IN THE SUPREME COURT
OF FLORIDA

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CASE No.: SC00-2252
Lower Tribunal No.: 4D99-1664

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LAWRENCE LOWE,

Petitioner,

vs.

BROWARD COUNTY,

Respondent.

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On Appeal from the Court of Appeal of Florida,
Fourth District

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REPLY BRIEF OF PETITIONER

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I.

BROWARD COUNTY HAS LEGISLATED IN THE AREA OF DOMESTIC RELATIONS LAW WHICH IS A MATTER OF STATEWIDE CONCERN

Broward County concedes that it cannot legislate in the area of domestic relations because it is a matter of statewide concern. Reply Brief at 7. However, Broward County then denies the obvious fact that it is giving official legal recognition to a family-type relationship and granting benefits and rights based on two people entering into that new joint familial status of "domestic partnership." In order to grant the benefits, the County must first define the relationship. And the defining of the relationship it acts beyond the scope of its local home rule authority and legislates in a matter of statewide concern.

This Court recently stated that domestic relations law involves recognition of family relationships:

> Historically, "domestic relations" has been limited to matters involving **familial relationships**, including divorce, separation, custody, support, and adoption. See Black's Law Dictionary 484 (6th ed. 1990).

Department of Health & Rehabilitative Servs. v. Honeycutt, 609 So. 2d 596, 597 (Fla. 1992) (emphasis added). This is exactly what Broward County is doing. Broward County admits that the people who enter into domestic partnerships are

"unmarried individuals [who] share an emotional and economic dependency," Reply Brief at 6. In the domestic partner ordinance, Sec. 16 ½ -151(a), Broward County states that the reason why it is enacting the domestic partnership ordinances is because the County "finds that there are many individuals who establish and maintain a significant personal, emotional, and economic relationship with another individual." The ordinance goes on to say that:

> Individuals forming such domestic partnerships often live in a committed relationship. Domestic partners are often denied public and private sector benefits because there is no established system for such relationships to be registered or recognized.

Id. The County then sets up a domestic partnership registry, Sec. 16 ½ -153, so that unmarried couples then can register their new joint familial status under County law. There can be no other reason for the registry except to give legal recognition that the two people have joined together to create one collective family unit that will be recognized under County law as a "domestic partnership." The various benefits and rights the County gives to domestic partners all depend on the two people meeting the County's eligibility standards for domestic partnership and going through the official County registration process in order to form their new family. This is family law. This is domestic relations law.

The County again tries to point to some differences that exist between

marriages and domestic partnerships. The petitioner explained in his opening brief that most of the differences are rooted in the fact that the state government can do more things that a county government. Opening Brief at 21-22. Married couples have rights under tort law and probate law, etc. that Broward County domestic partners don't only because Broward County has no authority to legislate in such areas as tort law and probate law. Counties have less power than the state government. If Broward County could, it would give more rights and benefits to domestic partners.

If the County actually believes this is not domestic relations law, then what is a "domestic partnership?" The County never gives a straightforward answer as to what these domestic partnerships are -- corporations? business partnerships? The answer is that they are family relationships defined by County law. Therefore, the County is legislating in the area of domestic relations law which is obviously beyond the scope of its home rule authority.

II.

THE COUNTY VIOLATES THE FLORIDA DEFENSE OF MARRIAGE ACT

Broward County dismisses the application of the Fla. Stat. § 741.212, which goes beyond merely outlawing same-sex marriage, but also specifically prohibits

any official "marriage-like" recognition of same-sex relationships by any Florida unit of government.

Broward County does exactly that. Every time Broward County grants a unique right or benefit solely to marriage, the County now extends those benefits to domestic partners. It treats domestic partnerships the same as marriages.

<u>Entering into a marriage or domestic partnership</u> -- Under Sec. 16 ½-153, only unmarried couples may register their family-like relationship with the County to gain official County recognition as a domestic partnership, as long as they meet the qualifications listed in 16 ½-153(b). The qualifications and the process parallel state law. *See* § 741.04 and § 741.405 Fla. Stat. Broward County gives marriage-like recognition to no other relationship except the County's own domestic partnership.

<u>Health insurance benefits for spouses and domestic partners</u> -- Broward County grants health insurance benefits uniquely to the married spouses of its employees, and now extends the same unique right to unmarried domestic partners, thereby treating domestic partnerships the same as marriages. Section 16 ½-156 states that "[a]ny County employee who is a party to a registered domestic partnership relationship ... shall be entitled to elect insurance coverage for his or her domestic partner ... on the same basis in which any County employee may elect

insurance coverage for his or her spouse ....” (emphasis added). Once again, the County violates the Defense of Marriage Act by extending the unique legal benefits it gives to married spouses to unmarried domestic partners.

Other employee benefits -- The County uniquely entitles the spouses of employees to various benefits and then extends that same entitlement to unmarried domestic partners of employees. Sec. 16 ½-156 (c) states that “all other benefits available to the spouses ... of County employees shall be made available on the same basis to the domestic partner ... of a County employee who is a party to a registered domestic partnership relationship. The County treats domestic partnerships the same as marriages in violation of § 741.212.

Surrogate health care decisions and visitation rights to health facilities -- The County grants unmarried domestic partners the same rights that married spouses of patients uniquely possess to make surrogate health care decisions for the patients and to visit their spouses. Ordinance 16 ½-158 (c) states that a “domestic partner of a patient or resident shall have the same rights as would a spouse ... with respect to visitation and the making of health care decisions for the patient or the resident ...” Once again, the County treats unmarried same-sex partners the same as married spouses. This violates § 741.212.

Therefore, Broward County treats a domestic partnership legally as an exact

parallel to marriage, because whenever Broward County used to extend a unique right or benefit solely to marriages, it now extends them to domestic partnerships, too. Broward County violates Fla. Stat. § 741.212 with its ordinances.

III.

BROWARD COUNTY GRANTS EMPLOYEE HEALTH INSURANCE BENEFITS TO THOSE WHO ARE NOT DEPENDENTS AS REQUIRED BY FLA. STAT. § 112.08

Petitioner urges this Court to rule that Broward County's grant of health insurance benefits to the unmarried domestic partners of County employees violates Fla. Stat. § 112.08 because the domestic partners are not actually dependent on the County employee. Petitioner urges this Court to rely on *Arlington County v. White*, 259 Va. 708; 528 S.E.2d 706 (Va. 2000) and *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995).

The County improperly argues that it may exceed the scope of Fla. Stat. § 112.08 because of its general grant of home rule authority that is broader than this statute. Answer Brief at 27-28. This is wrong for two reasons. First, the County in effect urges this Court to "repeal by implication" Fla. Stat. § 112.08. Florida law rejects judge-decreed repeal of a statute by implication. "Repeal by implication is not favored." *State v. Dunmann*, 427 So. 2d 166, 168 (Fla. 1983).

Also, the County violates the canons of statutory construction by arguing that a list in a statute is not restrictive but merely permissive and illustrative. Answer Brief at 27. This Court has ruled that a list in a statute is restrictive, not permissive. "Under the principle of statutory construction, *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another." *Moonlit Waters Apartments Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996). Therefore the list in § 112.08 limiting health insurance to dependents is restrictive.

IV.

THE WEIGHT OF AUTHORITY FROM AROUND THE NATION SUPPORTS THE PETITIONER'S CLAIMS.

Broward County relies on appellate court decisions from other states that address domestic partner benefits plans. However, they are distinguishable in some important ways. First, none of them have ordinances as wide sweeping as the Broward County ordinances, which give a broader, more comprehensive array of rights and benefits than any of the other reported cases. Those decisions have less weight in this case, because Broward County extends every benefit that it gives uniquely to married couples only to unmarried domestic partnerships.

Second, all of the cases except the Atlanta ones did not involve a domestic partner registry that two people must comply with in order to qualify for employee

health insurance benefits. There is no local county purpose for a domestic partner registry except to give official County recognition to a family-type relationship that has no legal existence under state law. In order to be eligible for the rights and benefits awarded under the Broward County ordinances, two people must comply with the qualifications and procedures laid out for the domestic partner registry.

A third and important distinction is that other states grant greater amounts of power to local units of government under the home rule authority than Florida law does to counties. Some states like Colorado and Illinois maintain the very broadest home rule power systems in the nation – systems which do not recognize the "local concern" and "implied preemption" doctrines followed in Florida.

- ***Schaefer v. City and County of Denver* is legally distinguishable from this case.**

In *Schaefer v. City and County of Denver*, 973 P.2d 717 (Colo.App. 1998), the Colorado Court of Appeals upheld the City of Denver's domestic partner benefits plan. However, this case is legally inapplicable to the instant suit due to the extremely broad home rule powers recognized in Colorado, which are much broader than home rule authority for counties under Florida law.

The *Schaefer* court specifically noted Colorado's system of broad home rule authority by distinguishing the Minnesota Court of Appeals decision in *Lilly v.*

City of Minneapolis, 527 N.W.2d 107 (Minn. App. 1995) and the first Georgia Supreme Court's decision in *McKinney* striking down Atlanta's plan:

> It is apparent that there are significant differences between Minnesota and Colorado with regard to the constitutional, statutory, and judicial approaches to the concept of home rule cities in general, and the legislative powers of home rule cities in particular, that render *Lilly v. City of Minneapolis* distinguishable and unpersuasive. For much the same reason, we find the analysis in *City of Atlanta v. McKinney* singularly unpersuasive.

Schaefer, 973 P.2d at 720.

Schaefer is further distinguishable from this suit in that the plaintiff raised no municipal health insurance statute restricting Denver's authority analogous to Fla. Stat. § 112.08(2)(a) discussed in the opening brief. Thus, in the Colorado case, the party challenging Denver's domestic partner benefits plan based the case entirely that Denver had legislated in an area of "statewide concern" – an argument that made little headway in Colorado's expansive home rule system. For these reasons, *Schaefer* should not be relied on by this Court.

- ***Crawford v. City of Chicago* is legally distinguishable from this case.**

The Illinois Court of Appeals' decision in *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill.App. 1999) is similarly distinguishable and unpersuasive in this case. Illinois follows a home rule system similar to that of Colorado's and quite different from that followed in Florida. The *Crawford* court highlights Illinois' distinctively

broad home rule authority system by contrasting Minnesota's more modest (and Florida-like) home rule authority in *Lilly* with that of Illinois':

> In Minnesota, home rule cities have authority to legislate on matters of local concern, but not statewide concern, as in Illinois. *Lilly*, 527 N.W.2d at 111-112. Minnesota law, however, allows the legislature to preempt home rule authority by implication, whereas the Illinois Legislature must preempt home rule authority expressly. *Lilly*, 527 N.W.2d at 111.

Crawford, 710 N.E.2d at 100.

Thus, *Crawford* makes it clear that the "local concern" and implied preemption doctrines adhered to in Florida and Minnesota had no application to its decision. Thus, like *Schaefer*, the legal standards applied by the Illinois Court of Appeals in *Crawford* have little applicability to this case.

Further distinguishing *Crawford* from this case is the fact that, similar to Colorado, Illinois has no preemptive municipal health insurance statute applicable to the City of Chicago. Since there was no analogous Illinois statute to Fla Stat. §112.08 involved in *Crawford*, the court did not even have to consider the preemption arguments applicable to this case. The lack of an applicable municipal employee health insurance statute further analogizes *Crawford* to Colorado's *Schaefer* decision and further distinguishes *Crawford* from this case and the decisions from Minnesota, Massachusetts and Virginia striking down domestic partnership plans. This Court should reject application of *Crawford* to this case.

- ***Slattery v. City of New York* is distinguishable from this case and should be rejected by this Court.**

In *Slattery v. City of New York*, 697 N.Y.2d 603, 266 A.D. 2d 24 (N.Y. App. 1999), the intermediate appellate court in New York upheld New York City's domestic partner benefits program. However, there are significant distinctions between *Slattery* and this case.

In *Slattery*, the state statute granting municipalities the authority to provide employee health benefits provided that municipalities could extend health benefits to their employees "and their <u>families</u>." *Slattery*, 697 N.Y.S.2d at 604. Unlike the statute at issue in *Slattery*, Fla. Stat. § 112.08 allows the County to extend benefits to employees and their "<u>dependents</u>." The Court in *Slattery* looked to recent, unique court decisions in New York that applied broad definitions of the term "family" to conclude that the term could reasonably include domestic partners under New York law. *See, Slattery* 697 N.Y.S.2d at 604. However, this broad manner of defining "family" in New York has absolutely no applicability to this Court's determination as to how "dependents" should be defined under Fla. Stat. § 112.08. Since the term "dependents" is not expressly defined in Fla. Stat. § 112.08, this Court must look to the plain and common law meaning of the term and may also look to the term's related usage within other Florida statutes to discern the

Legislature's intended definition. Petitioner's arguments on this point illustrate unmistakably that the Legislature did not intend "dependents" as that term is used in Fla. Stat. § 112.08, to include Broward County "domestic partners." Thus, the recent New York expansion of the definition of "family" in that state have no applicability to this case.

- ***City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995) and its progeny, *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997), are supportive of Petitioner's Position in this Case.**

The City of Atlanta has twice had its domestic partner program examined by the Georgia Supreme Court. In *McKinney*, the Georgia high court struck down Atlanta's plan because it did not meet the applicable state statute's requirements that benefits only be extended to employees and their "dependents." *McKinney*, 454 S.E.2d at 521 ("The issue here is whether the city impermissibly expanded the definition of dependent to include domestic partners"). As in this case, the Georgia municipal health insurance statute did not define the term "dependent." Thus, the Court looked to other state statutes to determine the legislature's intended definition. The Court noted that "other state statutes define a dependent either as a spouse, child, or one who relies on another for financial support. *See McKinney*, 454 S.E.2d at 521.

Similar to Broward County's domestic partner plan, Atlanta's original plan

only required prospective domestic partners to "agree to be obligated for the necessities of life for each other." *McKinney*, at 519. This is similar to the vague "interdependence" standard employed by Arlington County, Virginia which the Virginia Supreme Court struck down in *White*. The Georgia court then held that Atlanta "[d]omestic partners do not meet any of these statutory definitions of dependent" and struck down the ordinance. *McKinney*, 454 S.E.2d at 521.

The *McKinney* court also ruled that the City of Atlanta had illegally attempted to define a new family relationship by its creation of "domestic partnerships." The Court agreed with Petitioner's argument in this case that the creation and definition of domestic and family relationships is a matter of statewide concern. *McKinney*, 454 S.E. 2d at 520-21.

After the *McKinney* decision, the Atlanta city council apparently went back to the drawing boards and constructed a new domestic partner benefits plan – this time including a significantly more stringent requirement for financial dependency between the domestic partner and the city employee. It was this second, revised domestic partner plan that was the subject of *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997). The city's second domestic partner plan required the "domestic partner" to actually be financially dependent upon the city employee and to have lived in this financially dependent state for at least six months prior to

seeking health benefits. *See Morgan*, 492 S.E.2d at 195.

The Georgia Supreme Court upheld the revised Atlanta domestic partner plan because the court determined it was reasonably consistent with state law. *See Morgan*, 492 S.E.2d at 195-96. However, this result is actually supportive of Petitioner's position in this case due to Atlanta's significantly higher standard requiring "domestic partners" to show actual financial dependency. In this regard there is no similarity between the Broward County plan and the revised Atlanta plan. On the contrary, Atlanta's equivalent of Broward County plan was struck down on the same basis as Petitioner asserts here. Thus, *McKinney* and *Morgan* support or are at least consistent with the Petitioner's arguments in this case.

CONCLUSION

For the reasons stated above, Petitioner-Lowe respectfully requests that this Court reverse the decision of the Broward County Circuit Court and issue a declaratory judgment holding the Broward County Domestic Partnership Act of 1999 to violate Fla. Const. Art. VIII § 1(g) and to issue an injunction precluding the County from enforcing any portion of the Act.

Date: February 19, 2001

Respectfully submitted,

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) **SERVICE**
BROWARD COUNTY,)
)
Respondent.)
______________________________________)

On this 19th day of February, 2001, I sent via Federal Express, postage prepaid, the PETITIONER'S REPLY BRIEF to the following counsel:

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