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IN THE THIRD JUDICIAL DISTRICT COURT OF

SALT LAKE COUNTY, STATE OF UTAH

In the Matter of the Utah State Retirement Board's Trustee Duties and Salt Lake City Executive Order Dated September 21, 2005	**BRIEF OF *AMICI CURIAE* DIANNA GOODLIFFE, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF UTAH, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES – LOCAL 1004** Civil No. 050916879 Judge Stephen Roth

Come now Amici Curiae Dianna Goodliffe, the American Civil Liberties Union (ACLU), the American Civil Liberties Union of Utah (ACLU of Utah), and the American Federation of State, County, and Municipal Employees (AFSCME) Local 1004, by and through counsel, hereby requesting that this Court render direction that Petitioner Utah State Retirement Board/Public Employees Health Plan is not prohibited by Utah Code Ann. § 49-20-105, Utah Code Ann. § 30-1-4.1, or Article I, Section 29 of the Utah Constitution from implementing domestic partner health insurance benefits as requested by Respondent Salt Lake City.

Interest of Amici Curiae

Dianna Goodliffe is a full-time employee of the Salt Lake City Police Department where she has worked since 1997, first as a Youth and Family Specialist and currently as a Victim Advocate. For five and a half years, Dianna has been in a committed and loving relationship with her partner, Lisa. Dianna and Lisa made the decision to have and raise a child together. Dianna is the biological mother of their daughter, who is now almost four years old.

Although Dianna and Lisa would like to be legally married, they understand that this is not possible under Utah law. They have therefore taken the legal steps available to them for formalizing and protecting their familial relationship: they have given their daughter Lisa's last name, Lisa has guardianship of their daughter, and Dianna and Lisa have wills and powers of attorney that provide legal rights to one another. Additionally, Dianna and Lisa share financial responsibilities for their household and their daughter.

One year ago, Dianna and Lisa's child was diagnosed with diabetes, making health insurance and their child's medical care particularly important considerations for their family. Because Dianna is the child's biological mother, Dianna has been able to enroll her daughter in the Salt Lake City benefits program. However, Dianna currently cannot enroll her partner Lisa in the benefits program and would like the option of doing so, in part to give their family the option of choosing to have Lisa stay home or work part-time to take care of their daughter. In short, Dianna would like Salt Lake City to allow her to give the same protections to her family that married heterosexual employees are able to provide for their families.

The American Civil Liberties Union of Utah (ACLU of Utah) is the local affiliate of the nationwide, nonpartisan organization, the American Civil Liberties Union (ACLU). The local

affiliate in the State of Utah has more than 2,400 members, while the national ACLU has more than 400,000 members. Since its founding in 1920, the ACLU and its affiliates have devoted their resources and energies to protecting the constitutional rights and individual liberties of all Americans.

The ACLU of Utah has been involved extensively in litigation and advocacy to combat discrimination based on sexual orientation. Some of this litigation and advocacy has focused on the rights of lesbians and gay men to form families. Nationally, the ACLU's Lesbian and Gay Rights Project works with ACLU affiliates to coordinate and direct such litigation both as direct counsel and as amicus curiae. The issues presented in this case have significant implications for the civil rights of employees—whether gay or lesbian or straight—across the State of Utah: the right to be free from discrimination because of the nature of their relationships and the right to equal compensation for the work they do.

The American Federation of State, County and Municipal Employees – ("AFSCME") Local 1004 represents over 1,000 operations, maintenance, clerical and technical workers in Salt Lake City. Its mission/purpose is to insure that members achieve a fair contract and can adequately perform their duties. AFSCME Local 1004 supports the domestic partnership benefits currently offered by the Salt Lake City employee benefit program which provide necessary access to health care for members and their families. Without domestic partnership benefits, there is no equal pay for equal work. Domestic partnership benefits have become a business and industry standard and are routinely available in a number of companies and workplaces across the State of Utah and throughout the country and are necessary to recruit and retain qualified employees.

Summary of Argument

Neither Utah statutory nor constitutional law prohibits a municipality such as Salt Lake City from providing employee benefits to certain unmarried persons. Indeed, Salt Lake City Mayor Ross "Rocky" Anderson signed an Executive Order (the Executive Order) which seeks to do just that, by expanding the eligible people a City employee may enroll in the City's benefit plan to include an employee's domestic partner and the domestic partner's children. Not only is the City's action permissible under state law, but there are strong public policy arguments which demonstrate that providing such benefits is in the best interest of the City, its employees, and its residents.

The City's administrative decision to offer expanded benefits to its employees is before this Court because the Utah State Retirement Board (the Board), the governing body of the Public Employees Health Program (PEHP), requested declaratory judgment on the legality of administering the benefits and of amending the administrative contract between the Board and Salt Lake City, as required by the Executive Order. Salt Lake City responded (City Response) to the Board's petition, arguing that the Board is not prohibited from implementing the domestic partnership benefits requested by the City. Additionally, three residents and taxpayers of Salt Lake City filed a separate petition seeking a declaratory judgment that the Executive Order is void because it violates Utah state law by creating marriage-like benefits for unmarried partners of City employees. These taxpayers also allege that the City is creating a legal status that is an "imitation marriage."

Amici Dianna Goodliffe, the ACLU, the ACLU of Utah, and the AFSCME Local 1004 agree with Salt Lake City's response to the Board's petition for declaratory judgment. The City capably argues relevant law and demonstrates that the City's proposal is permissible under Utah law. Amici will not repeat the City's arguments in this brief. Instead, amici will highlight why Utah law, including its constitutional amendment, does not prohibit the provision of benefits proposed by the City. At issue is merely an administrative employment decision, and not the creation of a legal status that imitates or equals marriage. Amici will also address the strong public policy arguments favoring expanding the eligibility for benefits to include domestic partners of City employees, which will help individual employees such as Dianna Goodliffe, the City, and all its residents.

Background

Amici adopt Salt Lake City's statement of the background of this case and the description of the domestic partnership benefits the City would like to make available to City employees.

Argument

Salt Lake City's Executive Order proposing the extension of employee benefits to an employee's domestic partner and his or her children is not only valid under Utah law, it is good public policy. Neither Article I, Section 29 of the Utah Constitution, commonly known as "Amendment 3," nor Utah's "Marriage Recognition Policy," the state statute defining marriage, impact the City's proposal. *See* Utah Code Ann. § 30-1-4.1. Salt Lake City has simply made an administrative decision to expand the definition of who an eligible City employee may enroll in

the City's benefit plan. Because permitting employees to enroll domestic partners in the City's benefits plan is permissible under Utah law, and because of the strong public policy arguments in favor of making such a plan available, this Court should decide that Utah law does not prohibit the Board/PEHP from implementing the domestic partner benefits program as stated in the City's Executive Order.

I. THE CITY'S PROPOSAL IS PERMISSIBLE UNDER UTAH LAW.

A. "Domestic Partner" Is Not a Legal Status and Implicates Only Employee Benefits.

Nothing in Utah law prohibits a city or municipality from providing employment benefits like Salt Lake City's. *See* City Response, § III; Utah Code Ann. § 10-3-1103 (granting municipalities broad discretion in establishment and administration of specific benefits programs). The Utah State Retirement Board claims in its petition that it is uncertain whether domestic partner benefits create a status that is the substantial equivalent of marriage in violation of state law. The City's administrative decision, however, simply does not conflict with or implicate Utah marriage laws, nor does it create anything remotely similar to a legal status that is the "substantial equivalent" of marriage. The City has merely requested that the definition of dependent in its benefits contracts be amended to include the domestic partners of employees.

Salt Lake City's Executive Order directs the City's benefits providers to amend their contracts to allow for the enrollment of employees' domestic partners and the children of

domestic partners.[1] As with married spouses, the employee pays 100% of the premium charged for the additional enrollee(s). Unlike married spouses, however, "domestic partnership" is defined through the financial and emotional relationship the employee and the domestic partner share, not through a legal status. The definition of domestic partner in the Executive Order has five essential components, including a requirement that the eligible employee and the domestic partner share 1) "a long-term committed relationship of mutual caring and support," 2) residence "in the same household . . . for at least the past six consecutive months, 3) "common financial obligations," and 4) joint "responsibility for each other's welfare." Lastly, the employee and the domestic partner may not be related by blood to a degree that Utah law would prohibit marriage.

Because the domestic partner relationship is based on an economic and emotional relationship, it does not implicate or approximate the legal status of marriage. Marriage is defined both in the Utah Code and in the Utah Constitution as the "legal union of a man and a woman." *See* Utah Code Ann. § 30-1-4.1(1)(a); UTAH CONST. art. I, § 29. Under State law, marriage is a contract and requires some kind of legal proceeding to both initiate and end the relationship. *See* Utah Code Ann. § 30-1-1 *et seq.* (outlining legal effect of marriage in Utah). Moreover, under federal statutes, approximately 1,138 benefits, rights, and privileges are contingent on marital status. *See* U.S. General Accounting Office, "Defense of Marriage Act: Update to Prior Report" (Jan. 2004), *available at* http://www.gao.gov/htext/d04353r.html (last visited Nov. 4, 2005).

[1] As of November 1, 2005, Salt Lake City employees were invited to enroll their domestic partners in other aspects of the City's benefits program. Amicus Dianna Goodliffe is in the process of completing these applications.

In contrast, "domestic partner" for purposes of Salt Lake City's employment benefits is defined more broadly than a marriage, but has a much more limited legal effect. To be an employee's domestic partner does not require a legal proceeding to begin or end the partnership, and the myriad of state and federal legal benefits that are attached to marriage are not implicated. In fact, the only legal effect of falling within the definition of domestic partner is eligibility to be enrolled in the City's benefits plan, with the cost of the benefits borne by the employee. The partnership can be unilaterally dissolved by the employee without a legal proceeding or legal consequences. The narrow effect of dissolving the parties' "domestic partnership" is the termination of eligibility for specific employment benefits. Similarly, eligibility for benefits ends with the termination of the employee-partner's employment, even if the domestic partnership itself continues.

A domestic partnership thus has neither the durability nor the comprehensiveness of a statutory marriage. Clearly, the benefits at issue in this case are employment benefits, not marriage benefits.

B. Courts Have Repeatedly Held That Similar Benefits Provisions Do Not Constitute Extension of Marriage to Same-Sex Couples.

Like domestic partnership provisions established by other municipalities across the country, Salt Lake City's domestic partnership provision does not "address the panoply of statutory rights and obligations exclusive to the traditional marriage relationship," *Lowe v. Broward County*, 766 So. 2d 1199, 1205-06 (Fla. Dist. Ct. App. 2000), nor does it "curtail any existing rights incident to a legal marriage, nor does it alter the shape of the marital relationship

recognized by [Utah] law." *Id*. at 1205. It is for this reason that the courts of numerous states that, like Utah, prohibit the recognition of same-sex marriages, have rejected the assertion that domestic partnership registries and benefits impermissibly intrude on the state's exclusive right to create and define civil marriage.

Nevertheless, the Board and others question whether the option to enroll a City employee's domestic partner creates the substantial equivalent of marriage. This is an exaggerated concern and is not based in the plain language of Utah law,[2] as the City aptly addresses. *See* City Response at § I. Courts around the nation have repeatedly held that employee benefits packages which include domestic partners, or some equivalent thereof, do not convey a marriage-like status. Many of these courts were considering ordinances which were more expansive than Salt Lake City's, in that they created domestic partnership registries. Ordinances creating domestic partner registries and providing benefits for municipal employees have been upheld by the intermediate appellate courts of Wisconsin, Florida, Illinois, New York and Colorado, by the Supreme Courts of Alaska, Georgia, Washington and Maryland, and by the United States District Court for the Northern District of California. *See Alaska Civil Liberties Union v. Alaska*, Alaska Supreme Court No. 5950 (Alaska October 28, 2005); *Tyma v. Montgomery County, Maryland*, 801 A.2d 148, 158-59 (Md. 2002); *Heinsma v. City of Vancouver*, 29 P.3d 709, 711 (Wash. 2001); *Pritchard v. Madison Metropolitan School District*,

[2] The Utah Constitution states, "(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." UTAH CONST. art. I § 29. The Utah Marriage Recognition Policy, Utah Code Ann. § 30-1-4.1, states that Utah "will not recognize, enforce or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married."

No. 00-0848, 2001 Wisc. Ct. App. LEXIS 141 (Wis. App. Feb. 8, 2001); *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000); *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999); *Slattery v. City of New York*, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999), aff'g 686 N.Y.S.2d 683 (N.Y. Sup. Ct. New York Cty 1999); *Schaefer v. City & County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998); *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997); *S.D. Myers, Inc. v. City and County of San Francisco*, No. C 97-04463 CW, 1999 U.S. Dist. LEXIS 8748 (N.D. Cal. May 27, 1999).

Many of these courts considered and rejected arguments that such ordinances create a new marital status, establish a new category of common law marriage, expand or contradict the state's definition of marriage, or otherwise legislate in the arena of domestic relations law reserved to the state. *See, e.g.*, *Tyma*, 801 A.2d at 158-59 (collecting cases). Further, many of these courts held that the ordinances did not violate their state's public policy, even where, as in Utah, the state had adopted an explicit statute providing that the state would not recognize marriages between same-sex couples. *Id.*

Not all of the local ordinances offering domestic partnership have been upheld. However, those ordinances held to be impermissible were struck down because specific state laws expressly defined the persons for whom municipalities could provide health insurance benefits in a way that excluded domestic partners, *see Connors v. Boston*, 714 N.E.2d 335, 341-42 (Mass. 1999); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995); *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 111 (Minn. Ct. App. 1995), or strictly defined "dependent" to exclude domestic partners, *see Arlington County v. White*, 528 S.E.2d 706, 708 (Va. 2000). These courts did not conclude that the ordinances impermissibly recognized non-marital

relationships or threatened the institution of marriage, but rather concluded that specific state statutes concerning benefits and dependents did not allow municipalities to offer benefits to people who did not meet the statutory definitions.

Although Utah's marriage amendment precludes same-sex couples in Utah from civil marriage, it does not prohibit public employers from offering committed same-sex couples the same access to benefits that their married employees are offered. Just as other courts have held that similar amendments do not prohibit domestic partner benefits, *see, e.g.*, *Alaska Civil Liberties Union v. Alaska*, Alaska Supreme Court No. 5950, p. 9 (Alaska October 28, 2005) (noting that Alaska's marriage amendment does not address the topic of employment benefits), so too should this Court hold that Utah's Amendment 3 does not prohibit Salt Lake City's benefits plan.[3]

II. Providing Domestic Partner Benefits Is Good Public Policy.

A. Limiting Eligibility for Enrollment to Married Employees Discriminates against Gay and Lesbian Employees.

Providing Salt Lake City employees with the option to enroll their domestic partners in the City benefits plan is a matter of employment equity. An employee's compensation package often includes more than just pay for hours worked, it also includes benefits. Employer provided

[3] Just as the plain language of Utah Constitution article I, section 29 does not preclude the provision of the employment benefits at issue in this case, no legislative history has been cited by the parties implying that the amendment should be interpreted to prohibit the benefits. Additionally, in August 2005 Dan Jones and Associates conducted a statewide poll about the intentions of voters who voted in favor of the amendment. Of the 54% of Salt Lake County voters who supported the amendment, only 28% believed that it was meant to "prevent gay and lesbian couples from having any basic benefits or rights such as health insurance or hospital visitation." *See* Equality Utah

health care coverage provides an important element of any benefit package. *See* AFSCME International Resolution No: 101, "Domestic Partner Benefits" (June 1992), *available at* www.afscme.org/about/resolute/1992/r30-101.htm (last visited Nov. 8, 2005) (resolving that AFSCME encourage local unions to negotiate domestic partner benefits, as benefits are important element of any benefit package). By including employees' domestic partners, and the children of domestic partners, in the list of those eligible to enroll in the City's benefits plan, the City is working to provide equal pay for equal work. Not only do eligible employees benefit from the City's action, so too does the larger community.

Salt Lake City's definition of domestic partner includes both committed heterosexual couples and same-sex couples. As a public policy and employment matter, this inclusive definition makes sense. However, there is an important distinction between committed heterosexual and committed same-sex couples: the former can legally marry and the latter cannot. Accordingly, prior to the City's Executive Order, City employees like Dianna, who are in committed same-sex relationships, were categorically prohibited from enrolling their partners in the benefits program because they cannot legally marry. This effectively resulted in married employees receiving more compensation for the same work.

To help alleviate the inequities that result from basing employment benefits on marital status, many leading companies and institutions have changed their policies to include domestic partners. As of November 2005, 247 Fortune 500 companies, 11 state governments, and 130 City and County governments are reported to offer domestic partnership benefits to their

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Press Release October 2005 Press Release, *available at* http://www.equalityutah.org/PressReleases.html (last visited Nov. 4, 2005).

employees. *See* Human Rights Campaign, *available at* www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubTypeID=1 (last visited Nov. 8, 2005). This change in how employees are compensated recognizes that many American households are comprised of unmarried couples, and many of those couples are gay or lesbian. According to the 2000 census, gay and lesbian families live in 99.3 percent of counties in the United States. *See* U.S. Census Bureau, United States Census 2000, Table PCT22, "Unmarried Partner Households and Sex of Partner," *available at* http://factfinder.census.gov/servlet (last visited Nov. 4, 2005). In Utah, census figures show that 3,370 households identified as gay or lesbian couples, or approximately .7% of coupled households. *See* Human Rights Campaign, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households (August 2001) (analyzing 2000 U.S. Census Bureau data), *available at* www.hrc.org/familynet (last visited Nov. 4, 2005).

Many of these Utah couples who identified themselves to the U.S. Census Bureau are the parents of children they have either through previous relationships, adoption, or reproductive technology. Indeed, amicus Dianna Goodliffe and her partner are raising their child, who was diagnosed with diabetes at an early age. Dianna's family faces the same burdens of maintaining a joint household, raising children, and coping with health and other life crises, as do other families. Access to a healthcare benefit such as the City's allows employees like Dianna to take responsibility for their partners and their children, which is a primary reason for offering dependent coverage for employees.

B. Providing Domestic Partners With Access to Benefits Is Good for the Community.

By allowing partners of Salt Lake City employees the option to enroll in the City's benefits plan, the total number of uninsured City and community residents may decrease. Reducing the uninsured population will help reduce public costs for emergency and other care for the uninsured. Studies show that uninsured individuals forego preventative care, which not only has negative effects on public health, but also leads to inflated public costs. *See* The Kaiser Commission on Medicaid and the Uninsured: A Primer, p. 1 (Nov. 2004), *available at* http://www.kff.org/uninsured/7216.cfm (last visited Nov. 4, 2005). Additionally, health insurance has an effect on families' financial well-being, as it "helps reduce the financial uncertainty associated with health care, as illness and health care needs are not always predictable and care can be very expensive." *Id.*

Nation-wide most people are insured through employment; this is true in Utah where more than 68% of residents are covered through their employers. *See id.* at 22, table 3. The City's decision to offer eligible employees the option of enrolling their committed domestic partners and their children in the City's benefits plan may result in more preventative care being accessed by more individuals. In turn, public health may improve while the costs to the public are reduced.

Conclusion

Salt Lake City's provision of employment benefits to its employee's domestic partners and their families does not recognize a legal status even remotely equivalent to—let alone "substantially equivalent to"—marital status. Further, Salt Lake City's Executive Order provides

needed protection for employees and their families, and is good public policy. Accordingly, for the reasons set forth in this brief, and in the brief submitted by the City, amici respectfully request that this Court should declare that Utah law has no effect on public employers' power to offer employment benefits.

Respectfully submitted this 10th day of November, 2005.

AMERICAN CIVIL LIBERTIES UNION
OF UTAH FOUNDATION, INC.

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