IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2001

No. 20

STEVE TYMA, *et al.*

Appellants,

v.

MONTGOMERY COUNTY, MARYLAND,

Appellee.

Pursuant to a Writ of Certiorari to the Court of Special Appeals
On Appeal from the Circuit Court for Montgomery County, Maryland
(James C. Chapin, Judge)

BRIEF OF APPELLEE MONTGOMERY COUNTY, MARYLAND

Charles W. Thompson, Jr.
County Attorney
Marc P. Hansen
Chief, General Counsel Division
Edward B. Lattner
Associate County Attorney

Executive Office Building
101 Monroe Street, Third Floor
Rockville, MD 20850-2589
(240) 777-6700
Attorneys for Appellee

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STATEMENT OF THE CASE

Seeking to attract and retain qualified workers, Montgomery County joined the growing ranks of private and public employers extending benefits to their employees' domestic partners with the passage of the Employee Benefits Equity Act of 1999 ("the Act").[1] (E. 38-58) The Act extends to domestic partners many of the employment benefits available to County employees' spouses, such as health, leave, and survivor benefits.

Several individuals ("Tyma") filed suit in the Circuit Court for Montgomery County for a declaration that the Act was invalid and an order enjoining its implementation. (E. 21-37) The suit raised four grounds for the Act's invalidity: (1) the County did not have the authority to pass the Act; (2) the Act was preempted by federal law; (3) the Act conflicted with the State sodomy law; and (4) the Act was unconstitutionally vague. The trial court heard two days of oral argument on cross-motions for summary judgment and declared the Act valid. (E. 2-11) Tyma appealed to the Court of Special Appeals and filed a concomitant Petition for a Writ of Certiorari with this Court, which granted the Petition. Tyma has abandoned his sodomy and vagueness arguments on appeal and relies solely on the issues involving the County's authority and preemption.

QUESTIONS PRESENTED

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[1]IBM, Microsoft, Walt Disney, Capital Cities/ABC, Time-Warner, DaimlerChrysler, Ford, and General Motors are among the approximately 500 Fortune 1,000 companies that provide these employment benefits. *Crawford v. City of Chicago*, 710 N.E.2d 91, 99 (Ill. App. Ct.), *petition to appeal denied*, 720 N.E.2d 1090 (Ill. 1999). State and local governments in approximately 27 states and the District of Columbia also provide domestic partner benefits. Lambda Legal Defense and Education Fund, *Domestic Partner Benefits Listings*, at http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=21 (May 21, 2001).

I. May the County determine and fund its employees' benefits?

II. Does federal law preempt the County's authority to provide domestic partner benefits to its employees?

STATEMENT OF ADDITIONAL FACTS

The Act covers all benefits available to County employees' spouses, such as health (medical, dental, and vision), leave, and survivor benefits. It also provides benefits equivalent to those the County must provide to its employees' spouses and dependents under various federal laws. The County estimates the Act's annual cost between $100,000 and $483,000. (E. 28) The County's entire annual budget is almost $3 billion. The Act took effect March 3, 2000. (E. 38)

ARGUMENT

The County has the authority to determine what benefits it will extend to its employees. Contrary to Tyma's assertions, the Act does not create a marital relationship between domestic partners — it merely extends to domestic partners many of the employment benefits currently available to County employees' spouses. The Act does not address any of the issues associated with marriage, such as state or federal tax benefits; the ability to jointly adopt children; the right to alimony; or rights in property acquired during the relationship. Thus the Act is a local law under the Home Rule Amendment to the Maryland Constitution. Finally, federal laws that require employers to provide certain minimum levels of employment benefits do not preclude the County from extending greater benefits to its employees.

I. MONTGOMERY COUNTY MAY DETERMINE AND FUND ITS EMPLOYEES' BENEFITS.

A. The Express Powers Act Enables Montgomery County to Exercise Broad Authority in Extending Benefits to its Employees.

Article XI-A of the Maryland Constitution provides counties electing a charter form of government with a certain measure of independence from the State legislature by providing for the transfer, within well-defined limits, of certain legislative powers formerly reserved to the General Assembly. (Apx. 13) Ratified by the voters of this State in November 1915, Md. Const. art. XI-A, also known as the "Home Rule Amendment," was intended to secure to Maryland citizens "the fullest measure of local self-government" with respect to their local affairs. *State v. Stewart*, 152 Md. 419, 422, 137 A. 39, 41 (1927). Section 2 of the Home Rule Amendment mandates that the General Assembly expressly enumerate and delegate those powers exercisable by counties electing a charter form of government and, in 1918, the legislature enacted the Express Powers Act, Md. Ann. Code art. 25A (1998 Repl. Vol.), which endowed charter counties with a wide array of legislative and administrative powers over local affairs. Montgomery County became the first county to adopt a charter form of government by doing so in the November 1948 general election. *McCarthy v. Board of Education*, 280 Md. 634, 638, 374 A.2d 1135, 1137 (1977).

The broadest authority for local legislation exists in § 5(S) of the Express Powers Act, which is often referred to as the "general welfare clause" because it grants charter counties the power to legislate on matters not specifically enumerated elsewhere. (Apx. 19)

Montgomery Citizens League v. Greenhalgh, 253 Md. 151, 161, 252 A.2d 242, 247 (1969). Thus, in *Greenhalgh*, this Court relied upon § 5(S) to uphold Montgomery County's authority to enact a fair housing law when the Express Powers Act did not specify that power and explained that "[t]he broadest grant of powers customarily is to home rule Counties . . . and cases holding that a delegation was restricted or narrow are concerned almost always with delegations to municipalities that do not enjoy home rule." *Greenhalgh*, 253 Md. at 162, 252 A.2d at 247.[2]

This Court also has recognized the authority of a charter county to extend employment benefits where those benefits serve a public purpose. In *Snowden v. Anne Arundel County*, 295 Md. 429, 456 A.2d 380 (1983), a county law created a fund to reimburse the legal expenses of certain employees charged with a criminal offense arising out of the performance of their duties. Upholding the county's authority to enact the law under § 5(S), this Court explained that the law served a public purpose by enabling the county to recruit and retain qualified employees and maintain morale. *Snowden*, 295 Md. at 438, 456 A.2d at 385. The law, therefore, did not fall within the prohibition against the expenditure of county tax revenues for a private purpose contained in Md. Decl. Rights art. 15. (Apx. 19)

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[2]When reviewing County legislation in the past, the Court of Special Appeals similarly has relied upon § 5(S) as the enabling authority for County laws. *See Holiday Universal Club of Rockville, Inc. v. Montgomery County*, 67 Md. App. 568, 573-75, 508 A.2d 991, 994-95, *cert. denied*, 307 Md. 260, 513 A.2d 314 (1986) (public accommodation law); *Cade v. Montgomery County*, 83 Md. App. 419, 422-23, 575 A.2d 744, 745, *cert. denied*, 320 Md. 350, 578 A.2d 190 (1990) (towing law).

The same rationale allows Montgomery County to extend employment benefits to its employees, including domestic partner benefits, where those benefits serve a valid public purpose — recruiting and retaining qualified employees and promoting employee loyalty. The Montgomery County Council expressly found that amending the merit system law to provide domestic partner benefits "will significantly enhance the County's ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity." Montgomery County Code § 33-22(a). (E. 40) This is consistent with § 401 of the County's Charter, which authorizes the adoption of a merit system "to recruit, select, develop, and maintain an effective, non-partisan, and responsive work force."[3] (Apx. 20)

Upholding the Montgomery County law would be consistent with the example set by courts in several other jurisdictions that have upheld similar laws providing benefits to local government employees' domestic partners based on broad delegation of authority to local governments to do so. In Illinois, the intermediate appellate court upheld Chicago's domestic partnership law relying upon a state constitutional provision allowing a home rule unit "to regulate for the protection of the public health, safety, morals and welfare." *Crawford v. Chicago*, 710 N.E.2d 91, 96 (Ill. App. Ct.), *petition to appeal denied*, 720

[3]Tyma also attempts to restate the authority argument as a tax argument, claiming that the County cannot impose taxes or spend money to fund domestic partner benefits because that is an illegal purpose. But the question remains whether the County law is valid. In any event, the County enjoys "the power to tax to the same extent as the state has or could exercise said power within the limits of the county as a part of its general taxing power." 1990 Md. Laws ch. 707, codified at Montgomery County Code § 52-17. (Apx. 20) Moreover, the County does not levy any taxes specifically to fund employee benefits.

N.E.2d 1090 (Ill. 1999) (citing Ill. Const. art. VII, § 6(a)). Like Chicago, Montgomery County derives its authority to enact a domestic partner law from a general welfare clause. Similarly, the Colorado Court of Appeals upheld Denver's domestic partnership law because of a broad constitutional grant of "self-government in both local and municipal matters." *Schaefer v. City and County of Denver*, 973 P.2d 717, 720 (Colo. Ct. App. 1998) (citing Colo. Const. art. XX, § 6). Most recently, a Pennsylvania trial court upheld Philadelphia's domestic partnership ordinance for the same reason. *Devlin v. City of Philadelphia*, 48 Pa. D. & C.4th 86, 93-94 (C.P. Philadelphia Ct. 2000).

Only when an enabling statute expressly limits a local government's ability to grant employment benefits to its "employees and dependents" have courts in some jurisdictions invalidated similar laws. In Georgia, Florida, and Virginia, the courts found that the state enabling law did not authorize the extension of benefits to an employee's domestic partner unless the partner was financially dependent upon the employee.[4] Minnesota and Massachusetts have enabling laws that narrowly define the term "dependent" as referring to

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[4] *See Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997) (Georgia's Municipal Home Rule Act expressly limits local government's authority to provide employee benefits to "employees and their dependents;" the state supreme court approved an Atlanta ordinance extending benefits only to those domestic partners who were financially dependent upon their partners); *Lowe v. Broward County*, 766 So.2d 1199, 1208-10 (Fla. Dist. Ct. App. 2000) (Florida District Court of Appeal upheld a domestic partnership ordinance that, consistent with the state enabling law, extended benefits only to partners who were financially dependent upon the employee); *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000) (Virginia state law limits local government's authority to provide self-funded health benefit programs to employees "and their dependents;" the Virginia Supreme Court struck down Arlington County's domestic partnership law because benefits were not limited to a spouse, child, or financially dependent partner).

a spouse and unmarried minor children, and preclude the extension of benefits even to financially dependent domestic partners.[5] Courts in New York and Wisconsin, on the other hand, have construed the term "dependent" in those states' enabling laws the most broadly to include even financially independent partners within the protection of domestic partner laws.[6]

Montgomery County's domestic partnership law rests comfortably on the foundation of the Express Powers Act's general welfare clause. Moreover, the County's extension of

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[5]*See Lilly v. Minneapolis*, 527 N.W.2d 107 (Minn. App. 1995) (Minnesota state enabling law authorizing local governments to provide employee benefits to "employees and their dependents" defined dependents as the "spouse and minor unmarried children under the age of 18 years and dependent students under the age of 25 years actually dependent upon the employee." Because of these limiting definitions, the Minnesota Court of Appeals struck down a Minneapolis ordinance that extended health insurance benefits to same sex domestic partners); *Connors v. Boston*, 714 N.E.2d 335, 338 (Mass. 1999) (Massachusetts state enabling law contained almost identical limitations upon local governmental power; the state supreme court struck down a Boston executive order granting domestic partnership benefits, concluding that "the [state] legislature has defined precisely those who may be included in the category of 'dependents.'").

[6]*See Slattery v. New York*, 686 N.Y.S.2d 683 (Sup. Ct.), *aff'd*, 697 N.Y.S.2d 603 (App. Div. 1999), *appeal dismissed*, 727 N.E.2d 1253 and 734 N.E.2d 1208 (2000) (New York state enabling law allowed New York City to extend certain employment benefits to employees and "their families," and other types of benefits to employees and their "spouses and dependent children;" the appellate court upheld the city's extension of benefits to domestic partners, regardless of their financial dependency upon the municipal employee); *Pritchard v. Madison Metro. Sch. Dist.*, 625 N.W.2d 613 (Wisc. Ct. App. 2001) (Wisconsin state law authorized local school district's authority to extend benefits to "spouses and dependent children;" court of appeals upheld local school district's extension of benefits to a "designated family partner," regardless of financial dependency. The court relied upon a subsequently enacted state law granting broad authority to do "all things reasonable to promote the cause of education.").

domestic partner benefits is consistent with other jurisdictions that enjoy broad home rule authority.

B. The Act Is a Local Law That Extends Employment Benefits to County Employees' Domestic Partners and Does Not Redefine Marriage Under State Law.

Tyma complains that the Act is not a local law under Article XI-A of the Maryland Constitution (the Home Rule Amendment) because it redefines the state law definition of marriage. But there is a world of difference between the extension of employment benefits to employees' domestic partners and the legal protections that accompany marriage under state law.

Under § 3 of the Home Rule Amendment, a charter county has full power to enact "local laws" on any subject covered by the Express Powers Act. As a general proposition, a public local law applies to only one geographic subdivision (county) in the state, while a public general law applies to two or more subdivisions. *See Steimel v. Board of Election Supervisors*, 278 Md. 1, 5, 357 A.2d 386, 388 (1976); *State's Attorney v. City of Baltimore*, 274 Md. 597, 607, 337 A.2d 92, 98-99 (1975). The Home Rule Amendment otherwise "attempts no definition of the distinction between a local law and a general law, but leaves that question to be determined by the application of settled legal principles to the facts of particular cases in which the distinction may be involved." *McCrory Corp. v. Fowler*, 319 Md. 12, 17, 570 A.2d 834, 836 (1990) (quoting *Dash v. Jackson*, 170 Md. 251, 260, 183 A. 534, 537-538 (1936)). And a law is not a local law "merely because its operation is confined

to Baltimore City or to a single county, if it affects the interests of the people of the whole state." *McCrory*, 319 Md. at 18, 570 A.2d at 837 (quoting *Gaither v. Jackson*, 147 Md. 655, 667, 128 A. 769, 773 (1925)).

This Court has invalidated county enactments as non-local laws only when they clearly intruded on some well-defined state interest. For example, in *McCrory Corp. v. Fowler*, this Court struck down a Montgomery County law creating a private cause of action for violations of the County's employment discrimination law because it was not a "local law" under the Home Rule Amendment. "In Maryland, the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by this Court under its authority to modify the common law of this State." *McCrory*, 319 Md. at 20, 570 A.2d at 838. Likewise, in *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1891), this Court struck down Somerset County's prohibition of oyster dredging, concluding that it was not a "local law" because the dredging prohibition would deprive people of the entire state of their common right to take oysters within the waters of that county.

A county law regarding its employees' benefits does not resemble the types of enactments that Maryland courts have determined not to be a local law because it does not interfere with State interests. The County's extension of employment benefits to its employees' domestic partners does not implicate the state's interest in marriage but only provides certain employment benefits to employees' domestic partners. Inasmuch as the Act

does not create a new "marital status," the County has not invaded the province of the General Assembly by granting these benefits to County employees.

Among jurisdictions that have reviewed similar laws, no court has held that domestic partner plans in any way "(1) contravene criminal antisodomy or antifornication laws; (2) authorize common law marriages; or (3) define impermissible, municipal marital statuses." Jennifer L. Levi, *Massachusetts' Domestic Partnership Challenge: Hope For a Better Future*, 9 Law & Sex. 137, 147 (2000).[7] In *Slattery v. New York*, the trial court rejected the argument that the domestic partnership law redefined marriage under state law, because "as compared to marital relationships, domestic partnerships are marked by their lack of formalization, lack of legal protections, and by the significantly fewer rights that are extended to the domestic partners." 686 N.Y.S.2d 683, 688 (Sup. Ct.), *aff'd*, 697 N.Y.S.2d 603 (App. Div. 1999), *appeal dismissed*, 727 N.E.2d 1253 and 734 N.E.2d 1208 (2000). To qualify as domestic partners, the pair need only execute an affidavit declaring themselves to meet the statutory criteria, while "a marriage is not effectuated by the mere filing of an affidavit." *Slattery*, 686 N.Y.S.2d at 686-87. The court also noted that various health and blood tests are required to obtain a marriage license and that married individuals receive significant financial rights to their spouse's property (marital property). Affirming the trial court, the New York appellate court agreed that enormous differences exist between

[7]Even in striking down Boston's domestic partnership executive order, the Massachusetts Supreme Court dismissed the plaintiffs' claim that the order sought to define marital status or created the equivalent of common-law marriage. *Connors v. Boston*, 714 N.E.2d 335, 338 n.11 (Mass. 1999).

marriage and domestic partnership, and concluded that the city's domestic partnership law "cannot reasonably be construed as impinging upon the State's exclusive right to regulate the institution of marriage." *Slattery v. New York*, 697 N.Y.S.2d 603, 605 (App. Div. 1999), *appeal dismissed*, 727 N.E.2d 1253 and 734 N.E.2d 1208 (2000).

The Illinois intermediate appellate court dismissed similar arguments when it considered whether the Chicago domestic partnership law created a new "marital" status. Noting that the power to extend compensation and benefits to employees is essential to the operation of local government, the court concluded that the law addressed only health benefits extended to city employees and those living with them. The law affected only local personnel policies by extending the categories of beneficiaries and did not undermine state policy or create a marital relationship. *Crawford v. Chicago*, 710 N.E.2d 91, 98-99 (Ill. App. Ct.), *petition to appeal denied*, 720 N.E.2d 1090 (Ill. 1999).

The domestic partnership law enacted in Denver, Colorado, likewise did not intrude on the state's interest in marriage because "the scope of employee compensation, including benefits, is of particular concern to a local government because of its impact on a city's ability to both hire and retain qualified individuals." *Schaefer v. City and County of Denver*, 973 P.2d 717, 719 (Colo. Ct. App. 1998) (internal citation omitted). As in Illinois, the Colorado court read the law as simply qualifying a group of people for employment benefits without altering their ineligibility for a state-sanctioned marriage. And the state had not

asserted any interest in the compensation or benefits provided to local government employees. *Schaefer*, 973 P.2d 717, 721 (Colo. Ct. App. 1998).

Sustaining Broward County's domestic partnership law, the court in Florida turned aside the same argument. The court characterized the similarities between a domestic partnership and a marriage as "superficial" and, like the other courts, distinguished the panoply of statutory rights and obligations exclusive to the traditional marriage relationship from the meager benefits provided to domestic partners:

> [D]omestic partners under the [Act] . . . do not . . . enjoy the numerous additional rights reserved exclusively to partners in marriage. Some of the rights that are exclusive to the marriage relationship include: the right to jointly adopt; equal rights in property acquired during the marriage; the right to hold property as tenants by the entireties; the right to rehabilitative or permanent alimony in a proceeding for the dissolution of marriage; the right to an elective share in the estate of a deceased spouse; the right to enter into a gestational surrogacy agreement; distribution rights in homestead property; legitimacy of children born out of wedlock upon the marriage of the parents; and, certain state and federal tax benefits.

Lowe, 766 So.2d at 1205-06 (internal citations omitted). Virtually the same observations apply to the Act in this case under Maryland law.

Finally, the Act does not lose its status as a local law merely because the County receives funding from the State. That is not the test for determining whether a local enactment is a local law under the Home Rule Amendment. Moreover, if a local enactment's status as a local law was determined merely by the presence of state funding at some level, then every local enactment by a charter county would fail. Such a simplistic test does not determine whether the Act is a "local law" under the Home Rule Amendment.

C. The County Can Use Tax Revenue to Fund Its Employees' Benefits.

Although Tyma asserts that the State has not authorized the expenditure of its monies to fund the Act, this contention misconstrues the nature and role of State funding in the County. Moreover, the State does not oppose employers' extension of domestic partner benefits. An uncodified section of the recently enacted Antidiscrimination Act of 2001 states that it "may not be construed to require or prohibit an employer to offer health insurance benefits to unmarried domestic partners." 2001 Md. Laws ch. 340.

Contrary to Tyma's suggestion, the State does not micro-manage its aid to the point of forbidding a recipient from spending money on specific types of fringe benefits and, in fact, the State has never conditioned its money in such a narrow fashion. Rather, the State provides both general aid for certain purposes and grants that are tied to particular expenditures. In either case, these monies often include funding for any associated personnel costs, including fringe benefits. For example, the State might give a county money to widen a road. The county is then authorized to spend the money on equipment, material and personnel.

Tyma's reliance upon *Bowling v. Brown*, 57 Md. App. 248, 469 A.2d 896 (1984) to support the claim that there must be a state legislative enactment authorizing the County to designate domestic partners to receive benefits is misplaced. In that case, the court concluded that the La Plata Town Council did not have the authority to reimburse two town employees (the mayor and a council member) for their criminal defense fees arising out of

conduct beyond the scope of their employment because the expenditure did not serve a valid public purpose. The absence of a public purpose distinguished the case from *Snowden v. Anne Arundel County*, 295 Md. 429, 456 A.2d 380 (1983), where this Court held that a county law creating a fund to reimburse the legal expenses of certain employees charged with a criminal offense arising out of the performance of their duties served a public purpose. The *Bowling* court concluded that reimbursing employees' legal expenses for actions outside the scope of their employment would not encourage the faithful and courageous discharge of duty on the part of public officials, whereas the law in *Snowden* not only enabled the county to recruit and retain qualified employees, it also afforded necessary protection to those suffering financial liability as a result of their duties.

Unlike the unauthorized administrative action in *Bowling*, the Act serves a valid public purpose. Like the Anne Arundel County law upheld in *Snowden*, the County's Act "will significantly enhance the County's ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity." Montgomery County Code § 33-22(a). (E. 40) This Court more recently noted that "our cases hold[] that counties are authorized generally to appropriate revenues for county governmental purposes." *City of Annapolis v. Anne Arundel County*, 347 Md. 1, 12-13, 698 A.2d 523, 528-29 (1997).

The County is free to appropriate tax revenue for the Act because it serves a valid public purpose — recruiting and retaining qualified employees.

II. FEDERAL LAW DOES NOT PREEMPT THE COUNTY'S AUTHORITY TO PROVIDE DOMESTIC PARTNER BENEFITS TO ITS EMPLOYEES.

Tyma contends that the County cannot extend continuation coverage benefits beyond those defined as "qualified beneficiaries" under the Public Health Services Act (PHSA), 42 U.S.C. §§ 300bb-1 to -8, or leave benefits beyond the limits of the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-54. But these laws represent federal minimum standards that the County is free to exceed at its own choosing.

Congress enacted the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to provide temporary health insurance continuation coverage through amendments to both the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1161 to 1168, and the PHSA, 42 U.S.C. §§ 300bb-1 to -8. Although ERISA expressly excludes public employees covered by government health plans from its employee benefit plan provisions, 29 U.S.C. § 1003(b)(1) (Apx. 9), the PHSA fills this gap by guaranteeing continuation coverage to governmental plan beneficiaries who are specifically excluded by ERISA. The PHSA and ERISA use identical language to define "qualified beneficiaries" as an employee's spouse or dependent child. *Compare* 42 U.S.C. § 300bb-8(3) (PHSA) (Apx. 11) *with* 29 U.S.C. § 1167(3) (ERISA) (Apx. 10).

While the PHSA and ERISA may require an employer to extend continuation coverage benefits to its employees and their qualified beneficiaries neither statute prohibits an employer from extending those benefit to additional individuals. This is consistent with

the County's Human Relations Law, which prohibits employment discrimination based upon sexual orientation and differs from its state or federal analogs. No court has held that the County has redefined "employment discrimination" under state or federal law just because it provides greater protection than the state or federal law. "It is well settled that ERISA provides merely a floor for benefits, not a ceiling." *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 510 (2nd Cir. 1994).

Similarly, the FMLA encourages employers to provide additional benefits beyond the federal minimum. The regulations implementing the FMLA specifically provide that "an employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." 29 C.F.R. § 825.700(a). (Apx. 12)

Nor does the Internal Revenue Code (IRC) preclude the County from extending domestic partner benefits just because some partners may not qualify as "dependents" under 26 U.S.C. § 152. (Apx. 1) If an employee's partner does not qualify as a dependent under the IRC, then that employee simply loses a tax advantage — he cannot pay for those benefits with pre-tax dollars.

Tyma's reference to 26 U.S.C. § 4980B is a non sequitur. (Apx. 4) That section of COBRA amended the IRC to penalize employers who fail to include the minimum required insurance continuation options by denying them a business tax deduction. It does not

preclude domestic partner benefits. In any event, the County is not subject to this penalty. 26 U.S.C. § 4980B(d)(2).

The County does not violate the PHSA or the FMLA by providing domestic partner benefits to its employees. These laws set minimum requirements for employers, not maximum limitations.

CONCLUSION

The Express Powers Act authorizes the County to determine what benefits it will extend to its employees, including domestic partner benefits. The Act is a local law under the Home Rule Amendment to the Maryland Constitution that does not create a marital relationship between domestic partners — it merely extends to domestic partners many of the employment benefits currently available to County employees' spouses. Finally, federal laws that require employers to provide certain minimum levels of employment benefits, such as COBRA, ERISA, and the FMLA, do not preclude the County from extending greater benefits to its employees. For these reasons, this Court should affirm the circuit court's decision declaring the Employee Benefits Equity Act valid.

Respectfully submitted,

Charles W. Thompson, Jr.
County Attorney

Marc P. Hansen
Chief, General Counsel Division

Edward B. Lattner
Associate County Attorney

Pursuant to Maryland Rule 8-504(a)(8), this brief has been prepared with proportionally spaced type: Times New Roman 13 point.

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