STATE OF MICHIGAN
COURT OF APPEALS

NATIONAL PRIDE AT WORK, INC.,
A non-profit organization on behalf of
its Michigan Members, *et al*.,

Plaintiffs/Appellee,

COA No. 265870

v.

Ingham County Circuit
Court No. 05-368 CZ

JENNIFER GRANHOLM, in her official capacity
as Governor of THE STATE OF MICHIGAN,
CITY OF KALAMAZOO, a municipal corporation,

Defendant/Appellees.

and MICHAEL A. COX, in his official capacity
as Attorney General for the STATE OF MICHIGAN,

Intervening Defendant-Appellant
_____/

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BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSIONALS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

*****ORAL ARGUMENT REQUESTED****

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III. STATEMENT OF JURISDICTION

Appellants' State of Jurisdiction is complete and correct.

IV. COUNTERSTATEMENT OF QUESTIONS INVOLVED

The AAUP adopts by reference the Counterstatement of Questions Involved contained in the Plaintiffs-Appellees' Brief on Appeal, p vi. *Amicus Curiae* AAUP answers Yes.

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 44,000 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 US 564, 579 n 17 (1972); ***Tilton v Richardson,*** 403 US 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 "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 domestic partnership benefits interferes with their ability to recruit and maintain a diverse faculty and to represent values of tolerance, diversity, inclusion, and equality. Such a ban constitutes an unconstitutional interference in the autonomy of public universities and their faculty to manage their own affairs, and to make judgments on matters of educational policy.

The instant lawsuit may impact on whether Michigan public bodies, including universities, may continue to offer benefits to employees' same sex domestic partners and their children. Universities at which the Michigan Conference, AAUP represents professors offer benefits to employees' domestic partners and their children. The Michigan Conference, AAUP's members have a direct interest in the outcome of this lawsuit, and urge this Court to deny this appeal.

The Circuit Court held the provisions of Const 1963, art 1, § 25 did not prohibit public employers from entering into contractual agreements with their employees to provide domestic partner benefits, or voluntarily providing domestic partner benefits as a matter of policy. In so doing, the Court applied the first two rules of constitutional construction: (1) the words should be given their plain meaning at the time of ratification; and (2) when necessary to determine the intent of the people, consideration must be given to the circumstances surrounding the provision's adoption, and the purposes sought to be accomplished. (Circuit Court Opinion, p 6.) Because the Court based its decision on these two rules of constitutional construction, it did not deem it necessary to apply what the Court referred to as the third rule of constitutional construction, that a provision should be construed so it will not conflict with other provisions.

(***Id***.) The amicus submits the Circuit Court's application of these two principles of constitutional construction to the constitutional issue presented in this case was manifestly correct and should be affirmed by this Court.

It is the position of the amicus that the third rule of constitutional construction has special applicability to the question of whether the provisions of Const 1963, art 1, § 25 should be construed to prohibit a public university and its faculty union from entering into a collective bargaining agreement providing domestic partner benefits for same sex faculty and staff. The amicus wishes to present the following two arguments to this Court. One: the provisions of Const 1963, art 1, § 25 should not be construed to interfere with the constitutional autonomy of public universities to manage their own affairs and make their own judgments on matters of educational policy. Two: if the provisions of Const 1963, art 1, § 25 were construed as prohibiting a public university from providing same-sex benefits to its faculty and staff, this would raise a serious question as to its invalidity under the First Amendment to the Constitution of the United States.

VI. COUNTERSTATEMENT OF FACTS

The Michigan Conference, AAUP adopts by reference the Counterstatement of Facts contained in the Plaintiffs-Appellees' Brief on Appeal, pps 1-7.

VII. ARGUMENT

A

The provisions of Const 1963, art 1, § 25 should not be construed to interfere with the constitutional autonomy of public universities to manage their own affairs and make their own judgments on matters of educational policy.

The third rule of constitutional construction is that whenever possible, a construction that does not create constitutional invalidity is preferred to one that does. Under this rule of constitutional construction, every provision of the Constitution should be construed, if possible, to harmonize with other constitutional provisions, and no constitutional provision should be construed to nullify or impair another. ***Lapeer County Clerk v Lapeer Circuit Court***, 469 Mich 146,162; 665 NW2d 452, 460 (2003); ***Council of Organizations and Others for Education About Parochiaid, Inc. v Engler***., 455 Mich 557, 569;566 NW2d 208, 215 (1997); ***In re Probert***, 411 Mich 210, 232; 308 NW2d 773, 779 (1981); ***Council No. 11, AFSCME v Civil Service Commission***, 408 Mich 385; 292 NW2d 442 (1980); ***Traverse City School Dist. v Attorney General***, 384 Mich 390, 405; 185 NW2d 9, 14 (1971). As the Michigan Supreme Court has stated: "Of primary importance are two basic rules of constitutional construction. 1. Every statement in a state constitution must be interpreted in light of the whole document. 2. Because fundamental constitutional principles are of equal dignity, none must be so construed as to nullify or substantially impair another." ***Probert***, 411 Mich at 233, fn 17; 308 NW2d at 380, citing ***People v Blachura***, 390 Mich 326, 333; 212 NW2d 182, 183 (1973).[1]

[1] In ***Lapeer***, the Court applied the rule of harmonization to hold the county clerk, who exercised executive powers, could not supersede the role of the circuit court clerk with respect to the care and custody of the court's records. In ***Probert***, the Court applied the rule of harmonization to hold the Constitution did not give the Supreme Court the power to permanently enjoin a judge from holding judicial office, because this would infringe on the constitutional right of the voters to elect a judge.

The Michigan Constitution confers a unique constitutional status on our public universities and their governing boards. ***Federated Publications, Inc. v Board of Trustees of Michigan State University***, 460 Mich 75, 82; 594 NW2d 491, 495 (1999). The Supreme Court has described the governing boards' status as "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature." ***Board of Regents of the University of Michigan v Auditor General***, 167 Mich 444, 450; 132 NW 1037, 1040 (1911). As the Court explained in ***Federated***: "This Court has long recognized that Const, art 8, sec. 5 and the analogous provisions of the previous constitutions[2] limit the Legislature's power. '[T]he legislature may not interfere with the management and control of' universities. The constitution grants the governing boards authority over 'the absolute management of the University and the exclusive control of all funds received for its use.' The Court has 'jealously guarded' these powers from legislative interference." 460 Mich at 86-87; 594 NW2d at 497 (citations omitted).

Clearly, if the legislature had enacted a law prohibiting Michigan's public universities from providing domestic partner benefits for same sex faculty and staff, the law would be held to be unconstitutional as interfering with the constitutional autonomy of public universities to manage their own affairs and make their own judgments on matters of educational policy. Providing domestic partner benefits to same sex faculty and staff in accordance with a collective bargaining agreement with the faculty union involves both the university's management of its internal affairs, and its judgment on matters of educational policy. By providing domestic

[2] While the University of Michigan, Michigan State University, and Wayne State University have constitutional status in the Constitution, 1963, with elected governing boards, Const 1963, art 8, § 6 confers constitutional status on Michigan's other public universities, but provides for appointed, rather than elected governing boards.

partner benefits to same sex faculty and staff, the university is putting itself in a much better position to recruit and retain gay and lesbian persons to its faculty and staff.[3] If the State of Michigan, either by legislation or constitutional provision, were to prohibit its public universities from providing same sex domestic partner benefits, it would put those universities at a serious competitive disadvantage with universities elsewhere (who are not constrained by state law from providing same sex domestic partner benefits to faculty and staff) in recruiting and retaining highly qualified gay and lesbian faculty and staff. It would also impede the universities' ability to recruit any faculty and staff who value working in a diverse, non-discriminatory environment.

Secondly, as a matter of educational policy, providing domestic partner benefits to same-sex faculty and staff advances a number of educational objectives. One, as pointed out above, it promotes educational diversity by facilitating the recruitment and retention of gay and lesbian faculty members, who can bring to their teaching and research the perspective that comes from the experience of being a gay or lesbian person in America. Just as a public university has a compelling governmental interest in providing for its students the educational benefits that flow from having a diverse student body, ***Grutter v Bollinger***, 539 US 306, 327 (2003); ***Regents of the University of California v Bakke***, 438 US 265, 312 (1978), likewise, a public university has a compelling governmental interest in providing for its students the even greater educational benefits that flow from having a diverse faculty.[4] Two, a university's providing domestic partner

[3] A number of the plaintiffs in the present action have specifically alleged that they accepted a position at one of Michigan's public universities because it offered domestic partner benefits.

[4]Gay and lesbian faculty are integral and highly valued members of the academic environments in which they teach and pursue their research. Over the last 30 years, the presence of gay and lesbian faculty members at universities has been the impetus for the development of Gay and Lesbian Studies programs at many American universities. This is due in part to the fact

benefits to same-sex faculty and staff promotes educational diversity by sending a message of welcome and inclusion to potential gay and lesbian students, thereby encouraging them to enroll at the university. Three, by providing same-sex domestic partner benefits to faculty and staff, the university is directly advancing its educational mission by sending a message of non-discrimination and proclaiming the values of tolerance, diversity, inclusion, and equality. The heart of the message is that the university values its gay and lesbian faculty and staff in equal measure with its heterosexual faculty and staff. Since the university provides spousal benefits for its heterosexual faculty and staff who choose to marry, it provides domestic partner benefits for its gay and lesbian faculty who cannot legally make the choice to marry. The message is, indeed, a strong one, and it goes to the essence of the university's educational mission.

The provisions of Const 1963, art 1, § 25 do not, by their terms, apply to public universities, nor do they, by their terms, purport to interfere with the long-standing constitutional policy of the State of Michigan that public universities shall have the constitutional autonomy to manage their own affairs and make their own judgments on matters of educational policy. It is possible to fully harmonize the provisions of Const 1963, art 1, § 25 with the constitutional provisions providing for the constitutional autonomy of public universities by holding that the

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that gay and lesbian faculty members, again bringing to the universities the perspective that comes from the experience of being a gay or lesbian person in America, have changed some of the basic premises of the traditional academic disciplines. Their research has led to new knowledge in a number of important academic areas, including the history or urbanism in the United States, immigration, sexual legislation, censorship, social control, racial differences, and minority life. Gay and lesbian faculty members can bring to their teaching the perspective that comes from the experience of being a gay or lesbian person in America, and are thus particularly valuable to the university as teachers in these and other areas.

Finally, gay and lesbian faculty members are role models for diversity, helping to prepare undergraduates, straight and gay alike, for the complicated, global, multicultural, and socially diverse world in which they will be living.

provisions of Const 1963, art 1, § 25 are limited to prohibiting same-sex marriage and civil unions, and do not apply to prevent public universities from providing same-sex domestic partner benefits for their faculty and staff. Pursuant to the third rule of constitutional construction in Michigan, this is the only permissible construction that can be put on Const 1963, art 1, § 25.[5]

[5] Again, the amicus submits the Circuit Court was manifestly correct in holding the provisions of Const 1963, art 1, § 25 do not prohibit public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits as a matter of public policy. The position of the amicus in this respect is that, even if this were not so in regard to other public employers, Const 1963, art 1, § 25 should not be construed as imposing such a prohibition on public universities.

B

If the provisions of Const 1963, art 1, § 25 were construed as prohibiting a public university from providing same-sex domestic partner benefits to its faculty and staff, this would raise a serious question as to its invalidity under the First Amendment to the Constitution of the United States.

As stated previously, the third rule of constitutional construction in Michigan is that whenever possible, a construction that does not create constitutional invalidity is preferred to one that does. Under this rule of constitutional construction, a state law or constitutional provision should, whenever possible, be construed in such a manner as to avoid a question of its validity under the Constitution of the United States.[6] The United States Supreme Court has long recognized a university's educational autonomy has a constitutional dimension, grounded in the First Amendment's guarantee of academic freedom. ***Grutter v Bollinger***, ***supra***, at 330. As the Supreme Court there stated: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special place in our constitutional tradition." ***Id***. In speaking of the First Amendment's guarantee of academic freedom, Justice Felix Frankfurter long ago observed: "It is the business of a university to provide that atmosphere which is most conducive speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." ***Sweezy v***

[6] Whenever a federal law is challenged on constitutional grounds, the courts must first determine whether, as a matter of statutory interpretation, an interpretation of the law is fairly possible by which the constitutional question can be avoided. See the discussion in ***Rescue Army v Municipal Court of City of Los Angeles***, 331 US 549, 569 (1947). See also ***Frisby v Schultz***, 487 US 471 (1988), where the Supreme Court gave a local law a narrowing construction in order to avoid a potential conflict with the First Amendment.

New Hampshire, 354 US 234, 263 (1957) (Frankfurter, J., concurring).[7] And when the government is acting in the university setting, it "[a]cts against a background and tradition of thought and experiment that is at the center of our intellectual tradition." ***Rosenberger v Rector & Visitors of the University of Va***., 515 US 819, 835 (1995).

Academic freedom has long been deemed to extend beyond teaching and research. It extends to a university's decisions about admissions and the composition of its student body. ***Grutter v Bollinger***, ***supra***; ***Sweezy, supra*** at 262-63 (Frankfurter, J., concurring). Academic freedom likewise extends to university governance on matters of educational policy, structure and governance. See ***Regents of University of Mich. v Ewing***, 474 US 214, 226 & n 12 (1985).

In the preceding section of the argument, we have demonstrated that by providing same-sex domestic partner benefits to faculty and staff, the university is establishing educational policy and directly advancing its educational mission by sending a message of non-discrimination and proclaiming the values of tolerance, diversity, inclusion and equality. The right of the universities in Michigan to send this message of non-discrimination and to proclaim these values is part of the academic freedom of the university protected by the First Amendment.[8] To the extent the application of Const 1963, art 1, § 25 to public universities would interfere with the universities' First Amendment rights of academic freedom, there is a serious question as to the provision's invalidity under the First Amendment to the Constitution of the United States. The

[7] It may be noted in this regard Michigan's constitutional policy of providing for the constitutional autonomy of its public universities to manage their own affairs and make their own judgments on matters of educational policy serves to advance the academic freedom values of the First Amendment.

[8] When the provision of domestic partner benefits for same-sex faculty and staff is contained in the collective bargaining agreement between the university and its faculty union, the sending of this message of non-discrimination and the proclaiming of the values of tolerance, diversity, inclusion, and equality is also a part of the academic freedom of the university faculty and staff members.

provision can easily be construed in such a way as to avoid any question as to its constitutional validity by construing it as not applying to a public university's policy of providing same sex domestic partner benefits to its faculty and staff.

VIII. CONCLUSION AND RELIEF REQUESTED

For the reasons stated herein, the provisions of Const 1963, art 1, § 25 should not be construed to prohibit a public university and a faculty union from entering into a collective bargaining agreement providing domestic partner benefits for same sex faculty and staff. The Michigan Conference, AAUP urges this Court to deny this appeal.

Respectfully submitted,

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