

**STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
Hoekstra, P.J., Wilder and Zahra, J.J.**

NATIONAL PRIDE AT WORK, INC., a non-profit
organization on behalf of its Michigan Members; et
al.,

Plaintiffs-Appellees,

Supreme Court No. 133554

Court of Appeal No. 265870

Case No. 05-368-CZ

Hon. Joyce Draganchuk

v.

JENNIFER GRANHOLM, in her official capacity, as
Governor of the STATE OF MICHIGAN, CITY OF
KALAMAZOO, a municipal corporation,

Defendants-Appellees,

and

MICHAEL A. COX, in his official capacity, as
Attorney General for the STATE OF MICHIGAN,

Intervening Defendant-Appellant.

BRIEF OF AMICUS CURIAE AMERICAN FAMILY ASSOCIATION OF MICHIGAN

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INTEREST OF AMICUS

Amicus curiae American Family Association of Michigan is the Michigan state affiliate of the American Family Association. AFA-Michigan has been Michigan's leading voice for the preservation of traditional values and institutions such as marriage between one man and one woman. Michigan's Marriage Protection Amendment was first proposed by AFA-Michigan in June 2003 in response to neighboring Ontario, Canada's legalization of so-called homosexual "marriage." AFA-Michigan President Gary Glenn was one of two co-authors of the final language of the Amendment approved by voters in the November 2004 election. As the initial proponent, a co-author, and a leading advocate of the Amendment, AFA-Michigan submits this brief to assist the Court in confirming the intent of the authors of the Amendment and as understood by the citizens who approved it.

SUMMARY OF ARGUMENT

Michigan's Marriage Protection Amendment plainly prohibits the State and its political subdivisions, including in their capacity as public employers, from recognizing a same-sex or other non-marital relationship as being equal or similar to marriage "for any purpose." Consequently, a public employer's provision of taxpayer-financed benefits to a discrete class of employees, expressly on the basis of their intimate same-sex relationship, constitutes government recognition of that relationship and is prohibited by the Amendment. Because *every* action of government is an official public act, it is simply not possible for a government employer to offer benefits expressly on the basis of a same-sex relationship and its alleged similarity to marriage *without* first "recognizing" that relationship.

The court of appeals correctly ruled that “recognizing a domestic partnership agreement for the purpose of providing benefits . . . run[s] directly afoul of the plain language of the amendment” and is unambiguous. Appellants and amici argue, however, that the language of the Amendment is ambiguous, consideration of extrinsic evidence of the intent of the voters is therefore appropriate, and that the voters understood the reach of the Amendment as limited to defining what marriage is, not the proscribe the provision of employment benefits.

This amicus brief will narrowly focus on the interpretation of the language of the Amendment in light of the understanding of the citizens who adopted it, and demonstrate that *both* the plain language of the Amendment *and the debate surrounding its passage* support the conclusion that the people of the State of Michigan intended the Amendment to prohibit the State and its political subdivisions from formally recognizing same-sex relationships as being equal or similar to marriage “for any purpose,” including the conferral of health benefits by public employers on public employees involved in such relationships. In fact, counsel for the Appellants and their amici themselves plainly understood the Amendment as prohibiting conferral of employment benefits on the basis of recognition of same-sex relationships. Moreover, after the court of appeals’ decision in this case, Plaintiffs-Appellants and their amici not only conceded the reach of the Amendment, but fashioned new benefits policies that purport to continue to confer benefits on same-sex couples in a manner consistent with the Amendment. Therefore, the decision of the court of appeals should be affirmed even if extrinsic evidence is considered.

ARGUMENT

The Michigan Marriage Protection Amendment states in full:

To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Const 1963, art 1, § 25.

The Amendment was approved by the voters of Michigan by a 59-41% majority after an intense and often heated public campaign by both proponents and opponents. Amicus AFA-Michigan was a leader in both the preparation of the language of the Amendment and in the battle to secure its passage. During the course of the sometimes heated debate, both the supporters and the opponents of the Amendment – prominently including AFA-Michigan and Plaintiffs-Appellants’ counsel, the American Civil Liberties Union of Michigan -- publicly stated that it was *intended* to and *would* prohibit government recognition of domestic partnerships and other same-sex relationships, including for the purpose of providing taxpayer-funded employee benefits to public employees involved in such relationships. In fact, during the course of the campaign, the issue of government employers providing taxpayer-financed benefits on such basis was at the forefront of the debate.

I. Rules of Construction.

The court of appeals correctly noted that where “the constitutional language is clear, reliance on extrinsic evidence is inappropriate.” App. 88a (citing *American Axle & Mfg., Inc. v. City of Hamtramck*, 461 Mich. 352, 362-363, 604 N.W.2d 330, 335 (Mich. 2000)). Only if the meaning is unclear or subject to question should surrounding circumstances be considered. *Traverse City Sch.*

Dist. v. Attorney General, 384 Mich. 390, 405; 185 N.W.2d 9 (Mich. 1971). The court rightly found the language of the Amendment clear and unambiguous, and therefore appropriately declined to consider any extrinsic evidence of the intent of the voters. App. 88a.

Plaintiffs-Appellants, however, argue strenuously that the circumstances surrounding the adoption of the Amendment and the alleged understanding of the people voting on the Amendment should be considered. *See, e.g.*, Plaintiffs-Appellants' Brief at 18. AFA-Michigan concurs in the court of appeals' holding that the intent to prohibit government recognition of same-sex couples "for any purpose," including for the purpose of conferring health benefits, is clear in the plain language of the Amendment. Nonetheless, in order to assist In the event the Court in the event it determines that resort to the circumstances surrounding the adoption of the Amendment is appropriate here, AFA-Michigan offers the following to demonstrate that the voters understood the Amendment to prohibit provision of health benefits for same-sex couples by government employers.

II. The Plain Language of the Amendment and the Circumstances Surrounding its Adoption Indicate an Intent by the People to Prohibit Government from Recognizing Same-Sex Relationships as Similar to Marriage for Any Purpose, Including Conferral of Benefits on Government Employees Involved in Such Relationships.

The plain language of the Amendment prohibits government employers from recognizing same-sex relationships as being equal or "similar" to marriage "for any purpose," including the provision of taxpayer-financed employee benefits. Because employers recognize the validity of marriages between their employees and the employees' spouses, they routinely provide health benefits to such spouses. Similarly, the public employers here provided domestic partnership benefits on the basis of their recognition of domestic partnership agreements as being equal or similar to marriage. That is, the employers provided spousal-like benefits to domestic partners as

a direct result of their recognition of the domestic partnerships as the same or similar to marriage. Such recognition of a domestic partnership as a union similar to marriage for purposes of determining eligibility for health benefits is prohibited under the plain language of the Amendment's final clause. *Recognition* of the "similar union" is a prerequisite to conferral of the benefits.

Should this Court find any ambiguity or uncertainty in the plain language, then in the alternative the circumstances surrounding adoption of the Amendment strongly support the conclusion that the citizens of Michigan were aware of the public employee benefits issue prior to adoption of the Amendment, and by approving the Amendment signaled their intent to prohibit government recognition of domestic partnerships or other same-sex relationships "for any purpose," specifically including the conferral of health benefits on same-sex couples by public employers. In fact, high-profile public spokespersons on *both sides* of the election debate publicly argued that the Amendment would have that very effect, and was intended to. For example, *Detroit Free Press* political columnist Dawson Bell, after interviewing AFA-Michigan President Gary Glenn and others, published the following report in question-and-answer format in the paper's September 13, 2004 edition:

Q: What about employee benefits accorded to domestic partners and their dependents by some municipalities and public universities?

A: *Proponents and opponents* of the amendment say they would be *prohibited* to the extent they mimic benefits for married employees.

See http://www.freep.com/news/mich/gaymarriage13e_20040913.htm (emphasis added)

Attorney General Cox, opining on "the intent of the people of the State of Michigan who ratified" Prop 2, wrote:

Looking at the circumstances surrounding adoption of Proposal 2, therefore, *the issue of domestic partner benefits based on an (sic) union similar to marriage was at the*

forefront of the public debate as voters prepared to go to the polls, regardless of whether there was agreement regarding the effect the Proposal might have on domestic partner benefits. One thing that would certainly have been evident to voters was that the benefits provided based on the recognition of “similar union” were at issue and might be eliminated if the measure passed.

See OAG, 2005, N0. 7171 Formal Opinion of Robert H. Cinabro, City Attorney for Kalamazoo, dated April 12, 2005, at 2-3 (quoting AG’s Formal Opinion No. 7171). General Cox’s conclusion is well supported by the pre-election statements of both the supporters and the opponents of the Amendment.

- A. AFA-Michigan argued clearly and consistently that the proposal would, and was intended to, prohibit the State and its political subdivisions -- in their capacity as public employers -- from recognizing same-sex relationships as being equal or similar to marriage “for any purpose,” expressly including for the purpose of granting taxpayer-financed benefits to government employees involved in such relationships.**

AFA-Michigan repeatedly pointed out that the Amendment was intended to prohibit the provision of taxpayer-financed benefits to government employees on the basis of their involvement in same-sex relationships. As the non-partisan Citizens Research Council of Michigan reported in its September 2004 *CRC Memorandum*:

According to the American Family Association of Michigan, voter approval of the (Amendment) would *ensure that taxpayers would not be liable for governmentally funded benefits to same-sex couples* already accorded to heterosexual marriages, including social security death benefits.

See <http://crcmich.org/PUBLICAT/2000s/2004/memo1076.pdf> (emphasis added).

AFA-Michigan President Gary Glenn said in a news release dated September 28, 2004, well before the November 2, 2004 vote, that the “Amendment will not stop any employer in the future from offering benefits to anyone the employer chooses, *so long as it's not on the basis of* formally

recognizing homosexual relationships as equal or similar to marriage.”¹

Glenn noted in the release that while the Amendment *does* prohibit a government employer from granting benefits to employees *on the basis of recognizing same-sex relationships as being equal or similar to marriage*, the Amendment *would not* block government employees involved in such relationships from receiving benefits offered as part of a more *broadly-based* plan available to *all* employees – that is, a benefits plan *not* based in any way on recognizing same-sex relationships.

”A government employer could adopt an ‘anything goes’ policy,” Glenn explained in the release, “allowing employees to add *anyone they wish* to their health care coverage -- a sick relative, a neighbor, *or even their homosexual partner* -- so long as the offer is available to all employees and not only to those involved in a homosexual relationship.” (Emphasis added.)

Glenn and another prominent supporter of the Amendment repeated the point in the October 20, 2004 issue of *Metro Times*, a weekly news magazine published in Detroit:

1

Plaintiffs-Appellants argue disingenuously that the public employers here did not recognize the domestic partnerships “as a marriage,” but only as a “relationship.” *See, e.g.*, Plaintiffs-Appellants’ Brief at 25-26. In fact, however, the public employers made no pretense of the link between marriage and domestic partnerships. *See, e.g.*, Michigan State University’s description of the eligibility requirements for benefits, <http://www.hr.msu.edu/HRsite/Documents/Staff/Policies/DomesticPartner> (“Domestic partners and their eligible dependents will be eligible for benefits listed in the Same sex Domestic Partner Benefit Summary in the same manner as for an employee's/retiree's spouse and other dependents.”) (emphasis added). *See also* University of Michigan Policy Statement, <http://www.umich.edu/~benefits/forms/ssdp.pdf> (asserting that “[f]or the purpose of this policy statement, **any benefits, privileges, rights and responsibilities that accrue to spouses of University faculty and staff by virtue of their status as spouses will accrue to committed same-sex partners of University faculty and staff by virtue of their status as same-sex partners.**”) (emphasis added).

Conservative Oakland County Commissioner Tom McMillin, who sponsored a successful resolution supporting the proposed amendment, is satisfied with the language, and claims Prop 2 opponents overstate the amendment's potential effect on employers' ability to provide benefits. "(An employer) can say, 'Anybody who has benefits as of 2004 can still have them,'" McMillin says. "*The basis just cannot be that it's marriage or something similar to marriage.*"

This position is echoed by Gary Glenn, president of the American Family Association of Michigan, who says, "Under that policy (cited above by McMillin), every single person currently receiving any kind of benefit would continue to do so. *But it would not be on the basis of a government employer singling out homosexual relationships for the special treatment of being recognized as equal or similar to marriage.*"

See <http://www.metrotimes.com/editorial/story.asp?id=6866> (emphasis added).

As Glenn explained in scores of public appearances, debates, and media interviews in 2004, the issue before the Court is not one of government *benefits*, but government *recognition*. That government employers may continue to offer employee benefits that *include*, but are not *limited to*, employees who are involved in same-sex relationships – that are based on *broader, more inclusive* criteria, not on singling out employees involved in same-sex relationships *for special treatment and recognition* as if they are equal or similar to *marriage* – has never been seriously questioned.² Once again, the court of appeals correctly noted this distinction. See App. 97a ("The amendment as written does not preclude the extension of employment benefits to unmarried partners on a basis unrelated to recognition of their agreed-upon relationship.").

2

This is the point Eric Doster was attempting to make before the Board of Canvassers, albeit not very clearly, and on which Plaintiffs-Appellants and their amici have seized and distorted. See Plaintiffs-Appellants' Brief at 28-29 n.22; see also Brief of Amici Regents of the University of Michigan, et al. at 21.

- B. The ACLU of Michigan, a leading public *opponent* of the Amendment, argued that it would prohibit government recognition of same-sex couples for the purpose of providing taxpayer-financed benefits to government employees involved in such relationships.**

The American Civil Liberties Union of Michigan took an active role in opposing the Amendment.

ACLU Central Michigan chair, John Scalise, in an op-ed piece dated Oct. 11, 2004, wrote:

Proposal 2, an initiative that will be on the November ballot, is a constitutional amendment that would prohibit state recognition of all relationships other than a marriage between a man and a woman.

The advocates of this amendment would like you to believe that it is only about banning gay marriages, an issue that appears to have popular support. However, Michigan already has two laws that prohibit same sex marriage, making an amendment to the Constitution redundant and unnecessary. *The real goal of this measure is to ban not only gay marriage, but also civil unions for both straight and gay couples, and to prohibit the granting of domestic partnership benefits to non-married couples.*

See <http://www.aclumich.org/modules.php?name=ExtraNews&file=article&sid=26> (emphasis added).

Similarly, the ACLU prepared flyers in opposition to the Amendment asking rhetorically,

3.If the first sentence of the proposal talks about limiting marriage to one man and one woman, *why is there additional language that says “or similar union for any purpose?”*

4.What does the sentence “or similar union for any purpose” mean? *Would that prohibit civil unions, domestic partnerships, domestic partner benefits?*

6.*Wouldn't this proposal prevent the state and local governments from recognizing domestic partnerships or providing domestic partner benefits?*

7.*Wouldn't this proposal prevent public school districts and state universities and colleges from recognizing domestic partnerships or providing domestic partner*

benefits?

10 Wouldn't this proposal take away the rights of cities, municipalities and local governments to choose what kind of benefits they would like to offer? What about home rule and local control?³

See <http://www.aclumich.org/proposal2/flyer.pdf> (emphasis added); see also

<http://www.aclumich.org/proposal2/helpfulquestions.pdf> (highlighting language "or similar union for any purpose" and asserting that if passed, the Amendment could "ban domestic partnerships for same-sex and heterosexual unmarried couples" and "prohibit state and local governments from providing domestic partner benefits to unmarried couples").

The ACLU, then, a primary opponent of the Amendment *and counsel for Plaintiffs-Appellants*, clearly understood that the Amendment was intended to prohibit conferral of employment benefits by public employers on same-sex couples premised on recognition of their same-sex relationships.

C. Homosexual activist newspapers that *opposed* the Amendment argued that it would ban taxpayer-financed benefits for government employees involved in same-sex relationships.

On February 27, 2004, months before the issue went to the ballot box, *Between the Lines* published an article entitled, "THE MICHIGAN 'MARRIAGE AMENDMENT' - What It Means for the LGBT Community in Non-Legalese." The article stated the following as to the effect of the Amendment:

The amendment would prohibit Michigan from having civil unions. It would prevent local governments from providing domestic partner benefits. Cities like Ann Arbor and Kalamazoo, which currently provide such benefits to their employees could no

³ Numbering sequence reflects the specific quotes from the ACLU brochure.

longer do so. The amendment would prevent school districts from offering domestic partner benefits to its employees (both Ann Arbor and Birmingham school districts currently provide such benefits). State colleges and universities would also be prohibited from recognizing domestic partners of both employees and students. Recognition of domestic partners by employers frequently includes health care coverage. Children who live with a gay or lesbian family member will be at risk for losing health care coverage.

See <http://www.pridesource.com/article.shtml?article=6642> (emphasis added).

D. Leading homosexual activists who opposed the Amendment argued that it would ban taxpayer-financed benefits for government employees involved in same-sex relationships.

In the same way, the Triangle Foundation, which describes itself as “Michigan’s leading organization serving the gay, lesbian, bisexual, transgender and allied communities,” recognized the effect the Amendment would have on domestic partnership benefits offered by government employers. Sean Kosofsky, Director of Policy for the Foundation, led a group of activists opposed to the Amendment in recruiting students at Michigan State University and the University of Michigan to campaign with them. The group included the Coalition for a Fair Michigan, Michigan Equality, the Ypsilanti Campaign for Equality and the Stonewall Democrats in addition to the Triangle Foundation.

Kosofsky was quoted in the *State News* of East Lansing on Sept. 13, 2004, stating that “if the amendment were passed, it would have unintended consequences including *taking away health insurance and domestic partner benefits* for heterosexual unmarried couples and gay couples.” See www.statenews.com/index.php/article/2004/09/groups_aim_to_unite_students.

So not only did the activists recruiting college students to oppose the Amendment understand its reach, but so, too, did the higher education institutions now complaining that the Amendment was not intended to do what they warned it would do. The court of appeals should be affirmed.

- E. Coalition for a Fair Michigan, the registered campaign committee that opposed the Amendment during the 2004 election, expressly advised voters that the Amendment would ban taxpayer-financed benefits for government employees involved in same-sex relationships.**

The Coalition for a Fair Michigan (CFM) consisted of “a diverse group of leaders and organizations around the state” that came together solely to oppose the Amendment, and included thirteen (13) of Michigan’s fifteen (15) public higher education institutions. *See* http://web.archive.org/web/20040920142248/www.coalitionforafairmichigan.org/6_24.htm. CFM repeatedly acknowledged that the Amendment would ban taxpayer-financed benefits for government employees involved in same-sex relationships. In fact, after a public forum in June, 2004 on which both CFM representatives and Gary Glenn of AFA-Michigan were panelists, CFM issued a press release proudly proclaiming their agreement with Mr. Glenn as to the effect of the Amendment. *Id.*

The press release, dated June 24, 2004, noted that “both sides agreed that the amendment would go much further than defining marriage by also eliminating any government-sanctioned domestic partnership benefits.” *Id.* There was no misunderstanding of the effect of the Amendment, no confusion, and no attempt by either side to represent it as accomplishing anything less. In fact, CFM went out of its way to thank Mr. Glenn for being “upfront” about it:

“I’m glad we could find common ground with the AFA, and I want to thank Gary Glenn for his willingness to be upfront on this point,” said Wendy Howell, Campaign Manager for CFM. “Since we all agree that this amendment is about much more than marriage, it’s my hope that we can broaden the discussion to include all of the real and concrete impacts it would have on Michigan families rather than just focusing on its most divisive aspect.”

Id.

CFM’s assertion that the Amendment prohibits same-sex benefits for government employees, however, is also reported by the non-partisan Citizens Research Council of Michigan in its

September 2004 CRC Memorandum:

The Coalition for a Fair Michigan also asserts that passage *would eliminate existing domestic partner benefits that are provided by state universities and some other government employers*, which give health care and other benefits to the unmarried partners of employees. ...The Coalition, as well as other opponents of the proposal, suggest that this clause could be interpreted as a basis for *invalidating same-sex domestic benefits offered by public employers*, including the University of Michigan and Wayne State University, the Ann Arbor, Kalamazoo, and Port Huron school districts, and the City of Kalamazoo.

See <http://crcmich.org/PUBLICAT/2000s/2004/memo1076.pdf> (emphasis added).

The weight of the evidence, then, makes clear that leading public spokespersons on *both sides* of the debate *agreed* in their pre-election public statements that the Amendment would prohibit public employee benefits offered on the basis of government recognition of same-sex relationships as being equal or similar to marriage. In light of such evidence, the contention of Plaintiffs-Appellants that voters were unaware of the intended effects of the Amendment is disingenuous at best, and should not be countenanced.

III. Even After the Court of Appeals Ruling, Same-Sex Partners of Public Employees can Continue to Receive Health Benefits.

After the decision of the court of appeals barring public employers from conferring benefits premised on recognition of same-sex domestic partnerships, counsel for Plaintiffs-Appellants admitted that the same partners can continue to receive the same benefits from the same employers – only not on the same narrow premise of special rights for same-sex partners.

According to Pride Source, a homosexual activist news magazine, ACLU-Michigan chief counsel Jay Kaplan stated that “even under the Appeals Court ruling, benefits *can be offered*, but

have to be done in a way which does not recognize same-sex partners or relationships.” See <http://www.pridesource.com/article.shtml?article=25497>. Similarly the Lansing City Pulse reported that Mr. Kaplan wrote in an e-mail that “[t]he Michigan Court of Appeals decision never said that public employers could not provide health care coverage to domestic partners of employees.” He said that employers can provide health insurance coverage for domestic partners as long as they do not specifically recognize the domestic partner relationship -- by filing domestic partner benefit forms, for example -- when determining criteria for insurance eligibility.” See http://www.lansingcitypulse.com/index.php?option=com_content&task=view&id=1133&Itemid=2. Mr. Kaplan explained that employers could continue to provide health insurance coverage for domestic partners as long as they did not specifically recognize the domestic partner relationship, just as Mr. Glenn and the proponents of the Amendment had said all along.

The Kalamazoo Alliance for Equality, another homosexual activist group, echoed Mr. Kaplan’s admission: “The Michigan Court of Appeals did not say that health insurance coverage for domestic partners is illegal. The court said that public employers cannot use criteria that *recognizes* the domestic partner relationship.” See <http://www.tri.org/docs/Kzoodprallies.doc>. Also acknowledging the truth of this observation was Kalamazoo City Manager Kenneth Collard, who publicly announced that the City would enact an “expanded unmarried-partners benefit plan” in order to continue coverage for the city’s four employees who would have lost coverage for their homosexual partners as a result of the court of appeals ruling. See <http://www.mlive.com/news/kzgazette/index.ssf?/base/news-24/118226653935660.xml&coll=7>. According to news reports, Kalamazoo was modeling its liberal benefits plan after a Michigan State University “same-sex benefits compromise.” *Id.*

Finally, the University of Michigan also enacted a new plan whereby each employee is allowed to select an “other qualified adult” for health care benefits based upon seven criteria that include a shared residence and financial history. *See*

<http://www.mlive.com/news/annarbornews/index.ssf?/base/news-23/1182264074252460.xml&coll=2>.

These public admissions by counsel for Plaintiffs-Appellants and their amici call into question not only their claims of alleged dire consequences should the court of appeals decision be upheld, but even whether there is any legitimate remedy they seek in this action. Given that Plaintiffs are already entitled to obtain benefits on an equal basis with heterosexuals, one cannot help but question their motives for such zealous prosecution of this action.

CONCLUSION

Under both a plain language analysis and a contextual analysis, the Michigan Marriage Protection Amendment was intended to and did prohibit government recognition of same-sex relationships as being equal or similar to marriage “for any purpose,” including the extension of taxpayer-funded health or other benefits by public employers to public employees involved in such relationships. The Amendment’s prohibition against recognition of any “similar union for any purpose” plainly reaches domestic partnership benefits. Moreover, the circumstances surrounding passage of the Amendment similarly support the conclusion that the voters intended to prohibit the government from recognizing same-sex relationships as equal or similar to marriage “for any purpose,” including the offering of taxpayer-financed health or other benefits to government employees under the guise of domestic partnership or other same-sex agreements.

and its ultimate effect. While it does prohibit conferral of public employment benefits upon same-sex partners premised upon specific recognition of their agreement similar to marriage, it does not affect conferral of benefits on some other legitimate basis. Accordingly, the decision of the court of appeals should be affirmed.

Respectfully submitted,



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