STATE OF MICHIGAN
in the
MICHIGAN SUPREME COURT

Teri Rohde, Brendon Quilter, Mary Quilter, Walter Mackey, Barbara Mackey, Gary Gibson, Ellen Gibson, Ted Jungkuntz, Loise Jungkuntz, David Sponseller, Mary Sponseller, Mike Gladieux, Martha Gladieux, Helen Rysse, and Terry Trombley, John and Therese Williams,	)	Supreme Court No. 128768
	)	Court of Appeals No. 253565 Washtenaw County Circuit Court No. 03-1046-CZ
Plaintiffs, Appellants	)	
v.	)	
Ann Arbor Public Schools a/k/a The Public Schools of the City of Ann Arbor, Board of Education, Ann Arbor Public Schools, Karen Cross, in her official capacity as President of the Board of Education for Ann Arbor Public Schools; and Glenn Nelson, in his official capacity as Treasurer of the Board of Education for Ann Arbor Public Schools.	)	Reply To AAEA's Opposition To Plaintiffs/Appellants' Application For Leave To Appeal
Defendants, Appellees	)	
and	)	
Ann Arbor Education Association, MEA/NEA	)	
Intervening Defendant, Appellee	)	

128768
reply

FILED
JUL 11 2005
CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Patrick T. Gillen (P-47456)
Thomas More Law Center
Attorneys for Plaintiffs
24 Frank Lloyd Wright Dr.
P.O. Box 393
Ann Arbor, MI 48106
Ph: 734 827-2001
Fax: 734 930-7160

Seth M. Lloyd (P16742)
James M. Cameron, Jr. (P29240)
Laura Sagolla (P63951)
DYKEMA GOSSETT PLLC
Attorneys for Defendants
2723 South State Street
Suite 400
Ann Arbor, MI 48104
(734) 214-7660

Arthur R. Przbylowicz (P26492)
Theresa J. Alderman (P46305)
Attorneys for Intevening Defendant
Michigan Education Association
1216 Kendale Blvd., P.O. Box 2573
East Lansing, MI 48826-2573
Ph: (517) 332-6551

**PLAINTIFFS/APPELLANTS' REPLY TO
APPELLEE, ANN ARBOR EDUCATION ASSOCIATION'S RESPONSE IN
OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL
TO THE MICHIGAN SUPREME COURT PURSUANT TO MCR 7.302(B)(1)-(3).**

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. Rohde's Application Gives Good Grounds For Review 1

II. Rohde Has Standing Under The Plain Language Of MCL 129.61 4

III. AAPS' Same-Sex Domestic Partnership Benefits Policy Is Unlawful 6

CONCLUSION 10

TABLE OF AUTHORITIES

Advisory Opinion On Constitutionality of 1978 PA 426,
403 Mich. 631 (1978) 8

Baker v. Nelson,
291 Minn. 310 (1971) 8

Blessing v. Zeffero,
149 Mich. App. 558 (1986) 10

Bond v. Public Schools of Ann Arbor,
383 Mich. 693 (1970) 6

Carman v. Hare,
348 Mich. 443 (1971) 6

City of Hazel Park v. Potter,
169 Mich. App. 714 (1988) 9

Citizens For Protection of Marriage v. Board of State Canvassers,
263 Mich. App. 487 (2004) 7

Feaster v. Portage Public Schools,
451 Mich. 351 (1996) 9

Hadfield v. Oakland County Drain Comm.,
218 Mich. App. 351 (1996) 2

Hicks v. Miranda,
422 U.S. 332 (1975) 8

In re: Lapeer County Clerk,
469 Mich. 146 (2003) 7

Johnson v. White,
430 Mich 47 (1988) 2

K&K Woodworking, Inc. V. Mich. Emp. Sec. Com'n,
206 Mich. App. 515 (1994) 10

Koski v. Vohs,
426 Mich. 424 (1986) 2

Lawrence v. Texas,
539 U.S. 558 (2003) 8

Mayor of Detroit v. Arms Technology, Inc.,
258 Mich. App. 48 (2003) 2

McDonald v. Schnipke,
380 Mich. 14 (1968) 7

Mino v. Clio School Dist.,
255 Mich. App. 60 (2003) 9

Nat. Wildlife Fed. V. Cleveland Cliffs,
471 Mich. 608 (2004) 6

People v. Reed,
449 Mich. 375 (1995) 2

Romer v. Evans
517 U.S. 610 (1996) 9

Rowley v. Garvin,
221 Mich. App. 699 (1997) 9

Silver Creek Drain District v. Extrusions Division, Inc.,
468 Mich. 367 (2003) 6

Snyder v. Charlotte Public School Dist.,
421 Mich. 517 (1985) 9

Wilcox v. Moore,
354 Mich. 499 (1958) 10

Case Law

MCL 129.61 4

MCR 1.105 3

MCR 7.302(B)(1)-(3) 10

MCR 7.316 1

Article I, §25 . . . . . 2, 6, 8

INTRODUCTION

This Court should reject the ill-founded effort to avoid the merits of Rohde's Application For Leave To Appeal advanced by Appellee, the Ann Arbor Education Association's (AAEA), because Rohde presents important issues of state law that merit immediate consideration. State law plainly authorizes Rohde's suit to challenge AAPS' unlawful use of public funds to purchase same-sex "domestic partner" benefits, the Court of Appeals has placed insupportable limitations on the statute (impeding the statutory purpose), and the result in this case is to undermine the constitution and laws of this state which plainly prevent the recognition of same sex "domestic partnerships" for purpose of providing benefits purchased with public funds. AAEA's efforts to deny the importance of the questions Rohde presents turn on hypertechnical arguments that find no basis in the statute or common sense, and serve no higher goal than pointless procedural delay. For these reasons, explained further below, Rohde respectfully requests that this Supreme Court grant her Application For Leave To Appeal.

I. Rhode's Application Gives Good Grounds For Review.

The AAEA's effort to avoid review must be rejected because they are no more persuasive (or less tendentious) than those of AAPS. Reduced to its essence, AAEA claims that this Court cannot grant review because the lower courts chose not to address the merits of Rohde's claims. Yet it concedes (as it must), that review is at this Court's discretion, and this Court's rules make explicit its inherent authority to review and provide relief to the full extent of its power as the Supreme Court of this state. See MCR 7.316. Under these circumstances, AAEA's claim that the only issues "appropriate for review" are those decided by lower courts is wholly untenable. Indeed, this Court exercises its plenary authority to resolve disputes promptly where, as here, the issue is one of law

and the facts necessary for its resolution have been presented. *See e.g. People v. Reed*, 449 Mich. 375 (1995)(deciding ineffective assistance of counsel argument without remand to lower courts); *Koski v. Vohs*, 426 Mich. 424 (1986)(Court ruling on question of probable cause because question was one of law). It must be this way for AAPS' view of the matter, if taken seriously, would make lower courts the master of this Supreme Court's jurisdiction.

AAEA's related effort to avoid the application of Article I, §25 by asserting that Rohde's reference to the amendment presents a new "claim" is meritless. As Rhode demonstrated to the Court of Appeals, her "claim" is the same now as it was the day she filed suit, i.e., that AAPS' policy defining, recognizing, and subsidizing same-sex "domestic partnership" benefits is contrary to state law. Rohde raised §25 in the Court of Appeals because it took effect while this case was pending and, as such, became supplemental (and controlling) authority–which is why the Court of Appeals denied the AAEA's motion to strike the supplemental authority, a decision which is law of the case given AAEA's failure to seek review. *Cf. Johnson v. White*, 430 Mich 47 (1988)(law of the case doctrine barred Court of Appeals from revisiting issues decided in initial decision on remand from Supreme Court where Supreme Court did not grant leave on those issues); *see also Hadfield v. Oakland County Drain Comm.*, 218 Mich. App. 351, 356 (1996)("If a party disagrees with this Court's ruling on appeal it should seek rehearing or leave to appeal to the Supreme Court....") . Furthermore, it is fundamental that courts have a duty to apply the law as it exists at the time a decision is rendered. *See e.g. Mayor of Detroit*, 258 Mich Ap. 48, 65-66 (2003) (Court obliged to apply statutory amendments that became effective while case was pending on appeal).

Thus AAEA's efforts to gainsay the grounds for Rohde's Application reduce to nothing more than self-serving assertions. AAEA can assert that the circumstances under which taxpayers can

prevent unlawful expenditures is not a question of public interest, or that the Court of Appeals' interpretation of MCL 129.61 effectively invalidates the statute as applied, but Rohde sees these issues as vitally important to the public interest. AAEA can assert that Rohde's questions concerning AAPS' decision to define, recognize, and subsidize same-sex "domestic partnerships" does not provide good grounds for review but in support of that self-serving assertions, it offers only the groundless argument that question-dodging in the lower courts can defeat this Court's power to conduct plenary review, which is plainly wrong for the reasons stated above.

II. Rhode Has Standing Under The Plain Language Of MCL 129.61.

The arguments AAEA would use to rob Rohde of standing contradict the statutory language and defy common sense and logic. AAEA's effort to avoid Rohde's demand on the theory that Rohde did not use "magic" words employs a truly slavish literalism that produces an absurd result. AAEA at 12. Missing from AAEA's response is the plain meaning of demand set forth in the Court of Appeals opinion, i.e., to ask for with proper authority. See Opn at 4. The reason is simple, Rohde's request is just such a demand, at least if the statute is interpreted according to its plain meaning and reasonably in light of its purpose.

In another effort to avoid review the AAEA, like AAPS, urges that the treasurer is the <u>only</u> officer of the school board who is the appropriate recipient of the statutory demand. AAEA at 13-14. But neither AAEA nor AAPS explain how the statutory language supports this arbitrary limitation; they cannot precisely because the statute requires that the demand be made on the "public officer, <u>board</u> or commission, whose duty it may be to maintain a suit..." See MCL 129.61. Thus Rohde's notice is authorized by the plain meaning of the statute and, by any reasonable interpretation, notice on members of the board engaged in the unlawful expenditure must satisfy the statute because all

of the board members have a duty to halt an illegal expenditure. By the same token, notice to those board members satisfies the statute.[1]

In sum, there is no basis in the statutory language, logic, or common sense for the arbitrary limiting gloss which the Court of Appeals placed on the statute, and no basis for the AAEA's effort to arbitrarily limit the members of the school board to which the statutory demand can be directed. The utter absence of any basis for the limiting gloss offered by the AAEA in the statutory language or common sense reveals that its basis is AAEA's effort to avoid review. And, for like reasons, the Court of Appeals has already rejected the AAEA's argument that Rhode's action "on behalf of the treasurer" is not authorized by MCL 169.21., i.e., the argument finds no support in the language of the statute or commonsense. See Opn at 1-3.

The AEA's effort to deny notice of the demand based upon changing membership of the board has no support in the statute, defies common sense, and lacks candor. AAEA at 14-15. The implicit notion that the statute requires a citizen to repeatedly serve notice to a public body based upon changes in composition is utterly ridiculous and would, if adopted, constitute an unreasonable interpretation of the statute. Similarly, the statute provides no basis for AAEA's effort to deny Rohde's notice on the grounds that she gave the board time to drop the unlawful expenditure when collective bargaining agreements were renegotiated for, as the AAEA well knows, it obtains same-sex domestic partnership benefits in collective bargaining agreements, see AEA 7-8, and Rohde took for granted that by any reasonable interpretation of the statute, she would have to allow time for

[1]In fact Rohde communicated her demand to anyone who might have the duty to halt the unlawful expenditure. As she made clear in here motion for reconsideration, Rohde sent her demand to the Governor, Legal Counsel, Attorney General, Superintendent (and Assistant Superintendant) of Public Education for the State of Michigan, the Washtenaw County Prosecutor, ten members of the Ann Arbor School Board, and AAPS' Superintendant. See e.g. Exhibit A (Rohde's demand letters attached to motion for reconsideration).

renegotiation of contracts (not breach of contract). It is odd indeed, that the AAEA would have the statute require less notice, not more, before public bodies are sued.

Truth be told, AAEA's effort to defeat Rohde's request now–as if it would have proceeded differently–is disingenuous in the extreme. The truth of the matter is that the AAEA "moved to intervene...to protect the interests of its members, both present and future, as well as the integrity of the existing collective bargaining agreement." AAEA at 8. And AAPS' failure to take action in response to Rohde's request–and the position it has taken on the expenditure in connection with this litigation–indicates that it intends to follow its same-sex domestic partnership policy (and provide domestic partnership benefits) unless restrained from doing so. It is clear that this case is not moot, which simply shows that the notice, three days before the suit, three months, or three years, served the statutory purpose–to give the public body an opportunity to halt the unlawful expenditure. Again, it is odd that the AAEA (and AAPS) would have the statute require less notice, not more, before public bodies are sued.

III. AAPS' Same-Sex Domestic Partnership Benefits Policy Is Unlawful.

The AAEA's effort to exempt AAPS' same-sex "domestic partnership" benefits policy from state law governing domestic relations based on PERA is preposterous. As an initial matter it is clear that these claims fail as a matter of law to the extent the AAEA would use PERA to trump Article I, §25 because it is fundamental that no statute can authorize what the constitution forbids, in this case the recognition of same-sex marriages under the rubric "domestic partnership."

But the notion that AAPS could circumvent state law by means of contract is just as preposterous because it proves too much. If preemption principles do not restrain the exercise of AAPS' general powers (including its power to contract) then AAPS could recognize same-sex

marriages by contract without even the need for the affidavit of (same-sex) "domestic partnership." For it is only this transparent device which lends any pretense to the notion that AAPS' recognition of same-sex "domestic partnerships" is anything but a recognition of same-sex marriages that makes a mockery of state law. The simple fact of the matter is that by this pretense AAPS recognizes same-sex marriages, whether contracted in Michigan (and not legally recognized by the state) or elsewhere, despite state-law prohibiting this State from doing so. By any meaningful measureAAPS' policy presents a "direct" conflict with state law. In addition, its transparent "affidavit of domestic partnership" strategy also demonstrates that AAPS' policy enters the field of marriage and domestic relations so plainly occupied by state law; for it is this occupation which makes it necessary for AAPS to define a new "domestic relation" in order to achieve its (unlawful) policy goal.

Indeed, by the logic of AAEA's argument, PERA authorizes public bodies to do anything so long as it's a matter of contract; and one wonders which laws, if any, limit the plenary authority granted AAPS under PERA (as interpreted by the AEA). Not surprisingly, the AAEA's effort to place AAPS' domestic partnership policy beyond reach of preemption analysis on the theory that its domestic partnership benefits are a matter of contract is wrong as a matter of law. For one thing, the Defendants "contract exception" argument must be rejected because there is no question that the term "contract" does not negate AAPS' duty to contract consistent with state law. *See e.g. City of Hazel Park v. Potter*, 169 Mich. App. 714 (1988)(contract between city council and city manager was void as against statutory structure giving city council authority to appoint and remove public officers); *see also Mino v. Clio School Dist*, 255 Mich. App. 60 (2003)(confidentiality clause of severance agreement between school and superintendent is contrary to state law and therefore void).

Also, it is obvious that the contracts providing the domestic partnership benefits reflect the

AAPS' policy decision to provide same-sex "domestic partnership" benefits. *See* Amended Answer at ¶8; *Cf. Feaster v. Portage Public Schools*, 451 Mich. 351 (1996)(district policy which required custody by legal guardianship imposing requirement not included in School Code was void); *Snyder v. Charlotte Public School Dist.*, 421 Mich. 517 (1985)(district policy requiring full-time attendance to attend classes offered by public schools imposing requirement not mandated by School Code was void); *see also Rowley v. Garvin*, 221 Mich. App. 699 (1997)(local school policy defining "full time" student could not be used to define "full-time" student for purpose of state law governing postmajority support where state law defined term). Of course this policy decision to recognize same-sex "domestic partnerships" is necessary precisely because state law does not do so. But PERA cannot insulate AAPS' decision to recognize same-sex partnerships from the state law for the very reasons outlined in Rohde's Application.

AAEA's recourse to the law of other states must also be rejected. At issue here is the interpretation of Article I, §25, an amendment to the Michigan Constitution, which this Supreme Court interprets–finally and authoritatively. No amount of conflicting decisions from other states can displace this Court's interpretation of Article I, §25, an amendment that was "clearly written using words that have a common, everyday meaning to the general public." *Citizens For Protection of Marriage v. Board of State Canvassers*, 263 Mich. App. 487, 494 (2004). And no amount of decisions from other states can defeat the preemption principles so well established under Michigan law.

The straightforward meaning of Article I, §25 also forecloses the exercise in futility the AEA would foist upon this Court in order to discover limitations supposedly concealed in the amendment. As AEA should know, "[t]he cardinal rule of construction, concerning language, is to apply to it that

meaning which it would naturally convey to the popular mind...." *Carman v. Hare*, 348 Mich. 443, 452 (1971)(citations and quotations omitted). Put another way, the "sense of the people" is to be found in the language of the amendment they approved. For this reason, of course, it is fundamental that "in analyzing constitutional language, the first inquiry is to determine if words have a plain meaning or are obvious on their face. If they are, that plain meaning is given to them," *see Silver Creek Drain District v. Extrusions Division, Inc.*, 468 Mich. 367, 375 (2003), and "it is not necessary to resort to extrinsic evidence in order to determine the meaning...." *See Bond v. Public Schools of Ann Arbor*, 383 Mich. 693, 700 (1970).

These canons foreclose the exercise in futility urged by AAPS because, as the Court of Appeals has already recognized, Article I, §25 was "clearly written using words that have a common, everyday meaning to the general public." *Citizens For Protection of Marriage v. Board of State Canvassers*, 263 Mich. App. 487, 494 (2004). Indeed, this case is–in fact–about marriage, whether the AEA can see it or not. For there is no question that AAPS' recognition of same-sex domestic partnerships (and the termination of those partnerships) is no different, in substance, than the recognition of common-law marriages (and "divorces") by same-sex partners for the purpose of providing benefits. Such recognition is plainly prohibited by the plain language of Article I, §25 for the reasons stated in Rhode's application. For those reasons it is plain that there is no need for this Court to engage in vain speculation concerning what most people may have thought based on impressions supposedly held by various persons with varying agendas. And to contemplate the "trial" urged by the AEA is to immediately grasp its futility–and the grave risk it poses to the integrity of the political process.

The AAEA's remaining effort to gin-up constitutional objections is baseless. More

specifically, the AAEA's arguments under both the Equal Protection and bill of attainder clauses fail for want of a factual basis. Here again, the AAEA fails to grasp that Article I, §25 is about marriage. By its terms, Article I, §25 prevents recognition of "domestic partnerships" regardless of whether those partnerships are formed by heterosexual or same-sex couples, i.e., neither partnership can be recognized by the law in the way that agreements between heterosexual couples were once recognized under the rubric of common law marriage, and agreements of same-sex couples are under policies such as AAPS' same-sex domestic partnership policy (which excludes heterosexual partners from benefits). It is true that AAPS has chosen only to privilege same-sex domestic partnerships, but that limitation is contained in AAPS' policy, not Article I, §25. Under these circumstances, the AAEA's recourse to *Romer v. Evans*, 517 U.S. 620 (1996) is wholly misplaced. And the notion that Article I, §25 constitutes a bill of attainder is just as far-fetched and untenable: unless the constitutional amendment is said to "punish" any persons who might demand that agreements forming unions similar to marriages be recognized by state law for whatever purposes they please. On such a view of the clause, there is a right to common law marriage, domestic partnership, and who knows what else.

At the end of the day, AAEA's effort to find comfort in the law of other states is understandable–precisely because AAPS' same-sex domestic partnership benefits policy so plainly violates the law of this state. Understandable, but also unavailing. After all, it is absurd to suggest that AAPS has the power to define, recognize, and subsidize same-sex "domestic partnerships" when Michigan law prohibits the recognition of same sex marriages. The Defendants' transparent circumvention of state law must be rejected because in this state, at least, the law focuses on substance–not form. *See e.g. Wilcox v. Moore*, 354 Mich 499 (1958)(Court looks at substance of

transaction, not form, for purpose of applying usury statute); *K&K Woodworking, Inc. v. Mich. Emp. Sec. Com'n*, 206 Mich. App. 515 (1994). This state, and hence its political subdivisions, cannot recognize (never mind subsidize) same-sex marriages. And a same-sex marriage by any other name–including "domestic partnership"–is a same-sex marriage.

CONCLUSION

Rohde's Application For Leave To Appeal should be granted. The questions presented by Rohde's Application concern issues providing grounds for review under MCR 7.302(B)(1)-(3). State law plainly authorizes Rohde's suit to challenge AAPS' unlawful use of public funds to purchase same-sex "domestic partner" benefits, the Court of Appeals has placed insupportable limitations on the statute (impeding the statutory purpose), and the result in this case is to undermine the constitution and laws of this state protecting marriage.

Respectfully submitted,

July 11, 2005.

Patrick T. Gillen
Thomas More Law Center
24 Frank Lloyd Wright Dr.,P.O. Box 393
Ann Arbor, MI 48106
Ph: 734 827-2001; Fax: 734-998-4778
Attorneys for the Appellants/Applicants