

**STATE OF MICHIGAN
IN THE COURT OF APPEALS**

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

Plaintiff-Appellee,

Court of Appeals No. 265870

Ingham County Circuit Court
No. 05-368-CZ

Hon. Joyce Draganchuk

v.

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

Defendant-Appellee,

and

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

Intervening Defendant-Appellant.

Brief of Amicus Curiae Michigan Family Forum in Support of Defendants

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Introduction

Appellees' argument that the Michigan marriage amendment may violate the state's equal protection clause fails to acknowledge the standard for an equal protection claim and is grounded on inapposite law from other jurisdictions. (See Appellees' Op. Br. at 36-40). First, Appellees make no effort to show that they are similarly situated to married couples, which is a prerequisite to an equal protection claim. Moreover, they base their claim on their alleged right to seek state recognition and benefits as a couple, not individuals, despite the well-settled rule that equal protection guards individual rights.

Appellees also erroneously equate Michigan's marriage amendment, which defines marriage and prohibits state recognition of spouse-like relationships like domestic partnerships, with Colorado's Amendment 2 that specifically targeted homosexuals and denied them even the general protections of the law. Michigan's law cannot plausibly be compared to Colorado's. Michigan's marriage amendment applies neutrally to homosexuals and heterosexuals, and does not prohibit any general protections of the law, or even the very benefits that Appellees seek. It merely prohibits state recognition of a marriage-like relationship. The state and its political subdivisions are free to grant employment benefits to Appellees, and all other unmarried individuals, as long as those benefits are not granted on the basis of their domestic partnership or other similar union.

Finally, Appellees attempt to analogize this case to a recent decision by the Alaska Supreme Court that required the state to give employment benefits to same-sex couples. That case, however, was based on Alaska's expansive equal protection and equal benefits clause, and was not constrained by an amendment like Michigan's marriage amendment prohibiting such

recognition. In short, that decision was based on very different law and facts, and is not helpful in analyzing the issues presented by this case.

I. Appellees' Do Not Meet the Threshold Requirements For An Equal Protection Claim.

As an initial matter, Appellees have failed to meet the threshold requirement of an equal protection claim by showing that they are similarly situated with married couples. Equal protection “requires that persons similarly situated be treated alike.” *Rose v. Stokely*, 258 Mich.App. 283, 295-96 (Mich. App. 2003). “The guarantee of equal protection does not require things that are different in fact or opinion to be treated as though they were the same. The courts have not applied the requirement of equal protection as mandating ‘absolute equality.’” *Id.* at 296; *see also Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942). Several courts have concluded that laws differentiating between unmarried and married couples do not merit equal protection review because unmarried couples, homosexual or heterosexual, are not similarly situated with married couples. *See, e.g., Hinman v. Dep’t of Pers. Admin.*, 167 Cal.App.3d 516 (Cal. App. 1985); *Phillips v. Wisconsin Pers. Comm’n*, 167 Wis.2d 205 (Wis. App. 1992); *Ross v. Denver Dep’t of Health & Hosps.*, 883 P.2d 516 (Colo. App. 1994). As these cases recognize, unmarried individuals are not similarly situated with married spouses in a variety of ways. For example, the law imposes manifest duties on married couples that are not imposed on unmarried couples. Absent Appellees proving that they are similarly situated with married couples, their equal protection claim can go no further. *See Dowerk v. Charter Tp. Of Oxford*, 233 Mich.App. 62, 73-74 (Mich. App. 1998).

A second prerequisite to an equal protection claim is a showing of a deprivation of an individual right. In order to establish an equal protection violation, Appellees are required to establish that they are treated unequally as individuals rather than couples. The Michigan

guarantee of Equal Protection is explicit, providing that “[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.” Michigan Const. Article I, Section 2 (emphasis added). As the Supreme Court long ago held, “[i]t is the individual who is entitled to the equal protection of the laws” *Missouri v. Canada*, 305 U.S. 337, 351 (1938); *see also Shelley v. Kramer*, 334 U.S. 1, 22 (1948) (“The rights created by the first sentence of the Fourteenth Amendment are, by its terms, guaranteed to the individual”).¹ Although courts look to see what class or group to which the law applies to determine the level of scrutiny, any claim to discrimination must be triggered by unequal treatment of an individual, not a couple. *Id.*

Appellee’s equal protection claim relates to the rights of couples, not to the rights of individuals. *See, e.g.,* Appellees’ Op. Br. at 37 (“the Amendment would bar government from even considering same sex couples’ claims that their relationship should be the basis for legal rights”). Appellees implicitly acknowledge that they can seek any right or benefit they desire as individuals. *Id.* Article I, § 25 (“marriage amendment”) simply prohibits them from seeking state recognition of their relationship, or offering benefits *based on that relationship*. But an equal protection claim based on a couple’s right absent discrimination against individuals is simply not cognizable.

II. *Romer v. Evans* Is Inapposite Because Colorado’s Amendment 2 Specifically Targeted Homosexuals and Denied Them General Protection of the Law.

Even assuming that Appellees have presented a valid equal protection claim, Appellee’s cannot reasonably compare Michigan’s marriage amendment with Colorado’s Amendment 2,

¹ The Michigan equal protection clause is applied in the same manner as the equal protection clause of the Fourteenth Amendment. *Doe v. Dept of Social Service*, 439 Mich 650, 671 (1992).

which was struck down by the Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996).

Amendment 2 specifically targeted homosexuals and prohibited any protection for homosexuals at any level of government. Because it specifically targeted homosexuals and removed all protection from them as a class, the Supreme Court found that it did not have a rational basis under the equal protection clause of the Fourteenth Amendment. *Id.* at 635.

A brief description of Amendment 2 illustrates the absurdity of Appellee's comparison between it and Michigan's marriage amendment. Amendment 2 "repeal[ed] existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation . . . [and] prohibit[ed] any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future." *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994). Amendment 2 withdrew any legal protection for homosexuals, and prohibited any law from being passed at any level of state government that gave protection or benefits to homosexuals. *Romer*, 517 U.S. at 627. That meant that Amendment 2 nullified and prohibited any legal protection for homosexuals in any public accommodations law, employment discrimination law, or any "specific legal protections in housing, sale of real estate, insurance, health and welfare services, private education, and employment." *Id.* at 629. Moreover, the Supreme Court concluded that the law deprived "gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings." *Id.* at 630. It withheld "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society . . . and imposes special disability on those persons alone." *Id.* at 631.

In stark contrast, Michigan's marriage amendment simply prohibits the state and its political subdivisions from equating unmarried couples with married spouses by giving benefits

to domestic partners based on their domestic partnership. It does nothing more. It does not target homosexuals. It does not prohibit homosexuals from seeking any rights or protections as individuals.² It does not nullify any existing protections for homosexuals, nor does it prohibit the Legislature from enacting future protections. Articles I, Section 25 cannot plausibly be compared to Colorado's Amendment 2. What it does is prohibit the legislature giving benefits to any unmarried *couple*, based on that couple's relationship, that it gives to a married couple. Unmarried individuals may still seek all the benefits that they desire. They simply may not seek them based on a spouse-like relationship like a domestic partnership. Indeed, many Michigan municipalities have broad protections for homosexuals, which are completely unaffected by the marriage amendment. *See e.g.*, Detroit Charter, Article II, Section 27-3-1 (prohibiting any employment discrimination on the basis of sexual orientation); Article IV, Section 27-4-1 (prohibiting sexual orientation discrimination in selling or leasing real estate).

Another important distinction is that Amendment 2 was challenged under the equal protection clause of the Fourteenth Amendment, not the state of Colorado's equal protection clause. Thus, under the supremacy clause, the Amendment could be struck down. *Romer*, 517 U.S. at 620. Conversely, the Appellees are asking this Court to nullify and impair the marriage amendment via the state's equal protection clause. But as the Michigan Supreme Court has held, "every provision [of the constitution] must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer County Clerk v. Lapeer Circuit Court*, 469 Mich. 146, 156 (Mich. 2003). Thus, the Michigan equal protection clause may not be used to nullify the state's marriage amendment. Instead, Michigan follows

² As the Attorney General notes, all the benefits that Appellees seek can be provided under Article I, Section 25, as long as they are not provided on the basis of the domestic partnership. Benefits could be provided, for example, on the basis of economic dependence. *See Attorney General Opening Brief* at 14, n. 13.

the general rule that when a specific provision conflicts with a general provision in the constitution, the specific provision controls. *McDonald v. Schinipke*, 380 Mich. 14, 19 (Mich. 1968). So even assuming that there is a conflict between the state's equal protection clause and the marriage amendment, the marriage amendment, as the more specific provision, controls.³

Finally, even assuming Appellees could make out a cognizable equal protection claim, they have not even attempted to meet their burden to show that Michigan's marriage amendment is not rationally related to a legitimate government interest. Michigan has determined that it is good public policy to reserve the benefits and status of marriage for married couples. They are not alone. Nearly every state in the country agrees with Michigan that it is a rational policy decision to promote and protect marriage by reserving the benefits and status traditionally given to marriage for married couples. See *Kavan Peterson, Fifty State Rundown on Same Sex Marriage Laws*, available at <http://www.stateline.org>. Court's have almost unanimously found that the state has a rational basis for doing so. See, e.g., *Morrison v. Sadler*, 821 N.E.2d 15, 25 n.13 (Ind. Ct. App. 2005) (noting that providing an incentive for couples to marry is a rational purpose of reserving special status and benefits for married couples). Thus, the policy interests at issue in this case are far greater than any state interest Colorado had in Amendment 2. Indeed, Michigan's policy decision is consistent with the vast majority of states that reserve the status and benefits of marriage for married couples.

III. Appellees' Reliance on the Alaska Supreme Court's Decision Is Misplaced.

Appellees' cite the Alaska Supreme Court's decision in *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Ala. 2005) in support of their claims, but offer nothing more than

³ This also distinguishes the district court's opinion in *Citizens for Equal Protection, Inc. v. Bruning*, 368 F.Supp.2d 980 (D.Neb. 2005) since that case challenged a state law under the federal constitution. In addition, the court found that Nebraska's law was broader than other amendments, including Michigan's. *Id.* at 1000.

a superficial recital of the Court's holding in that case. Even a cursory review of the case shows that it does not support the Appellee's claims. Several facts distinguish the Alaska case from this one.

First, and most importantly, the court's decision was based on Alaska's far more expansive equal protection clause. Alaska's equal protection clause states that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. Art. I, § 1. Thus, Alaska's equal protection clause "guarantees not only equal 'protection,' but also equal 'rights' and 'opportunities' under the law." *Alaska Civil Liberties Union*, 122 P.3d at 785. So while Michigan's equal protection clause tracks the federal model "the Alaska Constitution's equal protection clause affords greater protection to individual rights than the United State's Constitution's Fourteenth Amendment." *Id.* at n. 16 (citations omitted); *cf Doe v. Dept of Social Service*, 439 Mich 650, 671 (1992) (Michigan "equal protection clause was intended to duplicate the federal clause and to offer similar protection"). Not only is Alaska's equal protection clause far different from Michigan's, so is its level of scrutiny applied to rational basis review. "Alaska's Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be *substantial*." *Alaska Civil Liberties Union*, 122 P.3d at 791 (emphasis in original); *cf Phillips v. Mirac, Inc.*, 470 Mich 415, 434 (Mich. 2004) ("rational basis test considers whether the classification itself is rationally related a legitimate governmental interest") (citation omitted).

Second, unlike Michigan, the Alaska constitution does not contain an amendment that prohibits benefits from being extended to domestic partners based on their status as domestic partners. The Alaska Court acknowledged that a claim that the state's marriage amendment

violated Alaska’s equal protection clause would be unavailing because of the general rule that the “state equal protection clause cannot override more specific provisions in the Alaska Constitution.” *Id.* at 787. But because Alaska’s marriage amendment did not prohibit giving benefits to another domestic union, the Court did not have to apply that rule. In this case, however, Michigan has enshrined in its constitution the policy that only spouses can be given the benefits of marriage. As noted above, Michigan law holds that when a specific provision conflicts with a general provision in the constitution, the specific provision controls. *McDonald v. Schinipke*, 380 Mich. 14, 19 (Mich. 1968). In this case, even assuming a conflict between the equal protection clause and the marriage amendment, the more specific marriage amendment would control.

Simply stated, the Alaska Supreme Court analyzed much different facts under different law, which cannot reasonably be likened to the law and facts at issue in this case.

Conclusion

Appellees’ equal protection argument fails because they cannot meet the threshold requirement of an equal protection claim by showing they are similarly situated with married couples, or that their individual rights are affected by the marriage amendment. Instead of arguing within the framework of an equal protection claim under Michigan law, Appellees cite inapposite law from other jurisdictions. Amicus Curiae respectfully requests that this Court deny Appellees’ claims under Article I, § 2 of the Michigan Constitution.

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Respectfully submitted this ____ day of January, 2006.

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