**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,

vs.

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

Defendant.
_____/

Case No. 2:12-cv-10038-DML-MJH

Hon. David M. Lawson
Mag. Michael J. Hluchaniuk

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Theresa Bassett, Carol Kennedy, Peter Ways, Joe Breakey, JoLinda Jach, Barbara Ramber, Doak Bloss, Gerardo Ascheri, Denise Miller, and Michelle Johnson, by counsel, hereby submit this Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

In compliance with Local Rule 7.1(a), on February 14, 2014, Plaintiffs' counsel conferred with Defendant's counsel. Plaintiffs' counsel explained the nature of Plaintiffs' motion and its legal basis, but Defendant did not concur in the relief sought.

Dated: February 17, 2014

Respectfully submitted,
/s/ John A. Knight

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**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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## STATEMENT OF ISSUES PRESENTED

1. Whether the undisputed material facts show that 2011 P.A. 297 ("the Act") intentionally discriminates against lesbian and gay public employees and their domestic partners because of their sexual orientation.

2. Whether the Act violates Plaintiffs' rights to equal protections in that it has no rational relationship to a legitimate governmental interest, including the purported goals of costs savings, promoting traditional marriage, or enforcing the marriage amendment and the *Nat'l Pride at Work v. Governor*, 748 N.W.2d 524 (Mich. 2008) decision.

3. Whether the Act violates Plaintiffs' rights to equal protection in that it was motivated by an impermissible purpose to discriminate against gays and lesbians.

4. Whether gays and lesbians are a suspect or a quasi-suspect class.

5. Whether the Act fails strict or intermediate scrutiny.

6. Whether the Act must be permanently enjoined, because without an injunction Plaintiffs will suffer irreparable harm and the balance of equities and the public interest favor entry of an injunction.

## CONTROLLING OR MOST APPROPRIATE AUTHORITIES

**Court Rules:**

Fed. R. Civ. P. 56

**Cases:**

*Alaska Civil Liberties Union v. Alaska*,
122 P.3d 781 (Alaska 2005)

*Bassett v. Snyder*,
951 F. Supp. 2d 939 (E.D. Mich. 2013)

*Bonnell v. Lorenzo*,
241 F.3d 800 (6th Cir. 2001)

*Collins v. Brewer*,
727 F. Supp. 2d 797 (D. Ariz. 2010)

*Dragovich v. United States Dep't of the Treasury*,
848 F. Supp. 2d 1091 (N.D. Cal. 2012)

*Erie Cnty. Retirees Ass'n v. Cnty. of Eria, Pa.*,
220 F.3d 193 (3d Cir. 2000)

*Johnson v. New York*,
49 F.3d 75 (2d Cir. 1995)

*Mem'l Hosp. v. Maricopa Cnty.*,
415 U.S. 250 (1974)

*Moore v. Detroit Sch. Reform Bd.*,
293 F.3d 352 (6th Cir. 2002)

*Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*,
822 F.2d 1390 (6th Cir. 1987)

*Schalk v. Teledyne, Inc.*,
751 F. Supp. 1261 (W.D. Mich. 1990)

# TABLE OF AUTHORITIES

**Court Rules:**



**Cases:**

**Statutes and Ordinances:**

## INTRODUCTION

Plaintiffs are local government, public school, and community college employees (Bassett, Ways, Jach, Bloss, and Miller (collectively, the "Public Employees")) and their committed life partners (Kennedy, Breakey, Ramber, Ascheri, and Johnson (collectively, the "Domestic Partners")). The government bodies that employ the Public Employees offer health insurance benefits for "other qualified adults" or some similar designation, which Public Employees have been able to provide to their Domestic Partners. However, in December 2011, the Public Employee Domestic Partner Benefit Restriction Act (the "Act") became law. The Act imposes a discriminatory ban on partner health insurance coverage while leaving employers free to provide benefits not only to their heterosexual employees' spouses but also to a broad swath of other related or unrelated individuals. 2011 P.A. 297 (codified at M.C.L. §§ 15.581-15.585) (Ex. A). Many of the Domestic Partners, some of whom have serious medical conditions such as high blood pressure and glaucoma, lost their health insurance coverage because of the Act, exposing them to potentially severe financial and health consequences.

Plaintiffs filed suit on January 5, 2012 and in March they moved to preliminarily enjoin the enforcement of the Act. Defendant moved to dismiss Plaintiffs' complaint. On June 28, 2013, this Court denied Defendant's motion to dismiss Plaintiffs' equal protection claim, granted Plaintiffs' motion for a

preliminary injunction, and enjoined the enforcement of the Act. *Bassett v. Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013) (Docket No. 75). Now Plaintiffs move for summary judgment and ask this Court to enter a permanent injunction against the enforcement of the Act.

## UNDISPUTED FACTS

## I. PASSAGE OF THE ACT AND ITS ECONOMIC IMPACT

### A. The History and Passage of the Act

After Michigan passed an anti-gay marriage amendment in 2004, Mich. Const. Art. 1, § 25 (the "marriage amendment"), Attorney General Mike Cox issued an opinion stating that providing benefits to domestic partners violated the marriage amendment when eligibility for benefits was "characterized by reference to the attributes of marriage." Mich. Atty. Gen. Op. 7171 (Mar. 16, 2005) (Ex. F). Subsequently, in *Nat'l Pride at Work v. Governor*, 748 N.W.2d 524, 534-36 (Mich. 2008), the Michigan Supreme Court ruled that existing government plans for providing health insurance coverage to same-sex domestic partners on the basis of attributes similar to those of marriage—such as the sex of the partners—violated the marriage amendment. *Id.*

Many Michigan public employers changed their benefits policies to conform to the *National Pride* decision, by dropping coverage criteria that pertained to attributes similar to marriage and instead provided benefits for "other qualified

adults," "other eligible adults," "household members," or some similar designation.[1] (*See* Exs. B-E (criteria used by Plaintiffs' employers)). For example, employers ended the policies' limitation to *same-sex* domestic partners by dropping all reference to the sex of the partners.

However, some Michigan lawmakers did not want same-sex partners to receive health benefits even if they were provided pursuant to benefits plans that conformed to *National Pride*. When Michigan's Civil Service Commission ("Commission") announced in January 2011 that it would extend health insurance benefits to unrelated designees of State workers with whom the workers had been living for at least twelve months, Rep. Pete Lund, who later co-sponsored the Act, disparaged this decision as "an absolute abomination . . . that shifts people's hard earned dollars into the pockets of same-sex partners." Press Release, Michigan House Republicans, Lund Calls to Abolish Civil Service Commission (Jan. 27, 2011) (Ex. G-2).[2] Representative Dave Agema, the Act's lead sponsor, declared: "The people of this state, the Attorney General and the Michigan Supreme Court have all decided in recent years that marriage is between one man and one woman

[1] For the sake of simplicity, this brief refers to all such benefits as "other qualified adult" or OQA benefits.

[2] Defendant has stipulated that Exhibits G-1 to G-13 are true, correct and authentic copies of the originals issued by the legislators and limits his objection to their admissibility to "relevance and prejudice." (Ex. 19 ¶¶ 2-14). They are relevant to show the legislature's discriminatory animus towards gays and lesbians. *Bassett*, 951 F. Supp. 2d at 96.

and to extend health benefits to unions that do not fall into that category is disrespectful to the people." Press Release, Michigan House Republicans, Agema Calls CSC Ruling "Utterly Irresponsible" (Jan. 26, 2011) (Ex. G-1). When the House failed to obtain a two-thirds majority to reverse the Commission's decision in March 2011, Agema again accused the Commission of "act[ing] as if it is above the law and disregard[ing] the state constitution in its daily work" by "[e]xtending health benefits to the live-in partners and roommates of state employees." Press Release, Michigan House Republicans, Agema "Appalled" by Dems' No Votes (Mar. 23, 2011) (Ex. G-3). In May 2011, Attorney General Bill Schuette filed suit in Michigan state court to enjoin the Commission's provision of benefits to other eligible adult individuals (OEAIs), claiming that granting the benefits exceeded the State's authority.[3]

In June 2011, Agema introduced the Public Employee Domestic Partner Benefit Restriction Act. H.B. 4770, 96th Leg. (Mich. 2011). As its name makes plain, the Act's only objective is to prevent public employees' domestic partners from receiving health insurance.[4] The relevant portion of the Act reads:

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[3] The court rejected Schuette's argument and ruled that the Commission was within its authority to offer benefits to OEAIs. *Att'y Gen. Bill Schuette v. Mich. Civil Serv. Comm'n*, No. 11-538 (Mich. Cir. Ct. Oct. 6, 2011) (Ex. H), *aff'd*, slip op., No. 306685 (Ct. App. Jan. 8, 2013), 2013 WL 85805, *appeal denied*, 493 Mich. 974 (2013).

[4] The House Fiscal Agency's analysis of the Act discussed the continued provision of domestic partner benefits after the marriage amendment and the *National Pride*

> (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.
>
> (2) A provision in a contract entered into after the effective date of this act that conflicts with the requirements of this act is void.

2011 P.A. 297 (Ex. A). The Act aims to slam the door on benefits for employees' partners while leaving it wide open to benefits for employees' distant relatives (regardless of whether they live with the employee or depend on the employee for support) and even to unrelated people who meet the IRS's definition of "dependent." *See* M.C.L. § 700.2103 (establishing intestate succession to descendants of decedent's grandparents, which encompasses blood relatives as distant as first cousins several times removed, grandnieces and their offspring, etc.); I.R.C. § 152 (2006); *see also* Internal Revenue Service, *Exemptions, Standard Deductions, and Filing Information*, No. 501, at 16 (2011) (noting, as an example, that "an unrelated friend and her 3-year-old child" can be a taxpayer's dependents under certain circumstances). Further demonstrating that the Act is irrationally aimed at domestic partners, the Act applies only to adults who "resid[e] in the same residence as a public employee," such that employers could legally

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case as the "Apparent Problem" solved by the Act. House Fiscal Agency, *Prohibit Domestic Partners Benefits and Exclude from Collective Bargaining* 1-4 (Sept. 6, 2011) (Ex. I) (Ex. 19 ¶ 15).

offer benefits to unmarried partners of employees so long as they do not live with the covered employees.

The Act was signed into law by Defendant in December 2011. Defendant issued a signing statement clarifying that the provisions of the bill "do not extend to university employees or state employees under civil service," consistent with the limitations of the Michigan Constitution. (Ex. J at 2) (Ex. 19 ¶ 16).

### B. The Financial Impact of the Act

#### 1. Initial Figures

The legislature passed the Act based on false and inflated estimates and with no information about its actual financial impact. The Office of the State Employer ("OSE") provided an initial estimate of how much the Act would save the State, but it assessed the cost of coverage only to State employees, who are not covered by the Act. (Ex. J. at 1-2). And the initial estimate the OSE provided—savings as high as $8 million (Ex. I at 5 n.3) (Ex. 19 ¶ 15)—turned out to be inflated and was later revised to less than $893,000 by the Senate Fiscal Agency. (Ex. K at 2) (Ex. 19 ¶ 17). Thus when the Legislature passed the Act, it had *no* information about the supposed cost savings of eliminating benefits to those employees actually covered by the Act. (Ex. I at 6 ("Comprehensive data are not available, so estimates cannot be made for what the savings would be for other public employers defined in the bill (*i.e.* city, village, township, county, political subdivision, school district,

community college, public university, etc.)"); Ex. 3.A at 1-6, Ex. 3.G at 1-2; Ex. 3.J at Bates No. SOM 1076).

**2. Cost Savings to the State**

The Act will not save the State money. The State funds local units of government according to formulas unrelated to health care benefits, and local units of government have discretion to allocate those funds. Put simply, the amount of money the State will expend in a given fiscal year is exactly the same with the Act as without it. (Ex. 7 at 2 (admitting that "[n]o impact on the State or its budge[t] have resulted from the preliminary injunction being entered in this case.")).

State funds are allocated to local units of government by formulas set by the Michigan Constitution and statutes.[5] These formulas are based largely on population (for cities, villages, townships, and counties) or number of pupils (for schools).[6] These calculations do not take into account the number of public employees employed by that unit of government, the number of public employees receiving health insurance benefits, or the number of insureds covered by the unit

[5] Under state law, the State must direct at least 48.97% of all spending to local governmental units. Mich. Const. Art. IX, § 30; M.C.L. §§ 18.1115(5), 18.1349; State Budget Office, *Statement of the Proportion of Total State Spending from State Sources Paid to Units of Local Government (Legal Basis)*, at 4 (2011) (Ex. L) (Ex. 19 ¶ 18).

[6] The State provides funds to cities, villages, townships, and counties through revenue-sharing payments, allocated largely by population. *See* Mich. Const. Art. IX, § 10; M.C.L. §§ 141.913, 141.911. Public school districts are funded through the School Aid Fund, which is allocated on a per-pupil funding formula. House Fiscal Agency, *Background Briefing: School Aid* 9-10, 22-28 (2014) (Ex. 10).

of government. As such, the type of insurance benefits local units of government choose to provide their employees does not affect the amount of state funding that they receive, as Defendant admits. (Ex. 3.F at 3-11).

Moreover, if local units of government are forced to stop offering "other qualified adult" ("OWA") benefits, the money they spent on those benefits will not be returned to the State. The state funding provided to local units of government is generally unrestricted, which means that these entities can spend state money in the ways they feel are most appropriate for their specific communities.[7] M.C.L. § 141.917 (noting that revenue-sharing money is given to a city's, village's, or township's general fund); (Dolehanty Decl. ¶ 30 ("Any cost savings associated with an involuntary termination of OQA benefits to the five employees resulting from [the Act] would accrue to [Ingham] County or potentially to the federal government, not to the state.") (Ex. 11)); Comsa Dep. at 40-41 ("[T]he source of the funds to pay for [OQA benefits] would be our general funds.") (Ex. 13); Skrobola Dep. at 35 (Ex. 16); Ex. 3.A at 1-7, 11; Ex. 3.I at 19, 21; Ex. 8 at 53).

[7] In 2011, the Legislature enacted 2011 P.A. 152, which placed some limitations on how much local entities can pay for employee health insurance benefits. Local units either can keep their benefits spending below a hard cap defined in the statute or can elect to pay only 80% of their employees' health benefits costs. 2011 P.A. 152 §§ 3, 4. Local units that do not comply with P.A. 152 have a small portion of their state funding from state sources reduced by ten percent. *Id.* § 9. Unlike the Act challenged here, P.A. 152 does not single out a specific group to be excluded from coverage. Further, local governments can actually vote to opt out of the restrictions in P.A. 152. *Id.* § 8.

If anything, the Act is likely to diminish the state fisc. Many public employees pay state income tax on their employers' contributions to their partners' benefits; if employers can no longer offer these benefits, the State will lose this tax revenue. (Badgett Decl. and Report at 9-10 (Ex. 9); Ex. 15 at 22; Ex. 11 ¶ 16). Also, to the extent that individuals affected by the Act lack access to other insurance, they will rely on Medicaid or other government-sponsored health care programs. (Badgett Report at 10-11 (Ex. 9).

The testimony of Defendant's expert, Dr. Price, provides no factual support for a claim of cost savings to the State. He asserts that "[r]estricting partner health benefits to married couples creates an additional incentive for couples to marry and this decision to marry produces economic benefits for the state of Michigan." (Price Report ¶¶ 1, 9, 42 (Ex. 14, dep. ex. 1)). He agrees that the relevant comparison for purpose of evaluating the economic impact of the Act are marriage versus cohabitation, (Price Dep. at 134, 137-39 (Ex. 14)), but admits that he has no empirical basis to assert that marriage generates any positive outcomes versus cohabitation. (Price Dep. at 124, 126, 139, 157-58, 160-61, 207, 230-31, 239, 248-49 (Ex. 14)). Further, he has no empirical basis to assert that the marriages allegedly caused by the Act would generate the same outcomes as marriage generally. (Ex. 14 at 162-68, 170, 172, 203, 205). Finally, he analyzed only hypothetical benefits of the Act, not costs, in violation of his own stated

methodology. (Ex. 14 at 33, 34, 37, 39, 42, 105-07, 206-07, 210, 217-18, 220). *See also* Pls' M. to Exclude Test. of Dr. Joseph Price. Moreover, all of the economic benefits that Dr. Price asserts result from denying OQA benefits to *different-sex* domestic partners. *Different-sex* domestic partners only began to receive health insurance coverage as a consequence of the State's efforts to deny legal protections to *same-sex* couples and health insurance coverage to the same-sex domestic partners of public employees. (Ex. 15 at 11-12; Ex. 1 ¶¶ 4-5; Wilkerson Decl. ¶ 12 (Ex. 12)).

### 3. Cost Savings to Local Units of Government

The Act will also result in only minimal, if any, cost savings to local units of government, who dedicate only a portion of their total expenditures to employee health care benefits. Ann Arbor Public Schools, for example, spent only 10.04% of its 2012-13 general fund budget on employee health care benefits. (Ex. 13, Comsa dep. ex. 6; Ex. 13 at 28-29).

Moreover, OQA benefits comprise only a tiny fraction of these employers' spending for health care, since only a tiny fraction of public employees have enrolled OQAs in employer-sponsored benefit plans. For example, of the 689 employees of the City of Kalamazoo, only six had added an OQA to their health plan as of late 2011 (Ex. V-1 ¶¶ 1, 7) and the number of OQAs had not changed as of February 2014 (Ex. 15 at 31-32). Of approximately 1,800 full-time Ann Arbor

Public Schools employees, 33 had enrolled "other eligible adults" as of January 2012 (Ex. V-2 ¶¶ 2, 5) while only twenty were enrolled in February 2014. (Ex. 13 at 21-22, 24 and Comsa dep. ex. 2). (*See also* Ex. 1 ¶¶ 7, 8 (three OQAs out of 832 eligible Ingham County employees in 2012); Ex. 11 at ¶¶ 7, 8 (five of 798 in Ingham County in 2014); Ex. 2.B at 17, 20-21, Ex. 2.C ¶¶ 3, 13 (one OQA of 402 employees eligible to participate in group health insurance at Kalamazoo Valley Community College in 2012)). These numbers are consistent with broader evidence indicating that few employees use partner benefits. (Badgett Report at 8 (Ex. 9) (noting that only 0.3% to 1.8% of employees eligible to sign up an "other qualified adult" actually took advantage of the coverage)). Thus, any savings from eliminating these benefits would be a sliver of each local unit of government's total budget. (*See also* Ex. V-1 ¶ 12 (City of Kalamazoo costs for OQA benefits was 0.45% of total 2011 health insurance costs); Ex. 16 at 20-21 and Skrobola dep. ex. 1 (estimated Kalamazoo OQA costs went down between 2011 and 2012); Ex. V-2 ¶ 11 (Ann Arbor Public Schools' costs for other eligible adults ("OEA") coverage were expected to be 1.2% of health insurance costs in 2011-2012); Ex. 13 at 32 and Comsa dep. ex. 2 (costs for OEA coverage dropped for 2013 from two previous calendar years); Ex. 11 at ¶ 13 (projected cost of Ingham County 2014 OQA coverage ($22,163) represents .2% of the 2014 approximate health insurance costs

($10,035,000)[8]).

In addition, the Act may impose additional costs on employers. Local units of governments offer OQA benefits because they have decided that doing so is central to attracting and retaining the best and the brightest. (Ex. V-1 ¶¶ 20-25; Ex. 15 at 25-29 (Jerome Post chose City of Kalamazoo job over private sector job offers because of availability of benefits for same-sex domestic partners); Ex. 15 at 54-57; V-2 ¶¶ 15-19; Ex. 13 at 17-21; Ex. 1 ¶¶ 23-27; Ex. 12 ¶¶ 16-19). Not offering such benefits may increase employee attrition, raising the cost to local employers of attracting and retaining talented employees. (Badgett Report at 12-15 (Ex. 9); Ex. V-1 ¶¶ 23-25; Ex. V-2 ¶¶ 18-19; Ex. 15 at 56-57; Ex. 1 ¶ 25; Ex. 12 ¶ 17). The Act may even cause couples who rely on partner benefits to move out of state (Ways Decl. ¶ 11 (Ex. 18.C); Breakey Decl. ¶ 12 (Ex. 18.D)), which further burdens local employers and deprives the State of tax revenue.

As such, the cost savings from the Act to local units of government will be negligible at best. Yet the local units of government *do not seek* these negligible cost savings—rather, they have determined that providing these benefits is a worthwhile expenditure.

## II. THE LAW'S IMPACT ON THE PLAINTIFFS

Plaintiffs are gay or lesbian public employees and their domestic partners.

[8] The declaration incorrectly states that the percentage is .002%.

On average, the plaintiff couples have been in their loving, committed relationships for close to 20 years.[9] Plaintiffs' relationships are founded on mutual pledges of emotional and financial support: each couple is financially interdependent, and nearly all of the Plaintiffs have provided a durable power of attorney to their partners.[10] Three of the couples (Theresa Bassett and Carol Kennedy, Peter Ways and Joe Breakey, and JoLinda Jach and Barbara Ramber) are raising children together.[11]

The Public Employees receive health insurance through their jobs with a county, city, school district, or community college in Michigan.[12] Each Public Employee has job duties and responsibilities that are equivalent to the duties and responsibilities of their heterosexual colleagues with comparable jobs.[13] The Public Employees' employers allow them to enroll their partners as OQAs (or similar designation). (Exs. B-E). Each of the Domestic Partners is—or was—enrolled in

[9] (Bassett Decl. ¶ 4 (Ex. 18.A), Kennedy Decl. ¶ 3 (Ex. 18.B) (27 years); Ways Decl. ¶ 3 (Ex. 18.C), Breakey Decl. ¶ 3 (Ex. 18.D) (22 years); Jach Decl. ¶ 4 (Ex. 18.E), Ramber Decl. ¶ 3 (Ex. 18.F) (19 years); Bloss Decl. ¶ 4 (Ex. 18.G), Ascheri Decl. ¶ 3 (Ex. 18.H) (20 years); Miller Decl. ¶ 4 (Ex. 18.I), Johnson Decl. ¶ 3 (Ex. 18.J) (10 years)).
[10] (Ex. 18.A ¶¶ 4-5; Ex. 18.B ¶¶ 3-4; Ex. 18.C ¶¶ 3, 5; Ex. 18.D ¶¶ 3-4; Ex. 18.E ¶¶ 4-5; Ex. 18.F ¶¶ 3-4; Ex. 18.G ¶¶ 4-5; Ex. 18.H ¶¶ 3, 5; Ex. 18.I ¶¶ 4-5; Ex. 18.J ¶¶ 3-4).
[11] (Ex. 18.A ¶ 6; Ex. 18.B ¶ 5; Ex. 18.C ¶ 4; Ex. 18.D ¶ 5; Ex. 18.E ¶ 6; Ex. 18.F ¶ 4).
[12] (Ex. 18.A ¶ 7; Ex. 18.C ¶ 7; Ex. 18.E ¶ 9; Ex. 18.G ¶ 7; Ex. 18.I ¶¶ 6-7).
[13] (Ex. 18.A ¶ 2; Ex. 18.C ¶ 4; Ex. 18.E ¶ 2; Ex. 18.G ¶ 2; Ex. 18.I ¶ 2).

one of these plans as his or her sole health insurance.[14]

If a permanent injunction is not granted, Plaintiffs will lose not only a valuable employment benefit but also the security and peace of mind that come with family health insurance coverage. The couples will be forced to allow the Domestic Partners to go without coverage or to find individual health insurance for the partner that, in each case, will be significantly more costly and/or less comprehensive than the coverage under their partners' plans.[15] For example, between the time Barbara's coverage with the City of Kalamazoo ended on December 31, 2012 and was restored because of the preliminary injunction on August, 1, 2013, the couple paid $1,798 in premiums for individual coverage for Barbara that had higher deductibles ($5,000 compared to $200 for in network care), larger medication and office visit co-pays, and no dental coverage. In contrast, after the injunction was entered, JoLinda could cover Barbara on her City of Kalamazoo family medical plan without an increase in the monthly premium and could provide her dental care coverage for $6 a month.[16] During the ten months between the time Gerardo's OQA coverage ended on December 31, 2012 and was restored on November 1, 2013, Doak and Gerardo paid $4,595 in premiums for an individual policy for Gerardo and $993 in out-of-pocket costs for

[14] (Ex. 18.B ¶¶ 7, 8; Ex. 18.D ¶¶ 6, 7; Ex. 18.F ¶ 6; Ex. 18.H ¶ 6; Ex. 18.J ¶ 5).
[15] (Ex. 18.A ¶ 9; Ex. 18.B ¶ 9; Ex. 18.C ¶ 9; Ex. 18.D ¶ 9; Ex. 18.E ¶ 11; Ex. 18.F ¶ 8; Ex. 18.G ¶ 10; Ex. 18.H ¶ 8; Ex. 18.I ¶ 9; Ex. 18.J ¶ 8).
[16] (Ex. 18.E ¶¶ 8, 9, 11; Ex. 18.F ¶¶ 6, 8).

his medication, deductibles, and dental care as compared to the $1830 in premiums he would have paid for OQA coverage that included dental care.[17]

Several of the Domestic Partners cannot afford a lapse of insurance coverage because they have conditions that require ongoing, uninterrupted care. For example, Barbara Ramber—whose partner JoLinda Jach works for the City of Kalamazoo—suffered an eye injury and has developed glaucoma.[18] Without medication, Barbara is in danger of going blind.[19] Gerardo Ascheri—whose partner Doak Bloss works for Ingham County—has high blood pressure and high cholesterol, which require ongoing medication and monitoring.[20]

## ARGUMENT

Plaintiffs are entitled to summary judgment on their claim for permanent injunctive relief because "there is no genuine dispute as to any material fact" and Plaintiffs are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court previously concluded that Plaintiffs had shown a likelihood of success on the merits; here, the uncontested facts show Plaintiffs' actual success on their claim that the Act violates their Constitutional rights to equal protection. *See Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012) ("In general, [t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with

[17] (Ex. 18.G ¶¶ 7, 10; Ex. 18.H ¶ 8).
[18] (Ex. 18.E ¶ 10; Ex. 18.F ¶ 7).
[19] (Ex. 6 at 19-20).
[20] (Ex. 18.G ¶ 9; Ex. 18.H ¶ 7).

the exception that [for a preliminary injunction] the plaintiff must show a likelihood of success on the merits rather than actual success.") (inner quotation marks and citations omitted).

## I. PLAINTIFFS HAVE SUCCEEDED ON THE MERITS.

The Act violates Plaintiffs' rights to equal protection by treating them differently than similarly situated families on the sole basis of their sexual orientation.

### A. The Act Violates Plaintiffs' Rights to Equal Protection.

The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty., Ohio*, 430 F.3d 783, 788 (6th Cir. 2005). The Act targets gay and lesbian families for differential treatment without any legitimate justification and thus violates the Equal Protection Clause.

#### 1. The Act Intentionally Targets Gay and Lesbian Families for Differential Treatment on the Basis of Sexual Orientation.

The Public Employees do the same work, have the same qualifications, and show the same dedication as their heterosexual colleagues, and are therefore entitled to equal compensation. Yet the Act intentionally burdens gay and lesbian

public employees and their partners because of their sexual orientation.

The Act "creates a classification based on sexual orientation" because it "both explicitly incorporates statutes that draw classifications based on sexual orientation and renders access to benefits legally impossible only for gay and lesbian couples." *Bassett*, 951 F. Supp. 2d at 963. It "incorporates the definitions in the Michigan marriage amendment and the intestacy statute," which "distinguish between opposite-sex couples, who are permitted to marry and can inherit under intestacy, and same-sex couples, who cannot." *Id.* It is therefore discriminatory on its face. *See, e.g., Johnson v. New York*, 49 F.3d 75, 79 (2d Cir. 1995) (striking a classification as facially discriminatory because it incorporated another law that distinguished on the basis of age); *Erie Cnty. Retirees Ass'n v. Cnty. of Erie, Pa.*, 220 F.3d 193, 211 (3d Cir. 2000) (determining that a classification based on Medicare eligibility was an age-based facial classification because only persons over sixty-five are eligible for Medicare).

Numerous courts (including this Court) have found that statutes restricting benefits on the basis of marriage intentionally classify on the basis of sexual orientation when gays and lesbians are explicitly excluded from marriage. *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788-89 (Alaska 2005) (applying Alaska Constitution) (restriction of benefits to "spouses" was facially discriminatory because state's definition of "spouse" excluded same-sex couples);

*Bedford v. New Hampshire Cmty. Technical Coll. Sys*., No. 04-E-229, 2006 WL 1217283, at *6 (N.H. Super. Ct. May 3, 2006) (applying New Hampshire law); *Collins v. Brewer*, 727 F. Supp. 2d 797, 803 (D. Ariz. 2010) ("Because employees involved in same-sex partnerships do not have the same right to marry as their heterosexual counterparts, Section O has the effect of completely barring lesbians and gays from receiving family benefits[, burdening] State employees with same-sex domestic partners more than State employees with opposite-sex domestic partners."), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 2884 (2013); *Dragovich v. U.S. Dep't of the Treasury*, 848 F. Supp. 2d 1091, 1100 (N.D. Cal. 2012) (law limiting benefit to married couples, when same-sex couples cannot marry, discriminates on the basis of sexual orientation).

The Act's intentional targeting of gays and lesbians is further underscored by considering what the Act *does not* prohibit. Same-sex partners—who under existing law can neither marry their partners nor inherit from them under intestacy law—cannot access employer-provided benefits. However, public employers remain free to extend health care to a broad range of other relatives and dependents. M.C.L. § 15.583. The narrowness of the burden imposed by the statute demonstrates that the Act was aimed at same-sex domestic partners. Because the Act focuses on burdening lesbians and gays, rational basis review must be

conducted with closer scrutiny than the deference given other legislative classifications. *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy"); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, [the Supreme Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

**2. The Act Has No Rational Basis.**

As the Supreme Court has pointed out, equal protection "require[s] that a distinction made have some relevance to the purpose for which the classification is made." *Baxtrom v. Herold*, 383 U.S. 107, 111 (1966). However, singling out gay and lesbian families for differential treatment has no rational relationship to the purported goals of saving costs, promoting traditional marriage, or "enforcing" the marriage amendment and the *National Pride* decision.

**a. The Act Does Not Cut the State's Costs.**

The desire to cut costs does not provide a rational basis for the Act. First, the cost justification is fake, since the legislature considered only exaggerated figures for *state* employee health insurance coverage rather than evaluating the costs for *local* employees. *See* Undisputed Facts ("Facts"), *supra*, I.B.1. Second, the decisions of local governments to provide OQA benefits will have no impact

on the amount of money the State provides those local governments whereas banning OQA benefits will put an end to the tax revenue the State receives on the value of those benefits and may increase the State's costs for government-sponsored health care programs. *See* Facts, *supra*, I.B.2. Finally, the Act will save only a tiny fraction of local government employers' health insurance outlays and none of these savings would be recouped by the State. Any savings to local governments will be offset by increased costs to the public employers and are unwanted by the employers themselves, as demonstrated by the fact that they chose to offer these benefits in the first place. *See* Facts, *supra*, at I.C.2-3.

Defendant's expert has opined that the Act will save State money by encouraging different-sex OQAs to marry, but then admits that he only looked at studies and data comparing married couples to single persons and that he has no empirical basis to assert that moving people from cohabitation to marriage saves the State money. (Ex.14 at 124, 126, 139, 157-58, 160-61, 207, 230-31, 239, 248-49). Second, Dr. Price admits that he has no factual support for his claim that the marriages that purportedly result from the Act will result in cost savings for the State. (Ex. 14 at 162-68, 170, 172, 203, 205). Third, Dr. Price admits that he analyzed only hypothetical benefits of the Act without addressing costs, (Ex. 14 at 33, 34, 37, 39, 42, 105-07, 206-07, 210, 217-18, 220), and that he has no basis for his assertion that the benefits he claims will result from incentivizing marriage will

outweigh the costs from the Act. (Ex. 14 at 218-19). Finally, these hypothetical cost savings from the Act's impact on unmarried *different-sex* couples fail to justify the injury the Act causes to *same-sex* domestic partners. (*Id*. at 223-25). The history of the Act makes it impossible to credit a state interest derived solely from the law's theoretical impact on different-sex couples where disadvantaging same-sex domestic partners "was more than an incidental effect of" the Act but "was its essence." *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

While cost savings can be a legitimate state interest, such slight and hypothetical cost savings cannot salvage a discriminatory bill such as this. *See Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (statute stripping same-sex partners of benefits was properly enjoined as lacking rational basis, despite the state's asserted cost justification, where evidence showed that the cost of such benefits were between 0.06% and 0.27% of the state's total spending on health care benefits). Even if the State could show some marginal savings, it may not "protect the public fisc by drawing an invidious distinction between its classes of citizens." *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974). Therefore, these incidental cost savings cannot justify an otherwise discriminatory policy. *W. Tenn. Chapter of Assoc. Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1028 (W.D. Tenn. 2000) ("[C]onsiderations of the City's financial health and administrative efficiency cannot run roughshod over plaintiff's constitutional

rights.”).

**b. The Act Does Not Promote “Traditional Marriage” or “Enforce” Existing Law.**

To the extent that the Defendant is arguing that the Act promotes “traditional marriage,” he has already abandoned that argument. (Def.’s Am. Mot. To Dismiss, Docket No. 17, at 24 (“[I]t strains credulity to believe that a couple would marry simply to obtain health benefits, or would acquiesce to participation in a relationship they might not otherwise choose in order to qualify for the benefit.”)). Additionally, promotion of “traditional marriage” fails to explain the burden the Act places on same-sex domestic partners who are unable to marry in Michigan. Instead, it references a history of discrimination against the relationships of same-sex couples of which the Act is the most recent chapter. Moreover, contrary to what the Act’s sponsors claimed, offering OQA benefits to domestic partners does not violate the marriage amendment or *National Pride*. (*See* Ex. I at 6; Facts, *supra*, at I.B). *National Pride* did not bar public employers from offering benefits to same-sex partners; the Michigan Supreme Court held unconstitutional only those plans that defined the relationship between the employee and the covered individual by the same-sex nature of the partnership and by reference to attributes similar to those of marriage. *National Pride*, 748 N.W.2d at 533-37. Putting aside the question of whether this holding is consistent with the Fourteenth Amendment, *National Pride* simply does not impose an absolute bar on the provision of benefits

to anyone other than a public employee's spouse, blood relatives, or IRS dependents.

In reality, the reference to the marriage amendment and the *National Pride* case by the Act's proponents is shorthand for their plain intent to discriminate against gay and lesbian families. Not content with prohibiting same-sex marriage in Michigan, these lawmakers wanted to make sure that not a single state or local tax dollar could be used to benefit same-sex partners—a purpose that strikes at the heart of local employers' attempt to promote workplace equality and has nothing to do with protecting the definition of marriage as between one man and one woman. (Ex. G-2 (referring to partner benefits as "an absolute abomination . . . that shifts people's hard earned dollars into the pockets of same-sex partners")). Rep. Agema's assertion that it "is disrespectful to the people" of Michigan to "extend health benefits to unions" other than those "between one man and one woman" (Ex. G-1) lays bare the intent to codify discrimination against lesbian and gay public employees' families based on social disapprobation for homosexuality. This the Constitution does not permit. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

### 3. The Act Was Motivated by An Impermissible Purpose to Discriminate.

The Equal Protection Clause prohibits legislative classifications whose primary purpose and effect is to harm an identifiable group. *Windsor,* 133 S. Ct. at 2693; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (equal

protection prohibits classifications based on the "bare . . . desire to harm a politically unpopular group."); *Romer*, 517 U.S. at 634; *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir. 1997). In *Windsor*, the Court determined the purpose of a statute by considering its "history of . . . enactment" and the statute's own text. 133. S. Ct. at 2693-94. And a law whose primary purpose and effect is to harm an identifiable group is unconstitutional, even if it incidentally serves a neutral governmental interest. *Id.* at 2694 ("[DOMA's] principal purpose [was] to impose inequality, not for other reasons like governmental efficiency[,]" and "no legitimate purpose overcomes the purpose and effect to disparage and injure" same-sex couples and their families). The Sixth Circuit has directed courts to look to a number of factors to determine whether a statute has an invidious discriminatory purpose: (1) the impact of the official action on a particular group, (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes, (3) the sequence of events that preceded the state action; (4) procedural or substantive departures from the government's normal procedural process; and (5) the legislative or administrative history. *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 369 (6th Cir. 2002) (citing *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977)).

Here, these factors show that the Act was the result of a legislative desire to

harm a politically unpopular group:

- The burden of the Act falls directly and exclusively on employees with same-sex partners. The Act expressly allows benefits for a wide range of individuals outside the heterosexual nuclear family, while only lesbian and gay families are left with no ability to gain benefits. (Unmarried different-sex couples can marry to obtain benefits.)

- The historical background and legislative history of the Act demonstrate animus. *See* Background, *supra*, at I.A. Following passage of the marriage amendment, opponents of gay rights sought and won an interpretation of the amendment to bar benefits contingent on the existence of a same-sex domestic partnership. But the Act's sponsors went further, expressing disgust and outrage that gay public employees were receiving the same partner benefits as their married colleagues. (Ex. G-2 (quoting Rep. Lund (who co-sponsored the Act) as saying it was "an absolute abomination" to provide benefits to public employees' "same-sex partners")).

- The Act is a unique departure from the State's strong tradition of allowing municipalities to govern their own affairs (a concept known as "home rule"). *Alco Universal Inc. v. City of Flint*, 192 N.W.2d 247, 249 (Mich. 1971) ("Michigan is a strong home rule state."). Never before has the legislature prevented a class of people from bargaining with local public employers (individually or collectively) for benefits. The Act is an unprecedented expansion of state control over local public employers. (Ex. 3.F at 1, 2).

Thus there is strong direct and circumstantial evidence that the Act has no rational basis, but instead is the product and expression of the legislature's purpose to harm lesbians and gays.

*United States Dep't of Agric. v. Moreno* also presented a situation in which government benefits were conditioned on family structure and motivated by impermissible purposed to discriminate. 413 U.S. 528. There, the Supreme Court struck down a statute that barred individuals from receiving food stamps if they

lived in a household with other unrelated individuals. The desire to harm a politically unpopular group, "hippies," could not constitute a legitimate basis for upholding the law. And although the government had a rational interest in preventing food stamp fraud, the "practical operation" of the amendment would allow the hippies allegedly abusing the system to change their housing arrangements to retain eligibility while categorically barring "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538. Such a classification was "wholly without a rational basis." *Id.*

Similarly, in *Diaz* and *Dragovich*, laws that conditioned access to benefits on family structures were found to be motivated by a desire to harm gays and lesbians. Both involved laws that excluded unmarried people from access to benefits. These cases held that the "challenged provision serve[d] no legitimate government interest and the enactment [was] tainted by animus against a politically unpopular group." *Dragovich*, 848 F. Supp. 2d at 1103-04; *Diaz*, 656 F.3d at 1014-15 (law was motivated by "bare . . . desire to harm"). The *Diaz* court added that barring health coverage for unmarried partners may actually "present a more compelling scenario" than *Moreno* because the plaintiffs were barred from eligibility not by their financial circumstances but by operation of law. 656 F.3d at 1014.

The Act in question here is even more clearly unlawful than those at issue in *Diaz* and *Dragovich* since the classification here—the family structure of same-sex domestic partners, as compared not only to married heterosexual couples (*Diaz*) or close family members (*Dragovich*) but to a broad group of familial relationships that are far less intimate—is even more attenuated from any legitimate purpose than the classifications in those cases. The uncontested facts show that the Act was motivated by an impermissible purpose to disadvantage lesbians and gays.

### B. The Act Also Fails Under Heightened Scrutiny.

Although the Act fails even rational basis review, the Act should be reviewed under heightened scrutiny because the Act discriminates against gays and lesbians, a suspect or quasi-suspect class that has been subject to widespread historical discrimination in Michigan and elsewhere.

#### 1. Gays and Lesbians Are a Suspect or a Quasi-Suspect Class.

This Court has already concluded that "[g]ays and lesbians as a group would seem to satisfy each of the[ ] factors" used to assess whether a class is suspect or quasi-suspect and that "[t]he tarnished provenance of *Davis* [*v. Prison Health Serv.*, 679 F.3d 433 (6th Cir. 2012)] and the cases upon which it relies provides ample reasons to revisit the question of whether sexual orientation is a suspect classification" but that rational basis is the current standard applicable in the Sixth Circuit. *Bassett*, 951 F. Supp. 2d at 961. Plaintiffs reassert their argument for

heightened scrutiny to preserve it for appeal.

The Sixth Circuit's ruling in *Davis* that gays and lesbians are not a suspect class relied on *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006), which in turn relied on other case law following *Bowers v. Hardwick*, 478 U.S. 186 (1986), before it was overruled by *Lawrence*, 539 U.S. at 580. In the wake of *Lawrence* and *Windsor*, two federal courts of appeals, four state supreme courts, and numerous federal district courts have recognized that gays and lesbians are entitled to heightened scrutiny as a class. *See, e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012); *Griego v. Oliver*, 316 P.3d 865, 880-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008); *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688, *14-*18 (S.D. Ohio Dec. 23, 2013); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d. 1140 (9th Cir. 2013).

The Supreme Court has identified four factors used to determine whether a class is suspect or quasi-suspect so as to warrant heightened scrutiny: (1) whether

the class has suffered a history of discrimination; (2) whether the class's members are a minority or politically powerless; (3) whether the class exhibits distinguishing or immutable characteristics that define them as a discrete group; and/or (4) whether the characteristic that defines the class "bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Cleburne*, 473 U.S. at 440-41. All four factors are met here.

***First***, there can be no dispute that gays and lesbians have historically experienced discrimination, both nationwide and in Michigan. *See, e.g.*, *Windsor,* 699 F.3d at 182; *Pedersen,* 881 F. Supp. 2d at 318; *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Varnum*, 763 N.W.2d at 889; *Kerrigan*, 957 A.2d at 432. Until the Supreme Court's 2003 decision in *Lawrence*, states were able to "demean [gays' and lesbians'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578.[21]

This history of discrimination against gays and lesbians continues today in Michigan. *See generally* Williams Institute, *Michigan—Sexual Orientation and*

[21] *Lawrence* effectively brought an end to a series of state laws criminalizing same-sex intimacy, including a Michigan statute that imposed lengthy prison sentences for consensual sexual activity. *See* M.C.L. § 750.158. Although *Lawrence* precludes their enforcement, Michigan's laws criminalizing private, adult, consensual, noncommercial conduct have never been formally repealed. *Id.*; *see also* M.C.L. §§ 750.158, 750.159, 750.338, 750.338a .

*Gender Identity Law and Documentation of Discrimination* 2-4 (2009) (Ex. Q) (documenting discrimination against gays and lesbians in Michigan in various areas). Michigan's constitution denies gay and lesbian couples legal recognition of a marriage or similar union. Mich. Const. Art. I, § 25. Michigan's civil rights statutes provide no remedy for sexual orientation-based harassment and discrimination in the workplace. *Barbour v. Dep't of Soc. Servs.*, 497 N.W.2d 216 (Mich. App. 1993). In 2012, crimes targeting gays, lesbians and bisexuals constituted twelve percent of all reported Michigan hate crimes. Michigan State Police, *2012 Hate/Bias Crime Report* (Ex. 17). One recent study found that gays and lesbians have a twenty-seven percent likelihood of experiencing discrimination in obtaining housing in Michigan. Pam Kisch and Pat Winston, eds., *Sexual Orientation and Housing Discrimination in Michigan* (2006) (Ex. S).

***Second***, although lack of political power is not essential for recognition as a suspect or quasi-suspect class, *Windsor*, 699 F.3d at 181, gays and lesbians lack "the strength to politically protect themselves from wrongful discrimination." *Id.* at 184; *Kerrigan*, 957 A.2d at 444. *See Lyng*, 477 U.S. at 638. This is true both at a national level and within Michigan. For example, in Michigan, gays and lesbians have been thus far unable to secure protection under Michigan's civil rights act, which prohibits discrimination in housing, employment, public accommodations, or education based on height, weight, and eight other characteristics. *See* M.C.L.

§§ 37.2102(1), 37.2202, 37.2302, 37.2402, 37.2502; *see also Golinski*, 824 F. Supp. 2d at 989 (reviewing recent developments nationwide and concluding that "the gay and lesbian community lacks meaningful political power").

***Third***, gays and lesbians have "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Lyng*, 477 U.S. at 638. Sexual orientation is a distinguishing characteristic that defines gays and lesbians as a discrete, socially visible group. *See Lawrence*, 539 U.S. at 568 (tracing emergence of sexual orientation as a discrete identity category in the late 19th century). Immutability is not required for a characteristic to garner heightened scrutiny, *Windsor*, 699 F.3d at 813 n.4, but evidence shows that sexual orientation is in fact immutable. *See Golinski*, 824 F. Supp. 2d at 986 ("[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic"); Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, at v (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf ("efforts to change sexual orientation are unlikely to be successful and involve some risk of harm").[22]

[22] Moreover, sexual orientation is a core component of a person's identity that no person should be required to change to avoid discrimination. *Perry*, 704 F. Supp. 2d at 964 ("Sexual orientation is fundamental to a person's identity."); *In re Marriage Cases*, 183 P.3d at 442 ("[A] person's sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate

***Fourth***, sexual orientation "bears no relation to [anyone's] ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686. "[H]omosexuality is not" a "characteristic[ ] . . . that may arguably inhibit an individual's ability to contribute to society[.]" *Windsor*, 699 F.3d at 681; *Kerrigan*, 957 A.2d at 434; *Golinski*, 824 F. Supp. 2d. at 986; *Perry*, 704 F. Supp. 2d at 1002.

**2. The Act Fails Heightened Scrutiny.**

For the same reasons the Act fails rational basis review, it is plainly unconstitutional under a heightened level of scrutiny. The Act cannot survive strict scrutiny because the State cannot show that it is narrowly tailored to achieve a compelling government interest. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Nor can the Act survive intermediate scrutiny, as the State cannot prove that it is substantially related to any important governmental interest. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461-62 (1988).

## II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE ACT IS ENFORCED.

If the Court does not enjoin the Act's enforcement, Plaintiffs will suffer irreparable harm. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[I]f . . . a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.

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or change his or her sexual orientation in order to avoid discriminatory treatment.").

2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Act impairs Plaintiffs' equal protection rights, and therefore, the irreparable harm requirement is easily met. "Moreover, the potential risk to the plaintiffs' health resulting from the loss of medical insurance qualifies as irreparable harm." *Bassett*, 951 F. Supp. 2d at 970; *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1268 (W.D. Mich. 1990) (company decision to shift premium payments to retirees, allegedly in violation of collective bargaining agreement, would impose irreparable harm in the form of "uncertainty [of] how much money will be needed to cover medical expenses" and "financial planning burden"), *aff'd,* 948 F.2d 1290 (6th Cir. 1991); *Collins*, 727 F. Supp. 2d at 812-13, *aff'd*, 656 F.3d 1008 (9th Cir. 2011).

Monetary damages would not remedy the harm Plaintiffs will suffer if they are unable to obtain medical care. Plaintiffs Ramber and Ascheri have chronic conditions that, if left untreated, will likely lead to serious and potentially irreversible health consequences. *See* Facts, *supra*, II at notes 18-20. Plaintiffs will be forced to contend with the increased financial burden of obtaining alternative insurance coverage by enrolling in a high-deductible plan or a plan with limited coverage, limiting their doctors' visits, switching to inferior medications or foregoing medications, or working more to pay for higher insurance costs. See Facts, *supra.*, II at notes 15-17.

## III. THE BALANCE OF THE EQUITIES FAVORS ENTRY OF AN INJUNCTION.

First, because the evidence shows that the Act is unconstitutional, the State cannot legitimately claim that the balance of harms favors the denial of an injunction. *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (where "there is a likelihood that [a law] will be found unconstitutional," it is "questionable whether the [State] has any 'valid' interest in enforcing [it]"). Second, the Act generates *de minimis* savings that, in any event, redound to other public employers and not the State, while denying an injunction would "place[ ] significant financial, emotional, and medical burdens on the plaintiffs that outweigh any slight increase in cost to the State." *Bassett*, 951 F. Supp. 2d at 971; *Schalk*, 751 F. Supp. at 1268 (balance of harms favored plaintiff retirees' interest in keeping health benefits over defendant's interest in saving money by shifting costs to the retirees); *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 416 (E.D. Mich. 1994) (same), *aff'd*, 73 F.3d 648 (6th Cir. 1996).

## IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION.

Finally, "the public interest favors granting an injunction[,]" since "the public has an interest in ensuring that only constitutional laws are enforced." *Bassett*, 951 F. Supp. 2d at 971 (citing *Planned Parenthood*, 822 F.2d at 1400; *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982); and since "[t]he public has an interest 'in the preservation of a healthy population.'"

*Bassett*, 951 F. Supp. 2d at 971 (quoting *Schalk*, 751 F. Supp. at 1268). The public interest is also served by giving local authorities autonomy over the use of employment benefits to attract and retain the most qualified workforce, and to promote diversity within their own communities.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' summary judgment and enjoin the enforcement of the Public Employee Domestic Partner Benefit Restriction Act.

Dated: February 17, 2014

Respectfully submitted,
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2014, I electronically filed the foregoing PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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