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

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GOVERNOR RICK SNYDER'S *CORRECTED* MOTION TO DISMISS

Governor Rick Snyder moves this Court to dismiss Plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P 12(b)(1) and (6) for the following reasons. The Court should abstain from exercising jurisdiction over this case; certain Plaintiffs lack standing; certain of claims are not ripe and should be dismissed; the Complaint

otherwise fails to state a claim upon which relief may be granted and the undisputed facts compel judgment for Governor Snyder.

Defense counsel sought concurrence in this motion pursuant to L.R. 7.1(a). Concurrence was denied.

Governor Rick Snyder prays the Court grants this motion for the reasons more fully set out in the accompanying Brief; enters its Order dismissing this complaint with prejudice; and enters its judgment for Defendant.

Respectfully submitted,

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Dated: March 5, 2012

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BRIEF IN SUPPORT OF GOVERNOR RICK SNYDER'S *CORRECTED* MOTION TO DISMISS

TABLE OF CONTENTS

Page

Table of Contents i

Concise Statement of Issues Presented iii

Controlling or Most Appropriate Authority iii

Statement of Facts 1

Introduction 4

Argument 6

I. The Court should abstain from exercising jurisdiction and dismiss certain Plaintiffs' because they either lack standing, and certain claims because they are not ripe for adjudication. 6

A. The Court should abstain from exercising jurisdiction. 6

1. PA 297 addresses policy problems of substantial public interest transcending the results of this case. 7

2. Federal review would disrupt the State's coherent public policy. 9

B. The Plaintiffs lack standing to challenge PA 297. 10

1. Plaintiffs have not set forth a cognizable injury in fact. 11

2. Plaintiffs cannot show a causal relationship between any injury they have sustained and PA 297. 11

3. A favorable decision will not likely redress an injury sustained by Plaintiffs. 12

4. Plaintiffs do not satisfy the requirements of prudential standing to assert these claims on behalf of their partners. 12

C. Plaintiffs' claims are not ripe. 13

II. Plaintiffs' due process claim fails as a matter of law because there is no fundamental right to public employer provided health insurance and PA 297 does not burden Plaintiffs' fundamental right to form and

sustain intimate family relationships. PA 297 is rationally related to a legitimate government interest. 15

III. PA 297 is rationally related to legitimate state interests treats Plaintiffs and all similarly situated public employees the same and without discriminatory animus, and does not infringe any constitutionality guaranteed right. Therefore, it does not violate equal protection. 22

Conclusion and Relief Requested 26

CONCISE STATEMENT OF ISSUES PRESENTED

1. The Court should abstain from exercising jurisdiction and dismiss certain Plaintiffs' claims because they either lack standing, and certain claims because they are not ripe for adjudication.

2. Plaintiffs' due process claim fails as a matter of law because there is no fundamental right to public employer provided health insurance and PA 297 does not burden Plaintiffs' fundamental right to form and sustain intimate family relationships. PA 297 is a rational related to a legitimate government interest.

3. PA 297 is rationally related to legitimate state interests and treats Plaintiffs and all similarly situated public employees the same and without discriminatory animus, and does not infringe any constitutionality guaranteed right. Therefore, it does not violate equal protection.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Abbott Labs v. Gardner,
387 U.S. 136 (1967) 13, 14

Adrian Energy Assoc. v. Public Service Comm'n.,
481 F.3d 414 (6th Cir. 2007) 6

Ammex, Inc. v. Cox,
351 F.3d 697 (6th Cir. 2003) 14

Atkins v. Parker,
472 U.S. 115, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985). 17

Auerback v. Board of Education,
136 F.3d 104 (2nd Cr. 1998) 14

Bell v. Ohio State University,
351 F.3d 240 (6th Cir.2003) 17

Bivens v. Grand Rapids,
443 Mich. 391 (1993) 8

Bova v. City of Medford,
564 F.3d 1093 (9th Cir. 2009) 14

Brandywine, Inc v City of Richmond,
359 F3d 830, 834-35 (CA 6, 2004)........ 10

Cnty. of Sacramento v. Lewis,
523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)........ 16

Collins v. Harker Heights,
503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)........ 16

Concrete Pipe and Prods. of Cal. v. Constr. Laborers,
508 U.S. 602 (1993)........ 21

Crego v Coleman,
463 Mich 248; 615 NW2d 218 (2000)........ 20

Déjà vu of Nashville, Inc. v. Metro Gov't of Nashville & Davidson County,
274 F.3d 377 (6th Cir. 2001)........ 13

Doe v. Michigan Dept. of State Police,
490 F.3d 491 (6th Cir. 2007)........ 20

FCC v. Beach Communications, Inc.,
508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)........ 20

Graham v. Connor,
490 U.S. 386; 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989)........ 15

Kallstrom v City of Columbus,
136 F3d 1055 (CA 6, 1998)........ 16

Kowalski v Tesmer,
543 US 125, 129; 125 S Ct 564; 160 L Ed 2d 519 (2004)........ 10, 13

Lawrence v. Texas,
539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003)........ 18

LensCrafters, Inc. v. Robinson,
403 F.3d 798 (6th Cir.2005)........ 19

Lujan v Defenders of Wildlife,
504 US 555, 570, ; 112 S Ct 2130; 119 L Ed2d 351 (1992)........ 10

National Pride at Work v Granholm,
481 Mich. 56, 748 N.W.2d 524 (2008)........ 3

Nordlinger v. Hahn,
505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992),........ 20

Palko v Connecticut,
302 US 319, (1937) 16

Phillips v. Washington Legal Foundation,
524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) 17

Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) 16

Powers v. Ohio,
499 U.S. 400 (1991) 13

Prime Media, Inc v City of Brentwood,
474 F 3d 332, 337, 338 (CA 6, 2007).. 10

Quackenbush v. Allstate Ins Co,
517 U.S. 706 (1996) 6

Regan v. Taxation With Representation of Wash.,
461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) 19

Reno v. Catholic Soc. Servs., Inc.,
509 U.S. 43 (1993) 13

Rental Property Owners Ass'n. of Kent Co. v. City of Grand Rapids,
455 Mich. 246 (1997) 8

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208 (1974) 11

Summers v. Earth Islan Inst.,
555 U.S. 488 (2009) 11

Taunt v. General Retirement System,
233 F.3d 899 (6th Cir. 2000) 8

U.S. v. Hays,
515 U.S. 737 (1995) 11

United States v Green,
654 F3d 637 (CA 6, 2011)... 23

United States v Moore,
543 F3d 891 (CA 7, 2008)... 23

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 21

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,
454 U.S. 464 (1982) 11

Viculin Civil Service Comm,
386 Mich 375; 192 NW2d 449 (1971) 25

Warth v Seldin,
422 US 490, 500; 95 S Ct 2197; 45 L Ed2d 343 (1975) 10, 12

Whitmore v. Arkansas,
495 U.S. 149 (1990) 11

Williamson v. Lee Optical Co.,
348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 21

Ysursa v. Pocatello Educ. Ass'n,
555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) 19

STATEMENT OF FACTS

2011 PA 297 (PA 297) was signed into law by Governor Snyder, on December 22, 2011. PA 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.
>
> M.C.L.A. 15.583
>
> 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.
>
> M.C.L.A. 15.584

The legislative analyses of PA 297 support that it was passed for both social and economic policy reasons (Motion Ex 1A-D).

The Plaintiffs identify themselves as four distinct same-sex couples who have been in committed relationships for between 8 and 25 years, and generally as "domestic partners" (R. 9, First Amended Complaint, ¶¶ 8, 16, 23, 30, 38, and 46).

Plaintiffs Bassett, Ways, Jach, Bloss, and Miller are lesbian and gay public employees (*Id.* at, ¶ 2). Plaintiffs Kennedy, Breakey, Ramber, Ascheri, and Johnson are, respectively, same-sex domestic partners of the public employee Plaintiffs (*Id.* at, ¶ 2). Each of the Plaintiff couples claims to have had health insurance provided

by a public employer that extended coverage to their domestic partners of the employee prior to the passage of PA 297. (*Id.* at, ¶ 2) Only Plaintiff Johnson claims to have lost her health insurance since the passage of PA 297 (*Id.* at, ¶ 52).

Plaintiffs Kennedy, Breakey, Ramber, and Ascheri allege that they will lose their health insurance if PA 297 remains in effect (*Id.* at, ¶¶ 19, 27, 35, and 43) though they do not specify when they will lose their health insurance. At least, with respect to Plaintiffs Kennedy and Breakey, who receive their benefits through the Ann Arbor Public Schools, it may be years before PA 297 could impact the collective bargaining agreement that covers their partners, Bassett and Ways (Motion Ex 2, 12/17/2011 Ann Arbor News article).[1] Plaintiffs Bassett, Ways, Jach, Bloss, and Miller do not allege that they are in any danger of losing their health insurance as a consequence of the passage of PA 297.

By way of providing some background and context to their Complaint, Plaintiffs assert that prior to 2004 "a number" of public employers provided family health benefits to same-sex domestic partners. (*Id.* at, ¶ 61) In 2004, the Michigan Constitution was amended to add Mich. Const. 1963, Art. 1, §25, which provides that 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." (*Id.* at, ¶ 62).

The Michigan Supreme Court affirmed that Art. 1, §25 prohibits public employers from providing benefits to same-sex domestic partners that were defined

[1] See, http://heritage.com/articles/2011/12/17/ann_arbor_journal/news/doc4eed14ef6a31b414455863.txt?viewmode=fullstory

in terms of their gender and lack of close blood connection. *National Pride at Work v. Granholm*, 481 Mich. 56 (2008). (*Id.* at, ¶ 65).

Plaintiffs claim that, in light of the *National Pride* decision, "some" public employers revised their health insurance policies to provide benefits that did not run afoul of Art. 1, §25. (*Id.* at, ¶ 66) The essence of the revisions was to provide coverage to another "qualified adult" and the relationship need not be of an "intimate nature". All that was required was evidence of a shared residence and in some cases "financial interdependence." (*Id.* at, ¶ 67) The benefit is extended to both opposite-sex and same-sex domestic partners. (*Id.* at, ¶ 1) This benefit is also extended to individuals who live with and share finances with employees regardless of the nature of the relationships. (*Id.* at, ¶ 3) Plaintiffs claim that they are covered under such public employer sponsored plans that will be impacted by PA 297. (*Id.* at, ¶¶ 3 and 4)

Plaintiffs also claim that PA 297 "singles out gay and lesbian public employees and categorically denies them, and only them, the ability to obtain employee health insurance benefits for" their domestic partners. (*Id.* at, ¶ 74) Plaintiffs acknowledge, however, that PA 297 does not deny health benefits to a gay or lesbian domestic partner that is claimed as a dependent of the public employee on the employee's federal tax return. (*Id.* at, p. 15, fn 1, and ¶ 76) Plaintiffs also implicitly acknowledge that other individuals who are not gays or lesbians, will lose coverage currently provided to "other eligible adults" as a consequence of PA 297. (*Id.* at, ¶¶ 1, 3, 93, 94)

Plaintiffs claim that the passage of PA 297 was motivated by an anti-gay bias. (*Id.* at, ¶¶ 77 and 79) Plaintiffs further claim there is no legitimate government interest in the restrictions imposed by PA 297. (*Id.* at, ¶¶ 85-104) But significantly, Plaintiffs acknowledge that PA 297 will save the State money. They simply challenge the amount the State will save and the methods used to calculate those potential savings. (*Id.* at, ¶¶ 86-90)

Plaintiffs also devote a considerable part of their complaint to challenging the wisdom of PA 297 and asserting that it is bad economic and social policy. (*Id.* at, ¶¶ 91-102) For instance, Plaintiffs allege that, nationally 33% of state and local government workers have access to health care benefits for their unmarried domestic partners (whether of the same or opposite-sex). (*Id.* at, ¶ 99) Yet Plaintiffs identify only 10 public employers in Michigan (out of hundreds, if not thousands) that offer the benefit. (*Id.* at, ¶ 68)

INTRODUCTION

This lawsuit challenges the State's legitimate exercise of authority over its subordinate units of government by defining the scope of certain employment benefits that may be offered to public employees. PA 297 limits the benefits a public employer may provide by prohibiting medical benefits or other fringe benefits for an individual currently residing in the same residence as a public employee. M.C.L. 15.583. Plaintiffs are same-sex couples, and one of each couple, works for a public employer who provides medical benefits to domestic partners. They allege

PA 297 denies due process and equal protection to same-sex domestic partners by prohibiting public employers from providing medical or other fringe benefits.

PA 297 is but one piece in a total 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. For example, the Legislature expanded Emergency Manger powers over labor contracts, employee compensation and fringe benefits; made significant changes to the State employees' retirement system; required other state and school employee contributions to the cost of retirement health care; and imposed caps on a public employer's contributions to publicly funded health insurance for employees.

In this context, PA 297 is rationally related to the State's regulation of public employers and public employees and is constitutionally sound. It does not infringe on any constitutionally guaranteed rights. It does not burden Plaintiffs' fundamental rights to form and sustain relationships. It treats similarly situated public employees equally and without discriminatory animus.

While this policy means that a public employee's unmarried domestic partner, whether opposite-sex or same-sex, is not provided medical benefits, with some exceptions, the proper forum to make arguments seeking to restructure public employer benefits is in the State Legislature – not this Court.

ARGUMENT

I. The Court should abstain from exercising jurisdiction and dismiss certain Plaintiffs' claims because they either lack standing, and certain claims because they are not ripe for adjudication.

A. The Court should abstain from exercising jurisdiction.

Abstention involves "careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action.'" *Quackenbush v. Allstate Ins Co*, 517 U.S. 706, 728 (1996) (citing *Burford v. Sun Oil Co*, 319 U.S. 315, 334 (1943)). A federal court clearly has the authority to decline to exercise its jurisdiction when "asked to employ its historic powers as a court of equity." *Id.* at 717. The Court should abstain from exercising its jurisdiction over these claims for declaratory and prospective injunctive relief under the *Burford* abstention doctrine. *Burford*, *supra*.

The *Burford* abstention doctrine prevents federal courts from exercising jurisdiction in two relevant situations:

- first, where "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case" exist;
- second, where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Adrian Energy Assoc. v. Public Service Comm'n., 481 F.3d 414, 421 (6th Cir. 2007). Both situations apply to this case.

1. PA 297 addresses policy problems of substantial public interest transcending the results of this case.

Unquestionably, difficult questions of state law bearing on policy problems of substantial public import are at issue here. The challenged statute is one of a number of legislative acts adopted over the past two years to address the severe financial situation facing the State and many of its local governments and school districts:

- 2011 PA 4, M.C.L. 141.1501, *et. seq*. the Local Government and School District Fiscal Accountability Act, expands 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 PA 264, M.C.L. 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, M.C.L. 38.35, required state employees to contribute 3% of their annual salary to the cost of retirement health care benefits;

- 2010 PA 135, M.C.L. 38.1343e, required public school employees to contribute 3% of their annual salary to the cost of retirement health care benefits;

- 2011 PA 152, M.C.L. 15.561, imposes caps on public employer contributions to publicly funded health insurance for public employees.

- 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 PA 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.

The State, as sovereign, addresses such matters of public concern and importance, in part, through legislation defining the power and authority of its local governments. These local governments, including school districts and other state educational institutions, derive their power and authority only from the State. *Bivens v. Grand Rapids,* 443 Mich. 391, 397 (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,* 455 Mich. 246, 566 (1997)).

While Plaintiffs' case challenges PA 297, it effectively presents a broader more generalized grievance relating to Plaintiffs' inability to marry in Michigan. Const. 1963, Art. I, § 25; *National Pride at Work v. Governor,* 481 Mich. 56 (2008). Plaintiffs effectively seek a broader ruling than simply the constitutionality of this challenged legislation. Indeed, prior to the adoption of PA 297, the provision of medical benefits to the domestic partners of public employees was within the public

employer's discretion. Yet, only 10 out of the hundreds of public employers in Michigan provided such benefits. (R. 9, ¶ 68). But, those other public employers were not sued for failing to extend medical benefits to domestic partners under federal constitutional theory. PA 297 simply extinguishes the public employer's discretion and prohibits these benefits. The underlying issue here is more than the limitation of the public employer's discretion to offer domestic partner benefits. Rather, a ruling favorable to Plaintiffs here will be used as a sword—first to impose limitations on Michigan's marriage amendment as interpreted by the Michigan Supreme Court, and second, to impact the broader public by requiring all public employers to provide domestic partner benefits, even where none were provided before PA 297. Unquestionably, these "policy problems of substantial public interest" transcend the results in this case. This substantial public interest makes this not only a unique state issue but also an issue unique to this State. Thus, the first *Burford* "scenario" is met.

2. Federal review would disrupt the State's coherent public policy.

The second *Burford* scenario is also met. Federal review in this case would disrupt state efforts to "establish a coherent policy with respect to a matter of substantial public concern." Absent state direction, public employers have addressed the issue of domestic partner benefits inconsistently. Among the 10 public employers providing this benefit, even the qualifying criteria vary widely. (R. 1, Complaint, Ex. B, C, D) PA 297 establishes a coherent policy, as part of a wider public concern expressed in Const 1963, Art. I §25, and more specifically as part of

the overall legislative scheme of cost control and regulating public employee benefits.

These matters are uniquely suited to state regulation and control and not suitable to federal court control. The *Buford* abstention doctrine certainly compels the Court to abstain from exercising jurisdiction in this case.

B. The Plaintiffs lack standing to challenge PA 297.

Standing is "'assessed under the facts existing when the complaint is filed.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570, n4 (1992). To meet the requirements of Art. III standing and invoke federal court jurisdiction, a plaintiff must establish: (1) an injury in fact, meaning an invasion of a legally-protected interest that is concrete, particularized, and actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan,* 504 U.S. at 560-561; *Brandywine, Inc v. City of Richmond*, 359 F3d 830, 834-35 (6th Cir. 2004).

A second prong of this inquiry involves the doctrine of prudential standing – a judicially created doctrine relied on as a tool of "judicial self-governance." *Warth v. Seldin,* 422 U.S. 490, 500; 95 S Ct 2197; 45 L Ed2d 343 (1975). Prudential standing requirements preclude litigation in federal court "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," or where instead of litigating "his own legal rights and interests, 'the plaintiff instead purports to rest his claim to relief on the legal rights or

interests of third parties.'" *Prime Media, Inc. v. City of Brentwood,* 474 F.3d 332, 337, 338 (6th Cir. 2007); *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004).

Plaintiffs Kennedy, Breakey, Ramber and Ascheri are currently receiving medical benefits through their respective partner's public employer. Thus these Plaintiffs and their employed partners fail to meet these standing requirements in all respects.

1. Plaintiffs have not set forth a cognizable injury in fact.

Plaintiffs, except Miller and Johnson, fail to plead facts establishing an injury in fact that is concrete, objective and palpable. *Lujan,* 504 U.S. at 560, 561; *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990). Without this injury in fact, the court has nothing to address and no "real need to exercise the power of judicial review to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 221 (1974). Absent this "real need" allowing the court to oversee legislative or executive action "would significantly alter the allocation of power … away from a democratic form of government." *Summers v. Earth Islan Inst.,* 555 U.S. 488, 493 (2009).

2. Plaintiffs cannot show a causal relationship between any injury they have sustained and PA 297.

Federal courts should refrain from "adjudicating abstract questions of wide public significance which amount to generalized grievances." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 474-475 (1982). Even a "generalized grievance against allegedly illegal

government conduct" is insufficient for standing. *U.S. v. Hays,* 515 U.S. 737, 743 (1995). Except for Miller and Johnson, Plaintiffs demonstrate no immediate, specific injury and no causal relationship sufficient to establish standing to challenge PA 297. None of these Plaintiffs have lost benefits. No facts are pled indicating when their medical benefits will terminate. No facts are pled establishing that termination of these benefits is or will be related to PA 297. These benefits could end because their partner changes jobs, is laid off or terminated. These benefits could end because the partners separate, or the domestic partner qualifies as a dependent.

3. A favorable decision will not likely redress an injury sustained by Plaintiffs.

Because Plaintiffs have not sustained an injury in fact directly traceable to PA 297, they cannot meet this third element necessary to establish Art. III standing—no injury, no causation, no redressability, no standing.

4. Plaintiffs do not satisfy the requirements of prudential standing to assert these claims on behalf of their partners.

To the extent any one Plaintiff has Art. III standing, that Plaintiff cannot assert claims on behalf of others to challenging PA 297. Generally a party must "assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth,* 422 U.S. at 499. This prudential requirement assures the "appropriate incentive to challenge … governmental

action." *Id.* at 500. It also prevents courts from deciding abstract questions of wide public significance more appropriately left for other forums. *Id.*

The Supreme Court has not treated this rule of prudential standing as absolute. It recognizes the need to grant third party standing to assert the rights of another may exists in certain circumstances. *Kowalski,* 543 U.S. at 129, 130. The Supreme Court has limited this exception by requiring the party seeking third party standing show, 1) a "close" relationship with the person who possesses the right; and, 2) a "hindrance" to the possessor's ability to protect his own interests. *Id.* at 130, citing *Powers v. Ohio,* 499 U.S. 400, 411 (1991). Even though Plaintiffs may meet the first requirement, they do not and cannot meet the second. There is no hinderance to any Plaintiffs' ability to protect his or her own interests. They are parties to this action and have the opportunity to assert their own claims in the concrete manner required by Art. III.

Thus, these Plaintiffs have not established their standing to bring these claims and should be dismissed.

C. Plaintiffs' claims are not ripe.

The concept of ripeness is closely related to the standing requirement, both being drawn from Article III limitations on and prudential considerations for refusing jurisdiction. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n 18 (1993). The doctrine of ripeness is meant to "avoid [] . . . premature adjudication." *Abbott Labs v. Gardner*, 387 U.S. 136, 148-149 (1967). To avoid premature adjudication, the courts "require[] that the 'injury in fact be certainly impending.'" *Déjà vu of*

Nashville, Inc. v. Metro Gov't of Nashville & Davidson County, 274 F.3d 377, 399 (6th Cir. 2001) (internal citation omitted).

"The ripeness inquiry arises most clearly when litigants seek to enjoin the enforcement of statutes, regulations, or policies that have not yet been enforced against them." *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003). In deciding whether a case is ripe, courts look to the following considerations: the hardship to the parties of withholding court consideration and the fitness of issues for judicial decision. *Abbott Labs*, 387 U.S. at 149. The more speculative and uncertain the harm, the less likely it is that review will be granted. These considerations compel the conclusion Plaintiffs' claims are not ripe for review.

Although PA 297 prohibits public employers from providing medical benefits to their employees' domestic partners, a ripe claim is dependent on the actual cessation of benefits. No concrete injury occurs until that time. Any claimed injury now is speculative and uncertain. For example, medical benefits would not be lost, if the domestic partner qualified as "a dependent of the employee, as defined in the internal revenue code of 1986." M.C.L. 15.583(b).

Further, the loss of medical benefits may not be attributable to PA 297. The Plaintiff couples may separate before the cessation of benefits. The public employee Plaintiff may change jobs, retire, or be laid off or terminated before the cessation of benefits. This reasoning has been adopted in other employee benefits cases dismissed because the claim was not ripe for adjudication. See, e.g., *Auerbach v. Board of Education,* 136 F.3d 104, 108-109 (2nd Cr. 1998); *Bova v. City of Medford,* 564 F.3d 1093, 1096-1097 (9th Cir. 2009).

Significantly, with the exception of Plaintiff Johnson, the Complaint does not indicate when each public employer's domestic partner medical benefit will cease under the requirements of PA 297. For example, Plaintiffs Kennedy and Breakey receive their benefits from the Ann Arbor School District. Yet, the collective bargaining agreement providing for those benefits was extended indefinitely in exchange for employee concessions before PA 297 was enacted. (Ex. 2) Section 3 of the Act does not apply until that contract "expires, or is amended, extended or renewed." M.C.L. 15.584. Additionally, the insurance coverage may not cease immediately—it may extend based on the coverage period.

These significant issues should compel the Court to abstain from exercising jurisdiction under the *Burford* abstention doctrine. Alternatively, the Court should dismiss these claims on standing and ripeness grounds.

II. Plaintiffs' due process claim fails as a matter of law because there is no fundamental right to public employer provided health insurance and PA 297 does not burden Plaintiffs' fundamental right to form and sustain intimate family relationships. PA 297 is rationally related to a legitimate government interest.

In any action brought under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. *Graham v. Connor*, 490 U.S. 386, 394 (1989). Here, Plaintiffs have attempted to plead a substantive due process claim based upon their assertion that PA 297's prohibition on providing domestic partner health benefits violates their fundamental rights and protected liberty interests in their private intimate conduct and family relationships with their same-sex domestic partners. But there is no fundamental right to public-

employer-provided health insurance for domestic partners of public employees. Nor does PA 297 burden Plaintiffs' fundamental right to form and sustain intimate family relationships.

The substantive component of the Due Process Clause protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Substantive due process protects an individual from state deprivation of constitutionally created rights for reasons so arbitrary, or by conduct so egregious, that it "shocks the conscience," regardless of the adequacy of the procedures used. *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998).

Those fundamental rights accorded substantive protection under the federal due process clause include matters related to marriage, family, procreation, bodily integrity, and directly related privacy interests. See, *e.g., Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847–849 (1992)*; Kallstrom v. City of Columbus*, 136 F3d 1055, 1062 (6th Cir, 1998). A fundamental right must be "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997). The United States Supreme Court has continuously expressed its reluctance to expand substantive due process through the recognition of new fundamental rights. "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field". *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992).

The "right" at issue here is not—as Plaintiffs contend— the private intimate conduct and family relationships of the Plaintiffs; rather the question is whether there is a fundamental right in public employer provided health insurance for the domestic partners of public employees. Insofar as public employment itself is not a fundamental right guaranteed by the substantive component of the Due Process Clause (see, generally, *Board of Regents v. Roth*, 408 U.S. 564, 577(1972)). Plaintiffs cannot seriously contend that health insurance provided as a fringe benefit of that employment is a constitutionally guaranteed fundamental right. Health insurance provided as an optional benefit to public employees is not "so deeply rooted in the Nation's history and traditions" as to be considered a fundamental right protected by due process.

Plaintiffs readily acknowledge that their claims to entitlement to domestic partner health benefits derive from their employment contracts—not the Constitution (First Amended Complaint, ¶ 2). It is well established that, at best, a property interest in a benefit may give rise to a procedural due process claim. *Id.,* at 577; see also *Phillips v. Washington Legal Found.,* 524 U.S. 156, 164 (1998). And most property interests warranting the protection of procedural due process may be substantively modified or abolished by the legislature. *Bell v. Ohio State Univ.,* 351 F.3d 240 (6th Cir.2003) relying on *Atkins v. Parker,* 472 U.S. 115, 129-31 (1985). But this is academic as Plaintiffs have not alleged a procedural due process claim.

Nor does PA 297 burden Plaintiffs' fundamental right to form and sustain intimate family relationships. Nothing in PA 297 infringes on Plaintiffs' right to engage in private, consensual sexual activity or any other privacy interest. The

only burden PA 297 places on Plaintiffs is an economic one—they will end up paying more for health insurance obtained from another source (R. 9, at ¶¶20, 27, 35, and 43). This is not a case where the State is intruding into Plaintiffs' personal and private life of in violation of the substantive reach of liberty under the Due Process Clause. This is very different than the Texas law criminalizing sodomy between consenting adult males that was struck down in *Lawrence v. Texas,* 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court concluded: "[T]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Lawrence,* 539 U.S. at 578. Plaintiffs here are free to maintain the same committed relationships that they had both before and during the time they were provided with domestic partner benefits. There is nothing in PA 297 that infringes on their liberty interests.

While the Complaint does not specify—except in the cases of Plaintiffs Bloss/Ascheri and Miller/Johnson—whether the Plaintiffs were couples prior to having domestic partner health insurance, it can be deduced that none of the Plaintiffs entered their committed relationships because their partners had such benefits. Johnson was not covered under Miller's insurance until August, 2011 (R. 9, ¶ 50). Bloss and Ascheri have been a couple longer than Bloss has been employed by Ingham County (R. 9, ¶¶ 37-38). The other Plaintiffs have not alleged that they have been covered by domestic partner benefits for 15 years or longer. It is clear that the availability of domestic partner benefits did not factor into Plaintiffs'

decisions to become committed-same-sex couples. And it would be implausible for Plaintiffs to assert that—as a result of PA 297—that they now will be forced to dissolve their commitments simply because one partner could not secure health benefits for the other.

Domestic-partner health benefits are relatively new and hardly universal. Indeed, Plaintiffs' Amended Complaint, ¶68, identifies only 10 public employers in Michigan (out of hundreds, if not thousands) that even offer the benefit. It cannot be fairly argued that gays and lesbians will be discouraged from forming and maintaining committed relationships because of PA 297. And while Plaintiffs have a liberty interest in forming and maintaining their personal relationships, the State does not have an obligation to affirmatively assist Plaintiffs in their pursuit of their liberty interests. In the context of a First Amendment claim, the Supreme Court has held, "While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . ." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009) citing (*Regan v. Taxation With Representation of Wash.,* 461 U.S. 540, 549 (1983)).

Because there is no fundamental right to public employer provided health insurance for domestic partners of public employees, and because PA 297 does not burden Plaintiffs' fundamental right to form and sustain intimate family relationships, PA 297 is evaluated utilizing a rational-basis standard of review. *LensCrafters, Inc. v. Robinson,* 403 F.3d 798, 806 (6th Cir.2005). Simply put, the

question is whether PA 297 is "rationally related to legitimate government interests." *Glucksberg,* 521 U.S. at 728. "This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances." *Doe v. Michigan Dept. of State Police*, 490 F.3d 491 (6th Cir. 2007). The Supreme Court has held that rational-basis review is satisfied "so long as there is a plausible policy reason" for the decision, *Nordlinger v. Hahn,* 505 U.S. 1, 11 (1992). It is "entirely irrelevant for constitutional purposes" whether the plausible reason in fact motivated the policymaker. *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). "Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice." *Crego v. Coleman*, 463 Mich 248, 260 (2000), Hence, the numerous allegations in the complaint attacking the wisdom, motive, or appropriateness of PA 297 are irrelevant (See, e.g., R. 9, ¶¶ 74-84, 91-102).

The State has a legitimate interest in reigning in the costs of public employee benefits. As set forth above, PA 297 is but one of a number of pieces of recent legislation negatively impacting public employee benefits in order to reign in public debt. And if PA 297 results in a loss of employer sponsored health benefits to any of these Plaintiffs, they will hardly be unique. A recent report from the Economic Policy Institute estimates that more than 1.25 million Michigan residents lost their

employer provided health insurance between 2000-01 and 2009-10 (Exhibit 3, 2/24/2012 Detroit News article).[2]

Plaintiffs do not contest that passage of PA 297 will save the State money (First Amended Complaint, ¶89). Instead, Plaintiffs argue that the savings gained through reduced health-care premiums are insignificant and more than offset by other negative economic consequences of the Act (See, e.g., ¶81). But it is irrelevant whether Plaintiffs think the Act is good public policy or economically sound. Moreover, legislation that "adjust[s] the burdens and benefits of economic life" is entitled to a "presumption of constitutionality." *Concrete Pipe and Prods. of Cal. v. Constr. Laborers,* 508 U.S. 602, 637 (1993) (quoting *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976)). To overcome that presumption Plaintiffs bear the burden of demonstrating "that the legislature has acted in an arbitrary and irrational way." *Id.* The burden of establishing such unreasonableness as to deny due process of law is not easily met. For the last half-century, courts have upheld challenged governmental acts unless no reasonably *conceivable* set of facts could establish a rational relationship between the regulation and the government's legitimate ends. *See Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955).

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[2] www.detroitnews.com/article/20120224/BIZ/202240417

III. PA 297 is rationally related to legitimate state interests and treats Plaintiffs and all similarly situated public employees the same and without discriminatory animus, and does not infringe any constitutionality guaranteed right. Therefore, it does not violate equal protection.

The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985). General legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes rational basis review – that is, if the classification drawn by the legislation is rationally related to a legitimate state interest. *Id.* at 440. Under this highly deferential standard, "the burden of showing a statute to be unconstitutional is on the challenging party, not the party defending the statute." *New York State Club Ass'n., Inc. v. City of New York,* 487 U.S. 1, 17 (1988). However, when legislation treats similarly situated groups disparately on the basis of a suspect classification – race, alienage, or national origin – or infringes on a fundamental right protected by the Constitution, the government bears the burden of establishing that the classification is narrowly tailored to serve a compelling governmental interest. *Cleburne,* 473 U.S. at 440. Here, as explained below, the rational review standard applies to this equal protection challenge. The burden, therefore, rests with the Plaintiff to establish that PA 297 is unconstitutional.

Plaintiffs model this equal protection challenge on *Collins v. Brewer,* 727 F. Supp. 2d 797 (D. AR. 2010), aff'd, *Diaz v. Brewer,* 656 F.3d 1008 (9th Cir. 2011). *Collins* challenged Arizona's 2008 amended Administrative Code, Sec. O, precluding healthcare coverage for state employees' domestic partners on equal protection grounds. The district court granted the plaintiffs a preliminary injunction, which was then appealed to the Ninth Circuit. Addressing the merits factor of the preliminary injunction test, the district court found that Section O was not discriminatory on its face, but as applied it "'unquestionably imposes different treatment on the basis of sexual orientation,' and makes benefits available on terms that are a legal impossibility for gay and lesbian couples." *Collins,* 727 F. Supp. 2d at 803. The Ninth Circuit affirmed this analysis concluding that since eligibility for health care coverage was limited to married couples, "different-sex couples wishing to retain their current family health benefits could alter their status – marry – to do so." *Diaz,* 656 F.3d at 1014. Both courts also rejected the State's stated rational basis of costs savings and reduced administrative burdens because the results were nominal and depended upon "distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review." *Collins,* 727 F. Supp. 2d at 803-805; *Diaz,* 656 F.3d at 1014.

Collins/Diaz decisions rest on fundamental errors in the equal protection analysis: first, that same-sex domestic partners are similarly situated to married employees; second, that opposite-sex couples wishing to retain their benefits may

change their status, yet same-sex couples cannot and, thus, never qualify for benefits. *Id.*

"Similarly situated" in this context means the individuals being compared are "identical in all relevant respects or directly comparable . . . in all material respects." *United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011) (citing *United States v. Moore*, 543 F.3d 891, 896 (7th Cir. 2008); *TriHealth*, *Inc v. Bd of Comms*, 430 F.3d 783, 790 (6th Cir. 2005)). 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 couples may *change their status* and qualify for benefits while same-sex couples cannot, is irrelevant to this analysis. At the time a domestic couple is excluded from benefits, neither couple—whether same-sex or opposite-sex is married. Further, it strains credulity to believe that a couple would marry simply to obtain health benefits, or would acquiesce to participation in a relationship they might not otherwise choose in order to qualify for the benefit.

This analysis does not recognize the distinct differences with this case. First, as alleged by Plaintiffs, approximately 10 public employers provided domestic partner benefits prior to enactment of PA 297. Applying the rationale of *Collins/Diaz,* those that did not do so logically violated the Equal Protection Clause. If PA 297 is found to be unconstitutional, such a decision, would likely then be used to force *all* public employers to provide such benefits a result completely contrary to the legislative aim of budget reduction. Second, Michigan's statute is but one of a number of legislative acts aimed at curbing local government costs and

restoring fiscal integrity and responsibility. Plaintiffs' allegations that PA 297 does not itself create large savings are irrelevant. This State and its local governments have faced and continue to face a long financial struggle. Any reduction in costs and administrative burden is a success.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis" it does not violate the Constitution simply because "in practice it 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)).

In this context of this case, Plaintiffs also fail to establish the requisite discriminatory animus under this equal protection analysis. To address this critical element, Plaintiffs rely principally on individual statements of a handful of legislators. These statements are not reflective of the Legislature's intent as a whole. Nor are they reflective of the Governor's intent in signing PA 297. Rather, when looked at in light of the overall legislative scheme developed over the past 2 years, PA 297 is a logical and cohesive part of the effort to address the fiscal insecurity of local governments. It is not singular and does not target same-sex couples. Indeed, several legislative enactments have addressed public employee employment and retirement benefits. Further, the Legislature recognized the limitations of PA 297 – that other constitutionally allocated powers might limit is application. PA 297 does not, for example, apply to the State itself because of the Michigan Civil Service Commission's plenary constitutional authority over

compensation for state employees. Const. 1963, art. 11, §5; *Viculin Civil Service Comm*, 386 Mich 375, 385 (1971).

Thus, Plaintiffs' claim fails as a matter law because they are not treated differently than similarly situated public employees; PA 297 is rationally related to a legitimate state interest; and, PA 297 is not motivated by discriminatory animus.

CONCLUSION AND RELIEF REQUESTED

Defendant Governor Rick Snyder asks this Court to grant this motion for the reasons presented above; enter its Order dismissing this complaint with prejudice; and, enter its judgment for Defendant.

Respectfully submitted,

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Dated: March 5, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such.

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