IN THE SUPREME COURT

STATE OF MICHIGAN

Appeal from the Michigan Court of Appeals

NATIONAL PRIDE AT WORK, INC. *et al.*,

Plaintiffs-Appellants,

v.

GOVERNOR OF MICHIGAN,
Defendant-Appellant,

SC: 133429

and

COA: 265870

CITY OF KALAMAZOO,
Defendant-Appellee,

Ingham CC: 05-000368-CZ

and

ATTORNEY GENERAL
Intervening Defendant-Appellee.

_____/

BRIEF ON APPEAL - AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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III. STATEMENT OF JURISDICTION

The AAUP adopts Plaintiffs-Appellees' Statement of Jurisdiction.

IV. STATEMENT OF QUESTIONS INVOVLED

The AAUP adopts by reference the Statement of Questions Involved and Answers to be contained in the Plaintiffs-Appellees' Brief.

V. INTEREST OF AMICUS CURIAE

The American Association of University Professors (hereinafter AAUP), including its Michigan Conference files this *Amicus Curiae* Brief in support of Plaintiffs-Appellees. The Michigan Conference, AAUP is an organization whose membership includes professors at various Michigan Colleges and Universities. The Michigan Conference, AAUP is comprised, in part, of member chapters which, at some Michigan Universities, serve as the collective bargaining representative of the professors. At other Michigan Universities, the Michigan Conference, AAUP serves as a professional organization for professors.

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 40,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is the development of policy standards on a number of key issues in higher education, including academic freedom, tenure, and freedom from discrimination. AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). "The Association is committed to use its procedures. . . against colleges and universities practicing illegal or unconstitutional discrimination, or discrimination on a basis not demonstrably related to the job function

involved, including but not limited to . . .marital status, or sexual orientation." *On Discrimination*, AAUP Policy Documents & Reports (2001 ed.). AAUP is opposed to overt and *de facto* "discrimination based upon an individual's sexual orientation in the selection of faculty, the granting of promotion or tenure, and the providing of other conditions and benefits of academic life," and has called upon the academic community to "work for the elimination of discriminatory practices which may adversely affect faculty members, students, and staff because of their sexual orientation, and to adopt policies that will give guidance and support to these efforts." AAUP Annual Meeting Resolution (1995). AAUP and its members are deeply concerned that barring public entities, such as state universities, from providing equal benefits to all employees interferes with their ability to recruit and maintain a first-rate faculty and attract an outstanding student body.

The instant lawsuit affects whether Michigan public bodies, including universities, may continue to offer the same benefits to all employees and their families. Universities at which the Michigan Conference, AAUP represents professors offer benefits to employees' domestic partners and their children. The Michigan Conference and AAUP's members have a direct interest in the outcome of this lawsuit, and urge this Court to reverse the judgment of the Court of Appeals and to reinstate the judgment of the Circuit Court holding that the provisions of Article 1, section 25 of the Michigan constitution do not prohibit public universities from entering into contractual agreements to provide domestic partner benefits or to voluntarily provide family and domestic partner benefits as a matter of educational policy. The amicus submits that the Court of Appeals erred in its application of the plain meaning rule of constitutional construction, and that the language of the so-called "marriage amendment" clearly does not apply to the provision of employment benefits. In addition, in determining the plain

meaning of Article I, section 25 as applied to public universities in the state, this Court is entitled to consider the status that Michigan's universities occupy in the state and the traditional deference accorded to the state's institutions of higher education. Because the decision of the Court of Appeals on the question presented in this case is patently incorrect, the amicus respectfully requests that this Court overturn the decision of the Court of Appeals and hold that Article 1, section 25 of the Michigan Constitution permits public institutions of higher education in the state of Michigan to provide "domestic partner benefits" to all university faculty and staff.

VI. STATEMENT OF FACTS

The AAUP adopts by reference the Statement of Facts to be contained in the Brief of Appellants on this appeal.

VII. ARGUMENT

A. The plain meaning of the language of Article 1, section 25 clearly does not prohibit a public university from providing "domestic partner benefits" to all university faculty and staff, because in so doing, the university is not thereby recognizing a legally valid relationship.

Article I, section 25 of the Michigan Constitution, as approved by the voters of Michigan, states: "To secure and preserve the benefits of marriage for our society and for future generations of children, 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." Const. 1963, Art. 1, § 25. The Court of Appeals found that the plain meaning of Article I, section 25 was to prohibit public employers, including public universities, from providing "domestic partner benefits" to their employees and staff. The Court of Appeals reasoned that because "domestic partner benefits" were given by a governmental employer to employees based upon the employee's "agreed upon"

relationship with another person, the government was "recognizing" the relationship "for any other purpose" within the meaning of Article I, section 25.

In so doing, the Court of Appeals clearly misapplied the plain meaning doctrine that it was purporting to follow. The Court of Appeals stated: "Consistent with our Supreme Court's mandate to construe technical or legal terms of art in their technical, legal sense, we find that the common understanding of the term 'recognize' as used in the amendment is in a legal sense, i.e., to acknowledge the legal validity of something." Slip op., pp. 7-8 (citing, *inter alia*, *City of Detroit v. Walker*, 445 Mich. 682, 699; 520 N.W.2d 135 (1994) ("A 'vested right' has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice.")). What the Court of Appeals failed to understand is that under the plain meaning of the language of Article I, section 25, a public university is not "recognizing a legally valid relationship" when it provides "domestic partner benefits" to all university and staff.

This is because as a constitutional matter, a public university has no power whatsoever to establish or recognize a "legally valid relationship." As a constitutional matter, only the State of Michigan, acting in its sovereign capacity, has the constitutional power to establish and recognize legally valid relationships. Only the State of Michigan has the constitutional power to acknowledge the legal validity of a relationship, as it has done with respect to the relationship of marriage. In Michigan, once parties have entered into the legal relationship of marriage, the law imposes rights and obligations arising from that relationship, and that relationship can only be dissolved in accordance with law. It is only then that this relationship becomes "an interest that the government is compelled to recognize and protect." Once the marriage relationship is recognized under state law, parties to the marriage receive a host of benefits, such as tax-related

benefits and survivorship benefits, from the state itself. Because only the State of Michigan has the constitutional power to establish and recognize legally valid relationships, such as marriages or civil unions, the plain, technical meaning of the terms of Article I, section 25 is to prohibit the State of Michigan from recognizing as a legally valid relationship any relationship other than one between a man and a woman. Article I, section 25 in its plain meaning thus expressly prohibits the State of Michigan from recognizing and giving legal validity to same-sex marriages or same-sex civil unions *in the same manner in which the state grants legal validity to opposite-sex marriages*.

By contrast, public universities do not have the constitutional power to establish or "recognize" and give legal validity to any relationship, including a relationship between a man and a woman. They only have the constitutional power to provide benefits to their employees. In the exercise of this power, they can set the conditions for eligibility for those benefits. So, when a public university enters into an agreement with the employees represented by the amicus to provide benefits for "domestic partners," the university is not "recognizing" any relationship within the legal meaning of that term, as it is used in Article I, section 25. It is doing no more than defining "domestic partner" for purposes of eligibility for the particular benefit provided by the university's own agreement with its faculty and staff. Parties eligible for domestic partnership benefits from the universities under these agreements have no entitlement to any of the legal incidents connected with the relationship of marriage, such as rights of support or rights of inheritance. To hold otherwise would be to invest any semi-governmental body with the power to act with the full weight of the state government.

Stated simply, when the universities grant equal benefits to all of their staff, as they accomplish through the provision of domestic partner benefits, the universities are not exercising

the power – indeed, do not have the power – to "recognize" "domestic partner" relationships or to vest such relationships with legal significance beyond the four walls of the university. Therefore, the plain meaning of the language of Article I, section 25 clearly does not prohibit a public university from entering into a contractual agreement to provide "domestic partner" benefits for its faculty and staff.

B. The constitutional autonomy of, and deference traditionally accorded to, Michigan's universities also counsel against an overly broad reading of this constitutional amendment.

The assertion that the plain meaning of the language Article I, section 25 clearly cannot be read to prohibit provision of "domestic partner" employment benefits by public universities is further bolstered by the status that Michigan's universities occupy in the state and the traditional deference accorded to the state's institutions of higher education. *See, e.g., Regents of the Univ. of Michigan v. State of Michigan*, 166 Mich. App. 314, 323-24, 419 N.W.2d 773 (Mich. Ct. App. 1988) ("The Michigan Supreme Court has repeatedly affirmed the constitutional independence and exclusive authority of [university] boards. [Citing cases.] . . . . The courts have clearly interpreted the Constitution as conferring general fiscal autonomy on the university boards."); *Schmidt v. Regents of the Univ. of Michigan*, 63 Mich. App. 54, 233 N.W.2d 855 (Mich. Ct. App. 1975); *Sprik v. Regents of the Univ. of Michigan*, 43 Mich. App. 178, 186-87, 204 N.W.2d 62 (Mich. Ct. App. 1972) ("The University of Michigan is a corporation established by the Constitution of this state. . . . [O]nce state funds are appropriated to the university, only the Regents may direct how they are spent."). It is precisely because of the autonomous status of Michigan's universities that no constitutional provision would be interpreted as restricting the powers or Michigan universities *unless that provision explicitly says so*. Since Article I, section 25 by its terms does not even mention universities, let alone purport to restrict their power to

provide benefits for their employees, the plain meaning of the language of Article I, section 25 does not prohibit public universities from providing "domestic partner benefits" to their faculty and staff. Moreover, this reading does not bring the two constitutional provisions into tension – instead, it harmonizes them, while giving full effect to the intent of Michigan's voters in passing the "marriage amendment."

Looking to the plain meaning of the language of Article I, section 25 of the Michigan Constitution, it is clear that this provision by its terms does not apply to eligibility criteria for benefits provided by public universities to their faculty and staff. The amicus submits, therefore, that the Court of Appeals misapplied the plain meaning doctrine in holding that Article I, section 25 precludes a public university from providing "domestic partner benefits" to university faculty and staff.

VIII CONCLUSION

For the reasons stated herein, the provisions of Article 1, section 25 should not be construed to prohibit public universities from entering into agreements to provide domestic partner benefits for their faculty and staff.

The amicus therefore respectfully requests that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the Circuit Court. [1]

Respectfully submitted,

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DATED: August 14, 2007

[1] The amicus submits that the Court of Appeals was clearly in error in holding that the provisions of Article I, Section 25 prohibit all public employers from entering into contractual agreements with their employees to provide domestic partner benefits. Even if this were not so in regard to other public employers, however, the amicus submits that Article I, section 25 should not be construed as imposing such a prohibition on public universities.

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

Angela C. Williams, being first duly sworn, deposes and says that on the 14th day of August, 2007, she mailed two copies of:

BRIEF ON APPEAL - AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Subscribed and sworn to before me this
14th day of August 2007.

James Michael Moore, Notary Public
State of Michigan, County of Wayne
My Commission Expires 6/27/2011
Acting in the County of WAYNE