

**STATE OF MICHIGAN
IN THE SUPREME COURT**

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

Supreme Court No. 133554
Court of Appeals No. 265870
Ingham County Circuit Court
No. 05-368-CZ

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

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

Intervening Defendant-Appellee.

Brief of Amicus Curiae Michigan Family Forum in Support of Intervening Defendant

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Introduction

The plain language of Michigan's marriage amendment prohibits redefining marriage to include same-sex couples *and* it prohibits recognition of any "similar union" to marriage "for any purpose." The Appellants cannot credibly contend that the domestic partnership plans at issue in this case are not intended to be "similar unions" to marriage for the purpose of giving employment benefits. The same private companies after which the Appellants' policies are modeled are clear that their domestic partner plans are meant to be unions similar to marriage, or otherwise known as "spousal equivalents." Because the Appellants grant benefits on the basis of these domestic partnerships, the plans violate the plain language of the constitution.

Appellants' citation of several cases holding that municipal domestic partnership plans are not preempted by state marriage law is not helpful to this case. This case does not involve whether a municipality has home rule authority to grant domestic partner benefits. None of the cases cited by Appellants involved a constitutional amendment like Michigan's that prohibit recognition of unions similar to marriage for any purpose.

I. Private Companies Offering Domestic Partnerships Acknowledge That They Are Intended To Be A "Spousal Equivalent."

Appellants claim that the domestic partnership provisions that they have put in place are not similar to marriage. As the Court of Appeals found, the domestic partnership plans at issue in this case recognize a "similar union" to marriage. *Nat'l Pride at Work v. Governor of Michigan*, 274 Mich. App. 147150-51 (Mich. App. 2007).

The common criteria used by the plans require that domestic partners 1) are of the opposite sex; 2) consent to the relationship; 3) are not related by blood; 4) are not married or have a similar relationship to another person; 5) be over 18 years of age. *Id.*

As Appellants note, many large private companies have initiated similar domestic partnership plans. But these private companies acknowledge the obvious – domestic partner benefits are intended to be a spousal equivalency. For example, Hewlett-Packard states outright in regard to its domestic partnerships plan that “[t]he company’s goal is ‘spousal equivalency.’”¹ Likewise, Fox, Inc. gives two options for enrolling in the company’s benefits program: by affidavit of marriage or by affidavit of “spousal equivalency” for domestic partnerships.² Kodak’s Domestic Partner Benefits policy states that it “defines same or opposite sex domestic partners as two people in a spouse-like relationship”³ The Domestic Partner model for Viacom, HBO, Warner Brothers, Time, and Sony Capital Cities also define domestic partners as “spousal

¹ Available at <http://www.hrc.org/documents/Sample-Policies-Hewlett-Packard.pdf>. (last visited October 2, 2007).

² Available at <http://www.hrc.org/documents/Sample-Statement-of-Domestic-Partnership-Fox-Inc.pdf> (last visited October 2, 2007).

³ Available at <http://www.hrc.org/documents/Sample-Policies-Kodak.pdf> (last visited October 2, 2007).

equivalents.”⁴ American Airlines Domestic Partner Benefits Pack also describes its domestic partnerships plan as “spouse-like.”⁵

Appellants’ domestic partner definitions mirror the common definition of domestic partner used by these companies and use the same or similar criteria to establish them.⁶ These private companies acknowledge that domestic partnerships are intended to be unions similar to marriage. Private companies, however, are not restricted from adopting domestic partnership policies because they are not political subdivisions of the state. But because Michigan’s marriage amendment prohibits state-sanctioned spousal equivalents, the Appellants’ domestic partnership policies are unconstitutional. It is simply disingenuous for the Appellants to claim as they have that their policies do not recognize a “similar union [to marriage] for any purpose.”

Michigan has made a policy decision that it wants to encourage marriage by granting benefits only to married persons when the benefits are granted *because of the relationship*. Through the marriage amendment, the state has clearly made a decision to extend those benefits only to married couples. The amendment’s purpose statement is clear – “To secure and preserve the benefits of marriage for our society and for future generations of children. . . .” The obvious state interest is to encourage couples to marry,

⁴ Available at <http://www.hrc.org/documents/Hollywood-Supports-Domestic-Partner-Task-Force.pdf> (last visited October 2, 2007).

⁵ Available at <http://www.hrc.org/documents/Sample-Policies-American-Airlines.pdf> (last visited October 2, 2007).

⁶ These plans and their criteria can be viewed at the website of the Human Rights Commission website, <http://www.hrc.org/issues/4818.htm>

and not merely cohabit. *See, e.g., Morrison v. Sadler*, 821 N.E.2d 15, 25 n.13 (Ind. Ct. App. 2005) (noting that providing an incentive for couples to marry is the purpose of granting spouses benefits). The Appellants' domestic partnership plans undermine that policy purpose by eroding the incentive to marry because under their plans, cohabiting couples are given the same benefits as married couples, based on the domestic partnership. Thus, as the Court of Appeals found, Appellants' policies violate the prohibition on recognizing a union similar to marriage "for any purpose."

Unmarried individuals may still seek all the benefits that they desire. As the Attorney General notes, all the benefits that Appellants seek can be provided under Article I, Section 25, as long as they are not provided on the basis of the domestic partnership. Benefits could be provided, for example, on the basis of economic dependence. They simply may not be provided based on a spouse-like relationship like a domestic partnership.

II. The Preemption Cases Cited by Appellants Are Inapposite.

Appellants cite several cases in which other state courts have upheld municipal domestic partnership plans against taxpayer suits that claimed the plans were preempted by the general marriage policy of the state. Not one of the cases cited by Appellants involved a state constitutional amendment like Michigan's that both defines what marriage is and prohibits giving benefits to any similar union for any purpose. Instead, each of them involved an issue of municipal preemption where the plaintiffs had to prove that city domestic partnership plans impliedly encroached on the state's authority to

regulate marriage. In other words, the plaintiffs in those cases were required to show that domestic partnerships were really “marriages” by a different name, not just a similar union to marriage.

The differences between the preemption line of cases and this case was recently highlighted by a Washington court of appeals. In *Leskovar v. Nickels*, 2007 WL 2696724 (September 17, 2007), a mayor had issued an executive order requiring that city departments recognize same-sex “marriages” for the purpose of city benefits in the same manner as opposite sex marriages. A group of taxpayer plaintiffs challenged the executive order on the grounds that it was preempted by the state marriage amendment that defined marriage as a union between a man and a woman. *Id.* at ¶¶ 1-4. The court of appeals found that the executive order was not preempted by the marriage amendment because the amendment did not prohibit domestic partner benefits. *Id.* at ¶ 19 (citing *Heisma*). But the court explicitly distinguished the Washington marriage amendment from Michigan’s Article 1, § 25. “It is significant that the Michigan court specifically noted that Michigan’s marriage amendment is unique from other jurisdictions because it prohibits the recognition of not only same-sex marriages, but also similar unions. . . . In contrast here, Washington’s marriage statute prohibits marriage by ‘persons other than a male and a female.’ It is distinct from Michigan’s marriage amendment, and does not prohibit the recognition of ‘similar unions for any purpose.’” *Id.* at ¶¶ 26-27 (quoting Mich. Const. Art. 1, § 25). Thus, the court found that Washington did not prohibit domestic partnerships because it did not have a marriage amendment like Michigan’s. *Id.*

A California appellate court likewise found that because a state statute defining marriage did not prohibit domestic partnerships or other unions similar to marriage, it was permissible for the state to give domestic partner benefits to same-sex couples. The court noted that if prohibiting domestic partnerships “had been its purpose, the [statute] easily and effectively could have accomplished that goal by using language akin to words used in laws from other states.” *Knight v. Superior Court*, 128 Cal.Rptr. 3d 687, 694 (Cal. App. 2005) (emphasis added) (citing marriage amendments like Michigan’s that prohibit domestic partnerships and other unions similar to marriage).

The preemption line of cases does not involve a specific prohibition on unions similar to marriage like domestic partnerships. For example, in *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. 1999), the court of appeals found that Illinois granted municipalities broad authority to enact their own legislation unless the municipalities were expressly preempted by the state. *Id.* at 100. Thus, the plaintiffs’ challenge to a municipal domestic partnership plan would have had to prove that Chicago actually created a marital status by enacting its domestic partnership law, not just a union similar to marriage for any purpose. *Id.* at 99. Once again, that is much different than this case.

In *Tyma v. Montgomery Co*, 801 A.2d 148, 155 (Md. Ct. App 2002), the plaintiffs argued that a county “exceeded its authority under the constitution and laws of Maryland by extending employment benefits to domestic partners of its employees because Maryland does not recognize either same-sex or common law marriages.” But the court found that the Act did not “purport to define, redefine or regulate marriage in Maryland.”

Id. at 157. The question was not whether the county had created a similar union for any purpose. It was whether the county had actually engaged in a backdoor attempt to recognize same-sex “marriage” contrary to its home rule authority. *Id.*

In *Heisma v. City of Vancouver*, 144 Wash.2d 556, 563 (Wash. 2001), the Washington Supreme Court concluded that Vancouver’s domestic partnership plan was not preempted by state law because it “does not affect the legislature’s ability to regulate familial relationships on a statewide basis.” Because the state had no law prohibiting domestic partnerships or other unions similar to marriage, a municipal domestic partnership plan was not preempted. Once again, that is far different from this case.

The same question was at issue in *Slattery v. City of New York*, 266 A.D.2d 24 (Ct. App. 1999). In that case a New York court found that a municipal domestic partnership plan was not preempted by state marriage law. Likewise, in *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1243 (Pa. 2004), the Pennsylvania Supreme Court found that a city’s domestic partnership plan was not preempted by state marriage laws. In neither case was there a law like Michigan’s prohibiting unions similar to marriage. But even in the implied preemption cases, some courts have held that the domestic partnerships are prohibited. See *Lilly v. City of Minneapolis*, 527 N.W. 2d 107 (Minn. App. 1995); *Arlington County v. White*, 528 S.E. 2d 706 (Va. 2000).

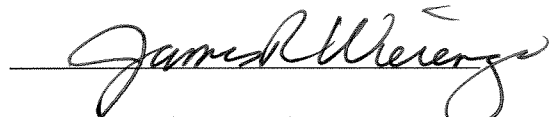
In sum, the preemption cases cited by Appellants deciding whether domestic partnerships are *ultra vires* of a municipality’s home rule authority are totally inapposite to this case, as recognized by the Washington Court of Appeals in *Leskovar*. Michigan’s

marriage amendment explicitly prohibits the state and its political subdivisions from recognizing—for any purpose—a union between unmarried couples that is similar to marriage. Because Appellants recognize domestic partnerships for the purpose of giving benefits, the plans at issue in this case are unconstitutional.

Conclusion

For the foregoing reasons, and those stated in the Attorney General's response, Amicus respectfully requests that this Court uphold the judgment of the Court of Appeals.

Respectfully submitted this 3rd day of October, 2007.



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