UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THERESA BASSETT and CAROL KENNEDY, PETER WAYS and JOE BREAKEY, JOLINDA JACH and BARBARA RAMBER, DOAK BLOSS and GERARDO ASCHERI DENISE MILLER and MICHELLE JOHNSON,

Plaintiffs,

v

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

Defendant.

No. 2:12-cv-10038

HON. DAVID M. LAWSON

MAG. MICHAEL J. HLUCHANIUK

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Governor Rick Snyder moves this Court for summary judgment of Plaintiffs' pursuant to Fed. R. Civ. P 56. No genuine issue of material fact relevant to a determination of Plaintiffs' equal protection claim exists and the claim otherwise fails as a matter of law entitling Defendant to judgment.

The filing of summary judgment motions and the fact the case would not be resolved without a decision from the Court was discussed

at the September 5, 2013 Status Conference with the Court and satisfies L.R. 7.1(a).

Governor Rick Snyder asks that the Court grant this motion for the reasons more fully set out in the accompanying Brief and enter its judgment for Defendant dismissing this complaint with prejudice.

Defense counsel sought concurrence in this motion pursuant to L.R. 7.1(a) on February 14, 2014. Concurrence was denied.

Respectfully submitted,

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Dated: February 14, 2014

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EASTERN DISTRICT OF MICHIGAN
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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,

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CONCISE STATEMENT OF ISSUES PRESENTED

1. Public Act 297 of 2011 does not infringe on any constitutionally guaranteed right, or discriminate against Plaintiffs because of their sexual orientation, and is rationally related to legitimate, state interests. The statute, therefore, does not violate federal equal protection guarantees.

INTRODUCTION

Public Act 297 is designed to further Michigan's Marriage Amendment ("union of one man and one woman") and to ensure fiscal responsibility in government, by limiting health insurance to the spouses of employees, and to either their dependents or their family members. By limiting benefits that are traditionally associated with marriage, the Act seeks to protect the unique status of marriage in law. It ensures that such benefits only extend to spouses, dependents, and family. If extended beyond its confines, marriage loses its central place. The Act does not target anyone, applying to all non-marital relationships.

The real gravamen of the claim here is a challenge to the constitutionality of Michigan's definition of marriage, which is being litigated in *DeBoer v. Snyder* (No. 12-cv-10285). The point is demonstrated by the fact that the justifications supporting the statute remain equally valid even if Michigan's marriage law was constitutionally required to include same-sex unions. Public Act 297 would still protect marriage's unique status under Michigan's law, recognizing that only spouses, dependents, and family members should

receive the benefits of marriage. It would continue to further fiscal responsibility.

STATEMENT OF FACTS

Public Act 297 of 2011 was signed into law by Governor Snyder, on December 22, 2011. Public Act 297 provides, in pertinent part, that:

> Sec. 3. (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.
>
> Sec. 4. If a collective bargaining agreement or other contract that is inconsistent with section 3 is in effect for a public employee on the effective date of this act, section 3 does not apply to that group of employees until the collective bargaining agreement or other contract expires or is amended, extended, or renewed.

Mich. Comp. Laws §15.584. Recognizing that these benefits might be provided through a negotiated contract, the law does not apply to any existing collective bargaining agreement until it "expires or is amended, extended, or renewed." (*Id.*) At the same time, Michigan's Public Employment Relations Act was amended to make the provision of

benefits in conflict with Public Act 297 a prohibited subject of collective bargaining. Mich. Comp. Laws §423.215.

The enacted law was different in a significant way from the one first introduced. The definition of "public employer," which included the State's public universities and would have applied the provision to them, was deleted. By removing the definition, the Legislature precluded application of Public Act 297 to "these institutions of higher learning." Governor Snyder acknowledged and appreciated the Legislature's actions in his Public Act 297 "signing" letter. (Motion Ex. 1 – December 22, 2011 letter, p. 1) The Governor also acknowledged the newly enacted law did not apply to the classified state civil service under the authority of Michigan's Civil Service Commission, which has "responsibility for setting rates of compensation and regulating all conditions of employment in the classified service." (*Id.* at p. 2.)

Indeed, the Civil Service Commission had already enacted what the law identifies as "domestic partner benefits." Mich. Comp. Laws §15.581. At its January 26, 2011, meeting the Commission approved collectively bargained contract provisions negotiated between the Office of State Employer and representatives of four state employee unions

providing these "domestic partner benefits" to members of the respective bargaining units. The Commission also adopted Resolution 11-01 authorizing the extension of these benefits to non-exclusively represented employees. (Motion Ex. 2, Commission Minutes, pp 2-5.) Covered state classified service employees who do not have an eligible spouse may enroll one qualified, unrelated adult, and that adult's dependents, in the State Health Plan. (Motion Ex. 2, 11-01Resolution.) These provisions were effective with the new fiscal year, October 1, 2011. (Ex. 2, pp. 2-5; Ex. 3 A, p. 2.)

The Legislature may act timely to reject or reduce increases in "compensation" approved by the State's Civil Service Commission. Mich. Const. 1963, art. XI, sec. 5, cl. 7. Here, the Legislature initiated action to reject the Commission's Other Eligible Adult ("OEAI") policy and approved contract provisions for state classified service employees, but failed to muster the necessary votes. (Motion Ex. 1, p. 2.)

Public Act 297 was enacted and signed into law approximately eleven months after the Civil Service Commission's approval of this benefit for state classified service employees. Over the course of Public Act 297's legislative process, the analysis of the law's fiscal impact

indicated it would "result in an indeterminate amount of savings for the State and local units of government. (Motion Ex 3 A, p. 2.) During the Legislature's consideration of Public Act 297, the only costs available for analysis related principally to state employment. Those overall cost estimates ranged upwards from $893,000. (Motion Ex. 3 A, p. 2; 3 B, pp. 2, 3; 3 C, p. 2) A September 6, 2011 legislative analysis, though, also referenced costs at the University of Michigan—the number of recipients being 618; with costs ranging from $7,000 to $10,000 per person. (Motion Ex. 3 D, p. 6.) Using these exemplars, the analysis concluded when the "costs of all of the domestic partner benefits that are now offered by public employers is tallied, and the benefits are eliminated, then the cost-savings will be much, much higher." (*Id.*)

A January 2, 2014 Report entitled *Governments Offering Benefits*, from the Partners Task Force for Gay & Lesbian Couples identifies eight Michigan local government units that offer "domestic partner" benefits. These units are: City of Ann Arbor; Ann Arbor Public School District; Detroit; East Lansing; Ingham County; Kalamazoo; Washtenaw County; Wayne County. (Motion Ex. 4, p. 12.) Three of these local government units provide benefits to the Plaintiff employees

and their domestic partners—Ann Arbor Public Schools, Ingham County and the City of Kalamazoo. (R. 9, First Amended Complaint, ¶¶ 15, 19, 22, 26, 29, 34, 37, 41, ID 63-67.) A fourth public employer, Kalamazoo Valley Community College (KVCC), not identified in this Report, also provides "domestic partner" benefits to one Plaintiff couple here. (*Id.* at ¶¶ 45, 50, ID ## 68-69.) (Note: Each employer program refers to either "other qualified adult" or "other eligible adult" or "household member." For purposes of this Brief, Defendant will refer to "other qualified adult" or OQA.)

While the program criteria for each of these employers varies, they all have certain similar eligibility requirements including; 1) the employee and OQA must have resided together for a specified period of time; the employee and OQA are not married to another party; the employee and OQA are not blood relatives, or not eligible to inherit from the other under Michigan's laws of intestate succession. (Motion Ex. 9A-D.) Under these programs the City of Kalamazoo currently insures 5 OQAs at a total cost (health and dental) of $24,678; Ingham County currently insures 5 OQAs—two are of the same sex as the employees, three are opposite sex adults or dependents—at a current

cost of $22,163; KVCC provides health, dental and vision coverage and enrolled 1 OQA in its pilot program; Ann Arbor Public Schools currently insures 20—10 are of the same sex and 10 are opposite sex adults or dependents. (Motion Ex. 5 City of Kalamazoo Dep Transcript, pp. 9, 10 and Dep Ex. 1; Ex. 6 Ingham County Dep Transcript, pp. 22-23; Ex. 7 KVCC Dep Transcript, p. 21, 32, 40; Ex. 8 City of Ann Arbor Dep Transcript, pp. 21-22, 37-38 and Dep Ex. 1)

The Plaintiffs identify themselves as same-sex couples who have been in committed relationships for between 8 and 25 years, and generally held themselves out as "domestic partners" (R. 9, First Amended Complaint, ¶¶ 8, 16, 23, 30, 38, and 46, ID ## 62, 63, 65-67). Plaintiffs Bassett, Ways, Jach, Bloss, and Miller are public employees whose employers provide OQA benefits. (R. 9, First Amended Complaint, ¶¶ 15, 19, 22, 26, 29, 34, 37, 41, 45, 50, ID ## 63-69.) Plaintiffs Kennedy, Breakey, Ramber, Ascheri, and Johnson are the respective same-sex partners of the public employee Plaintiffs. (*Id.*) Each of the Plaintiffs' partners health insurance is provided by Plaintiff employees' public employers under an OQA program. These benefits are extended either by a policy adopted by the public employer or

through a collective bargaining agreement. (Motion Ex. 6 pp. 12, 38; Ex. 7, pp. 38-39; Ex. 9 A-D.)

Plaintiffs assert that prior to 2004 "a number" of public employers provided family health benefits to same-sex domestic partners. (*Id.* at, ¶ 61, ID # 71.) In 2004, the Michigan Constitution was amended by the People to add a "Marriage amendment" that 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." Mich. Const. 1963, art. 1 §25. (*Id.* at, ¶ 62, ID # 71.)

The Michigan Supreme Court affirmed that art. 1, §25 prohibits public employers from providing benefits to same-sex domestic partners that relied on the existence of a relationship similar to marriage as eligibility criteria. *National Pride at Work v. Granholm*, 748 N.W. 2d 524, 537 (Mich. 2008). (*Id.* at, ¶ 65, ID # 72.)

In light of the *National Pride* decision, "some" public employers revised their health insurance policies to provide benefits that did not violate art. 1, §25. (*Id.* at, ¶ 66, ID #72.) The City of Kalamazoo, Ingham County and Ann Arbor Public Schools were among those who

revised their eligibility criteria to conform to the *National Pride* decision. (Motion Exs. 9A-9C.)

Plaintiffs complaint raised constitutional challenges to Public Act 297 based on violations of equal protection on the basis of "sexual orientation and sex," and substantive due process. (R. 9 First Amended Compliant, ¶¶ 107-117, 119-123, ID ## 83-87.) Plaintiffs' substantive due process claims have been dismissed. (R. 75, Opinion and Order, p. 51, ID # 3087.) The Court also issued a preliminary injunction enjoining the enforcement of Public Act 297 during the pendency of this case. (*Id.*)

ARGUMENT

I. Public Act 297 does not discriminate on the basis of sexual orientation or sex and is otherwise rationally related to legitimate state interests. It does not violate federal guarantees of equal protection.

The Equal Protection Clause commands no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Yet, "equal protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices." *TriHealth, Inc. v. Board of Com'rs, Hamilton County, Ohio*, 430 F.3d 783, 790-791

(6th Cir. 2005) (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-314 (1993). Rather, the clause prevents states from making distinctions that (1) burden a fundamental right; (2) target a suspect class; or (3) intentionally treat individuals differently from others similarly situated without any rational basis. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006).

A law that neither implicates a fundamental right nor targets a suspect class is accorded rational basis review. *San Antonio Dendep. School Dist. v. Rodriguez*, 411 U.S. 1, 29; 93 S. Ct. 1278; 36 L. Ed. 2d 16 (1973). Thus, the law need only be "rationally related to legitimate government interests," *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 501 (6th Cir. 2007) (internal quotation marks and citation omitted), and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *Beach Commc'ns, Inc.*, 508 U.S. at 313. A law that burdens a fundamental right or targets a suspect class is generally "subject to strict scrutiny, and will be upheld only when [it] [is] narrowly tailored to a compelling governmental interest." *Does v.*

Munoz, 507 F.3d 961, 964 (6th Cir. 2007) (internal quotation marks omitted).

A. Public Act 297 does not burden a fundamental right.

Public Act 297 prohibits certain public employers from providing medical benefits or other fringe benefits for an individual currently residing in the same residence as a public employee unless the individual is married to the employee, a dependent of the employee or eligible to inherit from the employee under the intestacy laws of Michigan. Mich. Comp. Laws § 15.583.

As this Court acknowledged in dismissing Plaintiffs' substantive due process claims, Public Act 297 does not impermissibly burden any fundamental right—including the right to form and maintain intimate family relationships. (R. 75, Opinion and Order, p. 20, ID #3056.)

B. Public Act 297 does not target a suspect class.

No court has recognized "domestic partners" as a suspect class for the purpose of equal protection analysis. The Sixth Circuit Court of Appeals has further declined to recognize sexual orientation as a suspect classification. *Davis v. Prison Health Services,* 679 F.3d 433, 438 (6th Cir. 2012) (citing *Scarbough,* 470 F.3d at 261.)

Nor does Public Act 297 classify on the basis of sexual orientation or sex. The Act draws lines between "individuals living in the same residence" who have a legally recognized relationship and those that do not. It prohibits all benefits whether between same-sex partners or opposite sex partners, whether the partners are in a committed relationship or are platonic partners sharing expenses. The fact same-sex partners in a committed relationship may not qualify for benefits under a program conforming to Public Act 297 because they cannot currently marry under Michigan law, is irrelevant to this analysis contrary to Plaintiffs' allegations and argument. The partner of a public employee in a same-sex platonic relationship cannot marry his or her partner either to retain these benefits.

Plaintiffs' charge that Public Act 297 discriminates on the basis of sexual orientation because Michigan prohibits marriage between same-sex couples is in reality nothing more than the proverbial red herring. Michigan's "marriage amendment" is currently being challenged on equal protection grounds and the trial is scheduled to begin February 25, 2014. *DeBoer, et al v Snyder,* 12-cv-10285 (E.D. MI). If art. 1, § 25 is declared unconstitutional and enjoined, Plaintiffs' equal protection

claim premised on Michigan's bar to same-sex marriages fails because they will be legally able to marry. If art. 1, § 25 is upheld, Plaintiffs' claim here also fails because the marriage bar is constitutional and related to legitimate state interests.

C. Plaintiffs are not treated differently than similarly situated individuals.

Prohibiting the State from denying equal protection of the laws is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985)(citing *Plyler v. Doe,* 457 U.S. 202, 216 (1982)). Although the Court disagrees this element of the equal protection analysis applies here, "the basis for *any* equal protection claim is that government has treated similarly situated individuals differently." *Braun v. Ann Arbor Charter Township,* 519 F.3d 564, 575 (6th Cir. 2008) (emphasis added) (citing *Silver v. Franklin Township Bd. of Zoning Appeals,* 966 F.2d 10331, 1036 (6th Cir. 1992)). (R. 75, Opinion and Order, pp. 31, 31, ID ##3067, 3068).[1]

[1] Defendant recognizes the Court has decided this issue in the context of the Motion to Dismiss. It is reiterated here to assure it is preserved and to avoid any future "waiver" argument.

"Similarly situated" in this context means the individuals being compared are "identical in all relevant respects or directly comparable . . . in all material respects." *Radvansky,* 395 F.3d at 312; *TriHealth*, 430 F.3d at 790. Unmarried employees, whether opposite-sex or same-sex, are not similarly situated to married employees in all material respects.

The fact that unmarried opposite-sex domestic partners may *change their status* by marrying and qualify for benefits while same-sex domestic partners cannot, is irrelevant to this analysis. At the time the domestic partner is excluded from benefits by Public Act 297, he or she is not married to the same-or opposite-sex public employee.

D. Public Act 297 is rationally related to legitimate state interests.

Generally, legislation is presumed valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Cleburne,* 483 U.S. at 440 (citations omitted). When social or economic legislation is at issue, like here, the Equal Protection Clause allows the State wide latitude, "the Constitution presumes that even improvident decisions will eventually be rectified by

the democratic processes." *Id.* (citing *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 174 (1980)). Thus, social or economic legislation does not violate equal protection merely because the classification made is imperfect or in practice "results in some inequality." *Dandridge v. Williams,* 397 U.S. 471, 501, 502 (1970) (citing *Lindsley v. Natural Carbonic Gas Co.,* 330 U.S. 61, 78 (1911)).

This general rule gives way only when the challenged statute uses *suspect* classifications. Public Act 297 does not classify on the basis of sexual orientation but rather on the basis of a domestic partnership—defined as an individual currently residing in the same residence as a public employee. In any event, a classification based on sexual orientation would not require heightened scrutiny. *Davis*, 679 F.3d at 438. Thus, rational basis review applies. Public Act 297 is rationally related to legitimate state interests.

1. Public Act 297 demonstrates a preference for marriage and familial relationships recognized by state law furthering legitimate state interests.

Public Act 297 permits a public employer to provide health and other fringe benefits to an employee currently residing in the same residence as a public employee when (1) married to the employee; (2) a

dependent of the employee; or (3) eligible to inherit under the State's intestacy laws. This preference for marriage and other familial relationships recognized under state law is related to legitimate state interests.

Public Act 297 recognizes and the supports Michigan's constitution and laws directed at developing and maintaining familial relationship, social, and economic support. As explained by the Michigan Supreme Court in interpreting Michigan's constitution, a local government cannot recognize a domestic partnership that is similar to marriage for any purpose, which includes "for the purpose of providing health-insurance benefits." *National Pride,* 748 N.W.2d at 539 n. 18. The point of the Michigan Marriage Amendment and Public Act 297 is to ensure that the benefits of marriage are not distributed to other similar relationships, thereby protecting marriage's unique status in law. The listed classes in Public Act 297 relate to marriage and family.

There are social and economic benefits to the State resulting from marriage including reducing welfare payments, increasing tax revenue and reducing costs incurred by the state related to criminal justice, child protection and health care. (Motion Ex. 10, Price Expert Report –

Economic Impacts of Michigan's Public Employee Domestic Partner Benefit Restriction Act of 2011, ¶¶ 9, 10, 13, 20, 22, 23.) Dr. Price opines that marriage promotes economic and social stability. It reduces costs to the State related to providing care as a substitute for the family unit. It promotes the stability of the family unit, child development, and can change adult behavior. *Id.* These matters are all legitimate state purposes.

2. Public Act 297 eliminates local government programs that are irrational and unfair.

The local governmental policies addressed by Public Act 297 included anomalies, by preventing married couples from sharing their benefits with persons other than their spouses and preventing employees from sharing their benefits with blood relatives. In other words, according to the local governmental policies, an employee can provide health benefits to his fraternity brother, but not his biological brother. If a spouse has his or her own health benefits, these policies preclude the employee from sharing his or her benefits with an adult child, for example, or anyone else. Even though the constitutionality of the policy was upheld, nonetheless these exclusions in the State Civil

Service Commission's policy were recently described as "absurd," "unfair," even "ridiculous." *Attorney General v. Civil Service Comm'n.*, 2013 WL 85805 (Mich. App. 2013) (Attached as Motion Ex. 11.)

Eliminating policies that disfavor familial relationships and are "absurd", "unfair," even "ridiculous" is rational and related to legitimate state interests in promoting fair and reasonable local government policies.

3. Public Act 297 is rationally related to the State's overall goal of reducing the costs of government and promoting financially sound local government units.

When viewed in light of the overall legislative scheme developed over the past 3 years, Public Act 297 is a logical and cohesive part of the effort to reduce costs and to address the fiscal insecurity of local governments that has increased exponentially over the past five years. It is not singular and does not target same-sex couples. Indeed, several legislative enactments have addressed public employee employment and retirement benefits:

- 2011 PA 4, Mich. Comp. Laws § 141.1501, *et. seq.*[2] the Local Government and School District Fiscal Accountability Act,

[2] Public Act 4 was rejected by referendum November 5, 2012. It has been replaced by 2012 PA 436, Mich. Comp. Laws. § 141.1541 *et. seq.*

expanded the powers, duties, and responsibilities of Emergency Managers appointed to restore the fiscal integrity and accountability of a financially distressed local government or school district–including the authority to rescind or modify collectively bargained labor agreements, or compensation and fringe benefits paid to employees;

- 2011 P.A. 9, Mich. Comp. Laws § 423.215, added sections (7), (8) and (9) to allow for the rejection, modification, or termination of collective bargaining with the appointment of an emergency manager for or entry into a consent agreement the public employer and suspending the duty to collective bargain for the period of a consent agreement.

- 2011 PA 264, Mich. Comp. Laws § 38.1, *et. seq.*, requires state employees who opt to remain in the State's defined benefits retirement plan to contribute 4% of their annual salary until retirement and requires certain retirement health-care funding elections by other state employees;

- 2010 PA 185, Mich. Comp. Laws § 38.35, required state employees to contribute 3% of their annual salary to the cost of retirement health care benefits;

- 2010 PA 135, Mich. Comp. Laws § 38.1343e, required public school employees to contribute 3% of their annual salary to the cost of retirement health-care benefits;[3]

- 2011 PA 152, Mich. Comp. Laws § 15.561, imposes caps on public employer contributions to publicly funded health insurance for public employees.

[3] This statute and Mich. Comp. Laws § 38.35 were ultimately struck down by the Michigan Supreme Court. However they have been replaced by subsequent legislation related to school and state employee retirement contributions.

- 2011 PA 63, introduced the Economic Vitality Incentive Program, which provides for increased revenues to each city, village or township that fulfills requirements in each of three categories, Accountability and Transparency; Consolidation of Services; and Employee Compensation.

These varied statutes demonstrate Public Act 297 is but a smaller piece of a larger effort to restore fiscal responsibility, reduce public spending and redefine the obligations of the public employer and public employee in light of current financial, economic, and business realities. These are significant matters of public concern and importance that transcend the results in this case. They relate directly to the State's authority over its local governments. *Bivens v. Grand Rapids,* 505 N.W. 2d 239, 241, 242 (Mich. 1993). Indeed, state law generally controls over local enactments and policy. *Taunt v. General Retirement System,* 233 F.3d 899, 906 (6th Cir. 2000) (citing *Rental Property Owners Ass'n. of Kent Co. v. City of Grand Rapids,* 566 N. W. 2d 514, 519 (Mich. 1997)).

These purposes are reasonable, rational, and related to legitimate state interests and responsibilities. *United States v. Windsor*, ___ U.S. ___; 133 S. Ct. 2675, 2693; 186 L. Ed. 2d 808 (2013).

E. Public Act 297 was not motivated by animus or ill-will.

In support of their claim that the enactment of Public Act 297 was motivated by animus, Plaintiffs' point to press releases issued by 9 of the 90 legislators, who voted in favor of the act. (R. 18-8, Exs. G-1 to G-13, Page ID # 273-98).[4] To the extent such releases are a probative part of this particular Act's "legislative history," which is questionable, the releases do not reveal discriminatory animus on the part of the Michigan Legislature towards gays and lesbians.

First, only one of the 13 releases was issued in context of enacting Public Act 297. The remaining 12 were issued by legislators directly in response to either the Civil Service Commission's January 2011 decision to extend health benefits to a broad group of individuals, including same-sex or opposite-sex domestic partners of state employees, their dependents, and to essentially anyone who shared costs with a state employee, other than family, (R. 18-8, Exs. G-1 and G-2, Page ID # 273-76), or to the Michigan House of Representatives' failure to approve a

[4] The legislative history for Public Act 297 may be found at, www.legislature.mi.gov/(S(g4a4ye55x4vaqd45p1aypd45))/mileg.aspx?page=getObject&objectName=2011-HB-4770.

joint resolution that would have rejected the Commission's decision. (R. 18-8, Exs. G-3 to G-12, Page ID # 277-96). Mich. Const., art. XI, § 5.

These press statements made by individual legislators before Public Act 297 had even been introduced are thus too remote to reasonably be considered probative of the "legislative history" of Public Act 297. Moreover, the statements of just 9 legislators cannot reasonably be considered sufficient to impute animus on the part of the 81 other legislators who voted for the Act, or of the Governor, who signed the Act into law. But even if that were not the case, the press releases reveal no animus towards gays or lesbians.

"Animus is defined as 'ill will, antagonism, or hostility usually controlled but deep-seated and sometimes virulent.' Similarly, ill will is defined as an 'unfriendly feeling: animosity, hostility.' " *Loesel v City of Frankenmuth*, 692 F.3d 452, 466 (6th Cir. 2012), quoting *Webster's Third New International Dictionary, Unabridged* (2002). None of the press releases evidence deep-seated hostility or animosity towards gays and lesbians based on their sexual orientation.

A careful review of the releases shows that these legislators were primarily angered by the Civil Service Commission's decision to expand

state health benefits at a time the State's budget was experiencing fiscal crisis. For example, one release provides that " '[a]t a time when we are making every effort to cut spending and govern with greater accountability, it is utterly irresponsible for the Civil Service Commission to enact this policy[.]' " (R. 18-8, Ex. G-1, Page ID # 273-74). All of the releases contain similar statements expressing concern over the costs of expanding state benefits.

Five of the releases also express the view of the particular legislator that the expansion of benefits violated Michigan's marriage amendment and the ruling of the Michigan Supreme Court. For example, one release provides:

> "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. For a state organization such as the Civil Service Commission] to blithely ignore these mandates is reprehensible."

(R. 18-8, Ex. G-1, Page ID # 273-74.) Four other releases contain similar expressions. See (R. 18-8, Exs. G-2 to G-5, Page ID # 276-82).

The one press release actually issued in connection with Public Act 297, contains similar expressions:

> "It is not the responsibility of taxpayers to support the roommates and unmarried partners of public employees . . . . Providing benefits in this way is not the role of the state, especially when tax dollars are in short supply and there are critical programs being affected by the decrease in revenue. . . . This is a fiscal issue. We are doing all we can to respect the will of the people and not place an unnecessary economic burden on our residents while so many are struggling to make ends meet."

(R. 18-8, Ex. G-13, Page ID # 297-98.)

These expressed concerns over costs and the possibility that the Civil Service Commission's actions violated the Michigan Constitution plainly do not show "animus" – hostility or antagonism – towards gays and lesbians based on their sexual orientation. On the whole, the press releases do not reveal a "legislative history" of the kind the Supreme Court recently found so troubling in *Windsor*, 133 S. Ct. at 2693-2695 (holding that federal Defense of Marriage Act was enacted for discriminatory purpose and violated Fifth Amendment).[5]

Nor does it matter that the fiscal concerns expressed by the various legislators were not subsequently borne out. Being wrong did not subsequently render their statements hostile. See, e.g. *Windsor*,

[5] Of the 13 press releases, only one expresses views that might give pause, (R. 18-8, Ex. G-4, Page ID # 279-80), but certainly the voice of the one cannot be imputed to the other 89 legislators.

133 S. Ct. at 2708 (Scalia, J., dissenting) ("errors may be made in good faith, errors though they are"). Similarly, it need hardly be said that individuals may hold deep-seated personal views completely inapposite of the other, and yet bear no animosity, no hatred towards each other. Here, to the extent several legislators expressed views supporting traditional marriage, such expressions are not per se discriminatory or hostile. (*Id.*) (Scalia, J., dissenting) ("to defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements"). Plaintiffs in this case have fallen far short of proving that Public Act 297 was motivated by animus or ill-will. *Scarborough*, 470 F.3d at 261.

CONCLUSION AND RELIEF REQUESTED

Defendant Governor Rick Snyder asks this Court to grant this motion for summary judgment, dismiss this complaint with prejudice, and enter its judgment for Defendant.

Respectfully submitted,

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Dated: February 14, 2014

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on February 14, 2014, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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