

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM**

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

Plaintiffs,

Case No. 05-368-CZ

Hon. Joyce Draganchuk

v.

JENNIFER GRANHOLM, in her official capacity as
Governor of THE STATE OF MICHIGAN,

Defendant.

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**BRIEF OF UNIVERSITY OF MICHIGAN AND WAYNE STATE UNIVERSITY AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFFS**

INTEREST OF AMICUS CURIAE

The University of Michigan (“UM”) ranks among the top three public universities in the country and is one of the top research universities in the world. With nineteen schools and colleges, many of its academic programs—liberal arts, business, engineering, law, medicine, social work, music—are among the very best in the United States. UM students come from all fifty states and over 125 countries, and many lead distinguished careers in all walks of life. Among its more than 450,000 alumni are a U.S. president, U.S. Supreme Court justices, Nobel laureates, and eleven astronauts. Ranked third among universities in the U.S. in terms of total annual research and development expenditures, UM’s research expenditures in 2003-2004 totaled \$752,527,056. UM employs more than 35,000 regular, benefit eligible faculty and staff members that it recruits from all over the country and the world. Its total payroll and benefits exceed \$2 billion annually. *University of Michigan 2005 Profile*, attached as Exhibit 1.

Wayne State University (“WSU”), is Michigan’s only urban research university. Founded in 1934 as Wayne University, with the merger of the Detroit College of Medicine and Surgery, the Detroit Teachers College, and the College of the City of Detroit, it became a State University in 1956. Its 12 schools and colleges offer degree programs in more than 350 subject areas. It has more than 33,000 students and employs more than 6,000 faculty and staff. It is currently ranked 61 among research universities, with nationally recognized programs in medicine, chemistry, social work, education and nursing. Among Wayne State University’s more than 200,000 alumni are a large portion of the practicing physicians, pharmacists, nurses, teachers, attorneys and judges in the state of Michigan.

UM and WSU (“UM/WSU” or “the Universities”) offer comprehensive fringe benefits packages, which include health care insurance as a key component (Exhibit 2). At UM and WSU, eligible faculty and staff members are entitled to cover their spouse, same sex domestic partner (“SSDP”), children, and other eligible dependents (see Exhibit 3). The ability to design and offer benefits, including domestic partner health benefits (“DPB”), and other forms of compensation is vital to the Universities’ ability to

recruit and retain the best and the brightest faculty and staff, offer quality health care programs, and maintain cost control by responding to the rapidly changing labor market and health care market. The Universities have a stake in the outcome of this litigation. The Marriage Amendment to the Michigan Constitution should not be interpreted to impact the Universities' ability to offer domestic partner benefits.

STATEMENT OF FACTS

A. Quality Health Care Benefits are Vital to Recruitment and Retention

Health insurance is consistently ranked by the majority of employees as the single most important benefit of employment (App.1). Steve Blakely and Rachel Christensen, *Value Of Employee Benefits Constant In A Changing World*, Employee Benefits Research Institute (ERBI) News Release, para. 4 (March 28, 2002), available at <http://www.ebri.org/pr/rl/pr593.htm> (visited June 15, 2005). (Results based on the most recent Value of Benefits Survey conducted by EBRI and Matthew Greenwald & Associates in early November 2001). (Journal articles, news articles, and web-based resources are attached in relevant part to the Appendix accompanying this brief). For example, respondents to an Eastern Michigan University study revealed that from twenty-eight (28) possible family support benefits, employees view health insurance as the benefit that is of the most interest to them, and also the benefit that would be most useful to them (App. 6). Denise Tanguay Hoyer and Jean M. McEnery, *Family Support Benefits: Individual Utility and Organizational Outcomes*, 10 BENEFITS Q. 64, 67 (First Quarter, 1994). Similarly, according to a study by conducted Hewitt Associates, twenty-eight percent (28%) of employees rated health care benefits as more important than pay, fifty-six percent (56%) felt that pay and benefits were of equal importance, and only sixteen percent (16%) felt that benefits were less important than pay (App. 5). *Id.* at 66. In a recent EBRI study, seventy-seven percent (77%) of employees declared that the benefits prospective employers offer are “very important” in their decision to accept or decline a job offer (App. 1). Blakely & Christensen, *supra* at para. 6.

Employers recognize health benefits as an investment in a business strategy focused on attracting new employees and retaining current employees (App. 11). Carey Jury, *Ten Companies Prove that Great Benefits can Lead to a Great Bottom Line*, 29 EMP. RELATIONS TODAY 27 (2003). Employers responding to a survey indicated that they offered health benefits because they attract quality employees, motivate employee productivity, and reduce costly employee turnover (App. 25). H.W. Hennessey, Jr., *Using Employee Benefits to Gain a Competitive Advantage*, 5 BENEFITS Q. 51, 52 (First Quarter, 1989). Notably, the Society for Human Resource Management notes that there is no single more effective employee retention tool than the provision of healthcare benefits (App.34). Nadya L. O'Connell, *Rewarding Employees with Psychic Income Pays Long Term Dividends*, 17 BENEFITS Q. 7, 10 (Third Quarter, 2001).

B. Private and Public Employers Who Offer Domestic Partner Health Benefits.

In the last decade, private and public employers have sent a clear and consistent message: DPB are good for business and imperative to remaining competitive. There are currently 8,277 employers in the United States offering DPB (App. 47). Human Rights Campaign Foundation, Domestic Partner Benefits, http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399 (visited June, 15 2005). DPB are offered by 240 Fortune 500 companies¹, 7,599 private sector employers, eleven state governments, and 129 city and county governments (App. 47). *Id.*². DPB are offered at over one-third (1/3) of high-tech organizations, and at nearly one hundred percent (100%) of firms in the software sector (App. 44). O'Connell, *supra* at 19. Most importantly, 295 colleges and universities offer DPB (App. 47). Human

¹ Nine of these Fortune 500 corporations are headquartered in Michigan: Borders Group, Inc., Comerica Inc., Delphi, Dow Chemical Co., DTE Energy Corp., Ford Motor Co., General Motors Corp., Visteon Corp., and Whirlpool Corp.

² In Michigan, DPB are offered by Ingham and Washtenaw Counties and by the Cities of Ann Arbor and Kalamazoo. The list of Michigan schools offering DPB include Wayne State University, Northern, Central, and Eastern Michigan Universities, Oakland University, Albion College, Kalamazoo College, Lansing Community College, Michigan State University and the University of Michigan.

Rights Campaign Foundation, Domestic Partner Benefits, *supra*. Notably every single big-ten school offers domestic partner health benefits except the University of Wisconsin-Madison (App. 48). David Callender, *Gov. wants UW Partner Benefits*, THE CAPITAL TIMES, Feb. 7, 2005, at 1A, <http://www.madison.com>.

1. Private Business Adopt DPB to Remain Competitive

Private businesses adopt DPB because it makes good business sense. The benefits for business are two-fold. DPB produce direct economic benefits for employers. DPB assist in the recruitment and retention of the most highly qualified workers. DPB also enhance individual productivity by maintaining the health and well-being of employees, their partners and their families.

In 1992, Lotus Development, Corp., became the first publicly traded company to offer DPB (App. 52). Human Rights Campaign, Frequently Asked Questions, http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/Frequently_Asked_Questions/Frequently_Asked_Questions.html (visited April 27, 2005). Soon, DPB became an important business strategy throughout the high-tech industry and started spreading to other sectors. The growth of DPB has been dramatic. In 1998, only sixty-nine (69) Fortune 500 Companies offered DPB (13%) (App. 61). Human Rights Campaign, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgendered Americans 2003* at 5-6 (2003). By 2003, only five years later, the number had increased to 200 (40%) (App. 61). *Id.* Today, the number stands at 240 (App. 47). Human Rights Campaign Foundation, Domestic Partner Benefits, *supra*. DPB reflect the mainstream of corporate strategy.

A landmark event demonstrating the growing economic significance of DPB was the collective decision of the Big Three Automakers to offer such benefits to their nearly 500,000 employees in 2000 (App. 64). Frank Swoboda, *Big Three Automakers to Offer Benefits to Same-Sex Partners*, THE WASHINGTON POST, June 9, 2000 at A.01. They continue to offer these benefits today.

“In a joint statement, the automakers said ‘offering health care benefits to same-sex domestic partners is consistent with each organization’s commitment to diversity in the workplace and is responsive to competitive trends among Fortune 500 companies.’” (App. 64-5). *Id.* “Monica Emerson, director of diversity for Daimler-Chrysler, said offering the new benefits aside from being ‘the right thing to do’ was an effort to attract the best workers. . . . ‘all corporations who want to be competitive will find themselves forced to cast wider nets to attract the best and the brightest.’” (App. 65). *Id.*

According to Business for Social Responsibility “a growing number of companies have come to realize that providing domestic partner benefits is not only socially responsible but makes good business sense as well.” (App. 68). Business for Social Responsibility, Issue Brief: Domestic Partnership Benefits, <http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=49766> (visited April 22, 2005), p. 2.

The Employee Benefit Research Institute (EBRI) reports that the “attraction to employees of a comprehensive benefits package that offers health and retirement coverage is well-documented. In today's tight labor market, designing a benefits package that appeals to a diverse work force enables an employer to maintain a recruitment edge and communicates that the employer values a diverse work force.” (App. 72). Employee Benefit Research Institute, Facts from EBRI: Domestic Partner Benefits (March 1999), at <http://www.ebri.org/facts/0399afact.htm> (visited April 22, 2005).

These sentiments are echoed in the specific statements of companies implementing DPB programs. “A Lockheed Martin Company Spokesperson explained the company’s 2003 decision to begin offering domestic partner benefits saying, ‘we have to look at what’s best for the future of Lockheed Martin. The workforce is becoming more and more diverse. We need to be able to attract and retain our talent.’” (App. 69). Business for Social Responsibility, *supra* at para. 3, sec. 2.

A similar sentiment was expressed by Siemens, another high-tech company. “On March 7, 2001, Siemens announced that they would join more than 3,600 U.S. employers in extending benefits to

domestic partners of employees.” (App. 75). Siemens Communications, Inc., *Siemens Extends Medical and Dental Benefits to Domestic Partners of Employees Starting April 1, 2001*, <http://www.icn.siemens.com/diversity/Announcements001.html> (visited April 22, 2005). The statement concluded by acknowledging that DPB were “one of the ways Siemens is responding to today’s intense competition to retain and attract superior employees.” (App. 75). *Id.*

While critical in the high-tech sector, the business case for DPB is reaching into older sectors of the economy as well. Georgia-Pacific is a case in point. “For Georgia Pacific officials, extending the benefits is part of staying afloat in a changing workplace, Keegan said. ‘One of the main reasons that this is something we are considering is because we want to be competitive,’ Keegan said. ‘We want to offer competitive benefits and attract the best talent for our company.’” (App. 77). Ryan Lee, *Georgia-Pacific Weighs Domestic Partnership Benefits: Company is only ATL-based Fortune 100 Without Gay Policy*, SOUTHERN VOICE ONLINE, March 25, 2005 at para. 6, at <http://www.sovo.com/2005/3-25/news/localnews/index.cfm> (visited April 22, 2005) (quoting Georgia-Pacific spokesperson Robin Keegan).

The same logic extends to large retailers like Circuit City. “Circuit City has initiated an expansive benefits program for its employees’ domestic partners—including health insurance, purchase discounts, and bereavement leave, among other provisions—as a way to attract and retain its retail workforce.” (App. 79). Nancy Montwieler, *Circuit City's Domestic Partnership Policy Draws, Retains Retail Workers, Counsel Says*, 69 DAILY LABOR REPORT at C-1 (April 12, 2005). The direct economic benefits of DPB are many. Dona Latta, Associate General Counsel for the company “cited several advantages to an employer that offers domestic partner benefits: attracting talented applicants; retaining employees who might be likely to seek employment with a different employer that offers such benefits; furthering diversity initiatives; enhancing productivity; and deterring discrimination claims.” (App. 79). *Id.*

2. Public Employers Gain the Same Advantages from DPB as Private Companies

Public employers adopt DPB for the same reasons private employers do: It is good for business. If public employers want to remain competitive, they must have the freedom to contract in the same manner as their private counterparts. As previously stated, some 129 city and county governments now offer DPB to their employees. Nowhere is the economic need for DPB greater than in higher education, where colleges and universities compete not only with each other in a nation-wide and world wide search for the best talent, but also with private business, particularly in the fields of medicine, science and technology. For these reasons, it is not surprising that nearly 300 colleges and universities offer DPB.

It is interesting to observe how closely the DPB arguments made by large universities echo the sentiments of Fortune 500 corporations. This dynamic has played out in the Big Ten. The University of Illinois adopted DPB on July 17, 2003. Trustees expressed “concern that Illinois is at a competitive disadvantage with institutions that offer domestic partner benefits and is losing exceptionally qualified people to other universities as a result.” (App. 82). Sharita Forrest, *Trustees Approve Expansion of Health Benefits to Include Same-Sex Partners*, 23 INSIDE ILLINOIS (July 24, 2003) <http://www.news.uiuc.edu/ii/03/0724/bot.html> (visited April 22, 2005).

Ohio State University (“OSU”) President Karen Holbrook sounded a similar theme in her remarks to the OSU Board of Trustees, when she sought approval for DPB. “Among the top 60 American research universities belonging to the AAU, 45 provide health care benefits for domestic partners. In the Big Ten, nine of 11 universities provide such benefits.” (App. 85). Karen Holbrook, *Remarks to the Ohio State University Board of Trustees*, SPEECHES AND STATEMENTS, July 9, 2004, http://president.osu.edu/trustees_07-09-04.html (visited April 22, 2005).

“Ohio State competes for talent not only among other universities but also with the private sector. Over 40 percent of Fortune 500 companies offer domestic partner benefits. Bank One, Cardinal Health, Huntington Bancshares, Limited Brands, The Longaberger Company, Nationwide, OCLC, and

SARCOM are among the Central Ohio employers offering such benefits.” (App. 86). *Id.* President Holbrook concluded that the provision of DPB was essential for OSU to remain competitive and to retain its commitment to excellence. President Holbrook also acknowledged the many positive externalities associated with DPB. “In addition to enhancing our ability to compete for the best faculty, staff, and students, this benefits program also serves our commitment to diversity and allows us to provide a supportive environment for everyone on the Ohio State campus. I am enormously grateful to all of you and to our Trustees for supporting The Ohio State University in fulfilling its commitment to excellence and diversity in such a meaningful way.” (App. 87). *Id.*

After OSU’s adoption, the only University in the Big Ten without DPB was the University of Wisconsin. This competitive disadvantage has lead Governor Jim Doyle to engage in a personal Campaign for their ratification. “Doyle told The Capital Times he is introducing the measure ‘because it is the right thing to do’ and because it would keep UW competitive with other major Universities. The UW-Madison is now the only Big Ten University that does not offer such benefits.” (App. 48). Callender, *supra* (quoting Governor Jim Doyle). The Governor also acknowledged the close link between DPB, the competitiveness of the University and the long term economic health of the state. “[T]he proposal is ‘crucial to the future of the University of Wisconsin and is crucial to the long-term economy of the state.’” (App. 48). *Id.*

C. UM/WSU Experience

The UM/WSU experience with recruitment and retention of faculty and staff is consistent with the conclusions made in the research and by organizations that have offered DPB.

There are 196 employees at the UM who cover a same sex domestic partner on their health insurance (see affidavit of Kathleen Van Valkenburgh, attached as Exhibit 4). These employees include, among others, administrative associates and assistants, lecturers, computer programmers, systems consultants and technologists; assistant, associate, and full professors; research scientists, associates and

fellows; nurses, custodians, office assistants, clerks, counselors, and retirees (*Id.*). There are eight children of SSDPs covered under UM health insurance (*Id.*). The 196 partners of employees and eight children would lose health insurance coverage should the university be prohibited from offering DPB.

Among the UM employees who cover a partner are:

- [*This part of the brief, describing the personal circumstances of four UM employees, has been redacted for web site posting*]

Academic administrators of key schools and colleges have found that the university's partner benefits impact the recruiting and retention of key faculty. Among them are:

- Professor Michael Schoenfeldt, Associate Dean in the College of Literature, Science and the Arts. In January of 2005, immediately after the passage of the Marriage Amendment, a senior faculty member in the college, who was a leader in her department and star scholar, resigned from the UM to accept a job at a university on the east coast. She informed Professor Schoenfeldt that the recent passage of the Marriage Amendment was a factor in her decision to leave UM (see affidavit attached as Exhibit 9).
- Professor Abigail Stewart, who has held administrative positions in the College of Literature, Science, and the Arts, Women's Studies, and the Institute for Research on Women and Gender. During the faculty recruitment process, Professor Stewart recalls at least three occasions in which candidates inquired about the availability of benefits for same sex partners. In her role as an academic administrator, it has been her experience that partner benefits have been an important consideration to faculty candidates, and thus a factor in the recruitment process (see affidavit attached as Exhibit 10);
- Professor Evan Caminker, Dean of the Law School, who has been questioned by a key recruit as to the availability of DPB. In his professional experience as an administrator, he has found that

the UM's benefit programs are of concern to prospective and current faculty and therefore assist the Law School recruit and retain its high quality faculty (see affidavit attached as Exhibit 11); WSU provides domestic partner coverage to approximately 26 of its employees. Some of WSU's employees who have elected domestic partner benefits include:

- *[This part of the brief, describing the personal circumstances of four WSU employees, has been redacted for web site posting]*

Several academic administrators have discovered that the domestic partner benefits policy at WSU has played a key role in recruitment and retention of faculty and staff. For example:

- Jeffrey Trzeciak, Associate Dean of the University Library System, has found that offering domestic partner benefits to prospective employees in the WSU libraries has helped in recruitment (see affidavit attached as Exhibit 12).
- Frank Wu, Dean of the Law School at WSU has stated that providing domestic partner benefits enhances WSU's reputation and allows WSU to recruit more effectively regardless of whether that candidate is gay or lesbian and was a reason Dean Wu decided to accept WSU's offer of employment as Dean (see affidavit attached as Exhibit 16).
- Department Chairperson Douglas Risner has stated that, because many of the faculty in his department are gay, the loss of domestic partner benefits would be extremely detrimental to the retention of these faculty members (see affidavit attached as Exhibit 15).
- John Vander Weg, Associate Dean for Academic Affairs in the College of Fine, Communications and Performing Arts has found that in the hiring interviews in which he has participated, about one-third of the prospective hires have asked about WSU's domestic partner benefits policy. He found that the availability of these benefits to prospective new hires has enhanced WSU's competitiveness, especially if WSU was competing with institutions that did not offer domestic partner benefits (see affidavit attached as Exhibit 17).

D. Health Care Costs and the Health Care Market

Offering high quality, affordable health care has been a tremendous challenge for universities and other employers over the past several years given the rapid growth in the rate of health insurance premiums. Between the spring of 2003 and the spring of 2004, premiums for employer-sponsored health insurance rose by 11.2%, the fourth consecutive year of double digit growth (App. 89). See *Employer Health Benefits 2004 Annual Survey*, Kaiser Family Foundation–and–Health Research Educational Trust, p. 1, 2. Since the year 2000, employer sponsored health insurance premiums for family coverage have risen by 59%, compared with inflation growth of 9.7% and wage growth of 12.3% (App. 89). *Id.* UM and WSU have successfully navigated the challenges of offering quality, affordable health care to their employees by implementing numerous strategies and by each year, examining their health insurance offerings and adapting them to the rapidly changing health care market.

ARGUMENT

**THE MARRIAGE AMENDMENT DOES NOT AFFECT THE
UNIVERSITIES' ABILITY TO OFFER HEALTH BENEFITS**

A. Introduction

The recruitment and retention of the very best faculty and staff allow UM and WSU to compete in the state, national and global marketplace. Their ability to remain competitive, and thus to remain a significant contributor to the economy of the State of Michigan, depends in large part on their ability to continue to design and offer benefits packages that are competitive and to have the freedom to change their benefit offerings to adapt to the rapidly evolving health care market. This includes the unfettered autonomy to decide to whom it will offer benefits. An interpretation of the Marriage Amendment that interferes with the Universities' ability in this regard simply could not have been what the voters of the State of Michigan intended last November when they passed the following:

A PROPOSAL TO AMEND THE STATE CONSTITUTION TO SPECIFY WHAT CAN BE RECOGNIZED AS A “MARRIAGE OR SIMILAR UNION” FOR ANY PURPOSE.

The proposal would amend the state constitution to provide that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”

B. Intent of the Framers

The primary objective in interpreting a constitutional provision is to determine the text’s original meaning to the ratifiers, the people, at the time of ratification. *County of Wayne v. Hathcock*, 471 Mich. 445, 468 (2004), citing *People v. Nutt*, 469 Mich. 565, 573 (2004). The Michigan Supreme Court recently reaffirmed this longstanding principle:

“A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* ‘For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed.’”

Hathcock, 471 Mich. at 468 (quoting *Traverse City School Dist. v. Attorney General*, 384 Mich. 390, 405 (1971) (emphasis in original)).

The circumstances surrounding the campaign and eventual passage of the marriage amendment make it abundantly clear that the voters of this state intended only to restrict the recognition of a legal marriage to one man and one woman. Certainly, this was the public stance of the Citizens for the Protection of Marriage, the organization that filed the petition with the Board of Canvassers, seeking to amend the Michigan Constitution. Marlene Elwell, the Campaign Director for the Citizens for the Protection of Marriage, told USA TODAY, “This has nothing to do with taking benefits away. This is about marriage between a man and a woman.” (App. 91). Charisese Jones, *Gay Marriage on Ballot in 11 States*, USA TODAY, October 15, 2004, at A.3.

Eric Doster, the attorney representing the Citizen's for the Protection of Marriage before the Board of Canvassers, told the Board:

"But there would certainly be nothing to preclude that public employer from extending those benefits if they so chose, as a matter of contract between the employer and employee to say domestic dependent benefits -whatever the phrase was- could be any a person, and it could be your cat. So they certainly could extend it as a matter of contract."

Transcript of Board of Canvassers Hearing, August 23, 2004, page 27 (see also Brief of Plaintiffs in Support of Motion for Summary Disposition). The citizens of this state were not voting to restrict the ability of UM, WSU, and other public employers from offering vitally important health care benefits as they deem appropriate—to the same sex partners of their employees or anyone else; they were not voting to put our flagship institutions at a competitive disadvantage by restricting their ability to recruit and retain the best and the brightest talent that the state and the country has to offer. And they certainly were not voting to harm the state's economy by sending our talent elsewhere. Should this Court interpret the Marriage Amendment to restrict the Universities' ability to offer DBP, however, this is precisely the result that would ensue.

There are 196 faculty and staff members at UM and approximately 26 at WSU who cover a SSDP on their health care insurance. At Michigan, eight children of partners are also covered. For many of these talented employees, DPB were a key factor in their decision to come to the Universities. For others, DPB are the reason they remain. Indeed, in one case at UM, the employee's partner is a law student who was recruited by some of the top schools in the nation and chose, instead, to come to UM in part because it offered DPB. The reputation and ranking of the Law School depends upon recruiting these top flight students. There is a distinguished scientist who remains at UM in part because of the DPB. The Assistant Curator at the treasured Matthei Botanical Gardens, is at UM in part because of DPB. These benefits were invaluable when his partner suffered a near fatal heart attack. Sadly, the College of Literature, Science and the Arts lost a key leader in part because of the passage of the

Marriage Amendment. Similarly, WSU was able to recruit both the Associate Dean of the Library System, and the Chairperson of the Department of Dance due to, in part, its domestic partner benefits. The decision of the Dean of the Law School to accept the position with WSU was also influenced by WSU's domestic partner benefits policy, even though he does not benefit directly from it.

Unfortunately, both the Associate Dean of the University Library System and the Sergeant in the Department of Public Safety have indicated that they would, more likely than not, look for employment elsewhere should domestic partner benefits no longer be available at WSU. Each and every one of the talented employees who utilize DPB is vital to the Universities' success.

The voters of the State of Michigan, when they passed the Marriage Amendment, were not voting to strip the Universities of their unfettered ability to design benefit packages; they were not voting to actually *limit* the number of persons to whom the Universities could voluntarily extend health care; and they were most certainly not voting to establish a difference between how a public employer and how a private employer could contract with their employees, thus putting the public employer at a competitive disadvantage. The voters of the state of Michigan voted to restrict marriage to one man and one woman, and nothing more.

C. Plain Language

The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. *Hathcock*, 471 Mich. at 468. Courts typically discern the common understanding of constitutional text by applying each term's "plain meaning at the time of ratification." *Hathcock*, 471 Mich. at 468-9.

In this case, the plain language of the amendment supports the conclusion that the amendment covers only legal marriage, was not intended to cover employer benefit offerings, and, indeed does not cover employer benefit offerings. The text of the Marriage Amendment does not mention the word "health care" or "benefits" or any similar term. Rather, the Marriage Amendment provides: "the union

of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”

UM and WSU do not “recognize” marriages. The Michigan legislature sets the criteria for legal marriage and the State of Michigan is the only body empowered to recognize a marriage. See Mich. Comp. Laws Ann. §551.1 (2004), et seq., setting forth the criteria for marriage in the State of Michigan. The Universities, on the other hand, are *employers*. They design and offer benefit programs for the purpose of recruiting and retaining employees through their equitable and competitive compensation packages. The universities offer benefits to many individuals other than the spouses and the SSDPs of their employees. They offer benefits, for example, to the unmarried children of employees, principally supported children, and disabled children (Exhibit 3). Clearly, the eligibility criteria established by the universities is not based on marriage and is not recognized as a marriage.

If the Marriage amendment meant that the Universities and other employers could only offer benefits to married couples, it would have read as such. It does not, and such a result simply cannot be construed as a reasonable interpretation of the plain language of the Amendment. The only logical interpretation of the Amendment is that it is intended to control rights conferred by law (e.g. marriage); not rights that are acquired by voluntary contractual arrangement between employers and employees. There is no indication in the plain language of the Amendment, or in the circumstances surrounding its passage, that the Amendment was intended to restrict the Universities from voluntarily conferring a benefit on their employees.

D. Constitutional Autonomy

The Michigan’s state universities are “constitutional bodies corporate”, the “highest form of juristic person known to the law”. *Regents v Auditor General*, 167 Mich 444, 450 (1911). These constitutional corporations are expressly established in the text of the Michigan Constitution of 1963, which provides, in relevant part

The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. **Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.**

...

Const 1963, art 8, §5. Emphasis added.

The constitutional autonomy accorded to the respective governing bodies of the state universities to control and direct all expenditures from the institution's funds and exercise general supervision of the institution is clearly provided by Const 1963, art 8, §5. The courts of this state have long recognized that this constitutional grant of autonomy vests the governing boards of the state's universities with "the absolute management of the University, and the exclusive control of all funds received for its use." *State Bd. of Agric. v. State Admin. Bd.*, 226 Mich. 417, 424 (1924), see also *Federated Publications, Inc. v Board of Trustees of Michigan State University*, 460 Mich 75 (1999).

Conversely, the Marriage Amendment addresses neither employee benefits or health care, nor universities. Indeed, one must stretch to read into it *any* applicability to the Universities.

The two Constitutional provisions—Autonomy and the Marriage Amendment—should not be read in a manner that derogates the longstanding constitutional autonomy of the universities. In fact, every statement in a state constitution must be interpreted in light of the whole document, and because fundamental constitutional principles are of equal dignity, none must be so construed as to nullify or substantially impair another. *Lapeer County Clerk v. Lapeer Circuit Court*, 469 Mich. 146, 156, 665 NW2d 452, 457-458 (2003).

Even if a conflict exists between the Marriage Amendment and the constitutional autonomy of public universities, the more narrow, specific language granting broad constitutional autonomy must prevail over the more generic language of the Marriage Amendment. See, *Advisory Opinion on*

Constitutionality of 1978 PA 426, 403 Mich 631, 639 (1978) (where there is a conflict between general and specific provisions of a constitution, the specific provision must control). See also, *In re Proposals D&H*, 417 Mich 409 (1983) (all constitutional provisions enjoy equal dignity, and fundamental rule of construction requires construction of every clause or section of a constitution consistent with its words or sense so as to protect and guard its purposes).

An interpretation of the Marriage Amendment that would prohibit the Universities from extending DPB, or otherwise designing and offering benefit programs as they deem appropriate, would be directly at odds with Const 1963, art 8, § 5, setting forth the full autonomy of Michigan's universities in matters regarding the direction of expenditures of its funds and management of the institutions. Pursuant to their broad autonomy, the state's universities must be permitted the flexibility to design employee wage and benefit packages as they deem appropriate. The Universities have chosen to design benefit packages for their employees that include health benefits for same sex partners. The Marriage Amendment must be interpreted in harmony with the very specific autonomy granted to Michigan's universities and which allows for the provision of DPB.

CONCLUSION

The plain language and circumstances surrounding the adoption of the Marriage Amendment compel the interpretation that it does not affect the Universities' ability to offer partner benefits, or to design benefit programs to meet their need to recruit and retain the best talent the country and the world has to offer. The Marriage Amendment nowhere references employers, benefits, health care, or similar language. To hold that it precludes the Universities from offering DPB will leave the Universities to guess at whether their benefit packages are legal or whether they might violate the Michigan Constitution. Neither the law nor public policy requires that they be put at this competitive disadvantage. The Universities must be able to contract with the same freedom as their private counterparts, and not be left to guess at whether their construction of a benefit program might or might

not violate the Michigan Constitution. This Court should give the only possible logical interpretation to the Marriage Amendment—that it regulates only legal marriage between a man and a woman.

Respectfully submitted,

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