IN THE UNITED STATES DISTRICT COURT
FOR THE 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
Magistrate Judge Michael J. Hluchaniuk

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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 Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65. Plaintiffs respectfully request that the Court enjoin enforcement of 2011 P.A. 297 because the law violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and in the absence of an injunction, the enforcement of the law will cause Plaintiffs' irreparable harm.

In compliance with Local Rule 7.1(a), on March 7, 2012, 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: March 7, 2012

Respectfully submitted,

s/ Michael J. Steinberg
Michael J. Steinberg (P43085)
Jay D. Kaplan (P38197)
Kary L. Moss (P49759)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, Michigan 28201
(313) 578-6814
msteinberg@aclumich.org
kaplan@aclumich.org
kmoss@aclumich.org

John A. Knight (admission pending)
American Civil Liberties Union Foundation
180 N. Michigan, 2300
Chicago, Illinois 60601
(312) 201-9740
jaknight@aclu.org

Amanda C. Goad (admission pending)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549- 2627
agoad@aclu.org

Donna M. Welch, P.C. (admission pending)
Bradley H. Weidenhammer (admission pending)
Amy E. Crawford (admission pending)
Kirkland & Ellis, LLP
300 North LaSalle Street
Chicago, Illinois 60654
(312) 862-2000
dwelch@kirkland.com
bweidenhammer@kirkland.com
amy.crawford@kirkland.com

Attorneys for Plaintiffs Theresa Bassett, Carol Kennedy, Peter Ways, Joe Breakey, JoLinda Jach, Barbara Ramber, Doak Bloss, Gerardo Ascheri, Denise Miller, and Michelle Johnson

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs in this action are five Michiganders who make their living serving the people of this State through local governments, public schools, and a community college (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")). In the past, each of the entities that employs the Public Employees voluntarily offered health insurance benefits for the employees' partners as "other qualified adults," "other eligible adults," "household members," or some similar designation. But 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 Mich. Legis. Serv. P.A. 297 (West) (codified at Mich. Comp. Laws §§ 15.581–15.585) (Ex. A). The Domestic Partners, some of whom have serious medical conditions such as high blood pressure and glaucoma, have already lost their health insurance coverage or will lose their coverage when their partners' current contracts expire in the coming months, exposing them to severe financial and potential health consequences.

Plaintiffs seek a preliminary injunction to halt the enforcement of this draconian law that singles out their families for disparate and discriminatory treatment. The standards for injunctive relief are readily met here. Plaintiffs are likely to succeed on the merits of their equal protection and due process claims because, in targeting same-sex couples, the Act discriminates on the basis of sexual orientation and sex, directly and substantially burdens Plaintiffs' intimate relationships on the sole basis of Plaintiffs' family structures, furthers neither a compelling nor an important government interest, and has no rational basis. Plaintiffs face irreparable harm both because the Act violates their constitutional rights and because it undermines their financial and physical

security and well-being. A balancing of the equities favors preventing serious harm to Plaintiffs at minimal expense to the State, and the public interest favors an injunction stopping the enforcement of this unconstitutional law.

BACKGROUND

I. RELEVANT LEGAL HISTORY

A. The Law Prior to the Act's Passage

In 2005, then-Attorney General Mike Cox issued an opinion stating that article 1, section 25 of the Michigan Constitution (the "marriage amendment"), which limited marriage to heterosexual couples, made providing benefits to domestic partners unconstitutional when eligibility for benefits was "characterized by reference to the attributes of a marriage." Mich. Atty. Gen. Op. 7171 (Mar. 16, 2005) (Ex. F). Concerned about losing their partners' health insurance, gay and lesbian public employees sought a declaration that the marriage amendment did not threaten their benefits. *Nat'l Pride at Work v. Granholm*, No. 05-368-CZ, 2005 WL 3048040 (Mich. Cir. Ct. Sept. 27, 2005). After the trial court granted declaratory relief to the plaintiffs, Cox intervened and appealed. The Michigan Supreme Court subsequently held that when public employers make insurance coverage to their employees' same-sex domestic partners contingent on attributes similar to those of marriage, employers violate the marriage amendment by recognizing domestic partnerships as "unions similar to marriage." *National Pride at Work v. Governor*, 748 N.W.2d 524, 534–36 (Mich. 2008).

B. The Public Employee Domestic Partner Benefit Restriction Act

After the 2008 *National Pride* decision, many public employers in this State changed their benefits policies to conform to the Michigan Supreme Court's holding, by dropping coverage criteria that pertained to attributes similar to marriage and instead providing 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' policies dropped all reference to the sex of the partners to avoid recognizing same-sex domestic partnerships as "unions similar to marriage." Employers continued to cover other qualified adults because, in their judgment, the value of attracting and retaining qualified employees outweighed the costs of the coverage. (*See* Decl. of M.V. Lee Badgett ("Badgett Decl.") ¶¶ 24, 28, 32 (Ex. U) ("If prevented from offering benefits to same-sex partners of employees, most of Michigan's public sector employers will be put at a competitive disadvantage that might result in higher labor costs."); Decl. of Kenneth P. Collard ("Collard Decl.") ¶ 20 (Ex. V-1) ("The City [of Kalamazoo] decided to adopt [domestic partner benefits] in an effort to recruit and retain a diverse and qualified work force . . . . This philosophy has had a return on investment in the form of quality employees participating in the domestic partner and Other Qualified Adult insurance plans who have saved the City literally millions of dollars through the work they have done since the implementation of domestic partner benefits."); Decl. of David A. Comsa ("Comsa Decl.") ¶ 17 (Ex. V-2) ("In order for . . . [Ann Arbor Public Schools] to recruit and hire the most qualified employees for each position, it must be able to hire from, and consider, as broad a group of qualified individuals as possible, and must be able to provide competitive benefits as well as competitive pay to those individuals whom it would most like to hire.").

But some in Michigan did not want any same-sex partners to receive health benefits under any circumstances, regardless of whether the benefits plans 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

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

workers had been living for at least twelve months, Rep. Pete Lund, who later co-sponsored the Act, called this decision "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). Rep. 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 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. 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-CZ (Mich. Cir. Ct. Oct. 6, 2011) (Ex. H).[2]

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[2] It is worth noting that the Attorney General (who is currently appealing the Michigan Circuit Court's decision) did not claim that the Commission's OEAI benefits violated the marriage amendment or the *National Pride* holding—justifications that the Act's sponsors use to explain their passage of the Act.

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 singular objective is to prevent public employees' domestic partners from receiving health insurance.[3] The relevant portion of the Act reads:

> (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* Mich. Comp. Laws Ann. § 700.2103 (West 2011) (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

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[3] 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* 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).

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

The bill was passed and signed into law by Defendant Snyder in December. Defendant Snyder 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. Letter from Rick Snyder, Governor, to Michigan House of Representatives 2 (Dec. 22, 2011) (Ex. J).

C. Fiscal Impact of the Act

1. Initial Figures

Some of the Act's supporters have framed the Act as a cost-saving measure, *see* Press Release, Michigan House Republicans, House Votes Against Taxpayer-Funded Healthcare for Roommates (Sept. 15, 2011) (Ex. G-13), but the facts fail to support this purported interest.[4] Although initial estimates by the Office of the State Employer listed the savings as high as $8 million (Ex. I at 5 n.3) this number turned out to be inflated and was later revised to less than $893,000 by the Senate Fiscal Agency. Senate Fiscal Agency, *Domestic Partner Benefits, House Bills 4770 & 4771*, at 2 (Oct. 18, 2011) (Ex. K). Even that figure was inaccurate, because it pertained only to coverage of state employees—who, as Governor Snyder later acknowledged, are not covered by the Act. (Ex. J at 1–2) Thus when the Legislature passed the Act, it had *no* information about the supposed cost savings of eliminating benefits to those employees actually

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[4] While supporters of the Act claimed that such benefits were not affordable during a time of fiscal crisis (an assertion belied by the Act's permissive approach to benefits for "dependents" and other relatives), the State recently acknowledged that it had a $457 million budget surplus in 2011. *See* Monica Davey, *Surplus Surprises Michigan, but Is It Safe to Spend Again?*, N.Y. TIMES, Feb. 8, 2012, http://www.nytimes.com/2012/02/09/us/surplus-surprises-michigan-but-is-it-safe-to-spend-again.html.

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.")).

2. Cost Savings to the State

In reality, there is little to no evidence that the Act will 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.

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 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.

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[5] Under state law, the State must direct at least 48.97% of all spending to local governmental units. Mich. Const. art. IX, § 30; MCL §§ 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).

[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; Mich. Comp. Laws Ann. §§ 141.913, 141.911 (West 2012). 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* 20–22 (2012) (Ex. M).

Moreover, if local units of government are forced to stop offering "other qualified adult" 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] Mich. Comp. Laws Ann. § 141.917 (West 2012) (noting that revenue-sharing money is given to a city's, village's, or township's general fund); Ann Arbor Public Schools, *Budget Transparency Reporting: Personnel Expenditures* (2009) (Ex. N); (Collard Decl. ¶ 26 ("[A]ny cost savings associated with an involuntary termination of OQA benefits resulting from Public Act 297 of 2011 would accrue to the City [of Kalamazoo], not to the State."); Comsa Decl. ¶ 23 ("[I]n the event that Ann Arbor Public Schools in the future is forced to cease making OEA benefits available to any of its employees, the small amount of reduced expenditures on benefits would accrue to the District, not to the state.")).

In other words, the Act offers no cost savings to the State. 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. ¶ 20) 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 Decl. ¶¶ 22–23)

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[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 (West 2012) §§ 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.

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 small portion of their total expenditures to employee benefits. "Other qualified adult" benefits comprise a tiny fraction of this small portion. 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.

Health care expenses comprise only a small portion of local government units' expenditures. (Badgett Decl. ¶ 15) For example, in 2010 the City of Kalamazoo spent $18,466,724 on total benefits for its 782 employees, which represented only 15% of the City's overall expenditures. Kenneth P. Collard, *Dollars and Sense: How City of Kalamazoo Spends Your Money* 5, 7 (2011) (Ex. O) Ann Arbor Public Schools spent only 9.84% of its 2009 general fund budget on employee health care benefits. Ann Arbor Public Schools, *Budget Transparency Reporting: Personnel Expenditures* (2009) (Ex. N)

Only a tiny fraction of public employees have enrolled "other qualified adults" in employer-sponsored benefit plans. For example, of the 689 employees of the City of Kalamazoo, only six have actually added an "other qualified adult" to their health plan. (Collard Decl. ¶¶ 1, 6) Of approximately 1,800 full-time Ann Arbor Public Schools employees, just thirty-three have enrolled "other eligible adults." (Comsa Decl. ¶¶ 2, 5) These numbers are consistent with broader evidence indicating that few employees use partner benefits. (Badgett Decl. ¶ 15 (noting that only 0.3% to 1.5% 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* Collard Decl. ¶ 12 (cost to City of Kalamazoo of health insurance for other qualified adults was 0.45% of total

2011 health insurance costs); Comsa Decl. ¶ 11 (cost to Ann Arbor Public Schools of health insurance for other eligible adults is expected to be 1.2% of health insurance costs in 2011-2012))

In addition, the Act may impose additional costs on employers. Local units of governments offer "other qualified adult" benefits because they have decided that doing so is central to attracting and retaining the best and the brightest. (Collard Decl. ¶¶ 20–25; Comsa Decl. ¶¶ 15–19) Not offering such benefits may increase employee attrition, raising the cost to local employers of attracting and retaining talented employees. (Badgett Decl. ¶¶ 24–33; Collard Decl. ¶¶ 23–25; Comsa Decl. ¶¶ 18–19) The Act may even cause couples who rely on partner benefits to move out of state (Ways Decl. ¶ 11 (Ex. T-3); Breakey Decl. ¶ 12 (Ex. T-4)), which further burdens local employers and deprives the State of tax revenue.

II. THE PLAINTIFFS

Plaintiffs are gay or lesbian public employees and their domestic partners. On average, the plaintiff couples have been in their loving, committed relationships for around 18 years. (Bassett Decl. ¶ 4 (Ex. T-1), Kennedy Decl. ¶ 3 (26 years) (Ex. T-2); Ways Decl. ¶ 3, Breakey Decl. ¶ 3 (21 years); Jach Decl. ¶ 4 (Ex. T-5), Ramber Decl. ¶ 3 (Ex. T-6) (17 years); Bloss Decl. ¶ 4 (Ex. T-7), Ascheri Decl. ¶ 3 (Ex. T-8) (18 years); Miller Decl. ¶ 4 (Ex. T-9), Johnson Decl. ¶ 3 (Ex. T-10) (8 years)) 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. (Bassett Decl. ¶¶ 4–5; Kennedy Decl. ¶¶ 3–4; Ways Decl. ¶¶ 3, 5; Breakey Decl. ¶¶ 3–4; Jach Decl. ¶¶ 4–5; Ramber Decl. ¶¶ 3–4; Bloss Decl. ¶¶ 4–5; Ascheri Decl. ¶¶ 3, 5; Miller Decl. ¶¶ 4–5; Johnson Decl. ¶¶ 3–4) Three of the couples (Theresa Bassett and Carol Kennedy, Peter Ways and Joe Breakey, and JoLinda

Jach and Barbara Ramber) are raising children together. (Bassett Decl. ¶ 6; Kennedy Decl. ¶ 5; Ways Decl. ¶ 4; Breakey Decl. ¶ 5; Jach Decl. ¶ 6; Ramber Decl. ¶ 4)

The Public Employees receive health insurance through their jobs with a county, city, school district, or community college in Michigan. (Bassett Decl. ¶ 7; Ways Decl. ¶ 7; Jach Decl. ¶ 8; Bloss Decl. ¶ 7; Miller Decl. ¶¶ 6–7) Each Public Employee has job duties and responsibilities that are equivalent to the duties and responsibilities of their heterosexual colleagues with comparable jobs. (Bassett Decl. ¶ 2; Ways Decl. ¶ 4; Jach Decl. ¶ 2; Bloss Decl. ¶ 2; Miller Decl. ¶ 2) The Public Employees' employers allow them to enroll their partners as "other qualified adults" (or similar designation), unmarried adults who live with the employee and are not related to the employee. (Exs. B–E) Their employers voluntarily offer this insurance coverage for a variety of reasons, including a desire to attract and retain talented workers and to promote equality within their workforces by allowing their gay and lesbian employees to obtain insurance for their partners since they cannot otherwise do so through marriage. (Collard Decl. ¶¶ 19–25; Comsa Decl. ¶¶ 15–20) The Domestic Partners are – or were – enrolled in one of these plans as his or her sole health insurance. (Kennedy Decl. ¶ 7; Breakey Decl. ¶ 7; Ramber Decl. ¶ 6; Ascheri Decl. ¶ 6; Johnson Decl. ¶ 5)

If an 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 are now or will be forced to allow the public employee's partner 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. (Bassett Decl. ¶ 9; Kennedy Decl. ¶ 9; Ways Decl. ¶ 9; Breakey Decl. ¶ 9; Jach Decl. ¶ 11; Ramber Decl. ¶ 9; Bloss Decl. ¶ 10; Ascheri Decl. ¶ 9; Miller Decl. ¶ 9; Johnson Decl. ¶ 8) For example, Carol

Kennedy, whose partner, Theresa Bassett, teaches middle school math in Ann Arbor, has a family history of breast cancer. Individual coverage comparable to her current plan would cost approximately $800 per month. (Bassett Decl. ¶ 9; Kennedy Decl. ¶ 9)

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. (Jach Decl. ¶ 9; Ramber Decl. ¶ 7) Without medication, Barbara is in danger of going blind. When Kalamazoo's collective bargaining agreement expires, the couple will either incur monthly out-of-pocket costs of about $135 per month for Barbara's medication or pay premiums of as much as $540 per month for individual coverage. (Jach Decl. ¶ 11; Ramber Decl. ¶ 9) Gerardo Ascheri—whose partner Doak Bloss works for Ingham County—has high blood pressure and high cholesterol, which require ongoing medication and monitoring. (Bloss Decl. ¶¶ 8–10; Ascheri Decl. ¶¶ 7, 9) When Doak's contract expires on December 31, 2012, the couple will either incur monthly out-of-pocket costs of $130 for Gerardo's medication or pay monthly premiums of approximately $500 for an individual policy. (Bloss Decl. ¶ 10; Ascheri Decl. ¶ 9) Since December 31, 2011, as a direct result of the Act, Michelle Johnson has gone without health insurance, even though she has medical conditions that must be monitored and may require surgery in the future. (Miller Decl. ¶¶ 6, 8; Johnson Decl. ¶¶ 5, 7)

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *United Food & Commercial Workers*

Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 348 (6th Cir. 1998). Plaintiffs satisfy each of these requirements.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The Act clearly violates Plaintiffs' rights to equal protection by treating them differently than similarly situated families on the sole basis of their sexual orientation. In addition, the Act violates the substantive due process rights of lesbian and gay employees by conditioning their ability to receive family insurance coverage on foregoing their right to intimate association with their same-sex domestic partners. *See Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) ("personal decisions relating to . . . family relationships" are constitutionally protected from state interference). As such, the Act cannot survive any level of scrutiny.

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.[8] Yet the Act intentionally burdens gay and lesbian public employees and their partners because of their sexual orientation.

The Act accomplishes this goal by creating—for the first time in Michigan—a disfavored class to whom public employers cannot offer employee health care benefits. The title of the Act—Public Employee Domestic Partner Benefit Restriction Act—demonstrates that the Act clearly distinguishes between gay and lesbian couples (who cannot legally marry and so must remain domestic partners) and unmarried same-sex couples (who can attain favored status via marriage). Moreover, by explicitly incorporating the classifications in the marriage amendment and intestacy statute, the Act demonstrates its purpose of distinguishing between same-sex and opposite-sex families. Although the Act does not use the term "sexual orientation," it expressly incorporates statutes that draw classifications based on sexual orientation—and, as such, is 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 have found that statutes restricting benefits on the basis of marriage intentionally classify on the basis of sexual orientation when gays and lesbians cannot legally marry. *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.*

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[8] Michigan courts recognize that "the term 'compensation' includes more than money and specifically includes fringe benefits." *Att'y Gen. Bill Schuette v. Mich. Civil Serv. Comm'n*, No. 11-538-CZ, at 5 (Mich. Cir. Ct. Oct. 6, 2011) (Ex. H) (citations omitted)).

Technical Coll. Sys., No. 04-E-229, 2006 WL 1217283, at *6 (N.H. Super. Ct. May 3, 2006) (applying New Hampshire law) ("[C]onditioning employment benefits upon marital status, where lesbians and gay men are not permitted to marry, constitutes unlawful discrimination based on sexual orientation."); *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); *Dragovich v. United States Dep't of the Treasury*, No. C 10-01564 CW, 2012 WL 253325, at *7 (N.D. Cal. Jan. 26, 2012) (law limiting benefit to married couples, when same-sex couples cannot marry, discriminates on the basis of sexual orientation).

Consideration of what the Act *does not* prohibit further demonstrates its intent to target gays and lesbians. 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 relatives and dependents. 2011 P.A. 297. The narrowness of the burden imposed by the statute demonstrates that the Act was aimed at same-sex domestic partners. Because of its focus on burdening lesbians and gays, rational basis review of the Act must be conducted with closer scrutiny in contrast to the deference given other legislative classifications. *Lawrence*, 539 U.S. at 580 (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 goals of saving costs 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. The Act will save only a tiny fraction of local government employers' health insurance outlays and little (if any) of this savings would be recouped by the State. *See* Background, *supra*, at I.C.2–3. Any savings would also 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. Background, *supra*, at I.C.3.

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 "Enforce" Existing Law.

According to the House Legislative Analysis and many statements by the Act's sponsors, article 1, section 25 of the Michigan Constitution and the *National Pride* decision bar spending public funds on domestic partner benefits. (*See* Ex. I at 6 ("First and foremost, [proponents of the Act] say any public employer who extends health care insurance to same-sex or opposite-sex domestic partners is clearly breaking the law."); Background, *supra*, at I.B. This fundamentally misstates Michigan law. *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 say what the Act's proponents attribute to it. Specifically, *National Pride* does not impose an absolute bar on the provision of benefits to anyone other than a public employee's blood relative.

In reality, the reference to the constitutional 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 political and legal victories 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 go far beyond the regulation of marriage and 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 Illegitimate Anti-Gay Animus.

The Equal Protection Clause prohibits classifications based on the "bare . . . desire to harm a politically unpopular group." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer*, 517 U.S. at 634; *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997). Courts look to a number of factors as evidence of 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–B. 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.

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 anti-gay animus.

United States Department of Agriculture v. Moreno also presented a situation in which government benefits were conditioned on family structure and motivated by impermissible animus. 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 animus against 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*, 2012 WL 253325, at *11; *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. 636 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. Plaintiffs thus have a high likelihood of showing that the Act was motivated by animus.

B. The Act Also Fails Under Heightened Scrutiny.

Although the Act fails even rational basis review, the Act should be reviewed under heightened scrutiny for three independent reasons: (1) 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; and (2) the Act discriminates on the basis of sex; and (3) the Act burdens lesbian and gay public employees' fundamental right of intimate association.

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

The Act warrants heightened scrutiny because it targets gays and lesbians. Since gays and lesbians meet all four factors used to assess whether a class is suspect or quasi-suspect, laws discriminating against them should be subject to heightened scrutiny.

The Sixth Circuit has previously stated that gays and lesbians are not a suspect class, *see Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006), but it did so relying on case law following *Bowers v. Hardwick*, 478 U.S. 186 (1986), before it was overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). In the wake of *Lawrence*, other courts have

recognized that gays and lesbians are entitled to heightened scrutiny as a class. *See, e.g.*, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432–62 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 889–97 (Iowa 2009). The U.S. Department of Justice, after carefully examining the factors discussed below, concluded last year that heightened scrutiny should apply to sexual orientation classifications. Letter from the Atty. Gen. to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) (Ex. P). This Court should reach the same conclusion.[9]

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.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989); *Varnum*, 763 N.W.2d at 889; *Kerrigan*, 957 A.2d at 432; *Andersen v. King Cnty.*, 138 P.3d 963, 974 (Wash. 2006). Until the Supreme Court's 2003 decision in *Lawrence*, states were able to "demean [gays' and lesbians'] existence or control their destiny by making

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[9] Because of the existing Sixth Circuit precedent, Plaintiffs ask the Court to analyze the heightened scrutiny factors for purposes of requesting that the Court of Appeals revisit the question and conclude that sexual orientation classifications are entitled to heightened scrutiny.

their private sexual conduct a crime." *Lawrence*, 539 U.S. at 578.[10]

This history of discrimination against gays and lesbians continues today in Michigan. *See generally* Williams Institute, *Michigan—Sexual Orientation and 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 2010, crimes targeting gays and lesbians constituted over fourteen percent of all reported Michigan hate crimes, the largest group after victims of anti-black and anti-white hate crimes. Michigan State Police, *2010 Hate/Bias Crime Report* (Ex. R). 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, gays and lesbians lack "sufficient political strength to bring a prompt end to the prejudice and discrimination [that they suffer] through traditional political means," *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,

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[10] *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* Mich. Comp. Laws § 750.158 (2012). Although *Lawrence* precludes their enforcement, Michigan's laws criminalizing private, adult, consensual, noncommercial conduct have never been formally repealed. *Id.*; *see also* Mich. Comp. Laws §§ 750.158, 750.159, 750.338, 750.338a (West 2012).

employment, public accommodations, or education based on height, weight, and eight other characteristics. *See* Mich. Comp. Laws §§ 37.2102(1), 37.2202, 37.2302, 37.2402, 37.2502 (West 2012); *see also Golinski v. U.S. Office of Pers. Mgmt.*, No. C 10-00257, 2012 WL 569685, at *14 (Feb. 22, 2012) (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). Evidence also shows that sexual orientation is an immutable characteristic. *See Golinski,* 2012 WL 569685, at *12 ("[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").[11]

Fourth, sexual orientation "bears no relation to [anyone's] ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686. The Public Employees, like thousands of other gay and lesbian Michiganders, have demonstrated this at their workplaces. "[S]exual

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[11] Moreover, sexual orientation is a core component of a person's identity that no person should be required to change to avoid discrimination. *Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 964 (N.D. Cal. 2010) ("Sexual orientation is fundamental to a person's identity."), *aff'd sub nom. Perry v. Brown*, No. 10-16696, 2012 WL 372713 (9th Cir. Feb. 7, 2012); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("[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 or change his or her sexual orientation in order to avoid discriminatory treatment.").

orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged." *Kerrigan*, 957 A.2d at 434; *Golinski*, 2012 WL 569685, at *12; *Perry*, 704 F. Supp. 2d at 1002.

2. Intermediate Scrutiny Applies Because The Act Discriminates On The Basis of Sex.

The Act should also be subjected to intermediate scrutiny for the independent reason that it discriminates against Plaintiffs based on each one's sex in relation to the sex of his or her life partner. By restricting the provision of benefits to married employees (as well as other arbitrarily-selected groups of persons as defined by intestacy and tax laws), who are necessarily opposite-sex partners, the State denies family coverage to the Domestic Partner Plaintiffs based on their sex, or from another perspective, based on the sex of the Public Employee Plaintiffs. *See In re Brad Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (denying health benefits to man in same-sex relationship was "sex-based" given that he could qualify if he were a woman and could marry his partner); *Baehr v. Lewin*, 852 P.2d 44, 67–68 (Haw. 1993).

3. Strict Scrutiny Applies Because the Act Burdens Fundamental Rights.

The Supreme Court has recognized that the Due Process Clause provides a substantive right of intimate association, which means that "personal decisions relating to . . . family relationships" are constitutionally protected from state interference. *Lawrence*, 539 U.S. at 573; *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices concerning family living arrangements, [courts] must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged resolution."). To survive the heightened scrutiny applicable to such impingements, a court must find that important governmental interests are at stake, the law will significantly further those interests, and the law is necessary to further those interests. *Witt v. Dep't of Air Force*, 527 F.3d

806, 817 (9th Cir. 2008) (applying the heightened scrutiny required by *Lawrence*); *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (same).

The Act directly and substantially interferes with Plaintiffs' family relationships by creating an arbitrary and discriminatory restriction on their ability to receive the family insurance coverage that their employers have willingly provided them—and does so only because the Public Employee Plaintiffs have formed family relationships with persons they cannot marry in Michigan. Once a municipality or other local entity has willingly offered partner benefits to its unmarried employees (particularly its gay and lesbian employees, who cannot marry), the State may not withhold those benefits from public employees because of their exercise of their fundamental right to intimate association and family integrity. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable government benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."); *Ark. Dep't of Human Servs. v. Cole*, 2011 Ark. 145, 2011 WL 1319217, at *13-14 (Ark. Apr. 7, 2011) (law restricting adoption and foster parenting to married persons burdened plaintiffs' intimate association in violation of Arkansas Constitution). Thus, the Act unconstitutionally burdens Plaintiffs' family relationships.

4. The Act Fails Heightened Scrutiny.

For the same reasons Plaintiffs are likely to succeed even if the Act is subjected to rational basis review, they will succeed when heightened review is applied. 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*, 555 U.S. at 20. "[W]hen reviewing a motion for a preliminary injunction, if it is found that 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. 2001) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). As discussed above, the Act impairs Plaintiffs' constitutional equal protection and due process rights, and therefore, the irreparable harm requirement is easily met.

Even if the Act did not infringe constitutional rights, Plaintiffs could still show irreparable harm. "An injury is irreparable if it cannot be undone through monetary remedies." *Performance Unltd., Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995). 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. (Jach Decl. ¶ 9; Ramber Decl. ¶ 7; Bloss Decl. ¶ 8; Ascheri Decl. ¶ 7) 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. (Badgett Decl. ¶ 7; Bassett Decl. ¶ 9; Kennedy Decl. ¶ 9; Ways Decl. ¶ 9; Breakey Decl. ¶ 9; Jach Decl. ¶ 11; Ramber Decl. ¶ 9; Bloss Decl. ¶ 10; Ascheri Decl. ¶ 9; Miller Decl. ¶ 9; Johnson Decl. ¶ 8) Courts routinely find such consequences to meet the requirement of irreparable harm. *See, e.g., 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).

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

Denying an injunction would harm Plaintiffs far more than granting an injunction would harm the State. *See Winter*, 555 U.S. at 24 (courts weigh the burden to the plaintiff of denying preliminary relief against the burden to the defendant of granting it). As discussed above, the Act's ban on partner coverage will make it much more difficult for Plaintiffs to access comparable insurance coverage, thereby imposing significant financial burdens on Plaintiffs and threatening the health of the Domestic Partner Plaintiffs. *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), *aff'd,* 73 F.3d 648 (6th Cir. 1996) (same).

In contrast, enforcing an unconstitutional law is not a valid state interest, so 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]"). Moreover, the Act generates *de minimis* savings that, in any event, redound to other public employers and not the State.

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION.

As the Sixth Circuit has noted, "the public is certainly interested in the prevention of enforcement of [laws] which may be unconstitutional." *Id.* at 1400; *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). The public interest also favors a healthy citizenry, which is promoted when public employers are permitted to extend benefits as broadly

as they see fit and impaired when benefits are abruptly terminated for partners of gay and lesbian public employees across the State. *Schalk*, 751 F. Supp. at 1268–69 (recognizing the public interest "in the preservation of a healthy population"). 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. The only possible public interests in favor of the Act are either not furthered by the Act (saving costs) or are illegitimate (denying equal benefits to gay and lesbian Michiganders) and should be rejected for the reasons discussed above. Thus, the public interest weighs in favor of an injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the enforcement of the Public Employee Domestic Partner Benefit Restriction Act be enjoined.

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Respectfully submitted,

s/ Michael J. Steinberg
Michael J. Steinberg (P43085)
Jay D. Kaplan (P38197)
Kary L. Moss (P49759)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, Michigan 28201
(313) 578-6814

John A. Knight (admission pending)
American Civil Liberties Union Foundation
180 N. Michigan, 2300
Chicago, Illinois 60601
(312) 201-9740

Amanda C. Goad (admission pending)
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549- 2627

Donna M. Welch, P.C. (admission pending)
Bradley H. Weidenhammer (admission pending)
Amy E. Crawford (admission pending)
Kirkland & Ellis, LLP
300 North LaSalle Street
Chicago, Illinois 60654
(312) 862-2000

Attorneys for Plaintiffs Theresa Bassett, Carol Kennedy, Peter Ways, Joe Breakey, JoLinda Jach, Barbara Ramber, Doak Bloss, Gerardo Ascheri, Denise Miller, and Michelle Johnson

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March, 2012, a true copy of the foregoing was delivered by electronic filing to:

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

s/ Michael J. Steinberg
Michael J. Steinberg (P43085)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, Michigan 28201
(313) 578-6814
msteinberg@aclumich.org