UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan,

Defendant.

No. 2:12-cv-10038

HON. DAVID M. LAWSON

MAG. MICHAEL J. HLUCHANIUK

Michael J. Steinberg (P43085)
American Civil Liberties Union Fund of Michigan
Attorney for Plaintiffs
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6814

Amanda C. Goad
American Civil Liberties Union Foundation
Attorney for Plaintiffs
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2661

Margaret A. Nelson (P30342)
Mark E. Donnelly (P39281)
Attorney for Defendant
Michigan Department of Attorney General
Public Employment, Elections & Tort Division
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

John A. Knight
American Civil Liberties Union of IL
Attorney for Plaintiffs
180 N. Michigan Ave, Ste 2300
Chicago, IL 60601
(312) 201-9740

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DEFENDANT GOVERNOR SNYDER'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CONTROLLING OR MOST APPROPRIATE AUTHORITY

***Authority*:**

Cases

Statutes

CONCISE STATEMENT OF ISSUES PRESENTED

1. A preliminary injunction is extraordinary relief that should issue only after a finding in Plaintiffs' favor on four specific factors: 1) likely success on the merits; 2) whether movants will suffer irreparable injury without such relief; 3) whether a preliminary injunction would cause substantial harm to others; and, 4) whether such relief is in the public interest. Plaintiffs here fail to meet any of the requisite criteria for issuance of a preliminary injunction against the challenged statute prohibiting "domestic partner" benefits, which is regulatory in nature and serves the public's interest and safety. Should the Court deny Plaintiffs' motion for preliminary injunction?

STATEMENT OF FACTS

2011 PA 297 (PA 297) was signed into law by Governor Snyder on December 22, 2011. PA 297 provides, in pertinent part, that:

> 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 a public employee, if the individual 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.
>
> M.C.L.A. 15.583
>
> Sec. 4. If a collective bargaining agreement or other contract that is inconsistent with section 3 is in effect for a public employee on the effective date of this act, section 3 does not apply to that group of employees until the collective bargaining agreement or other contract expires or is amended, extended, or renewed.
>
> M.C.L.A. 15.584

The legislative analyses of PA 297 support that it was passed for both social and economic and fiscal policy reasons. (R. 15, Def's Motion to Dismiss, Ex 1A-D.)

The Plaintiffs identify themselves as four distinct same-sex couples who have been in committed relationships for between 8 and 25 years, and generally as "domestic partners". (R. 9, First Amended Complaint, ¶¶ 8, 16, 23, 30, 38, and 46.) Plaintiffs Bassett, Ways, Jach, Bloss, and Miller are lesbian and gay public employees. (*Id.* at, ¶ 2.) Plaintiffs Kennedy, Breakey, Rambler, Ascheri, and Johnson are, respectively, same-sex domestic partners of the public employee Plaintiffs. (*Id.* at, ¶ 2.) Each of the Plaintiff couples claims to have had health insurance provided by a public employer that extended coverage to their domestic partners of the employee prior to the passage of PA 297. (*Id.* at, ¶ 2.) Only Plaintiff Johnson claims to have lost her health insurance since the passage of PA 297. (*Id.* at, ¶ 52.)

Plaintiffs also devote a considerable part of their complaint to challenging the wisdom of PA 297 and asserting that it is bad economic and social policy. (*Id.* at, ¶¶ 91-102.) For instance, Plaintiffs allege that, nationally 33% of state and local government workers have access to health care benefits for their unmarried domestic partners (whether of the same or opposite-sex). (*Id.* at, ¶ 99.) Yet Plaintiffs identify only 10 public employers in Michigan (out of hundreds, if not thousands) that offer the benefit. (*Id.* at, ¶ 68.)

Defendant will reference additional facts below in the context of each specific argument response as needed.

INTRODUCTION

This lawsuit challenges the State's legitimate exercise of authority over its subordinate units of government and State agencies by defining the scope of certain employment benefits that may be offered to public employees. PA 297 limits the benefits a public employer may provide by prohibiting medical benefits or other fringe benefits for an individual currently residing in the same residence as a public employee. M.C.L. 15.583.

Plaintiffs are same-sex couples, and one of each couple, works for a public employer who provides medical benefits to domestic partners. They allege PA 297 denies due process and equal protection to same-sex domestic partners by prohibiting public employers from providing medical or other fringe benefits.

PA 297 is but one piece in a total effort to restore fiscal responsibility, reduce public spending, and redefine the obligations of the public employer and public employee in light of current financial, economic, and business realities. For example, the Legislature expanded Emergency Manger powers over labor contracts, employee compensation, and fringe benefits; made significant changes to the State employees' retirement system; required other state and

school employee contributions to the cost of retirement health care; and imposed caps on a public employer's contributions to publicly funded health insurance for employees.

In this context, PA 297 is rationally related to the State's regulation of public employers and public employees and is constitutionally sound. It does not infringe on any constitutionally guaranteed rights. Nor does it burden Plaintiffs' fundamental rights to form and sustain relationships. It treats similarly situated public employees equally and without discriminatory animus.

As indicated in the legislative history, PA 297 also serves the purpose of furthering traditional marriage, a matter within the State's exclusive purview and on which the voters of Michigan have spoken. Const. 1963, art 1, sec. 25

While PA 297 means that a public employee's unmarried domestic partner, whether opposite-sex or same-sex, is not provided medical or fringe benefits, with some exceptions, the proper forum to make arguments seeking to restructure public employer benefits is the State Legislature—not this Court. Significantly, Plaintiffs only challenge PA 297's prohibition as to medical health coverage, not in relation to "other fringe benefits" that are prohibited. Presumably Plaintiffs lack standing to challenge these other aspects of the law because they received and are currently receiving only medical health care coverage.

Plaintiffs' motion for preliminary injunction argues only the likelihood of success on the merits of their equal protection claim, although they have also asserted both substantive and procedural due process claims in their Complaint. The arguments relied on in support of their motion are legally and factually deficient in the context of this equal protection argument:

- Plaintiffs' argument relies on the existence of a committed relationship that was not and could not be a factor in the public employer's decision to provide "other

eligible adult" health coverage benefits.[1] Thus, facts related to the type and status of Plaintiffs' relationships are irrelevant to the provision of employer health benefits based on the applicable Michigan law;

- Plaintiffs' reliance on individual expressions of legislators' subjective intent or purpose for sponsoring or support PA 297 are irrelevant to the legal issue and its determination;
- Plaintiffs reliance on caselaw applying federal discrimination statutes as support for the conclusion PA 297 is discriminatory on its face is misplaced and contrary to traditional equal protection analysis applicable to state legislation;
- Plaintiffs' challenge to the stated purpose and intent of PA 297—that it doesn't result in actual savings to the State or local governments—is specious and fails to recognize the State's legitimate interest in the fiscal integrity of its agencies and local governments.

Thus, this motion for preliminary injunction should be denied for the reasons discussed below.

[1]For ease of reference and argument, Defendant adopts Plaintiffs' reference to "other eligible adult" benefits.

ARGUMENT

I. A preliminary injunction is extraordinary relief that should issue only after finding in Plaintiffs' favor on four specific factors: 1) likely success on the merits; 2) whether movants will suffer irreparable injury without such relief; 3) whether a preliminary injunction would cause substantial harm to others; and, 4) whether such relief is in the public interest. Plaintiffs here fail to meet any of the requisite criteria for issuance of a preliminary injunction against the challenged statute, M.C.L. 15.538, which prohibits public employers from providing "domestic partner" benefits to employees.

When determining whether to issue a preliminary injunction, this Court must consider four factors:

> (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994) (citing *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993)). "A district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Six Clinics Holding Corp., II v Cafcomp Sys., Inc.*, 119 F.3d 393, 399 (6th Cir. 1997) (citing *In re Dolorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)). The decision of whether to issue a preliminary injunction lies within the discretion of the district court. *CSX Transp, Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 552 (6th Cir. 1992). "[T]he less certain the district court is of the likelihood of success on the merits" of the claims, the greater the burden on the plaintiff to "convince [it] that the public interest and the balance of hardships tips in [plaintiffs'] favor." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003).

Analyzing the claims and argument presented by Plaintiffs warrants the conclusion they fail to meet the requisite factors for issuance of a preliminary injunction and this motion should be denied.

A. Plaintiffs are not likely to succeed on the merits because Plaintiffs lack of understanding, the case is not ripe, and PA 297 does not violate Plaintiffs' rights to Equal Protection.

Plaintiffs are not likely to succeed on the merits of this Complaint for a number of reasons. First, these claims do not meet the requisite justiciability standards of standing and ripeness. Second, the Court should abstain from exercising jurisdiction. Third, Plaintiffs' claims fail as a matter of law. Fourth, Plaintiffs seek relief through this preliminary injunction beyond the scope of the Court's authority and jurisdiction.

Plaintiffs only present argument on the merits of their equal protection claim in support of this factor. Defendant incorporates the facts and arguments presented in the Motion to Dismiss in support of this response in opposition. (R. 17, Corrected Motion to Dismiss; R. 15. Motion to Dismiss Exs.) Defendant presents the following additional argument addressing Plaintiffs' claim.

1. The level of review is rational basis

To analyze this claim, the Court must first determine the level of review to be accorded. The Sixth Circuit has not recognized sexual orientation, and more specifically, homosexuality, as a suspect classification. Thus, Plaintiffs' equal protection challenge is subject to rational basis review. *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Davis v. Prison Health Servs.*, ___ F.3d ___, 2012 WL 1623216, *3 (6th Cir. 2012). "On rational-basis review," a challenged statue enjoys "a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis

which might support it.'" *F.C.C. v. Beach Communications., Inc.*, 508 U.S. 307, 314-315 (1993). Alternatively, a plaintiff must demonstrate the challenged government action was "motivated by animus or ill-will." *Scarbough*, 470 F.3d at 260. Yet, these judicial restraints have added force "where the legislature must necessarily engage in a process of line-drawing." *Beach Communications*, 508 U.S. at 315 (internal quotes and citations omitted).

The rational basis justifying a statute against an equal protection claim need not be stated in the statute or in its legislative history. "[I]t is sufficient that a court can conceive of a reasonable justification for the statutory distinction." *U.S. v. Dunham*, 295 F.3d 605, 611 (6th Cir. 2002) (quoting *Estate of Kunze v. Comm'r of Internal Revenue*, 233 F.3d 948, 954 (7th Cir. 2d 2000) (citing *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969)). Means need not be narrowly drawn to meet – or even be entirely consistent with – the state legislative ends. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 487, 489 (1955). Further, a legislature is presumed to have acted constitutionality, and statutes are presumed to be constitutional.

Plaintiffs argue they are likely to succeed on the merits of this claim despite the presumptive constitutionality of PA 297, first because it is based on "animus and ill-will" and second because it has no rational basis. Both arguments should be rejected based on the applicable standards of review.

a. PA 297 was not motivated by animus or ill-will.

Plaintiffs assert PA 297 intentionally discriminates against gay and lesbian public employees and their partners by creating a disfavored class to whom public employers cannot offer employee health care benefits. Plaintiffs support this assertion by claiming:

- The title of the Act demonstrates it clearly distinguishes between gay and lesbian couples;
- By explicitly incorporating the classifications in the marriage amendment and intestacy statute, the Act demonstrates its purpose of distinguishing between same-sex and opposite-sex families;
- Other states have concluded that statutes restricting benefits on the basis of marriage intentionally discriminate on the basis of sexual orientation because gays and lesbians cannot legally marry;
- Consideration of what the Act does not prohibit further demonstrates its intent to target gays and lesbians.

Each claim is without legal merit or support.

i. The title of the Act

The title of the Act—Public Employee Domestic Partner Benefit Restriction Act—is neutral, is not based on sexual orientation, and speaks only to its legitimate purpose. It is compliant with the State's Title-Object Clause requirement. Const. 1963, art. IV, sec. 24. It encompasses all domestic partners regardless of sex, sexual orientation, or relationship status.

ii. Marriage Amendment/Intestacy Statute

Plaintiffs argue PA 297 specifically incorporates the "classifications" in the marriage amendment and intestacy statute, thereby demonstrating a purpose to distinguish between same-sex and opposite-sex families. The Act prohibits a public employer from providing health benefits to an individual living in the same residence with the public employee unless the individual is 1) married to the public employee; 2) a dependent of the public employee; or 3)

otherwise eligible to inherit from the public employee. Contrary to Plaintiffs' argument, none of these "classifications" are based on sexual orientation. Although the first, married to the public employee, may impact individuals who are gay and lesbian because they cannot legally marry in Michigan, it also excludes heterosexual individuals who are not married and chose not to marry whatever the reason. Nothing in the legislative history or other evidence the Court may rely on to analyze legislative purposes and intent suggests a specific animus or ill will toward gays and lesbians. Rather, the marriage classification furthers the legitimate public policies of furthering traditional marriage and limiting the provision of benefits to individuals with a legally recognized relationship.

Similarly, the reference to dependents and individuals otherwise eligible to inherit does not support Plaintiffs' argument. A gay or lesbian individual may qualify as a dependent and/or may qualify under the third category as well. Neither of these "classifications" categorically excludes gays and lesbians based on their sexual orientation.

The caselaw relied on by Plaintiffs also demonstrates the error of their argument. *Johnson v. New York*, 49 F.3d 75 (2d Cir. 1995) and *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pa.*, 220 F.3d 193 (3d Cir. 2000) are not applicable here. Both cases arise under the federal Age Discrimination in Employment Act (ADEA). In *Johnson*, the state employer adopted an Air National Guard policy requiring termination of employees at age 60 to apply to its civilian employees. Because the Guard is not subject to the ADEA, the State's application of the policy did not violate the statute. But application of this facially discriminatory termination policy as a condition of employment for certain civilian employees did. Here, no federal discrimination statute is implicated. Nor are the marriage amendment, the intestacy statute, or the "classifications" they created facially discriminatory.

The application of *Erie County* should also be rejected under the same reasoning. *Erie* again raised a challenged to the County employer's action under the ADEA. Specifically, medicare-eligible retirees were transferred to different health insurance coverage inferior to that offered non-medicare-eligible retirees. The County thus treated retirees differently with respect to compensations, terms, conditions, or privileges of employment because of age, thereby violating the ADEA. No such issue exists here. Again, the asserted 'classifications in PA 297 are not facially discriminatory in either their original context or as utilized in the challenged Act.

iii. Restricting benefits on the basis of marriage does not intentionally discriminate on the basis of sexual orientation because gays and lesbians cannot legally marry.

Plaintiffs further argue that conditioning employment benefits upon marital status when gays and lesbians are not permitted to marry in Michigan constitutes unlawful discrimination. The failed logic of this argument and of the cases relied on in support is clear. First, the Act does not limit the provision of medical benefits to only individuals who are married. Second, the provision of health benefits that Plaintiffs claim are being lost were not provided on the basis of their "committed" relationship. Plaintiffs note that after the Michigan Supreme Court's decision in *National Pride at Work v. Granholm*, 481 Mich. 56; 748 N.W.2d 524 (2008), the provision of health benefits to unmarried employees could not be based on a relationship similar to marriage. Thus, the provision of health coverage benefits, at least since the *National Pride* decision, has not been based on any relationship. Accordingly, the prohibition against providing such benefits, does not directly implicate same-sex or opposite-sex relationships.

Under this Act, then, whatever the individuals' sexual orientation, their other eligible adult, whether same or opposite sex, cannot receive the medical coverage benefit. For example, an unmarried heterosexual female public employee who lives with a longtime heterosexual

female friend would not be eligible for this benefit under PA 297. There are whole categories of individuals with platonic relationships who are excluded from receiving the benefit under this policy. Whether they are the same sex, opposite sex, in a relationship or not, these individuals are not eligible for benefits.

To recognize an obligation on Michigan's public employers to provide benefits based on a "relationship similar to marriage" would create a constitutional conflict with Michigan's Constitution. Const. 1963, art. 1, sec. 25. Plaintiffs' position requires the State and its public employers to provide a benefit based on a "relationship similar to marriage" and develop a system to recognize, evaluate, and verify the type of relationship between same-sex couples when there is no existing legal test—all contrary to its Constitution. The Court would improperly substitute its judgment for that of the State in an area within the State's exclusive purview. Domestic relations and the definition and incidents of lawful marriage – "a leading instance of the states' exercise of their broad police-power authority over morality and culture" has been "primarily confided to the states" from the start of the nation. *Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Servs, et. al.,* ___ F.3d ___, no. 10-2204, slip opinion, p. 20 (1st Cir. 2012). (Attached as Def's Ex. 1) (citing *Hisquierdo v Hisquierdo,* 439 U.S. 572, 581 (1979) (quoting *In re Burrus,* 136 U.S. 586, 593-594 (1890)) and *Loving v. Virginia,* 388 U.S. 1, 7 (1967)). Unlike Massachusetts, Michigan does not recognize same-sex marriage. The implications and influence of federal law, specifically the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, are substantially less on Michigan than on those states that recognize same-sex marriage. *Commonwealth of Massachusetts. Id.* at p. 22.

Other principles of constitutional review also compel rejection of Plaintiffs' argument. Specifically, the Court must heed the canon of constitutional avoidance, which is grounded in the

longstanding, fundamental principle that "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *see also Gonzales v. Carhart*, 550 U.S. 124, 153 (2007). Acceptance and application of Plaintiffs' arguments would negate a clearly valid statute and create a substantial conflict with Michigan's Constitution that should clearly be avoided.

Given these distinctions, the principles of review, and the difference in applicable state law, this Court should decline to adopt the holdings of other States and at least one federal court cited and relied on by Plaintiffs. Each state case analyzed this issue only under its respective state constitutional provision, which in each instance utilized a different analysis than the rational basis review required here. Moreover, in at least one case, the State recognizes both same-sex marriage and registered domestic partner relationships. These are clear distinctions that compel rejection of the conclusions and holding of each of those courts.

iv. Consideration of the Act does not prohibit is irrelevant and unrelated to this analysis.

Plaintiffs argue PA 297 permits public employers to extend benefits to a broad range of relatives and dependents, which in turn demonstrates an intent to discriminate against gays and lesbians because they cannot marry. But the argument does not logically follow. The exception for dependents and those individuals who otherwise are eligible to inherit under Michigan's intestacy law is not based on a marital relationship. Indeed, the Plaintiff partners may qualify for medical benefits as a dependent of their employed partners. Too, just as with other individuals, they may qualify for benefits under the intestacy exception through a relative who is a public

employee. Under this last exception, they simply may not qualify for benefits through their partner.

b. PA 297 has a rational basis

The legislative history and related statements by the Governor indicate PA 297 has a rational basis and survives review. First, PA 297 serves the purpose of reducing government costs related to the provision of medical benefits by public employers. Second, PA 297 serves the purpose of furthering the State's policy of recognition of "traditional" marriage. Third, PA 297 is but one piece of numerous legislative enactments designed to reduce costs and expenses , and restore fiscal stability to the State and its local units of government. This argument is presented in more detail in Defendant's Brief in support of the motion to dismiss. (R. 17 Corrected Motion to Dismiss.)

Plaintiffs argue the Act does not pass rational basis review because it does not actually save costs, for either the State or its local governments—it does not save enough costs to be meaningful. But equal protection analysis does not compel such a mathematical threshold. How much is rational; how little is irrational? This is the very line-drawing the Court must avoid in deference to the Legislature.

An examination of Plaintiffs' argument demonstrates its futility here. By reducing the number of covered individuals, both the State and the local government save costs related to medical coverage. If the government unit is self-insured—for example the State or Kalamazoo Valley Community College, one of Plaintiffs' employers—that government entity saves even more in health costs. By reducing the number of covered individuals it reduces the amount of claims it pays. (Pls' Ex. 2a, Schlack Tr, pp. 7, 56-58. 60, 65; Pls' Ex. 2b, Bohnet Tr, pp. 50, 53, 54-55.) By reducing health coverage costs, the government unit can use that money elsewhere,

for example, to pay for classroom instruction, to reduce deficits, or to cover other expenses. Further, as already noted, PA 297 is one of a series of bills enacted to address costs of government and fiscal and economic stability. Reduction of these health care costs is related to and reasonably serves this purpose, both standing alone and as part of the total package legislation designed for this purpose.

Plaintiffs rely principally on *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) in support of their argument here. Plaintiffs assert that because neither the State nor its local governments actually save money as a result of PA 297, or the amount was so diminimus, therefore the Act does not serve a rational basis. *Id.* at 1013, 1014. Yet, while *en banc* review was subsequently denied in *Diaz*, this decision was substantially criticize by a dissenting opinion. *Diaz v. Brewer*, 676 F.3d 823 (2012). That dissent is instructive of the issues being considered in this case and further demonstrates how unsound and misdirected are Plaintiffs' arguments:

- A statute is not unconstitutional based on disproportionate impact alone, *Id.* at 825;
- Reliance on *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973) was misplaced; there is no evidence the challenged Section was motivated by animus; its context and history indicate it rests entirely on budgetary considerations, *Id.*;
- The panel erred in holding the challenged Section cannot withstand rational basis review; Plaintiffs failed to negate every conceivable basis that might support rational basis; the cost-savings rational was sufficient to justify Section O, *Id.* at 826;
- The costs savings do not depend on distinguishing between homosexual and heterosexual employees, similarly-situated; rather the cost savings come from discontinuing the benefits to opposite-sex partners because the greater costs come from them, *Id.*;

- The panel decision threatens to dismantle constitutional, statutory and administrative provisions in those states that wish to promote traditional marriage, *Id.* at 827;
- The panel's conclusion that rules benefitting only traditional marriage serve no conceivable rational purpose clashes with Supreme Court precedent and 9th circuit case law, and with decisions of other federal and state courts, *Id.* at 827, 828.

For these reasons, in the context of the argument presented here, the Court should reject Plaintiffs' argument and conclude PA 297 is rationally based and constitutional.

c. PA 297 is not motivated by anti-gay animus.

Defendant incorporates the argument presented above in subsections (a) and (b) in response to this claim. Additionally, Plaintiffs' argument fails to the extent it relies on the individual, subjective statements of Legislators. (Pls' Brief, pp 3, 4.) outside the legislative records and unrelated to the legislative functions to establish a discriminatory animus. Federal courts have long rejected reliance on individual legislators' statements as informative of legislative intent or purpose. *Ilse Royale Boaters Assoc., et. al.* v. *Norton*, 330 F.3d 777, 784, 785 (6th Cir. 2003). Rather, "words of the statute" itself are the primary focus in determining legislative intent. *Id.* at 784.

Applying these principles and the arguments above, it is clear PA 297 was not motivated by anti-gay animus. Instead, is rationally based and serves legitimate state interests. Thus, it passes equal protection scrutiny.

2. Plaintiffs' Heightened Scrutiny does not apply and otherwise fails as a matter of law.

Plaintiffs' argument that PA 297 should be reviewed under a heightened scrutiny standard because they are members of a quasi-suspect class can be addressed in quick fashion.

The Sixth Circuit does not recognize sexual orientation as a suspect classification. *Davis v. Prison Health Services*, 2012 U.S. App. LEXIS 9548; 2012 FED App. 0131P (6th Cir. May 10, 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ*., 470 F.3d 250, 261 (6th Cir. 2006). Plaintiffs acknowledge this but nonetheless argue that this Court should conduct its own analysis of whether sexual orientation classifications should be entitled to heightened scrutiny (R. 18, Motion p. 21.) Such a request is improper.

The holding in *Scarborough* that sexual orientation is not a suspect classification has been most recently re-affirmed in *Davis v. Prison Health Services*, 2012 U.S. App. LEXIS 9548; 2012 FED App. 0131P (6th Cir. May 10, 2012). Plaintiffs' suggestion that the *Scarborough* and *Davis* Courts were unaware of the Supreme Court's decision in *Lawrence v Texas*, 539 U.S. 558 (2003) lacks plausibility. *Lawrence* was decided three years before *Scarborough* and nine years before *Davis*. The Sixth Circuit is presumed to have been aware of it. It is more likely that *Lawrence* simply has no bearing on the issues in *Scarborough*, *Davis*, or this case.

In *Lawrence*, the Supreme Court struck down a Texas law criminalizing sodomy between consenting adult males, concluding: "[T]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Lawrence*, 539 U.S. at 578.

In *Scarborough*, the plaintiff claimed he was deprived of a government employment opportunity in retaliation for agreeing to speak at a church with a predominantly gay and lesbian congregation. The Court concluded that it had to examine the plaintiff's due process claim under a rational basis test because "[i]nasmuch as homosexuality is not a suspect class in this circuit, we cannot hold that persons who associate with homosexuals constitute a suspect class." 470

F.3d at 261. In *Davis*, the plaintiff claimed he was removed from his prison public-works employment because of his sexual orientation. Again the Sixth Circuit affirmed that the claim was reviewed under a rational basis test *Davis*, 2012 FED App. 0131P at **6.

Lawrence struck down a criminal statute that infringed on a fundamental right to form and maintain intimate relationships between consenting adults. It did not recognize gays and lesbians as a suspect class. Because fundamental liberty rights were not implicated in *Scarborough* and *Davis* and because homosexuality is not a protected class, those cases were appropriately decided under a rational basis test.

Similarly, here, there is no fundamental right to public employer provided medical benefits to an employee's domestic partner, so PA 297 is properly analyzed under a rational basis test. These Plaintiffs are free to maintain the same committed relationships that they had both before and during the time they were provided with domestic partner benefits. There is nothing in PA 297 that infringes on Plaintiffs' right to intimate association.

Finally, this Court is bound to follow Sixth Circuit precedent. A published prior panel decision "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001); *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). The Supreme Court decision in *Lawrence* did not recognize that homosexuality was a suspect classification. Rather, it held that the State could not interfere with private sexual conduct between consenting adults. *Scarborough* and *Davis* are not inconsistent with *Lawrence*.

Since gays and lesbians have not been recognized as a suspect or quasi-suspect class in the Sixth Circuit, this Court must examine Plaintiffs' equal protection claim under a rational

basis review. *See, Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307; 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976).

B. Plaintiffs will not suffer irreparable harm.

Plaintiffs have not identified any immediate, irreparable harm to support the issuance of this motion. Only one Plaintiff Denise Miller, has been identified as having lost medical benefits at this time. That Plaintiff had those benefits for only a few months, as they were made available through a pilot project that had only been initiated in 2011 by Kalamazoo Valley Community College. (Pls' Ex. 2b, Bohnet Tr., pp. 52-53.) Plaintiff is in no different position now than she was a few short months ago. The earliest others may lose benefits is the end of December 2012. There is no immediate need for an injunction of the operation of this Act. No constitutional violation is supported by this record; no irreparable harm exists at this time.

C. The balance of equities favors denial of an injunction.

Again, only one Plaintiff has currently lost benefits and those she had for only a few months. Plaintiffs present no compelling reason to enjoin a valid statute that otherwise expresses the legitimate policy of the State.

D. The public interest favors denial of this injunction.

The public's interest in the exercise of proper judicial review and authority and the recognition of the validity of state laws and the proper motives of state legislators clearly favors denial of the requested preliminary injunction.

CONCLUSION AND RELIEF REQUESTED

Defendant prays the Court deny Plaintiffs' motion for preliminary injunction; grant the motion to dismiss previously filed with the Court; and, enter its judgment for Defendant and the constitutionality of PA 297.

Respectfully submitted,

BILL SCHUETTE
Attorney General

s/ Margaret A. Nelson
Margaret A. Nelson (P30342)
Mark E. Donnelly (P39281)
Attorney for Defendant
Michigan Department of Attorney General
Public Employment, Elections & Tort Div
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

Dated: June 12, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such.

s/Margaret A. Nelson
Margaret A. Nelson (P30342)
Mark E. Donnelly (P39281)
Attorney for Defendant
Michigan Department of Attorney General
Public Employment, Elections & Tort Div
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
Primary E-mail: nelsonm9@michigan.gov
(P30342)