IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Ingham County Circuit Court
Hon. Joyce Draganchuk

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

Plaintiffs-Appellees,

Docket No. 265870

vs.

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

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* CITY OF ANN ARBOR
IN SUPPORT OF PLAINTIFFS-APPELLEES

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COUNTER-STATEMENT OF ISSUES PRESENTED

DOES THE MARRIAGE AMENDMENT PROHIBIT A MUNICIPALITY FROM VOLUNTARILY PROVIDING HEALTH CARE BENEFITS TO ITS EMPLOYEES AND THEIR SAME-SEX DOMESTIC PARTNERS?

Plaintiffs-Appellees answer .... No.

Defendants answer .... No.

The City of Ann Arbor states that this Court should answer .... No.

Intervening Defendant-Appellant answers ....Yes.

STATEMENT OF JURISDICTION

The City of Ann Arbor takes no position on the jurisdictional statement.

INTEREST OF THE CITY OF ANN ARBOR

The City of Ann Arbor (referred to as the "City") submits this amicus curiae brief because it believes that the Marriage Amendment to the Michigan Constitution has serious legal flaws and does not cover or prohibit the provision of domestic partnership health benefits by a city. Specifically, the claim that the Amendment prevents the provision of domestic partnership benefits by a city, if upheld by the Court, would undermine the City's provision of domestic partner benefits and thus undermine the right of a municipal employer to make business decisions involving its employees.

The City provides the following facts to demonstrate the interest the City has in the substantive issue. The authority of the City to govern itself is broad. The Home Rule City Act states that a Home Rule City may "pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state." MCL 117.4j(3). The ability to recruit and retain employees has always been a fundamental municipal concern.

On August 17, 1992, the City approved a resolution to approve certain benefits (such as medical benefits) for gay or lesbian domestic partners of City employees. The City determined at that time that it was important for it, as an employer, to offer such benefits. The City has traditionally used certain benefits to recruit and retain employees, as have many municipalities and private corporations. Without the ability to do this, the City may not be able to offer competitive employment situations. Other public and private corporations offer such benefits.

The City Resolution clarified that the domestic partner benefits program was applicable to gay and lesbian domestic partners who either were not represented by a collective bargaining union or whose collective bargaining union had affirmatively expressed its acceptance of this benefit. The domestic partners were defined by City ordinance as persons "neither of whom are

married . . ." City Code of Ordinances, Chapter 110, Section 9:87(4). The resolution approving domestic partnership benefits specifically recognized the legal inability of gay or lesbian partners to marry and specified that this relationship is not marriage. The domestic partnership information sheet provided by the City Clerk states specifically that domestic partnership does not provide the "right to any benefits…." The City provides such domestic partner benefits to a small number of employees.

SUMMARY OF ARGUMENT

The City recognizes that a Michigan Attorney General Opinion supports the position that the Marriage Amendment prevents the provision of domestic partnership benefits by a city and is the view of the Attorney General as the Intervening Defendant in this case. Respectfully, however, this view of the applicability of the Amendment to domestic partner benefits is based on a flawed analysis. Such an analysis requires an implicit categorization of "spousal benefits" received from an employer as a "right" of marriage. Once so defined, it requires an implicit argument that no other category of person can receive such benefits without entering a "sphere of marriage."

However, spousal benefits do not magically arise from marriage. Such benefits arise solely from collective bargaining and/or the consent of an employer to provide such benefits. In general, there is no requirement that the City provide health benefits to anyone. It is simply an economic benefit offered and/or bargained for to attract and retain workers. Having voluntarily provided such benefits for spouses of employees at one point in time, an employer is not and should not (as a matter of law) be prohibited from offering similar benefits to others.

The Court of Appeals decision has thus actually trivialized marriage by defining it in terms of economic benefits that are unrelated to the institution of marriage itself.

ARGUMENT

THE COURT OF APPEALS INCORRECTLY APPLIED THE MARRIAGE AMENDMENT TO ECONOMIC BENEFITS UN-RELATED TO THE INSTITUTION OF MARRIAGE

There have been many briefs filed in this matter and the City will not repeat much of what has been written about the historical context of the Amendment, policy matters, and related legal issues. However, the threshold issue is the plain meaning of the Amendment. The Amendment merely states that " [t]o secure and preserved 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."

The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. *County of Wayne v Hathcock,* 471 Mich 445, 468 (2004), citing *People v Nutt*, 469 Mich 565, 573 (2004). The Michigan Supreme Court recently reaffirmed this principle:

> A constitution is made for the people and by the people. *The interpretation that should be given is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning of the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.'

Hathcock, supra at 468 (quoting *Traverse City School Dist v Attorney General*, 384 Mich 390, 405 (1971) (emphasis in original)).

The common understanding of constitutional text is determined by applying each term's "plain meaning at the time of ratification." *Hathcock, supra*, at 468-9.

In this case, the plain language of the Amendment supports the conclusion that the Amendment covers only legal marriage, was not intended to cover employer benefit offerings,

and indeed does not cover employer benefit offerings.

First, the prefatory language in the amendment is ignored by the Court of Appeals. The purpose of the amendment was "to secure and preserve the benefits of marriage." Unlike numerous statutory benefits, health benefits, as argued further below, are not benefits of marriage and are not inherent to the marriage relationship, but derive solely from the employment relationship.

Second, the Court of Appeals opinion is flawed because of its failure to recognize this fundamental proposition: An employer has no obligation to provide certain benefits even to employees or much less to spouses or children of employees (except by contract or collective bargaining). An employer could in theory, for example, decide not to provide health insurance benefits to an employee or to provide health insurance benefits only to its employees and not to spouses or children. But an employer may also decide to offer such benefits to others, or they may offer such benefits as the result of collective bargaining.

Moreover, there is nothing inherent in the existence of marriage or which derives from marriage that requires an employer to offer benefits to a spouse of an employee in the first instance. An employer may choose to provide spousal benefits or it may not. When it chooses to do so, it does so not to preserve or "recognize" the marriage relationship, but to offer a benefit to an employee, who is married, to retain that employee. All of the rhetoric surrounding this issue has clouded this fundamental economic reality.

The Court of Appeals rationale is that when an employer has first provided such benefits to spouses, an employer cannot provide "the same type of" benefits to other persons without somehow altering the definition of marriage. The Court of Appeals has thus defined marriage to include "spousal benefits" that an employer is not even required to provide in the first place. The

Court of Appeals' evident rationale is that whatever spouses first receive from an employer cannot then be given to others. Therefore the timing of such benefits dictates whether they can be provided. If domestic partnership benefits are offered first, and then spousal benefits added, they then would be constitutional. This is illogical and contrary to the stated purpose of the Amendment to preserve those "benefits of marriage."

The Court of Appeals' interpretation of the Amendment has no basis and merely asserts that economic benefits voluntarily given to spouses are "benefits of marriage" to be preserved only for married couples. Spousal benefits are not given to "recognize" marriage. These are economic benefits and can be given at an employer's discretion, and for the most part, to any class of employees. Similarly, providing domestic partner benefits is not done to "recognize" domestic partnerships, but to offer a benefit to an employee, who is in such a relationship, to retain that employee.

In sum, this Court should cut through the false logic presented in this case and find that health benefits are an economic benefit that the City offers to keep and retain employees. There is no "right" to health benefits for a spouse or even for an employee. They are contracted and/or bargained for. They do not arise from marriage but arise because the City chooses to offer them.

The Court of Appeals opinion has significant analytical flaws, in the same way another Court of Appeals recent decision was flawed, *Greater Bible Way Temple of Jackson v City of Jackson,* 468 Mich App 673; 708 NW2d 756 (2005). The Supreme Court's recent reversal in that decision provides an analytical framework for the present case as well. That case is instructive in that it dealt with religion, which is clearly important to our society and historically has certain special legal status. *Greater Bible Way Temple of Jackson v City of Jackson,* 478 *Mich* 373; 733 NW2d 73; (2007). Despite the important role of religion, the Michigan Supreme

Court insisted that proper legal analysis take place in a case involving the actions of a church. This Court unanimously rejected the superficial analysis presented by the Court of Appeals.

In *Greater Bible Way*, the Court of Appeals held that a federal statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 USC 2000cc et seq, entitled a church to the rezoning of its property to allow it to build an apartment complex, when no other entity would be entitled to such a rezoning. The Supreme Court held that a refusal to rezone does not constitute an "individualized assessment" under the statute and that, therefore, RLUIPA was inapplicable. The Court held that a decision whether to re-zone property does not involve consideration of only a particular or specific user or only a specific project; rather it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects. *Id* at 390-391. The Supreme Court took a clear look at the term "individualized assessment" and realized that it just did not apply to rezoning.

Likewise, a clear view of the language of the Marriage Amendment demonstrates that health benefits are not a "benefit of marriage" and offering health benefits to domestic partners does not constitute the recognition of the participants' relationship as a "marriage or similar union." It is simply the recognition of an employment relationship, not a marriage relationship.

The Court in *Greater Bible Way* went on to find that ownership of an apartment building by a religious institution "does not transform the building of an apartment complex into a 'religious exercise,' unless the term is to be deprived of all practical meaning. Something does not become a 'religions exercise' just because it is performed by a religions institution." *Id* at 394. Otherwise, as the Court recognized, any religious institution could claim any activity as a religious exercise merely by asserting that it was done by a religious entity. Basically, the Court adopted a plain meaning application of the statutory language. This is instructive in the current

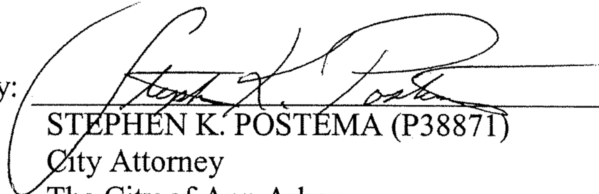
case. Merely by declaring that "spousal benefits" are benefits of marriage does not make it true. Something does not become a 'marital benefit' just because it is given to spouses by an an employer. Otherwise, any way in which married couples are treated or structure their lives would become a benefit of marriage under the Marriage Amendment, unavailable to unmarried persons. A common sense, practical approach would suggest that this is not true. The Marriage Amendment is speaking of statutory rights conferred upon legally married couples, not contractual benefits available to persons as benefits of their employment.

CONCLUSION AND RELIEF REQUESTED

The City has broad authority to contract with its employees regarding benefits. This Court is left with the question whether the Marriage Amendment prohibits domestic partner benefits. The City submits that it does not, based on the plain language of the Amendment. The Court of Appeals decision to the contrary should be reversed.

Respectfully submitted,

CITY OF ANN ARBOR

By: 

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Date: October 22, 2007

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Docket No. 1336554

Court of Appeals No. 265870

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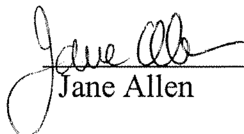
Case No. 05-368-CZ
Hon. Joyce Draganchuk

PROOF OF SERVICE OF MOTION OF THE CITY OF ANN ARBOR TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF AMICUS CURIAE CITY OF ANN ARBOR

I hereby certify that I mailed, postage prepaid, true and correct copies of the City of Ann Arbor's Motion to File brief as *Amicus Curiae* and the City's *Amicus Curiae* Brief to the following counsel of record and amici counsel.

Date: October 22, 2007.



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