precision Instrument*, 324 U.S. at 815.

CONCLUSION

Because of the significant and numerous differences between marriage and domestic partnerships, Ch. 770 does not violate the Marriage Amendment. Further, Plaintiffs' own actions created the very issue about which they now complain. Plaintiffs are not entitled to equitable relief because of their unclean hands.

Dated this 20th day of May, 2011.



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[21] Even if Plaintiffs were to offer evidence to show a factual dispute over the applicability of the clean hands doctrine, Plaintiffs' motion for summary judgment must be denied for the reasons shown in Intervenor Defendants' brief but also because the evidence at least raises a fact issue regarding whether Plaintiffs' wrongful conduct in purposefully misleading voters led to the passage of the Amendment on which they base their claim here.