No. _____

In The
Supreme Court of the United States

ISMET ISLAMI,

Petitioner,

v.

KEMPER INDEPENDENCE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. OWENS
Counsel of Record
LAW OFFICES OF
JOSEPH F. OWENS, LLC
2665 S. Moorland Road, Suite 200
New Berlin, Wisconsin 53151
Phone: (262) 785-0320
aolaw@bizwi.rr.com

- and -

DEBRA K. RIEDEL
LAW OFFICES OF DEBRA K. RIEDEL
2665 S. Moorland Road, Suite 200
New Berlin, Wisconsin 53151

Counsel for Petitioner Ismet Islami

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Introductory Statement

This is a liberty based "due process" case. Enactment by the Wisconsin legislature of the Wisconsin Marital Property Act in 1986 provided all persons domiciled in the State of Wisconsin, and in particular, those of the Roman Catholic, Orthodox Jewish, and Muslim faiths, with a viable alternative legal proceeding to that of "divorce" to dissolve their legal status as "married" for all property and financial matters via a "decree of legal separation." The Wisconsin Supreme Court explicitly nullified this legislatively conferred fundamental liberty right by its Decision in the instant case without a constitutionally sufficient rational basis.

Question 1. Whether the Wisconsin Supreme Court Decision here petitioned from, in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, deprives all persons domiciled in Wisconsin, of their fundamental liberty right to exercise their statutory entitlement to "dissolution" of legal status as "married" via a judicial "decree of legal separation" pursuant to the Wisconsin Marital Property Act.

Question 2. Whether the Wisconsin Supreme Court Decision here petitioned from, in violation of the First and Fourteenth Amendments to the Constitution of the United States, infringes the "free exercise" of religious rights by denying to all persons domiciled in

QUESTIONS PRESENTED – Continued

Wisconsin who, for religious reasons, seek to exercise the right to civil dissolution of the legal status as "married" pursuant to the Wisconsin Marital Property Act via a judicial "decree of legal separation."

PARTIES TO THE PROCEEDING

Petitioner, Ismet Islami, was the defendant-appellant below and is a naturalized American citizen who is a resident of the Town of Summit, Waukesha County, Wisconsin.

Respondent, Kemper Independence Insurance Company, is an incorporated casualty insurance company and was the plaintiff-respondent below.

RELATED CASES

- *Kemper Independence Insurance Company v. Ydbi Islami and Ismet Islami*, Case No. 2013-CV-2875, Waukesha County Circuit Court, State of Wisconsin. [Summary Judgment entered: January 29, 2019.]
- *Kemper Independence Insurance Company v. Ismet Islami*, Appeal No. 2019-AP-000488, Wisconsin Court of Appeals. [Judgment Affirmed: May 27, 2019.]
- *Kemper Independence Insurance Company v. Ismet Islami*, Wisconsin Supreme Court Opinion 4/3 split decision. [Filed June 8, 2021, Motion To Reconsider denied July 16, 2021.]

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OPINIONS BELOW

The Supreme Court of Wisconsin's Opinion is a reported decision at *Kemper Independence Insurance Company v. Ismet Islami*, 397 Wis.2d 394, 959 N.W.2d 912, 2021 WI 53 (2021). The Court of Appeals Opinion is also a reported decision at *Kemper Independence Insurance Company v. Ismet Islami*, 392 Wis.2d 866, 946 N.W.2d 231, 2020 WI App. 38 (2020). The Opinions of the Circuit Court of Waukesha County, Wisconsin are reproduced at App. 57-69 and App. 95-104.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), 28 U.S.C. §2104 and 28 U.S.C. §2106. This case arises from a final Decision and Order rendered by the Supreme Court of the State of Wisconsin on June 8, 2021 as to which reconsideration and rehearing was denied on July 16, 2021, which Decision infringed fundamental liberty rights provided by the First and Fourteenth Amendments to the Constitution of the United States relating to the "free exercise" of religion; and "due process of law." The time within which to file this Petition for Certiorari was extended to 150 days by Order of this Court dated July 19, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The first clause of Amendment I to the United States Constitution provides: "Congress shall make no law respecting establishment of religion, or prohibiting the free exercise thereof. . . ." (*emphasis added.*)

Section 1 of Amendment XIV to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 765 of the Wisconsin Statutes, enacted in 1979, contains the following provisions:

> §**765.01 A civil contract.** Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.

Chapter 766 of the Wisconsin Statutes effective January 1, 1986, entitled "The Wisconsin Marital Property Act," contains the following provisions:

> §**766.01(8)** "During marriage" means a period in which both spouses are domiciled in this state that begins at the determination date

and ends at dissolution or at the death of a spouse.

§766.01(7) "Dissolution" means termination of a marriage by a decree of dissolution, divorce, annulment or declaration of invalidity or entry of a decree of legal separation. . . ."

§766.75 After a dissolution each former spouse owns an undivided one-half interest in the former marital property as a tenant in common, except as provided otherwise in the decree or an agreement entered by the former spouses after dissolution.

§766.97(1) Women and men have the same rights and privileges under the law in the exercise of suffrage, freedom of contract, choice of residence, jury service, holding office, holding and conveying property, care and custody of children and in all other respects. The various courts and executive and administrative officers shall construe the statutes so that words importing one gender extend and may be applied to either gender consistent with the manifest intent of the legislature. The courts and executive and administrative officers shall make all necessary rules and provisions to carry out the intent and purpose of this subsection.

Chapter 767 of the Wisconsin statutes, enacted in 1975, contains the following provisions:

§767.005 Scope. This chapter applies to actions affecting the family.

§**767.001 Definitions.** In this chapter:

(1) "Action affecting the family" means any of the following actions:

(a) To affirm marriage.

(b) Annulment.

(c) Divorce.

(d) Legal separation (formerly divorce from bed and board).

(e) Custody.

(f) For child support.

(g) For maintenance payments.

(h) For property division.

(i) To enforce or modify a judgment or order in an action affecting the family granted in this state or elsewhere or an order granted under s. 48.355(4g)(a) or 938.355(4g)(a).

(j) For periodic family support payments.

(k) Concerning periods of physical placement or visitation rights to children, including an action to relocate and reside with a child under s. 767.481.

(L) To determine paternity.

(m) To enforce or revise an order for support entered under s. 48.355(2)(b)4. or (4g)(a), 48.357(5m)(a), 48.363(2), 938.183(4), 938.355(2)(b)4. or (4g) a), 938.357(5m)(a), or 938.363(2).

§767.35 Judgment of divorce or legal separation.

(1) . . .

(2) GRANTING DIVORCE OR LEGAL SEPARATION. When a party requests a legal separation rather than a divorce, the court shall grant a judgment of legal separation unless the other party requests a divorce, in which case the court shall hear and determine which judgment shall be granted.

(3) WHEN DIVORCE JUDGMENT EFFECTIVE. A judgment of divorce is effective when granted. A court granting a judgment of divorce shall inform the parties appearing in court that the judgment is effective when granted but that it is unlawful under s. 765.03 (2) for a party to marry again until 6 months after the judgment is granted.

(4) . . .

(5) CONVERSION OF LEGAL SEPARATION TO DIVORCE. By stipulation of both parties, or upon motion of either party not earlier than one year after entry of a judgment of legal separation, the court shall convert the judgment to a judgment of divorce.

§765.03 Who shall not marry; divorced persons.

(1) . . .

(2) 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 6 months after judgment of divorce is granted, and the marriage of any such person solemnized before the expiration of 6 months from the date of granting of judgment of divorce shall be void.

STATEMENT OF THE CASE

I. STIPULATED FACTS OF RECORD.

On June 10, 2013, Ismet Islami's home, all of her clothing, furniture, furnishings, automobile, personal effects and memorabilia were totally destroyed by arson intentionally set by her former spouse, Ydbi Islami. [R-147, pp. 1-2, Joint Report of Counsel; R-165, Supplementary Stipulations pp. 1-2.] Ismet had obtained a Judgment of Legal Separation from Ydbi Islami 15 years before on March 25, 1998 in the Circuit Court of Waukesha County, Wisconsin by which she was awarded sole ownership and legal title to the residence. [R-110, pp. 2-20.] On the date of the fire, Ismet was the sole owner and sole "named insured" on the homeowner's insurance policy issued by Kemper Independence Insurance Company. [R-147, pp. 1-2.]

Trial counsel for the parties stipulated on the record that the fire loss was not the result of any act on the part of Ismet, that she did not engage in any act of fraud, concealment or misconduct of any sort with respect to the fire loss, and that she was an "innocent

insured" for "all purposes" in this civil action. [R-165, pp. 1-2.] Ydbi Islami was initially found mentally incompetent to stand trial but ultimately was criminally charged, convicted and imprisoned for this arson. [R-214, p. 4.] All parties stipulated that Ydbi Islami had no insurable interest in the insured property. [R-214, p. 4.] Ydbi Islami had a history of criminal convictions for crimes against women which included multiple sexual assault charges, stalking, habitual criminality, and was a registered sex offender. [R-117, p. 1; R-118, pp. 1-18.] Ismet Islami's Affidavit filed in these proceedings recited to the court that Ydbi's criminal history was one of the reasons Ismet proceeded to obtain the Judgment of Legal Separation in 1998. [R-111, pp. 1-3.]

Ismet Islami also specifically explained to the trial court in her Affidavit in Opposition to Summary Judgment [*see* Appendix pp. 105-10] that the tenets of her Moslem faith do not allow her to divorce her husband without his permission and that he would not give his consent. Therefore, in the eyes of God he was still her husband, but she could proceed to obtain a Judgment of Legal Separation in reliance upon Wisconsin civil law to dissolve the legal status and attributions of being "married" to Ydbi Islami. [R-111, pp. 1-2.]

Kemper Insurance Company's homeowner's insurance policy contained a standard Wisconsin endorsement conforming its insurance policy to all provisions of Wisconsin statutory law. [R-128, p. 50.] Significantly, Kemper's policy definitions include the "named insured" and the "spouse" of the named insured within its definition of "insureds." [R-128, p. 6.]

Kemper's policy contains an "intentional loss" provision that preserves the policy rights of an "innocent insured" [R-128, p. 48], but also proceeds later in its policy to include a "fraud or concealment" clause that provides coverage to "no insureds" if "an insured engages in fraud or deceit." [R-128, p. 49.] Thus, the status of whether Ydbi Islami was the "spouse" of Ismet at the time of the fire, and thereby was "an insured," became the pivotal contractual issue in this civil lawsuit.

The legal issue thus presented for judicial decision was whether the 1998 Judgment of Legal Separation legally dissolved and therefore terminated Ydbi Islami's status as the "spouse" of Ismet under Wisconsin law for purposes of property insurance. Under Kemper's policy, all the policy exclusions relieving it from coverage obligations based upon wrongful conduct by Ydbi Islami as an "insured" hinged on that legal question.

II. PROCEDURAL HISTORY.

This is a declaratory judgment action brought by Kemper Independence Insurance Company (hereinafter "Kemper"), in which Kemper sought summary judgment declaring that Kemper was not obligated to pay a stipulated "innocent insured" under its homeowner's policy for the total destruction of her solely owned home and all of its contents by arson perpetrated by her former spouse, Ydbi Islami, who stands convicted and incarcerated therefor. The trial court,

the Wisconsin Court of Appeals, and ultimately, the Wisconsin Supreme Court (in a 4/3 split decision), ruling on summary judgment, stripped Ismet Islami of her property right as a judgment holder to enforce the decree of legal separation dissolving her legal status as "married" to Ydbi Islami, statutorily granted her via a "Judgment of Legal Separation" obtained some 15 years before the subject fire.

On December 19, 2013, Kemper filed a "Declaratory Judgment Complaint" commencing this action seeking judicial construction of specifically identified provisions of its homeowner's contract to void any payment obligation under the policy. [R-1, pp. 1-7.]

On March 10, 2014, Ismet Islami timely filed an Answer and Counterclaim, alleging, *inter alia*, that Ydbi Islami was not a party to the insurance contract, was not her spouse, and had no insurable interest in the insured property; and that she, Ismet Islami, was the sole owner of the property and sole "named insured." She also raised as an Affirmative Defense the public policy of Wisconsin disfavoring application of insurance forfeiture clauses against an "innocent insured." [R-2, pp. 1-6.]

Between April 10, 2015 and June 22, 2015, the court entertained and denied various partial motions for summary judgment filed by the parties.

On June 22, 2015, the court stayed discovery during pendency of the criminal arson proceedings against Ydbi Islami, which had been initially delayed due to

initial court findings of his lack of mental competency to stand trial. [R-56, pp. 1-2.]

The suspension of proceedings continued for almost two years until May 24, 2017, one week after Ydbi Islami's conviction for arson. [R-68, p. 1.]

On January 26, 2018, February 28, 2018 and March 26, 2018, pre-trial conferences were held to move the case forward in contemplation of a two week jury trial. [R-211, pp. 1-42.]

On November 8, 2018, the parties began a second round of summary judgment motions. [R-107; R-141.]

At a December 11, 2018 hearing, the trial court specifically rejected as "irrelevant" Chapter 766 (the Wisconsin Marital Property Act), and on December 12, 2018 entered an order ruling as a matter of law that Ydbi Islami and Ismet were "spouses" of each other for purposes of "contract" with Kemper, thereby finding Ydbi Islami to be an "insured" under the Kemper property policy. [R-158, pp. 1-2.]

In doing so, the court did not identify where in "their contract" Ydbi's marital status to Ismet was recited for residential property coverage. [R-212, pp. 4-8, 53, 55.] The actual words of the court on this issue are as follows:

> ***As I reviewed the policy in this case which I find to be unambiguous in its relevant terms and the affidavit of Ismet Islami that was submitted by***

Mr. Owens, I reached certain conclusion outside of the Wisconsin Statutes and inside of the contract that was issued by Kemper. (*emphasis added.*)

[Transcript 12/11/18 Hearing; R-212, p. 4.]

* * * * * * * * * * * *

The court continued in explaining its decision as follows:

Ismet filed an affidavit indicating that she sought legal separation because of concerns related to financial concerns in her marriage but that given her faith as a Muslim she views herself as

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married in the eyes of God. It is very clear that that perspective entered into her relevant behavior pattern, her undisputed behavior pattern so far as the interaction with Kemper was concerned.

* * * * * * * * * * * *

This Court concludes that there's no genuine issue of material fact regarding the fact that for purposes of the contract and the contract itself

> ***was based upon these two individuals being married. It is irrelevant in this Court's view whether or not under the law of Wisconsin they were in fact married.*** (*emphasis added.*)

[R-212, pp. 5-6.]

On December 19, 2018, the court conducted a follow-up pre-trial hearing which resulted in a stipulation to dismiss Ydbi Islami as a party to this action without prejudice. [R-213, pp. 1-13; R-168, pp. 1-2.]

On January 17, 2019, the trial court conducted the final hearing on the cross-motions for summary judgment. In its oral rulings, it first dismissed any relevance of the "Intentional Loss" exclusion in Kemper's policy which preserves to an "innocent insured" their policy rights. [R-214, p. 11.]

On January 29, 2019, the court entered its final order: a) denying Ismet Islami's motion for summary judgment as an "innocent insured" and, b) granting Kemper's motion for summary judgment voiding the policy recovery rights based upon Ydbi Islami's status as an "insured" who acted in breach of the "Concealment or Fraud" condition of Kemper's policy. [R-175, pp. 1-2.]

On March 7, 2019, Ismet Islami timely filed a Notice of Appeal. [R-189.]

On May 27, 2020, the Wisconsin Court of Appeals issued its decision affirming the summary judgment

order of the Circuit Court of Waukesha County. [Appendix pp. 38-56.]

The Court of Appeals Opinion in footnote 3 conceded the religious basis for Ismet having initially sought a divorce from Ydbi and because Ydbi would not consent, Ismet obtained a Judgment of Legal Separation:

> [3] ***Ismet*** *submitted an affidavit and gave sworn testimony in an Examination Under Oath conducted by Kemper's attorney, in which* ***she stated that she initially sought a divorce from Ydbi after his 1988 conviction for sexual assault but that he would not consent to the divorce. According to Ismet, for religious reasons this prevented her from obtaining a divorce, and she ultimately pursued the alternative path of legal separation.*** *Since Ismet and Ydbi continued to live in the same residence, the separation may have been a financial decision (and some of Ismet's statements indicate that this was the primary consideration). Resolving the purpose behind the separation is not relevant to the issues on this appeal, however, and we express no opinion on this point.* (*emphasis added.*)

The Court of Appeals then proceeded to completely ignore the existence of Chapter 766 of the Wisconsin Statutes, "The Wisconsin Marital Property Act," and the express language of Chapter 766 describing "dissolution" as "terminating" marital status via a Judgment of Legal Separation found at Wis. Stat. §766.01(7) and

(8). Despite these explicit provisions of law, which were quoted and argued in pages 28, 29, 30 and 31 of Ismet's Defendant-Appellant's Brief in the Court of Appeals and reiterated in her Reply Brief on p. 3, the Court of Appeals Opinion is conspicuously bereft of assigning any significance to her claim of a religious based right to obtain legal emancipation from the status as being "married" to Ydbi Islami pursuant to Chapter 766 of the Wisconsin Statutes, "The Wisconsin Marital Property Act."

On June 23, 2020, Ismet Islami filed a Petition for Review with the Wisconsin Supreme Court which was granted.

On June 8, 2021, the Wisconsin Supreme Court issued its Decision affirming the Court of Appeals. [Appendix pp. 1-37.] The Supreme Court Opinion in ¶ 4 recognized that Ismet had sought a legal separation rather than a divorce for religious reasons. But because Ismet had not sought a divorce, in ¶ 12, the Supreme Court blanketly ruled that "Ismet's and Ydbi's legal separation in 1998 did not alter Ydbi's status." In ¶ 19 and ¶ 20, the Wisconsin Supreme Court refused to give effect in this contract case to the unequivocal dissolution language of Wis. Stat. §766.01(7) and (8), thereby depriving Ismet Islami of her statutorily vested right conferred under a judgment of legal separation to the status of not being "married" to Ydbi Islami and not vicariously liable for his tortious conduct by virtue of being his "spouse."

On June 28, 2021, Ismet Islami filed a Motion to Reconsider [Appendix pp. 72-75] with the Wisconsin Supreme Court because its Opinion explicitly nullified the legislatively conferred right by Wis. Stat. §766.01(7) and (8) to alter the legal effect of one's marital status via a judgment of legal separation for all property related matters. Ismet Islami's Memorandum in Support of Motion to Reconsider [Appendix pp. 76-90] at pp. 3, 6 and 7 concisely brought into focus the constitutional issues created by the Wisconsin Supreme Court's opinion:

> *The majority opinion, in holding as a matter of law that a judgment of legal separation does not terminate "marriage" (Maj. Op. pgs. 10-11), effectively renders a judgment of legal separation a nullity; and the parties are therefore subject to all the obligations and rights of being "married," including the complexities of community property law, inheritance, probate, paternity, and taxation. It renders void the estate plans of all propertied persons who have for religious reasons or otherwise obtained a judgment of legal separation since 1986. The effect of the majority opinion is to divest these people of a legislatively bestowed right to judicial dissolution of the civil bonds arising by virtue of being another person's spouse. This holding, if not withdrawn, deprives them of "privileges and immunities" enjoyed by citizens of the United States; and "due process" and "equal protection" of the law*

per the Fourteenth Amendment to the U.S. Constitution.

[Memorandum In Support of Motion to Reconsider p. 3.]

* * * * * * * * * *

2. *The Majority Opinion Violates The Fourteenth Amendment To the Constitution Of The United States.*

It is elemental that the right to freely exercise freedom of religion is explicitly identified as a fundamental right guaranteed by the First Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution of the United States prohibits the States from enforcing any law abridging the privileges and immunities of the citizenry. In addition, no State may deprive any person of life, liberty or property without due process of law nor deny any person of equal protection of the laws.

[Memorandum In Support of Motion to Reconsider p. 6.]

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The majority opinion in this case goes beyond any of the decisions in the courts below because it, for the first time, unequivocally disentitles all persons who, in the exercise of their religious beliefs against divorce, from the right granted to them by the Wisconsin legislature in the Wisconsin Marital Property Act to avoid the ramifications of the Wisconsin Marital Property Act by obtaining a judicial decree of

> *legal separation. State power over domestic religions is not without constitutional limits. The Due Process Clause requires a showing of justification "when the government intrudes on choices concerning family living arrangements" in a manner which is contrary to deeply rooted traditions.* ***Moore v. City of East Cleveland, Ohio****, 431 U.S. 494, 499, 503-04, 97 S.Ct. 1932, 1936, 1937-39, 52 L.Ed.2d 531 (1977) (plurality opinion). Cf.* ***Smith v. Organization of Foster Families****, 431 U.S. 816, 842-47, 97 S.Ct. 2094, 2109-12, 53 L.Ed.2d 14 (1977).*
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> * * * * * * * * * *
>
> *The majority opinion constitutes an unwarranted intrusion by the judiciary into the province of the legislature by writing out of existence a statutory provision which preserved the fundamental religious liberty and property interests of those persons. It also denies them equal protection of the law.*

[Memorandum In Support of Motion to Reconsider p. 7.]

On July 16, 2021, the Wisconsin Supreme Court summarily denied Ismet Islami's Motion to Reconsider. [Appendix pp. 70-71.]

REASONS FOR GRANTING THE PETITION

I. The Wisconsin Supreme Court Opinion Violates The Fourteenth Amendment Liberty Rights Of All Persons Domiciled In The State Of Wisconsin To Dissolution Of Marital Status As "Married" Via A "Decree Of Legal Separation" Pursuant To The Wisconsin Marital Property Act.

Wisconsin changed from a "common law" property state to a "community property" state on January 1, 1986 by enactment of Wis. Stat. Chapter 766, the "Wisconsin Marital Property Act."

The technical complexities of a community property system, as exemplified in the Wisconsin Marital Property Act, place upon all married persons myriad rights and responsibilities involving fundamental financial issues, including property ownership, income taxation, commercial contracts and civil liability. Currently, nine states operate within a "community property" system, and Alaska allows its citizenry to opt into that property system.[1]

Traditional common law concepts of title to property and contract law are completely displaced by a community property statute such as the Wisconsin Marital Property Act. A "Marital Property Agreement" between the spouses themselves is not effective to bind any third party creditor who does not have actual

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[1] Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, and Alaska allow its citizenry to opt-in.

notice of all the terms of the spouse's Marital Property Agreement, and only after the creditor has received actual notice.

By way of example, sufficiently propertied individuals, when faced with enormous unanticipated hospital expenses generated by treatment of a spouse cannot, as a practical matter, deliver a copy of an exculpatory Marital Property Agreement – if they have one – in advance to all medical providers involved. The same is true in the case of wealthy married couples if one of the spouses is a business person who by the nature of his or her business (i.e., commercial real estate developer; investment fund manager, etc.) is subject to potential enormous personal liability exposure. Divorce is one option. However, the Wisconsin Marital Property Act provides to those persons, and, in particular, to persons whose religious beliefs do not allow them to divorce, an alternative to a full blown divorce. That alternative is a "decree of legal separation."

Marital partners who seek a "decree of legal separation" fall into two categories:

a) Individuals who intend to completely terminate their marital relationship, but for religious reasons cannot divorce; and

b) Propertied individuals who for financial reasons need to avoid the community property complexities of the Wisconsin Marital Property Act, but do not seek a judgment of divorce.

Under the Wisconsin Marital Property Act, entry of a "decree of legal separation" terminates the status of the marital partners as "spouses" per Wis. Stat. §766.01(8), which provides:

> (8) "During marriage" means a period in which *both spouses are domiciled in this state that begins at the determination date and ends at dissolution* or at the death of a spouse. (*emphasis added*.)

Wis. Stat. §766.01(7) then defines "*Dissolution*" as follows:

> (7) *"Dissolution" means termination of a marriage by* a decree of dissolution, divorce, annulment or declaration of invalidity or *entry of a decree of legal separation* or separate maintenance. The term does not include a decree resulting from an action available under ch. 767 which is not an annulment, a divorce or a legal separation. (*emphasis added.*)

The provisions of the Marital Property Act quoted above clearly and unequivocally identify a "decree of legal separation" as effecting "termination" of a marriage. [Wis. Stat. §766.01(7) and (8).] Notably, Wis. Stat. §766.75 underscores the explicit intent of the statute to nullify the legal status of the marital partners at dissolution as "spouses" for property purposes by identifying them as "former spouses":

> *766.75 Treatment of certain property at dissolution.*
>
> *After a dissolution each former spouse owns an undivided one-half interest in the former marital property as a tenant in common, except as provided otherwise in a decree or an agreement entered into by the* ***former*** *spouses after dissolution.*

Parenthetically, "Common Law" marriage has been abolished in Wisconsin since 1917. [*See Watts v. Watts*, 137 Wis. 2d 506, 519 n. 11, 405 N.W.2d 303 (1987); Wisconsin Laws of 1917, Ch. 218 §3.]

Since entry of a judicial decree of legal separation effects "dissolution" of the marriage, all the legal attributions of marriage for tax, contract and other financial purposes are thereby prospectively "terminated." For property and contract purposes, such decrees of legal separation are equal to a judgment of divorce or annulment and are effective notice to the world that the former spouses and their assets are no longer subject to prospective liability exposure for the acts and debts of the other former spouse, and the property awarded to each of them is their separate property. The majority opinion of the Wisconsin Supreme Court does not express any rationale for its decision in this case which takes away from all persons domiciled in Wisconsin the right provided by the Legislature to obtain a decree of legal separation in order to avoid all of the impacts of the Wisconsin Marital Property Act under circumstances where a divorce is not desired.

The majority opinion of the Wisconsin Supreme Court unequivocally holds as a matter of law on p. 10 that, " . . . *a judgment of legal separation does not terminate marriage*." On page 11, the majority opinion repeats that holding: "*Given that Ismet and Ydbi never initiated divorce proceedings but instead received a judgment of legal separation, they remained married under Wisconsin law*." On page 12, the majority opinion states again: "*Chapter 767 controls the dissolution of marriage and under its provisions, Ismet and Ydbi were still 'spouses' by law as well as under the Policy*." This holding nullifies the specific provisions of the Wisconsin Marital Property Act cited *infra* which state exactly the opposite.

The effect of this holding on all persons who have obtained judgments of legal separation since 1986 is potentially disastrous financially. If a person continues to be "married," all property is marital property except property specifically classified as individual property or left unclassified. [Wis. Stat. §766.03(2) and Wis. Stat. §766.31(1).] "Property" is defined expansively in Wis. Stat. §766.01(15) to include "an interest, present or future, legal or equitable, vested or contingent in real or personal property." Each spouse has a present equal undivided interest in each item of marital property [Wis. Stat. §766.31(3) and (4)], including all income of each spouse. [Wis. Stat. §766.01(10).] All property of spouses is presumed to be marital property [Wis. Stat. §766.31(2).] In general, a spouse may transfer only his or her half interest in all marital property at death. [Wis. Stat. §861.01(1).] A surviving spouse

has the right to elect against the Will of a deceased spouse so as to obtain an amount equal to half of the augmented deferred marital property estate per Wis. Stat. §861.02.

If still "married," despite entry of a judgment of legal separation, the non-incurring party's property continues to be subject to liability to creditors of the incurring "spouse" per Wis. Stat. §766.55, §766.56 and §766.565.

If one of the parties dies intestate following a judgment of legal separation, according to the majority opinion, the survivor continues to be a "spouse" for purposes of intestate succession.

If the parties are "married" despite a decree of legal separation, they must file tax returns as "married" persons, either "jointly" or "separately." If they file jointly, they become subject to potential liability in the event of tax fraud or deceit by the other. If they file "married filing separately," they must each claim one-half the other party's income and are exposed to tax liability if the other party has under-withheld. Notwithstanding entry of a judgment of legal separation, the Wisconsin Supreme Court majority opinion identifies all such persons as "married." Accordingly, either party can mortgage, pledge or encumber that parties' one-half interest in all the parties' marital property.

With respect to medical expenses, under the majority opinion, notwithstanding entry of a judgment of legal separation, each marital partner continues to be liable under the "doctrine of necessaries" for the other

"spouse's" potentially disastrous medical expenses and also subjects invalid "spouses" to the exhaustion of assets rules under Medicare in order for Title 19 coverage to be available for infirm "spouses."

The foregoing examples illustrate only some of the numerous untoward consequences of the majority opinion's myopic rejection of the exhaustively negotiated legislative construct of Chapter 766 of the Wisconsin Marital Property Act, which has been operative in the State of Wisconsin since 1986. Quite apart from the impact of the majority decision on Wisconsin property interests, the United States General Accounting Office, Office of the General Counsel, noted in its report of January 23, 2004 to the Majority Leader of the United States Senate that, as of that time, there were a total of 1,138 federal statutory provisions in which marital status is a factor in determining or receiving benefits, rights and privileges under federal laws.[2]

In this arson case, the facts are uncontroverted that a woman's home (Ismet Islami) and all of her possessions within it were totally destroyed in 2013 by arson, intentionally set by her former husband, Ydbi Islami, who was convicted and incarcerated for that crime. Kemper Independence Insurance Company has formally stipulated that Ismet Islami was in all respects an "innocent insured." Kemper has also stipulated that Ismet was the sole titled owner of her home,

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[2] Office of the General Counsel, General Accounting Office, GAO-04-353R, *Defense of Marriage Act*, Report to Bill Frist, Majority Leader, United States Senate, 1 (2004), *at* http://www.gao.gov/new.items/d04353r.pdf.

awarded to her pursuant to a judgment of legal separation from Ydbi Islami entered in 1998, and that she was the sole "named insured" on Kemper's homeowner's policy. It is further stipulated that Ydbi Islami had no insurable interest or property rights under the policy. However, the Wisconsin Supreme Court Opinion issued here holds that Ydbi Islami constituted an "insured" under the policy as Ismet's "spouse," nullifying Ismet's vested rights under a judicial decree of legal separation per the Wisconsin Marital Property Act, Wis. Stat. §766.01(7) and (8). The certified copies of the Judgment of Legal Separation filed herein conclusively resolve that issue as a matter of law. [*See* Appendix pp. 111-16.] Accordingly, the Wisconsin Supreme Court's Decision here deprived Ismet Islami of the intangible property rights granted by the State of Wisconsin attendant to a Judgment of Legal Separation without due process of law.

II. The Wisconsin Supreme Court Opinion Violates The "Free Exercise" Clause Of The First Amendment And The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States By Denying To All Persons Domiciled In Wisconsin Who, For Religious Reasons, Seek To Exercise The Right To Civil Dissolution Of The Legal Status As "Married" Pursuant To The Wisconsin Marital Property Act Via A Judicial "Decree Of Legal Separation."

The Fourteenth Amendment was ratified by the State of Wisconsin on February 7, 1867 and became

the supreme law of the land on July 9, 1868 when the Secretary of State of the United States certified its ratification by 28 of the 37 states. However, it was not until 1940 that the First Amendment was incorporated into the ambit of the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

It is therefore elemental at the present time that the First Amendment right to freely exercise freedom of religion is a fundamental right guaranteed by the Fourteenth Amendment to the Constitution of the United States. The common purpose of the "establishment" and "free exercise" religion clauses of the First Amendment is to secure religious liberty. *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000). In this context, the First Amendment applies to the exercise of state authority by executive or judicial officers no less than it does to the exercise of a state's legislative authority. *Shrum v. City of Coweta*, 449 F.3d 1132 (10th Cir. 2006).

The First Amendment's prohibition on governmental infringement of free exercise of religion historically required complete withdrawal of the power to proscribe or favor, directly or indirectly, any particular religious belief or doctrine. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). The government was recognized as possessing inherent police powers to regulate religious activities in a reasonable manner in order to protect society in general, but only so long as it serves a "compelling state interest." *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed.

1628 (1943). In particular, it is settled law that the "free exercise" clause protects not just beliefs and profession of religious belief but also religiously motivated conduct, such as was evidenced by Ismet Islami in her seeking a "judgment of legal separation" versus a "judgment of divorce." *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013).

The prevailing standard of "compelling state interest" for testing the constitutional sufficiency of state action under the "free exercise" clause of the First Amendment which began with *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and continued through *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In 1990, however, the "compelling state interest" obligation in such state action cases was relaxed in Justice Scalia's well known opinion in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 883-90, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). The *Employment Div. v. Smith* decision's ostensible abandonment of the *Cantwell* "compelling governmental interest" standard centered on American Indian religious practitioners seeking exemption from a state statute of general import criminally prohibiting sacramental use of peyote. The facts of the present case, however, stand in stark contrast to *Employment Div. v. Smith*. The case presented here involves a Petitioner who scrupulously followed state statutory law in obtaining a valid judgment, who stands divested of the benefit of that judgment through state action by a Wisconsin Supreme Court decision that contains no rational explanation whatsoever of any governmental

interest furthered by its nullification of a key provision of the Wisconsin Legislature's duly enacted Wisconsin Marital Property Act affecting broad-based religious groups.

Roman Catholics are prohibited from divorcing by Canon Law.[3] However, recognition by the Roman Catholic Church has historically been given to the competency of civil law to effect a "permanent separation" in coordination with permission obtained from proper church authority.[4] Orthodox Rabbinic law allows divorce, but only with the permission of the husband.[5] The Quran allows Islamic spouses to bring a marriage to an end, but that is contingent upon consent by both spouses.[6] This results in either marital partner in the Moslem faith having veto power over obtaining a divorce. Accordingly, members of three of the largest religions in the world often turn to a civil "decree of legal separation" as a procedural vehicle within the legal system, which is open to them to effectuate emancipation from the civil bonds of marriage without violating basic tenets of their faith.

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[3] Canon 1056 provides: "The essential properties of marriage are its unity and indissolubility. . . ."

[4] "The Catholic Church on Separation and Civil Divorce," E.F. MacKenzie, *The Catholic Lawyer*, Vol. I, No. 1 (Jan. 1955).

[5] "Legal-Religious Status of the Married Woman," Tirzah Meacham (leBeit Yoreh), *Shalvi/Hyman Encyclopedia of Jewish Women*, December 31, 1999, Jewish Women's Archive.

[6] Quran 2:231: "*Divorce And Religion: What Different Faiths Say About Ending A Marriage*," Garratt Callahan, Family Law and Divorce, DivorceNet, published by NOLO.

This case represents how unfettered state judicial activism, if allowed to push beyond the outer limits of the Scalia opinion in *Employment Div. v. Smith*, can expand the reach of legislation which is philosophically favored, notwithstanding the attendant infringement of religion and liberty rights of identifiable segments of the population. This is accomplished by judicially blocking the legal exits from that legislation expressly provided in that legislation by the Legislature. In this case, the Wisconsin Supreme Court did not attempt to provide even a minimal exposition of its rationale for nullifying the clear and unambiguous provisions in the Wisconsin Marital Property Act which provide an alternative avenue to divorce within which to exit the Marital Property Act by dissolution of a marriage through a "decree of legal separation."

The majority opinion of the Wisconsin Supreme Court in this case myopically disentitles all persons, including those who, in the exercise of their religious beliefs against divorce, seek to exercise the right granted to them by the Wisconsin Legislature in the Wisconsin Marital Property Act to avoid the ramifications of the Wisconsin Marital Property Act by obtaining a judicial decree of legal separation. State power over domestic relations is not without constitutional limits. The Due Process Clause requires a showing of justification "*when the government intrudes on choices concerning family living arrangements*" in a manner which is contrary to deeply rooted traditions. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499, 503-04, 97 S.Ct. 1932, 1936, 1937-39, 52 L.Ed.2d 531 (1977) (plurality opinion). Cf. *Smith v. Organization of*

Foster Families, 431 U.S. 816, 842-47, 97 S.Ct. 2094, 2109-12, 53 L.Ed.2d 14 (1977).

The Wisconsin Supreme Court majority opinion in this case represents an unwarranted intrusion by the judiciary into the province of the Wisconsin Legislature by writing out of existence a statutory provision which preserves the fundamental religious liberty and property rights of persons domiciled in Wisconsin. This group of persons includes Roman Catholics, Orthodox Jews, and Muslims, among others. "*This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment*." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40, 94 S.Ct. 791, 796, 39 L.Ed.2d 52 (1974). These precedents continue to have vitality and application in tandem with *Employment Div. v. Smith*.

This case is governed by Chapter 766 of the Wisconsin Statutes, and centers on the legal effect of a judgment of legal separation on property and contract rights. In contrast, Chapter 767 of the Wisconsin Statutes governs how to obtain a judgment of divorce, legal separation or annulment.

To be sure, each state as a sovereign has a legitimate prerogative over, the marital status of persons domiciled within it. *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942). It is also true that federal courts as a general rule abstain from adjudicating domestic relations, divorce and custody

cases. *Ankenbrandt v. Richards*, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). However, this prerogative is subject to constitutional limitations. *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). It is important to note, therefore, that this is not a "domestic relations" case. It is first and foremost a contract case, where the legal effect of a state's specific legislatively conferred substantive right (i.e., judgment of dissolution of marital status) was stripped from the judgment holder 13 years after the fact of entry of that judgment by the majority vote of four members of the Wisconsin Supreme Court – without any public policy pronouncement or constitutional predicate. This was raw "state action," affecting the entire adult population of the State of Wisconsin in violation of "due process" of law. As decried by the Chief Justice of the Wisconsin Supreme Court in *Schwab v. Schwab*, 397 Wis.2d 820, 961 N.W.2d 56, 66 (2021), 2021 WI 67, another case recently decided in that Court during the same term as the instant case:

> As we cut away the flowery language and demystify the majority's argument, the truth reveals itself: the majority simply disagrees with the policy decision of the legislature. Such a power grab runs afoul of our role as judges to declare the law, not create it. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).
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> The majority sheds its judicial robes and takes its seat in the legislature.

Schwab v. Schwab, *supra* p. 66.

Where, as here, the highest court of a state overrides the duly enacted statutory law of that state without any expiation of a rational basis for its decision, it infringes First Amendment due process rights of its citizenry guaranteed them by the Fourteenth Amendment. The only recourse open to the aggrieved litigant(s) and other citizens similarly affected is review by the United States Supreme Court. There is no other forum.

CONCLUSION

The Wisconsin Legislature, by enacting Chapter 766 of the Wisconsin Statutes, adopted the community property system of property ownership effective January 1, 1986 governing all property rights, commercial obligations and civil liabilities of married persons domiciled in Wisconsin. The Wisconsin Marital Property Act is a discrete body of law. It is separate and distinct from Chapter 767 of the Wisconsin Statutes, which governs traditional domestic relations and is expressly limited to statutorily delineated "actions affecting the family."

This case presents solely as a contract case, brought against Ismet Islami by Kemper Independence Insurance Company in a declaratory judgment seeking to avoid the impact of the plain language of the Wisconsin Marital Property Act. The case sounds in contract and centers on the property rights of a judgment holder, Ismet Islami. Ismet Islami obtained

a "Judgment of Legal Separation" in 1998 from Ydbi Islami, based on religious beliefs whereby she was awarded sole titular ownership of the residence insured by Kemper. The judgment was officially recorded at the Waukesha County Register of Deeds Office at that time. She was the sole "named insured" on the contract with Kemper, and Kemper has stipulated that Ydbi had no insurable interest in the insured property. The court record is clear that Ismet obtained the Judgment of Legal Separation based on her religious conviction that under the Quran and in the eyes of God she could not divorce her husband without his permission. However, she could obtain a civil judgment of legal separation.

In 2013, when Ydbi burned her house down and was later convicted of arson, Kemper asserted that because Ismet had not divorced Ydbi, they were still "spouses," notwithstanding her 1998 Judgment of Legal Separation. The trial court, the Wisconsin Court of Appeals and the Supreme Court of Wisconsin have refused to enforce the effect of the Judgment of Legal Separation. The Wisconsin Supreme Court, by its decision in this case, has announced to all persons domiciled in Wisconsin that, despite the provisions of the Wisconsin Marital Property Act, in order to extract themselves from the myriad civil bonds of marriage, they can only divorce, even if doing so violates their most fundamental religious convictions.

The plain language of the Wisconsin Marital Property Act effecting "dissolution" of a marriage for contract and property purposes by a "decree of legal

separation" is eviscerated without any consideration of its impact on the entire citizenry of Wisconsin, including devout practitioners of the religious tenets of the Roman Catholic, Hebraic and Islamic faiths, among others. This is unbridled "state action," violative of the "free exercise" clause of the First Amendment and the requirements of due process of law.

Ismet Islami, therefore, respectfully requests this Court to issue a Writ of Certiorari to review and reverse the action of the Supreme Court of the State of Wisconsin in this matter.

Respectfully submitted,

JOSEPH F. OWENS
Counsel of Record
LAW OFFICES OF
JOSEPH F. OWENS, LLC
2665 S. Moorland Road, Suite 200
New Berlin, Wisconsin 53151
Phone: (262) 785-0320
aolaw@bizwi.rr.com

- and -

DEBRA K. RIEDEL
LAW OFFICES OF DEBRA K. RIEDEL
2665 S. Moorland Road, Suite 200
New Berlin, Wisconsin 53151

Counsel for Petitioner Ismet Islami