

# Massachusetts’ Domestic Partnership Challenge: Hope for a Better Future

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## I. INTRODUCTION

Acknowledging that its decision means that “some household members” may be without a “critical social necessity,” the Massachusetts Supreme Judicial Court (SJC) ruled in *Connors v. City of Boston* that Boston Mayor Thomas M. Menino’s executive order granting health insurance benefits to the domestic partners of city employees could not stand in the face of a Massachusetts state insurance law.<sup>1</sup> In *Connors*, the SJC simultaneously recognized that although the demographics of Massachusetts households have changed within the more than forty years since the state insurance law, G.L. c. 32B (Chapter 32B), was adopted, that law nevertheless constrains municipalities from extending health insurance benefits to the full range of household members who rely on city employees for their support.<sup>2</sup> In other words, despite the court’s recognition that

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1. 714 N.E.2d 335, 342 (Mass. 1999).  
2. *See id.* at 341-42.

families come in different forms, it decided it could not, as a technical matter, uphold a municipality's grant of benefits to non-traditional families where the legislature has failed to incorporate a contemporary definition of family into its state insurance law.

The decision is an unfortunate departure from the general home rule authority jurisprudence of the Commonwealth, which, by constitutional amendment, makes local control the rule, rather than the exception.<sup>3</sup> Although its reach is in one sense narrow—the ruling has no effect on either domestic partnership benefits provided by private employers or municipal domestic partner benefits other than group health insurance—it is in another sense very significant in that it strictly defines persons for whom cities and towns can expend funds to provide group health insurance benefits.

## II. BACKGROUND

### A. *History of Domestic Partnership in Massachusetts*

Efforts to achieve domestic partner benefits began in the 1980s and gained momentum in the early 1990s when municipal employees throughout the Commonwealth began to inquire as to whether their municipal employers would issue health insurance benefits to their domestic partners and dependents, thereby providing equal pay for equal work to employees with families.<sup>4</sup> While the City of Boston declined early requests,<sup>5</sup> in 1992 the City of Cambridge passed the

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3. See MASS. ANN. LAWS ch. 2, § 6 (Law. Co-op. 1979). This provides:

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-law, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

*Id.*

4. See generally James P. Baker, *Equal Benefits for Equal Work? The Law of Domestic Partnership Benefits*, 14 LAB. LAWYER 23 (1998) (explaining the trend of expanding medical benefits to cover domestic partners).

5. See Opinion of Albert W. Wallis, Corp. Counsel for the City of Boston (May 1, 1992). Two decisions of Boston Corporation Counsel, one from 1992 and one from 1994, reflected Boston's then-opinion that the term "dependent" in the state insurance law was not broad enough to include domestic partners and their children. See Opinion of Albert W. Wallis, Corp. Counsel for the City of Boston (May 1, 1992); Opinion of Albert W. Wallis, Corp. Counsel for the City of Boston (June 28, 1994). An analysis that the state definition of "dependent" includes domestic partners and their dependents would have expressly authorized cities and towns to provide such benefits. In the absence of such express authorization, an argument remained that although not

first domestic partnership ordinance in Massachusetts.<sup>6</sup> In the ensuing years, a number of cities and towns (including Northampton, Amherst and Brookline) followed Cambridge's lead and adopted domestic partnership plans.<sup>7</sup> Each of the towns' plans provided group health insurance benefits for domestic partners of municipal employees and their dependents at the municipalities' expense.<sup>8</sup>

### B. *Recent History of Domestic Partnership in Boston*

In 1993, the City of Boston passed the Family Protection Ordinance.<sup>9</sup> The Ordinance allowed persons to register their domestic partnerships with the City of Boston.<sup>10</sup> Although it provided no health insurance benefits to the registered domestic partners of city employees, it did extend certain domestic partner privileges to City of Boston employees.<sup>11</sup> After several years of having the domestic partnership registry in place, the City of Boston filed with the legislature a home rule petition<sup>12</sup> that had been passed by the Boston City Council in order to provide group health insurance benefits.<sup>13</sup>

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expressly authorized to do so, a city was not necessarily excluded from providing such benefits under state law. *See* Opinion of the Justices to the House of Representatives, 696 N.E.2d 502, 506-07 (Mass. 1998).

6. *See* CAMBRIDGE, MASS., MUNICIPAL CODE ch. 2119 (1992).

7. *See* Opinion of the Justices, 696 N.E.2d at 505 n.3.

8. The benefits extended to domestic partners were unequal to those extended to statutory "spouses" and "dependents," as defined by MASS. GEN. LAWS ch. 32B, § 2(b), because of the tax implications. *See* William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1, 5-6 (1995). In the federal tax code, municipalities must attribute to the employee an amount of compensation equal to the cost of the health insurance benefits provided to the domestic partner and dependents. *See id.* at 6. This additional compensation was taxable. *See id.* In contrast, employees whose "spouses" received health insurance were not taxed on this additional "compensation." *See id.*

9. *See* BOSTON, MASS., PUBLIC HEALTH AND WELFARE ORDINANCE ch. 12-9A (1993).

10. *See id.* ch. 12-9A.2.

11. *See id.* For example, registered domestic partners receive equal access to school records of children of the partnership. The ordinance also allows for equal hospital and jail visitation for domestic partners. *See id.*

12. As explained in note 3, cities and towns in Massachusetts enjoy broad, constitutional home rule authority that allows them to take action locally without legislative authority as long as the local action is not inconsistent with state law. *See* MASS. ANN. LAWS ch. 2, § 6 (Law. Co-op. 1979). Cities and towns may take local action even when such action is in conflict with state law, but they must do so with the permission of the legislature. *See id.* Legislative permission is sought by the introduction of a home rule petition. *See id.* The term "home rule" is used in the vernacular to sometimes mean home rule authority and sometimes mean home rule petition. To avoid confusion, this article always uses the full terms—home rule authority and home rule petition.

13. *See* Geeta Anand, *Health-care OK'd for the Partners of City Workers*, BOSTON GLOBE, March 14, 1996, at 21.

The home rule petition, submitted in 1995 to the legislature, would have expressly authorized the City of Boston to provide group health insurance benefits to any persons determined eligible by the city notwithstanding any contrary provision of state law, including Chapter 32B.<sup>14</sup> The legislation languished, however, because of leadership opposition to domestic partnership benefits in the Massachusetts House of Representatives and, in part, because of a perception that Boston did not need legislative approval (in the form of the home rule petition) to issue the benefits.<sup>15</sup>

In the spring of 1998, as part of a compromise designed to bring the home rule petition question to closure, the Massachusetts House of Representatives sent two questions to the SJC about the legality of Boston's proposed plan.<sup>16</sup> The House asked the SJC for an opinion on (1) whether the City of Boston was required to obtain legislative approval in order to provide group health insurance benefits to domestic partners of city employees, and (2) whether the home rule petition was an improper delegation of authority to the City of Boston given that the petition allowed the city to define the term "domestic partner" as it saw fit.<sup>17</sup> An answer to the first question would have resolved all of the legal doubts as to the authority of cities and towns to provide the benefits that Cambridge had extended since 1992. In particular, it would have resolved the question directly raised by the *Connors* suit.

The SJC, however, properly declined to answer the first question, stating that it would be improper to answer a question from the legislature regarding the authority of the City of Boston.<sup>18</sup> With respect to the second question, the SJC answered negatively and confirmed that Boston could extend domestic partnership benefits by passage of a home rule petition adopted by the General Assembly and signed by the Governor.<sup>19</sup>

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14. See *Act Relative to Employee Benefits in the City of Boston* (City Council passed March 13, 1996) (Mayor approved March 25, 1996).

15. See Jill Zackman, *Senate Approves Domestic Partners Bill*, BOSTON GLOBE, Jan. 1, 2000.

16. See Opinion of the Justices to the House of Representatives, 696 N.E.2d 502, 504 (1998).

17. See *id.* at 504.

18. See *id.* at 505-06 (finding that question one called for an "interpretation of existing law" and was outside of their "solemn occasion" jurisdiction).

19. See *id.* at 506-08.

The road to domestic partner benefits would not, however, be that smooth. Shortly after the SJC rendered its *Opinion of the Justices*, Boston's home rule petition passed the House and the Senate and went to Governor Paul Cellucci for his signature.<sup>20</sup> Supporting the extension of benefits to same-sex couples but asserting that providing domestic partnership to unmarried heterosexual couples would undermine family structure and discourage marriage, Governor Cellucci vetoed the bill.<sup>21</sup> Abandoning the fight in the legislature, Mayor Menino acted upon his own authority and signed the executive order to extend group health insurance benefits to persons registered under the Family Protection Ordinance as domestic partners and dependents.<sup>22</sup> Announced on August 4, 1998, the executive order took effect on November 1, 1998.<sup>23</sup>

### C. *The Rise of Connors v. City of Boston*

Ten days after the executive order went into effect, members of the Catholic Action League, represented by the American Center for Law and Justice,<sup>24</sup> challenged its validity.<sup>25</sup> The case put squarely before the court the question that the SJC had deferred when put to it by the legislature: are municipal domestic partnership benefit plans inconsistent with the state statute addressing group health insurance for municipal workers, and therefore, beyond the city's power?<sup>26</sup> Although rooted in this narrow legal question, the suit also offered a vehicle for the ACLJ's seemingly broader social agenda—to argue that domestic partner benefits somehow create “common law” marriages, contravene criminal sodomy and antifornication laws, and

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20. See Tatsha Robertson, *Edict Expected on Partner Benefits*, BOSTON GLOBE, Aug. 4, 1998, at B1.

21. See *id.*

22. See *Connors v. City of Boston*, 714 N.E.2d 335, 336 (Mass. 1999).

23. See *id.*

24. The American Center for Law and Justice (ACLJ) states the group's dedication “to the promotion of pro-liberty, pro-life, and pro-family causes.” The American Center for Law and Justice, *About the ACLJ* (visited March 23, 2000) <<http://www.aclj.org/about a.html>>. The group was founded in 1990 by Pat Robertson and has filed lawsuits challenging municipal domestic partnership plans throughout the country. See *id.*

25. The petitioners had standing to sue based on their status as taxpayers. See MASS. ANN. LAWS ch. 40, § 53 (Law. Co-op. 1979); *Connors*, 714 N.E.2d at 336.

26. See *Connors*, 714 N.E.2d at 335-36; *Opinion of the Justices to the House of Representatives*, 696 N.E.2d 502, 505-08 (1998).

otherwise impermissibly “expand” the definition of marriage by local law.<sup>27</sup>

By their suit, the plaintiffs sought a preliminary injunction against the Mayor and the city to enjoin implementation of the executive order.<sup>28</sup> After the December 2, 1998 hearing, Superior Judge Charles Grabau ruled on December 11, 1998 that the executive order was inconsistent with state law and granted the plaintiffs’ preliminary injunction request.<sup>29</sup> Concluding that the case raised a question of first impression regarding the consistency of the executive order with state law, Judge Grabau reported the question to the appeals court.<sup>30</sup> The SJC took up the question on direct appellate review.<sup>31</sup>

### III. LEGAL ANALYSIS

The sole question before the court was the one reported to it by Superior Court Judge Grabau:

Whether the Executive Order signed by Mayor Thomas M. Menino on August 4, 1998, extending health benefits coverage to domestic partners of Boston city employees, and their dependents, is inconsistent with G.L. c. 32B, §§ 2(b) and 15(b), and, therefore, in violation of § 6 of the Home Amendment Rule and G.L. c. 43B, § 13.<sup>32</sup>

In answering the question, the SJC recognized the deferential approach to home rule authority wherein municipal action is valid until proven otherwise.<sup>33</sup> Under the constitutional and statutory home

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27. See *Connors*, 714 N.E.2d at 339-41. Although not squarely before the court, the SJC put to rest the ACLJ’s marriage arguments. The SJC said:

Contrary to the plaintiffs’ claims, we see nothing in the executive order that creates the ‘equivalent’ of common-law marriage for registered domestic partners, that conflicts with any criminal law of the Commonwealth, or that otherwise seeks to define the marital status between two individuals in contravention of any [law].

*Id.* at 338 n.11.

28. See *id.* at 336.

29. See *id.* at 336-37. Judge Grabau also allowed a motion to intervene filed by Gay & Lesbian Advocates & Defenders (GLAD) on its own behalf as well as on behalf of a city employee and her domestic partner. See *id.* Motions to intervene on behalf of City Councilor Thomas Keane, Jr. and Service Employees International Union, Local 285 were not explicitly ruled on. See *id.* at 336 n.6.

30. See *id.* at 337.

31. See *id.* at 337.

32. *Id.* at 337.

33. See *id.* at 337. Among the fifty states, Massachusetts has the broadest type of home rule authority available. See *id.* Under Massachusetts’ constitutional home rule authority, a municipality may take any action as long as it is not inconsistent with state law. See *Bloom v.*

rule provisions,<sup>34</sup> a city or town may undertake any action as long as that action is not “‘inconsistent’ with State laws or the Constitution.”<sup>35</sup> Finding whether local action is inconsistent with state law requires determining: (1) if there is express legislative intent to forbid local activity, or (2) whether local regulation somehow frustrates the purpose of a state statute.<sup>36</sup>

In order to resolve the question of inconsistency, the SJC considered the language and legislative history of G.L. c. 32B, specifically with respect to the prohibition of Section 15(b) that states no city may “‘appropriate or expend public funds’ for the payment of group health insurance premiums for its active or retired employees, or their dependents, ‘unless such insurance is procured pursuant to the provisions’” of the state law.<sup>37</sup>

Striking the executive order that provided domestic partner benefits, the court rejected the defendants’ argument that Section 15(b) sets a floor of benefits, not a ceiling.<sup>38</sup> Relying in part on general principles of insurance law, the court explained that Chapter 32B addresses the provision of benefits, not just to the named insured (the employee), but to all persons who, because they are “‘dependent’” on the employee, have an insurable interest through that employee.<sup>39</sup> In particular, the court stated that only those persons specified in the definitions of “‘dependent’” found in Section 2(b) could obtain insurance through their relationship with the employee.<sup>40</sup> Because Section 2(b) defines “‘dependent’” to include only legal spouses, children under nineteen years of age, and children over nineteen years

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Worcester, 293 N.E.2d 268, 276-77 (Mass. 1973). In other states, home rule authority is not as broad. See *Lilly v. Minneapolis*, 527 N.W.2d 107, 111 (Minn. App. 1995) (finding that Minnesota has only limited home rule powers because municipalities have no inherent powers in determining matters of statewide concern); *City of Atlanta v. Morgan*, 492 S.E.2d 193, 196 (Ga. 1997) (holding that Georgia municipalities may use their administrative power to determine whether to provide benefits to anyone who falls under the term “‘dependent’”).

34. See MASS. GEN. LAWS ANN. CONST. amend. art. 89, § 6 (1966); MASS. GEN. LAWS ANN. ch. 43B, § 13 (1966). These provisions are nearly identical.

35. *Connors*, 714 N.E.2d at 337. Powers exerted under home rule authority must also be ones that “‘the general court has power to confer’” on the city. MASS. GEN. LAWS ANN. CONST. amend. art. 89, § 6 (1966). Recall, the SJC had already determined that the legislature could have properly delegated to the city authority to extend domestic partner benefits. See Opinion of the Justices of Representatives, 696 N.E.2d 502, 506-08 (1998).

36. See *Connors*, 714 N.E.2d at 337-38.

37. *Id.* at 339.

38. See *id.*

39. See *id.* at 339 n.15.

40. See *id.* at 336 n.8, 339.

who are unable to provide for themselves, Section 15(b), according to the court, excludes the provision of group health insurance to domestic partners.<sup>41</sup>

Despite the limited scope of the question before the court, the SJC commented on the impact of its decision in undoubtedly the least formalistic portion of the decision. Justice Margaret Marshall, writing for the court, noted the sharp departure today in the make-up of households from that prevalent in 1955 when the legislature passed the insurance law, Chapter 32B.<sup>42</sup> Relying on census data, Justice Marshall pointed out that the category of dependents covered by the state law undeniably “no longer fully reflects all household members for whom city employees are likely to have continuing obligations to provide support. A ‘family’ may no longer be constituted simply of a wage-earning father, his dependent wife, and the couple’s children.”<sup>43</sup>

In recognition of the fact that this decision creates a stark void between the reality of contemporary families and the scope of coverage of existing insurance law, Justice Marshall pointedly noted that “[a]djustments in the legislation to reflect these new social and economic realities must come from the Legislature.”<sup>44</sup> She offered two possibilities. The legislature can either expand the Section 2(b)

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41. *See id.* at 339 (referring to cost containment of insurance programs, in that municipality benefit provisions cannot exceed the county’s, which cannot exceed the state’s provisions). Bolstering its interpretation of Chapter 32B, the court looked to a report issued in 1967 by the Special Commission on Implementation of the Municipal Home Rule Amendment to the State Constitution. *See id.* This report was issued when the Section 15 limitation in Chapter 32B was first introduced and reflected a purpose of cost containment limiting the “level of benefit” to be not greater than that afforded to county and state employees. *See id.* The court read the term “level of benefits” to include all of the benefits issued to and through the employee, thereby including all “household members” who received benefits as a result of the employee’s insurable interest. *See id.* To support its interpretation, the court noted that “who” a group plan covers is often as important as the risks that are covered. *See id.*

The court also looked to the report to glean a purpose of uniformity behind the state law that creates a “state-wide” system for the purchase of group health insurance. *See id.* at 340. Despite a series of amendments to Section 15(b) that provide mechanisms other than Chapter 32B by which a governmental unit may appropriate funds for group health insurance (arguably eroding any original purpose of uniformity), the court rejected the defendants arguments that the purposes of the law had changed over time. *See id.* at 341 n.20. According to the SJC, whatever the current form of the law, the original purposes of cost containment and uniformity remained and removed any possibility that the city could offer group health insurance that could “coexist” consistent with the purposes of Chapter 323. *See id.* at 340.

42. *See id.* at 341.

43. *Id.* at 341.

44. *Id.* at 341-42.

definition of “dependent” to reflect modern-day reality, or it can authorize cities and towns to define the scope of “dependents.”<sup>45</sup>

#### IV. IMPACT OF THE DECISION

Although filed by the plaintiffs with the stated intention of advancing “family values,” the *Connors* decision has directly harmed families by resulting in the loss of health insurance for over 120 adults and 80 children in the City of Boston who are the family members of Boston city employees.<sup>46</sup> According to an affidavit filed by the City of Boston in seeking an extension of time before the superior court’s injunction took ultimate effect, the result of the court’s decision is that many persons will be unable to obtain alternative coverage, including many who may have foregone alternative coverage as a result of the guarantees of coverage made by the executive order.<sup>47</sup>

##### A. *Loss of Local Control of Workplace Benefits*

Although not directly at issue in the *Connors* case, the benefits provided to domestic partners and their dependents by the Town of Brookline and the Cities of Cambridge, Northampton, and Amherst are called into question by the court’s ruling.<sup>48</sup> Data is not publicly available which totals the number of persons who could conceivably lose critical health care coverage or the number of people who might be without coverage for an indeterminate amount of time for care of preexisting conditions. Anecdotal reports suggest that over a hundred people will be left without health insurance, a “critical social necessity.”<sup>49</sup>

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45. *See id.* at 342.

46. *See Joann Pizzarella Aff., Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999) (No. 98-734F).

47. *See id.* (“As of July 8, 1999, there were one hundred and twenty-one persons affected by the court’s decision in this matter. Of those . . . persons, eighty-one city employees had converted their health benefits plan from an individual to a family plan, thereby assuming a higher premium cost. Since the health benefits plans operate on a thirty day advanced payment schedule, these employees have paid in advance a higher monthly premium for their converted family plans.”).

48. *See supra* text accompanying notes 6-8. The ACLJ recently filed an identical lawsuit against the City of Cambridge’s plan. *See ACLJ News Release* (released March 21, 2000) <<http://www.aclj.org/PR000321.html>>.

49. *Connors*, 714 N.E.2d at 342. *See Joann Pizzarella Aff., Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999) (No. 98-734F).

It is also worth noting that, in this case, a conservative legal organization has, in effect, created a regime where an issue of traditionally local concern has become one of statewide control. That result seems contrary to vocal advocating of the federalism which conservative legal organizations typically invoke against remote governmental regulation.<sup>50</sup> Conservatives have argued that local governments, being closer to the people, are more accountable to the electorate and will therefore, in certain cases, more effectively and efficiently administer social programs.<sup>51</sup> Ironically, as a result of a lawsuit spearheaded by conservative interests, Massachusetts municipalities are prevented from providing workplace benefits that reflect existing social and economic realities, despite the fact that cities and towns are arguably best situated to determine local demographics of householders.<sup>52</sup> Additionally, municipal employers lose a competitive advantage vis-à-vis private employers in that they are prevented by law from providing competitive workplace benefits, another antifederalist result.<sup>53</sup>

*B. Viewing Connors from a National Perspective*

Putting *Connors* in a national perspective offers an additional glimpse into the plaintiff's motivation behind the suit. The ACLJ has said that *Connors* was the centerpiece of "a major national offensive . . . to challenge" municipal domestic partner benefit plans across the country.<sup>54</sup> The ACLJ views these challenges as critical because, in the ACLJ's eyes, providing health insurance to domestic partners of city employees "redefine[s] and ultimately destroy[s]" marriage.<sup>55</sup> The

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50. See George Bush, *Federalism: Restoring the Balance*, 18 CUMB. L. REV. 125, 127 (1987).

51. See *id.* at 128.

52. A Boston Globe article identifying that an increasing number of grandparents are taking on the parental role illustrated this point. See Nancy B. Johnson, *More Grandparents Return to Parenting*, BOSTON SUNDAY GLOBE, Sept. 13, 1998, at 17.

53. In its Brief, the Attorney General pointed out that "of the 25 largest corporate employers in Suffolk County, at least ten offer health insurance benefits to domestic partners of employees." Att'y Gen. Brief at 46 n.26, *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999) (No. SJC-07945).

54. Jay A. Sekulow, *Case Update: Domestic Partnership Ordinances* (last modified Feb. 26, 1999) <<http://www.aclj.org/cudomesticpartners.html>>. Mr. Sekulow is the Chief Counsel of the American Center for Law and Justice.

55. *Id.*

results of this national campaign have been mixed; however, while the ACLJ is winning some battles, it is losing the war.<sup>56</sup>

To date, domestic partner ordinances, executive orders, and benefit plans have been attacked in New York,<sup>57</sup> Illinois,<sup>58</sup> Colorado,<sup>59</sup> California,<sup>60</sup> Georgia,<sup>61</sup> Florida,<sup>62</sup> and Virginia<sup>63</sup> in addition to Massachusetts. In no case has a court 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.<sup>64</sup> At best, the challenges to municipal domestic partner plans have served as modern-day challenges to somewhat historic and untested broad grants of home

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56. See *Crawford v. City of Chicago*, 710 N.E.2d 91, 91-100 (Ill. App. Ct. 1999) (upholding Chicago's domestic partner plan); *Slattery v. City of New York*, 697 N.Y.S.2d 603, 604 (N.Y. App. Div. 1999) (upholding domestic partnership ordinance based on lack of conflict with common law marriage); *City of Atlanta v. Morgan*, 492 S.E.2d 193, 195-96 (Ga. 1997) (upholding an Atlanta domestic partner ordinance framed in terms of "dependency"); *Lilly v. Minneapolis*, 527 N.W.2d 107, 108-11 (Minn. Ct. App. 1995) (striking a Minneapolis health benefits ordinance based on Minnesota's narrow home rule powers in which municipalities have no inherent authority).

57. See *Slattery v. Giuliani*, 686 N.Y.S.2d 683, 684-85 (N.Y. Sup. Ct. 1999), *aff'd as modified by Slattery v. City of New York*, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999) (upholding domestic partnership ordinance based on lack of conflict with common law marriage).

58. See *Crawford*, 710 N.E.2d at 99.

59. See *Schaefer v. City & County of Denver*, 973 P.2d 717, 721 (Colo. Ct. App. 1998), *reh'g denied* (April 12, 1999) (upholding domestic partner benefits).

60. See *S.D. Myers, Inc. v. City and County of San Francisco*, No. C97-04463, 1999 U.S. Dist. LEXIS 8748, at \*3 (N.D. Cal. May 27, 1999) (upholding domestic partner benefits).

61. See *City of Atlanta v. McKinney*, 454 S.E.2d 517, 520-21 (Ga. 1995) (striking domestic partner benefits because inconsistent with state family law). *But see Morgan*, 492 S.E.2d at 194-96 (upholding redrafted domestic partners ordinance that conditioned benefits on "dependency").

62. See David Fleshler, *Group Sues over Domestic Partner Law*, SUN SENTINEL (Fort Lauderdale, Fla.), Feb. 20, 1999, at 3B.

63. See *Arlington County v. White*, No. 991374, 2000 WL 429453, at \*3 (Va. Apr. 21, 2000) (holding that the local governing body acted ultra vires in extending health insurance benefits to the domestic partners of its employees).

64. As the Northern District of California Court reasoned, statutes extending rights and protections to unmarried couples is "neither inimical to state marriage laws nor contrary to State policy favoring marriage." *S.D. Myers*, 1999 U.S. Dist. LEXIS 8748 at \*16. This conclusion was confirmed by the SJC which saw "nothing in the executive order that creates the 'equivalent' of common-law marriage for registered domestic partners, . . . or that otherwise seeks to define marital status between two individuals in contravention of any Massachusetts statute or the Massachusetts Constitution." *Connors v. City of Boston*, 714 N.E.2d 335, 338 n.11 (Mass. 1999) (citing Opinion of the Justices to the House of Representatives, 696 N.E.2d 502, 507-09 (1998)). *But cf. Arlington County*, 2000 WL 429453, at \*5 (Hassell, J., dissenting in part and concurring in judgment) (arguing that the extension of domestic partnership benefits is beyond the county's power because it recognizes common law marriages and same-sex unions, defining marital relationships).

rule authority by states to municipalities. *Connors* falls into this latter category, resulting in an express invitation by Massachusetts' highest court to the legislature for it to redress a gap caused by the legislature's failure to update an antiquated insurance law.

C. *Options Remaining for Municipal Domestic Partner Benefits*

*Connors* leaves some, albeit limited, options for remaining municipal domestic partnership benefits. First, the only relevant prohibition in Chapter 32B is on a governmental unit "appropriat[ing] or expend[ing] public funds for the payment of premiums."<sup>65</sup> Therefore, programs offered by municipalities whereby group health insurance is made available to domestic partners at their or the employees' expense remain a viable alternative to city-funded domestic partner plans. Further, the SJC was careful to note that the decision applies only to group health insurance benefits.<sup>66</sup> Accordingly, cities and towns remain free to extend individual insurance policies to domestic partners, even if only as an interim measure until a long-term solution can be found.<sup>67</sup> Unfortunately, employee-paid plans or individual insurance are less than satisfactory short-term solutions in light of the high costs associated with each approach.

The more obvious fix is for the legislature to respond to the SJC's invitation to address a matter of statewide concern—that household members are left without health insurance, a "critical, social necessity."<sup>68</sup> One bill is currently pending in the state legislature that would amend state law to allow cities (and require the Commonwealth) to provide health insurance to their employees' domestic partners (and their dependents).<sup>69</sup> Passage of that bill would redress the technical problem that *Connors* identified.

A final option is for cities and towns to file, individually or as a group effort, home rule petitions with the legislature to obtain express approval to provide group health insurance to domestic partners or any other household members determined appropriate to receive

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65. MASS. GEN. LAWS ANN. ch. 32B, § 15(b) (1993).

66. See *Connors*, 714 N.E.2d at 340 n.18.

67. Indeed, the Towns of Northampton and Amherst have adopted this short term solution.

68. *Id.* at 342.

69. See S. Res. 2048, 181st Gen. Con., Reg. Sess. (Mass. 1999).

them.<sup>70</sup> This route may present the same political hurdles faced by Boston in its first attempts to provide domestic partnership benefits. There are, however, after *Connors*, even more compelling reasons for the legislature (and the Governor) to defer to municipalities' requests, both in deference to the traditional home rule authority and in recognition of the changing demographics of cities and towns so clearly illustrated by Justice Marshall in the *Connors* decision itself.<sup>71</sup>

#### V. CONCLUSION

Regardless of what political response the court's decision elicits, several things are clear in the aftermath of *Connors*. Hundreds of people throughout the Commonwealth have lost group health insurance coverage, coverage that is routinely provided to families of city workers as long as they are legal spouses, but is not provided to domestic partners. In its decision, the court pointed out the negative social consequences of this loss. It identified the problem, and it also identified its source and solution. The rest is up to the people and their representatives.

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70. Amherst has filed such a petition.

71. See *Connors*, 714 N.E.2d at 341 n.21.