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**BRIEF OF AMICUS CURIAE,
CITIZENS FOR THE PROTECTION OF MARRIAGE,
URGING AFFIRMANCE OF THE DECISION BELOW**

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STATEMENT OF ISSUES PRESENTED

I. Does The Recognition of Same Sex Domestic Partnerships
For The Purpose Of Providing Benefits Violate Michigan Law?

The Plaintiffs/Appellants Answer: No.

The Defendant/Appellant Answers: No.

The Intervener-Defendant/Appellee Answers: Yes.

The Court of Appeals Ruled: Yes.

Amicus Curiae Answers: Yes.

OUTLINE OF THE ARGUMENT

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INTRODUCTION

Amicus Curia, Citizens For The Protection Of Marriage (“CPM”), respectfully urges this Supreme Court to affirm the decision below. In so doing, CPM does not wish to merely restate the arguments the Attorney General and believes that Court of Appeals quite correctly found that the result reached below is required by the plain language of Michigan’s Marriage Amendment. Rather, CPM writes to bring to this Supreme Court’s attention a related area of law that may assist the Court in its resolution of the matter, *i.e.*, longstanding preemption principles. CPM respectfully submits that these principles should inform this Court’s deliberations so that this Court’s decision confirms the broad reach of Michigan’s Marriage Amendment.

LAW AND ARGUMENT

I. Policies Recognizing “Domestic Partnerships” Are Unlawful.

Although Article I, §25 undoubtedly requires the invalidation of policies recognizing same-sex domestic partnerships, there is also no question that such policies violate a large and well settled body of law governing the exercise of powers granted to subordinate governmental units by the State of Michigan. Pursuant to that law a political subdivision of a state is precluded from enacting an ordinance or regulation “if...the ordinance is in direct conflict with the state statutory scheme or...if the state statutory scheme preempts the ordinance by regulating the field which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.” *People v. Llewellyn*, 401 Mich. 314, 321 (1977)(holding Detroit obscenity ordinance preempted by state law). As explained further below, policies defining, recognizing, or subsidizing domestic partnerships are void because they violate both of these principles limiting the use of general powers given to subdivisions of the

State. First, such policies enter the field of marriage, family, and domestic relations by defining and recognizing a new domestic relationship akin to marriage, i.e., the “domestic partnership,” entering a field that is occupied by state law. Second, policies recognizing domestic partnerships undermine the state law that is designed to prohibit the recognition of same-sex marriages by the State of Michigan. CPM respectfully submits that the broad reach of these preemption principles should inform the Court’s application of Michigan’s Marriage Amendment.

I. No State Official, Entity, Department, Or Political Subdivision Has Power To Recognize “Domestic Partnerships” Because The Field of Domestic Relations Has Been Occupied By The State Legislature, Which Has Created A Comprehensive Framework Governing Marriage, Divorce, Family, And Child-Custody.

This Supreme Court’s decision in *Mack v. City of Detroit*, 467 Mich. 186 (2002), demonstrates the operation of preemption principles and shows that policies which seek to define, recognize, or subsidize same-sex domestic partnerships are unlawful. In *Mack* the City of Detroit had used its general powers as a Home-Rule City to prohibit discrimination based on sexual orientation. Mack brought suit against the City, alleging that she was discriminated against because she was a woman and a lesbian, and seeking damages based on the alleged violation of the charter provisions. The City responded by claiming the charter could not create liability against the municipality.

This Supreme Court held that the City could not use its unquestioned home-rule power to create a cause of action against the City for discrimination based on sexual-orientation because such an exercise of the City’s powers was inconsistent with state law, more specifically, the Governmental Tort Liability Act, M.C.L. §691.1407. *Id* at 193-94. In doing so this Court rejected the claim that the City’s action was authorized by the general grant of power to the City,

emphasizing that the City’s powers were “subject to the constitution and law.” For this reason any effort to create liability on the part of the City for sexual–orientation discrimination was void because it was inconsistent with state law. And on remand the Court of Appeals held that the City also could not use its general powers to create a cause of action for sex discrimination because this area had been preempted by the Elliot Larsen Civil Rights Act. *See Mack v. City of Detroit*, 254 Mich. App. 498 (2003). As *Mack* illustrates, the principles outlined above leave no doubt that policies defining, recognizing, or subsidizing domestic partnerships are unlawful.

No state official, entity, department, or political subdivision has power to recognize same-sex “domestic partnerships” because the People of the State of Michigan, acting through the legislative branch (which makes the laws) have occupied the field of domestic relations, including that area of law which pertains to whether same-sex unions shall be recognized by this State. There is no question that the state’s regulation of the “domestic” relationships that can be recognized is comprehensive. State law provides that marriage is a relationship between a man and a woman, announces the public policy of supporting that relationship; and it further provides that a “marriage contracted between individuals of the same sex is invalid in this state.” MCL §551.1 State law declares that marriage is a civil contract “between a man and a woman”, and consent alone is not enough to contract a marriage, thus ensuring that persons qualify for marriage under state law and barring common law marriage. MCL §551.2. State law limits the persons a man and woman can marry—providing that they cannot marry same-sex partners. MCL §§551.3 & 551.4. And state law prohibits more than one partner. MCL §551.5.

State law, of course, also governs capacity to marry. State law provides that the parties must be of a certain age to be legally competent. MCL §551.103. State law specifies those who

have power to solemnize marriage, *i.e.*, publicly recognize the commitment of the parties. MCL §§551.7; *see also Black's Law Dictionary*, p. 1392 (defining solemnize as “to enter marriage publicly before witnesses in contrast to a clandestine or common law marriage.”). State law also penalizes those who solemnize marriages contrary to law. MCL §§ 551.14, 551.15, 551.16, 551.17. And state law requires a license and certificate for the purpose of public records. MCL §551.18, MCL §§551.101, 551.102.

State law also governs the recognition of domestic relations created in other states, including same-sex marriages. State law bars the recognition of same-sex marriages between state residents contracted in other states. MCL §551.271. Likewise, state law bars recognition of marriages that are not between a man and a woman regardless of whether the marriage is valid under the laws of another state. MCL §551.272.

Just as state law governs the formation and recognition of the domestic relation that is marriage, it governs the procedure for termination of that relationship. State law provides that marriages contracted by persons incompetent to do so in law are void. MCL §552.1. Because such relationships have significant consequences for society, state law provides an elaborate procedure for divorce, including the requirements for securing a judgment or decree of divorce. MCL §552.1 *et seq.* In connection with the termination of this relationship, state law provides a detailed scheme for support, including the provision of health care benefits to the former spouse. *See e.g.* MCL §552.601 *et seq.*

There is no question that policies defining and recognizing a new domestic relation, the same-sex “domestic partnership” enter the field occupied by the state law. As demonstrated by

the decision below, the policies at issue require the “domestic partners” to certify such things as the following:

- They are of the same sex, have an intimate and committed relationship and co-habitate; *Cf.* MCL §551.1 (marriage an inherently unique relationship between man and woman).
- They are competent to contract; *Cf.* MCL §§551.2 (marriage a civil contract between a man and a woman) & MCL § 551.103 (minimum age for marriage).
- they are not married; *Cf.* MCL §551.5 (bigamy prohibited).
- they are not more closely related by blood than what is allowed for legal marriage; *Cf.* MCL §§551.3 (persons a man cannot marry), MCL § 551.4 (persons a woman cannot marry).
- they do not have different domestic partners; *Cf.* MCL §551.5 (bigamy prohibited).

Similarly, once the domestic partnership is terminated, certain policies require a “Declaration of Termination of Domestic Partnership” akin to the procedure for divorce and governing the allocation of health-care benefits upon termination. *Cf.* MCL §552.1 *et seq* (procedures for divorce).

The recognition of a domestic relation that cannot exist under state law, i.e. “domestic partnership” (including a same-sex domestic partnership), is an integral part of policies subsidizing “domestic partnerships”. It is the definition and recognition of the “domestic partnership” which makes it possible to differentiate the same-sex “partners” from opposite-sex “partners” who are unmarried under state law so same-sex partners can be treated as akin to married spouses. And just as these policies provide for the declaration and recognition (akin to solemnization) of the domestic partnership, they provide a method for the termination of such partnerships (akin to a decree of divorce). Plainly, such policies enter into the area of domestic

relationships that are defined and regulated by state law. As a result, policies in this area are unlawful. Here, as in *Mack*, general powers given state officials, entities, departments or subdivisions do not include the right to define and recognize domestic relationships. *Cf. Mack v. City of Detroit*, 467 Mich. 186 (2002)(City’s general powers did not give it power to subject itself to liability for discrimination based on sexual orientation); *Bo. of Ed. City of Detroit v. Michigan Bell Tel. Co.*, 395 Mich 1, 5 (1975) (school board’s power to do all things necessary to promote education did not include power to condemn property); *East Jackson Public Schools*, 133 Mich. App. at 139 (general powers granted to schools did not included power to bring legal challenge to state law governing school finance).

This Court has refused to enter into the field of family law which the legislature has regulated *via* a comprehensive scheme designed to balance the vitally important and sensitive interests which are implicated when the law addresses the nature of marriage and family. Refusing to create non-statutory rights to child custody, this Supreme Court has noted the “major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from [meretricious] relationships.” *Van v. Zahorik*, 460 Mich 320, (1999). In so doing, this Court recognized the longstanding commitment of the people of this state to traditional marriage and the adverse impact that recognition of other relationships can have upon that institution and, ultimately, society. *Id.* at 332-336.

The decision below correctly held that polices recognizing same-sex domestic partnerships violate Michigan’s Marriage Amendment. For there is no question that by means of such policies recognition is given to the agreement of same-sex partners to unite in a intimate

union labeled a “domestic partnership” an illicit parallel to the marriage agreement recognized by the state law of civil marriage. As demonstrated above, and found by the court below, there is no question that the “domestic partnership” is a union of same-sex partners that is similar to marriage. And there is no question that such policies recognize the union of the same-sex partners in a “domestic partnership” for the purpose of providing medical and other benefits to same-sex partners of employees. For these reasons, such policies are contrary to the plain meaning of Article I, §25, which provides that “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.” By the same token, such policies enter into an area that has been preempted by the People of the State of Michigan. And for this reason, policies which seek to recognize same-sex domestic partnerships for the purpose of providing benefits are unlawful.

II. No State Official, Entity, Department, Or Political Subdivision Has Power To Recognize “Domestic Partnerships” Because Such Recognition Conflicts With State Law Prohibiting The Recognition of Same-Sex Marriages.

Policies that recognize same-sex domestic partnerships are also unlawful because they undermine state law in the area of domestic relations and marriage. Although the People of the State of Michigan have decided that same-sex unions will not be recognized in this State, policies recognizing same-sex domestic partnerships for the purpose of providing benefits do just that. Such a result directly undermines the prohibition on recognition of same-sex marriages required by state law.

Recognizing that the Legislature has occupied the field of family law, Michigan’s courts have repeatedly refused to take any action that would undermine state law in this area. As noted above, in *Van v. Zahorik*, 460 Mich 320 (1999), this Supreme Court recently refused to recognize an “equitable parent” claim because doing so would undermine the limitations on recognition of custodial rights provided for by state law. The courts of this state have also refused to employ the doctrine of unclean hands to prevent a party from voiding a bigamous marriage because to do so would undermine the law prohibiting bigamy. *See Harris v. Harris*, 201 Mich. App. 65 (1993). Likewise, the courts of this state have refused to allow unmarried “partners” to take property by reason of the meretricious relationship because doing so would undermine the state law governing marriage. *Featherstone v. Steinhoff*, 226 Mich. App. 584 (1998)(refusing to recognize contract for support based on meretricious relationship); *Ford v. Wagner*, 153 Mich. App. 466 (1986)(unmarried man who lived with woman without legal marriage could not recover as “other person” under dramshop act because no legal rights accrue based upon a relationship which does not meet the statutory criteria of a marriage and barring common law action for loss

of consortium because to do so would recognize common law marriages); *Carnes v. Sheldon*, 109 Mich. App. 204 (1981) (Court refusing to allow an unmarried partner to recover support on an implied contract theory because to do so would undermine the state law governing marriage).

The respect for the action of the Legislature reflected by these judicial decisions is mandatory for state officials, entities, departments, and political subdivisions of the state because only the legislative branch has the power to make the law. As noted above, it is fundamental that a municipal body cannot enact a regulation that is in direct conflict with a statutory scheme. *Llewellyn*, 401 Mich. at 322. And the Michigan Supreme Court has emphasized that “[a] direct conflict exists...when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.” *Id.* at n. 4. Any number of municipal regulations are preempted under these principles. *See e.g. Howell Township v. Rooto Corp.*, 20003 WL 22136268 (Ct. App. 236440)((2003)(NREPA preempted ordinance allowing township to recover costs of fighting “toxic fire”); *Michigan Coalition For Responsible Gun Owners v. City of Ferndale*, 256 Mich. App. 401 (2003)(state laws regulating gun ownership preempted local ordinance creating gun-free zones); *Michigan Restaurant Assoc. v. City of Marquette*, 245 Mich. App. 63 (2001)(state law addressing nonsmoking seats in restaurants preempted ordinance banning smoking); *Sherman Bowling Center v. City of Roosevelt Park*, 154 Mich App. 576 (1986)(state law preempted city ordinance concerning requirements for liquor license). And it is a truism that executive branch officials can only enforce the law—they cannot make law or, for that matter, violate the law.

These controlling legal principles demonstrate that no state official, entity, department, or subdivision has power to define and recognize a new domestic relationship akin to marriage, *i.e.*,

the “domestic partnership.” It is obvious that the whole purpose of the state law outlined above is to prevent the State of Michigan (including its subdivisions) from recognizing same-sex unions whether the civil contract (i.e. agreement) between the parties is labeled a “marriage” (and solemnized) or a “partnership” (and recognized). For this reason, the law not only prohibits the solemnizing of such same-sex unions in Michigan, but also prohibits the recognition of such unions solemnized under the marriage laws of other states, whether contracted by state residents or non-Michigan residents. See MCL §§551.1, 551.271 & 551.272. Pursuant to these laws, neither the same-sex nor the opposite-sex partners can take benefits available to spouses under state law based on their intimate relationships, cohabitation, *etc.* Under the well established principles noted earlier, same-sex partners cannot be allowed to benefit by virtue that relationship under state law.

Same-sex domestic partnership policies are plainly designed to circumvent this limitation in order to provide “domestic partnership” benefits for same-sex partners. That goal is achieved *via* a policy that recognizes the meretricious relationship and uses general powers to confer benefits on same-sex “partners.” The conflict could not be more direct; Michigan law prohibits the recognition of common law marriages precisely cause such recognition conflicts with state law, see MCL 551.2; but “same-sex domestic partnership” policies do just that, in substance, for the same-sex couples privileged by its “domestic partnership” benefits policy. Such 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)(Court looks at substance, not form, to

determine successor liability for purposes of workers' comp statute); *Blessing v. Zefferio*, 149 Mich. App. 558 (1986)(whether a transaction is a business or agricultural loan within meaning of National Bank Act turns on substance not form of the transaction and courts are not bound by parties' characterization). This state, and hence its officials, entities, departments, and 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

The Court of Appeals quite correctly held that the plain language of Michigan's Marriage Amendment prohibits recognition of domestic partnerships, including same-sex domestic partnerships, for any purpose—including, but not limited to, the provision of benefits to same-sex partners. CPM brings this Supreme Court's attention to related area of law that can assist the Court in its resolution of the matter, *i.e.*, longstanding preemption principles. CPM respectfully submits that these principles should inform this Court's deliberations so that this Court's decision confirms the broad reach of Michigan's Marriage Amendment. The People of the State of Michigan have spoken on this issue *via* Michigan's Marriage Amendment. The will of The People—as expressed in the simple and straightforward language of Article I, §25—should be given its broadest possible expression. In doing so, this Supreme Court can find guidance in earlier decisions that have steadfastly—and quite rightly—refused to take any step that would undermine in any way our state's commitment to traditional marriage. For it is upon this institution that the future of this great state and our great nation ultimately rests.

Respectfully submitted,

4th of October 2007.



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