THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Subject: SACUA Resolution on a Recent Michigan Supreme Court Decision

SACUA and Senate Assembly have long been concerned about the University's ability to attract and retain gay male and lesbian faculty. This concern became even more acute after Michigan's electorate, in 2004, adopted the Michigan Marriage Amendment, a strangely worded amendment with the incontestably laudable aim of "secur[ing] and preserv[ing] the benefits of marriage for our society and for future generations of children."

In early 2007 the Michigan Court of Appeals, in *National Pride at Work v. Granholm*, held that this amendment barred Michigan's public employers from providing health insurance benefits to their employees' qualified same-sex domestic partners. The University, recognizing that the loss of these benefits would have a severe impact on the quality of Michigan's faculty and staff, reacted with praiseworthy speed and ingenuity by establishing a substitute mechanism that gives health benefits to "other qualified adults" who meet a number of criteria, including sharing a primary residence with a faculty or staff member.

A final ruling on the amendment's interpretation, however, was up to the Michigan Supreme Court, which on May 7, in a 5-2 ruling, affirmed the Court of Appeals decision. The faculty's considerable disappointment and disquiet with this decision was reflected in a May 12 resolution that SACUA passed 6-1 and that was unanimously accepted by Senate Assembly members on May 19.

In the first instance, of course, our disapproval stemmed from the outcome. But a closer examination of the decision made this disapproval much, much stronger. The majority approached the language of this amendment as if that language was "unambiguous," and so to be interpreted through its plain language. But the wording of the marriage amendment ("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") was and is notoriously difficult to interpret, and indeed it has now received four "official" plain language interpretations (from the Attorney General and three courts), all of which are different in important respects, and none of which can be entirely reconciled with the others.

The difficulty, of course, is that when a court does not honestly recognize the presence of linguistic ambiguity in a legislative text, then its use of a plain language approach (excluding all extrinsic evidence of meaning) becomes no more than the imposition of a meaning on the text. The Supreme Court's opinion makes it abundantly clear that such an imposition did occur.

This decision is entirely of a piece with the Michigan Supreme Court's output in recent years — an output so poor in quality that, according to a recent University of Chicago study, this court is the worst state Supreme Court in the United States. Three criteria were used in the Chicago study: the productivity of each court, its degree of

internal political partisanship, and its influence in other states. Michigan's decisions are typically so cramped, inward-looking, and pedestrian that they enjoy little national esteem. The domestic partnership decision is also of this type, with no significant reference to the social implications of the decisions or to the developing national jurisprudence in this area. Further, the decision places us out of step with almost all other states, and it is already being used against us by our competitors. At least a few gay faculty members have already left the University or are now contemplating doing so.

We believe that the University has adequately protected the economic position of same-sex couples among its faculty and staff, and in a manner that is legally consistent with the Supreme Court's decision. Therefore the effects of this decision are, for now, largely confined to morale: a perception, both here and elsewhere, that this state does not welcome gay males and lesbians. There is much to reinforce this perception. Michigan still has a sodomy law, for instance, and it provides no statutory protection to gays and lesbians against housing and employment discrimination, nor against hate crimes. Unsurprisingly, Michigan has the second highest per capita incidence of hate crimes based on sexual orientation.

There is, probably, not much that the University can do about the present situation, apart from continuing its *amicus* role when other cases arise under the marriage amendment. To date, we have encountered nothing but understanding and support from the administration, and we are deeply grateful for their cooperation. But SACUA and Senate Assembly wish to stress the importance, for the future, of reinforcing the effort to explain to the public why reflexive "social agenda" measures like the Michigan Marriage Amendment have alarming consequences not only for the reputation of the University, but also for the economic viability of the state.

(Submitted July, 2008)

Regents' Bylaw 4.04. The Senate Assembly shall serve as the legislative arm of the senate…The assembly shall have power to consider and advise regarding all matters within the jurisdiction of the University Senate which affect the functioning of the University as an institution of higher learning, which concern its obligations to the state and to the community at large, and which relate to its internal organization insofar as such matters of internal organization involve general questions of educational policy.