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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,

Plaintiff, Case No. 12-10038

-v-

Richard Snyder, in his official
capacity as Governor of the State
of Michigan,

Defendant.

MOTION HEARING

BEFORE THE HONORABLE DAVID M. LAWSON
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
August 7, 2012

APPEARANCES:

FOR PLAINTIFFS: AMANDA C. GOAD
JOHN A. KNIGHT
ACLU Foundation
and
MICHAEL J. STEINBERG
ACLU of Michigan
and
AMY E. CRAWFORD
Kirkland & Ellis, LLP

FOR THE DEFENDANT: MARGARET A. NELSON
Michigan Department of Attorney General

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1 Detroit, Michigan

2 August 7, 2012

3 1:52 p.m.

4 * * *

5 THE CLERK: All rise. The United States District
6 Court for the Eastern District of Michigan is now in session.
7 The Honorable David M. Lawson presiding.

8 THE COURT: You may be seated.

9 THE CLERK: Now calling the case of Bassett v Snyder,
10 Case Number 12-10038.

11 THE COURT: All right. Good afternoon, Counsel. May
12 I have your appearances, please?

13 MR. KNIGHT: Good afternoon, your Honor. John Knight
14 for the Plaintiffs.

15 MS. CRAWFORD: Amy Crawford for the Plaintiffs.

16 MR. STEINBERG: Michael J. Steinberg for the
17 Plaintiffs.

18 MS. GOAD: Amanda C. Goad for the Plaintiffs.

19 THE COURT: Who is arguing?

20 MS. GOAD: Your Honor, I'll be arguing the motions.
21 My co-counsel will be introducing witnesses, if you will allow
22 that.

23 THE COURT: What do you have in terms of -- I'm
24 sorry. Let's get Ms. Nelson's appearance, please.

25 MS. NELSON: Thank you, your Honor. Assistant

1 Attorney General Margaret A. Nelson on behalf of the Defendant
2 Governor Richard Snyder.

3 THE COURT: Thank you.

4 What do you have in terms of witnesses?

5 MR. KNIGHT: Your Honor, we have two witnesses,
6 JoLinda Jach and Barbara Ramber. We anticipated no more than
7 a half hour in testimony.

8 THE COURT: Is there anything that you need to offer
9 that can't be submitted by affidavit with respect to those
10 witnesses?

11 MR. KNIGHT: The reason for live testimony, your
12 Honor, was because the irreparable harm is an issue for the
13 Court, obviously, that we thought that live testimony, with
14 the ability to judge the credibility of witnesses, would be
15 useful to your Honor.

16 THE COURT: Ms. Nelson, do you have a view? Do you
17 want to cross examine?

18 MS. NELSON: Well, we discussed this briefly this
19 morning, your Honor, and I suggested I didn't believe that
20 there would be anything they could offer that hasn't already
21 been offered in their declarations and amended declarations
22 that have been filed. They are going to be speaking to, as I
23 was informed, their emotional distress caused by the loss of
24 the medical benefits and any economic damage. I don't know
25 that -- there isn't anything that hasn't already been set

1 forth in their declarations. I don't see that that can be
2 developed. We chose not to take their depositions. I don't
3 know that I would have any substantial cross based on their
4 declarations.

5 THE COURT: I guess the reason I would suggest the
6 witnesses would be called would -- to give you -- would be to
7 give you an opportunity to cross examine, and you're telling
8 me you don't think that's necessary.

9 MS. NELSON: I appreciate that, your Honor, but as I
10 said, we made a decision not to take their depositions. We
11 could have.

12 I don't know that there is any enhancement or
13 anything that we could deal with through cross examination
14 that we can't deal with on argument. Our position is that
15 these are legal issues to begin with and these fact issues
16 that they have offered have no direct impact on that.

17 THE COURT: All right. I guess Mr. Knight's point is
18 that there is an element in the four part or four factor test,
19 I guess, for issuing a preliminary injunction and that's why
20 he wants to set that out.

21 Is there really a contest to the notion that if
22 somebody has medical benefits and a need for medical
23 treatment, and loses the ability to obtain that treatment,
24 that irreparable harm could result?

25 MS. NELSON: Well, your Honor, I disagree with how

1 that issue has actually been stated here.

2 First of all, the Plaintiffs, in their declarations
3 and in their Complaint, have identified essentially their
4 irreparable harm as being the emotional stress they suffer
5 from the potential or ultimate loss of their benefits, in
6 addition to economic harm that they might incur in replacing
7 those benefits.

8 So unlike many other situations, they have all
9 declared that they are financially independent. All of the
10 partners who are not public employees are employed. They
11 have economic resources. They have all identified in their
12 declarations that they have searched alternative forms of
13 insurance that they can purchase, so that is available to
14 them.

15 And there is no one, at this point, who has
16 identified any immediate need for medical care that isn't
17 otherwise being provided to them, either that they are paying
18 for directly themselves or that they are -- still have
19 covered, because many of -- at least three of the Plaintiff
20 groups have coverage through the end of the year, is my
21 understanding, based on the facts that have been given to me.

22 So I can't stand here and say, your Honor, that we
23 don't dispute the fact that the emotional stress that they
24 have talked about and the financial stress that they have
25 talked about constitutes irreparable harm for purposes of

1 meeting that factor for issuance of a preliminary injunction.

2 THE COURT: All right, Ms. Nelson. Thank you.

3 Mr. Knight, I'll let you call your witnesses.

4 There are two motions. There is a motion to dismiss
5 filed by the State and there is a motion for preliminary
6 injunction.

7 I think it's probably useful to dispense, not to be
8 pejorative, with the testimony first, at least get it out of
9 the way so that we can make a record on that, and then we will
10 hear the arguments.

11 You may call your first witness.

12 MR. KNIGHT: Plaintiffs call JoLinda Jach.

13 THE COURT: Ms. Jach, would you step forward, please?

14 Just step right up to the lectern. Raise your right
15 hand and be sworn.

16 * * *

17 JoLINDA JACH

18 was called as a witness, after having
19 been duly sworn to testify to the truth.

20 * * *

21 THE COURT: Would you have a seat right over here in
22 the witness box, please?

23 Mr. Knight, you can go ahead and rotate that, if you
24 like. There is a cord in the floor, though. Don't unplug it.

25 MR. KNIGHT: Okay.

1 THE COURT: Ms. Jach, would you pull the microphone
2 up so that you can speak into it about maybe three or four
3 inches from your mouth. There you go.

4 And would you state your full name?

5 THE WITNESS: JoLinda Jach.

6 THE COURT: And would you spell your first name for
7 me?

8 THE WITNESS: J-o-L-i-n-d-a.

9 THE COURT: And Jack is J-a-c-k?

10 THE WITNESS: J-a-c-h.

11 THE COURT: J-a-c-h. Thank you.

12 Mr. Knight, go ahead.

13 DIRECT EXAMINATION

14 BY MR. KNIGHT:

15 Q. Ms. Jach, where do you live?

16 A. Kalamazoo.

17 Q. And where were you born, Ms. Jach?

18 A. In Paw Paw.

19 Q. How long have you lived in Michigan?

20 A. My entire life.

21 Q. How old are you now?

22 A. Forty-eight.

23 Q. Why are you involved as a Plaintiff in this lawsuit?

24 A. To try and secure some health benefits for my partner that
25 we may be losing at the end of the year.

1 Q. Why did you understand you'll be losing your health
2 insurance? For Barbara, I should say.

3 A. As part of the House bill that Governor Snyder signed.

4 Q. And I'm sorry, you said -- when will Barbara lose her
5 insurance?

6 A. December 31st.

7 Q. And why will it be then?

8 A. I'm a non-bargaining unit employee with the City of
9 Kalamazoo, so we don't technically have a contract, but all of
10 our contracts, all of our benefits run January to December.

11 Q. What do you -- what do you do for work, Ms. Jach?

12 A. I'm a senior systems analyst.

13 Q. Where do you -- who do you work for?

14 A. The City of Kalamazoo.

15 Q. And how long have you worked for the City?

16 A. Twenty-four years.

17 Q. You mentioned your partner. What is your partner's name?

18 A. Barbara Ramber.

19 Q. And how long have you --

20 THE COURT: Barbara's last name?

21 THE WITNESS: Ramber.

22 BY MR. KNIGHT:

23 Q. How long have you and Barbara been together?

24 A. Seventeen years.

25 Q. Would you describe the nature of your relationship?

1 A. We're in a loving, committed, monogamous relationship.

2 Q. If Michigan law permitted you to marry, would you?

3 MS. NELSON: Objection, your Honor. Relevance.

4 THE COURT: Overruled.

5 BY MR. KNIGHT:

6 Q. You may -- you may answer.

7 A. Yes, we would.

8 Q. Do you and Barbara have any children?

9 A. Yes, we do. We have an eleven-year-old son and an
10 eight-year-old daughter.

11 Q. You currently have held insurance through the City of
12 Kalamazoo, is that right?

13 A. That's correct.

14 Q. Does your plan cover anyone other than you?

15 A. It covers both of our children and Barbara currently.

16 Q. How is Barbara covered on your insurance?

17 A. As an other qualified adult.

18 Q. How long has Barbara been covered on your health
19 insurance?

20 A. Since 2000.

21 Q. Why did you decide to put Barbara on your insurance?

22 A. Initially, I had better health insurance benefits than she
23 did. And as we continued with our life, we wanted to start a
24 family. It gave us an opportunity to have a parent home with
25 our children.

1 Q. And how did that give you an opportunity to have a parent
2 home with your children?

3 A. Barbara is currently working part-time. She works
4 part-time. Her schedule coincides with our children's school
5 schedule, so she is home when they are home.

6 Q. And how does that relate to her ability to have insurance?

7 A. It allows us to have that choice. She -- without
8 insurance, she would have to be uninsured or find full-time
9 employment that may cover her.

10 Q. Okay. And so you're saying that her part-time employment
11 does not allow her the same kind of insurance that you could
12 offer her?

13 A. That's correct.

14 Q. Why does Barbara need health insurance?

15 A. She has some serious medical issues.

16 Q. Does the City's health insurance coverage cover the cost
17 of Barbara's treatment for those conditions?

18 A. Yes, it does.

19 Q. When did you learn that Barbara would lose her health
20 insurance coverage?

21 A. Last December.

22 Q. Why --

23 A. Near the end of the year.

24 Q. And why would she lose it then?

25 A. Because of the House bill that was signed.

1 Q. What happened at that time to you and Barbara?

2 A. We had about seven days left of coverage for her, and on
3 December 31st of 2011 her benefits were terminated initially.

4 Q. And how did they get reinstated?

5 A. They were reinstated based on the fact that I had to sign,
6 in November, my -- any changes to my health insurance coverage
7 for the next year, so I had already signed a coverage contract
8 for the following year.

9 Q. How has the law that you have been talking about affected
10 you?

11 A. It's been very stressful. It has changed how we're
12 dealing with our finances.

13 Q. Anything else?

14 A. It has caused a great deal of stress for both myself and
15 Barbara and our children.

16 Q. Have you looked into alternative health care for Barbara?

17 A. Yes, we have.

18 Q. What did you find?

19 A. We found that it's extremely costly. Barbara is employed
20 part-time and in having to purchase insurance for her it
21 would -- it would basically be what she is earning.

22 Q. Have you considered any other options?

23 A. We have considered her looking for work where she might be
24 able to secure benefits for herself. We have also looked at
25 disability insurance, because of her health conditions.

1 Q. Talking about looking for full-time employment, have there
2 been any road blocks to finding -- for her to find full-time
3 employment?

4 A. Yes. The work that she has done in the past, because of
5 some of the health concerns that she has, we're not sure she
6 would be capable of performing those jobs.

7 Q. How is it -- how has this planning affected the family
8 budget?

9 A. We have definitely looked at where we can cut back.
10 Potentially refinancing our house. Looking at other ways we
11 can cut our budget to afford insurance that would -- that would
12 be beneficial.

13 Q. Ms. Jach, how has this affected you personally?

14 A. Personally, it's been very stressful and I feel like we're
15 being singled out.

16 Q. What do you mean by being singled out?

17 A. Because of the relationship that I have with Barbara, that
18 this is specifically targeting our family and families like
19 ours.

20 MR. KNIGHT: Okay. I have no further questions, your
21 Honor.

22 THE COURT: Ms. Nelson.

23 CROSS EXAMINATION

24 BY MS. NELSON:

25 Q. Ms. Ramber, what did you and your partner do for medical

1 insurance prior to 2000 when you secured it through the City of
2 Kalamazoo? I'm sorry, Ms. Jach.

3 A. Yes.

4 Q. I called you by the wrong name. I apologize.

5 A. Prior to Barbara being covered on my insurance, she was
6 covered through her employer.

7 Q. So she gave up her employer insurance to be covered under
8 yours?

9 A. She did not give up her employer insurance. It was in
10 addition to.

11 Q. So yours was initially supplemental --

12 A. Yes.

13 Q. -- is that correct?

14 And then what happened to her employer-provided
15 insurance?

16 A. She actually left that employment to work part-time.

17 Q. So it was a voluntary choice on her part and your part,
18 is that correct?

19 A. Yes, it was.

20 Q. Is Barbara able to COBRA benefits under the policy through
21 the City of Kalamazoo?

22 A. No, she is not.

23 Q. Can you tell me how many partners or OEA's -- let me put
24 it this way -- how many OEA's receive benefits through the
25 City of Kalamazoo's insurance coverage plan?

1 A. I cannot. I don't have that information.

2 Q. Do you know how many are opposite-sex OEA's?

3 A. No, I don't.

4 Q. Do you know if there are any at all?

5 A. I don't know.

6 Q. All right. To your knowledge, are you and Barbara the
7 only OEA benefit recipients through the City of Kalamazoo?

8 A. I don't have that knowledge.

9 MS. NELSON: Okay. That's all I have. Thank you.

10 THE COURT: Anything else, Mr. Knight?

11 MR. KNIGHT: One.

12 THE COURT: Did you have further questions?

13 MR. KNIGHT: I do have one question, I think, your
14 Honor.

15 REDIRECT EXAMINATION

16 BY MR. KNIGHT:

17 Q. Ms. Jach, Ms. Nelson asked you about the voluntary
18 leaving, Barbara leaving her job. Why did she leave her job?

19 A. She left her job in order to be at home with our children
20 or at least to accommodate their schedule.

21 MR. KNIGHT: Okay.

22 THE COURT: Any follow-up, Ms. Nelson?

23 MS. NELSON: Nothing, your Honor.

24 THE COURT: Ms. Jach, thank you. You may stand down.
25 Did you say you had another witness, Mr. Knight?

1 MR. KNIGHT: Yes, your Honor. Barbara Ramber is our
2 second witness.

3 THE COURT: Ms. Ramber, are you in the courtroom?

4 Are you Barbara Ramber? Ma'am, would you just come
5 up here, please?

6 Just stand right there. Raise your right hand to be
7 sworn.

8 * * *

9 BARBARA RAMBER

10 was called as a witness, after having
11 been duly sworn to testify to the truth.

12 * * *

13 THE COURT: You may have a seat right over here,
14 please, in the witness box.

15 Ma'am, would you adjust that microphone? Pull it up
16 so that it's about three, four inches from your mouth and
17 speak right into the tip of it. You can pull it right toward
18 you. There you go.

19 Now would you state your full name?

20 THE WITNESS: Barbara Jean Ramber.

21 THE COURT: And would you spell your last name?

22 THE WITNESS: R-a-m-b-e-r.

23 THE COURT: Thank you.

24 Mr. Knight, I take it you're not conducting the exam
25 on this witness?

1 MR. KNIGHT: I am not. My counsel, co-counsel,
2 Amy Crawford is.

3 THE COURT: All right, Ms. Crawford. Go ahead.

4 MS. CRAWFORD: Thank you, your Honor.

5 DIRECT EXAMINATION

6 BY MS. CRAWFORD:

7 Q. Ms. Ramber, where do you live?

8 A. Kalamazoo, Michigan.

9 Q. And how long have you lived in Michigan?

10 A. Thirty years.

11 Q. Your partner is JoLinda Jach?

12 A. Yes.

13 Q. Why did you and your partner JoLinda join this lawsuit?

14 A. For a couple of reasons. One, it was important to put a
15 face to show that there are LGBT families that will be impacted
16 by this. And secondly, we needed to put our complete, total
17 support in trying to defeat that Act.

18 Q. Talk for a moment about your employment. Where do you
19 work?

20 A. I work for Kalamazoo Public Schools.

21 Q. And what do you do there?

22 A. I'm in food service.

23 Q. How much do you earn per year?

24 A. \$10,000.

25 Q. Are you eligible for health benefits through your job?

1 A. No, I am not.

2 Q. Why not?

3 A. I am a non-contractual employee.

4 Q. Can you purchase health care insurance through your job?

5 A. Yes, I can.

6 Q. And how much would that insurance coverage cost?

7 A. \$564.

8 Q. So that would be in excess of \$6,000 -- you mean 540 [sic]
9 per month?

10 A. Per month.

11 Q. And would that be in excess of \$6,000 a year?

12 A. Yes.

13 Q. And you have testified that you earn about \$10,000 per
14 year, right?

15 A. Correct.

16 Q. Let's talk about your medical issues. Could you please
17 give the Court a brief overview of the health issues for which
18 you currently receive medical treatment?

19 A. I suffered a severe blunt eye trauma in my left eye. I
20 have a cataract in my right eye. I have GERD. And I have
21 rheumatoid arthritis in both hands and wrists.

22 Q. Let's talk about your eye injury first. How did you
23 injure your eye?

24 A. I went to a semi-professional baseball game, and the
25 batter hit a foul ball, came off the bat and hit me directly

1 in my left eye.

2 Q. What treatment did you have as a result of that injury?

3 A. I spent many hours in the emergency room. I had facial
4 surgery a few days afterwards. They removed the broken bones
5 and then installed three metal plates in my face. Within a
6 year after that I developed a traumatic cataract which I had
7 cataract surgery for. This has left me with glaucoma.

8 Q. And what type of medical care do you receive for your eye
9 now?

10 A. I see my eye specialist every four months, more if needed,
11 to check the pressure in my left eye.

12 Q. Do you take any medication for your eye condition?

13 A. Yes, I do.

14 Q. What do you take?

15 A. Timolol.

16 Q. What would be the risk if you stopped taking your
17 medication?

18 A. The pressure would build in the eye and I would lose sight
19 in my left eye.

20 Q. Has the injury affected your vision?

21 A. Yes.

22 Q. How?

23 A. My vision recedes. It's not constant. I have a
24 permanently dilated pupil which allows a lot of light in,
25 which creates a lot of tearing, which also contributes to the

1 blurriness. And also, I see halos around all light sources,
2 artificial and natural.

3 Q. Do you have an understanding of what type of medical care
4 you may need in the future as a result of your eye condition?

5 A. This is a lifelong situation for me. I will be seeing my
6 specialist or a specialist for the rest of my life.

7 Q. Is there any risk of or any need for potential surgery in
8 the future?

9 A. Yes. I'm at lifetime risk for retinal detachment, which
10 would require surgery. Also, my eye was injured, so when the
11 intraocular implant, after the cataract was removed, after the
12 implant went in, it's -- my eye is missing some items that help
13 hold that in place, so I'm at risk for detachment of that, as
14 well.

15 Q. And what would happen if you didn't receive surgery?

16 A. I would lose sight in that eye.

17 Q. Now, you also mentioned that you had rheumatoid arthritis,
18 is that right?

19 A. That's correct.

20 Q. When were you diagnosed with that?

21 A. 2009.

22 Q. And what are your symptoms?

23 A. Joint swelling, inflammation and deformity.

24 Q. Does this affect your ability to work?

25 A. It certainly does. It affects my ability to lift, grasp,

1 support much weight.

2 Q. Do you have an understanding of whether your arthritis is
3 likely to progress over time?

4 A. Yes, it will.

5 Q. And do you know what kind of treatment you may need in the
6 future?

7 A. Yes. Medication to try and slow it down.

8 Q. Now, you also mentioned that you have GERD, is that
9 correct?

10 A. Yes.

11 Q. Is that gastroesophageal reflux disease?

12 A. Yes.

13 Q. Can you explain what that is?

14 A. I had heartburn for many years, only it wasn't very
15 obvious to me, and it damaged my esophagus.

16 Q. Have you been diagnosed with any specific syndromes or
17 disorder related to the GERD?

18 A. I was tested for Barrett's esophagus and it looks --
19 clinically, it looks like Barrett's, but it wasn't -- it didn't
20 biopsy out as Barrett's.

21 Q. What are your symptoms?

22 A. Difficulty swallowing.

23 Q. Are you taking any medication for that condition now?

24 A. Yes, I do.

25 Q. What is that?

1 A. It's a protonic called Pantoprazole.

2 Q. Do you have an understanding of whether you may need
3 additional treatment in the future?

4 A. Yes. I will need continued endoscopes to check the
5 esophagus.

6 Q. To date, has all of your treatment for these medical
7 issues we have talked about been covered by the insurance
8 coverage that you have through your partner's job?

9 A. For the most part, except for co-pays.

10 Q. I want to talk to you about the Act that's at issue in
11 this lawsuit, okay?

12 Is it your understanding that the Public Employee
13 Domestic Partner Benefit Restriction Act will take away the
14 insurance coverage that you have through JoLinda's job with
15 the City of Kalamazoo?

16 A. Yes.

17 Q. When will you lose your coverage?

18 A. December 31st of this year.

19 Q. Has the Act had any impact on you and JoLinda emotionally?

20 A. Very much so. It's -- I'm scared to death about losing
21 the benefits. I'm -- my eyesight is -- the thought of losing
22 that is terrifying.

23 Q. If you were to go without insurance altogether, how might
24 that affect your health?

25 A. I would not be able to afford the care that I'm getting

1 now, particularly with my eye specialist. They are very
2 costly.

3 Q. What are the financial risks to you and your family if you
4 were to forgo health insurance entirely?

5 A. When I went to the ballpark that day I didn't expect
6 to take a fastball in the eye, and so if something else
7 catastrophic were to happen, I -- that could just sink us.
8 That would be awful.

9 Q. Is it a realistic option for you to forgo medical
10 insurance entirely?

11 A. I don't see how, no.

12 Q. What do you anticipate the impact, then, would be of
13 having to seek alternative insurance?

14 A. I don't see how we would be able to afford the level of
15 coverage that we have now.

16 Q. How has this Act impacted you and your family?

17 A. It's been hard on everyone. My son does not understand
18 why his family is treated differently than other families.

19 Q. And how about how it's affected you and JoLinda?

20 A. Again, anxiety in trying to figure out, you know, what to
21 cut, how to cut, where to cut, what to do.

22 MS. CRAWFORD: No further questions, your Honor.

23 THE COURT: Ms. Nelson.

24 MS. NELSON: I have no questions, your Honor.

25 THE COURT: Thank you.

1 Very well then, Ms. Ramber, you may stand down.

2 Mr. Knight, do you have any further witnesses?

3 MR. KNIGHT: I do not, your Honor.

4 THE COURT: Very well.

5 Ms. Nelson, do you want to address your motion to
6 dismiss?

7 MS. NELSON: I will, your Honor. We had discussed
8 earlier that we thought a better progression would be
9 Plaintiffs going forward, since they have the burden on the
10 preliminary injunction, and the issues overlap, but if the
11 Court prefer --

12 THE COURT: If I grant your motion, I believe that
13 that would make it moot, wouldn't it?

14 MS. NELSON: I understand that, yes.

15 THE COURT: Although, you know you're not going to
16 get a decision today on either one of them.

17 MS. NELSON: I understand that.

18 THE COURT: I'll be taking it under advisement and
19 getting you a decision in writing.

20 But I would rather hear from you first, and caution
21 you that I have -- I'm familiar with the issues and request
22 that you simply hit the highlights.

23 MS. NELSON: That's my plan.

24 THE COURT: Good.

25 MS. NELSON: Thank you.

1 THE COURT: Thank you. You can rotate that, if
2 you -- maybe you can't.

3 MS. NELSON: I think I have got it.

4 THE COURT: That's our first lawyer agility test.

5 MS. NELSON: How did I do?

6 THE COURT: Well, I'll give you that decision in
7 writing, as well.

8 MS. NELSON: Like all the others, wisely written out.
9 Thank you, your Honor.

10 This is Defendant's motion to dismiss, and as the
11 Court has indicated, this -- the issues presented both on the
12 motion to dismiss and in respect to the motion for preliminary
13 injunction have been thoroughly briefed in cross briefs and
14 reply briefs.

15 Essentially, the Plaintiffs' claim and arguments
16 rest on four cornerstone arguments. Our position is, those
17 arguments lack foundation, factual and legal merit.

18 First, Plaintiffs argue with respect to the
19 appropriate level of scrutiny. The law very clearly
20 establishes the level of scrutiny to be applied to the equal
21 protection claim is rational basis. And I'm going to focus,
22 your Honor, on the equal protection claim, principally, rather
23 than the procedural and jurisdiction issues, which I think we
24 have briefed and the Court is cognizant of.

25 In addition, the due process claim, Plaintiffs didn't

1 raise that in the context of their preliminary injunction
2 motion, and I believe those issues have been adequately
3 addressed, as well, and the rational basis test applies in
4 that context, as well.

5 But in connection with the equal protection argument,
6 Plaintiffs in effect are asking this Court to adopt a new
7 standard of review, which has not yet been reviewed and
8 approved by the Sixth Circuit, based on an interlocutory
9 appeal decision out of the Ninth Circuit; that being, the
10 Collins and Davis series of cases, in which the Ninth Circuit
11 applied perhaps not a fully or what we might consider
12 heightened scrutiny, but certainly an elevated level of
13 scrutiny involving the gay and lesbian plaintiffs in that
14 particular case, because of its analysis and application of
15 its interpretation of Moreno in that, and saying that because
16 they are an unpopular group, the Supreme Court recognized in
17 Moreno that some heightened level of review might be
18 appropriate.

19 Our position essentially is that that is a legally
20 deficient and incorrect decision as set forth by the dissent
21 in the en bank analysis of the case, and we have set that
22 forward in our arguments.

23 So the Sixth Circuit has clearly established that
24 sexual orientation is not a suspect classification and has
25 continuously rejected to -- rejected any heightened level

1 of scrutiny to claims based on sexual orientation, most
2 recently in the Davis case that we have cited and have
3 attached for this Court's review, in that it's an unpublished
4 opinion. So the level of scrutiny involved in this case that
5 must applied is clearly rational basis.

6 The second cornerstone of their argument that fails
7 is Plaintiffs' assertion that they are similarly situated in
8 all relevant respects to married public employees as opposed
9 to single public employees.

10 Now, the basis for this argument is unclear, at least
11 in terms of the legal context, in my opinion, and hopefully in
12 the Court's, because the Plaintiffs very clearly, when you
13 apply the similarly-situated test developed by the United
14 States Supreme Court, are more closely associated with single
15 employees as opposed to married employees.

16 The Plaintiffs do not have a legally recognized
17 relationship under Michigan law. The existence of a
18 relationship similar to marriage, which the Plaintiffs spend
19 considerable amount of time in discussing and establishing
20 both through the allegations in their Complaint and the
21 fact submissions in support of their motion for preliminary
22 injunction, is not the basis upon which the health coverage
23 that's in dispute here is being provided.

24 So the existence of a relationship between the
25 Plaintiff employee the Plaintiff partner is not relevant to

1 the determination for purposes of equal protection and the
2 rational basis review as to whether they are similarly
3 situated or not.

4 Similarly situated, they are similarly situated to
5 employees who have opposite-sex partners or no relationships
6 at all, such as roommates, friends or some sort of platonic
7 relationship, who will also clearly lose their benefits in the
8 same context as Ms. Jach and Ms. Ramber just discussed with
9 the Court.

10 And interestingly enough, your Honor, in the context
11 of the questions presented, that I presented to Ms. Jach, I
12 would -- I would point the Court to Plaintiffs' Exhibit V-1,
13 which is the declaration from the Human Resources Director
14 from the City of Kalamazoo, which indicates that currently
15 there are six participants who are OEA's in their benefits
16 coverage program, three of whom are the same-sex partners of
17 an employee, three who are not, who will also lose their
18 benefits in the same way that the Plaintiffs in this lawsuit
19 will lose theirs.

20 Additionally, the Plaintiffs argue that they are
21 different, or attempt to set themselves apart from those
22 opposite-sex partners or friends or roommates or whatever
23 the basis is upon which those benefits are provided, because
24 they contend that the opposite-sex partner can marry, whereas
25 they cannot. That is really a specious argument and a red

1 herring for purposes of this analysis, because, again, the
2 basis under which these benefits are provided is not dependent
3 on the existence of a relationship, very clearly.

4 Second, not all opposite-sex partners would or want
5 to marry.

6 Third, opposite-sex individuals who may be receiving
7 benefits as an OEA could have a platonic relationship, as I
8 said before, could simply be a friend, could simply be a
9 roommate. They will lose their benefits. So marriage doesn't
10 solve that problem for them any more than it will solve the
11 problem for the Plaintiffs with respect to the loss of their
12 benefits.

13 There clearly is no discriminatory purpose with
14 respect to the elimination of these benefits between these
15 classifications of individuals as the Legislature has drawn
16 it, and no disparate impact based on the application of
17 Public Act 297, as the Plaintiffs are treated identically to
18 those opposite-sex individuals who have qualifying OEA, or
19 other eligible adult individuals, let me put it that way for
20 the record, who are currently receiving benefits.

21 The third cornerstone, faulty cornerstone of the
22 Plaintiffs' argument is that Public Act 297 is not rationally
23 related to any legitimate State interest.

24 Now, the State has argued essentially three
25 legitimate State interests. The first being cost savings,

1 which Plaintiffs argue, based on the line of reasoning out of
2 the Ninth Circuit in the Collins/Diaz series of cases, that
3 any cost savings to the State are so de minimis as to have no
4 legitimate purpose. However, that requires this Court to
5 again apply a faulty analysis, the same faulty analysis the
6 Ninth Circuit applied, in that it requires you to recognize
7 that the equal protection analysis sets a floor, sets a
8 mathematical floor when analyzing this type of an economic
9 interest.

10 That's not the burden in terms of the economic -- of
11 the equal protection argument, and the State doesn't have to
12 establish that there is a specific or a certain amount of
13 economic benefit or cost savings that would occur.

14 If, in fact, it is a legitimate rationale or a
15 legitimate reason, and that is, cost savings, then no amount
16 of cost savings is determinative of whether or not it complies
17 with this equal protection analysis.

18 So the fact that the State currently may not receive
19 a direct benefit or cost savings is clearly irrelevant given
20 how the equal protection analysis is applied and the
21 presumptions that this Court must make with respect to this
22 statute. The Court must presume that this statute is
23 constitutional and must presume that the State has expressed
24 and demonstrated significant and substantial and legitimate
25 State interests and rationale in support of this statute.

1 Second, this statute furthers the State's clear
2 policies with respect to marriage. Also a legitimate State
3 interest, also most recently recognized by the United States
4 Supreme Court as an interest that is clearly within the
5 traditional and historic police powers and authority of the
6 State. The State has an interest in protecting marriage and
7 marriage relationships and this statute moves in relation to
8 its -- the State's constitutional protection in Article I,
9 Section 25, to serve that purpose.

10 Third, and which the Plaintiffs completely ignore,
11 this statute isn't a stand-alone, singular legislative
12 enactment. This statute is part of a larger legislative
13 agenda and package intended and focused on restructuring
14 public employment, public -- the public employer and public
15 employee relationship. It's the employer's obligations and
16 the costs associated with operating that public employment.

17 As we have set out in our brief over the past two to
18 two and-a-half years, the Legislature and the Governor have
19 made -- have initiated and enacted substantial litigation
20 directed at the restructuring of public employment and the
21 costs associated with public employment, including benefits
22 provided to public employees, both at the local and at the
23 State level.

24 And this statute, when analyzed in the context of
25 these three legitimate purposes and legitimate interests, is

1 rational and is directly related to those legitimate interests
2 and meets the basic test of constitutionality applicable under
3 this equal protection analysis.

4 Fourth, Plaintiffs allege and argue that Public
5 Act 297 is motivated by animus. And to support that argument
6 they first assert that because it has no legitimate -- it
7 provides no legitimate cost savings, it can have no legitimate
8 purpose, which is completely incorrect. Even if the Court
9 concludes that the stated purpose of cost savings may not
10 be -- may not exist, the Court can justify and find the
11 statute to be constitutional under any conceivable rational
12 basis, and the State has offered two additional that support
13 this statute.

14 Plaintiffs also argue that the structure of the
15 statute, the history that predated this statute, and
16 specifically, legislative comment outside of the actual
17 legislative forum, demonstrate a specific animus in adopting
18 this statute, all of which is unsupported here by this record
19 and by Plaintiffs' facts and argument.

20 The title and plain language of this statute clearly
21 demonstrates the intent here of the Legislature and of the
22 Governor in enacting this bill is to create and work -- take
23 an opportunity to, as I say, restructure public government and
24 the relationship between a public employer and its public
25 employees as part of a larger overall legislative initiative

1 that has been undergone in this State for the past two years
2 to address both economic reality and the financial stability
3 issues of many of the public employers in this State, all of
4 which does have a significant impact on costs, the process,
5 the programs and the ability of the State to operate, to
6 secure monies, and to protect the public fisc, all of which
7 is completely ignored by the Plaintiffs, the Plaintiffs'
8 argument, but is clearly within the body of rationale and the
9 reasoning that this Court must consider in examining whether
10 or not this Public Act is motivated by animus.

11 Plaintiffs' reliance on legislative statements as
12 demonstrating animus, too, is clearly erroneous. As we have
13 argued in the brief, the Supreme Court and the Sixth Circuit
14 have repeatedly rejected resort to the individual statements
15 outside of the legislative context of legislators as
16 demonstrating or indicative of the overall legislative intent
17 and that's exactly what the Plaintiffs are doing here.

18 And most interestingly, your Honor, the vast
19 majority, if not all of the statements relied on and pointed
20 to by the Plaintiffs, don't even pertain to Public Act 297.
21 When you examine their Exhibits G-1 through G-11, all of which
22 are newspaper reports or press releases attributing statements
23 to individual legislators, all relate to the State's Civil
24 Service Commission's adoption of its other eligible adult
25 policy to provide benefits to other eligible adults and the

1 Legislature's failure to override, or for lack of a better
2 word, veto that policy. They do not relate to Public Act 297.

3 And those statements that the Plaintiffs point to,
4 even if they show or have one in the context of 297, doesn't
5 state or support a finding of animus directed to anything
6 other than the domestic benefit or the provision of the
7 domestic benefit and its impact on Government budgets and the
8 ability to restore financial and fiscal stability to this
9 State.

10 They don't express an animus directed toward the
11 recipients of those benefits. They -- they express a dislike
12 for the benefit itself because of the impact that it has on
13 the fiscal stability and the costs associated with the
14 operation of government.

15 Analyzing the equal protection claim, then, in the
16 context of those four cornerstones and the failures of their
17 arguments and their facts to support any findings, reasonable
18 findings by this Court to conclude that the Public Act 297
19 lacks a rational basis or, in fact, is representative of a
20 discriminatory animus on the part of the Legislature and the
21 Government, this equal protection claim must fail.

22 Similarly, Plaintiffs' due process claim fails for
23 this principal reason: Plaintiffs' claim is premised not on
24 a denial of the benefit, but on an alleged impact on their
25 fundamental right to form and maintain intimate relations.

1 There hasn't been any testimony here today, nor is
2 there any testimony in any of the declarations that have
3 presented -- been presented that Public Act 297 has impacted
4 any of the Plaintiffs' relationships.

5 THE COURT: I don't think I need any additional
6 argument on the due process argument.

7 MS. NELSON: Thank you, your Honor.

8 THE COURT: Or on the due process claim. I'm content
9 with the briefing on that.

10 MS. NELSON: Thank you.

11 With respect to the preliminary injunction motion,
12 would you -- would you like me to address those elements, the
13 other elements besides the likelihood of merits, the merits?

14 THE COURT: Well, I'm not going to let you do it
15 twice. If you want to do it now, you won't be able to
16 respond.

17 MS. NELSON: All right. Thank you, your Honor.

18 THE COURT: All right.

19 Ms. Goad, are you responding to the motion to
20 dismiss?

21 MS. GOAD: I am, your Honor.

22 THE COURT: You may proceed.

23 MS. GOAD: Thank you, your Honor.

24 Since Ms. Nelson started out speaking of the standard
25 of review under equal protection, I want to do the same.

1 As articulated in our papers, Plaintiffs believe that
2 ultimately rational basis review may not be the appropriate
3 standard to apply to a sexual orientation classification, but
4 we recognize the law on the books in the Sixth Circuit, and
5 I'm totally content to focus today on rational basis review,
6 because the statute lacks any plausible justification even
7 under rational basis review.

8 Under Sixth Circuit case law, like Scarbrough and
9 the Davis case that Ms. Nelson just referenced, the Act is
10 unconstitutional if Plaintiffs can either establish that
11 it was motivated by animus or can negate every conceivable
12 rational basis. Here Plaintiffs have done both.

13 Even if the Court were to conclude that this Act
14 was not motivated by anti-gay hatred, the lack of a truly
15 legitimate rational basis dooms it.

16 Looking first at animus, it is no accident that this
17 law is causing harm to people like Barbara Ramber and JoLinda
18 Jach and the rest of these Plaintiff families. Your Honor, it
19 was not named the Roommate Restriction Act. Make no mistake,
20 this Act was intended to harm people, and particular ly to
21 harm gay and lesbian people. The animus involved is clear not
22 only from the name, not only from its reference to a marriage
23 classification, it is facially discriminatory for those
24 reasons.

25 But even if it were not, plenty of other evidence

1 on this record would indicate the presence of intentional
2 discrimination from the statements of legislators
3 contemporaneous to the passage of this Act, which are relevant
4 under Arlington Heights and City of Parma, a number of other
5 cases. But the bizarre line drawing in the Act itself, the
6 way that people who live together cannot retain benefits,
7 people who live next door to one another can; a partner of
8 20 years with no other form of support is denied benefits, a
9 cousin or an uncle who is independently wealthy is allowed to
10 keep benefits.

11 Further, the Act's place within a long history of
12 sometimes bitter controversy over gay and lesbian family
13 benefits in Michigan.

14 Of course, the effects of the statute are also
15 discriminatory, just as they were intended, to exclude almost
16 all same-sex partners from access to benefits.

17 THE COURT: Is effects a relevant consideration?

18 MS. GOAD: It is, your Honor. Under, for example,
19 Arlington Heights, it is one of several appropriate factors
20 to consider in determining intent.

21 THE COURT: All right. But this is a -- is a
22 challenge, a facial challenge to the statute, correct?

23 MS. GOAD: It's both.

24 THE COURT: Not an as-applied challenge.

25 MS. GOAD: Your Honor, we do believe that this is a

1 facially discriminatory statute, and that the things I just
2 listed in the record illustrate that the entire thing should
3 be struck down as unconstitutional, however, we would argue
4 in the alternative that it's unconstitutional as applied to
5 same-sex committed couples, given their particular status as
6 similarly situated to heterosexual married couples who are
7 able to retain benefits.

8 THE COURT: Well, since there has been no effort to
9 certify a class, then the relief would be limited to the named
10 Plaintiffs, if that were the rationale, is that correct?

11 MS. GOAD: Your Honor, that is not our understanding
12 under Sixth Circuit equal protection case law. We have reason
13 to believe that there are a number of other affected families
14 both at Plaintiffs' same employers and at approximately six
15 or seven other employers around the State that offer the
16 same type of benefit programs. It is our understanding that
17 even if the statute were found unconstitutional as applied
18 to same-sex couples, that that relief, the appropriate
19 scope of an injunction or declaration would cover all
20 similarly-situated families.

21 THE COURT: Did you brief that?

22 MS. GOAD: We did, your Honor, although if this is a
23 topic of particular interest to the Court, we can pursue it
24 further, if you would be interested in supplemental briefing.

25 THE COURT: Not particularly. I'm just wondering

1 where you are taking the argument, because I thought the main
2 thrust was really a facial challenge to the statute.

3 MS. GOAD: That is correct, your Honor. And of
4 course, there are a number of Supreme Court cases in which
5 statutes were found unconstitutional facially without
6 applying the Salerno test of demonstrating that they are
7 unconstitutional in every possible factual scenario. That's
8 the same type of situation we have here, analogous to Adarand
9 or Romer or Seattle School District.

10 This Act singles out the family relationships of gay
11 and lesbian employees and denies them and only them family
12 health insurance benefits.

13 Heterosexual couples can marry to maintain coverage.
14 Same-sex couples, of course, do not have that option in
15 Michigan.

16 Ms. Nelson just rearticulated the State's arguments
17 that this Act purportedly furthers State interests in cost
18 savings, averting financial insolvency and protecting
19 traditional marriage, however, once we explore the relation
20 between each of those purported justifications and the object
21 to be obtained -- excuse me -- between the classification that
22 was adopted and each of those purported justifications, as
23 Romer suggests, that relation is lacking in each case, and
24 thus, the Act has no actual rational basis.

25 First looking at cost, we have submitted affidavits

1 from Dr. Lee Badgett, as an expert economist, and an extensive
2 factual record establishing that this law does not reduce
3 expenditures for the State of Michigan.

4 Ms. Nelson also appeared to just concede there is no
5 evidence that it saves costs.

6 To the extent it is removing a small, targeted group
7 of people --

8 THE COURT: I didn't hear that concession. I
9 understood her argument to be that, even if it didn't, the
10 other two prongs of her support would be sufficient to
11 establish a rational basis. I didn't understand her to say
12 that there is no cost savings.

13 In fact, what I understood her to say is that there
14 was no constitutional floor by -- established by equal
15 protection jurisprudence, but rather, if there is any cost
16 savings at all, the amount is irrelevant in order to find a
17 rational basis. Isn't that what you understand her to say?

18 MS. GOAD: I believe that was part of it, your Honor,
19 and I'm very happy to address that.

20 THE COURT: All right.

21 MS. GOAD: First of all, it's an attenuated
22 justification, because the State is attempting to take credit
23 for cost savings that were actually incurred by localities,
24 school districts, colleges, et cetera. And those employers
25 have stated very clearly they don't want to accrue that type

1 of purported savings. They have chosen to undertake OQA
2 benefits programs, other qualified adults, for some
3 combination of fairness and equity reasons, or because of
4 the economic benefits that these programs bring in terms of
5 recruiting and retaining the best talent.

6 Significantly, the State has already acted through
7 neutral and nondiscriminatory means, as Ms. Nelson alluded
8 to, to control the costs of local employee benefit programs.
9 They have set caps on per capita spending through things like
10 Public Act 152 of last year, and that generic, universally
11 applicable approach, actually saving costs without targeting
12 any particular embattled minorities, contrasts sharply with
13 the Domestic Partner Benefit Restriction Act and its narrow
14 focus on denying coverage to a small subset of families.

15 There is also a significant constitutional problem
16 with trying to defend a statute based on defense of the public
17 fisc in a context where the only benefit to the public fisc is
18 arbitrary exclusion of a minority. The State is not entitled
19 to protect the public fisc by drawing an invidious distinction
20 between its classes of citizens, as the Supreme Court said in
21 Maricopa County.

22 The Arizona decision which was also previously
23 mentioned, *Collins v Brewer*, determined that an Arizona
24 statute barring domestic partner benefits for State employees
25 lacked a rational basis, even though that statute did result

1 in a small direct cost savings to the State of Arizona. That
2 was inadequate to the District of Arizona and the Ninth
3 Circuit. And here, where cost savings appear to be negative,
4 the rational basis is even more clearly not present.

5 This classification and its purported cost savings
6 are analogous to those of the food stamp amendments in the
7 Moreno case. This Act is engaging in absurd line drawing.
8 And the way that its subsections effectively allow employers,
9 if they choose, to maintain coverage for so many people, while
10 cutting it off only for same-sex domestic partners, make the
11 State's cost justification implausible.

12 Turning next to protecting marriage, the people hurt
13 by this law are same-sex couples. They are not permitted to
14 marry in Michigan, under the 2004 amendment and the statutes
15 on the books then and now. Taking away these people's health
16 insurance could not possibly motivate them to get married.
17 That option is already off the table.

18 Rather than furthering traditional marriage, which
19 the State has not actually established any reason that
20 traditional marriage needs to be protected through something
21 like this, the Act is penalizing people for whom marriage was
22 already not an option, which is an attenuated, implausible
23 rationale.

24 Finally, the State has offered fiscal integrity or
25 prevention of insolvency as a basis, but that also is an

1 incoherent one. All of these benefit programs were offered
2 voluntarily by public employers within the State.

3 For support, I would turn to the amicus brief of the
4 City of Ann Arbor which has articulated a number of reasons
5 why that City, for example, found it appropriate to offer the
6 benefits programs, and why choice of compensation programs
7 should be in the purview of local government officials.

8 As Dr. Badgett's declaration confirms, as well
9 as the other amicus brief from the business community in
10 Michigan, the type of benefits at issue here tend to be a
11 good investment. And more importantly, the State has not
12 made any showing that any employer actually offering an
13 OQA program was suffering from financial instability. This
14 is a red herring, as well as an attenuated rationale analogous
15 to what was rejected in Cleveland Living Center.

16 Because the statute reflects intentional
17 discrimination against gays and lesbians and lacks any
18 plausible legitimate justification, it's unconstitutional
19 under equal protection.

20 And I want to turn briefly back to what Defendant
21 had to say about similarly situated individuals. Each of
22 the Plaintiff couples have been in a committed, loving
23 relationship for a least eight years, in some cases more than
24 twenty. They are similarly situated in every relevant respect
25 to their co-workers and the spouses of those co-workers who

1 retain eligibility for coverage. They work in parallel jobs.
2 They otherwise receive equal compensation. And the State has
3 not made any showing of a meaningful or relevant distinction.

4 There is also a question raised by the State as to
5 the discriminatory purpose of the statute, and I would again
6 recommend the five factor analysis in Village of Arlington
7 Heights to articulate what Plaintiffs believe is a clear
8 record of discriminatory intent here between the long history
9 of political controversy over same-sex benefits, the
10 statements of legislators, some of which were sparked directly
11 by the State's Civil Service Commission decision to offer a
12 similar program of benefits to State employees, other eligible
13 adult individuals, but they are still relevant to establishing
14 the intent of those same legislators in voting on this Act a
15 matter of weeks or months later.

16 Further, the classifications drawn in the statute
17 speak for themselves. The way that so many people are able
18 to retain access to coverage, while a small minority are
19 excluded, it's implausible to have ever thought this would
20 be an effective cost savings measure, an effective fiscal
21 integrity measure, or an effective means of protecting
22 marriage.

23 And I think I understood the Court to be satisfied
24 with the briefing on substantive due process, in which case I
25 won't take up more time with it.

1 THE COURT: All right. I think, Ms. Goad, that is --
2 your argument is responsive, of course, to the State's motion
3 to dismiss, but also addresses one of the components of the
4 preliminary injunction test, which is the likelihood of
5 success on the merits, and I think I would ask you to then
6 address the preliminary injunction motion and focus on the
7 other three, and then I'll hear from Ms. Nelson on that and
8 give you a chance to respond.

9 MS. GOAD: Absolutely, your Honor.

10 Again, hitting only the highlights.

11 THE COURT: You were the one that was to argue that
12 motion, right?

13 MS. GOAD: Yes, your Honor.

14 THE COURT: All right.

15 MS. GOAD: Let me speak first to the harm aspect of
16 the preliminary injunction standard. By taking away benefits,
17 this law is actively and presently harming gay and lesbian
18 people, including Plaintiff Michelle Johnson, who has already
19 lost her health insurance, as well as the two other Plaintiffs
20 who will lose their coverage on dates certain later this year,
21 as you heard from Barbara Ramber today.

22 THE COURT: Well, the State's argument is one, as I
23 understand it, that economic harm cannot really furnish proof
24 of irreparable harm, and if anybody wants coverage they can
25 just go buy it. That is what I understand the State's

1 position to be. Do you want to address that?

2 MS. GOAD: Absolutely, your Honor.

3 First of all, Plaintiffs are alleging constitutional
4 injury, and that alone constitutes irreparable harm under
5 Bonnell and a number of other cases.

6 THE COURT: Oh, you mean simply the denial of equal
7 protection.

8 MS. GOAD: The denial of a constitutional right, yes.
9 But beyond that, there is a long line of cases holding that
10 denial of health insurance or even denial of affordable health
11 insurance in situations where premiums or co-pays suddenly
12 rise to a level families involved cannot pay constitutes
13 irreparable harm. That was the holding of the Sixth Circuit
14 in Wood versus Detroit Diesel. That case cites a number of
15 others, including Yolton and Golden.

16 And as articulated there, the loss of health
17 insurance or the loss of meaningful access to health
18 insurance, where it's too expensive for the family to attain,
19 like Ms. Jach and Ms. Ramber spoke to, that situation forces
20 families to choose between life's basic necessities. And
21 given that necessity of making a choice in the moment between
22 whether to cover a health need or cover some other family
23 need, that is an irreparable injury because the choice can
24 never be undone.

25 Further, Plaintiffs have articulated both today and

1 in their declarations, in addition to financial harm and
2 financial stress, there's emotional stress imposed by this
3 Act both after and before the denial of coverage; that, also,
4 we would argue is irreparable harm.

5 And further, given that we're talking about health
6 insurance, if a family has to choose to forgo health care,
7 whether because health insurance was unavailable or the type
8 of health insurance attained, as many of the Plaintiffs'
9 families have testified, if they are only able to access a
10 high deductible plan or a plan that excludes their preexisting
11 conditions, in any of those scenarios, if they have to forgo
12 treatment, the medical harms may well be irreparable.

13 So we have already spoken to likelihood of success on
14 the merits. I can briefly address the remaining two factors
15 of the preliminary injunction standard.

16 The balance of the equities here clearly tilts in
17 favor of enjoining the Act, given the harms this law is
18 causing to people like the Plaintiffs in contrast to the lack
19 of any demonstrated harm to the State from ceasing enforcement
20 as addressed in discussing their purported rational bases.

21 Finally, an injunction here serves the public
22 interest as shown by statements on the record from several
23 of the Plaintiffs' employers that they would much prefer
24 to continue offering OQA benefits for a number of reasons,
25 given the State's inability to show that its interests are

1 | meaningfully furthered by having this Act in place, and also
2 | given the case law establishing that the public has an
3 | interest in ending an unconstitutional State action.

4 | So for all of these reasons, Plaintiffs respectfully
5 | ask for preliminary injunction against any further enforcement
6 | of this law which intentionally discriminates against an
7 | already embattled minority.

8 | THE COURT: Thank you, Ms. Goad.

9 | Any response, Ms. Nelson?

10 | MS. NELSON: Yes, your Honor.

11 | The Court is correct with respect to the additional
12 | argument on the irreparable harm, that what we're talking
13 | about here is economic injury and nothing more, and that does
14 | not address irreparability, and even in the context of the
15 | Detroit Diesel case, because it is clear here from this
16 | testimony that, first of all, the benefits will not be lost
17 | until December 31st with respect to Ms. Jach and her partner,
18 | Ms. Ramber.

19 | Essentially, the only Plaintiffs who have lost
20 | benefits are Ms. Miller and Ms. Johnson, who work for
21 | Kalamazoo Valley Community College. They -- Ms. Johnson
22 | was covered only for a brief period from August 1st until
23 | December 31st under a pilot program, and the Community College
24 | determined not to continue the pilot program as early as
25 | October 1, when they engaged in collective bargaining, and

1 did not include that as a matter of bargaining for their
2 contract.

3 That's set forth in the testimony of Ms. Bohnet,
4 which is Plaintiffs' Exhibit 2-B, and Ms. -- Ms. Schlack, I
5 think is how it's pronounced, which is Plaintiffs' Exhibit
6 2-A. And we also cite to that in our brief.

7 From the standpoint of the alleged economic injury,
8 in that the insurance is unaffordable, and therefore, that
9 creates an irreparable harm because it can never be remedied,
10 neither Ms. Jach nor Ms. Ramber indicated they could not
11 afford to buy health insurance. They might not have been able
12 to buy a level of insurance or the Cadillac coverage that is
13 being provided to them by the City of Kalamazoo, but there
14 are many other individuals who are impacted by this statute
15 who are in the identical situation who are not same-sex
16 partners, who are opposite-sex partners, or have other
17 relationships that we have already discussed and identified
18 for the Court that have received or are impacted in the same
19 way as the Plaintiffs in this case.

20 In addition, there are any number of individuals in
21 today's society who are unable to purchase insurance of any
22 amount, unlike the Plaintiffs who testified here today. This
23 Court, I believe, would have to conclude that as a matter of
24 law the denial of health coverage by a public employer or by
25 virtually any employer constitutes irreparable harm, and that

1 clearly, clearly cannot and should not be the case, because
2 then the Court would, in effect, be recognizing a fundamental
3 right to the provision of health coverage, which clearly is
4 not supported either under the due process analysis or the
5 equal protection analysis presented by the Plaintiffs here.

6 Additionally, your Honor, with respect to the balance
7 of equities, the motivation of public employers for purposes
8 of providing these benefits is clearly irrelevant to this
9 analysis. Public employers are creatures of the State. The
10 State governs and gives them what authority it wants them to
11 have or develops and the State can change that authority.
12 It's not bound in any way to leave in place any particular
13 authority, any particular financing, any particular program
14 that it extends to these local units of Government.

15 Now, the fact that the Plaintiffs are motivated --
16 or I'm sorry -- the Plaintiffs' employers are motivated by a
17 sense of needing to provide these to their employees to keep
18 them, to keep good employees, that's certainly understandable,
19 or to motivate others to be able to attract quality employees,
20 that's certainly understandable, too, but that isn't different
21 than any other employer in the State of Michigan, whether
22 public or private or at any level of public employment in
23 terms of the benefits that might be provided. And it
24 certainly isn't sufficient to tip the balance of interests
25 here in the Plaintiffs' favor as opposed to the preservation

1 of financial -- of monies in today's situation and status with
2 many of these public employers.

3 For example, the City, or the Ann Arbor Public
4 Schools are having difficulty with their budgets and what --
5 if they aren't spending money on providing benefits to other
6 eligible adults, whether same sex or opposite sex or whatever
7 the relationship, that money can be spent somewhere else. And
8 that's clearly the point here and that's the balance. That's
9 the point of the fulcrum that we're talking about, and those
10 are the savings and those are the interests that the State has
11 which clearly outweigh the issuance or the balance of harms to
12 the Plaintiffs here, and clearly fail to support Plaintiffs'
13 analysis, the issuance of a preliminary injunction, where
14 Plaintiffs won't even be losing their benefits until
15 December 31st. And this is August 7th.

16 And I understand it's going to take some time for
17 the Court to render a decision and issue an opinion in this
18 case, but certainly the time frame that we have here does not,
19 at this point, at this point, justify the issuance of a
20 preliminary injunction based on the facts and the records
21 extant.

22 THE COURT: Thank you.

23 Any follow-up, Ms. Goad?

24 MS. GOAD: Yes, your Honor.

25 Looking first to the question of timing and imminence

1 of irreparable harm, as I have explained before, the Plaintiff
2 families and other similarly-situated families are already
3 enduring both the constitutional injury threat, as well as
4 the financial and emotional stress, and in some cases are
5 having to rearrange their family lives in order to address the
6 impending loss of affordable health coverage. Barbara Ramber
7 and JoLinda Jach spoke to that.

8 I also wanted to mention, your Honor, we attempted
9 to submit supplemental declarations last week from another
10 example of an affected couple, having just heard from them
11 quite recently. This is a couple, Kelli and Stacey Weller,
12 one of whom is a teacher at the West Bloomfield School
13 District. The teachers contract is up at the end of August,
14 so Kelly Weller is scheduled to lose her benefits when that
15 contract renews at the end of August.

16 THE COURT: They are not named Plaintiffs, is that
17 correct?

18 MS. GOAD: That is correct, your Honor. But that
19 goes to my previous point about the appropriate scope of
20 relief extending to all similarly-situated families.

21 The District Court in the Collins v Brewer case,
22 which, as I have noted, there are differences and this is in
23 some ways an easier case, but some of the central issues were
24 the same, and that injunction was entered in the summer, in
25 advance of an anticipated loss of coverage at the end of the

1 year.

2 Given the fulsome report that we have presented, it
3 would not seem appropriate to delay entry of injunctive relief
4 simply because the date for which some named Plaintiffs will
5 be losing coverage has not yet arrived. And Michelle Johnson
6 having already lost coverage, of course, further goes to the
7 appropriate timing.

8 On the point about some other people lacking health
9 insurance and some people being able to afford other health
10 insurance options, Plaintiffs respectfully submit that that
11 is irrelevant. The issue here is discriminatory denial of
12 benefits where employers have voluntarily made them available.

13 Plaintiffs are not seeking to compel any other
14 employer to create an OQA program, only to secure the
15 continued existence of those that public employers have
16 chosen to establish.

17 And Defendant's argument addressed the notion that
18 programs had been extended by the State to other public
19 employers, which is not the case. Programs were entirely
20 within the purview of local employers. The existence of such
21 a program or the existence of any family benefits program for
22 employees is not something the State controls. It's not
23 something that goes into the State's formula for funding
24 localities.

25 More general, neutral, appropriate formulas for

1 controlling the costs do go into things like the Economic
2 Vitality Incentive Program, but that's conceptually different
3 from discriminatory denial of benefits to the few.

4 Finally, on the question of the public interest and
5 whether it's relevant that the public employers of these
6 Plaintiffs have stepped up to articulate their reasons, I
7 would submit that the feelings of the Deputy Superintendent
8 of Ann Arbor Public Schools, the City Manager of Kalamazoo,
9 the Controller of Ingham County, and the President of
10 Kalamazoo Valley Community College are relevant to assessing
11 the public interest. But the public interest is always harmed
12 where unconstitutional State action is being allowed to
13 continue. So that's our primary basis for arguing that the
14 public interest favors an injunction.

15 Further, the State has not been able to articulate
16 any meaningful harm it is incurring from the existence of this
17 Act -- excuse me -- from the injunction of this Act, thus,
18 they have made no showing that a public interest would not
19 favor the injunction.

20 THE COURT: Anything further?

21 Ms. Goad, I say, anything further?

22 MS. GOAD: No, sir.

23 THE COURT: Yes.

24 MS. NELSON: Your Honor, would you care for briefing
25 on the injunction, on the scope of the injunction issue?

1 Because I believe Kowalski versus Tesmer resolved that issue
2 for the Court.

3 THE COURT: No, I don't need any additional briefing.

4 MS. NELSON: Thank you.

5 THE COURT: Mr. Knight, did you have something else?

6 MR. KNIGHT: I'm sorry. I just was going to offer to
7 do that, if you would like briefing on this issue of the scope
8 of the injunction.

9 I think Ms. Goad said earlier that we had addressed
10 it. I don't think we fully addressed that issue in the brief.
11 It is true that the Diaz case actually issued a broader
12 injunction than Ms. Goad has talked about, but we could
13 certainly brief that issue if your Honor would like us to.

14 THE COURT: Well, you know, I'm -- I'm not certain
15 as to the direction I'm going with this case yet, but it seems
16 to me that if your arguments are not persuasive with respect
17 to a facial challenge, the as-applied challenge, I don't know
18 that it would help you that much under the circumstances, so
19 as far as the scope of the injunction is concerned, I don't
20 think I need additional briefing from you on that point.

21 MR. KNIGHT: There is case law and we do have --
22 we have researched this issue. There is case law for
23 as-applied challenges where the relief was broader than just
24 the Plaintiffs; that is, if there was a class of people who
25 were affected in the same way because of an unconstitutional

1 statute, the courts have, in many other cases, they have ruled
2 that it's unconstitutional as applied to all people of that
3 sort.

4 THE COURT: Right. I get the sense that both
5 sides have something else to say on this, so under those
6 circumstances, I will permit you each to file simultaneous
7 supplemental briefs not to exceed five pages on the scope of
8 the relief.

9 MR. KNIGHT: Okay. Thank you, your Honor.

10 THE COURT: And you can do that by the 21st.

11 MR. KNIGHT: That's fine.

12 THE COURT: All right. Other than that, then, the
13 matter is submitted. I will get you a written decision.
14 Thank you for your arguments, Counsel.

15 MS. GOAD: Thank you, your Honor.

16 THE COURT: Recess court.

17 MS. NELSON: Thank you, your Honor.

18 THE CLERK: All rise. Court is now in recess.

19 (Proceedings adjourned at 3:06 p.m.)

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CERTIFICATE OF COURT REPORTER

As an official court reporter for the United States District Court, appointed pursuant to provisions of Title 28, United States Code, Section 753, I do hereby certify the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

s/ Rene L. Twedt
RENE L. TWEDT, CSR, RMR, CRR
Federal Official Court Reporter