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***Court of Appeals***

**STATE OF NEW YORK**

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In the Matter of the Application of
Council Of The City Of New York,
Petitioner-Appellant,

For a Judgment Under Article 78 of the CPLR,

– against –

Michael R. Bloomberg, in his official capacity as Mayor of the City of New York, and City of New York
Respondents.

# BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND THE EMPIRE STATE PRIDE AGENDA AS AMICI CURIAE


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Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and The Empire State Pride Agenda (“Pride Agenda”) (together “the Amici”) submit this *amici curiae* brief to highlight errors in the decision by the Appellate Division, First Department invalidating New York City Local Law 27 of 2004, entitled the Equal Benefits Law (the "EBL"). In the face of the City Council’s striking factual record to the contrary, the Appellate Division struck down the EBL on the grounds, among others, that it was inconsistent with New York State procurement statutes because it "expressly excludes a class of potential bidders for a reason unrelated to the quality or price of the goods or services they offer."[1]

That decision was plain error and should be reversed. The extensive legislative history developed prior to the EBL's adoption which was cited in the Verified Petition demonstrates that the EBL is consistent with the goals of the State procurement laws to obtain high quality goods and services at lower cost. The EBL furthers those goals because, among other reasons, the provision of equal benefits promotes the hiring and retention of the best workers which, in turn produces better work and reduces costly turnover expenses. In light of that legislative history – and in the absence of any contradictory evidence – there simply was no basis for the Appellate Division's decision.

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[1] The Appellate Division also found that the EBL was preempted by the Employee Retirement Income Security Act, 29 U.S.C. §1001, *et seq.* Although the amici do not address that erroneous conclusion, they join in the arguments advanced by the Petitioner-Appellant on the issue.

## STATEMENT OF INTEREST OF *AMICI CURIAE*

Lambda Legal is a national organization, headquartered in New York City, committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

Lambda Legal has appeared as counsel or participated as *amicus* in this and other courts in numerous cases involving legal benefits and protections for gay and lesbian domestic partners. *See, e.g., Braschi v. Stahl Assocs.,* 74 N.Y.2d 201, 543 N.E.2d 49 (1989)(surviving domestic partner of deceased leaseholder is "family member" entitled to protections of New York rent control laws); *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 754 N.E.2d 1099 (2001)(upholding right of same-sex domestic partners to challenge university housing policy excluding them from married-student housing); *Air Transp. Ass'n v. City & County of San Francisco,* 992 F. Supp. 1149 (N.D. Cal. 1998), *aff'd,* 266 F.3d 1064 (9th Cir. 2001) (upholding San Francisco's Equal Benefits Ordinance ("EBO") in substantial part); *S.D. Meyers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (upholding the San Francisco EBO).

In addition to litigating on issues relevant to this case, Lambda Legal engages in education and public policy advocacy on the value to businesses and other organizations and the municipalities that contract with them flowing from

extending equal benefits to the domestic partners of employees. Lambda Legal is also acutely aware of the importance of these benefits to its nearly 7,000 members in New York and to the New York community it serves, who will be directly affected by the Court's decision.

Founded in 1990, Pride Agenda is New York's statewide civil rights organization committed to winning equality and justice for lesbian, gay, bisexual, and transgender ("LBGT") New Yorkers and their families. The Pride Agenda has offices in New York City and Albany and is the largest statewide LGBT organization in the country. Among its goals, the Pride Agenda is dedicated to ensuring that all New Yorkers are protected from discrimination and that all New York families are supported by government in their roles as parents and caregivers.

The Pride Agenda has been advocating for the passage of New York City's EBL since the late 1990's. The organization's interest in the measure grew out of the experiences of its members and the New York LGBT community it represents where many families suffered real harm by being denied access to healthcare, bereavement leave, and other benefits that employers were granting to similarly situated married employees. Through its work for over a decade with municipal governments, private sector employers, labor unions, LGBT-employee affinity groups, and individual LGBT employees and their family members, the Pride Agenda has witnessed how domestic partner benefits can benefit not only

LGBT employees, but workplaces as a whole. The Pride Agenda has a keen interest in this litigation because tens of thousands of its members will have their personal lives directly affected by the Court's decision; in some cases, the existence of an EBL will make the difference whether or not these members will be able to secure health insurance for their loved ones or be allowed to be at the side of a life-long partner during a time of loss.

The *Amici* submit this brief specifically to share with the Court their expertise concerning a central issue in the case – how the EBL furthers the goal of the State procurement laws to obtain the best work at the lowest possible price.

## SUMMARY OF ARGUMENT

This brief addresses the failure of the Appellate Division to consider and appropriately weigh the undisputed evidentiary record before it demonstrating that the EBL is consistent with the goals of New York State's procurement statutes. The record shows that Petitioner-Appellant, the Council of the City of New York (the "City Council"), before enacting the EBL, considered substantial, detailed and credible documentary and testimonial evidence that the EBL would likely serve to reduce the costs of City contracts and improve the quality of goods and services obtained. Because the Appellate Division concluded – without any record support – that the EBL was not designed to further the goals of the State procurement statutes, the Appellate Division's decision should be reversed.

On June 28, 2004, the City Council enacted the EBL over the veto of Respondent, Mayor Michael R. Bloomberg (the "Mayor"). (R. 58-62.)[2] The EBL prohibits City contractors from discriminating in the provision of employment benefits based on marital status. It achieves this by requiring, as a condition to City contracts – and subject to certain limitations designed to avoid any undue burden – that bidders agree not to discriminate in the provision of employment benefits between their employees who are married and their employees who have "domestic partners." (R. 59.)

After passage of the EBL, the Mayor announced that he would not enforce it. (R. 63-64.) The City Council sued the Mayor in an Article 78 proceeding to compel enforcement of the duly enacted legislation, and the trial court ruled in the City Council's favor. (R. 3-4.) On appeal, the Appellate Division reversed, finding the EBL invalid. The Appellate Division based its decision, among other things, on the grounds that the EBL was inconsistent with State procurement statutes (such as General Municipal Law §§100-a, 103(1) and 104-b[1]) because it "expressly excludes a class of potential bidders for a reason unrelated to the quality or price of the goods or services they offer." (R. 179.)

[2] The Record on Appeal filed by the City Council is cited as ("R. ___.")

That determination is clearly erroneous. The EBL does not exclude any potential bidders: not only may all bidders choose to comply with the EBL, but no evidence was offered demonstrating that the EBL's requirements are too burdensome for *any* bidder to satisfy. Indeed, the evidence supported just the opposite conclusion.

Most importantly, the Appellate Division erred because it ignored the undisputed facts showing that the City Council considered, prior to voting, substantial evidence that the EBL would further the quality/cost criteria of the State procurement laws. Over the course of five hearing days, the City Council learned from numerous informed, credible witnesses – including government officials, public policy groups, City contractors and labor unions – that adoption of the EBL would promote the goals of the State procurement laws because, among other things, it would:

- Expand the available labor pool to ensure that City contractors attract and retain the best and most talented employees, thereby increasing the quality of goods and services delivered;

- Decrease employee turnover and absenteeism rates, thereby improving employee performance and reducing recruitment and other related costs;

- Increase job satisfaction (*e.g.*, by allowing employees the opportunity to focus on their work and by improving the employers' perceived commitment to the fair treatment of their employees), thereby improving employee performance;

- Impose marginal or no additional costs on the City because City contractors are unlikely to experience increased costs from compliance; and

- Not deter entities from contracting with the City.

The Mayor failed to offer – either in the City Council hearings or in this action – any evidence contradicting the EBL's expected quality/cost benefits. In fact, the evidence supporting the City Council's adoption of the EBL is fully consistent with a growing body of research generated by academics and human resource professionals, among others, based on the evolving experience of thousands of public and private entities who provide employee benefits without discriminating based on marital status. That research confirms that the non-discriminatory provision of employee benefits improves performance, and thus the quality of products and/or goods delivered, in the same manner as do all employee benefits – *i.e.*, by providing access to an expanded labor pool, reducing employee turnover rates and increasing employee job satisfaction – without any, or only marginal, cost increases.

In sum, the unchallenged evidence before the Appellate Division demonstrated that the EBL is consistent with the goals of the State procurement laws. The Appellate Division's unsupported conclusion to the contrary is clearly erroneous and should be reversed.

## ARGUMENT

### I. THE EBL'S CONSISTENCY WITH STATE PROCUREMENT STATUTES IS MEASURED BY A RATIONAL RELATION TEST

The EBL, like all local laws imposing contract specifications on the purchase of goods and services, will be deemed consistent with State procurement statutes[3] – and thus not preempted – if found to be *"rationally related* to the[] twin purposes" of those statutes. *New York State Chapter, Inc., Assoc. Gen. Contractors of Am. v. New York State Thruway Auth.*, 88 N.Y.2d 56, 68, 666 N.E.2d 185, 190 (1996)(emphasis added).[4] Those "twin purposes" are the "(1) protection of the public fisc by obtaining the best work at the lowest possible price,

[3] The State procurement statutes include those cited by the Appellate Division in its decision – *i.e.*, General Municipal Law §§100-a, 103(1) and 104-(b)(1). (R. 179.) *See New York State Chapter*, 88 N.Y.2d at 67-68, 666 N.E.2d at 189 (citing General Municipal Laws §§100-a and 103(1) as examples of procurement statutes).

[4] Although the Mayor suggests that the EBL must be not only rationally related to the goals of the State procurement statutes, but must be "essential" to them (Mayor Br. at 27), application of that heightened standard is not appropriate here. Rather, this Court has employed such a heightened standard only where a specification excluded a class of potential competitors. *See Gerzof v. Sweeney*, 16 N.Y.2d 206, 211-12, 211 N.E.2d 826, 829 (1965); *New York State Chapter*, 88 N.Y.2d at 67-68, 666 N.E.2d at 189. As discussed below, the EBL does not exclude any competitors and thus its validity should be assessed using the traditional rational relation test. *See infra* at 20-21. *See also Abco Bus Co., Inc. v. Macchiarola*, 75 A.D.2d 831, 833, 427 N.Y.S.2d 876, 879 (2d Dep't 1980)(local bidding specification should be upheld where a "rational basis for that determination is found to exist")(Hopkins, J.P., dissenting), *rev'd for reasons stated in dissent*, 52 N.Y.2d 938, 939, 419 N.E.2d 870, 870 (1981); *General Contractors Assoc. v. Tormenta*, 180 Misc. 2d 384, 391, 687 N.Y.S.2d 871, 875 (Sup. Ct. New York County 1999)(bidding precondition not unlawful unless it "bears no rational relationship to obtaining the best work at the lowest price").

and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts." *Id.* at 67-68, 666 N.E.2d at 190. [5]

Consistent with that "rational relation" test, even those local laws which impede competition will be sustained when the record shows that the "decision" to adopt the law "had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes." *Id.* at 69, 666 N.E.2d at 190. Thus, so long as "the record supporting the determination to" adopt the bidding specification "establishes that [it] was justified by the interests underlying the competitive bidding laws," the specification will be sustained. *Id*. at 65, 666 N.E.2d at 187-88.[6]

Of course, not just any "record" will suffice to support a bidding specification. For example, a "[*p*]ost hoc rationalization for the . . . adoption" of a

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[5] The validity of a bidding specification does not depend upon it furthering both goals of the State's procurement statutes, so long as it is not inconsistent with those goals. For example, a bidding specification will be upheld if it advances the quality/cost ratio of local contracts and does not otherwise promote favoritism, improvidence, fraud or corruption. *See, e.g., Acme Bus Corp. v. Board of Ed. of Roosevelt Union Free School Dist.*, 91 N.Y.2d 51, 54-55, 689 N.E.2d 890, 892 (1997)(approving selection of lowest responsible bidder where no evidence existed of actual favoritism, improvidence, fraud or corruption in the selection process). The Appellate Division did not suggest (and the Mayor has not argued) that the EBL would undermine confidence in the integrity of the public bidding process.

[6] *See also McMillen v. Browne*, 14 N.Y.2d 326, 331; 200 N.E.2d 546, 548 (1964) (local ordinance imposing minimum wage requirement for city contractors upheld because it "reflects a *determination by the city* that the work performed for it, as well as the products to be manufactured and furnished for its use, will be of a higher quality" and that work will not be "interrupted or delayed" by labor unrest if contractors' employees receive at least minimum wage) (emphasis added).

bidding specification is insufficient. *Id.* at 75, 666 N.E.2d at 193. Rather, the evidence must reflect that "prior to deciding in favor of a" bidding specification, the local legislature "considered the goals of competitive bidding." *Id*.

The Mayor concedes (Mayor Br. at 21) that under this Court's precedents he bears a "heavy burden . . . to prove inconsistency" with the State's general laws. *See 41 Kew Gardens Road Assoc. v. Tyburski*, 70 N.Y.2d 325, 333, 514 N.E.2d 1114, 1118 (1987). As discussed below, the Mayor did not – and cannot – satisfy that burden because the EBL's legislative history shows that the City Council acted on the basis of extensive evidence that the EBL would advance those goals of the State procurement statutes.

## II. THE EBL'S LEGISLATIVE HISTORY DEMONSTRATES THAT IT WAS ENACTED TO FURTHER THE GOAL OF PROCURING HIGH QUALITY GOODS AND SERVICES AT LOW PRICES

The Verified Petition (R. 10-13) and the legislative history show that the City Council, before passing the EBL, compiled extensive documentary and testimonial evidence demonstrating that the EBL would likely reduce the cost and improve the quality of the products and services for which New York City contracts.[7] The legislative record makes clear that the City Council thoroughly

[7] The Verified Petition, which summarizes the EBL's legislative history, constitutes evidence that is dispositive on this issue. Indeed, the verified petition is considered the "equivalent of a responsive affidavit for purposes of a motion for summary judgment." *Travis v. Allstate Ins. Co.*, 280 A.D.2d 394, 394-95, 720 N.Y.S.2d 499, 500 (1st Dep't 2001); *see also* CPLR § 105(u) ("A verified pleading may be utilized as an affidavit whenever the latter is required."). The Verified

considered the benefits and costs of the law. During numerous hearings before the Council Committee on Contracts and in formal submissions, the Council heard compelling evidence that the EBL would improve the quality of goods and services received by the City and would have a negligible (if any) effect on the costs of contracts entered into by the City. Notably, although the Mayor's office objected to the passage of the EBL on the theory that it would be inconsistent with State procurement laws, it backed its objections with neither sound reasoning nor evidence.

Based on the evidence presented to it, the City Council exercised its collective judgment to pass the EBL, not once, but twice. As the legislative history demonstrates, the City Council gave credence and substantial weight to the testimony it heard regarding the fiscal benefits of the EBL. And, for reasons including the expressly stated purpose of improving the quality of the goods and

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Petition summarized the extensive evidence before the City Council demonstrating that the EBL was enacted to further the goals of the procurement statutes. The testimony and documentary submissions that are part of the EBL's legislative history are a matter of public record appropriately considered in evaluating the EBL's validity. *See, e.g., State v. Green*, 96 N.Y.2d 403, 424 n.2, 754 N.E.2d 179, 183 n.2 (2001) (judicial notice taken of legislative history in determining legislative policy); *Affronti v. Crosson*, 95 N.Y.2d 713, 720, 746 N.E.2d 1049, 1053 (2001) (judicial notice may be taken for "first time on appeal" of census data because "this data reflects a legislative fact, as opposed to an evidentiary fact"). For the convenience of the Court, relevant excerpts from the legislative history are appended as exhibits to the Affirmation of David F. Wertheimer dated December 1, 2005.

serviced contracted for by the City, the City Council overrode the Mayor's veto and enacted the EBL.

### A. Testimony Showed An Expected Increase In The Quality Of Goods And Services

The City Council heard testimony and received submissions from numerous sources to the effect that the EBL would markedly improve the quality of goods and services provided to the City. These sources included government officials, public policy groups specializing in the study of human resources and benefits programs, contractors providing services to the City, and labor unions.

New York State Comptroller Alan Hevesi – the State's chief financial officer responsible for supervising the fiscal affairs of local governments, including New York City – made his position on the EBL's fiscal benefits clear in a letter to the City Council during its deliberations:

> The costs associated with extending such employee benefits are negligible and are offset by the contractors' ability to attract and retain the best and most talented employees with competitive benefits packages. A commitment to equal benefits actually lowers turnover and recruitment costs, and helps improve employee job satisfaction and performance. From a purely fiscal point of view, it benefits the City of New York to do business only with companies that treat their workers fairly.

Letter from Alan G. Hevesi to the New York City Council, dated December 9, 2003. (*See* Exhibit A to Wertheimer Affirmation dated December 1, 2005 ["Wertheimer Aff."].) (*See also* R. 11-12.)

Comptroller Hevesi gave further testimony, delivered by his representative, Imogen Taylor, explaining his analysis:

> Many companies that have instituted inclusive benefit packages will confirm that doing so is simply smart business. Employees feel supported and respected, and are therefore more loyal, more motivated, and less likely to leave. Fair treatment increases morale, decreases turnover and absenteeism and reduces workers' level of stress, making them more productive.
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> . . . .
>
> Such packages provide a competitive edge in recruiting employees, allowing the company to hire from among the best and the brightest, most qualified applicants.
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> . . . .
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> Furthermore attracting a diverse workforce also allows a company to be more in touch with its market [and hence provide a higher quality product]. For example, the Chief Executive Officer of Procter & Gamble, John Pepper, has said, 'Our success as a global company is a direct result of our diverse, talented workforce. Our ability to develop new customer insights, and ideas and to execute in a superior way across the world, is the best testimony to the power of diversity any organization could have.'

(Feb. 27, 2004 Hrg. at 16-17, [Wertheimer Aff. Ex. B].)

The Council also heard testimony on this issue from Cynthia Goldstein of the San Francisco Human Rights Commission, the official responsible for enforcing that city's equal benefits law. This testimony, based on San Francisco's actual experiences in administering a statute substantially similar to New York City's EBL, provided the Council with further evidence of the fiscal benefits that could be gained by enacting the law. (*See* Nov. 13, 2003 Hrg. at 79-

90, [Wertheimer Aff. Ex. C].) Ms. Goldstein testified that San Francisco had found that, by prohibiting contractors from discriminating in the provision of employee benefits, the city's equal benefits law resulted in a higher quality of services to the city. (*See id.* at 87-88.) In addition, she pointed the Council to studies that "confirmed that domestic partner benefits are among the top recruitment and retention tools available in the workforce, and also that company loyalty directly correlates to the quality of services and products produced." (*Id.*) She summarized her conclusion succinctly: "if you offer employees domestic partner benefits and treat them fairly, they will in fact produce a better project for your dollar." (*Id.* at 88-89.)

Finally, numerous public policy organizations and employers presented additional evidence to the Council that employers who offer domestic partner benefits provide better services. For instance, Darryl Herrschaft of the Human Rights Campaign (the "HRC"), a national gay and lesbian advocacy and research organization, testified regarding the results of numerous studies of domestic partner benefits conducted by his organization and others. He testified that HRC's surveys showed that both employers and employees reported that offering domestic partner benefits decreased employee turnover and improved recruitment, productivity, and reputation. (*See* Nov. 13, 2003 Hrg. at 111, [Wertheimer Aff. Ex. C].) Consistent with these findings, he testified regarding a

study by the Society for Resource Management, which determined that "Domestic Partner Benefits were the number one recruiting tool for executives and the number three recruiting incentive for managers and line workers" and that "the most successful companies in the United States are more likely to offer domestic partner benefits." (*Id.* at 112.) Based on these studies, Mr. Herrschaft testified, "[The EBL] will benefit New York City and does not pose an undue hardship to business. By extending the values of New York City's anti-discrimination laws to its contracting specifications, the City will help these companies increase their overall productivity and competitiveness through developing a more inclusive workplace environment." (*Id.* at 108.)

Likewise, representatives of numerous employers, including several city contractors, gave testimony or provided letters to the Council regarding the competitive advantages of offering domestic partner benefits, including:

- Verizon: "We believe extending benefits to same-sex domestic partners enhances our ability to attract and retain the best and most talented employees. Our commitment to equal benefits also lowers turnover and recruitment costs, and helps improve employee job satisfaction and performance." (Letter from Donna C. Chiffriller, Vice President for Benefits, to the New York City Council, dated August 4, 2003)[Wertheimer Aff. Ex. D.];

- Merrill Lynch: "In our experience, offering equal benefits is a sound business practice. The costs associated with extending these benefits are more than offset by our ability to attract and retain talented employees. As an employer, providing competitive

benefits reduces turnover and recruitment costs, and helps improve employee job satisfaction and performance." (Letter from Paul W. Critchlow, Counselor to the Chairman and Vice Chairman for Public Markets, to the New York City Counsel, dated September 8, 2003)[Wertheimer Aff. Ex. E.];

- Housing Works: "Contrary [to the] view that [equal] benefits [are] detrimental to the bottom line, [and] not cost effective, Housing Works' experience is that this is simply not true." (Nov. 13, 2003 Hrg. at 138)[Wertheimer Aff. Ex. C.];

- Gay Men's Health Crisis: "[W]e can testify through our own experience – that the cost associated with extending the benefits are measurable, and definitely any costs that there are, are offset by the ability to attract and retain the most talented employees with a comprehensive benefit package." (*Id.* at 152); and

- Safe Horizon: "[N]ot to offer [equal benefits to domestic partners] would put us at a competitive disadvantage. . . . We cannot afford not to offer fair and equal benefits to different employee groups, especially since the City recognizes such partnerships." (*Id.* at 169).

### B. Testimony Showed No Material Increase In Costs

The legislative record shows that considerable attention was also paid to the effect the EBL would have on the cost of City contracts. Government officials, public policy groups, City contractors and labor unions all testified that providing domestic partner benefits would not lead to a material increase in costs.

For example, representatives of both the New York City Comptroller and the New York State Comptroller testified that the EBL would not increase the cost of City contracts. At the Council's initial hearing on November 13, 2003, City

Comptroller William C. Thompson, Jr., in testimony delivered by Deputy Comptroller Greg Brooks, endorsed the view that the EBL would not "deter entities from contracting with the City or have a negative fiscal impact on the City." (Nov. 13, 2003 Hrg. at 19, [Wertheimer Aff. Ex. C].) And the City Comptroller emphasized that his support for the EBL was fully consistent with his fiduciary duty to guard the City's fiscal health. (*Id.* at 23; R. 11.)

Likewise, State Comptroller Hevesi provided testimony on how, rather than increasing costs for the City, the EBL "has the potential to save significant resources for both the City and the State of New York." (Feb. 27, 2004 Hrg. at 13, [Wertheimer Aff. Ex. B].)

> Almost 7,000 private companies, including 211 Fortune 500 companies, already provide equal benefits to employees with domestic partners. The administrative costs to companies that provide benefits to employees with domestic partners are negligible. In fact, a 1997 study found that 85 percent of the employers that implemented a policy of providing equal benefits have not experienced an increase in costs at all.

(*Id.* at 14-15; *see also* R. 12.)

In addition to hearing the cost analyses of the City and State Comptrollers, the Council also heard from Ms. Goldstein of the San Francisco Human Rights Commission on the potential costs. Her testimony, based on San Francisco's actual experiences, again supported the same conclusion reached by

the Comptrollers: that New York City's EBL would not increase costs to the City. (*See* R. 13.)

According to Ms. Goldstein, San Francisco's experience showed that "Equal Benefits Legislation works because it does not cost contractors much money to comply with this legislation . . . ." (Nov. 13, 2003 Hrg. at 79, [Wertheimer Aff. Ex. C]; R. 13.) She testified:

> [T]here is over 20 years of actuarial data that's been gathered by the insurance industry to support the idea that domestic partner insurance does not cost a lot of money.
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> And it doesn't cost a lot of money for a few reasons. First of all, the start up cost associated with offering domestic partner insurance is very minimal. Again, you're not rolling out a new benefits plan and incurring the costs associated with doing so. All you're doing is adding a new group of people, a new group of eligible people to benefits that you already have in place.
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> Secondly, the ongoing cost of offering domestic partner insurance benefits is very minimal . . . [F]or most companies, all they have to think about is what do they pay for the cost of insurance premiums for spouses, and they would be looking at a one to three percent increase in that cost for the insurance premiums for domestic partners.
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> . . . .
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> [Furthermore,] health care claims for domestic partners tend to be less than or equal to those of spouses.
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> . . . .
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> [And when] you look at other types of benefits that are covered by this policy, things like bereavement leave and family leave, those benefits are so inexpensive that most companies don't track the cost of those benefits even for their entire workforce, let alone be concerned about the cost of them for just this new group of eligible domestic partners.

> . . . .
> [And finally] there now is a national market for domestic partner insurance, [so to the extent there is concern regarding the ability of contractors to find insurance companies that provide coverage for domestic partners,] it's really already being addressed by the insurance market.

(*Id.* at 79-83.)

With regard to the market for domestic partner insurance, Ms. Goldstein noted that her office was in the process of collecting a database of providers offering "domestic partner inclusive insurance products," that the number of providers was extensive, and that the list included "dozens" that would provide benefits to small companies. (*Id.* at 83.) Furthermore, she testified that San Francisco's experience showed that any potential difficulty or burden on City contractors associated with finding satisfactory insurance providers were readily avoided through mitigating provisions, similar to those included in the EBL, that ensured contractors would not be penalized if, in spite of their good faith efforts, they were unable to obtain proper domestic partner coverage. (*Id.* at 83-84.)

Ms. Goldstein testified that, based on her experience in San Francisco, the lack of additional costs to contractors would translate into a lack of additional costs to the City: "Since the companies aren't going to be incurring any costs associated with complying, there won't be costs for them to pass on to the City." (Nov. 13, 2003 Hrg. at 87, [Wertheimer Aff. Ex. C].) In fact, Ms. Goldstein

testified that a study of certain contract costs both before and after the enactment of San Francisco's EBL found there "was absolutely no statistically significant change in the amount of dollars spent for these particular contracts." (*Id.*)

Finally, representatives of several public policy groups, City contractors, and labor unions provided information to the Council supporting the conclusion that EBL would not significantly impact the cost of services to the City including:

- UAW Region 9A: "[E]xperience has demonstrated over the years that we have had this coverage in place that frankly it does not cost additional money." (Feb. 27, 2004 Hrg. at 51, [Wertheimer Aff. Ex. B]);

- HRC: "[After] more than 20 years [of] administering these benefits, we now have hard data to demonstrate the cost is usually negligible." (Nov. 13, 2003 Hrg. at 109-11, [Wertheimer Aff. Ex. C]);

- Project Renewal: "The cost has been minimal, and the benefit significant." (*Id.* at 143); and

- Safe Horizons: "The annual cost, therefore, to the organization is very low, at less than two percent of our total employer paid premium costs. . . . The return to us, in terms of employee morale and the positioning as an employer of choice are great and from a cost-benefit standpoint we consider this to be a worthwhile investment." (*Id.* at 170.)

### C. Testimony Showed No Adverse Impact On Competition

The City Council also considered the impact the EBL might have on competition, particularly whether passage of the law would result in a material

decline in the number of bidders for City contracts and thus a decrease in competition for City business. The evidence heard by the City Council pointed to no material decrease in competition.

Specifically, the City Council was presented with the testimony by Ms. Goldstein on the absence of any adverse effect on competition for city contracts due to San Francisco's equal benefits law: "To the extent we did experience any decrease in the number of bidders on our contracts, it was very short lived, we learned that complying wasn't a reason to refrain from City business and market forces drew companies back into competition." (Nov. 13, 2003 Hrg. at 87, [Wertheimer Aff. Ex. C].) "People just added domestic partnership to their benefit package and that was it." (*Id.* at 102.) Her testimony was bolstered by that of New York City Comptroller Thompson, who saw no danger that companies would decline to bid on City business because of opposition to the EBL.[8] (*Id.* at 19.)

[8] In contrast to this quantitative evidence, the Mayor's representative, in testimony before the City Council, speculated that based on "some very preliminary research" done by the Mayor's Office, there was a tentative concern that certain organizations might not continue as City vendors if the EBL passed. (Nov. 13, 2003 Hrg. at 60, [Wertheimer Aff. Ex. C].) The Mayor, however, did not (a) identify the bidders who might withdraw from competition, (b) quantify what impact their withdrawal might have on competition, or (c) contend that other responsible bidders would not quickly replace any vendors who abandoned City business.

### D. The City Council Determined That The EBL Would Improve The Quality/Cost Ratio For City Contracts

The legislative record confirms that the City Council relied on the foregoing testimony and submissions in enacting the EBL with the expectation that it would improve the quality of goods and services per dollar spent by the City. Council Member Robert Jackson, Chairman of the Committee on Contracts, clearly stated this intent at several City Council hearings:

> Many employers now recognize that in order to attract and retain the best employees from the largest pool possible, they must provide equal pay for equal work, and have taken steps to equalize the compensation offered to their employees with domestic partners. In fact, a wide array of government employers, including New York City, public institutions and private companies now offer various types of domestic partnership benefit packages to their employees.
>
> These employers benefit from being able to better compete for employees for a wide group of applicants. This bill is, therefore, important for purely economic reasons for the City of New York. Businesses that offer compensational parity, companies that treat their employees fairly, are better business partners, since better paid and satisfied employees produce better goods and services more cheaply.

(Feb. 27, 2004 Hrg. at 5, [Wertheimer Aff. Ex. B].)

Moreover, the fiscal benefits of the EBL were prominently featured in the EBL Committee Reports. The Reports emphasized that domestic benefits are an important tool in attracting the most qualified employees and reducing turnover

and recruitment expenses, and that the cost of offering equal benefits would be negligible.[9] Indeed, the Reports drafted subsequent to the testimony summarized above explicitly state:

> Simply, the [EBL] is meant to save the City money by requiring a measure of fairness in the way City contractor employees are paid. The Committee has heard extensive testimony indicating that companies that provide equal benefits attract and retain better-qualified, more productive employees. Such companies, the Committee has found, have a competitive edge and provide superior, less expensive goods and services and give the City better value for its dollar
>
> . . . .
>
> Indeed, the Committee has heard testimony from experts throughout the country, and particularly from the New York State Comptroller, Alan Hevesi, that on purely economic grounds, the [EBL] will help ensure that the City obtains the best value for taxpayer dollars by contracting with employers that provide employees with domestic partners the same benefits they provide to employees with spouses.
>
> . . . .
>
> Employers now recognize that in order to be able to attract and retain the best employees it is in their best interests to offer spousal-type benefits or equal compensation to unmarried but committed couples. Indeed, a wide array of government employers, public institutions and private companies now offer various types of domestic partnership benefits packages. The Committee has found that it is in the City's economic interest to do business with such companies since better-

[9] *See* Report of the Governmental Affairs Division, dated February 27, 2004, *available at* http://webdocs.nyccouncil.info/attachments/60279.

> paid and satisfied employees produce better goods and services less expensively.[10]

Thus, the legislative record makes clear that the City Council made a reasonable determination, based on extensive testimony and written submissions, that enacting the EBL would have the effect of increasing the quality of contracted goods and services without increasing overall costs to the City.

## III. THE EVIDENCE SUPPORTING THE EBL IS CONSISTENT WITH THE EXPERIENCE OF THE NUMEROUS PRIVATE AND PUBLIC ENTITIES OFFERING EQUAL BENEFITS

The Mayor, both during the hearings before the City Council and in this action, offered no evidence challenging the conclusion that the quality/cost ratio for City contracts would likely improve as a result of the EBL. The Mayor's silence is not surprising. The testimony and other evidence the City Council reviewed and relied upon in passing the EBL is consistent with both the findings of academic research and the reported experiences of private and public entities that offering equal employee benefits advances employer interests.

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[10] *See* Report of the Governmental Affairs Division, dated April 16, 2004, *available at* http://webdocs.nyccouncil.info/attachments/60640. *See also* Report of the Governmental Affairs Division, dated May 5, 2004, *available at* http://webdocs.nyccouncil.info/attachments/60842; Report of the Governmental Affairs Division, dated June 28, 2004, *available at* http://webdocs.nyccouncil.info/attachments/61574.

## A. Employment Benefits Improve The Quality/Cost Ratio For Goods And Services

### 1. The rationale behind employee benefits

The provision of employee benefits dates back to colonial times.[11] Employee benefits were initially designed to "decrease employee turnover, increase worker efficiency, and prevent union organization." M.V. Lee Badgett, *Money, Myths and Change: The Economic Lives of Lesbians and Gay Men* (The University of Chicago Press 2001) (hereinafter "*Economic Lives*"), at 75.[12] The reason is clear: "Retirement benefits, health care plans, relocation allowances, credit union memberships, and even company store discounts, among others" are huge financial incentives that increase worker loyalty and productivity. *Id.*[13]

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[11] *See* Employee Benefit Research Institute, *Employee Benefits in the United States: An Introduction*, in Fundamentals of Employee Benefit Programs, 3, 3 (2005), *available at* http://www.ebri.org./publications/books/index.cfm?fa=fundamentals (follow "*1: Employee Benefits in the United States: An Introduction*" hyperlink).

[12] The relevant portions of this book are annexed to Wertheimer Aff. as Ex. F.

[13] *See also Employment Policy Foundation: The American Workplace 2005: The Changing Nature of Employee Benefits*, at v (2005), *available at* http://www.epf.org (follow "Executive Summary" hyperlink under "The American Workplace 2005: The Changing Nature of Employee Benefits" heading); *Employee Benefit Research Institute*, EBRI Research Highlights: Health Benefits 5 (2003), *available at* http://www.ebri.org/publications/ib/index.cfm?fa=ibDisp&content_id=175 (employers offer health benefits "to promote health, to increase worker productivity, and as a form of compensation to recruit and retain qualified workers").

### 2. Benefits are a material part of employee compensation

Benefits have become a fundamental and substantial portion of an employee's overall compensation package. According to Ron Blackwell, director of corporate affairs for the AFL-CIO, "benefits are the second most important concern of working people today, ranking behind job security and ahead of wages."[14] The United States Department of Labor's Bureau of Labor Statistics recently released statistics for March of 2005 demonstrating that wages and salaries in the private sector averaged 71 percent of employer compensation costs per hour worked, *while benefits averaged 29 percent.*[15] It is thus easy to see why benefits play a critical role in attracting highly qualified applicants in the first place, retaining them in the second, and improving the quality of their performance in the third.[16]

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[14] Christopher R. Conte, *Introduction: Do Employers/Employees Still Need Employee Benefits?*, *in* Employee Benefit Research Institute, Do Employers/Employees Still Need Employee Benefits? 1, 3 (Dallas L. Salisbury ed. 1998), *available at* http://www.ebri.org/publications/books/dis_eeeb.cfm (follow "Download Book PDF" hyperlink).

[15] U.S. Department of Labor, Bureau of Labor Statistics, *Employer Costs for Employee Compensation - June 2005*, at 1, 5 (June 16, 2005), *available at* http: www.bls.gov/schedule/archives/ecec_nr.htm#2005 (follow "employer costs for employee compensation hyperlink"; then follow "June 2005 (PDF)" link).

[16] *See, e.g.*, Rachel Christensen, *Value of Benefits Constant in a Changing World: Findings from the 2001 EBRI/MGA Value of Benefits Survey*, EBRI Notes (Employee Benefits Research Institute, Washington, D.C.), March 2002, at 2, *available at* http://www.ebri.org/publications/notes/index.cfm?fa=notesDisp&content_id=3276 (benefits very important in a prospective employee's job selection); *The American Workplace 2005: The*

### 3. The importance of benefits to quality/cost issues

Research confirms what common sense suggests: that the ability to obtain and retain a higher quality employee by increasing that employee's compensation results in the employer's production of better quality products or services at a lower cost.

The role of educated, skilled employees has become much more important as this country moves from an industrial economy based on mass marketing and economies of scale to a service economy in which information and knowledge are critical and can come only from individuals and groups who "must be educated, motivated and rewarded much differently than their industrial predecessors."[17]

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*Changing Nature of Employee Benefits*, supra, note 13, at vii ("employees are now likely to weigh a benefits package just as heavily as salary when considering a career move").

[17] Jeffrey J. Hallett, *Work and Business in a New Economy*: in Employee Benefit Research Institute: Adjusting to Change 27, 29-30 (1989), *available at* http://www.ebri.org/publications/books/index.cfm?fa=bwba (follow "Download Book PDF" hyperlink); s*ee also* Working Caregivers Show Need for Workplace Flexibility, *The Balancing Act* (Employment Policy Foundation, Washington, D.C.) July 24, 2003, at 6 (noting "a projected labor and skill shortage of up to 35 million workers by 2030" and that "[r]etaining highly skilled employees is essential to competitive success"), *available at* http://www.epf.org/pubs.asp?sort=d&summary=n (follow "*The Balancing Act — Working Caregivers Show Need for Workplace Flexibility*" hyperlink).

Employees in the "new" economy are no longer interchangeable parts on an assembly line but highly skilled, specialized professionals who demand a competitive package of wages and benefits to deliver a quality performance:

> Individual employees have become increasingly important, as quality, excellence, innovation, flexibility, ingenuity, and change have come to define our operating reality. Workers are not simply performing predesigned tasks that could be done by any healthy body. Quality performance and true excellence occur only when each individual in the process is dedicated to it and is working, by choice, toward these goals. When the competitive reality is a demand for quality, one individual or group not so motivated or concerned can destroy the efforts of everyone else and every other element of the process. This was not the case when the challenge was quantity and the method was mass production.

*Id.* at 34.[18]

Employers today offer a variety of benefit plans to ensure that employees are as healthy as possible so that they "arrive daily[] and perform[] at peak levels (health insurance); [and to] reduce[e] turnover costs and increas[e] employee tenure (retirement plans)." *See, e.g., Employment Policy Foundation: The American Workplace 2005: The Changing Nature of Employee Benefits*, at v,

[18] *See also* Charles G. Tharp, *Do Employers/Employees Still Need Employee Benefits? Yes.*, in Employee Benefit Research Institute, Do Employers/Employees Still Need Employee Benefits? 11, 12-13 (Dallas L. Salisbury ed. 1998) *available at* http://www.ebri.org/publications/books/dis_eeeb.cfm ("The high road to competitive success must focus on product quality and customer service first, and must meet the competition through increased productivity, which requires employee commitment.").

*supra* note 13. The benefits most important to obtaining and retaining employees "recognize[e] and nurture[e] the diversity of the work force of the modern corporation." *See also* Tharp, at 11, *supra* note 18.

It is well established that organizations reduce their costs when they reduce employee turnover. The Employment Policy Foundation, a respected nonprofit, nonpartisan public policy research and educational foundation that focuses on workplace trends and policies, has concluded that "[e]mployee turnover is a critical cost driver for American business."[19] "Companies that can achieve a lower than average turnover rate gain a competitive advantage."[20]

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[19] Employee Turnover Rises, Increasing Costs, *Fact Sheet* (Employment Policy Foundation, Washington. D.C.) March 22, 2005, at 1 *available at* www.epf.org/pubs.asp?sort=d&summary=n (follow Fact Sheet-Employee Turnover Rises, Increasing Costs hyperlink). "Conservative estimates of the costs of replacing a worker are about 25 percent of an employee's annual total compensation." *Id*. at 2. *See also* Employee Turnover-A Critical Human Resource Benchmark, in HR Benchmarks (Employment Policy Foundation, Washington, D.C.) December 3, 2002 at 4, *available at* www.epf.org/pubs.asp?sort=d&summary=n (follow "HR Benchmarks-Employee Turnover-A Critical Benchmark" hyperlink)("Based on full-time vacancies at 23.8 percent per year and $12,506 per vacancy turnover costs (based on the generally accepted 25 percent ratio of turnover costs to compensation), a Fortune 500 corporation with 40,000 full-time employees would face turnover costs of $119 million per year. A change in the turnover rate by one percentage point … can add to or subtract from corporate operating costs up to $5 million per year.").

[20] *Id*. at 4. *See also* Employee Turnover-A Critical Human Resource Benchmark, in HR Benchmarks (Employment Policy Foundation, Washington, D.C.) December 3, 2002 at 4, *also available at* www.epf.org/pubs.asp?sort=d&summary=n (follow "HR Benchmarks-Employee Turnover-A Critical Benchmark" hyperlink).

### B. The Provision Of Domestic Partner Employee Benefits On A Non-Discriminatory Basis Achieves The Same Goals Furthered By Employee Benefits Generally

Employers who decide to offer domestic partner benefits do so for the very same reason that they decide to offer employee benefits in general: to recruit and retain valuable employees.[21] As one benefits specialist aptly put it: "[A]lthough [the issue of domestic benefits] is considered controversial, it shouldn't be. *It is merely a tool to attract, retain and reward employees, as is any other benefit.*" Melody A. Carlsen, *Domestic Partner Benefits-Commentary*, Census of Certified Employee Benefit Specialists (International Society of Certified Employee Benefit Specialists, Brookfield, WI), May 1995, at 5 (emphasis added) [Wertheimer Aff. Ex. G].[22]

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[21] Employee Benefit Research Institute, *Domestic Partner Benefits*, in Fundamentals of Employee Benefit Programs, 65, 66 (2005)(hereinafter "*Domestic Partner Benefits"*), *available at http://www.ebri.org/publications/books/index.cfm?fa=fundamentals* (follow 38: Domestic partner benefits" hyperlink); *Domestic Partner Benefits: Facts and Background*, Facts from EBRI (Employee Benefits Research Institute, Washington, D.C.) March 2004, at 1, *available at* http://www.ebri.org/publications/facts (follow "Domestic Partner Benefits: Facts and Background March 2004 hyperlink).

[22] A benefits manager surveyed by benefits professionals put it well: "We wanted to be able to attract and retain employees from all different parts of the population, all different, diverse groups and we want to offer a competitive benefits package." Judy Greenwald, *More U.S. Employers Seen Adding Benefits for Domestic Partners*, 37 Bus. Ins. 3, 4 (2003) [Wertheimer Aff. Ex. H].

### 1. Recruitment/Retention

Not surprisingly, then, the provision of equal benefits to gay and lesbian and other unmarried employees has at least the same effect on their recruitment and retention as has the provision of benefits has among the general population.[23] According to a survey of employers conducted this year, "the top reason most companies offer domestic partner benefits is *to attract and retain employees* . . . ." Hewitt Associates, LLC, *Survey Findings: Benefit Programs for Domestic Partners & Same-Sex Spouses: 2005*, at 9 (emphasis in original) (hereinafter "Hewitt Associates Survey") [Wertheimer Aff. Ex. I].

### 2. Productivity/Quality

Additionally, as noted above, benefits are directly related not only to obtaining and retaining high caliber employees, but to the employees' performance and the quality of the product or service offered. This is particularly true in the case of gay and lesbian employees. Workers who are compelled to hide their sexual orientation because of an inhospitable work environment expend energy that detracts from their productivity and overall career development. *See* Sharon S. Rostosky & Ellen D. B. Riggle, "*Out" at Work: The Relation of Actor and Partner*

[23] *See* Kristin H. Griffith & Michelle R. Hebl, *The Disclosure Dilemma for Gay Men and Lesbians: "Coming Out" at Work*, 87 J. Applied Psychol. 1191, 1197 [Wertheimer Aff. Ex. J.]; Employee Benefit Research Institute, *Domestic Partner Benefits*, Fundamentals of Employee Benefit Programs, at 66 (2005), *available at* www.ebri.org; Employee Benefit Research Institute, *Domestic Partner Benefits: Facts and Background*, at 1 (March 2004).

*Workplace Policy and Internalized Homophobia to Disclosure Status*, 49 J. Counseling Psychol. 411, 411 (2002) [Wertheimer Aff. Ex. K]. An employer's failure to provide domestic partner benefits actually decreases productivity by adding to the mental and economic stress of gay and lesbian employees. *Id.*

Conversely, organizations that provide benefits to individuals, regardless of sexual orientation, encourage gay and lesbian employees to participate fully and be their most productive within those organizations. An employer that offers domestic partner benefits demonstrates that all of its workers are valued and appreciated. In turn, "employee morale and productivity have been found to improve in work environments where individuals believe the employer demonstrates that it values employees." *Domestic Partner Benefits, supra* note 21 at 66. Organizations that offered same-sex domestic partner benefits have reported more organizational commitment on the part of their employees and less turnover those organizations that lacked this benefit. *See* Belle R. Ragins & John M. Cornwall, *We are Family: The Influence of Gay Family-Friendly Policies on Gay Employees*, at 14 (2001), *available at* http://home.earthlink.net/~globalage1/id91.html.

Moreover, the provision of equal benefits to gay and lesbian employees has a positive "spillover" effect on the remaining employee population. By providing same-sex benefits, an employer sends the message to all employees

that this form of diversity is valued in the organization. Employees within the company view domestic partner benefits as indicators of a supportive culture within a particular business. *See* Kristin H. Griffith & Michelle R. Hebl, *The Disclosure Dilemma for Gay Men and Lesbians: "Coming Out" at Work*, 87 J. Applied Psychol. 1191, 1197. [Wertheimer Aff. Ex. J.] The institution of these policies provides a basis for heterosexual employees to judge the type of atmosphere a particular employer wishes to foster, thus providing a competitive advantage in the recruitment process for all employees – not solely those who may take advantage of the EBL. *See id*. Domestic partner benefits can thus be a powerful recruitment and retention tool for organizations generally. *See We Are Family* at 14-15.

### C. The Costs to Employers of Providing Domestic Partner Benefits Are Negligible

The costs associated with extending employee benefits to domestic partners have been studied closely for nearly two decades and have consistently proven to be minimal. For example, one such study found that about 85 percent of employers offering domestic partner benefits report that such benefits constitute less than three percent of total benefits costs. Hewitt Associates Survey at 26; *see also Domestic Partner Benefits* at 67 (2005) (citing Hewitt Associates LLC, *Domestic Survey Findings: Domestic Partner Benefits: 2000* (2000))[Wertheimer

Aff. Ex. I]; M. V. Lee Badgett, *Calculating Costs with Credibility: Health Care Benefits for Domestic Partners,* 5 Angles 1, 1 (2000) ("overall, the likely cost increase will be . . . roughly 1%)[Wertheimer Aff. Ex. L]; Society for Human Resource Management, *Domestic Partner Benefits Mini-Survey,* 6 (1997) (85% of employers experience no cost increase from providing domestic partner benefits.) [Wertheimer Aff. Ex. M.]

The low cost of domestic partner benefits correlates with employee enrollment rates for these benefits. Typically, employers have found that about one percent of their employees enroll in domestic partner benefits plans. *See, e.g.*, *Domestic Partner Benefits,* at 66-67; *see also* Badgett, *Calculating Costs with Credibility*, at 1 ("overall, the likely cost increase will be roughly the same size as the increase in enrollment").

The Mayor contends that the low enrollment rate demonstrates that employees are not interested in domestic partner benefits. (Mayor's Br. at 5-6, 32.) The Mayor, however, has misconstrued the data contained in the May 5, 2004 Report issued by the City Council's Committee on Contracts. (Mayor's Br. at 5.) That Report quotes a Hewitt Associates survey published in 2000, stating that over 50% of surveyed companies reported that less than one percent "of employees eligible for benefits actually elected coverage for a domestic partner." (May 5, 2004 Report at 4 (cited in Mayor's Br. at 5).) But this description of "eligible"

employees includes *all employees eligible to receive health care benefits* – not just those employees eligible to enroll in domestic partner benefits. *See* Hewitt Associates Survey at 5, 13 (defining employee eligibility for the survey), 25 (reporting enrollment rates of eligible employees in 2000 and 2005).

Thus, the one percent enrollment rate says nothing about the percentage of employees who are in domestic partner relationships (gay, lesbian or heterosexual) and *also* participate in offered domestic partner benefit programs. Given that according to 2000 Census data, approximately 2.6 percent of the adult population live in unmarried couple households (*i.e.,* are domestic partners) – and thus perhaps approximately 1.3% of the employee population would be eligible to enroll their partners in, for example, health benefit programs – it is clear that a very substantial proportion of those in domestic partnerships do, in fact, enroll for domestic partner benefits when those benefits are offered to them.[24]

Another reason the costs of domestic partner benefit programs are low is that experience has shown that the customers enrolling in such benefit programs have not incurred health care costs materially different from the average

[24] According to the 2000 Census, 209,128,094 adults over age 18 live in the United States. S*ee* United States Census Bureau, American Fact Finder, United States Census 2000 Demographic Profile Highlights, *available at* http://factfinder.census.gov/ (follow "factsheet" hyperlink). 5,475,768 persons, or approximately 2.6% of the adult population, reported living in unmarried couple households. *See* Tavia Simmons & Martin O'Connell, U.S. Census Bureau, Married Couples and Unmarried Partner Households: 2000 at 2, *available at* http://www.census.gov/prod/2003pucs/censr-5.pdf.

population.[25] It is no more expensive to insure a same-sex domestic partner than it is to ensure a married heterosexual spouse. *See* Badgett, *Calculating Costs with Credibility*, at 4. Indeed, some of the initial concerns that had kept businesses from implementing equal benefits for domestic partners have simply never materialized.[26] One such concern was the unfounded notion that insuring domestic partners in the same way as married heterosexual couples would spike costs for businesses due to costs associated with AIDS or HIV-related claims. Studies have shown, however, that employers have not incurred any increased costs due to such claims. *See* Badgett, *Calculating Costs with Credibility* at 3-4; *see also* Steven N. Hargrove, *Domestic Partnership Benefits: Redefining Family in the Work Place*, 6 Loy. Consumer L. Rep. 49, 56, 59 (1994) [Wertheimer Aff. Ex. N].

Importantly, however, not only is the *actual use* of the domestic partner benefits important, but their availability alone has a positive impact in the

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[25] "The earliest employers to provide partner benefits often had to agree to surcharges or other measures to protect insurance companies from unexpected losses from high costs for partners. For instance, the City of Berkeley, had to pay a 2% fee to Kaiser Permanents [in 1985]. When no unusually high costs were reported for domestic partners in the first three years of the plan, Kaiser dropped the fee." Badgett, *Economic Lives*, at 85.

[26] *See* Employee Benefit Research Institute, *Domestic Partner Benefits*, in Fundamentals of Employee Benefit Programs, 65, 66-67 (2005), *available at* http://www.ebri.org/publications/books/index.cfm?fa=fundamentals (follow 38: "domestic partner benefits" hyperlink); *Domestic Partner Benefits: Facts and Background*, at 2 (Employee Benefit Research Institute, Washington, D.C.), March 2004, at 1, http://www.ebri.org/publications/facts (follow Domestic Partner Benefits: Facts and Background March 2004" hyperlink).

workplace. This is true for a variety of reasons. First, while domestic partners of employees may themselves be employed elsewhere, and participate in their own employers' benefit plans, gay and lesbian employees seriously consider the opportunity to take advantage of domestic partner benefits in making employment decisions:

> Even without signing up their partners, gay employees gain symbolically from their employers' recognition of domestic partners and might even gain in a larger social sense from an increased degree of openness about their relationships. Eligibility for partner benefits also comes with other potential benefits, including a sense of security should a partner lose his or her job and flexibility for making decisions about whether a partner can afford to leave a job to return to school, raise children, or become self-employed.

M.V. Lee Badgett, *Economic Lives*, at 84.

Second, the mere fact that equal benefits are available conveys the message that an employer values gay and lesbian workers, which promotes recruitment and retention of gay and lesbian workers *as well as workers generally* through the spill-over effect noted above.

Third, the failure to provide equal benefits adds to the mental and economic stress of gay and lesbian employees and thus can significantly detract from their productivity and career development, which, in turn, affects the productivity of the employer. *See* Rotosky & Riggle, *'Out' at Work*, at 411.

Moreover, valuable employees may be keeping other employment opportunities in mind if benefits are not available, causing a negative economic incentive. The employer not only loses a valuable and productive employee but incurs the costs associated with turnover and training of a new employee. *See* M.V. Lee Badgett, *Economic Lives*, at 95-96.

In short, the legislative history as well as independent studies establish that employers can access a wider labor force and experience a substantial reduction in employee turnover (all of which generate quality/cost advantages) by the perception that the employer offers a fair, non-discriminatory workplace committed to democratic ideals and diversity.

### D. The Proof Is In The Numbers: Provision Of Equal Benefits Is Widespread

Given the low costs and substantial advantages of offering domestic partner benefits, it is not surprising that over 8,274 employers in the United States offered domestic partner benefits as of December 31, 2004.[27] Among these employers are 247 of the companies in the Fortune 500, or 49 percent. *Id*. In addition, many cities and municipalities require those with whom they contract for

[27] *See* Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans: 2004*, at 15 (2005), *available at* http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/Customsource/Worknet/srch.cfm&searchtypeid=3&searchsubtypeID=12/Resources1/Publications_And_Other_Resources.htm.

goods and services to offer equal benefits. They have determined – as the City Council did – that it is simply good business to offer such benefits. In 1997, the City of San Francisco implemented its Equal Benefits Ordinance. The City of Berkeley followed suit in 2001. *See* Berkeley Municipal Code § 13.29.030. Similarly, Seattle, Los Angeles, Oakland, Minneapolis King County, Washington, Olympia County, Washington, San Mateo County, California, Tumwater, Washington and Portland, Oregon have all passed equal benefits ordinances.[28] That other cities comparable in size or economic diversity to New York City have successfully implemented equal benefits laws without significant costs and while realizing substantial benefits highlights the reasonableness of the City Council's conclusion that the EBL would further the goals of the State's procurement laws.[29]

* * *

Requiring bidders to offer equal employment benefits is good business. Both common sense and actual commercial experience support the conclusion that such benefits improve the quality of goods and services by

[28] *See* Seattle Municipal Code § 20.45.010; Los Angeles Municipal Code § 10.8.2.1; Oakland Municipal Code § 2.32.010; Minneapolis Code of Ordinances § 18.200; King County Code Bill No. 2003-0419; Olympia Municipal Code § 3.18; San Mateo County Code § 2.93.010; Tumwater Municipal Code § 3.46; Portland Code of Ordinances § 13.6-34.

[29] That conclusion is further supported by the State of California's passage of an equal benefits law (effective in 2007) requiring all bidders for state contracts in excess of $100,000 to provide equal benefits for domestic partners. *See* 752 Cal. Pub. Cont. Code § 10295.3 (2003).

improving recruitment and the productivity of the best available candidates, while at the same time decreasing the costs of producing those goods and services by increasing the retention of those candidates. As a result, there is no evidentiary basis for the Appellate Division's conclusion that the EBL runs afoul of the General Municipal Law requirement that bidding regulations be designed to achieve the best quality services for the least cost. The EBL is designed to, and will, accomplish just those goals.

## IV. THE APPELLATE DIVISION ERRED IN FINDING THAT THE EBL VIOLATES STATE PROCUREMENT LAWS

In the face of the unrefuted evidence to the contrary, the Appellate Division simply asserted without discussion that the EBL is invalid because it "expressly excludes a class of potential bidders for a reason unrelated to the quality or price of the goods or services they offer." (R. 179.) Whether viewed as a legal or factual determination, the Appellate Division's decision is erroneous and should be reversed.

### A. The Appellate Division's Conclusion That The EBL Is "Unrelated" To The Goals Of The State Procurement Statutes Is Contrary To All The Evidence And Without Any Support

There was no rational basis for the Appellate Division's factual determination that the EBL was adopted "for a reason unrelated to the quality or price of the goods or services" that bidders offer. (R. at 179.) As discussed, the

undisputed evidence established that the City Council adopted the EBL after an extensive factual investigation which overwhelmingly demonstrated that the EBL would further the goals of the State procurement statutes. There is *no evidence* in the record to the contrary.

The Mayor's contention that the EBL's legislative record is insufficient because it is "the antithesis of the fact-supported, project-based analysis" which this Court undertook in *New York State Chapter*, (Mayor Br. at 31), is simply wrong and based on a flawed reading of that case. Contrary to the Mayor's suggestion, this Court never held in *New York State Chapter* that bidding specifications for every single contract must be the subject of independent scrutiny by the legislature (or a contracting agency). Rather, the Court determined only that, because project-specific labor agreements ("PLAs") "*which are clearly different from typical prebid specifications in their comprehensive scope*," the factual circumstances of each individual project controls the validity of a particular PLA. *New York State Chapter*, 88 N.Y.2d at 68-69, 666 N.E.2d at 190 (emphasis added).

This Court in *New York State Chapter* was thus not confronted with – and thus did not address – the validity of a bidding specification (such as the EBL) premised on economic and industrial organization principles relevant to labor relations in general and supported by objective evidence of the specification's general applicability. This Court has made clear that such specifications will be

upheld so long as they are based on a "determination" that the specification would result in the City obtaining "higher quality" goods and services. *McMillen*, 14 N.Y.2d at 331, 200 N.E.2d at 548 (approving bid specifications generally applicable to City contracts requiring City vendors to pay minimum wage rate). The legislative record demonstrates that the EBL will achieve those results.

**B. The EBL Does Not Exclude A Class Of Bidders**

A class of bidders is excluded only where a bidding specification is so narrowly drawn as to exclude all but a single (or select group) of service/product providers. *See, e.g.*, *Gerzof*, 16 N.Y.2d at 211; 211 N.E.2d at 828 ("uncontradicted facts" showed that specifications drawn to ensure award to one manufacturer); *J.I. Case Co. v. Town Bd. Of Town of Vienna*, 105 A.D.2d 1077, 1077, 482 N.Y.S.2d 599, 599 (4th Dep't 1984) ("competitive bidding is effectively eliminated" where specifications drawn so that "only one manufacturer can meet them"). The EBL, however, is not drafted in such a restrictive manner. Indeed, the EBL does not exclude any competitors or, by extension, reduce competition.

*First*, it does not impose any affirmative requirement that bidders on City contracts provide their employees with any benefits at all. Rather, it simply directs that *if* bidders offer employee benefits, they do so on a non-discriminatory basis. No evidence exists in the record that any potential bidders for City contracts are incapable of satisfying the EBL by ending the discriminatory provision of

employee benefits. Moreover, the fact that some bidders may *voluntarily* choose not to cease their discriminatory practices does not mean that they have been excluded by the EBL. To the contrary, they have chosen simply to exclude themselves.

The situation here is no different than the one this Court addressed in *New York State Chapter*. when the Court found that the bidding specification requiring potential contractors to accept a pre-negotiated PLA did not exclude a class of bidders because the terms of the PLA allowed it to be accepted by both union and non-union contractors. As this Court held, the fact that some contractors might not wish to accept the PLA did not mean that the bidding specification had a preclusive effect on competition:

> The fact that certain nonunion contractors may be disinclined to submit bids does not amount to the preclusion of competition we identified in *Gerzof* as violative of the competitive bidding mandate.

*New York State Chapter*, 88 N.Y.2d at 71, 666 N.E.2d at 192.

*Second*, the Mayor's speculation that some current City vendors *might* cease bidding on City contracts rather than comply with the EBL (Mayor Br. at 31-32), is not sufficient to invalidate the specification. The State procurement laws "were not enacted to help enrich the corporate bidders but, rather, were intended

for the benefit of the taxpayers." *Conduit & Foundation Corp. v. Metro. Trans. Auth.*, 66 N.Y.2d 144, 148, 485 N.E.2d 1005, 1008 (1985).

For that reason, this Court "has never insisted upon unfettered competition in the letting of public contracts." *New York State Chapter*, 88 N.Y.2d at 75, 666 N.E.2d at 194. Instead, it has recognized that a bidding specification which "impedes the competition to bid" for public contracts should be enforced if "rationally related" to the goals of the State procurement statutes. 88 N.Y.2d at 68; 666 N.E.2d at 190. In this case, the EBL's legislative record unquestionably establishes that it will further those goals, and thus it should be upheld.

The Court's decision in *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344, 482 N.E.2d 1 (1985) – which the Mayor cites (Mayor's Br. at 32) – does not suggest a different result. In *Under 21*, the Court questioned "how the city would economically benefit" from an executive order precluding City contractors from discriminating on the basis of sexual orientation when "the most apparent consequence" of the order's enforcement "would be a *reduction* in the number" of City bidders. 65 N.Y.2d at 359 n.5, 482 N.E.2d. at 7 n.5. Such skepticism was warranted in that case because the record was bereft of any evidence that the Mayor had examined the impact of his order on the quality/cost ratio of City contracts. In contrast, here there is an extensive legislative record assembled by the City Council to answer the question

posed by the Court in *Under 21* – a record demonstrating that the EBL will advance the goals of the State procurement laws.

*Finally*, the Appellate Division's finding, and the Mayor's assumption, that potential bidders are being excluded by the EBL is based on nothing but idle speculation.[30] Neither in the hearings before the City Council nor in this action did the Mayor identify any specific vendors who would cease doing business with the City. Nor did he quantify the amount of business those unidentified bidders may represent. Indeed, in contrast to the Mayor's hypothetical concerns, the City Council heard evidence from a representative of the City of San Francisco that following enactment of its similar equal benefits law there was no material decline in bidders for San Francisco's business and "market forces drew companies back into competition." (Nov. 13, 2003 Hrg. at 87, [Wertheimer Aff. Ex. C].)

Moreover, it is significant that the EBL includes safeguards to limit any undue burden on City bidders, such as:

- exempting religious institutions from the obligation to recognize "domestic partners" and instead permitting them to offer equal benefits to an employee's "household" member who is an adult, unmarried and "lives permanently" with the employee (EBL §6-126.c(a)(ii))(R. 23);

[30] The same is true for a similar point raised in the *amici curiae* brief filed by The Archdiocese of New York, The Diocese of Brooklyn, Catholic Health Care System and St. John's University (the "Archdiocese"). Those *amici* argue that they provide substantial services to the City and oppose the EBL. But they concede they have "not yet determined how they would respond" if the EBL is upheld and do not suggest they would cease to bid for City contracts. (Archdiocese Br. at 20.)

- allowing contractors to require their employees to pay the difference if the cost of domestic partner benefits exceeds the cost of equivalent spousal benefits (*id*. §6.-126.f)(R. 24); and

- allowing contractors unable to secure domestic partner benefits comparable to those offered to spouses to pay affected employees a cash equivalent. (*Id*. §66-126.h)(R. 24).

In addition, recent developments have further reduced any potential impediments to complying with the EBL. On October 6, 2005, the Mayor announced that four major insurance companies had committed to offering domestic partner insurance to small City businesses (those with two to fifty employees) and, by Executive Order No. 72, established an executive agency to assist City vendors in obtaining and providing such insurance to their employees. *See* Exec. Order No. 72 (October 6, 2005), [Wertheimer Aff. Ex. O.] The Appellate Division's finding that potential bidders are being excluded is thus without any support and was error.

### C. The EBL Does Not Constitute Improper Social Policymaking

The Appellate Division also erred when it concluded that the EBL was an improper attempt to achieve "laudable goals" under the guise of the state procurement statutes. (R 179.) As set forth above, the EBL is specifically furthering the goals of those state procurement laws. The Mayor's contention on appeal that the EBL is invalid because it was designed to achieve "policy

objectives" unrelated to the goals of the State procurement statutes (Mayor's Br. at 25) is untenable. From a factual perspective, although comments in the legislative history reflect that the City Council favored the EBL because, among other reasons, it furthered non-discriminatory practices (Mayor Br. at 33), there is evidence that shows the EBL was adopted because it advances the goals of the State procurement laws. As discussed above, the City Council heard extensive, detailed evidence of the expected cost savings and quality improvements that the EBL would yield in the City's contracting relationships and explicitly relied upon that factual analysis in passing the EBL. Accordingly, there is no factual basis to find that the EBL's "purpose" amounted to disqualifying "social policymaking." *New York State Chapter*, 88 N.Y.2d at 76, 666 N.E.2d at 194.

In addition, this Court has never held that a bidding specification furthering the goals of the State's procurement statutes is invalid simply because it also yields other social benefits. Rather, bidding specifications advancing a social policy objective have been "struck down" only when "not linked to the interests embodied in the competitive bidding statutes." *Id*. at 68, 666 N.E.2d at 189. The broader rule advocated by the Mayor – which would condemn all bidding specifications offering any "social" policy benefits – not only is contrary to the public interest but is inconsistent with this Court's precedents. Specifically, this Court has recognized that bidding specifications which appropriately furthered

quality improvement and/or cost reductions could also promote other social values. *See, e.g., Broidrick v. Lindsay*, 39 N.Y.2d 641, 648, 350 N.E.2d 595, 599 (1976) (programs to end racially restrictive employment practices could serve to reduce the cost of government projects, a "proper consideration" for "government procurement policy"); *McMillen*, 14 N.Y.2d at 331, 200 N.E.2d at 548 (minimum wage specification for employees of city contractors enabled city to obtain "higher quality" products and services and avoid interruptions and delays caused by labor unrest).

## CONCLUSION

The City Council wisely – and lawfully - passed the EBL because it was good business to do so. *Amici* respectfully submit that the EBL is valid and that the decision of the Appellate Division should be reversed.

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Respectfully submitted,

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[*] All references to "Wertheimer Aff." are to the Affirmation of David F. Wertheimer dated December 1, 2005.