

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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

Plaintiffs-Appellants,

v

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

Defendant-Appellant,

and

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

Intervening Defendant-Appellee.

Supreme Court No. 133429; 133554

Court of Appeals No. 265870

Ingham County Circuit Court  
No. 05-368-CZ

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**ATTORNEY GENERAL'S BRIEF ON APPEAL**  
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### Statement of Question Involved

**Under the Michigan Constitution, art 1, § 25, "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 four public employers at issue here provided health benefits to same-sex domestic partners in the same way that spouses obtain them. The Court of Appeals concluded that these public employers violated the Amendment because they defined domestic partnership agreements in terms similar to marriage and then recognized same-sex domestic partnership agreements as the equivalent of marriage for the purpose of conferring health benefits. Did the Court of Appeals properly apply the Amendment's plain language?**

## Summary of Argument

In the November 2004 general election, the citizens of the State of Michigan ratified an amendment to the Michigan Constitution that secured the benefits of marriage for society and for future generations. The Amendment, art 1, § 25, states that the union of one man and one woman in marriage will be the only agreement recognized for any purpose, and prohibited the recognition of any unions similar to marriage for any purpose. By prohibiting the recognition of similar unions to marriage for any purpose, the Amendment prevents the State from elevating other similar unions – unions that imitate marriage – from being accorded the same unique status of legal marriage in Michigan. The Amendment thus preserves the benefits of marriage.

By its plain language, the Amendment forbids (1) the recognition of (2) a union similar to marriage (3) for any purpose. At issue in this case are the contracts and policies of four different public employers: the State of Michigan, the City of Kalamazoo, the University of Michigan, and Michigan State University. All of these public employers would extend health benefits to same-sex domestic partners on the same basis in which they are provided to spouses. The public employers violate the Amendment because they "recognize" these unions by formally acknowledging their status for the purpose of establishing a legal right to health benefits. And the public employers define these agreements using the same basic criteria that the State uses to define marriage. In other words, these same-sex domestic partnership agreements are "similar unions" to marriage. And the public employers recognize these unions for "any purpose," i.e., for the purpose of conferring health benefits. In doing so, the public employers recognize a same-sex domestic partnership agreement as the equivalent of a marriage for the purpose of conferring health benefits. Consequently, the contracts and policies of the public employers violate the Amendment.

In order to reach this conclusion, this Court need only apply the plain language of the Amendment, which employs ordinary terms. There is no need to venture into the contentious political debate that surrounded the passage of the Amendment. The people have spoken, and this Court is bound by the language that the citizens of this State approved. The Amendment must be enforced as written.

The Amendment does not, however, operate as a bar to the conferring of health benefits on same-sex domestic partners as long as these benefits are provided in a manner that comports with the Amendment. In these contracts and policies, it is clear that these public employers confer on these same-sex domestic partners a special status because the public employers exclude from coverage other similarly-situated non-spouses who might otherwise appear to have the same claim to be legally covered by an employee's contract. The public employers could, however, achieve the end of extending health benefits to same-sex domestic partners without violating the Amendment by identifying some neutral standard, which applies to all non-spouses equally, without singling out same-sex domestic partners for special consideration.

## Counter-Statement of Facts and Proceedings

In this appeal, the Governor and the plaintiffs ask this Court to reverse the decision of the Court of Appeals in its review of Const 1963, art 1, § 25 ("the Amendment"). The decision of the Court of Appeals, however, provided the correct ruling on the Amendment and should be affirmed.<sup>1</sup>

### **I. The Amendment**

On November 2, 2004, the citizens of the State of Michigan voted and approved an amendment to the Michigan Constitution, Const 1963, art 1, § 25, that provides:

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.

The Amendment took effect on December 18, 2004.

### **II. The Contracts of the Public Employers**

#### **A. The State of Michigan**

In 2004, before the Amendment's passage, the UAW-Local 6000 (the exclusive representative of the State employee appellants) and the Office of the State Employer negotiated an agreement that would make health benefits available to the same-sex domestic partners of State employees if the partners met certain criteria. In 2005, the State of Michigan and the UAW – Local 6000 negotiated for the following proposed eligibility criteria for health benefits:

The State Health Plan shall be amended to include persons who meet the criteria set below within the definition of "eligible dependents."

To be eligible, the individual must meet the following criteria and bear the following relationship to an employee who is enrolled in the State Health Plan:

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<sup>1</sup> See *National Pride v Governor*, 274 Mich App 147; 732 NW2d 139 (2007).

1. Be at least 18 years of age.
2. Share a close personal relationship with the employee and be responsible for each other's common welfare.
3. Not have a similar relationship with any other person, and not have had a similar relationship with any other person for the prior six months.
4. Not be a member of the employee's immediate family as defined as employee's spouse, children, parents, grandparents or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles or cousins.
5. Be of the same gender.
6. Have jointly shared the same regular and permanent residence for at least six months, and have an intent to continue doing so indefinitely.
7. Be jointly responsible for basic living expenses, including the cost of food, shelter and other common expenses of maintaining a household. This joint responsibility need not mean that the persons contribute equally or in any particular ratio, but rather that the persons agree that they are jointly responsible. [Appendix 35a, Letter of Understanding, Article 43, Section C, Group Insurances.]

The plan also provides that the employer may require an affidavit to set "forth the facts and circumstances which constitute compliance with those requirements." The State contract proposal would have expanded the definition of "eligible dependents" from including only an employee's "spouse and any of your unmarried children" to include same-sex domestic partners. See Appendix 3b, Eligibility guidelines for State employees under the State health plan, p 7.

After the passage of the Amendment, on December 3, 2004, UAW-Local 6000 and the Office of State Employer mutually agreed to withdraw the proposed-benefits provision based on an understanding that the proposal would be resubmitted to the Civil Service Commission after a court decision interpreting the Amendment. Appendix 34a, Letter of intent, dated December 3, 2004.

**B. City of Kalamazoo**

Similarly, before the passage of the Amendment, the City of Kalamazoo provided for health benefits to the same-sex "domestic partners" of its city employees based on their status as a "domestic partnership." The City's collective bargaining agreement defined "domestic partners" as follows:

For the purposes of the City of Kalamazoo's program, the definition and use of the term domestic partner shall only include couples of the same sex. To be considered as domestic partners, the individuals must:

- A. Be at least 18 and mentally competent to enter into a contract;
- B. Share a common residence and have done so for at least six (6) months;
- C. Be unmarried and not related by blood closer than would prevent marriage;
- D. Share financial arrangements and daily living expenses related to their common welfare;
- E. File a statement of termination of previous domestic partnership at least six (6) months prior to signing another Certification of Domestic Partnership. [Appendix 36a, City of Kalamazoo, Domestic Partner Benefits Policy.]

The City also required a notarized Certificate of Domestic Partners, which affirms the criteria listed in paragraphs A through E, and required proof of mutual economic dependence, such as joint lease or mortgage, and evidence of common legal residence. The policy expressly stated that these "domestic partner" benefits are "identical to those provided to spouses of city employees." Appendix 36a.

### **C. The University of Michigan Contract**

In 2004, before the passage of the Amendment, the University of Michigan contract defined eligibility for its health benefits for its employees as follows:

Dependents:

#### **Spouse**

A person who:

- is of the opposite sex as you;
- is legally married to you; and
- is not already covered through the University as an employee.

**or**

#### **Same-sex Domestic Partner**

A person who:

- is the same sex as you;
- is not legally married to another individual;
- is not related to you by blood in a manner that would bar marriage;
- is not already covered through the University as an employee.
- You and your partner have registered the domestic partnership in the manner authorized by a municipality or other government entity; and
- For your partner (and your partner's children) to be eligible both you and your partner must have allowed six months to pass since the termination of a same-sex domestic partnership. [Appendix 13b, Eligibility for University of Michigan Benefits for Dependents, p 3.]

Plaintiffs noted in their amended June 8, 2005 brief seeking summary disposition filed in the Circuit Court that this policy required that the domestic partners be at least 18 years of age.<sup>2</sup>

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<sup>2</sup> See Plaintiffs' brief filed in Ingham County Circuit Court on June 8, 2005 brief, p 8 n 9.

#### **D. Michigan State University**

In 1997, the Michigan State Board of Trustees added benefit eligibility for same-sex domestic partners of faculty, retirees, and applicable staff who meet certain criteria. According to its plan, Michigan State University provides health benefits, requiring that the domestic partners meet the following conditions:

[E]ligibility criteria for same-sex domestic partners of faculty, retirees, applicable staff who meet certain criteria. They:

1. are same-sex and for this reason are unable to marry each other under Michigan law,
2. are in a long-term committed relationship, have been in the relationship for at least 6 months, and intend to remain together indefinitely,
3. are not legally married to others and neither has another domestic partner,
4. are at least 18 years of age and have the capacity to enter into a contract,
5. are not related to one another closely enough to bar marriage in Michigan,
6. share a residence and have done so for more than 6 months,
7. are jointly responsible to each other for the necessities of life, and
8. provided a signed "partnership agreement" that obligates each of the parties to provide support for one another, and provides for substantially equal division, upon termination of the relationship, of earnings during the relationship and any property acquired with those earnings. [Appendix 92c, MSU Recognized Same-Sex Domestic Partner.]

#### **III. The Attorney General's Opinion**

On March 16, 2005, after the Amendment passed, the Attorney General issued Formal Opinion, No. 7171, responding to Representative Jacob Hoogendyk's request for an answer regarding the meaning of the Amendment with respect to the City of Kalamazoo's ability to provide same-sex domestic partnership benefits to its city employees. In this opinion, the Attorney General determined that the City's criteria for eligibility for these unions were similar

to a marriage and that the City of Kalamazoo conferred a marriage-like status on the same-sex domestic partnerships by granting exclusively to them the same benefits as conferred on employee's married spouses:

The City's Policy accords same-sex "domestic partnerships" a "marriage-like" status. The clear design of the City of Kalamazoo's policy is to establish a special status for "domestic partners" of the same-sex, who share a common residence and financial arrangements, and to use this as a basis on which to confer benefits on the "partner" of the city employee. In the words of art 1, § 25, the City's Policy recognizes same-sex domestic partnerships as a "similar union" to marriage. Given the broad language of the amendment, there can be little doubt that conferring these benefits constitutes recognition or the acknowledgement of the validity of these same-sex relationships. Conferring these health- and retirement-related benefits also falls within the all-encompassing "for any purpose" language. [Appendix 55a, OAG, 2005, No. 7171, p 16.]

The Attorney General then concluded that the conferring of health benefits to employees on the basis of a domestic partnership agreement violated the Amendment:

Thus, the City's policy of offering benefits to same-sex domestic partners violates the amendment's prohibition against recognizing any "similar union" other than the union of one man and woman in marriage. . . . The provision of benefits itself does not violate the amendment, but the benefits cannot be given based on the similarity of the union or domestic partnership agreement to a legal marriage. In other words, Const 1963, art 1, § 25 does not prevent the City of Kalamazoo, if it elects to do so, from conferring benefits on persons a city employee may wish to designate as a recipient as long as the benefits are not dependent on the existence of a union that is similar to a marriage as defined by Michigan law.

It is my opinion, therefore, that Const 1963, art 1, § 25 prohibits state and local governmental entities from conferring benefits on their employees on the basis of a "domestic partnership" agreement that is characterized by reference to the attributes of a marriage. [Appendix 55a-56a, OAG, 2005, No. 7171, pp 16-17.]

The Attorney General further determined that the Amendment did not affect existing contracts but applied to future contracts. See Appendix 60a, OAG, 2005, No. 7171, p 21.

#### **IV. The Complaint in Circuit Court**

On March 21, 2005, five days after the Attorney General issued his opinion, National Pride at Work and 22 plaintiffs employed by 7 different public employers filed a complaint against defendant Governor Jennifer Granholm, asking the Ingham County Circuit Court ("Circuit Court") to enter a declaratory judgment stating that the Amendment does not prohibit the State of Michigan from conferring health benefits on same-sex domestic partners— even where those benefits are conditioned on the existence of this same-sex union. The individual plaintiffs are employed by (1) the State of Michigan through its agencies; (2) the City of Kalamazoo; (3) the University of Michigan; (4) Michigan State University (MSU); (5) Eastern Michigan University (EMU); (6) Wayne State University (WSU) and (7) Eaton/Clinton/Ingham Community Mental Health Board. In the complaint, the employees' same-sex domestic partners are also listed as plaintiffs, bringing the total number of persons to 41 listed in the complaint.<sup>3</sup>

In May 2005, plaintiffs filed a motion for summary disposition pursuant to MCR 2.116 (C)(10) and sought a declaration that the Amendment does not preclude public employers from providing same-sex domestic partnership benefits. The City of Kalamazoo also announced that it would not again extend health benefits to same-sex domestic partners for contracts beginning in January 2006, absent a ruling that such benefits do not violate the Amendment. In light of the City's stated intentions, plaintiffs amended their complaint to include the City of Kalamazoo as a defendant.

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<sup>3</sup> In this appeal, the Attorney General addresses only the contracts and policies that were before the lower court: (1) the proposed contract for the State of Michigan, (2) the City of Kalamazoo, (3) the University of Michigan, and (4) MSU. These are the only contracts that were evaluated by the Michigan Court of Appeals in its decision below because they were the only policies of record. *National Pride*, 274 Mich App at 161 n 12. The Attorney General addresses the relevant plans as they existed when the Amendment passed.

On June 8, 2005, plaintiffs filed an amended motion for summary disposition arguing that (1) the plain language of the Amendment does not prohibit public employers from granting same-sex domestic partnership benefits, (2) that the circumstances surrounding the passage of the Amendment support such a conclusion, and (3) that if the Amendment was interpreted otherwise it would conflict with other provisions of the Michigan Constitution, including the Equal Protection Clause.

On June 30, 2005, Governor Granholm's attorneys also filed a motion for summary disposition seeking dismissal of the claims pending against her. Additionally, on July 14, 2005, the Governor's attorneys filed a response to plaintiffs' amended summary disposition motion, arguing that plaintiffs' analysis failed to give meaning to the full text of the Amendment, failed to rebut the analysis set forth in the Attorney General opinion, and was otherwise unsupported by facts and relevant case law. Subsequently, on July 20, 2005, the Attorney General intervened in the case and adopted the Governor's July 14, 2005 brief as his legal position and argument.

On August 1, 2005, the Governor retained new counsel, withdrew the original motion to dismiss, and filed a revised response to plaintiffs' amended motion. In the revised response, the Governor asserted that the Amendment only prohibits the recognition of an agreement "other than a marriage between one man and one woman, as a 'marriage or similar union for any purpose.'" According to this argument, the Amendment would not preclude public employers from extending health benefits to an employee's same-sex domestic partner, even though the provision of such benefits is based on the existence of this partnership agreement.

On August 8, 2005, the Attorney General replied to the Governor's revised pleadings. In his response, the Attorney General argued that the Amendment prevents the State, its agencies, and State governmental entities from conferring health benefits based on the existence of a same-

sex domestic partnership defined using the same characteristics as marriage because this action would recognize an agreement other than a union of one man and one woman in marriage for the purpose of conferring health benefits on same-sex domestic partners in the same way as spouses.

## **V. The Decision of the Circuit Court**

On September 27, 2005, the Circuit Court granted plaintiffs' Motion for Summary Disposition and issued a declaratory judgment holding that the Amendment does not "prohibit public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits as a matter of policy." Appendix 82a, Circuit Court opinion and order, September 27, 2005, p 13. The Circuit Court failed to address the issue regarding the employer's basis for providing the health benefits to same-sex domestic partners.

## **VI. The Decision of the Court of Appeals**

On February 1, 2007, the Court of Appeals reversed the Circuit Court's decision and determined that the contracts of the public employers at issue violated the plain language of the Amendment<sup>4</sup>:

The marriage amendment's plain language prohibits public employers from recognizing same-sex unions for any purpose. Therefore, we reverse the grant of summary disposition upholding the negotiated plan between the OSE [Office of State Employer] and UAW Local 6000, and further reverse the trial court's order determining that the University of Michigan, Michigan State University and the City of Kalamazoo's domestic partnership policies were not violative of article 1, section 25 of the Michigan constitution.

The Court gave its opinion immediate effect.

Both the Governor (docket number 133429) and the plaintiffs (docket number 133554) applied for leave to appeal the decision of the Court of Appeals. On May 23, 2007, this Court granted the applications for leave to appeal and consolidated the appeals. On July 18, 2007, the

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<sup>4</sup> *National Pride*, 274 Mich App at 147.

Governor filed her brief on the merits in docket number 133429. On August 30, 2007, the plaintiffs filed their brief on the merits in docket number 133554. On September 6, 2007, this Court entered an order granting the Attorney General's request to file a single brief.

## Argument

**Under the Michigan Constitution, art 1, § 25, "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 four public employers at issue here provided health benefits to same-sex domestic partners in the same way that spouses obtain them. The Court of Appeals concluded that these public employers violated the Amendment because they defined domestic partnership agreements in terms similar to marriage and then recognized same-sex domestic partnership agreements as the equivalent of marriage for the purpose of conferring health benefits. The Court of Appeals properly applied the plain language of the Amendment. This Court should affirm.**

### **I. Standard of Review**

This Court reviews de novo a lower court's construction of a constitutional provision as a matter of law.<sup>5</sup>

### **II. Analysis**

The people of the State of Michigan voted and approved the Amendment to protect the benefits of marriage. The Amendment achieves this end by ensuring that the union of one man and one woman in marriage will be the only agreement recognized for any purpose and by prohibiting the recognition of a union similar to a marriage for any purpose. In other words, the Amendment forbids (1) the recognition of (2) a union similar to marriage (3) for any purpose. The contracts and policies of the public employers at issue here grant a legal right to health benefits to same-sex domestic partners based on their same-sex domestic partnership agreement in the same way as are provided to spouses in marriage. In applying the ordinary meaning of the words in the Amendment, these contracts and policies all violate the Amendment by seeking to recognize same-sex domestic partnership agreements – a union similar to a marriage – for the purpose of conferring health benefits.

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<sup>5</sup> *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

At the outset, the Attorney General notes that the Amendment does not prevent a public employer from extending benefits to same-sex domestic partnerships as long as the basis of the provision is "unrelated to recognition of their agreed-upon relationship."<sup>6</sup> The State of Michigan, however, cannot privilege same-sex domestic partnerships for special status among non-spouses, singling them out to the exclusion of other similarly-situated non-spouses. This Court should affirm.

**A. Michigan's law on interpreting constitutional provisions requires this Court to give effect to the plain language of the Amendment.**

The primary objective when interpreting a constitutional provision's meaning is to realize the intent of the people by whom and for whom the constitution was ratified.<sup>7</sup> In *Wayne Co v Hathcock*, this Court explained that this objective is achieved by examining "the text's original meaning to the ratifiers, the people, at the time of ratification."<sup>8</sup> This examination is the rule of "common understanding," and the common understanding of a constitutional provision is ordinarily understood "by applying each term's plain meaning at the time of ratification." In *Hathcock*, this Court quoted Justice Cooley on this point<sup>9</sup>:

A constitution is made for the people and by the people. The interpretation that should be given it 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 in 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.

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<sup>6</sup> *National Pride*, 274 Mich App at 172.

<sup>7</sup> *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004).

<sup>8</sup> *Hathcock*, 471 Mich at 468.

<sup>9</sup> *Hathcock*, 471 Mich at 468 (emphasis added; citations omitted; and internal quotes omitted), quoting Cooley, *Constitutional Limitations* 81.

Moreover, where there is a need to clarify the meaning of a constitutional provision, the Court may look to the circumstances leading to its adoption and the purpose sought to be accomplished.<sup>10</sup> Finally, the Court should endeavor wherever possible to give an interpretation that does not render the provision unconstitutional.<sup>11</sup>

Where the constitutional provision is plain on its face, however, no further construction is allowed. In *American Axle & Mfg, Inc v Hamtramck*, the Supreme Court similarly quoted from Justice Cooley when recognizing this point<sup>12</sup>:

The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. . . . "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In other words, the same rule that governs interpreting statutory language also governs the interpretation of a constitutional provision – the Court is bound to give effect to the intent of the people by applying the plain language of the text.

**B. The purpose of the Amendment is to protect the benefits of marriage for the community. The Amendment's language is unambiguous and prohibits the recognition of a similar union to marriage for any purpose, including the purpose of conferring health benefits.**

In understanding the people's intent in passing this Amendment, this Court should examine the unambiguous words of the Amendment, Const 1963, art 1, § 25, itself:

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<sup>10</sup> *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) ("A second rule is that to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered").

<sup>11</sup> *Traverse City School District*, 384 Mich at 406.

<sup>12</sup> *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362-363; 604 NW2d 330 (2000), quoting Cooley, *Constitutional Limitations* (Little, Brown & Company, 1868), p 55.

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.

Its meaning is plain and does not require construction.

In the first clause of the Amendment, the people of the State declared their purpose to secure and preserve the benefits of marriage. This purpose is accomplished by ensuring that the unique position of marriage as defined between one man and one woman in law is protected, reserving to marriage alone legal recognition. And the Amendment protects the unique position of marriage by also ensuring that unions similar to marriage shall not be given legal recognition for any purpose. This requirement that there be no legal recognition of similar unions ensures that the position of legal marriage between one man and one woman remains unique – it alone receives legal recognition. The underlying public policy is clear that the Amendment is designed to defend the unique nature of marriage by ensuring that similar unions are not accorded special consideration on a legal basis in the same way as marriage by the government in any respect.

In forbidding the recognition of similar unions for any purpose, the Amendment creates a threefold test to determine if the actions of the public employer violate the Amendment – there can be no:

- (1) recognition;
- (2) of a similar union to marriage;
- (3) for any purpose.

An examination of the ordinary understanding of the words supports the decision of the Court of Appeals.

**(1) Recognition**

- i. The public contracts and policies would "recognize" same-sex domestic partnership agreements, which are similar unions to marriage. The public employers provide the same legal right to health benefits to same-sex partners as they do spouses.*

The Merriam-Webster online dictionary, [www.m-w.com](http://www.m-w.com), provides that "recognize" means "to acknowledge formally" or "to acknowledge or take notice of in some definite way." Similarly, the Court of Appeals determined that "recognize" means "to acknowledge the legal validity of something."<sup>13</sup> In the same vein, the Circuit Court referred to a dictionary definition of "recognize," which the Oxford English Dictionary defined as "special notice, approval, or sanction; to treat as valid, as having existence or as entitled to consideration." Appendix 77a, Circuit Court, opinion and order, p 8 n 2. These definitions accord with common sense.

Applying these related definitions of "recognition," the Amendment prevents a public employer from formally acknowledging a union similar to a marriage or for acknowledging the legal validity of a same-sex domestic partnership agreement. This is particularly true where the public employer grants some kind of special consideration to a union similar to a legal marriage in the same way as marriage, based on its similarity to a marriage. In forbidding recognition, the Amendment prohibits one particular thing – the establishment of a legal right. And that is exactly what all the public employers do here through their contracts and policies: they establish a legal right for same-sex domestic partners to receive health benefits in the same way spouses receive them.

In examining the contracts and policies of the public employers, they are clear that they "recognize" these same-sex domestic partnership agreements by establishing a legal right for health benefits on the basis of the partnership agreement. All of the public employers formally

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<sup>13</sup> *National Pride*, 274 Mich App at 159.

acknowledge these partnership agreements and acknowledge their legal validity by creating strict eligibility criteria that mirror the requirements of marriage, require compliance with these standards in order to qualify for the benefits, establish a legal right in the contract and policies, and then confer the benefit on this legal basis.

The fact that all of the public employers have *expanded* this right from one that was previously reserved to spouses to one which includes same-sex domestic partners to the exclusion of all others non-spouses demonstrates that the benefit is being given as the equivalent of a marital benefit. The previous contracts and policies limited the eligibility to an employee's "spouse" and "children." Appendix 3b, State of Michigan eligibility guidelines, p 7; Appendix 16b-17b, City of Kalamazoo, dependent requirements; Appendix 13b-15b, University of Michigan, eligibility criteria; and Appendix 92c, MSU.<sup>14</sup> In other words, in the absence of these special provisions for same-sex domestic partners, the only persons that currently receive health benefits for these employees are the employee's spouse or the employee's dependent children.

The Court of Appeals rightly determined that this arrangement would "recognize" the same-sex domestic partner by conferring a "similar status" on the partnership as that of a married couple<sup>15</sup>:

By officially *recognizing* a same-sex union through the vehicle of a domestic partnership agreement, public employers give same-sex domestic couples similar status to that of married couples.

The Court also noted that the State of Michigan would recognize these similar unions by "extending to domestic partners and dependents the benefit of insurance coverage *equivalent* to

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<sup>14</sup> In its proposed contract, the State of Michigan intended to expand the definition of "eligible dependents" to include "same-sex domestic partners." See Appendix 1b, State health plan, Article 43, Section C, p 14 ¶26.

<sup>15</sup> *National Pride*, 274 Mich App at 164 (footnote omitted; emphasis added).

coverage that is extended to married spouses."<sup>16</sup> By using an employee's marital status as a basis on which to confer health benefits on a spouse, the State of Michigan confers a benefit on married employees. By extending the same benefits to same-sex domestic partners in the place of a spouse, the public employers recognize these partnership agreements by formally acknowledging them by contract and policy and by acknowledging their legal right in the same way as spouses.

Where the public employer recognizes a legally valid marriage to confer health benefits on an employee's spouse by contract or policy, the employee's spouse is receiving a benefit based on the marriage to a public employee. The spouse gets this coverage only because of the marriage based on the legal contract or policy. If the public employer recognizes a union similar to a marriage, other than the union of one man and one woman in marriage, for the purpose of conferring health benefits in the same way that a spouse receives them, that would constitute a recognition under the Amendment.

*ii. The public employers single out same-sex domestic partners among non-spouses for special consideration.*

Moreover, these public employers single out same-sex domestic partners for special recognition, using eligibility criteria that parallel marital requirements, which confirms that these contracts and policies constitute a legal recognition. They confer on same-sex domestic partners the health benefits through a legal arrangement with them alone. By extending this benefit to them in this way, the public employers simultaneously exclude other non-spouses who are similarly situated and who otherwise would appear to have the same claim for coverage. The reality is that same-sex domestic partnership agreements are being treated like marriages for the

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<sup>16</sup> *National Pride*, 274 Mich App at 165.

purpose of conferring health benefits. In effect, the public employers attempt to create a new "common-law" marriage-right for same-sex domestic partners for health benefits through their contracts and policies.

The examination of the particular criteria of the public employers at issue here reveals that they seek to provide special treatment on same-sex domestic partnerships over other non-spouses. This is achieved through a legal contract or policies with public employees, providing a benefit to only same-sex domestic partners to the exclusion of other non-spouses. This special consideration is clear when examining the eligibility criteria.

Regarding the same-sex requirement, other than privileging same-sex domestic partners in the same fashion as spouses, there is no apparent basis on which to exclude from health benefits an employee's friend of the opposite sex where that person is in the same situation as a same-sex domestic partner. Likewise, in the absence of the special status conferred on same-sex domestic partners, there would be no reason for these public employers to prevent the benefits from extending to an employee's blood relation like an aged parent or invalid sibling, where a public employee wishes to bring the person under the policy. The limitation of age does not further any apparent legitimate interest outside of this special status. This is because there is no obvious reason to exclude the designation of a child under the age of 18 of an uninsured friend, who is financially dependent on that employee and living in the same residence. Thus, other than to confer a special status on the same-sex domestic partners, there is no apparent basis on which to exclude friends of the opposite sex, family members, or any other person for whom an employee is financially responsible and would otherwise meet the criteria.

Indeed, one of the cases cited by the plaintiffs on appeal, *Devlin v City of Philadelphia*,<sup>17</sup> the Pennsylvania Supreme Court examined a city ordinance that exempted same-sex partners from the real estate transfer tax, and noted the unfairness of singling out same-sex partners for special treatment over other "legitimate relationships:"

[E]ven if we were to accept the City's explanation that its goal in adding Life Partners to subsection 19-1405(6)'s list of relationships exempted from the transfer tax was truly to exempt transfers between financially interdependent units who do not have the ability to marry, *its attempt to accomplish that goal was simply unreasonable as it has plainly favored same-sex relationships over other legitimate relationships that cannot be consummated in marriage* and can also be financially interdependent, such as that between (1) first-cousins, (2) aunts or uncles and nephews or nieces, and (3) individuals and minors under the age of eighteen who are not qualifying relatives. As such, the City has simply provided this Court with no "legitimate distinction between the classes" and we cannot independently discern a legitimate distinction that would permit us to escape the conclusion that "the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated." [Emphasis added.]

In short, the Pennsylvania Supreme Court found that this privileging of same-sex partners violated equal protection because the ordinance singles them out for special treatment among non-spouses. The same reasoning applies here.

**(2) Union similar to marriage**

- i. The eligibility criteria in the contracts and policies of these public employers define same-sex domestic partnerships in terms that are similar to a marriage by sharing common characteristics. These same-sex domestic partnership agreements are unions similar to marriage.*

Merriam-Webster online dictionary defines the word "similar" as "having characteristics in common."<sup>18</sup> Also, it provides that "union" is "an act or instance of uniting or joining two or more things into one."

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<sup>17</sup> *Devlin v City of Philadelphia*, 580 Pa 564; 862 A2d 1234, 1251 (2004).

<sup>18</sup> Merriam-Webster Online Dictionary, [www.m-w.com](http://www.m-w.com).

The fact that the eligibility criteria of the contracts and policies of the public employers mirror the statutory requirements of a marriage is unmistakable. For the seven provisions of law that provide the definition of marriage in Michigan, MCL 551.1 through MCL 551.9 (MCL 551.6 and 551.8 have been repealed), almost all of them are recreated in some form in these contracts and policies.

In defining the criteria necessary to obtain same-sex domestic partnership benefits, the public employers would require five attributes that are the same basic criteria for the requirements of a legal marriage under Michigan law. Rather than differing from one employer to the next, these contracts share almost the identical features as if derived from the same template:

- (1) each requires that the partner be of the same-sex;  
*cf* MCL 551.1 (requires that spouse be of the opposite sex);
- (2) each requires there be some kind of agreement about the partnership;  
*cf* MCL 551.2 (marriage requires the consent of the parties);
- (3) each requires that the partner not be a blood relation;  
*cf* MCL 551.3; MCL 551.4 (listing blood relations that one cannot marry);
- (4) each requires that the partner not be married to another or have a partnership agreement with another person;  
*cf* MCL 551.5 (prohibition against bigamy); and
- (5) each mandates an age requirement of 18 years of age;  
*cf* MCL 551.51 (minimum age for marriage is 16 years of age).

These contracts and policies formally acknowledge these agreements, giving them a legal recognition, and grant them a special status for same-sex domestic partners – they use this status as a basis on which to confer benefits on the "partner" of the public employee. In fact, three of the public employers, the City of Kalamazoo, the University of Michigan, and MSU, candidly note that the partner cannot be related in a way that would "bar marriage" with the employee,

while the State of Michigan's health plan lists the blood relations excluded. The MSU contract also admits the basis of the policy in requiring that the employee's partner be of the same-sex: they must be of the "same-sex and *for this reason* are unable to marry each other under Michigan law." Appendix 92c, MSU same-sex domestic partnership policies (emphasis added). This statement explains the basis of each of the contracts and policies – they attempt to rectify the perceived unfairness in excluding same-sex couples from marriage. But the Amendment forbids these public employers from recognizing a similar union for any purpose, even for the worthy purpose of conferring health benefits.

Here, the public employers confer a privilege on same-sex domestic partners in the same way that spouses are privileged. The similarities – between the contracts and policies at issue here and the legal definition of marriage under Michigan law – are obvious when matching them side-by-side.

*ii. All of the contracts and policies require an agreement.*

One of the threshold requirements under the Amendment, and one of the principal similarities between the proposed same-sex domestic partnerships and marriage, is the requirement of an agreement. The Merriam-Webster online dictionary provides that "agreement" means "an arrangement as to a course of action."<sup>19</sup>

The policies of the City of Kalamazoo, the University of Michigan, and MSU all require an agreement by the filing of documentation or registration. The City of Kalamazoo requires that the partners file a notarized certificate that they are domestic partners. The University of Michigan requires that the partners have "registered the domestic partnership in the manner authorized by a municipality or other governmental entity." MSU requires that the employee and partner sign a "partnership agreement."

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<sup>19</sup> Merriam-Webster Online Dictionary, [www.m-w.com](http://www.m-w.com).

The proposed contract for the State of Michigan also requires an agreement and allows that the employer "may require the employee to sign an affidavit setting forth the facts and circumstances which constitute compliance." Appendix 35a, Article 43, Section C (emphasis added). The proposed contract would require that the persons have a "close personal relationship," and "be responsible for each other's common welfare." The same-sex domestic partners must also have "*the intent* to continue . . . indefinitely" to have a "jointly shared" regular and permanent residence. Finally, and most importantly, the same-sex domestic partners must "*agree*" that they are "jointly responsible" for "basic living expenses" in "common expenses of maintaining household." In plain terms, this is an agreement.

The Court of Appeals rightly concluded that the established criteria of the public employers were "similar to a marriage," each requiring an agreement<sup>20</sup>:

All the plans listed establish criteria for eligibility that are similar to those for marriage. In addition, as we previously noted, the plans of the University of Michigan, Michigan State University, and the city of Kalamazoo also require that the employee enter into a domestic-partnership agreement in order to receive benefits. In order to be eligible for benefits under the state plan, the employee and the employee's eligible dependent must have agreed to be jointly responsible for basic living expenses and other common expenses of maintaining a household. Thus, while the state plan does not characterize the agreement between the employee and the dependent as a domestic-partnership agreement, its character and operation are effectively the same.

Therefore, in the case of each of the plans, upon being advised of the existence of the employer-required agreement, the employer is contractually, i.e., legally, obligated to recognize the agreement for the purpose of providing health-care benefits to the dependent. In this way, the agreement between the employee and the dependent constitutes a union similar to marriage, because with the agreement (as with a marriage), the employer has a legal obligation to recognize the union and provide benefits to the eligible dependent (as with a spouse).

In looking at the ordinary meaning of "similar union," there can be no real dispute about the fact that the contracts and policies define a union similar to a marriage.

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<sup>20</sup> *National Pride*, 274 Mich App at 164 (emphasis in original; paragraph-break added).

**(3) For any purpose**

- i. The contracts and policies would recognize these similar unions for the purpose of conferring health benefits, and therefore would violate the Amendment's prohibition of recognizing a similar union "for any purpose."*

The Merriam-Webster online dictionary defines "any" to mean "one, some, or all indiscriminately of whatever quantity."<sup>21</sup> The Amendment's use of the phrase "for any purpose" encompasses the widest possible application of the Amendment's prohibition. In adopting this broad language, the people have ensured that the government cannot circumvent the Amendment by using similar unions to marriage as replacements for marriage for purposes previously reserved to marriage.

Significantly, the phrase "for any purpose" modifies the verb "recognize." The Court of Appeals rightly noted this point<sup>22</sup>:

A public employer that requires proof of the existence of a formal domestic partnership agreement to establish eligibility for benefits "recognizes" the validity of a same-sex union as reflected in the "agreement" for the "purpose" of providing the same benefits to a same-sex couple that would be provided to a married couple. This violates the plain language of the amendment prohibiting such unions to be "recognized . . . for any purpose."

Moreover, in the Court's analysis, the Court correctly determined that the proposed contract for the State of Michigan recognized a union similar to a marriage for the purpose of providing health benefits – the same health benefits for a same-sex domestic partner as are provided to an employee's spouse. The Amendment prohibits the recognition of a similar union for this purpose.

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<sup>21</sup> Merriam-Webster Online Dictionary, [www.m-w.com](http://www.m-w.com).

<sup>22</sup> *National Pride*, 274 Mich App at 161.

- ii. *The Amendment was not designed to only prohibit the establishment of civil unions, which confer the same rights and obligations as do a marriage. This interpretation would eliminate the significance of the phrase "for any purpose" from the Amendment.*

In their briefs on appeal, the appellants argue that the language of "similar union for any purpose" in the Amendment was included only to address other States like Vermont that established civil unions. See the Governor's brief, p 10; Plaintiffs' brief, pp 39-41. In other words, they argue that the Amendment's additional phrasing "or similar union for any purpose" was only designed to address the kind of legislation from Vermont, in which its legislature created a civil union law, stating that "[p]arties to a civil union shall have *all* the same benefits, protections and responsibilities under law . . . as are granted spouses in marriage."<sup>23</sup>

This argument, however, effectively nullifies the significance of the phrase "for any purpose" in the Amendment. In Vermont, civil unions have all the same rights and responsibilities that a legal marriage enjoys. But in Michigan the Amendment limits the State from recognizing a similar union for *any single* purpose, not just blocking the State from recognizing civil unions for *all* purposes. In other words, in Michigan, the recognition of a union similar to marriage for a single purpose – like the conferring of health benefits – violates the Amendment. The argument that the definition of "union" requires that the similar union have all the same duties and privileges of a legal marriage in order to qualify as a "union" would render meaningless the Amendment's requirement that such a union cannot be recognized "for any purpose." The Court of Appeals concluded the same<sup>24</sup>:

Plaintiffs contend that for such a "union" to exist, the legal status of the parties to the union typically encompasses legal effects, governing hundreds of legal rights, benefits and obligations imposed by the state and federal government.

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<sup>23</sup> 15 VSA § 1204 (emphasis added).

<sup>24</sup> *National Pride*, 274 Mich App at 161.

Plaintiffs assert that absent the conferment of the legal rights, responsibilities and benefits triggered by marriage and given the ease in terminating a domestic partnership (unilaterally, without judicial intervention), a determination equating marriage to the extension of health insurance to same sex partners would distort the plain meaning of marriage. Again, we disagree.

As the Court of Appeals found, the Amendment forbids the government from recognizing a similar union for *any* purpose. The State cannot create a civil union for the purpose of conferring health benefits to same-sex domestic partners.

This is the overarching error of the plaintiffs – they provide no explanation in their 50-page brief of the role of the phrase "for any purpose" in the Amendment. But this violates a fundamental rule of statutory construction. In construing a statute, every word, phrase, or clause must be considered as to avoid rendering any part of it surplusage or nugatory.<sup>25</sup> Moreover, in arguing that marriage and same-sex domestic partnership agreements are not similar because the partnership agreement does not confer "the vast array of rights and privileges associated with marriage," see plaintiffs' brief, p 42, the plaintiffs evidence their misunderstanding of the Amendment. As long as *one* benefit is provided in the same way to a union similar to marriage as it is provided to marriage – such as health benefits – the Amendment is violated.

In examining the entire three-part test, the Court of Appeals correctly determined that the contracts and policies of the public employers would violate the Amendment because they would recognize a similar union for any purpose by conferring a special status on same-sex domestic partners – singling them out for treatment like a married couple – for the purpose of conferring health benefits. They would (1) recognize (2) a union similar to marriage, i.e., a same-sex domestic partnership agreement (3) for the purpose of conferring health benefits. The Court of Appeals rightly evaluated this issue. This Court should affirm.

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<sup>25</sup> *Bukowski v City of Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007).

**C. The Amendment applies to all public employers, and these employers recognize a similar union for the purpose of conferring health benefits where they establish a legal right to health benefits by contract or by policy.**

By establishing a right in policy or in contract, the public employers engage in public conduct that must comply with State law and the State Constitution. The suggestion that a public employer is exempt from the Constitution is mistaken. Moreover, the Governor's claim on appeal that a public employer's contract does not constitute a recognition in a legal sense is contradicted by the common understanding of the Amendment.

**(1) The Constitution binds public employers.**

Michigan law is clear that, as an employer, the State of Michigan and its agencies are bound by the Constitution and by State law.<sup>26</sup> In other words, all State governmental actors are bound by the Constitution.<sup>27</sup> Consequently, they are limited from recognizing unions similar to marriage for any purpose because the Amendment does not distinguish between the State of Michigan acting as a Legislature or acting as an employer. For the ordinary citizen, the State is the State in all its forms and actions. In the same way that the Legislature is constitutionally bound not to recognize similar unions for any purpose, so are State agencies, municipalities, State universities, and these same State entities when acting as employers.

The Governor seeks to circumvent the broad effect of the Constitutional mandate by arguing that only the "State and its political subdivisions in the exercise of sovereign or delegated power" can run afoul of the Amendment because only the Legislature or its

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<sup>26</sup> See, e.g., *Alspaugh v Mich Law Enforcement Officers Training Council*, 246 Mich App 547, 554; 634 NW2d 161 (2001) (evaluating a sex and age discrimination suit against the State agency responsible for establishing fitness standards for men and women applying to become police officers).

<sup>27</sup> See *Booth Newspapers v University of Mich Bd of Regents*, 444 Mich 211, 257; 507 NW2d 422 (1993) (recognizing the Michigan Constitution as the "supreme authority" in Michigan law).

subdivisions could recognize a similar union to marriage for any purpose. See Governor's brief, pp 20-21. This argument suggests that somehow the State of Michigan cannot violate the Amendment where it acts only as an employer. But this is wrong.

The State of Michigan, as a public employer, can violate the Amendment. A civil servant's employment with the State of Michigan and its agencies is a public act, not a private one. No one would dispute the point that the Constitution and State law prevent the State from discriminating based on race, sex, or ethnicity in its employment practices.<sup>28</sup> If the State were to confer health benefits on only one ethnic or racial group, it would not be a viable defense to assert that the decision is a private action, or that Elliott-Larsen only applies to sovereign acts of the State.<sup>29</sup> The same principle applies here. The State of Michigan acting in its public role as an employer is forbidden from recognizing a similar union to a marriage for any purpose. The State of Michigan must act in accordance with the Constitution and State law in its employment policies.

**(2) In establishing a legal right to health benefits for same-sex domestic partners on the same basis as spouses, the public employers have recognized the same-sex domestic partnership agreements.**

The Governor argues on appeal that there is no recognition in the legal sense where the legal entitlement is established by contract. Governor's brief, p 14. The Governor argues that "[t]he term 'recognize' must be construed more consistently with the people's understanding to

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<sup>28</sup> See, e.g. Const 1963, art 1 § 26, art 11 § 5, and MCL 37.2201 *et seq*, Elliott-Larsen Civil Rights Act.

<sup>29</sup> See, e.g., *Marsh v Civil Service Dep't*, 142 Mich App 557, 561; 370 NW2d 613 (1985)(employees of the state classified civil service may directly bring suit in the circuit court to enjoin violations of Const 1963, art 11, § 5); and *Calcaterra v Civil Service Comm*, 52 Mich App 27, 31; 216 NW2d 613 (1974)(Constitution permits any citizen to seek injunctive or mandamus relief to assure that any of the provisions of Const 1963, art 11, § 5 are met).

involve the grant of an enduring legal status, not merely requiring a relationship as a basis for affording contractual benefits." Governor's brief, p 20.

But this claim is wrong. There is nothing that limits the Amendment's prohibition to recognize a similar union to one with an "enduring legal status."<sup>30</sup>

Moreover, the Governor's argument is contradicted by the common meaning of these words. The ordinary person understands that the State may establish a legal status or a legal entitlement through its contracts as evidenced by the fact that the State must comply with State law and the State Constitution in its public role. There can be no dispute that the State may establish a legal right by contract. In recognizing marriage alone, the Amendment prohibits conferring the same legal rights to same-sex domestic partnership agreements as it does to marriage. This conferring would otherwise be a "recognition" of these similar unions. This is the point of the Amendment – to protect the unique status of marriage in Michigan.

For example, if the Michigan Legislature passed a statute requiring public employers to provide health benefits to same-sex domestic partners on the same basis as provided to spouses, there would be no dispute that this action conferred a legal status. There is no legal difference for purposes of the Amendment between the State acting through the Legislature and the State acting as a public employer. The State's provision of health benefits based on a definition of a

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<sup>30</sup> Ironically, even if there were some requirement of "enduring legal status," on this point, the requirements of the same-sex domestic partnership agreements are similar in nature to those of marriage. If anything, the policies are more stringent: three of the contracts and policies here require a six-month waiting period before establishing a new same-sex domestic partnership agreement. The contract for the State of Michigan would direct that they "have not had a similar relationship with any other person for the prior six months," and the City of Kalamazoo and University of Michigan required that the previous partnership been terminated at least six months earlier (MSU required that the partners have shared a residence for six months). By comparison, Michigan law requires a 60-day waiting period for a divorce from the time of complaint, unless there are minor children, in which case the State requires a six-month period before testimony may be taken. *Alexander v Alexander*, 103 Mich App 263, 266; 303 NW2d 202 (1981), citing MCL 552.9f.

same-sex domestic partnership agreement is just as much State action as if the Governor had issued an executive order, the Legislature passed an act, or one of the State Departments established this as a matter of policy. In all of these actions, the State would "recognize" these unions by establishing a legal right to health benefits and provide the agreements the same rights as marriage for that purpose. This violates the Amendment.<sup>31</sup>

Along the same lines, the plaintiffs argue that the Amendment is violated only where a person in a similar union to marriage is given a benefit as a "spouse" set forth in a statute – even though the person is not a spouse. See plaintiffs' brief, pp 26-30. To illustrate this point, the plaintiffs cite MCL 390.1243 and MCL 390.1263, which provide that spouses of officers killed in the line of duty receive a tuition waiver. The plaintiffs then argue that if a domestic partner received this benefit as a spouse, the Amendment would be violated. See p 28 ("it would constitute the university's recognition of that domestic partnership relationship as a marriage").

But this argument misses the point. The Amendment is not just violated when a domestic partner is given the benefit of a spouse in the face of the language of the statute, but would also be violated if the statute were amended to allow "domestic partners" to receive this benefit in the same way as a spouse. This is so because the Amendment requires both that marriage be the only agreement recognized for any purpose and that similar unions not be recognized for any

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<sup>31</sup> On this point, the Governor argues if a State contract can establish a legal right that there then is no "textual basis" for limiting it to only public employers. See Governor's brief, p 20. The Court of Appeals rightly rejected such a claim, concluding that the placement of the Amendment in article 1 "is legally significant and contemplates limitations on government conduct." *National Pride*, 274 Mich App at 159 n 10, citing *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 205; 378 NW2d 337 (1985)("The Michigan Constitution's Declaration of Rights provisions have never been interpreted as extending to purely private conduct; these provisions have consistently been interpreted as limited to protection against state action"). Moreover, only the government legally defines marriage; private organizations cannot do so. Consequently, by ensuring that other similar unions are not recognized like marriages, the Amendment indicates that its scope only extends to the government and its recognition, not to private actors.

purpose.<sup>32</sup> Plaintiffs acknowledge this point elsewhere in their brief – "a government entity . . . [violates the amendment] by recognizing [a same-sex partnership] as a marriage *or as a union similar to a marriage*," p 28 [emphasis added]). The Amendment prohibits the State from creating parallel structures to marriage for similar unions and then conferring on them the same benefits as are given to marriage. Plaintiffs' arguments on this point fail to address the manner in which the health benefits are extended to same-sex domestic partners. Plaintiffs' argument also fails to address that the employer is excluding other to such health benefits. One only need look to *how* the benefit is being conferred to see that the public employer is treating the same-sex domestic partnership as a marriage.

**D. Because the Amendment is unambiguous and its meaning is known from the words it employed, this Court need not look to the circumstances surrounding the passage of the Amendment.**

Attempting to avoid the plain language of the Amendment, the Governor and some of the amicus briefs assert that it is necessary to rely on facts relating to the passage of the Amendment to understand its meaning. The Court of Appeals rejected the argument that it needed to examine the "public debate" surrounding the adoption of the Amendment to understand its meaning<sup>33</sup>:

Because article 1, section 25 is unambiguous and plainly precludes the recognition of same-sex domestic partnerships or similar unions for any purpose, this Court need not look to extrinsic evidence to ascertain the voters' intent. *American Axle & Mfg, supra* at 362. We therefore decline plaintiffs' invitation to consider the circumstances and public debate surrounding the adoption of the amendment.

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<sup>32</sup> Plaintiffs' argument in this section also wrongly suggests that even civil unions established by the Legislature that provide *all* the rights and benefits of marriage would not violate the Amendment because the domestic partners would receive the benefits as "domestic partners" not as "spouses" (and therefore not as a marriage). In this way, the additional phrase "or similar union for any purpose" would have no meaning.

<sup>33</sup> *National Pride*, 274 Mich App at 159.

This Court should similarly decline this invitation to go beyond the plain and unambiguous language of the Constitution.

The exploration of the public statements of different political figures in Michigan on this issue does not assist this Court in its role in reviewing the Amendment. Such an exploration is unnecessary and should not be undertaken here. The Amendment is plain on its face and does not require construction. It employs ordinary terms that have a common, everyday meaning. There is no need for a technical construction of the Amendment, and there is no need to review the statements of proponents or opponents of the Amendment to understand its meaning. Even the Circuit Court acknowledged this point, holding that "the words [of the Amendment] used have a common meaning and the intent of the people is contained in the amendment." Appendix 75a-76a, Circuit Court opinion and order, pp 6-7.

**(1) This Court need not examine the comments of different political figures to understand the meaning of the Amendment.**

On appeal, the Governor attempts to shift this Court's focus by asserting that where the meaning of the Amendment "may be questioned," this Court has resorted to the historical context in examining the meaning of a constitutional provision. There is, however, no reason to resort to a review of the decisions from other jurisdictions and statements from certain supporters of the Amendment. Moreover, the analysis of the appellants employs the very kind of argument that Chief Justice Taylor noted that the Court is reluctant to accept because it displaces the language of the text with the politically-motivated statements of partisans in the dispute<sup>34</sup>:

This is indeed a "history" because we make reference here to contemporaneous events that resulted in legislative action. This history of the period can safely be used as a guide to the intent of the Legislature. *To be noted is that this reliability is missing when staff-developed legislative analyses, reports of a legislative*

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<sup>34</sup> *Yaldo v North Point Ins Co*, 457 Mich 341, 352; 578 NW2d 274 (1998)(Taylor, J., dissenting)(emphasis added).

*committee, or the like, which are all only opinions of the authors of the reports regarding the intent of the Legislature, are considered as actual and conclusive expressions of legislative intent.*

Here, the Governor and the plaintiffs offer partial quotes from certain Amendment supporters to assert that the nature of the debate surrounding the Amendment's passage provides a broader understanding of its purpose. Governor's brief, pp 8-10; Plaintiffs' brief, pp 8-10. These quotes are less reliable than the staff-developed legislative analyses or reports of a legislative committee, which are unnecessary here because the Amendment is unambiguous.<sup>35</sup> Moreover, these public statements do not clarify the meaning of the Amendment and are exactly the kind of statements that this Court has viewed with suspicion.

The Governor cites *People v Smith*<sup>36</sup> and *People v Nutt*<sup>37</sup> to support her claim that the historical circumstances and debates play a vital role in this Court's review of the Amendment. Both of these cases, however, rely on the Address to the People for the 1963 Constitution, which was an official record of the Constitution's proceedings that was "widely distributed to the public prior to the ratification vote."<sup>38</sup> For this reason, this Court has noted that it is a "valuable tool in determining whether a possible 'common understanding' diverges from the plain meaning of the

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<sup>35</sup> There are, of course, competing quotes to those offered by the appellants, which contradict these accounts. See e.g., the Michigan Civil Rights Commission issued a statement in 2004 about the meaning of the Amendment:

If passed, Proposal 2 would result in fewer rights and benefits for unmarried couples, both same-sex and heterosexual, by banning civil unions and overturning existing domestic partnerships. Banning domestic partnerships would cause many Michigan families to lose benefits such as health and life insurance, pensions and hospital visitation rights. [Quoted by AFA Michigan Amicus filed in the Court of Appeals, January 4, 2006, p 14.]

<sup>36</sup> *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007).

<sup>37</sup> *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004).

<sup>38</sup> *Nutt*, 469 Mich at 590 n 26. See also *People v Smith*, 478 Mich at 301-302.

actual words of our constitution."<sup>39</sup> The Amendment at issue here, however, was adopted under circumstances different from the adoption of the 1963 Constitution. There was no official record of constitutional proceedings distributed to the public. Consequently, the Governor's reliance on *Smith* and *Nutt*, which rely on the value of the official record to the 1963 Constitution, is unavailing.

Rather, the will of the people is known here by the words of the Amendment, not by examining newspaper accounts of what others said about the Amendment. The people of the State of Michigan are not dependent on "experts" to inform them of the meaning of a constitutional amendment where that amendment uses ordinary, everyday terms. The people act through the language they ratify. As the Court of Appeals concluded, this matter is resolved by examining the words of the Amendment itself.

**(2) The analysis of other State's decisions does not address the unique language used in the Michigan Amendment.**

Similarly, the Governor and the plaintiffs refer to select decisions of other courts in attempt to suggest a particular historical context of the Amendment at issue here. The plaintiffs refer to the way six States have compared marriage to domestic-partner agreements, but none of these other State's constitutions share the unique language used by the Amendment here.

Therefore, they are not helpful to an understanding of the Amendment.<sup>40</sup> Rather, the cases cited by the plaintiffs were addressing the provision of domestic-partnership benefits by a local

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<sup>39</sup> *Nutt*, 469 Mich at 590 n 26, citing *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 378, 379 n 11; 630 NW2d 297 (2001).

<sup>40</sup> In reviewing other State constitutions, there are other State Constitutional Amendments, like Michigan, which do more than reaffirm the definition of marriage, but also limit the recognition of other similar or substantially equivalent unions. See, e.g., Ga Const Art I, § IV, Para I; Kan Const Art 15, § 16; Ky Const. § 233a; La Const Art. XII, § 15; Mo Const Art I, § 33; ND Const Art XI, § 28; Ohio Const Art XV, § 11; Okl Const Art II, § 35; Tex Const Art I, § 32; Utah Const Art I, § 29; and Wis Const Art XIII, § 13. None of these states, however, use the same language of Michigan – none has the broad language "for any purpose."

municipality where there was state legislation defining marriage as a union between a man and a woman.<sup>41</sup> None of the cases involved the provision of benefits where a State prohibited the recognition of a similar union for any purpose.<sup>42</sup>

Regarding the historical setting in which this Amendment was passed, the Governor and the plaintiffs claim that this Amendment responds to the development of civil union laws in other States. They specifically rely on the Vermont case, *Baker v State*,<sup>43</sup> to demonstrate their claim that this State only passed the Amendment to respond to civil union laws in other States.

But this is a selective analysis. A party could just as easily cite *Devlin v City of Philadelphia* to show that the Michigan Amendment was designed to block same-sex domestic partnership benefits.<sup>44</sup> In *Devlin*, the Pennsylvania Supreme Court held that the Pennsylvania Amendment, which defined marriage as between one man and one woman but did not contain the language prohibiting recognition of unions similar to marriage for any purpose, did not prevent the City of Philadelphia from conferring on its city employee's same-sex partners (defined as "life partners") certain employment benefits.<sup>45</sup> By including the additional language in the Michigan Amendment ("or similar union for any purpose"), like appellants, one could argue that the unique

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<sup>41</sup> See Plaintiffs' brief, pp 44-47, citing *Heinsma v Vancouver*, 144 Wash 2d 556; 29 P3d 709 (Wash Sup Ct 2001); *Crawford v Chicago*, 304 Ill App 3d 818; 710 NE2d 91 (1999); *Slattery v New York City*, 697 NYS2d 603; 266 AD2d 24 (1999); *Devlin*, 862 A2d at 1234; *Tyma v Montgomery Co*, 369 Md 497; 801 A2d 148 (Md App Ct); and *Lowe v Broward Co*, 766 So2d 1199 (Fla Dist Ct App 2000).

<sup>42</sup> All six of the cases focused on whether the local municipal ordinances or policies were preempted from providing these benefits to their employers by state law. *Heinsma*, 29 P3d at 710-711; *Crawford*, 710 NE2d at 99; *Slattery*, 697 NYS2d at 604; *Devlin*, 862 A2d at 1243; *Tyma*, 801 A2d at 156; and *Lowe*, 766 So2d at 1203, 1208. They are inapposite.

<sup>43</sup> *Baker v State*, 170 Vt 194, 197-198; 744 A2d 864 (1999) (the court required Vermont to provide all the same benefits and protections that are provided for marriage in Vermont to civil unions).

<sup>44</sup> *Devlin*, 580 Pa 564; 862 A2d 1234 (although the case was decided in December 2004, after the vote on this Amendment occurred, the case was argued on April 13, 2004).

<sup>45</sup> *Devlin*, 862 A2d at 1245 n 9.

language of the Amendment was designed in response to prevent this kind of public recognition of same-sex domestic partnership agreements. The resort to this historical analysis, however, is unnecessary.

**E. The Amendment does not forbid the State of Michigan or other public employers from conferring health benefits on same-sex domestic partners as long as the provision of benefits is not based on the existence of a union similar to a marriage.**

The plaintiffs and the amici raise the issue that same-sex domestic partners may then be precluded from receiving health benefits in light of the decision of the Michigan Court of Appeals. The Amendment, however, does not prevent public employers from conferring benefits on a public employee's same-sex domestic partner as long as the public employer does not confer the benefits based on the existence of a union similar to a marriage. The Court of Appeals also acknowledged this point<sup>46</sup>:

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.

For example, one possible facially-neutral basis on which to confer benefits that would not recognize a union similar to a marriage might be to confer benefits on economic dependence. In this way, any uninsured person who is economically dependent might be eligible to receive health benefits, regardless whether the uninsured person is a same-sex domestic partner or family member or friend. Such an eligibility criterion would not define a union similar to a marriage in violation of the Amendment.<sup>47</sup> The Court of Appeals correctly evaluated the Amendment – this Court should affirm.

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<sup>46</sup> *National Pride*, 274 Mich App at 162.

<sup>47</sup> In fact, the graduate students from the University of Michigan apparently proposed a "designated beneficiary" plan in which the University of Michigan might confer health benefits for a second person designated by the student, without limitation. See AFA Michigan Amicus filed in the Court of Appeals, January 4, 2006, p 11.

**Conclusion and Relief Sought**

WHEREFORE, the Attorney General respectfully requests that this Honorable Court affirm the decision of the Michigan Court of Appeals.

Respectfully submitted,

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