IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THERESA BASSETT, CAROL KENNEDY, PETER WAYS, JOE BREAKEY, JOLINDA JACH, BARBARA RAMBER, DOAK BLOSS, GERARDO ASCHERI, DENISE MILLER, and MICHELLE JOHNSON

Plaintiffs

vs.

RICHARD SNYDER, in his official capacity, as Governor of the STATE OF MICHIGAN,

_____/

Case No. 2:12/cv-10038
Hon. David M. Lawson

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**CITY OF ANN ARBOR's MOTION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS**

The City of Ann Arbor moves this Court for leave to participate in the above-referenced case as *amicus curiae,* and to file the attached Brief in Support of Plaintiffs' Brief in Support of Summary Judgment. In support of this Motion, the City of Ann Arbor states as follows:

1. The City of Ann Arbor is a municipality in Washtenaw County in the state of Michigan. The City of Ann Arbor employs more than 800 union and non-union employees. Since 1992 the City of Ann Arbor has offered health, dental, and life insurance benefits to the same-sex domestic partners of these employees. The City of Ann Arbor has an interest in retaining the valuable employees who utilize Other Qualified Adult benefits, and an interest in offering benefits fairly and equitably to all of its employees.

2. The City of Ann Arbor maintains that the Employee Domestic Partner Benefits Restriction Act should be declared unconstitutional.

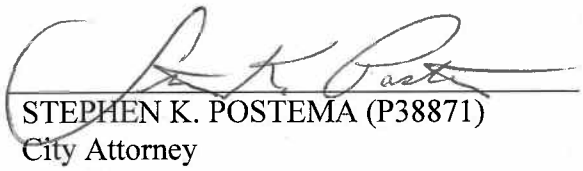
3. The Court's decision on this issue has a direct impact on the City of Ann Arbor, and other municipalities who offer similar benefits.

4. The City has sought and received concurrence to file this brief from all parties, including Assistant Attorney General Margaret Nelson on behalf of the Defendant.

WHEREFORE, the City of Ann Arbor respectfully requests that this Court grant the City Leave to participate in this case as an *amicus curiae,* and to file the attached Brief in Support of Plaintiffs.

Respectfully submitted,

CITY OF ANN ARBOR

By: 

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Date: July 13, 2012.

PROOF OF SERVICE

I hereby certify that on July 13, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiffs' Counsel and Defendant's Counsel, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants: None.

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**BRIEF OF CITY OF ANN ARBOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS**

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## COUNTER-STATEMENT OF ISSUES PRESENTED

DOES THE PUBLIC EMPLOYEE DOMESTIC PARTNER BENEFIT RESTRICTION ACT UNCONSTITUTIONALLY LIMIT THE CITY'S ABILITY TO GOVERN ITS LOCAL EMPLOYMENT RELATIONS?

Plaintiffs answer.....Yes.

Defendants answer.....No.

The City of Ann Arbor states that this Court should answer.....Yes.

## INTRODUCTION AND INTEREST OF THE CITY OF ANN ARBOR

The City of Ann Arbor (the "City") submits this amicus curiae brief because the application of the State of Michigan's Public Employee Domestic Partner Benefit Restriction Act (the "Act") will unreasonably curtail the City's ability to govern its local employment relations. Specifically, the Act would prevent the City's provision of medical insurance benefits to what the City has termed Other Qualified Adults ("OQAs") and would thus undermine the right of a municipal employer to make business decisions involving its employees. Such an intrusion by the state should not be allowed by this Court. The City provides this brief to demonstrate the strong interest the City has in this issue.

As the Michigan Supreme Court has recognized, Michigan is a "strong Home Rule state" with a constitution that "recognizes basic local authority." *Alco Universal Inc. v. City of Flint*, 192 N.W.2d 247, 249 (Mich. 1971). The authority of the City to govern itself is broad. The Home Rule City Act states that a Home Rule city may "pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state." MCL 117.4j(3). The ability to recruit and retain employees has always been a fundamental municipal concern.

The expansion of state restrictions into the City's fundamental municipal concern with employment relations not only limits the City's ability to compensate its employees as it sees fit, but specifically mandates a restriction that is disruptive to employment relations in the City (as well as other municipal entities). The Act is also discriminatory against a class of Other Qualified Adults that includes gay and lesbian employees who by law cannot marry and thus cannot become eligible for the same medical insurance benefits as married employees. The state legislature has purported to act in the best interests of Michigan, but the City and other similarly situated local government entities will actually receive little or no benefit from the Act. The

fiscal rationale cited by the state is superficial, does not take into account the true cost of losing employees to may leave for financial or moral reasons because of the Act, and is short-sighted and for these reasons, as developed below, this Court should grant Plaintiffs' request for injunctive relief.

**FACTS RELATING TO THE PROVISION OF OTHER QUALIFIED ADULT BENEFITS IN THE CITY**

On August 17, 1992, the City approved a resolution to approve certain benefits (such as medical benefits) for gay or lesbian domestic partners of City employees (the "City Resolution"). The City determined at that time that it was important, as an employer, to offer such benefits. The City has traditionally used certain benefits to recruit and retain employees, as have many municipalities and private corporations. The City's ability to offer competitive compensation packages would be diminished without the ability to offer such benefits. Other public and private employers offer such benefits as an issue of fairness and these other entities are available sources of employment for City employees.

The City Resolution clarified that the domestic partner benefits program was applicable to gay and lesbian domestic partners who either were not represented by a collective bargaining union or whose collective bargaining union had affirmatively expressed its acceptance of the benefits program. The domestic partners were defined by the City ordinance as persons "neither of whom are married." (City Code of Ordinances, Chapter 110, Section 9:87(4)). The resolution approving domestic partnership benefits specifically recognized the legal inability of gay or lesbian partners to marry and noted that their relationship, by law, could not constitute marriage.

In 2008, the Michigan Supreme Court held that domestic partnership benefits provided by Michigan municipalities violated Article I, Section 25 of the Michigan Constitution (the "Marriage Amendment") by recognizing domestic partnerships as "unions similar to marriage."

*Nat'l Pride at Work, Inc. v. Gov. of Mich.*, 481 Mich 56 (2008). (The Supreme Court ruling unfortunately ignored the basic fact that health benefits for a spouse or an OQA arise not from the institution of marriage itself but solely because the City chooses to offer the benefits or because they are bargained and contracted for; such benefits are not a recognition of marriage or a similar union.)

Nevertheless, the City then altered its benefit policy to comply with the ruling in *National Pride.* In the newly configured program, the City offered coverage to an employee for an eligible OQA. The OQA and the employee were required to share a common residence, could not be married to another person, and could not be related under the Michigan laws of intestate succession. The City covered OQAs because it determined that it made economic sense to provide such coverage to attract and retain employees who sought this coverage. Further, its unions bargained for such benefits for their members.

While the City had sought to comply with the law, the state has now changed the law by passing the Act. The objective of the Act is to prevent public employees' domestic partners from receiving health insurance. The Act prevents public employers, like the City, from conferring medical benefits on individuals who reside in the same residence as a public employee, who are not married to the employee and are not legal dependents of the employee, and who are not related as defined by law. [1] 2011 P.A. 297. As a practical matter, this primarily precludes gay and lesbian employees from receiving health insurance benefits because unmarried heterosexual partners can obtain such benefits through marriage. Furthermore, the Governor has claimed that

[1] In pertinent part: "Sec. 3. (1) A public employer shall not provide medical benefits or other fringe benefits for an individual currently residing in the same residence as an employee of the public employer who is not 1 or more of the following: (a) Married to the employee. (b) A dependent of the employee, as defined in the internal revenue code of 1986. (c) Otherwise eligible to inherit from the employee under the laws of intestate succession in this state.

these restrictions apply only to public employees who are not "university employees or state employees under civil service."

The Act would currently impact eight City employees who have secured coverage for OQAs under the City's policies. While this is a small number of individuals, for those affected it certainly has a major impact. Moreover, the lack of any rational basis for the Act, as well as the injustice it causes, would require careful scrutiny even if only one OQA were impacted.

**THERE IS NO REASONABLE JUSTIFICTION FOR THE ACT**

The state must show at the very least that "the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). In *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011), the Ninth Circuit Court of Appeals struck down an Arizona statute that eliminated health benefits for domestic partners using the rational basis test. The court in *Diaz* did not reach the question of whether a heightened form of scrutiny applied because it concluded that the statute violated the Equal Protection Clause based on the rational basis test. *Id.* at 1012. While this Court should adopt a heightened form of scrutiny as set forth below at p. 8, the state's weak arguments to support the Act strain any concept of rationality.

As a threshold issue, the lack of any rational basis for the Act is demonstrated by the fact that, in theory, an OQA could maintain health benefits coverage, even under the Act, as long as he did not reside "in the same residence as an employee of the public employer." (While clearly an OQA would most likely live in the same residence, and that is a requirement of the City's current program, not all Other Qualified Adult benefit programs would necessarily require that the partners live in the same primary residence.) The fact that an OQA partner could move to the house next door and thereby maintain coverage under state law highlights the odd and irrational classifications that could arise from the Act. What possible state interest could there be in

allowing benefit coverage for individuals who do not actually reside with a public employee, but restrict the same coverage for an OQA who lives at the same residence? The Act clearly is not grounded in the reality of how partners live their lives and take care of one another. This directly harms the families that rely on OQA benefits to help them care for one another in their own homes.

Proponents of the Act have cited financial savings to the state as the main reason for passing the legislation, which prevents public employers, like the city of Ann Arbor, from conferring medical benefits on the domestic partners or OQAs of its employees. http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/htm/2011-HLA-4770-3.htm. For the reasons stated below, not only will the Act save the state little or no money, but the City will suffer negative economic consequences from the restriction. First, the state will not spend less money on the City or other municipalities because of the Act, since the number of public employee family members receiving medical benefits is not a factor in the state's allocation of funding to municipalities.[2] Second, the state does not pay the medical benefits of City employees or those covered as OQAs. As the sixth-largest city in Michigan,[3] the City of Ann Arbor provides medical benefits through employment compensation packages to 3,254 people, including employees, retirees, spouses, children, etc. Of that number, only eight people are covered as OQAs. That means that 0.0025%, or one-quarter of 1%, of those receiving medical benefits from the City are designated as OQAs.

It "costs" the City an approximate annual (illustrative) amount of $6,953 per OQA enrolled in the City's self-funded health plan. The total annual illustrative cost to the City for all

[2] See footnotes 5 and 6 from p. 7 of the brief filed by the Plaintiffs in this case supporting a Motion for Preliminary Injunction.
[3] 2010 Census.

eight OQAs is $55,626.[4] These numbers pale in comparison to the over $16,000,000 spent by the City on health insurance for active and retired employees in the one-year period ending June 30, 2011.

The amount of $6,953 "paid" by the City for an employee's OQA coverage is also actually added to the employee's income as imputed income. Therefore, ironically, the state will lose out on tax revenue paid by employees who have an OQA. This fact directly contradicts the claim by the Act's advocates that providing health benefits to same-sex partners "shifts people's hard-earned dollars into the pockets of same-sex partners." Rep. Peter Lund, "Lund Calls to Abolish Civil Service Commission,"[5]

If the state believes that there is a further cost savings to the City, it neglects to factor in the very real economic cost of failing to attract or retain employees in City employment. This potential attrition muddies the economic impact of the Act, as it is difficult to quantify the financial loss incurred when such employees leave. The loss of institutional memory is a very real loss to the City when an experienced employee leaves. The City does not want to face the prospect of losing a valued part of its workforce due to the state's usurpation of power in an area traditionally left to employers, nor does it want to incur the financial cost of having to seek out and train new employees as a result of the Act. Because gay and lesbian OQAs have no recourse to marry their partners and thus avail themselves of medical benefits, the Act may force lesbian and gay employees in committed relationships to seek employment elsewhere in order to obtain these benefits or greater compensation to cover these benefits. This is a very real concern to the

[4] This illustrative rate varies because the plan is self-funded and it is based on standardized underwriting practices used by all major carriers, including Blue Cross Blue Shield of Michigan. This method has been consistently applied for rating of each of the active and retiree plans for the city of Ann Arbor over prior years. The basis for the rate derivation is the total adjusted medical/prescription claims for the most recent 12 month experience period, less certain charges.

[5] http://www.gophouse.com/readarticle.asp?ID=6867&District=36.

City, and the costs of employee turnover and loss of institutional memory were not calculated into the state's simplistic and short-sighted analysis.

The Act is a major competitive disadvantage to the City when it comes to recruiting talented employees. Not only does it prevent the City from being a viable employer for a part of the workforce, but it places the City in a competitive disadvantage because of the health benefits offered by the private sector and other similarly-situated municipalities outside of Michigan. Health care can be extremely expensive and a significant factor for people looking to find new jobs. In order to compete with other employers for highly-qualified employees, the City may have to spend more on salaries to attract employees whose partners are ineligible for OQA benefits.

Whether a current gay or lesbian employee leaves or a potential new employee decides not to pursue a job with Ann Arbor as a result of the Act, a very plausible consequence is that someone with a spouse and/or other dependents will then take their place. These individuals will then be eligible for health care benefits—the same benefits that would have been provided to the OQA. This scenario obviously does not result in any cost savings to the City.

The state has claimed that it is rational to restrict domestic partners from receiving medical benefits through public employers in order to save money. Though the classification of domestic partners seems non-discriminatory on its face, it is discriminatory in effect because gay and lesbian OQAs have no recourse to marry their partners to remain eligible for employee benefits. The Act then comes down to nothing more than a classification system for government benefits based on sexual orientation. In claiming certain financial savings, the state has only used a superficial economic analysis, based on the average cost of health care per year for a public employee, and has disregarded the true financial benefits of employee retention and

recruitment as well as loss of tax revenue and other important factors. If the City thought it was in its best economic interests to restrict OQAs from receiving medical benefits, it would have already done so.

**THE CITY HAS AN INTEREST IN BEING ABLE TO CHOOSE ITS OWN METHODS OF EMPLOYEE COMPENSATION**

The City has no desire to impinge upon the equitable interests of its employees. Fringe benefits are considered compensation under Michigan law.[6] By restricting medical benefits for OQAs (while preventing gay and lesbian employees from marrying), the state is effectively preventing the City from providing equal compensation for equal work. The City has an interest in this equality. Not only does this policy of inequality defeat the notion of fairness in the workplace, but it can cause valued gay and lesbian employees to leave for both financial and moral reasons. This employee turnover can cause inefficiency and loss of institutional memory.

The City believes the Act is unconstitutional, and the "public is certainly interested in the prevention of enforcement of [laws] which may be unconstitutional." *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987). While the City recognizes that "a person has no 'right' to a valuable government benefit," it also recognizes that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The state's discriminatory animus in using sexual orientation as a means of determining coverage for medical benefits violates this right of equal protection.

While the state cannot even demonstrate a rational basis for the Act, this Court should apply the recent heightened formulation of the rational basis test in the constitutional analysis. "When a law exhibits such a desire to harm a politically unpopular group, we have applied a

[6] See footnote 8 on p. 13 of the ACLU brief.

more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). The Supreme Court has recognized the homosexual community as being "politically unpopular." *See Romer v. Evans*, 517 U.S. 620, 634 (1996) (disallowing a state statute that imposed a "broad and undifferentiated disability on a single named group" specifically, homosexuals).

Municipal employees are not constitutionally entitled to health benefits. However, when a governmental entity chooses to provide these benefits, it "may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular." *Diaz*, 656 F.3d. at 1013. "The desire to effectuate one's animus against homosexuals . . . can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997).

**CONCLUSION**

This Court should strike down the Act as unconstitutional. There is no rational basis for the Act. The purported savings to the state are theoretical at best and the savings to the City are de minimis at best and, in fact, the Act could create additional expenses for the City due to the loss of experienced employees.

This case involves fundamental principles. The City has broad authority to contract with its employees regarding benefits. A municipality needs employees to operate. As an employer, the City needs to be able to determine how to best compensate its employees. The employees who work for the City, employees who protect the City or keep the City functioning or perform any of a myriad of tasks for the City, also have lives to live outside of work. Those same employees leave their work and return to their private lives, private lives that often include other people for whom they care.

Some of these City employees are gay and lesbian. Taking away OQA benefits from them by state law will not change that, nor will it change the fact that those gay and lesbian employees in relationships will continue to have someone to care for in their private lives.

What the Act will do is use the power of the state to force the City to treat a set of employees in a manner that is not in the economic or legal interest of the City. The City desires to provide benefits equally to all employees. It desires to provide benefit coverage to employees in a manner that it believes is fair and that preserves the City's ability to recruit and retain employees. The City should be allowed to provide OQA benefits in order to preserve the integrity of the social fabric that the City has established for itself. The state should not prevent the City from providing such benefits once it chooses to do so.

This Court should not allow the Act to be used to force the City to discriminate among its employees. To attempt to restrict access to health care in this manner is cruel and unconscionable, as it eliminates health care benefits for those who need it. The Plaintiffs in this case, some of them residents of Ann Arbor, as well as employees in the City, and other employees throughout the state seek the protection of this Court because the Act is harmful, without a rational basis, and unconstitutional. Therefore, this Court should strike down the Act as unconstitutional.

Respectfully submitted,
CITY OF ANN ARBOR

By: _____

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