**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

THERESA BASSETT *et al.*,

Plaintiffs,

vs.

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

Defendant.

Case No. 2:12-cv-10038

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

PLAINTIFFS' SUPPLEMENTAL BRIEF ON THE APPROPRIATE SCOPE OF INJUNCTIVE RELIEF

The Public Employee Domestic Partner Benefit Restriction Act of 2011 (the "Act") violates the equal protection and due process rights of gay and lesbian Michigan public employees and their same-sex domestic partners. The Court may strike the Act in its entirety because it was motivated by an impermissible purpose and creates an invidious classification that cannot meaningfully be severed. But even if the Court finds that the Act is unconstitutional only as applied to Plaintiffs, the Court's order enjoining its enforcement against Plaintiffs should extend to other gay and lesbian public employees whose employers have chosen to make benefits available to them and their partners to prevent continued unconstitutional state action.[1]

ARGUMENT

I. The Court Can and Should Strike the Act in Its Entirety.

The Sixth Circuit has cited two paradigm examples of when it is appropriate to "take [a] law off the books completely": when the law draws an invidious classification and when it serves

[1] Plaintiffs' Amended Complaint and Motion for Preliminary Injunction, assert that the Act is unconstitutional both on its face and as applied to Plaintiffs and other similarly situated gay and lesbian couples. (*See* Am. Compl. (Dkt. No. 9) ¶¶ 76, 103, 110, 116, 123, 127; Mot. Prelim. Inj. (Dkt. No. 18) 5, 14–20)

an unconstitutional purpose. *See Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009). The Act suffers from both deficiencies. By explicitly incorporating a marriage classification that excludes same-sex domestic partners, the Act creates an invidious classification and serves an unconstitutional purpose that renders the law facially invalid. (*See* Mot. Prelim. Inj. 14–15) Discriminatory laws are facially invalid, even though they may apply to persons who are not members of the burdened group. *E.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (denying food stamps to households of unrelated persons could affect "hippies" but seriously burdened poor people).[2]

Moreover, the Act's purposeful discrimination against same-sex domestic partners cannot "meaningfully be severed." *See Connection Distrib.*, 557 F.3d at 335. Courts "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884 (1997). Here, the Act limits eligibility for family benefits to public employees' spouses, IRS dependents, and relatives by blood or adoption. 2011 P.A. 297 (West 2012). To remedy the constitutional defect, the Court could either invalidate the entire Act or invalidate its use to prohibit benefits for same-sex domestic partners. However, since no specific provision of the Act deals with its application to same-sex domestic partners, an injunction limited to this application would require the Court to draft a limiting construction. "[W]hile a federal court may enjoin the operation of some provisions of a statute and leave others to operate, it cannot itself draft a new limiting condition, thus reframing the statute." *Id.* at 1127–28; *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397

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[2] "[A]ny equal protection case . . . hinges on whether the statute uses an improper classification, apart from how it classifies the individual litigant." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 260 (1994). *See also* 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3531.9-4 (3d ed. 2012) ("[E]qual protection carries with it a personal right not to be subject to discriminatory regulation.")

(1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements."). Such redrafting requires the Court to make "policy choices usually made by the state legislature." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991). Complete invalidation avoids intrusion into the state's legislative function and restores the status quo in which Michigan public entities may operate Other Qualified Adult benefits programs.[3] Because the Act is premised on an impermissible classification, serves an unconstitutional purpose, and has a constitutional infirmity that cannot be severed without intruding into state and local governments' legislative and policy-making functions, the Court can and should strike it entirely.

II. In the Alternative, the Court Should Enjoin the Act's Enforcement Against All Gay and Lesbian Public Employees and Their Same-Sex Domestic Partners Whose Employers Have Chosen to Make Benefits Available to Them.

If the Court holds that the Act is unconstitutional only as applied to Plaintiffs, it should enjoin the Act's application to all Michigan gay and lesbian public employees and their same-sex domestic partners whose employers have chosen to provide them health insurance benefits. In a civil rights case seeking equitable relief from an unconstitutional law, "[***a***]***ny declaratory or injunctive relief will accrue to the benefit of others similarly situated***." *Curry v. Dempsey*, 520 F. Supp. 70, 75 (W.D. Mich. 1981) (emphasis added), *rev'd on other grounds*, 701 F.2d 580 (6th Cir. 1983); *Tipler v. E. I. duPont deNemours & Co*., 443 F.2d 125, 130 (6th Cir. 1971) (noting that, even in non-class suits alleging class discrimination, courts should "protect the interests" of those similarly situated); *Potts v. Flax*, 313 F.2d 284, 289–90 (5th Cir. 1963) (holding that once a court finds unconstitutional discrimination, it "must order that it be discontinued," and such an order applies to all similar individuals); 7A Wright et al., *supra*, § 1771 (noting that in cases such as this, "the requested relief generally will benefit not only the claimant but all other persons

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[3] Michigan public employers offering Other Qualified Adult benefits do not inquire whether beneficiaries are employees' same-sex domestic partners. (*See* Exs. B–E to Mot. Prelim. Inj.)

subject to the practice or the rule under attack"). Otherwise, the Court "would . . . contribute actively to the [prohibited] class discrimination," which is impermissible. *Potts*, 313 F.2d at 289.

In *Collins v. Brewer*, individual plaintiffs challenged a law similar to the Act and obtained an injunction barring the Arizona governor from enforcing the law "to eliminate family insurance eligibility for lesbian and gay State employees, and their domestic partners and domestic partners' children." 727 F. Supp. 2d 797, 815 (D. Ariz. 2010). The court ordered that "Defendants are required to make available family health insurance coverage for lesbian and gay State employees, *including plaintiffs*. . . . to the same extent such benefits are made available to married State employees." *Id.* (emphasis added). A Ninth Circuit panel affirmed the injunction as ordered, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), and the Ninth Circuit denied Defendant's petition for reconsideration and en banc review, 676 F.3d 823 (9th Cir. 2012).

Plaintiffs did not bring this case as a class action because injunctive relief on behalf of the five named couples will address the constitutional harm imposed by the Act on all similarly situated gay and lesbian public employees and their same-sex domestic partners. In fact, courts often deny class certification in such circumstances because "a class action is not necessary inasmuch as all the class members will benefit from any injunction issued on behalf of a single plaintiff." 7A Wright et al., *supra*, § 1785.2; *Craft v. Memphis Light, Gas, & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976) (affirming denial of class certification where "[n]o useful purpose would be served by permitting this case to proceed as a class action" because the relief would be class-wide in any event) (quoting *Ihrke v. N. States Power Co.*, 459 F.2d 566, 572 (8th Cir. 1972)), *aff'd* 436 U.S. 1 (1978); *see also Barton v. Saunders*, 1991 WL 24651, at *3 (S.D. Ohio Jan. 14, 1991) (following *Craft*); *Green v. Williams,* 94 F.R.D. 238, 242 (E.D. Tenn. 1980) (same).

III. *Kowalski* Is Inapposite to the Question of the Appropriate Scope of Relief.

During the August 7, 2012 hearing in this case, Defendant's attorney suggested that *Kowalski v. Tesmer*, 543 U.S. 125 (2004), restricts the scope of injunction the Court may issue. (Mot. Hearing Tr. at 54–55 (Ex. 1)) However, *Kowalski* is a standing case and merely holds that "a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski*, 543 U.S. at 129 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Plaintiffs here assert their own legal rights, not the legal rights of third parties, and they plainly have standing. *Kowalski* says nothing about the proper scope of injunctive relief and provides no counterweight to the authority Plaintiffs cite above.

CONCLUSION

The Court may and should enjoin enforcement of the Act or, alternatively, enjoin the Act's application to all gay and lesbian public employees and their committed same-sex partners whose employers have chosen to extend benefits to them.

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Respectfully submitted,

s/ Amy E. Crawford

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2012, I caused *Plaintiffs' Supplemental Brief on the Appropriate Scope of Injunctive Relief* to be delivered by electronic filing to the following counsel:

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