No. _____

In The Supreme Court of the United States

JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; SCOTT SMITH, in his official capacity as Director of the Arizona Department of Administration; KATHY PECKARDT, in her official capacity as Assistant Director of Human Resources for the Arizona Department of Administration,

Petitioners,

vs.

JOSEPH R. DIAZ; KEITH B. HUMPHREY; BEVERLY SECKINGER; STEPHEN RUSSELL; DEANNA PFLEGER; CARRIE SPERLING; LESLIE KEMP; COREY SEEMILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals ignore this Court's precedent and err in holding that Arizona Revised Statutes (A.R.S.) Section 38-651(O) (Section O) violates the Equal Protection Clause by limiting healthcare benefits to state employees' spouses and dependents – and thus not extending such benefits to state employees' domestic partners – given that a) Section O is facially neutral and there is no evidence that the Legislature intended to discriminate based on sexual orientation; b) Section O furthers the State's interests in promoting marriage while also eliminating the additional expense and administrative burdens involved in providing healthcare benefits to state employees' domestic partners; and c) the court's reason for finding that Section O discriminates against gay and lesbian state employees was that Arizona prohibits same-sex marriage?

PARTIES TO THE PROCEEDING

Petitioners, who were the Defendants-Appellants below, are Janice K. Brewer, in her official capacity as Governor of the State of Arizona, and Kathy Peckardt, in her official capacity as Assistant Director of Human Resources for the Arizona Department of Administration. Scott Smith, in his official capacity as Director of the Arizona Department of Administration, is also a Petitioner who is substituted for Defendant-Appellant David Raber under Supreme Court Rule 35(3).

Respondents, who were Plaintiffs-Appellees below, are Joseph R. Diaz, Keith B. Humphrey, Beverly Seckinger, Stephen Russell, Deanna Pfleger, Carrie Sperling, Leslie Kemp, and Corey Seemiller. Judith McDaniel was a Plaintiff below, but she is no longer a state employee and the issue is therefore moot as to her. (Pet. App. 17a n.1.)

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PETITION FOR WRIT OF CERTIORARI

Arizona Governor Janice K. Brewer, Director of the Arizona Department of Administration Scott Smith, and Director of Human Resources for the Arizona Department of Administration Kathy Peckardt (referred to collectively as State Officials) respectfully petition the Court for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's judgment in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-15a) is reported at 656 F.3d 1008 (9th Cir. 2011). The district court's opinion granting Respondents' request for preliminary injunction (Pet. App. 16a-56a) is reported at 727 F. Supp. 2d 797 (D. Ariz. 2010). The court of appeals' order and opinion on denial of rehearing en banc (Pet. App. 57a-69a) is reported at 676 F.3d 823 (9th Cir. 2012).

JURISDICTION

The court of appeals entered judgment on September 6, 2011. The court denied Petitioners' timely Petition for Rehearing en Banc on April 3, 2012. This Petition has been filed within ninety days of April 3,

2012. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The Equal Protection Clause of the Fourteenth Amendment provides the following in pertinent part: "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

Article XXX, § 1 of the Arizona Constitution provides the following: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." Arizona Revised Statute § 25-125(A) provides the following:

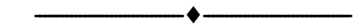
> A valid marriage is contracted by a male person and a female person with a proper marriage license who participate in a ceremony conducted by and in the presence of a person who is authorized to solemnize marriages and at which at least two witnesses who are at least eighteen years of age participate.

Arizona Revised Statute § 38-651(O) provides the following:

> For the purposes of this section, "dependent" means a spouse under the laws of this state, a child who is under twenty-six years of age or a child who was disabled before reaching nineteen years of age, who continues to be disabled under 42 United States Code

> § 1382c and for whom the employee had custody before reaching nineteen years of age.

The entire text of A.R.S. § 38-651 is reproduced in the appendix. Pet. App. 70a-80a. The following Arizona regulations are involved in this case and are reproduced in the appendix: Arizona Administrative Code (A.A.C.) R2-5-101 (2008) (Pet. App. 81a-96a); A.A.C. R2-5-416(C) (2008) (Pet. App. 97a-99a); A.A.C. R2-5-101(22) (2005) (Pet. App. 100a-111a).



STATEMENT OF THE CASE

Arizona law has long provided that a "valid marriage is contracted by a male person and a female person." A.R.S. § 25-125(A); 1980 Ariz. Sess. Laws, ch. 97, § 4. In *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. App. 2003), two homosexual men in a committed relationship challenged A.R.S. § 25-125(A)'s constitutionality after applying for and being denied a marriage license. The Arizona Court of Appeals held that Arizona's prohibition of same-sex marriage did not deprive petitioners of "their constitutional rights to substantive due process, privacy, or equal protection" under the U.S. or Arizona Constitutions. *Id.* at 465. In November 2008, Arizona voters amended Arizona's Constitution to provide that "[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state." Ariz. Const. art. XXX, § 1.

The State of Arizona provides healthcare benefits to its state employees and their eligible dependents.

A.R.S. § 38-651 (Pet. App. 70a-80a). Before 2008, Arizona regulations defined "eligible dependent" as "the employee-member's . . . spouse under Arizona law or an unmarried child" who fell within the categories listed in the regulations. A.A.C. R2-5-101(22) (2005) (Pet. App. 105a).[1] In 2008, the Arizona Department of Administration amended A.A.C. R2-5-101 to expand the definition of "eligible dependent" to include a "domestic partner," defined as a "person of the same or opposite gender" who had lived with the employee for at least a year before applying for benefits, was financially interdependent with the employee, and met the regulation's other qualifications. A.A.C. R2-5-101(22), (23) (2008) (Pet. App. 86a-88a). It also amended the definition of "child" to include a domestic partner's child. A.A.C. R2-5-101(10) (Pet. App. 82a-83a). "Approximately 800 . . . State employees receive[d] benefits for a qualifying domestic partner" and "only [a] small fraction of those 800 employees receive[d] benefits for a same-sex domestic partner." (Pet. App. 20a.) The cost of providing domestic partner benefits was over $4 million in fiscal year 2008, and the State had received claims for approximately $5.5 million in the following fiscal year. (Pet. App. 48a-49a.)

Beginning in fiscal year 2008 and continuing throughout fiscal year 2009, Arizona suffered a severe

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[1] Before 2005, A.A.C. R2-5-101(22) defined "eligible dependent" as "a dependent eligible for employee benefits under Section 125 of the Internal Revenue Code." A.A.C. R2-5-101(22) (2003).

budget crisis. *See League of Ariz. Cities & Towns v. Martin*, 201 P.3d 517, 520 (Ariz. 2009) (State's budget deficit was projected to be approximately $400 million in June 2008 but by the beginning of 2009 was reported to be nearly $1.6 billion). In the midst of this budget crisis, the Legislature passed a budget reconciliation bill that contained forty-two sections dealing with such diverse budget-related issues as nonwaiver of court fees, new licensing fees, repealing some social service programs, and reducing many previous appropriations. 2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 10.[2] The bill included A.R.S. § 38-651(O) (Section O), which superseded existing regulations and statutorily defined "dependents" as state employees' spouses and children. (A.R.S. § 38-651(O) is reproduced in Pet. App. 79a.)

In January 2010, Respondents filed their Amended Complaint against State Officials, alleging that Section O discriminates against lesbian and gay employees because unlike heterosexual employees in different-sex

[2] The severity of Arizona's budget crisis is also illustrated by the litigation it spawned. *See, e.g., Arpaio v. Maricopa Cnty. Bd. of Supervisors*, 238 P.3d 626, 628-29 & n.2 (Ariz. App. 2010) (certain counties were required to transfer amounts of $24,168,400 and $3,794,400 to State's general fund); *Ariz. Ass'n of Providers v. State*, 219 P.3d 216, 220-21, 226 (Ariz. App. 2009) (Department of Economic Security responded to an over $100 million reduction in its budget by suspending certain services to developmentally disabled persons and reducing rates that it paid for other services); *Martin*, 201 P.3d at 518 & n.1, 520 (cities and towns required to deposit a total of $18,329,822 into the State's general fund to address 2008-2009 deficit).

partnerships, they cannot marry. (Appellants' Excerpt of Record filed in the Ninth Circuit below [E.R.] 253.) Although Respondents did not claim that Arizona's laws defining marriage were unconstitutional, they alleged that State Officials had violated their equal-protection rights by implementing Section O and thereby intentionally refusing "to allow State employees any means to qualify a same-sex life partner or partner's children for family coverage." (E.R. 287.)

After the parties briefed and argued the State Officials' Motion to Dismiss and Respondents' preliminary injunction motion, the district court issued its opinion granting the preliminary injunction. *Collins v. Brewer*, 727 F. Supp. 2d 797, 815 (D. Ariz. 2010) (Pet. App. 55a-56a). Although the court found that "Section O is not discriminatory on its face," it determined that it imposed different burdens based on sexual orientation because it "makes benefits available on terms that are a legal impossibility for gay and lesbian couples." *Id.* at 27a.

In summarily rejecting the State Officials' multiple rationales for Section O, the court did not examine the reasons for Section O's classification, which distinguishes between married partners and *both* heterosexual and same-sex domestic partners; it instead narrowly analyzed whether excluding same-sex domestic partners furthered the State's interests. *Id.* at 32a (because Plaintiffs alleged that the cost savings involved in providing benefits to state employees' same-sex partners was negligible, denying those benefits was not rationally related to the cost-savings rationale); *id.* at 34a (the administrative burden of

"[a]pplying the existing standards to the occasional new gay or lesbian applicant would be . . . minimal"); *id.* at 37a (Section O does not further the State's long-standing interest in promoting marriage and families with children because gays and lesbians cannot marry). The court then granted the preliminary injunction because "plaintiffs have demonstrated that the absolute denial of benefits to employees with same-sex domestic partners is not rationally and substantially related to the State's purported interests in cost savings, administrative efficiency, and favoring marriage and families with children." *Id.* at 47a. As the Amended Complaint requested (E.R. 298), the court enjoined enforcement of the portion of Section O that eliminated "family insurance eligibility for lesbian and gay State employees, and their domestic partners and domestic partners' children who satisfy the criteria set forth in [A.A.C.] R2-5-101." (Pet. App. 56a.)[3] The court did not enjoin enforcement of Section O's elimination of healthcare benefits for state employees' opposite-sex domestic partners. *Id.*

The court of appeals affirmed, stating that the district court correctly "found that the plaintiffs demonstrated a likelihood of success on the merits, because they showed that the law adversely affected a classification of employees on the basis of sexual orientation, and did not further any of the State's

[3] When the district court issued the preliminary injunction in 2010, no Arizona statute or regulation defined "domestic partner." *See* A.A.C. R2-5-101 (2009) (the definition of "domestic partner" is no longer included in the regulation).

claimed justifiable interests." *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011) (Pet. App. 2a-3a). The court agreed with the district court that the savings that resulted from excluding state employees' different-sex domestic partners from eligibility for healthcare benefits were not relevant and determined that because the cost of providing same-sex domestic-partners with healthcare benefits was minimal, Section O did not further the State's interest in reducing costs. (Pet. App. 10a.) And the court agreed with the district court that Section O did not further the State's interest in promoting marriage because "the denial of benefits to same-sex domestic partners cannot promote marriage, since such partners are ineligible to marry." *Id.* at 13a-14a. The court did not state that there was any evidence that the Legislature intended to discriminate against gay and lesbian state employees when it enacted Section O, but held that "when a state chooses to provide benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular." *Id*. at 11a.

The court denied the State Officials' Petition for Rehearing en Banc. *Diaz v. Brewer*, 676 F.3d 823, 824 (9th Cir. 2012) (Pet App. 58a). Judges O'Scannlain and Bea dissented from the denial of rehearing en banc, noting that the "panel's holding rests on a disparate impact theory that the Supreme Court has squarely rejected and on a misapprehension of rationality review." *Id.* at 59a. The dissent also noted

that the "panel all but expressly held that opposite-sex-only marriage rules are unconstitutional – indeed, that such rules are irrational per se because they can rest only on a 'bare desire to harm a politically unpopular group'" *Id.* (quoting panel decision at Pet. App. 14a and noting that internal quotation marks and ellipses were omitted).

REASONS FOR GRANTING THE PETITION

This case presents a straightforward question: Does Section O, which does not extend healthcare benefits to state employees' domestic partners, meet the Equal Protection Clause's rational-basis test? The court of appeals' holding that Section O is invalid – even though it is facially neutral, was applied to both same-sex and different-sex partners, and there was no evidence that the State intended to discriminate against gay and lesbian employees in enacting it – is contrary to this Court's adverse-impact, equal-protection precedent. And the holding conflicts with the decisions of state appellate courts deciding similar issues under federal or state constitutional equal-protection provisions.

The court of appeals' decision also perverts the application of the rational-basis test by ignoring the State's valid justifications for Section O's classification – conserving state resources and funds and promoting traditional marriage – and conflicts with state court appellate decisions applying the rational-basis test under the federal constitution or applying

the same rational-basis test under their state constitutions' equal-protection provisions.

Finally, by finding that Section O discriminates against homosexual domestic partners because only heterosexual domestic partners can marry under Arizona law, the court of appeals premised the decision on an indirect invalidation of Arizona's statutory and constitutional provisions defining marriage as a union between a man and a woman. The decision is therefore contrary to this Court's longstanding precedent and the decisions of other federal circuit and state courts. (*See* Pet. App. 65a-66a) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (noting that the panel's decision "threatens to dismantle constitutional, statutory, and administrative provisions in those states that wish to promote traditional marriage").

The court's decision will directly impact federal, state, and local governmental entities' right to determine which dependents are eligible for healthcare benefits and thus control their budgets.[4] The decision also "spur[s] challenges to other state constitutional and statutory provisions that protect – indeed, even recognize – traditional marriage." *Id.* at 67a. The Ninth Circuit decision in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *reh'g en banc denied*, Nos.

[4] Note 7 *infra* lists federal statutes that provide healthcare benefits to spouses, but not to domestic partners, of federal employees and notes that the majority of States do not provide benefits to state employees' domestic partners.

10-16696, 11-16577, 2012 WL 1994574 (9th Cir. June 5, 2012), concerning the constitutionality of California's constitutional amendment defining a valid marriage as one between a man and a woman, is undoubtedly headed for this Court. Nonetheless, the Court should grant certiorari here because "[t]his case is in some ways even more breathtaking" than the Ninth Circuit's decision in *Perry,* which did not reach "'the constitutionality of any ban on same-sex marriage,'" (Pet. App. 68a) (O'Scannlain, J., dissenting from denial of rehearing en banc) (quoting *Perry*, 671 F.3d at 1082 n.14). Judge O'Scannlain explained the implications of the panel's opinion: "By holding here that opposite-sex-only marriage rules serve no rational purpose, the panel decided an issue that bears directly – perhaps dispositively – on the broad question expressly left open in *Perry*." *Id.*[5]

[5] *Massachusetts v. United States Department of Health & Human Services*, Nos. 10-2204, 10-2207, 10-2214, 2012 WL 1948017 (1st Cir. May 31, 2012) (*USDHHS*), which held that the federal Defense of Marriage Act was unconstitutional, may also be headed for this Court. But *USDHHS* states even more clearly than the *Perry* decision that it does not address whether the States have a rational basis for defining marriage as a union between a man and a woman. *Id.* *1 ("Rather than challenging the right of states to define marriage as they see fit, the[se] appeals contest the right of Congress to undercut the choices made by same-sex couples and by individual states in deciding who can be married to whom.").

A. The Court of Appeals' Holding that Section O Violates the Equal Protection Clause – Even Though the Statute Is Facially Neutral and There Was No Evidence of Intent to Discriminate Based on Sexual Orientation – Is Contrary to This Court's Precedent and Conflicts with the Reasoning in State Appellate Decisions.

The court of appeals acknowledged that Section O was not discriminatory on its face "because it affected both same-sex and different-sex couples" but nonetheless approved the district court's finding of an equal-protection violation based on Section O's discriminatory effect. (Pet. App. 7a.) Neither the court of appeals nor the district court, however, cited or discussed any evidence of intent to discriminate based on sexual orientation. The court of appeals either assumed that a disparate-impact showing was sufficient or inferred discriminatory intent against same-sex domestic partners because they cannot marry under Arizona law. Both the assumption and the inference are erroneous.

This Court has made clear "that a law or other official act, without regard to whether it reflects a . . . discriminatory purpose, is [not] unconstitutional Solely because it has a . . . disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976). "[A] neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on

the basis of race." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 260 (1979); *see also City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194 (2003) ("We have made clear that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (brackets and internal quotation marks omitted). Absent a clear pattern that is unexplainable on grounds other than animus toward the affected group, "impact alone is not determinative." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 229, 266 (1977). Other evidence that can establish discriminatory intent includes "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" and "legislative or administrative history." *Id.* at 267-68.

The court of appeals did not even purport to find that any of the *Arlington Heights* factors demonstrated animus against gay and lesbian state employees. Indeed, Section O's historical background and legislative history demonstrated that the Legislature was motivated by budgetary considerations when it passed Section O.

Before 2008, Arizona provided state-employee dependent-partner healthcare benefits only to dependent spouses and children. In April 2008, Arizona amended its regulations to extend healthcare benefits to state employees' qualified domestic partners and children. A.A.C. R2-5-101(23) (2008) (Pet. App. 88a). The regulations defined "domestic partner" as a "person of the same or opposite gender who," among

other requirements, had shared a residence with the state employee for at least a year before applying for benefits, was financially interdependent with the employee, and was not married or in another domestic-partner relationship. *Id.* at 86a-88a. Only a small fraction of the state employees who received benefits for a qualifying domestic partner received the benefits for a same-sex domestic partner. (Pet. App. 20a.) The cost of providing domestic partner benefits was over $4 million in fiscal year 2008 and was approximately $5.5 million the following fiscal year. *Id.* at 48a-49a.

Shortly after the amended regulation went into effect, Arizona suffered a severe budget crisis. *See Martin*, 201 P.3d at 520 (Arizona's budget deficit was projected to be approximately $400 million in June 2008 but by the beginning of 2009 was reported to be nearly $1.6 billion). In the midst of this budget crisis, the Arizona Legislature passed a budget reconciliation bill that addressed the crisis in a variety of ways, including repealing some social services programs, reducing previous appropriations, and amending A.R.S. § 38-651 to include Section O, which defines a state employee's dependent as a spouse. 2009 Ariz. Sess. Laws, 3d Spec. Sess., ch. 10.

In this case as in *Arlington Heights*, 429 U.S. at 269, there is nothing about the "sequence of events" leading to Section O's enactment "that would spark suspicion" that the Legislature was motivated by an intent to discriminate against gays and lesbians. The lower court therefore should have concluded that

Respondents "failed to carry their burden of proving that discriminatory purpose was a motivating factor," *id.* at 270, in the Arizona Legislature's decision.

The court of appeals instead apparently simply attributed an undemonstrated discriminatory motive to the State, noting that the district court's decision barring the State from returning to the status quo and offering benefits only to employees' spouses "is consistent with long standing equal protection jurisprudence holding that 'some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests.'" (Pet. App. 14a) (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) and citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). These authorities are not disparate-impact cases and do not support the court of appeals' assumption of the Legislature's animus against homosexuals.

In *Lawrence*, Justice O'Connor found that a Texas statute that criminalized sodomy between same-sex partners but not between opposite-sex partners violated the Equal Protection Clause. 539 U.S. at 581 (O'Connor, J., concurring). Because the statutory classification facially discriminated against homosexuals, Justice O'Connor accurately determined that the Legislature intended to discriminate against homosexuals. In striking contrast, Section O merely retracted gratuitous healthcare benefits from both same-sex

and opposite-sex domestic partners of state employees.

In *Cleburne*, 473 U.S. at 447-48, the Court found that a zoning ordinance that required a group home for the mentally impaired to obtain a special permit but that did not require most other adult group homes to do so violated the Equal Protection Clause. Because the ordinance in *Cleburne,* like the statute in *Lawrence*, facially discriminated against the group in question, the Court could validly conclude that it had been promulgated with a discriminatory intent.

In *Moreno*, the Court addressed the Food Stamp Act's provision that rendered ineligible for food stamps any household that contained an individual who was unrelated to any other member of the household and held that it violated the Equal Protection Clause. 413 U.S. at 538. The Court found that the provision did not further the Food Stamp Act's expressly stated purposes because "'[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.'" *Id.* at 534 (quoting *Moreno v. U.S. Dep't of Agric.*, 345 F. Supp. 310, 313 (D.D.C. 1972)). The Court noted that the little legislative history that existed "indicate[d] that [the] amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* (quoting the relevant legislative history). The Court explained that "a bare

congressional desire to harm a politically unpopular group [hippies] cannot constitute a legitimate governmental interest . . . in and of itself." *Id.* The Court then examined the government's proffered interest in minimizing fraud and found that the provision did not further that interest. *Id.* at 535-38. The Court found that most people in the hippie category could and would "alter their living arrangements in order to remain eligible for food stamps," whereas "the AFDC mothers who tr[ied] to raise their standard of living by sharing housing [would] be affected" because they were too poor to alter their living arrangements. *Id.* at 537-39 (internal quotation marks omitted).

Unlike the legislative history in *Moreno*, the legislative history here provides no support for the court of appeals' assumption that the Legislature enacted Section O based on a desire to harm gay and lesbian state employees. And, unlike the provision that the Court found invalid in *Moreno*, Section O furthers legitimate state interests. See Section B *infra*. Therefore *Moreno* does not support the court of appeals' inference that the Arizona Legislature intended to discriminate against gay and lesbian employees when it enacted Section O.

The court of appeals also suggested that it was inferring discriminatory intent from the fact that "different-sex couples wishing to retain their current family health benefits could alter their status – marry – to do so" but that "same-sex couples were prohibited from doing so" by the Arizona Constitution. (Pet. App. 12a.) Although homosexuals cannot

marry their same-sex partners and make them spouses, Section O does not impose this limitation – Arizona's constitutional and statutory provisions defining marriage do. The court of appeals' determination thus conflicts with state appellate decisions that have held that benefit provisions similar to Section O do not unlawfully target gays and lesbians in violation of federal or state equal-protection principles even though same-sex couples cannot marry. *See Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516, 520 (Colo. App. 1994) (holding that denying sick-leave benefits to a city employee seeking to care for her same-sex partner was not discrimination based on sexual orientation under either the federal or state constitution and rejecting plaintiff's argument that her inability to marry her same-sex partner "distinguishes her situation from that of an unmarried heterosexual employee"); *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 833-34 (N.J. Super. App. Div. 1997) (relying on *Feeney*, 442 U.S. at 274-75, to find that the statute limiting health insurance coverage to employees' spouses was facially neutral and that plaintiffs failed to show a discriminatory intent behind the marital-status classification even though same-sex domestic partners could not qualify for coverage because they could not marry the covered employee and that the statute thus did not violate the state constitution's equal-protection provision); *Bailey v. City of Austin*, 972 S.W.2d 180, 186 (Tex. App. 1998) (relying on federal law to find that although limiting benefits to employees' spouses imposed a disproportionate burden on homosexual employees with domestic partners because they could

not marry their partners, this alone was not a basis for finding an intent to discriminate against homosexuals under the Texas Constitution) (citing *Arlington Heights*, 429 U.S. at 265, and *Schweiker v. Wilson*, 450 U.S. 221, 233-34 (1981)); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 123 n.1, 128-29 (Wis. App. 1992) (holding that an employee benefits rule that distinguished between married and unmarried employees did not discriminate based on sexual orientation under the Wisconsin Constitution, which "implies the same equal protection guaranties as are found in the United States Constitution").[6]

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[6] Respondents argued below that these cases are antiquated and that the "weight of state authority decidedly favors the panel's analysis." Plaintiffs-Appellees' Opposition to Petition for Rehearing en Banc at 12 & n.7. But the cases that Respondents cite do not support the court of appeals' equal-protection analysis. Those cases were decided in States whose courts had interpreted their state constitutions to provide greater protection than the federal Equal Protection Clause and at least one case involved a policy that discriminated against same-sex couples. *See Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 787 (Alaska 2005) (denying benefits to public employees' same-sex domestic partners violated the Alaska Constitution's equal protection clause, which "protects Alaskans' right to non-discriminatory treatment more robustly than does the federal equal protection clause"); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 449-51 (Mont. 2004) (finding that the Montana University's policy prohibiting gay employees from obtaining insurance coverage for their same-sex domestic partners violated the Montana Constitution's equal protection provision, which "provides even more individual protection than the [federal] Equal Protection Clause," based on its finding that same-sex couples were not treated similarly to different-sex couples because the "policy allow[ed] unmarried opposite-sex couples, who may only have a

(Continued on following page)

Given the court of appeals' conclusion that Section O's adverse impact on same-sex couples violated the Equal Protection Clause without any evidence of discriminatory intent, the decision also threatens the validity of federal and state statutes that offer benefits only to employees' spouses.[7] This Court should therefore grant review to clarify that the court of appeals erroneously inferred that the Arizona Legislature was motivated by a discriminatory intent when it limited healthcare benefits to state employees'

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fleeting relationship, to receive health insurance benefits by signing an Affidavit" but denied the same opportunity to same-sex couples); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 446-47 (Or. App. 1998) (denying benefits to unmarried domestic partners of both homosexual and heterosexual employees violated Oregon Constitution's privileges and immunities clause because homosexuals are a suspect class and discrimination is actionable without a showing of discriminatory intent).

[7] *See, e.g.,* 5 U.S.C. §§ 8901(5) (defining "member of family" for purposes of healthcare benefits as "spouse of an employee" and dependent children); 8951(2) (using definition in § 8901(5) for purposes of dental benefits); 8981(2) (using definition in § 8901(5) for purposes of vision benefits); *see also* National Conference of State Legislatures, State Employee Benefits, http://www.ncsl.org/issues-research/health/state-employee-health-benefits-ncsl.aspx at 7 (last visited June 26, 2012) (noting that in addition to Arizona, twenty-one States provide benefits for same-sex partners of state employees). Delaware is not included on the list but it now grants to and imposes upon parties to a civil union the legal rights and responsibilities that state law grants to and imposes upon married spouses. Del. Code Ann. tit. 13, § 212. Thus, the majority of States do not provide benefits to state employees' domestic partners.

spouses when there was no evidence to support that inference.

B. The Court of Appeals' Distorted Rational-Basis Analysis Conflicts with State Appellate Decisions' Rational-Basis Analysis and Lower Federal Courts Are Relying on the Court of Appeals' Distorted Analysis.

Although other federal courts have recently found that statutory provisions denying benefits to same-sex couples fail the rational-basis test, the court of appeals' decision is unique in that it alone finds that a facially neutral statute fails the Equal Protection Clause's rational-basis test without any evidence of intent to discriminate against gays and lesbians.[8] The Court should grant review in this case because the court of appeals' application of the rational-basis test conflicts with state court decisions applying the rational-basis test under federal or state equal-protection provisions and lower federal courts'

[8] For example, the Ninth Circuit found that California's constitutional amendment, which had the effect of singling out only same-sex couples by taking away their right "to obtain and use the designation of 'marriage' to describe their relationships," failed to meet the rational-basis test. *Perry*, 671 F.3d at 1063. And the First Circuit found that the denial of federal benefits to same-sex spouses failed to meet rational-basis review because it was not "adequately supported by any permissible federal interest." *USDHHS*, 2012 WL 1948017 at *11. In contrast to the court of appeals' decision here, both of these decisions are based on statutes that facially discriminate against gays and lesbians.

reliance on the court of appeals' decision makes it clear that the decision calls into question the constitutionality of countless governmental benefit programs.[9]

Rational-basis review is a "paradigm of judicial restraint" – it "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). A legislative classification "is accorded a strong presumption of validity," and challengers must "negat[e] every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). As long as one legitimate state purpose upholds a classification, it does not matter whether it was the primary purpose or whether the classification might also in part have been based on an illegitimate interest. *See McGinnis v. Royster*, 410 U.S. 263, 276 (1973). Under rational-basis review, courts must "accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321.

Under these principles, Section O meets the rational-basis test. The Legislature could have reasonably concluded that eliminating health insurance coverage for state employees' heterosexual and same-sex domestic partners would further the State's

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[9] For example, the federal government and many States do not provide benefits to government employees' same-sex partners. See note 7 *supra*.

interest in promoting traditional marriage while also eliminating the additional expense and administrative burden involved in providing domestic-partner coverage. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (recognizing the validity of the State's "'responsible procreation' theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot").

The court of appeals erred in applying the rational-basis test by ignoring Section O's actual classification and by finding that same-sex partners were similarly situated to spouses. Neither the authority that the court of appeals cites nor any other relevant authority supports its distortion of the rational-basis test.[10]

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[10] The court of appeals' analysis is similar to the Alaska Supreme Court's analysis in *Alaska Civil Liberties Union*, 122 P.3d at 788 (finding that offering valuable benefits to employees' spouses but not to unmarried employees' domestic partners discriminated against same-sex couples and that "the proper comparison is between same-sex couples and opposite-sex couples" because employees in same-sex relationships cannot marry to obtain the benefits). But the Alaska Supreme Court was applying the Alaska Constitution, which provides "greater protection to individual rights" than the Equal Protection Clause does, *id.* at 785 n.16, and its analysis is faulty for the same reason that the court of appeals' analysis is faulty.

First, the court of appeals ignored the State's justification for Section O's *actual* classification and required the State to justify a classification that Section O does not make. (Pet. App. 10a) (finding that Section O's restriction of coverage for employees' same-sex partners did not further the State's interests in saving costs and reducing administrative burdens because the number of state employees who will apply for healthcare benefits for their same-sex partners is small and the State therefore will not save much in costs when it denies them coverage);[11] (*id.* at 13a-14a) (finding that Section O did not further the State's interest in promoting marriage because same-sex partners cannot marry). The court required the State to justify excluding one admittedly limited group of employees[12] instead of recognizing that granting employment benefits to spouses promotes marriage while granting those benefits to unmarried partners would not. *See Bd. of Trs. of Univ. of Alaska v. Garrett*, 531 U.S. 356, 366-67 (2001) ("Under rational-basis review, where a group possesses 'distinguishing

[11] As Judge O'Scannlain noted in his dissent, "the legislature was entitled to believe that most employees in opposite-sex domestic partner relationships would not sprint to marry, and thus it was entitled to believe that the lion's share of the savings would come from ending coverage for opposite-sex couples." (Pet. App. 65a.)

[12] The district court found that "[a]pproximately 800 of the 140,000 participating State employees receive benefits for a qualifying domestic partner" and that "[a] small fraction of those 800 employees receive benefits for a same-sex domestic partner." (Pet. App. 20a.)

characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation.") (quoting *Cleburne*, 473 U.S. at 441); *see also U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.").

Second, the court of appeals erred in implicitly finding that same-sex domestic partners were similarly situated to spouses. The court of appeals believed that this analysis was justified because Arizona's law prevents only same-sex couples from marrying and thus implicitly (but erroneously) determined that state employees with same-sex domestic partners were similarly situated to married state employees. (Pet. App. 13a) (rejecting the State's interest in saving costs and reducing administrative burdens because "the savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review"). Married state employees have a legal responsibility to care for their partners, whereas no such duty is imposed on domestic partners. *See* A.R.S. § 13-3611 (a married person is guilty of a misdemeanor if he or she fails to provide necessary medical care for his spouse); *see also Phillips*, 482 N.W.2d at 126 (noting that a same-sex domestic partner is not similarly situated to a spouse because "[t]he law imposes no mutual duty of general support, and no responsibility for provision of

medical care, on unmarried couples of any gender, as it does on married persons"). In addition, same-sex domestic partners are not bound by Arizona's community property laws. *See* A.R.S. § 25-211(A) (stating that "[a]ll property acquired by either husband or wife during the marriage is the community property of the husband and wife" with limited exceptions).

The court of appeals' decision conflicts with state court decisions that have determined that providing benefits to governmental employees' spouses but not to their domestic partners furthers legitimate government interests under the rational-basis test of the Equal Protection Clause or state constitutional equal-protection provisions. *See Rutgers*, 689 A.2d at 833 (State's "policy of extending health benefits to employees' spouses rather than domestic partners furthers the governmental goal of creating a workable administrative scheme that can be applied in a uniform and objective manner" and did not violate the New Jersey Constitution); *Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105, 109 (N.Y. App. 2007) (workers' compensation provision providing benefits to spouses but not to parties to civil unions furthered the State's legitimate interest in protecting the traditional family constellation of husband, wife, and children and thus did not violate federal or state equal protection provisions); *Bailey*, 972 S.W.2d at 189 (limiting city employee "benefits to an employee's legal spouse and other persons in a cognizable family relationship with an employee . . . advance[d] the government's legitimate interest in recognizing and

favoring such relationships" and thus did not violate the Texas Constitution).

The Court should grant review not only to resolve the conflict between state court decisions and the court of appeals' decision but also to provide guidance to the federal courts on this issue. Federal district courts have relied on the court of appeals' erroneous analysis. In *Dragovich v. United States Department of the Treasury*, No. C 10-01564 CW, 2012 WL 1909603 at *1 (N.D. Cal. May 24, 2012), the district court granted plaintiffs' motion for summary judgment on their equal-protection claim challenging § 3 of the federal Defense of Marriage Act (DOMA) on behalf of same-sex couples who were registered domestic partners under California law. Relying on this case, the court rejected the argument that DOMA was justified under the rational-basis test because it was "designed to conserve scarce government resources." *Id.* at *11-12 (noting that the *Diaz* court "held that a provision to save funds based on such a distinction [between same-sex and similarly situated heterosexual couples, because heterosexual couples could preserve their benefits by marrying, whereas same-sex couples were barred from marriage by Arizona law] could not survive rational basis review because it amounted to the 'selective application of legislation to a small group'") (quoting Pet. App. 13a). The court rejected the federal defendants' argument that the *Diaz* case was inapposite because it concerned the withdrawal of an existing benefit, stating the following: "This, however, was not the crux of the Ninth

Circuit's reasoning. The court explained that 'when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.'" *Id.* at *15 (quoting Pet. App. 11a). In *Golinski v. United States Office of Personnel Management*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012), the district court found that the denial of benefits to a lesbian employee's same-sex spouse under DOMA failed the rational-basis test. The district court quoted the court of appeals' decision in this case and noted that "[w]hen applying rational basis review to a classification that adversely affects an unpopular group, courts apply a 'more searching' rational basis review." *Id.* (quoting Pet. App. 7a).

C. The Court of Appeals' Implicit Holding that the State Cannot Constitutionally Limit Marital Benefits to Unions Between a Man and a Woman Is Contrary to This Court's Precedent and Conflicts with Other Federal and State Appellate Decisions.

The court of appeals erred in finding that Section O discriminates against employees with same-sex partners by distinguishing only between married and unmarried employees. The court of appeal's distinction was based on Arizona law limiting marital benefits to unions between a man and a woman. (Pet. App. 12a) (noting that because eligibility for benefits was limited to married couples and the Arizona Constitution prohibits same-sex couples from marrying,

same-sex couples were excluded from eligibility by operation of law). Thus, "[t]he panel concluded – in a way that is veiled but unmistakable – that rules benefitting only traditional marriage serve no conceivable rational purpose." (Pet. App. 66a) (O'Scannlain, J., dissenting from denial of rehearing en banc). That conclusion "clashes with Supreme Court precedent . . . and with decisions of other federal and state appellate courts holding that laws recognizing or promoting traditional marriage do not violate the federal Constitution." *Id.* at 67a.

Like the vast majority of States,[13] Arizona preserves the traditional definition of marriage as a union of a man and a woman. *See* Ariz. Const. art.

[13] Some States have adopted constitutional amendments prohibiting the recognition of same-sex marriages. *See* Ala. Const. art. I, § 36.03; Alaska Const. art. I, § 25; Ark. Const. amend. 83, § 1; Cal. Const. art. I, § 7.5 (found unconstitutional by *Perry*, 671 F.3d at 1063); Colo. Const. art. II, § 31; Fla. Const. art. I, § 27; Ga. Const. art. I, § 4, ¶ I; Idaho Const. art. III, § 28; Kan. Const. art. 15, § 16; Ky. Const. § 233A; La. Const. art. XII, § 15; Mich. Const. art. I, § 25; Miss. Const. art. 14, § 263A; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. 1, § 21; N.C. Const. art. XIV, § 6; N.D. Const. art. XI, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. II, § 35; S.C. Const. art. XVII, § 15; S.D. Const. art. XXI, § 9; Tenn. Const. art. XI, § 18; Tex. Const. art. I, § 32; Utah Const. art. I, § 29; Va. Const. art. I, § 15-A; Wis. Const. art. XIII, § 13. Other States have passed statutes explicitly limiting marriage to the union of a man and a woman. *See* Del. Code Ann. tit. 13, § 101(a), (d); Haw. Rev. Stat. § 572-1; 750 Ill. Comp. Stat. 5/201, 5/212, 5/213.1; Ind. Code § 31-11-1-1; Me. Rev. Stat. Ann. tit. 19-A, §§ 650, 701; Minn. Stat. § 517.03; 23 Pa. Cons. Stat. Ann. § 1704; W. Va. Code § 48-2-603; Wyo. Stat. Ann. § 20-1-101.

XXX, § 1; A.R.S. § 25-125(A); *see also Standhardt,* 77 P.3d at 290 (holding that the "fundamental right to marry protected by our federal . . . constitution[ ] does not encompass the right to marry a same-sex partner" and that "Arizona's prohibition of same-sex marriages furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else"). Section O is consistent with Arizona's constitutional and legislative choice to give only traditional marriage legal recognition. The court of appeals' unfounded conclusion that Section O must be motivated by a "bare desire to harm a politically unpopular group" and serves no conceivable rational purpose (Pet. App. 14a [internal quotation marks and ellipsis omitted]) condemns the Legislature's and the Arizona voters' choice to legally recognize only traditional marriage.

In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court unanimously dismissed "for want of a substantial federal question" an appeal from the Minnesota Supreme Court arguing that a state law limiting marriage (and all its benefits) to the union of one man and one woman violated the Equal Protection Clause. *Id.*; *see also Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). Because the dismissal in *Baker* is a decision on the merits that binds lower courts on that issue, *see Mandel v. Bradley*, 432 U.S. 173, 176 (1977), the court of appeals erred in ruling in a manner that is contrary to *Baker*. The court of appeals' ruling is also inconsistent with

federal and state appellate decisions holding that laws recognizing or promoting traditional marriage do not violate the federal constitution. *See, e.g., Citizens for Equal Prot.*, 455 F.3d at 871; *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982); *Standhardt*, 77 P.3d at 458; *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. App. 1973); *Baker*, 191 N.W. at 185-87.

This Court should grant review to reaffirm that States have the right to promote traditional marriage by providing benefits to the spouses of state employees and not providing the same benefits to unmarried partners of state employees.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH R. DIAZ; JUDITH MCDANIEL; KEITH B. HUMPHREY; BEVERLY SECKINGER; STEPHEN RUSSELL; DEANNA PFLEGER; CARRIE SPERLING; LESLIE KEMP; COREY SEEMILLER,

Plaintiffs-Appellees,

v.

JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; DAVID RABER, in his official capacity as Interim Director of the Arizona Department of Administration and Personnel Board; KATHY PECKARDT, in her official capacity as Director of Human Resources for the Arizona Department of Administration and Personnel Board,

Defendants-Appellants.

No. 10-16797

D.C. No.
2:09-cv-02402-JWS

OPINION

Appeal from the United States District Court
for the District of Arizona
John W. Sedwick, District Judge, Presiding

Argued and Submitted
February 14, 2011 – San Francisco, California

Filed September 6, 2011

Before: Mary M. Schroeder and Sidney R. Thomas, Circuit Judges, and Mark W. Bennett, District Judge.*

Opinion by Judge Schroeder

COUNSEL

Tara L. Borelli, Los Angeles, California, for plaintiffs-appellees Joseph R. Diaz, et al.

Charles A. Grube, Deputy State Attorney General, Phoenix, Arizona, for defendants-appellants Janice K. Brewer, et al.

OPINION

SCHROEDER, Circuit Judge:

The State of Arizona appeals the district court's order granting a preliminary injunction to prevent a state law from taking effect that would have terminated eligibility for health-care benefits of state employees' same-sex partners. In a published opinion, the district court found that the plaintiffs demonstrated a likelihood of success on the merits, because they showed that the law adversely affected

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* The Honorable Mark W. Bennett, District Judge for the United States District Court for the Northern District of Iowa, sitting by designation.

a classification of employees on the basis of sexual orientation, and did not further any of the state's claimed justifiable interests. *Collins v. Brewer,* 727 F. Supp. 2d 797 (D. Ariz. 2010).[1] The court also found that the plaintiffs had established a likelihood of irreparable harm in the event coverage for partners ceased. The district court's findings and conclusions are supported by the record and we affirm.

BACKGROUND

In April of 2008, the State of Arizona administratively adopted amendments to Section 101 of Chapter 5 of Title 2 of the Arizona Administrative Code to offer access to healthcare benefits for qualified opposite-sex and same-sex domestic partners of state employees. Prior to 2008, when state employees chose to participate in the State's health insurance program, they only had the option to include their spouses and children within the defined parameters of the term "dependent." In 2008, the amendments expanded the definition of "dependent" to include qualified "domestic partners," who could be of either sex. *See* 14 Ariz. Admin. Reg. 1420-34 (Apr. 25, 2008).

In November of 2008, however, the Arizona voters approved Proposition 102, also known as the *Marriage Protection Amendment,* which amended the Arizona Constitution to define marriage as between

[1] On June 6, 2011, the panel granted Plaintiff Tracy Collins's unopposed motion to dismiss without prejudice.

one man and one woman: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." Ariz. Const. art. 30, § 1. On September 4, 2009, the governor of Arizona signed House Bill 2013, which included a statutory provision, Ariz. Rev. Stat. § 38-651(O) ("Section O") that redefined "dependants" as "spouses," and thus would eliminate coverage for domestic partners:

> O. FOR THE PURPOSES OF THIS SECTION, BEGINNING OCTOBER 1, 2009, "DEPENDENT" MEANS A SPOUSE UNDER THE LAWS OF THIS STATE, A CHILD WHO IS UNDER NINETEEN YEARS OF AGE OR A CHILD WHO IS UNDER TWENTY-THREE YEARS OF AGE AND WHO IS A FULL-TIME STUDENT.

After a number of adjustments not at issue here, the new definition of "dependent" was slated to take effect on January 1, 2011.

A group of gay and lesbian state employees ("Plaintiffs") filed a complaint on November 17, 2009 amended on January 7, 2010, seeking injunctive and declaratory relief to redress Section O's claimed violation of their equal protection and substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. According to the factual allegations of the complaint, which are not disputed, all of the plaintiffs are highly skilled state employees whose job duties are equivalent to the duties of their heterosexual colleagues. Each of the nine plaintiffs and his or her domestic partner have enjoyed a

long-term, committed, and financially interdependent relationship, and would marry if Arizona law permitted same-sex couples to marry. Each plaintiff enrolled his or her domestic partner and the domestic partner's qualifying children (if any) for family coverage during the 2008 or 2009 open enrollment period. Each plaintiff, domestic partner, and partner's child met the eligibility requirements for coverage at the time of enrollment and continue to meet those requirements. Each named plaintiff would lose health insurance coverage for his or her domestic partner, and his or her partner's children if Section O were to go into effect.

The complaint also reflects that such a loss would cause all of the plaintiffs serious financial and emotional harm. For example, one of the plaintiffs, Beverly Seckinger, a Professor and Interim Director of the School of Media Arts at the University of Arizona, has been in an exclusive and financially interdependent relationship with Susan Taunton for over 22 years. The two registered as domestic partners with the City of Tucson in October 2005. Susan enrolled in the state's family coverage in 2008, and remains enrolled. Susan is the primary caregiver for her 89-year-old mother, who has dementia and needs much more caregiving help than her assisted living facility can provide. The care of her mother precludes Susan from obtaining full-time employment.

Private insurers have consistently refused to insure Susan because of her chronic asthma. Beverly's declaration stated that "[e]ven if [she] were to

persuade a private insurer to provide Susan with health coverage, [she] would not be able to secure a health plan with equivalent coverage." Moreover, due to Beverly's financial support, it is possible that Susan no longer qualifies for medical coverage through the state's Medicaid program.

Another plaintiff, Joseph R. Diaz, an Associate Librarian at the University of Arizona, has been in a committed relationship for the last 17 years with Ruben E. Jiménez. Ruben enrolled in the state's family coverage in 2008 and 2009, and he relied on this coverage in making a decision to leave his low-wage job with health benefits for a more promising position without health benefits. Ruben has high cholesterol and Type 2 diabetes, and requires daily medication and testing strips which would cost approximately $300 a month out of pocket. A private insurance agent informed Joseph and Ruben that "she could not locate any individual insurance plans in Arizona that would cover a person [like Ruben] with diabetes and high cholesterol." Ruben earns $100 too much per month to qualify for indigent health care.

Defendants include the governor of Arizona, the interim Director of the Arizona Department of Administration ("ADOA"), and two other ADOA officials. They moved to dismiss the complaint on the ground that the complaint failed to state equal protection and substantive due process claims, and argued that the statute furthered valid legislative interests. It further argued that the governor was immune from suit.

Plaintiffs opposed the motion and sought a preliminary injunction barring enforcement of the law. They submitted affidavits and other material to support their position that the law did not further any legitimate financial or administrative interest of the state. The supporting materials included the analysis of an expert that the entire state expenditure for domestic partner benefits represented a tiny fraction of the total employee healthcare benefits.

In a careful order, the court considered each of the possible state interests the law might be said to further and ruled that the law and the record negated each of them. Although plaintiffs argued heightened scrutiny was required, the district court applied rational basis review, but noting that such review is more searching when a classification adversely affects unpopular groups. *Collins,* 727 F. Supp. 2d at 804 (citing *Lawrence v. Texas,* 539 U.S. 558, 580 (2003) (O'Connor, J., concurring)). We do not need to decide whether heightened scrutiny might be required.

While the district court noted that Section O was not discriminatory on its face, because it affected both same-sex and different-sex couples, the court held that Section O had a discriminatory effect. This is because, under Arizona law, different-sex couples could retain their health coverage by marrying, but same-sex couples could not. *Id.* at 802-03. Therefore, the district court granted plaintiffs' request for a preliminary injunction on equal protection grounds.

The court applied the appropriate standards for the grant of preliminary injunctive relief. *See* Fed. R. Civ. P. 65; *see also Winter v. NRDC,* 555 U.S. 7, 24-25 (2008); *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1126-27 (9th Cir. 2009). It concluded that the plaintiffs had established a likelihood of success on the merits and that they were likely to suffer irreparable harm if the injunction did not issue. *Collins,* 727 F. Supp. 2d at 811-14. In assessing the likelihood of success, the court examined each of the interests the state contended the statute furthered and found the statute was not rationally related to them. In addition, the district court tried to conceive of any additional interests to sustain Section O and concluded it could not.

The likelihood of the plaintiffs suffering irreparable harm was well documented by the plaintiffs' affidavits. The health problems of domestic partners facing loss of healthcare benefits included a life-threatening torn carotid artery, chronic asthma, and inability to obtain private insurance because of diabetes and high cholesterol. The court also considered the public interest and found it, as well as the balance of the equities, weighed in favor of granting injunctive relief. *See Stormans,* 586 F.3d at 1138-40.

The district court, however, denied plaintiffs' claim that the law violated substantive due process rights, *Collins,* 727 F. Supp. 2d at 809, and that claim is not before us. The court also held that the governor was not immune from a suit seeking injunctive relief. *Id.* at 809-11; *see Ex parte Young,* 209 U.S. 123 (1908);

Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1045 (9th Cir. 2000). Finally, the court considered the arguments of the parties concerning a bond and ruled that plaintiffs' were not required to post one.

This appeal by the defendants followed. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), as an appeal of an interlocutory order for a preliminary injunction.

DISCUSSION

Defendants' principal argument on appeal is that the district court, in granting the preliminary injunction, improperly accepted all of the plaintiffs' allegations as true. This argument is premised on a fundamentally distorted misreading of the district court's opinion. The court's opinion was dealing with two separate and discrete motions. The first was the defendants' motion to dismiss the complaint. The law is well settled that in deciding such motions the court is to accept the plaintiffs' allegations as true. *See Ashcroft v. Iqbal,* ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009); *Hebbe v. Pliler,* 627 F.3d 338, 341-42 (9th Cir. 2010). The district court properly did so here and its order makes it apparent that it understood the proper application of the rule. *Collins,* 727 F. Supp. 2d at 802.

After denying the defendants' motion to dismiss, the court then considered the plaintiffs' motion for a

preliminary injunction. The court applied the appropriate standards, looking first at the likelihood of success on the merits. It reviewed each of the justifications for the law in light of the evidence in the record. *Id.* at 804-05. The most important was that the change furthered the state's economic interests by reducing costs.

Of particular significance to the district court was the fact that while the plaintiffs produced expert analysis on the impact of the law on the state's expenditures and found it minimal, *id.* at 811-12, the court was not provided any evidence of the actual amount of benefits the state paid for same-sex partners:

> In opposition to the motion for a preliminary injunction, the State attaches a spreadsheet indicating that a total of 698 domestic partners participated in the State's health plan in the 2008-2009 plan year, and 893 domestic partners participated in the 2009-2010 plan year. . . . However, no information is provided as to the number of same-sex domestic partners participating in the State health plan, nor the total claims of same-sex domestic partners.

Id. at 812 (footnote omitted).

The district court therefore rejected what the state said was the principle justification for the statute: cost savings. *Id.* The defendants, on appeal, do not seriously challenge this finding.

The defendants, on appeal, also contend that the district court's order impermissibly recognized a constitutional right to healthcare. Again, this contention rests on a misunderstanding of the court's decision. The court held that the withholding of benefits for same-sex couples was a denial of equal protection. The state is correct in asserting that state employees and their families are not constitutionally entitled to health benefits. But when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular. The most instructive Supreme Court case involving arbitrary restriction of benefits for a particular group perceived as unpopular is *U.S. Department of Agriculture v. Moreno,* 413 U.S. 528 (1973). In that case, Plaintiffs challenged the constitutionality of an amendment to the Food Stamp Act of 1964, which redefined the term "household" to limit the program's eligible recipients to groups of related individuals. *Id.* at 529-30. While noting the "little legislative history" available on the amendment, the Court concluded that the legislation was aimed at groups that were unpopular. The "amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* at 534.

In defending the amendment under rational basis review, the government contended that Congress might rationally have thought that the amendment would prevent fraud given the relative instability of households with unrelated individuals.

Id. at 535. The Court rejected both justifications. The Court held that the "practical operation" of the amendment would allow the hippies, with means, who were allegedly abusing the program, to rearrange their housing status to retain eligibility, while excluding those who were financially unable to do so, i.e., "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538. Those excluded were like the same-sex partners in this case who, because they cannot marry, are unable to alter their living arrangements to retain eligibility. The Court concluded that the "hippie" amendment's classification was "wholly without any rational basis." *Id.* We must reach the same conclusion.

Here, as in *Moreno,* the legislature amended a benefits program in order to limit eligibility. Since in this case eligibility was limited to married couples, different-sex couples wishing to retain their current family health benefits could alter their status – marry – to do so. The Arizona Constitution, however, prohibits same-sex couples from doing so. Thus, this case may present a more compelling scenario, since the plaintiffs in *Moreno* were prevented by financial circumstances from adjusting their status to gain eligibility, while same-sex couples in Arizona are prevented by operation of law.

Defendants nevertheless contend on appeal that this law is rationally related to the state's interests in cost savings and reducing administrative burdens.

As the district court observed, however, the savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review. The Supreme Court in *Eisenstadt v. Baird,* 405 U.S. 438 (1972), was well aware of this principle when it quoted the eloquent words of Justice Robert H. Jackson, decrying the selective application of legislation to a small group:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Eisenstadt, 405 U.S. at 454 (quoting *Ry. Express Agency v. New York,* 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring)).

The state has also argued that the statute promotes marriage by eliminating benefits for domestic partners, but the plaintiffs negated that as a justification. The district court properly concluded that the

denial of benefits to same-sex domestic partners cannot promote marriage, since such partners are ineligible to marry. *Collins,* 727 F. Supp. 2d at 807. On appeal, the state has not seriously advanced this justification.

In sum, the district court correctly recognized that barring the state of Arizona from discriminating against same-sex couples in its distribution of employee health benefits does not constitute the recognition of a new constitutional right to such benefits. Rather, it is consistent with long standing equal protection jurisprudence holding that "some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests." *Lawrence,* 539 U.S. at 580 (O'Connor, J., concurring) (quoting *Moreno,* 413 U.S. at 534) (alteration in the original); *see also City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 447 (1985). Moreover, the district court properly rejected the state's claimed legislative justification because the record established that the statute was not rationally related to furthering such interests. *Collins,* 727 F. Supp. 2d at 807. Contrary to the state's assertions, the court did not place the burden on the state to prove a legitimate interest. After concluding that neither the law nor the record could sustain any of the interests the state suggested, the district court considered whether it could conceive of any additional interests Section O might further and concluded it could not. On appeal, the state does not suggest any interests it or the district court may have overlooked. The court ruled

the plaintiffs had established a likelihood of success in showing the statute furthered no legitimate interest.

Finally, the state contends that the district court committed clear error by not considering whether plaintiffs should post a bond as required under Federal Rules of Civil Procedure Rule 65(c). Rule 65(c) provides that a district court may grant a preliminary injunction, "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The district court retains discretion "as to the amount of security required, *if any.*" *Johnson v. Couturier,* 572 F.3d 1067, 1086 (9th Cir. 2009) (internal quotation marks and citations omitted) (emphasis in the original). Here, the parties disputed whether a bond was required. The district court considered the arguments and properly invoked its discretion not to have plaintiffs post a bond in this matter. There was no error.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

TRACY COLLINS; KEITH B. HUMPHREY; JOSEPH R. DIAZ; JUDITH MCDANIEL; BEVERLY SECKINGER; STEPHEN RUSSELL; DEANNA PFLEGER; COREY SEEMILLER; CARRIE SPERLING; AND LESLIE KEMP, **Plaintiffs,** **vs.** **JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; DAVID RABER, in his official capacity as Interim Director of the Arizona Department of Administration and Personnel Board; KATHY PECKHARDT, in her official capacity as Director of Human Resources for the Arizona Department of Administration and Personnel Board,** **Defendants.**	**2:09-cv-02402 JWS** **ORDER AND OPINION** **[Re: Motions at Docket 22 and 31]**

I. MOTIONS PRESENTED

At docket 22, defendants Governor Janice K. Brewer, David Raber, and Kathy Peckhardt (collectively "the State") move to dismiss the amended complaint filed by plaintiffs Tracy Collins, Keith B. Humphrey, Joseph R. Diaz, Judith McDaniel,[1] Beverly Seckinger, Stephen Russell, Deanna Pfleger, Corey Seemiller, Carrie Sperling, and Leslie Kemp (collectively "plaintiffs"). At docket 23, plaintiffs oppose the motion. The State replies at docket 27. In addition, plaintiffs have filed a motion for preliminary injunction at docket 31. At docket 40, the State opposes the motion. Plaintiffs reply at docket 41. Oral argument on both motions was heard on June 28, 2010.

II. BACKGROUND

As part of the State's personnel compensation system, the State provides subsidized health care benefits to eligible employees and their dependents. The Arizona Administrative Code currently defines dependents eligible to participate in the health benefit plan as an "employee-member's spouse as provided by law or domestic partner," and "[e]ach child,"[2] which is defined as including a "natural child, adopted child,

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[1] Plaintiff Judith McDaniel's claims recently became moot due to her obtaining new employment which provides family health insurance for her domestic partner. Doc. 31 at p. 2 n.1.

[2] Ariz. Admin. Code § R2-5-416(C).

or stepchild of the employee-member, retiree, former elected official, or domestic partner."[3]

Section R2-5-101(22) of the Arizona Administrative Code defines "domestic partner" as a "person of the same or opposite gender who:"

> a. Shares the employee's or retiree's permanent residence;
>
> b. Has resided with the employee or retiree continuously for at least 12 consecutive months before filing an application for benefits and is expected to continue to reside with the employee or retiree indefinitely as evidenced by an affidavit filed at time of enrollment;
>
> c. Has not signed a declaration or affidavit of domestic partnership with any other person and has not had another domestic partner within the 12 months before filing an application for benefits;
>
> d. Does not have any other domestic partner or spouse of the same or opposite sex;
>
> e. Is not currently legally married to anyone or legally separated from anyone else;
>
> f. Is not a blood relative any closer than would prohibit marriage in Arizona;

[3] Ariz. Admin. Code § R2-5-101(10).

g. Was mentally competent to consent to contract when the domestic partnership began;

h. Is not acting under fraud or duress in accepting benefits;

i. Is at least 18 years of age; and

j. Is financially interdependent with the employee or retiree in at least three of the following ways:

i. Having a joint mortgage, joint property tax identification, or joint tenancy on a residential lease;

ii. Holding one or more credit or bank accounts jointly, such as a checking account, in both names;

iii. Assuming joint liabilities;

iv. Having joint ownership of significant property, such as real estate, a vehicle, or a boat;

v. Naming the partner as beneficiary on the employee's life insurance, under the employee's will, or employee's retirement annuities and being named by the partner as beneficiary of the partner's life insurance, under the partner's will, or the partner's retirement annuities; and

vi. Each agreeing in writing to assume financial responsibility for the welfare of

> the other, such as durable power of attorney; or
>
> vii. Other proof of financial interdependence as approved by the Director.

Currently, state employees in homosexual domestic partnerships may obtain the same coverage bestowed upon married heterosexual couples, provided the lesbian or gay employee and her or his partner can satisfy the above criteria.[4] The State provides approximately $750 million in health, dental, life disability, and vision benefits to approximately 140,000 State employees, retirees, and their dependents.[5] Such employment benefits are commonly valued "at between one-fifth and one-third of total compensation."[6] Approximately 800 of the 140,000 participating State employees receive benefits for a qualifying domestic partner. A small fraction of those 800 employees receive benefits for a same-sex domestic partner.[7]

On August 20, 2009, the Arizona House of Representatives transmitted House Bill ("H.B.") 2013 to defendant Brewer for review, consideration, and approval or rejection in her capacity as Arizona Governor. H.B. 2013 amends A.R.S. § 38-651, which authorizes the Department of Administration to

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[4] Ariz. Admin. Code § R2-5-101.

[5] Doc. 19 at p. 7.

[6] *Id.* at p. 33.

[7] *Id.* at p. 31.

expend funds on health and accident insurance for State employees and their eligible dependents. The amendment added a new section, Section O, which provides that "[f]or the purposes of this section, beginning October 1, 2009, 'dependent' means a spouse under the laws of this state, a child who is under nineteen years of age or a child who is under twenty-three years of age and who is a full-time student."[8]

Section O eliminates family coverage for non-spouse domestic partners, whether they are of the same or different sex. Heterosexual domestic partners may continue to receive subsidized family health coverage by getting married. Same-sex couples are precluded from obtaining coverage because Section O limits coverage to "spouses" under the laws of Arizona. The Arizona Constitution prevents same-sex couples from marrying and prohibits the State from honoring a civil marriage entered by a same-sex couple in another jurisdiction.[9] Similarly, the Arizona Revised Statutes limit marriage to "a male person and a female person."[10] Governor Brewer signed H.B. 2013 on September 4, 2009.

Section O specified an intended effective date of October 1, 2009. On September 25, 2009, the Department of Administration announced that it would

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[8] A.R.S. § 38-651(O).

[9] Ariz. Const. Art. 30 § 1.

[10] A.R.S. § 25-125.

recognize November 24, 2009 as the effective date of the statute. On October 9, 2009, the Department posted another announcement indicating that, based on legal advice from the Office of the Attorney General, the definition of "dependent" for the State insurance plan year beginning October 1, 2009 would not be affected by H.B. 2013 so as not to impair the contractual expectations of State employees. On July 22, 2010, the State filed a notice indicating that the State's current benefit plan, including domestic partner coverage, will be extended through December 31, 2010.[11] The definition of "dependent" currently in place will remain effective through December 31, 2010; the new definition of "dependent" in H.B. 2013 will go into effect on January 1, 2011.

On January 7, 2010, plaintiffs filed an amended complaint against the State seeking declaratory and injunctive relief.[12] Plaintiffs' amended complaint alleges in part,

> The selective withdrawal of family coverage from lesbian and gay State employees – while leaving family coverage intact for heterosexual State employees with a legally recognized spouse – will deny each Plaintiff equal compensation for equal work and discriminatorily inflict upon each Plaintiff and his or her family members anxiety, stress, risk of untreated or inadequately treated

[11] Doc. 46.

[12] Doc. 19.

> health problems, and potentially ruinous financial burdens.[13]

Plaintiffs' complaint requests the court to enter judgment declaring that the portion of A.R.S. § 38-651(O) that limits eligibility for family coverage to an employee-member's "spouse" or a spouse's child, "to the exclusion of lesbian and gay State employees with a committed same-sex life partner" violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Plaintiffs' complaint further requests the court to permanently enjoin defendants' enforcement of the portion of A.R.S. § 38-651(O) that limits eligibility to an employee-member's spouse and spouse's child to the exclusion of lesbian and gay State employees with a same-sex life partner. In addition, plaintiffs request an order requiring defendants to "maintain family coverage, on terms equal to the family coverage [d]efendants offer to heterosexual State employees who marry a different-sex life partner, for [p]laintiffs and other qualifying lesbian and gay State employees with a committed same-sex life partner who satisfy the relevant eligibility criteria specified in the Ariz. Admin. Code § R2-5-101."[14]

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[13] Doc. 19 at p. 3.

[14] *Id.* at p. 46.

All of the plaintiffs are highly skilled State employees whose job duties are equivalent to the duties of their heterosexual colleagues.[15] Each of the nine plaintiffs and his or her domestic partner have enjoyed a long-term, committed, and financially interdependent relationship and would marry if Arizona law permitted same-sex couples to marry.[16] Each plaintiff enrolled her or his domestic partner and/or domestic partner's qualifying children for family coverage during the 2008 or 2009 open enrollment period, and each plaintiff and her or his domestic partner or partner's children met the eligibility requirements for coverage at the time of enrollment and continue to meet those requirements.[17] As result of the adoption and enforcement of Section O, each named plaintiff will lose health insurance coverage for his or her domestic partner, and/or domestic partner's children on October 1, 2010.

III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint.[18] In reviewing a Rule 12(b)(6) motion to dismiss, "[a]ll allegations of material fact in the

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[15] *Id.* at p. 12.

[16] *Id.* at pp. 13-30.

[17] *Id.* at p. 10.

[18] *De La Cruz v. Tormey,* 582 F.2d 45, 48 (9th Cir. 1978).

complaint are taken as true and construed in the light most favorable to the nonmoving party."[19] "Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss."[20] A dismissal for failure to state a claim can be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory."[21] To avoid dismissal under Rule 12(b)(6), plaintiffs' complaint must aver "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "[22]

IV. DISCUSSION

A. Motion to Dismiss

1. Equal Protection Claim

The State first argues that plaintiffs' complaint fails to state a claim under the Equal Protection Clause of the Fourteenth Amendment because Section O passes constitutional muster under rational basis review. "The Equal Protection Clause of the Fourteenth Amendment commands that no State

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[19] *Vignolo v. Miller,* 120 F.3d 1075, 1077 (9th Cir. 1997).

[20] *Lee v. City of Los Angeles,* 250 F.3d 668, 679 (9th Cir. 2001).

[21] *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir. 1990).

[22] *al-Kidd v. Ashcroft,* 580 F.3d 949, 956 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (internal citation omitted)).

shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike."[23] The first step in equal protection analysis, therefore, is to identify the classification of groups within the statute or regulations in question.[24] "To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people."[25]

The State contends that Section O is a neutral policy that treats all unmarried employees equally. Plaintiffs argue that "Section O deliberately classifies State employees into two groups-heterosexual employees who are offered a way to qualify for family health insurance, and lesbian and gay State employees who are deprived of any way to qualify for those benefits,"[26] and as such are denied equal compensation for equal work. Section O, when read together with Arizona Constitution Article 30 § 1, treats unmarried heterosexual State employees differently than unmarried homosexual employees. Heterosexual domestic partners may become eligible for family coverage under the State plan by marrying. Because

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[23] *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) (quotation omitted).

[24] *Lazy Y Ranch Ltd. v. Behrens,* 546 F.3d 580, 589 (9th Cir. 2008).

[25] *Id.* (quoting *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1187 (9th Cir. 1995)).

[26] Doc. 23 at p. 4.

employees involved in same-sex partnerships do not have the same right to marry as their heterosexual counterparts, Section O has the effect of completely barring lesbians and gays from receiving family benefits. Consequently, the spousal limitation in Section O burdens State employees with same-sex domestic partners more than State employees with opposite-sex domestic partners.

While Section O is not discriminatory on its face, as applied Section O "unquestionably imposes different treatment on the basis of sexual orientation,"[27] and makes benefits available on terms that are a legal impossibility for gay and lesbian couples. As a result, Section O denies lesbian and gay State employees in a qualifying domestic partnership a valuable form of compensation on the basis of sexual orientation. As early as 1990, the Ninth Circuit recognized that "state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection."[28] Because the spousal limitation in Section O imposes different burdens on the basis of sexual orientation, it is subject to scrutiny under the Equal Protection Clause.

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[27] *In re Levenson,* 560 F.3d 1145, 1147 (9th Cir. 2009) (quoting *In re Marriage Cases,* 183 P.3d 384, 441 (2008)).

[28] *Flores v. Morgan Hill Unified School Dist.,* 324 F.3d 1130, 1137 (9th Cir. 2003) (quoting *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 573-74 (9th Cir. 1990)).

"The basic principles governing the application of the Equal Protection Clause of the Fourteenth Amendment are familiar."[29] In applying the Equal Protection Clause, the Supreme Court "has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of people in different ways."[30] The Equal Protection Clause does, however, deny States "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[31] "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"[32] Whether a statute "bears a rational relationship to a legitimate state interest is primarily an objective inquiry."[33]

Plaintiffs contend that some form of heightened scrutiny should apply to an evaluation of Section O's constitutionality, because it treats State employees

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[29] *Eisenstadt v. Baird,* 405 U.S. 438, 446 (1972) (citing *Reed v. Reed,* 404 U.S. 71 (1971)).

[30] *Reed,* 404 U.S. at 75.

[31] *Id.* at 75-76.

[32] *Id.* at 76 (quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920)).

[33] *Perry v. Schwarzenegger,* 591 F.3d 1147, 1165 (9th Cir. 2010).

differently on the basis of their sexual orientation; because homosexuals have experienced a history of purposeful unequal treatment and are politically vulnerable; and because sexual orientation is an immutable characteristic which does not bear upon a person's ability to contribute to society as a productive employee. Some form of heightened scrutiny might apply to plaintiffs' claims, but it is unnecessary to decide whether or which type of heightened scrutiny might apply to plaintiffs' claims because plaintiffs have averred in their complaint sufficient factual matter, accepted as true, to state an equal protection claim that is plausible on its face even under the rational basis standard of review.[34]

Applying the rational basis standard, the question before the court is whether the spousal limitation in Section O bears "a rational relationship to an independent and legitimate legislative end."[35] The statute is presumed constitutional, and the burden is on those attacking the rationality of the legislative classification "to negative every conceivable basis which might support it."[36] However, "even the standard of rationality . . . must find some footing in the

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[34] *See In re Levenson,* 587 F.3d 925, 931(9th Cir. 2009).

[35] *Romer v. Evans,* 517 U.S. 620, 633 (1996).

[36] *Heller v. Doe by Doe,* 509 U.S. 312, 320 (1993) (internal citations and quotation omitted).

realities of the subject addressed by the legislation."[37] Moreover, the court applies a "more searching form of rational basis review" when a classification harms politically unpopular groups or personal relationships.[38]

The State offers the following rationales for Section O: (1) the statute "will save the State millions of dollars per year"; (2) the statute will be "much easier to administer";[39] (3) "scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute"; (4) "this benefit would be most valuable to married persons, who are more likely to have dependent children"; and, (5) the

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[37] *Immigrant Assistance Project of Los Angeles County Federal of Labor v. I.N.S.,* 306 F.3d 842, 872 (9th Cir. 2002) (quoting *Heller,* 509 U.S. at 321).

[38] *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973) (holding that an amendment preventing households containing unrelated individuals from receiving food stamps violated equal protection because it was intended to prevent "hippies" from participating in food stamp program); *Romer*, 517 U.S. at 632 (finding that an amendment that made it more difficult for one group of citizens – homosexuals – to seek aid from the government denies equal protection of the laws); *Eisenstadt*, 405 U.S. at 454 (concluding that under the Equal Protection Clause, the State could not outlaw distribution of contraceptives to unmarried persons but not to married persons).

[39] Doc. 22 at 8-9.

new statute "would further the rational, long-standing and well-recognized government interest in favoring marriage."[40] Plaintiffs argue there is no legitimate interest served by denying lesbian and gay State employees, including plaintiffs, equal compensation in the form of subsidized family coverage.

a. Cost Savings

The State argues that the cost savings of limiting benefits to "spouses" of employee-members is sufficient to satisfy the rational basis test. Plaintiffs argue that the State may not "protect the public fisc by drawing an invidious distinction between classes of its citizens."[41] The court must agree, for the Supreme Court has held that, although "a State has a valid interest in preserving the fiscal integrity of its programs," the State may not attempt to "limit its expenditures . . . by invidious distinctions between classes of its citizens."[42] That proposition applies here because the spousal limitation in Section O rests on an invidious distinction between heterosexual and homosexual State employees who are similarly situated.[43]

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[40] *Id.* at 10.

[41] Doc. 23 at 9 (quoting *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 263 (1974)).

[42] *Graham v. Richardson,* 403 U.S. 365, 374 (1971) (quoting *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969)).

[43] *Eisenstadt,* 405 U.S. at 454.

Plaintiffs allege that offering family coverage to "the small pool of lesbian and gay State employees who otherwise are categorically barred from family coverage because they cannot marry causes only negligible costs for the State."[44] Plaintiffs' complaint specifically alleges that "family coverage for lesbian and gay State employees with a same-sex life partner costs far less than the half-of-one-percent-of-health-costs figure . . . attributable to unmarried domestic partners generally,"[45] and that "the minimal costs of offering family coverage to lesbian and gay State employees is offset by the resulting reduced use of AHCCCS,[46] which is more costly on average to the State than allowing employees to share the cost of their health insurance by paying a portion of the premium for family coverage."[47] For purposes of the motion to dismiss, these facts must be accepted as true. Thus, plaintiffs have demonstrated that denying benefits to same-sex domestic partners of State employees is not rationally, much less substantially, related to the purported rationale of cost savings.

Moreover, if the State's interest were "simply saving money, the companion goal of promoting

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[44] Doc. 19 at p. 31.

[45] *Id.*

[46] Arizona Health Care Cost Containment System ("AHCCCS") is Arizona's Medicaid agency.

[47] Doc. 19 at p. 32.

marriage would seem to do the opposite."[48] If Section O succeeds in promoting marriage, the State will have to provide health benefits to more people, thus increasing the State's expenditures.

b. Administrative Efficiency

The State next argues that restricting the definition of "dependent" to "spouse" in Section O results in a benefits system that is easier to administer, and that "simplifying a complex administrative program is the sort of rational basis that justifies a distinction between married and unmarried participants."[49] Plaintiffs claim that "purported administrative convenience [cannot] justify singling out lesbian and gay employees for disfavored treatment."[50]

The Supreme Court noted in *Frontiero v. Richardson* that "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'"[51] While the State claims that "the restricted definition of dependent results in a benefits system that is much easier and less expensive to administer," the savings arise from an impermissible invidious classification which imposes costs

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[48] *Alaska Civil Liberties Union v. State of Alaska,* 122 P.3d 781, 790 (Alaska 2005).

[49] Doc. 22 at p. 9.

[50] Doc. 23 at p. 10.

[51] 411 U.S. 677, 690 (1973) (quoting *Stanley v. Illinois,* 405 U.S. 645, 656 (1972)).

on lesbians and gays by stripping their dependents of health care benefits, which the dependents of their heterosexual counterparts would continue to enjoy.

In addition, the State has already implemented a set of criteria domestic partners must meet to show their financial interdependence, commitment, and dependency and has successfully applied the criteria to those few State employees who apply for benefits for their same-sex domestic partners. There is little or no continuing administrative burden on the State in providing health coverage to plaintiffs and their partners, all of whom have already met the eligibility requirements for coverage. Applying the existing standards to the occasional new gay or lesbian applicant would be a minimal burden.

c. Funds Better Spent on Heterosexual Spouses

The State contends that another rational basis for the spousal limitation in Section O is that "scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute."[52] Plaintiffs argue that the State's rationale is discriminatory on its face, and not a rational state interest. The court concurs. The State's justification raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of

[52] Doc. 22 at p. 10.

persons affected,"[53] namely toward same-sex domestic partners who by law cannot become spouses. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[54] "Romer makes clear that a simple desire to treat gays and lesbians differently is not, in and of itself, a proper justification for government actions. Discrimination against gays and lesbians, or same-sex couples, must, at the very least, serve some more substantive and lawful function."[55]

d. Interest in Favoring Marriage and Families with Children

The State also contends that limiting family coverage to "spouses" and their children is rational because it would further the "long-standing and well-recognized government interest in favoring marriage" and family coverage "would be more valuable to married persons, who are more likely to have dependent children."[56] Plaintiffs argue that the State's purpose to favor or promote marriage "simply restates an intent to privilege [heterosexual] employees

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[53] *Romer,* 517 U.S. at 635.

[54] *Id.* (quoting *Moreno,* 413 U.S. at 534).

[55] *Levenson,* 587 F.3d at 932 (citing *Romer v. Evans,* 517 U.S. 620 (1996)).

[56] Doc. 22 at p. 10.

along invidious lines."[57] In addition, plaintiffs indicate that six out of the nine same-sex couples represented in this action are raising children together. Plaintiffs further claim that "Section O cannot be said to promote the welfare of children" when its effect is to "arbitrarily strip[ ] benefits from one group of employees with children who are no less worthy of insurance."[58]

The State cites *Irizarry v. Board of Education of the City of Chicago*[59] for the proposition that the government's interest in favoring marriage and procreation is "rational, long-standing and well-recognized."[60] However, *Irizarry* did not decide the question of whether the promotion of marriage was a rational justification for distinguishing between heterosexuals and homosexuals.[61] In any event, unlike *Irizarry,* the question before this court is whether Section O's distinction between heterosexual and homosexual employees is rationally related to the State's interest in promoting marriage and families with children. The court concludes that it is not.

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[57] Doc. 23 at p. 12.

[58] *Id.*

[59] 251 F.3d 604 (7th Cir. 2001).

[60] Doc. 22 at 10 (citing *Irizarry,* 251 F.3d at 607).

[61] *Irizarry,* 251 F.3d at 607-08.

The Supreme Court has characterized marriage as "the most important relation in life,"[62] but construing the facts of the complaint as true it cannot be said that Section O's distinction between heterosexual and homosexual employees is legitimately, rationally, and substantially related to promoting that interest. Certainly, that aspect of Section O which is challenged, the denial of benefits to State employee's same-sex domestic partners, cannot promote marriage because gays and lesbians are ineligible to marry.[63] It is only by denying benefits to heterosexual domestic partners that marriage might be promoted. However, denying benefits to heterosexual partners (who can marry in order to obtain benefits) does not require denial of those benefits to homosexual partners (who cannot marry). It is possible that the State's proffered interest in promoting or protecting marriage and procreation is a *post hoc* justification in response to litigation.[64]

The State's interests in cost control, administrative efficiency, and promotion of marriage are legitimate. However, construing the facts alleged in the complaint as true, the absolute denial of benefits to

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[62] *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978) (quoting *Maynard v. Hill,* 125 U.S. 190, 205 (1888)).

[63] *Alaska Civil Liberties Union v. State of Alaska,* 122 P.3d 781, 793 (Alaska 2005).

[64] *United States v. Virginia,* 518 U.S. 515, 532 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.")

employees with same-sex domestic partners is not rationally and substantially related to these governmental interests. Moreover, the court cannot identify any other governmental interests that might be served by denying plaintiffs the same access to family medical coverage afforded to heterosexual State employees.[65] Accordingly, the court denies the State's motion to dismiss plaintiffs' equal protection claim.

2. Substantive Due Process Claim

The State next moves to dismiss plaintiffs' claims under the Substantive Due Process Clause of the Fourteenth Amendment for failing to state a claim upon which relief may be granted. Plaintiffs argue that Section O burdens their fundamental right to form and sustain intimate family relationships under the substantive due process framework articulated in *Lawrence v. Texas*[66] and *Witt v. Department of the Air Force.*[67]

The State argues, on the other hand, that the State's refusal to fund the exercise of even a fundamental right does not amount to an interference with that right, citing *Ysursa v. Pocatello Education Association.*[68] The State further asserts that Section O in

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[65] *Levenson,* 587 F.3d at 934.

[66] 539 U.S. 558 (2003).

[67] 527 F.3d 806 (2008).

[68] ___ U.S. ___, 129 S.Ct. 1093 (2009).

no way burdens plaintiffs' liberty interests because, assuming plaintiffs' allegations are true, their "long-term and stable relationships . . . flourished years before the domestic partner benefit was first established in 2008."[69] Finally, the State claims that "[i]t cannot be seriously contended that optional employees health insurance is deeply rooted in the Nation's history and traditions"[70] and, therefore, "is not a fundamental right protected by due process."[71]

The State has the more persuasive argument. As an initial matter, *Ysursa* held, in the context of a free speech challenge to Idaho's ban on public-employee payroll deductions for political activities, that a State's "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."[72] Thus, even if the court were to find that plaintiffs' right to form and sustain intimate family relationships was indirectly burdened, it would be constitutionally permissible, under rational basis review, for the State to discontinue funding health benefits. While plaintiffs are correct that the availability of health insurance is a "valuable benefit of employment," there is no fundamental right to such a benefit. Although it likely

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[69] *Id.*

[70] *Id.* at 13.

[71] Doc. 27 at 7.

[72] *Ysursa,* 129 S.Ct. at 1098 (quoting *Regan v. Taxation With Representation of Wash.,* 461 U.S. 540, 549 (1983)).

would put the State at a competitive hiring disadvantage, it is free to refuse its employees health benefits under the U.S. Constitution.

In that regard, the State is also correct that State employees do not have a fundamental right to dependent health benefits. This is not a case like *Lawrence*, where the right to engage in private, consensual sexual activity was burdened by a law banning homosexual conduct which, in turn, burdened the rights of homosexuals to engage in private relations within their own home, which was deemed fundamental. Here, plaintiffs' stated right to form and sustain family relationships is not burdened by Section O. As the State points out, most of the plaintiffs have been in committed relationships with their respective domestic partners for upwards of 20 years, commencing long before domestic partner benefits were extended to them. Moreover, it is not tenable to assert that people who are devoted to one another in the manner of the plaintiffs would opt to avoid commitment simply because one partner could not secure health benefits for the other.

Plaintiffs' argument that *Witt* "made clear that adverse employment actions – such as Section O's elimination of valuable health benefits-constitute sufficient injury to give rise to an actionable due process claim" ignores the salient limitation in *Witt*, namely, that *Lawrence*-based claims must involve a government intrusion of some sort. Indeed, *Witt* set forth the following heightened scrutiny analysis to be

used in evaluating a *Lawrence*-based substantive due process claim,

> [W]hen the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.[73]

Here, plaintiffs have been unable to articulate the way in which the State has intruded into their personal and private affairs. Indeed, under the present statutory scheme, the State intrudes far deeper into plaintiffs' lives by inquiring of their eligibility for domestic partner benefits than it would after Section O's implementation. Because plaintiffs cannot point to a constitutionally remediable intrusion, plaintiffs have failed to state a substantive due process claim that is plausible on its face and their substantive due process claim is dismissed. As discussed above, plaintiffs' remedy lies in the Equal Protection Clause.

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[73] *Witt,* 527 F.3d at 819.

3. Immunity of Defendant Brewer

Finally, the State contends that "because Governor Brewer is entitled to legislative immunity for signing [H.B.] 2013 and 42 U.S.C. § 1983 does not permit claims for vicarious liability, she should be dismissed from this lawsuit."[74] Plaintiffs argue that they do not seek an order in connection with Governor Brewer's signing H.B. 2013 or an order based on vicarious liability.[75] Rather, plaintiffs seek to enjoin Governor Brewer from enforcing Section O based on her specific statutory duty in A.R.S. § 41-703(1) to oversee the Department of Administration's operations to eliminate family health insurance eligibility for same-sex domestic partners of State employees.[76] Plaintiffs' amended complaint alleges in pertinent part:

> 168. Upon information and belief, Defendant Brewer has the duty and authority to ensure that the Department implements Section O, and through her own individual actions, has acted and, if not enjoined, will continue to act personally to violate Plaintiffs' right to equal protection by implementing Section O to strip Plaintiffs discriminatorily of access to family coverage for a committed

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[74] Doc. 27 at p. 11.

[75] Doc. 41 at pp. 7-8.

[76] A.R.S. § 41-703(1) provides that the director of the Department of Administration shall "[b]e directly responsible to the governor for the direction, control and operation of the department."

> same-sex life partner, thereby proximately causing Plaintiffs' injury.[77]

The State argues that if plaintiffs' argument is accepted, Governor Brewer "could be sued every time someone challenges the constitutionality of any statute . . . based on the general theory that a state's chief executive is charged with the enforcement of all its laws."[78] Perhaps that is so, but it is hard to see why that makes a difference. Moreover, in another action pending before this court which seeks injunctive and declaratory relief based on the passage of Senate Bill 1017, Governor Brewer sought and received leave to intervene "both in her official capacity and on behalf of the State of Arizona-pursuant to her role as the highest executive voice in the State and to ensure that SB 1070 is 'faithfully executed.'" In support, Governor Brewer argued that "Article 5, Section 4 of the Arizona Constitution provides [the governor] with the duty to 'take care that the laws be faithfully executed' and to 'transact all executive business with the officers of the government. . . .'"[79] Governor Brewer is subject to suit in her role as "the highest executive voice in the State" in this action as well.

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[77] Doc. 19 at p. 36.

[78] Doc. 27 at p. 9.

[79] *Friendly House v. Whiting,* 2:10-cv-01061, Doc. 51 at p. 5.

Citing *al-Kidd v. Ashcroft,*[80] plaintiffs also seek to enjoin defendant Brewer based on her status as an official with supervisory responsibility. The State argues that even if Governor Brewer is responsible for supervising the other named defendants, "a supervisor may be liable only if the supervisor is personally involved in the constitutional deprivation or there is a causal connection between the supervisor's conduct and the constitutional violation."[81]

In *al-Kidd,* the Ninth Circuit recognized that "direct, personal participation is not necessary to establish liability for a constitutional violation."

> Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinate; or (4) for conduct that shows a 'reckless or callous indifference to the rights of others.'[82]

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[80] 580 F.3d 949 (9th Cir. 2009).

[81] Doc. 22 at p. 15.

[82] *al-Kidd,* 580 F.3d at 965.

"Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation."[83]

Plaintiffs' amended complaint alleges that defendant Brewer "directly caused action by others to enforce and implement Section O which [she] knew, or reasonably should have known, would cause others to inflict these constitutional injuries upon Plaintiffs"; "knowingly refused to prevent anticipated action by others who are charged to implement State law and policies under her supervision, including Section O's elimination of family coverage for Plaintiffs"; "has caused and acquiesced in this constitutional deprivation to be effectuated by her subordinates"; and, "has engaged in conduct demonstrating a reckless and callous indifference to the constitutional rights of Plaintiffs."[84]

Taken as true, plaintiffs have pled enough facts to state a claim of supervisory liability against defendant Brewer that is plausible on its face. "Were this case before [the court] on summary judgment, and were the facts pled in the complaint the only ones in the record, [the court's] decision might well be different."[85] However, the plausibility standard "does not impose a probability requirement at the pleading

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[83] *Id.*

[84] Doc. 19 at p. 37

[85] *al-Kidd,* 580 F.3d at 977.

stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence to prove that claim."[86]

B. Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 enjoining the State from enforcing the portion of A.R.S. § 38-651(O) that restricts family health insurance to State employees with a spouse "to the extent that Section O eliminates Plaintiffs' eligibility to qualify for State employee family health insurance covering each Plaintiff's same-sex life partner and that partner's qualifying children."[87] As explained by the Supreme Court, "plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest."[88]

1. Likelihood of Success on the Merits

The State argues that plaintiffs "have no chance of success on the merits unless they can establish

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[86] *Id.*

[87] Doc. 31 at p. 2.

[88] *Sierra Forest Legacy v. Rey,* 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winter v. Natural Resources Defense Council, Inc.,* ___ U.S. ___, 129 S.Ct. 365, 374 (2008)).

that there is no possible rational basis for the new definition of dependent."[89] As discussed above, construing the facts alleged in the complaint as true, plaintiffs have demonstrated that the absolute denial of benefits to employees with same-sex domestic partners is not rationally and substantially related to the State's purported interests in cost savings, administrative efficiency, and favoring marriage and families with children.

In support of their motion for preliminary injunctive relief, plaintiffs attach further evidence that Section O is not rationally related to the State's purported interests in cost savings and administrative efficiency, including a report produced by the State, entitled "Annual Check-Up Benefit Options October 1, 2008 through September 30, 2009," which summarizes the efficiency and effectiveness of the State health plan during 2008-2009, the first year the State provided coverage for employees' domestic partners and their children. The report states in relevant part,

> In review, the 2008-2009 Plan Year demonstrated a balance of expenses and premiums that allowed the State to offer members comprehensive and affordable insurance coverage. The State effectively controlled the rise in health care costs through quality benefit design, administrative oversight,

[89] Doc. 40 at p. 6.

> strategic audit planning and efficient contracts management.[90]

Plaintiffs also attach evidence showing that domestic partner coverage for both same-sex and opposite-sex partners costs the State about $3 million in 2008-2009, in comparison to the $625 million the State spent on health insurance for other employees.[91] Plaintiffs further provide an economist's estimate that "when employees' same-sex partners are provided access to an employer's health plan, enrollment tends to increase by 0.1% to 0.3%."[92] The economist further states that the cost of family coverage for lesbian and gay employees comprises "between 0.06% and 0.27%" of the State's total spending on health benefits.[93] This evidence further increases the likelihood of plaintiffs' success on the merit of their equal protection claim.

In opposition to the motion for a preliminary injunction, the State attaches a spreadsheet indicating that a total of 698 domestic partners participated in the State's health plan in the 2008-2009 plan year, and 893 domestic partners participated in the 2009-2010 plan year. The spreadsheet also lists the total of $4,076,822 claims for domestic partners in 2008-2009, and $5,490,660 for domestic partner claims in the

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[90] Doc. 32-1 at p. 8.

[91] Doc. 32-2 at p. 2.

[92] Doc. 42 at p. 3.

[93] *Id.* at p. 5.

2009-2010 plan year to date.[94] However, no information is provided as to the number of same-sex domestic partners participating in the State health plan, nor the total claims of same-sex domestic partners.

For the reasons set out in the court's discussion of the motion to dismiss and based on the further evidence provided by plaintiffs in support of their motion for preliminary injunctive relief, plaintiffs have demonstrated a likelihood of success on the merits on their equal protection claim.

2. Irreparable Harm

In *Winter,* the Supreme Court "clarified that preliminary injunctive relief is available only if plaintiffs 'demonstrate that irreparable injury is likely in the absence of an injunction,'" not merely possible.[95] Plaintiffs have demonstrated several kinds of irreparable harm. First, because plaintiffs have shown a likelihood of success on the merits of their equal protection claim, plaintiffs have demonstrated the harm of unconstitutional discrimination based on sexual orientation if injunctive relief is not granted. The Ninth Circuit has stated that "an alleged constitutional infringement will alone constitute irreparable

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[94] It is unclear whether these figures reflect premiums paid by employees.

[95] *Johnson v. Couturier,* 572 F.3d 1067, 1078 (9th Cir. 2009) (quoting *Winter,* 129 S.Ct. at 374).

harm."[96] "Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."[97]

Plaintiffs have also demonstrated that they are likely to suffer extreme anxiety and stress in the absence of an injunction enjoining the State from enforcing Section O to eliminate family health insurance eligibility for lesbian and gay State employees. Like the loss of one's job, the loss of one's job benefits "does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages."[98] Plaintiffs' declarations document that some of them might not be able to secure private health coverage for their domestic partners who have serious pre-existing health conditions and have been refused private coverage in the past.[99] Several plaintiffs' domestic partners have medical conditions requiring daily medication and consistent treatment that if left untreated will likely lead to irreversible health consequences.[100] In addition, plaintiffs' declarations

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[96] *Monterey Mechanical Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Assoc. General Contractors v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991)).

[97] *Nelson v. NASA,* 530 F.3d 865, 882 (9th Cir. 2008).

[98] *Id.*

[99] *See, e.g.,* Doc. 31-1 at pp. 2-4; Doc. 31-4 at p. 3; Doc. 31-5 at pp. 2-3; Doc. 31-6 at p. 3, Doc. 31-9 at p. 3.

[100] *See, e.g.,* Doc. 31-1; Doc. 31-4; Doc. 31-5; Doc. 31-6.

substantiate the stress of incurring greater financial burdens to provide private insurance coverage for their domestic partners and their children.[101]

Plaintiffs further document the financial hardship that losing family coverage through the State health plan will impose on their families.[102] While "[i]t is true that economic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award,"[103] all plaintiffs have demonstrated other harms than economic injury, including the stigma of discriminatory treatment and the harm of receiving unequal compensation for equal work.

The State argues that plaintiffs will not suffer irreparable harm because they will likely be able to obtain coverage for their domestic partners and their children either through private insurance coverage, the Arizona Medicaid agency, or through the employers of their domestic partners. Even assuming that is true, the Ninth Circuit has recognized there is "an inherent inequality" in allowing some employees to participate fully in the State's health plan, while expecting other employees to rely on other sources, such as private insurance or Medicaid. "This 'back of

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[101] *See, e.g.,* Doc. 31-3 at p. 4; Doc. 31-4 at p. 3.

[102] *See, e.g.,* Doc. 31-3 at p. 4; Doc. 31-4 at p. 3; Doc. 31-5 at p. 3; Doc. 31-7 at p. 3; Doc. 31-8 at p. 3; Doc. 31-9 at p. 4.

[103] *Rent-A-Center, Inc. v. Canyon Television,* 944 F.2d 597, 603 (9th Cir.1991).

the bus' treatment relegates Plaintiffs to a second-class status by imposing inferior workplace treatment on them, inflicting serious constitutional and dignitary harms that after-the-fact damages cannot adequately redress."[104] For all of the above reasons, plaintiffs have demonstrated the likelihood of irreparable harm in the absence of injunctive relief.

3. Balance of Equities

"To qualify for injunctive relief, the plaintiffs must establish that 'the balance of equities tips in [their] favor.'"[105] "In assessing whether the plaintiffs have met this burden, the district court has a 'duty . . . to balance the interests of all parties and weigh the damage to each.'"[106] Plaintiffs argue that the "extreme hardship to plaintiffs of foregoing family insurance, or paying significantly more for an inferior alternative, greatly outweighs the negligible cost to [the State] of maintaining the status quo."[107] Plaintiffs further argue that continuing plaintiffs' coverage in a group health plan that the Department of Administration admitted has functioned efficiently and successfully with plaintiffs' participation imposes

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[104] Doc. 31 at p. 15 (quoting *In re Golinski,* 587 F.3d 956, 960 (9th Cir. 2009))

[105] *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting *Winter,* 129 S.Ct. at 374)

[106] *Id.* (citing *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League,* 634 F.2d 1197, 1203 (9th Cir. 1980)).

[107] Doc. 31 at p. 16.

a small burden on defendants, if any at all. In addition, plaintiffs contend that any attempt to compensate plaintiffs with damages would be inadequate to remedy the irreparable harms of inequitable treatment and the stress and anxiety caused by the loss of benefits.

The State argues that the balance of equities favors the State, contending that plaintiffs' out-of-pocket expenses and private health insurance costs would be minimal compared to the costs of continuing domestic partner coverage. The State, however, has not provided any evidence showing the costs to the State of providing coverage for same-sex domestic partners who meet the criteria set forth in Ariz. Admin. Code § R2-5-101. To the contrary, although the State suggests entry of a preliminary injunction will worsen the State's budget shortfall, the record indicates that the impact of an injunction on the State's budget shortfall would be minimal, particularly in light of the unrefuted estimate that the cost of family coverage for lesbian and gay employees comprises "between 0.06% and 0.27%" of the State's total spending on health benefits.[108]

The State further argues that granting preliminary injunctive relief and awarding plaintiffs' domestic partner benefits, even temporarily, would "cause harm to other constituents of State services," suggesting that continuing plaintiffs' domestic partner

[108] Doc. 42 at p. 5.

benefits "would cause potential budget cuts for education, indigent health care, public safety, social programs, or perhaps layoffs for some more State employees like the plaintiffs, in order to pay for the domestic partner coverage."[109] The State's argument, which is not supported by any evidence, is speculative at best, and discriminatory at worst. Contrary to the State's suggestion, it is not equitable to lay the burden of the State's budgetary shortfall on homosexual employees, any more than on any other distinct class, such as employees with green eyes or red hair. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[110] Based on the record, the court concludes that the balance of equities tips in favor of plaintiffs.

4. Public Interest

"The public interest analysis for the issuance of a preliminary injunction requires us to consider 'whether there exists some critical public interest that would be injured by the grant of preliminary relief.'"[111] The State contends that the public's interest in reducing the cost of State employees' health

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[109] Doc. 40 at p. 14.

[110] *Romer,* 517 U.S. at 633 (quoting *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948)).

[111] *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly,* 572 F.3d 644, 659 (9th Cir. 2009) (quoting *Hybritech Inc. v. Abbott Labs.,* 849 F.2d 1446, 1458 (Fed.Cir. 1988)).

coverage would be injured by granting injunctive relief. However, as discussed above, the record demonstrates that the impact of injunctive relief on the [sic] Arizona's total expenditures for health coverage for State employees would be minimal. Accordingly, the State's budgetary considerations do not "constitute a critical public interest that would be injured by the grant of preliminary relief."[112]

On the other hand, it would not be in the public's interest to allow the State to violate the plaintiffs' rights to equal protection when there are no adequate remedies to compensate plaintiffs for the irreparable harm caused by such violation.[113] The public interest weighs in favor of injunctive relief. Because plaintiffs have demonstrated that they are likely to succeed on the merits of their equal protection claim, that they face a significant threat of irreparable injury, and that the balance of equities and the public interest favor them, the court will grant the motion for preliminary injunction.

V. CONCLUSION

For the reasons set forth above, the State's motion to dismiss at docket 22 is **GRANTED** in part and **DENIED** in part as follows: (1) the motion is **DENIED** with respect to plaintiffs' equal protection

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[112] *Id.*

[113] *California Pharmacists Ass'n,* 563 F.3d at 852-853.

claim; (2) the motion is **GRANTED** with respect to plaintiffs' substantive due process claim; and (3) the motion is **DENIED** as to defendant Brewer's claim of immunity.

It is **FURTHER ORDERED** that plaintiffs' motion for preliminary injunction at docket 31 is **GRANTED** as follows:

> 1) Defendants are enjoined from enforcing A.R.S. § 38-651(O) to eliminate family insurance eligibility for lesbian and gay State employees, and their domestic partners and domestic partners' children who satisfy the criteria set forth in Ariz. Admin. Code § R2-5-101;
>
> 2) Defendants are required to make available family health insurance coverage for lesbian and gay State employees, including plaintiffs, who satisfy the relevant eligibility criteria set forth in Ariz. Admin. Code § R2-5-101 to the same extent such benefits are made available to married State employees;
>
> 3) The preliminary injunction shall take effect within ten (10) business days and shall remain in effect pending trial in this action or further order of the court.

DATED this 23rd day of July, 2010.

/s/ JOHN W. SEDWICK
UNITED STATES
DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH R. DIAZ; JUDITH MCDANIEL; KEITH B. HUMPHREY; BEVERLY SECKINGER; STEPHEN RUSSELL; DEANNA PFLEGER; CARRIE SPERLING; LESLIE KEMP; COREY SEEMILLER,

Plaintiffs-Appellees,

v.

JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; DAVID RABER, in his official capacity as Interim Director of the Arizona Department of Administration and Personnel Board; KATHY PECKARDT, in her official capacity as Director of Human Resources for the Arizona Department of Administration and Personnel Board,

Defendants-Appellants.

No. 10-16797

D.C. No. 2:09-cv-02402-JWS
District of Arizona, Phoenix

ORDER

Filed April 3, 2012

Before: Mary M. Schroeder and Sidney R. Thomas, Circuit Judges, and Mark W. Bennett,* District Judge.

* The Honorable Mark W. Bennett, United States District Judge for the District of Northern Iowa, sitting by designation.

Order;
Dissent by Judge O'SCANNLAIN.

ORDER

The panel has voted to deny defendants-appellants' petition for panel rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judges Schroeder and Bennett have so recommended.

The full court was advised of defendants-appellants' petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

Defendants-appellants' petition for panel rehearing and petition for rehearing en banc are denied.

O'SCANNLAIN, Circuit Judge, joined by BEA, Circuit Judge, dissenting from the order denying rehearing en banc:

In this case a three-judge panel of our court holds that a state law limiting state-employee dependent-partner health benefits to spouses – and thus denying such benefits to dependent domestic partners – could not survive rational basis review. Although most of those affected adversely by the law would be opposite-sex couples, the panel concluded that the law irrationally discriminated against gays and lesbians.

The panel's holding rests on a disparate impact theory that the Supreme Court has squarely rejected and on a misapprehension of rationality review. The panel also all but expressly held that opposite-sex-only marriage rules are unconstitutional – indeed, that such rules are irrational per se because they can rest only on a "bare desire to harm a politically unpopular group." 656 F.3d 1008, 1015 (internal quotation marks and ellipses omitted).

Such a dramatic expansion of circuit law – particularly one beset by critical legal errors – should not have been taken without considered reflection by a larger cohort of our court. I respectfully dissent from the regrettable failure of our court to rehear this case en banc.

I

Until 2008, the State of Arizona limited state-employee dependent-partner health benefits to dependent spouses. In April of that year, Arizona's administrative code was amended to extend such benefits to qualified domestic partners, whether of the same or opposite sex as the state employee. 656 F.3d at 1010; *see* Ariz. Admin. Code R2-5-101(22) (Apr. 25, 2008) (for purposes of granting benefits to state employees, a "domestic partner" is one who, among other requirements, had shared a residence with the state employee for at least 12 consecutive months before applying for benefits, was financially

interdependent with the employee, and was not married or in another domestic partner relationship).

Soon after this amendment was made, the State began to deal with a severe budget crisis. The State had a projected $400 million deficit in June 2008 and a reported $1.6 billion deficit by early 2009. As part of a budget reconciliation bill addressing that crisis, in 2009 the state legislature enacted Section O, which limits state-employee dependent-partner health benefits to employees' spouses. 656 F.3d at 1010; *see* Ariz. Rev. Stat. § 38-651(O). Section O would have halted such benefits for dependent domestic partners, whether of the opposite or the same sex as the state employee.

The plaintiffs are several gay and lesbian state employees with committed domestic partners. They filed suit in November 2009 seeking a declaration that Section O violates the equal protection and due process clauses of the Fourteenth Amendment and an order permanently enjoining Section O from being enforced. In July 2010 the district court preliminarily enjoined Section O as a likely violation of the equal protection clause. 727 F. Supp. 2d 797 (D. Ariz. 2010).

The panel affirmed the preliminary injunction. Although Section O on its face applies to employees in both opposite-sex and same-sex domestic partner relationships, it concluded that the provision drew an irrational classification because opposite-sex partners could escape Section O's effect by marrying, whereas same-sex couples in Arizona may not do so because the state constitution limits marriage to unions

between one man and one woman. *See* 656 F.3d at 1014. The panel rejected the State's argument that Section O is justified by the State's pressing need to cut costs in the face of a historic budget crisis. It reasoned that "the savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review." *Id.* The panel rejected all other justifications for Section O, condemning it as an "arbitrary" law that "adversely affects [a] particular group[ ] that may be unpopular." *Id.* at 1013.

II

With respect, I suggest that the panel's equal protection analysis suffers from two significant errors.

A

The panel disregarded the requirement that a plaintiff alleging an equal protection violation must show that state action "had a discriminatory effect *and* that it was motivated by a discriminatory purpose." *Wayte v. United States,* 470 U.S. 598, 608 (1985) (emphasis added).

For nearly fifty years the Supreme Court has made clear that its cases "have not embraced the proposition that a law or other official act, without regard to whether it reflects a . . . discriminatory purpose, is unconstitutional *solely* because it has a

. . . disproportionate impact." *Washington v. Davis,* 426 U.S. 229, 239 (1976); *see, e.g., City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 194 (2003) ("We have made clear that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (brackets and internal quotation marks omitted); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977) (same).

The panel side-stepped this fundamental proposition. It cited no evidence that Section O was adopted with an intent to discriminate. The panel instead embraced the district court's rationale that the law violated equal protection because of its supposed disparate impact. But as the cases just cited make clear, such a showing could not alone invalidate Section O on equal protection grounds even under the highest level of judicial scrutiny.

Rather than apply that settled law, the panel concluded that *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973), required a different result because (in the panel's view) Section O "adversely affects [a] particular group[ ] that may be unpopular." 656 F.3d at 1013. *Moreno* struck down as irrational an amendment to the Food Stamp Act that rendered ineligible for assistance any household containing a person unrelated to any other member of the household. Taking stock of legislative history "indicat[ing] that th[e] amendment was *intended* to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program," the Court

concluded that the amendment was motivated by "a bare congressional desire to harm a politically unpopular group," which "cannot constitute a legitimate governmental interest." 413 U.S. at 534 (emphasis added; other emphasis omitted). *Moreno* did not rest only on the law's adverse effect; rather, it applied the equal protection principles set forth above to strike down a law motivated by a discriminatory purpose.

There is no such evidence that Section O was motivated by animus. Section O's context and history bears out that it rests entirely on budgetary considerations. Until 2008, Arizona limited state-employee dependent-partner health benefit coverage to spouses. In 2008 it briefly relaxed that limitation. The very next year, in the face of its budget crisis, Arizona decided to return to its previous policy. That decision does not show animus, actual or implied. Nor does Section O's supposed disparate impact on gays and lesbians. Indeed, Section O most likely would burden many more opposite-sex than same-sex couples because many more opposite-sex partners would stand to lose their benefits. *See* 727 F. Supp. 2d at 800. To conclude that the law will disproportionately affect same-sex couples would require one to assume that the vast majority of affected opposite-sex domestic partners would marry just to preserve their benefits. Though the panel seemed to credit that assumption, *see* 656 F.3d at 1014, the Arizona legislature was entitled (particularly under rationality review, *see infra* Part II-B) to presume that Section O would not spur a mass rush into matrimony.

The plaintiffs here have simply not shown – as was their burden, *see Wayte,* 470 U.S. at 608 – that Section O was motivated by a discriminatory intent. They have not even shown a likely disparate effect that would harm them. The panel therefore erred in finding a likely equal protection violation.

B

The panel also erred in holding that Section O cannot withstand rational basis review. Even in cases applying a robust form of rationality review, the Supreme Court has made clear that a legislative classification must be upheld "so long as it bears a rational relation to some legitimate end." *Romer v. Evans,* 517 U.S. 620, 631 (1996). Those challenging a classification on rational basis grounds "have the burden to negat[e] every conceivable basis which might support it." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993) (internal quotation marks omitted).

Here, the cost-savings rationale offered by the State was sufficient to justify Section O. In 2008 and 2009, Arizona faced a severe budget crisis. The State therefore enacted a budget reconciliation bill that, among other cost-reduction measures, tightened state-employee dependent-partner benefits. Section O would have generated significant cost savings. In the 2008-2009 plan year, domestic partner healthcare claims cost the State more than $4.07 million; when the district court granted the preliminary injunction, those claims had already cost the State more

than $5.49 million in the 2009-2010 plan year. 727 F. Supp. 2d at 812.

The panel nonetheless held that Section O is not rationally related to cost saving because, in the panel's view, "the savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review." 656 F.3d at 1014. But that is clearly wrong as a matter of fact: The cost savings depend on no such distinction. To the contrary, the savings will come mostly from discontinuing benefits to *opposite*-sex domestic partners because only "[a] small fraction" of those receiving domestic partner benefits are in a same-sex partnership. 727 F. Supp. 2d at 800.

Had the panel faithfully represented how Section O operates, it could not have condemned it as irrational. As already explained, the legislature was entitled to believe that most employees in opposite-sex domestic partner relationships would not sprint to marry, and thus it was entitled to believe that the lion's share of the savings would come from ending coverage for opposite-sex couples. The panel was obliged to credit that determination and to uphold the law.

III

Beyond the damage done to established Fourteenth Amendment law, the panel decision threatens to dismantle constitutional, statutory, and administrative provisions in those states that wish to promote

traditional marriage. The panel concluded – in a way that is veiled but unmistakable – that rules benefitting only traditional marriage serve no conceivable rational purpose. That conclusion broadsides Arizona voters, smothers their efforts (and the efforts of other voters in this circuit) to protect traditional marriage, and clashes with decisions of other courts.

Both states and the federal government have long sought to embody, in the law, our Nation's deep-rooted respect for traditional marriage. *See, e.g.,* 28 U.S.C. § 1738C; *Reynolds v. United States,* 98 U.S. 145, 164-66, 168 (OT 1878); *Adams v. Howerton,* 673 F.2d 1036, 1039-40, 1042-43 (9th Cir. 1982); *Baker v. Nelson,* 191 N.W.2d 185, 185-87 (Minn. 1971). In the past decade alone, many states have amended their constitutions to affirm that respect and to fortify the protections of traditional marriage[1] notwithstanding that some states have voted to extend the status of marriage to same-sex couples.[2]

Arizona voters made clear their desire to protect this fundamental institution when, in November

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[1] *See, e.g.,* Fla. Const. art. I, § 27 (2008); Ga. Const. art. I, § 4, ¶ I (2004); Idaho Const. art. III, § 28 (2006); Kan. Const. art. XV, § 16 (2005); Ky. Const. § 233A (2004); Mich. Const. art. I, § 25 (2004); Mo. Const. art. I, § 33 (2004); Nev. Const. art. I, § 21 (2002); N.D. Const. art. XI, § 28 (2004); Okla. Const. art. II, § 35 (2004); Or. Const. art. XV, § 5a (2004); Tex. Const. art. I, § 32 (2005); Wis. Const. art. XIII, § 13 (2006).

[2] *See, e.g.,* 2012 Md. Laws Ch. 2 (H.B.438); Vt. Stat. Ann. tit. 15, § 8 (2009).

2008, they amended their constitution to define marriage as between one man and one woman. *See* Ariz. Const. art. XXX, § 1. Section O accords with their choice to recognize legally only traditional marriage.

By concluding that Section O lacks any rational basis, the panel condemned the considered views of Arizona's voters and all others who wish to promote traditional marriage through the law. Without any supporting evidence, the panel berated that choice as animated by "a bare desire to harm a politically unpopular group." 656 F.3d at 1015 (internal quotation marks and ellipses omitted). That combustive conclusion will spur challenges to other state constitutional and statutory provisions that protect – indeed, even recognize – traditional marriage. No such laws are now safe in the Ninth Circuit: they are all, by the panel's judicial declaration, begotten from bigotry.

The panel's bottom-line conclusion – that rules benefitting only traditional marriage serve no conceivable rational purpose – also clashes with Supreme Court precedent, with our own case law, and with decisions of other federal and state appellate courts holding that laws recognizing or promoting traditional marriage do not violate the federal Constitution. *See, e.g., Baker v. Nelson,* 409 U.S. 810 (1972) (dismissing for want of a substantial federal question the appeal from *Baker v. Nelson,* 191 N.W.2d 185 (Minn. 1971)); *Adams,* 673 F.2d at 1042-43; *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 871 (8th Cir. 2006); *Jones v. Hallahan,* 501 S.W.2d 588,

590 (Ky. 1973); *Baker,* 191 N.W.2d at 185-87. Rather than showing similar respect for voters' choices, the panel in this case stripped our circuit's citizens of the right to embody their long-accepted, long-heralded, and long-cherished beliefs about marriage in their laws.

This case is in some ways even more breath-taking than our recent decision in *Perry v. Brown,* Nos. 10-16696, 11-16577, ___ F.3d ___, 2012 WL 372713 (9th Cir. Feb. 7, 2012). *Perry* struck down an amendment to California's constitution that restricted marriage to unions between a man and a woman. But the *Perry* majority said that it was "address[ing] no . . . question" regarding "the constitutionality of any ban on same-sex marriage," and was instead examining "whether the people of a state may by plebiscite strip a group of a right or benefit, constitutional or otherwise, that they had previously enjoyed on terms of equality with all others in the state." *Id.* at *17 n.14. By holding here that opposite-sex-only marriage rules serve no rational purpose, the panel decided an issue that bears directly – perhaps dispositively – on the broad question expressly left open in *Perry*.

IV

The panel opinion conflicts with long-settled principles of equal protection law. It hobbles the efforts of States and their citizens to protect traditional marriage by condemning, as a matter of federal constitutional law, such efforts as motivated by

unbridled, irrational hatred. It undermines the decision of Arizona's legislature to respond rationally to a historic budget crisis. Although the panel's decision was reached in the context of an interlocutory appeal of a preliminary injunction, its corrosive logic reaches further, all but proclaiming that limiting benefits only to married couples is unconstitutional.

If our court were going to break so dramatically from long-standing practice and tradition – and divide ourselves from the weight of authority on a matter that is so important – we should have done so only after reconsidering this matter en banc.

I respectfully dissent.

APPENDIX D

Arizona Revised Statutes Annotated

→→ § 38-651. Expenditure of monies for health and accident insurance; definition

A. The department of administration may expend public monies appropriated for such purpose to procure health and accident coverage for full-time officers and employees of this state and its departments and agencies. The department of administration may adopt rules that provide that if an employee dies while the employee's surviving spouse's health insurance is in force, the surviving spouse is entitled to no more than thirty-six months of extended coverage at one hundred two per cent of the group rates by paying the premiums. Except as provided by § 38-1103, no public monies may be expended to pay all or any part of the premium of health insurance continued in force by the surviving spouse. The department of administration shall seek a variety of plans, including indemnity health insurance, hospital and medical service plans, dental plans and health maintenance organizations. On a recommendation of the department of administration and the review of the joint legislative budget committee, the department of administration may self-insure for the purposes of this subsection. If the department of administration self-insures, the department may contract directly with preferred provider organizations, physician and hospital networks, indemnity health insurers, hospital and medical service plans, dental plans and health maintenance organizations. If the department

self-insures, the department shall provide that the self-insurance program include all health coverage benefits that are mandated pursuant to title 20. [FN1] The self-insurance program shall include provisions to provide for the protection of the officers and employees, including grievance procedures for claim or treatment denials, creditable coverage determinations, dissatisfaction with care and access to care issues. The department of administration by rule shall designate and adopt performance standards, including cost competitiveness, utilization review issues, network development and access, conversion and implementation, report timeliness, quality outcomes and customer satisfaction for qualifying plans. The qualifying plans for which the standards are adopted include indemnity health insurance, hospital and medical service plans, closed panel medical and dental plans and health maintenance organizations, and for eligibility of officers and employees to participate in such plans. Any indemnity health insurance or hospital and medical service plan designated as a qualifying plan by the department of administration must be open for enrollment to all permanent full-time state employees, except that any plan established prior to June 6, 1977 may be continued as a separate plan. Any closed panel medical or dental plan or health maintenance organization designated as the qualifying plan by the department of administration must be open for enrollment to all permanent full-time state employees residing within the geographic area or area to be served by the plan or

organization. Officers and employees may select coverage under the available options.

B. The department of administration may expend public monies appropriated for such purpose to procure health and accident coverage for the dependents of full-time officers and employees of this state and its departments and agencies. The department of administration shall seek a variety of plans, including indemnity health insurance, hospital and medical service plans, dental plans and health maintenance organizations. On a recommendation of the department of administration and the review of the joint legislative budget committee, the department of administration may self-insure for the purposes of this subsection. If the department of administration self-insures, the department may contract directly with preferred provider organizations, physician and hospital networks, indemnity health insurers, hospital and medical service plans, dental plans and health maintenance organizations. If the department self-insures, the department shall provide that the self-insurance program include all health coverage benefits that are mandated pursuant to title 20. The self-insurance program shall include provisions to provide for the protection of the officers and employees, including grievance procedures for claim or treatment denials, creditable coverage determinations, dissatisfaction with care and access to care issues. The department of administration by rule shall designate and adopt performance standards, including cost competitiveness, utilization review

issues, network development and access, conversion and implementation, report timeliness, quality outcomes and customer satisfaction for qualifying plans. The qualifying plans for which the standards are adopted include indemnity health insurance, hospital and medical service plans, closed panel medical and dental plans and health maintenance organizations, and for eligibility of the dependents of officers and employees to participate in such plans. Any indemnity health insurance or hospital and medical service plan designated as a qualifying plan by the department of administration must be open for enrollment to all permanent full-time state employees, except that any plan established prior to June 6, 1977 may be continued as a separate plan. Any closed panel medical or dental plan or health maintenance organization designated as a qualifying plan by the department of administration must be open for enrollment to all permanent full-time state employees residing within the geographic area or area to be served by the plan or organization. Officers and employees may select coverage under the available options.

C. The department of administration may designate the Arizona health care cost containment system established by title 36, chapter 29 [FN2] as a qualifying plan for the provision of health and accident coverage to full-time state officers and employees and their dependents. The Arizona health care cost containment system shall not be the exclusive qualifying plan for health and accident coverage for state

officers and employees either on a statewide or regional basis.

D. Except as provided in § 38-652, public monies expended pursuant to this section each month shall not exceed:

1. Five hundred dollars multiplied by the number of officers and employees who receive individual coverage.

2. One thousand two hundred dollars multiplied by the number of married couples if both members of the couple are either officers or employees and each receives individual coverage or family coverage.

3. One thousand two hundred dollars multiplied by the number of officers or employees who receive family coverage if the spouses of the officers or employees are not officers or employees.

E. Subsection D of this section:

1. Establishes a total maximum expenditure of public monies pursuant to this section.

2. Does not establish a minimum or maximum expenditure for each individual officer or employee.

F. In order to ensure that an officer or employee does not suffer a financial penalty or receive a financial benefit based on the officer's or employee's age, gender or health status, the department of administration shall consider implementing the following:

1. Requests for proposals for health insurance that specify that the carrier's proposed premiums for each plan be based on the expected age, gender and health status of the entire pool of employees and officers and their family members enrolled in all qualifying plans and not on the age, gender or health status of the individuals expected to enroll in the particular plan for which the premium is proposed.

2. Recommendations from a legislatively established study group on risk adjustments relating to a system for reallocating premium revenues among the contracting qualifying plans to the extent necessary to adjust the revenues received by any carrier to reflect differences between the average age, gender and health status of the enrollees in that carrier's plan or plans and the average age, gender and health status of all enrollees in all qualifying plans.

G. Each officer or employee shall certify on the initial application for family coverage that the officer or employee is not receiving more than the contribution for which eligible pursuant to subsection D of this section. Each officer or employee shall also provide the certification on any change of coverage or marital status.

H. If a qualifying health maintenance organization is not available to an officer or employee within fifty miles of the officer's or employee's residence and the officer or employee is enrolled in a qualifying plan, the officer or employee shall be offered the opportunity to enroll with a health maintenance organization

when the option becomes available. If a health maintenance organization is available within fifty miles and it is determined by the department of administration that there is an insufficient number of medical providers in the organization, the department may provide for a change in enrollment from plans designated by the director when additional medical providers join the organization.

I. Notwithstanding subsection H of this section, officers and employees who enroll in a qualifying plan and reside outside the area of a qualifying health maintenance organization shall be offered the option to enroll with a qualified health maintenance organization offered through their provider under the same premiums as if they lived within the area boundaries of the qualified health maintenance organization, if:

1. All medical services are rendered and received at an office designated by the qualifying health maintenance organization or at a facility referred by the health maintenance organization.

2. All nonemergency or nonurgent travel, ambulatory and other expenses from the residence area of the officer or employee to the designated office of the qualifying health maintenance organization or the facility referred by the health maintenance organization are the responsibility of and at the expense of the officer or employee.

3. All emergency or urgent travel, ambulatory and other expenses from the residence area of the officer or employee to the designated office of the qualifying

health maintenance organization or the facility referred by the health maintenance organization are paid pursuant to any agreement between the health maintenance organization and the officer or employee living outside the area of the qualifying health maintenance organization.

J. The department of administration shall allow any school district in this state that meets the requirements of section 15-388, a charter school in this state that meets the requirements of section 15-187.01 or a city, town, county, community college district, special taxing district, authority or public entity organized pursuant to the laws of this state that meets the requirements of section 38-656 to participate in the health and accident coverage prescribed in this section, except that participation is only allowed in a health plan that is offered by the department and that is subject to title 20, chapter 1, article 1. [FN3] A school district, a charter school, a city, a town, a county, a community college district, a special taxing district, an authority or any public entity organized pursuant to the laws of this state rather than this state shall pay directly to the benefits provider the premium for its employees.

K. The department of administration shall determine the actual administrative and operational costs associated with school districts, charter schools, cities, towns, counties, community college districts, special taxing districts, authorities and public entities organized pursuant to the laws of this state participating in the state health and accident insurance

coverage. These costs shall be allocated to each school district, charter school, city, town, county, community college district, special taxing district, authority and public entity organized pursuant to the laws of this state based on the total number of employees participating in the coverage. This subsection only applies to a health plan that is offered by the department and that is subject to title 20, chapter 1, article 1.

L. Insurance providers contracting with this state shall separately maintain records that delineate claims and other expenses attributable to participation of a school district, charter school, city, town, county, community college district, special taxing district, authority and public entity organized pursuant to the laws of this state in the state health and accident insurance coverage and, by November 1 of each year, shall report to the department of administration the extent to which state costs are impacted by participation of school districts, charter schools, cities, towns, counties, community college districts, special taxing districts, authorities and public entities organized pursuant to the laws of this state in the state health and accident insurance coverage. By December 1 of each year, the director of the department of administration shall submit a report to the president of the senate and the speaker of the house of representatives detailing the information provided to the department by the insurance providers and including any recommendations for possible legislative action.

M. Notwithstanding subsection J of this section, any school district in this state that meets the requirements of section 15-388, a charter school in this state that meets the requirements of section 15-187.01 or a city, town, county, community college district, special taxing district, authority or public entity organized pursuant to the laws of this state that meets the requirements of section 38-656 may apply to the department of administration to participate in the self-insurance program that is provided by this section pursuant to rules adopted by the department. A participating entity shall reimburse the department for all premiums and administrative or other insurance costs. The department shall actuarially prescribe the annual premium for each participating entity to reflect the actual cost of each participating entity.

N. Any person that submits a bid to provide health and accident coverage pursuant to this section shall disclose any court or administrative judgments or orders issued against that person within the last ten years before the submittal.

O. For the purposes of this section, "dependent" means a spouse under the laws of this state, a child who is under twenty-six years of age or a child who was disabled before reaching nineteen years of age, who continues to be disabled under 42 United States Code section 1382c and for whom the employee had custody before reaching nineteen years of age.

[FN1] Section 20-101 et seq.

[FN2] Section 36-2901 et seq.

[FN3] Section 20-101 et seq.

APPENDIX E

Title 2, Ch. 5 ***Arizona Administrative Code (2008)***

Department of Administration –
Personnel Administration

ARTICLE 1. GENERAL

R2-5-101. Definitions

The following words and phrases have the defined meanings unless otherwise clearly indicated by the context.

1. "Agency" means a department, board, office, authority, or other governmental budget unit of the state.
2. "Agency head" means the chief executive officer of an agency.
3. "Appeal" means a request for a review by the Personnel Board of a disciplinary action under A.R.S. § 41-782.
4. "Applicant" means a person who seeks appointment to a position in state service.
5. "Appointment" means the offer to and the acceptance by a person of a position in state service.
6. "Base salary" means an employee's salary excluding overtime pay, shift differential, bonus pay, special performance adjustment previously granted, or pay for other allowance or special incentive pay program.

7. "Business day" means the hours between 8:00 a.m. and 5:00 p.m. Monday through Friday, excluding observed state holidays.

8. "Candidate" means a person whose knowledge, skills, and abilities meet the requirements of a position and who may be considered for employment.

9. "Cause" means any of the reasons for disciplinary action provided by A.R.S. § 41-770 or these rules.

10. "Child" means:

    a. For purposes of R2-5-416(C), pertaining to the health benefit plan, R2-5-418(B), pertaining to the retiree health benefit plan, and R2-5-419(C), pertaining to the health benefit plan for former elected officials, an unmarried person who falls within one or more of the following categories:

        i. A natural child, adopted child, or stepchild of the employee-member, retiree, former elected official, or domestic partner and who is younger than age 19 or younger than age 25 if a full-time student;

        ii. A child who is younger than age 19 for whom the employee-member, retiree, or former elected official has court-ordered guardianship;

        iii. A foster child who is younger than age 19;

iv. A child who is younger than age 19 and placed in the employee-member's, retiree's, or former elected official's home by court order pending adoption; or

v. A natural child, adopted child, or stepchild of the employee-member, retiree, former elected official, or domestic partner and who was disabled prior to age 19 and continues to be disabled under 42 U.S.C. 1382c and for whom the employee-member, retiree, former elected official or domestic partner had custody prior to age 19.

b. For purposes of R2-5-417(C) and (D), pertaining to the life and disability income insurance plan, and R2-5-421(B), pertaining to the life insurance plan for former elected officials, an unmarried person who falls within one or more of the following categories:

i. A natural child, adopted child, or stepchild of the employee-member, former elected official, or domestic partner and who is younger than age 19 or younger than age 25 if a full-time student;

ii. A child who is younger than age 19 for whom the employee or former elected official has court-ordered guardianship;

iii. A foster child who is younger than age 19;

iv. A child who is younger than age 19 and placed in the employee's or former elected official's home by court order pending adoption; or

v. A natural child, adopted child, or stepchild of the employee-member, former elected official, or domestic partner and who was disabled prior to age 19 and continues to be disabled under 42 U.S.C. 1382c and for whom the employee, former elected official, or domestic partner had custody prior to age 19; or

c. For purposes of R2-5-207(D), pertaining to the employment of relatives, R2-5-404, pertaining to sick leave, R2.5-410, pertaining to bereavement leave, the term includes a natural child, adopted child, foster child, or stepchild; and

d. For purposes of R2-5-411, pertaining to parental leave, the term includes a natural child, adopted child, foster child, or stepchild.

11. "Class" means a group of positions with the same title and pay grade because each position in the group has similar duties, scope of discretion and responsibility, required knowledge, skills and abilities, or other job-related characteristics.

12. "Class series" means:

    a. For purposes of R2-5-902(B), pertaining to the administration of reduction in force, and R2-5-903(A), pertaining to a temporary reduction in force, a group of related classes that is listed in the Arizona Department of Administration, Human Resources Division, Occupational Listing of Classes as a subsection of the occupational group; and

    b. For purposes of R2-5-902(D), pertaining to the calculation of retention points for length of service, a group of related classes that is listed in the Arizona Department of Administration, Human Resources Division, Occupational Listing of Classes as a subsection of the occupational group, including a position that has been reclassified or reassigned to the class series within five years before the effective date of the reduction in force.

13. "Class specification" means a description of the type and level of duties and responsibilities of the positions assigned to a class.

14. "Clerical pool appointment" means the noncompetitive, temporary placement of a qualified individual in a clerical position.

15. "Competition" means the process leading to the identification of candidates for employment or promotional consideration that includes an evaluation of knowledge, skills, and abilities and the development of a hiring list in accordance with these rules.

16. "Covered employee" means an employee in state service who is subject to the provisions of these rules.

17. "Covered position" means a position in state service, as defined in ARS § 41-762.

18. "Days" means calendar days.

19. "Demotion" means a change in the assignment of an employee from a position in one class to a position in another class with a lower pay grade that results from disciplinary action for cause.

20. "Department" means the Arizona Department of Administration.

21. "Director" means the Director of the Arizona Department of Administration, and the Director's designee with respect to personnel administration.

22. "Domestic partner" means a person of the same or opposite gender who:

    a Shares the employee's or retiree's permanent residence;

    b. Has resided with the employee or retiree continuously for at least 12 consecutive months before filing an application for benefits and is expected to continue to reside with the employee or retiree indefinitely as evidenced by an affidavit filed at time of enrollment;

    c. Has not signed a declaration or affidavit of domestic partnership with any other

person and has not had another domestic partner within the 12 months before filing an application for benefits;

d. Does not have any other domestic partner or spouse of the same or opposite sex;

e. Is not currently legally married to anyone or legally separated from anyone else;

f. Is not a blood relative any closer than would prohibit marriage in Arizona;

g. Was mentally competent to consent to contract when the domestic partnership began;

h. Is not acting under fraud or duress in accepting benefits;

i. Is at least 18 years of age; and

j. Is financially interdependent with the employee or retiree in at least three of the following ways:

   i. Having a joint mortgage, joint property tax identification, or joint tenancy on a residential lease;

   ii. Holding one or more credit or bank accounts jointly, such as a checking account, in both names;

   iii. Assuming joint liabilities;

iv. Having joint ownership of significant property, such as real estate, a vehicle, or a boat;

v. Naming the partner as beneficiary on the employee's life insurance, under the employee's will, or employee's retirement annuities and being named by the partner as beneficiary of the partner's life insurance, under the partner's will, or the partner's retirement annuities; and

vi. Each agreeing in writing to assume financial responsibility for the welfare of the other, such as durable power of attorney; or

vii. Other proof of financial interdependence as approved by the Director.

23. "Eligible dependent" means the employee-member's, retiree's, or former elected official's spouse under Arizona law, domestic partner, child, or older child.

24. "Emergency appointment" means an appointment made without regard to the recruitment, evaluation, referral, or selection requirements of these rules in response to a governmental emergency.

25. "Entrance salary" means the minimum rate of the pay grade established for a specific class.

26. "Essential job function" means the fundamental job duties of a position that an applicant or employee must be able to perform, with or without a reasonable accommodation.

27. "Evaluation" means the procedure used to determine the relative knowledge, skills, and abilities of an applicant.

28. "Flexible or cafeteria employee benefit plan" means a plan providing benefits to eligible employees that meets the requirements of Section 125 of the Internal Revenue Code.

29. "FLSA" means the federal Fair Labor Standards Act.

30. "FLSA exempt" means a position that is not entitled to overtime compensation under the FLSA.

31. "FLSA non-exempt" means a position that is entitled to overtime compensation under the FLSA.

32. "FMLA" means the federal Family and Medical Leave Act.

33. "Good standing" means the status of a former employee at the time of separation from state service for reasons other than disciplinary action or anticipated disciplinary action.

34. "Grievance" means a formal complaint filed by an employee, using the procedure established in Article 7 of these rules, that alleges discrimination, noncompliance with these

rules, or concerns other work-related matters that directly and personally affect the employee.

35. "Human Resources Employment Database" means the database that contains the resume of an applicant interested in employment within state service.

36. "Incumbent" means the officer or employee who currently holds an office or position.

37. "Institution" means a facility that provides supervision or care for residents on a 24-hour per day, 7-day per week, basis.

38. "Knowledge, skills, and abilities" means the qualifications and personal attributes required to perform a job that are generally demonstrated through qualifying service, education, or training.

    a. Knowledge is a body of information applied directly to the performance of a function;

    b. Skill is an observable competence to perform a learned psychomotor act; and

    c. Ability is competence to perform an observable behavior or a behavior that results in an observable product.

39. "Limited appointment" means an appointment to a position that is funded for at least six months but not more than 36 months.

40. "Limited position" means a position in state service that is established for at least six

months but not more than 36 months based on the duration of funding.

41. "Manifest error" means an act or failure to act that is, or clearly has caused, a mistake.

42. "Mobility assignment" means the assignment of a permanent status employee to an uncovered position or to a covered or uncovered position in another state agency.

43. "Older child" means an individual who:

    a. Is younger than 25 years old,

    b. Is unmarried,

    c. Was covered by a health insurance plan made available by the Department during the year that the individual was 18 years old, and

    d. Resides in Arizona, if the individual is:

        i. A natural child, adopted child, or stepchild of an employee, officer, retiree, or former elected official;

        ii. A natural child, adopted child, or stepchild of a domestic partner; or

        iii. A child for whom an employee, officer, retiree, or former elected official received a court-ordered guardianship when the child was 18 years old or younger.

44. "Original probation" means the specified period following initial appointment to state

service in a regular or limited position for evaluation of the employee's work.

45. "Original probationary appointment" means the initial appointment to a regular or limited position in state service.

46. "Parent" means, for purposes of R2-5-403, pertaining to annual leave, R2-5-404, pertaining to sick leave, and R2-5-410, pertaining to bereavement leave, birth parent, adoptive parent, stepparent, foster parent, grandparent, parent-in-law, or anyone who can be considered "in loco parentis."

47. "Participant" means an employee who is enrolled in the state's insurance program.

48. "Part-time" means, for purposes of R2-5-402, pertaining to holidays, R2-5-403, pertaining to annual leave, R2-5404, pertaining to sick leave, R2-5-902, pertaining to reduction in force, and R2-5-903, pertaining to temporary reduction in force, employment scheduled for less than 40 hours per week.

49. "Pay grade" means a salary range in a state service salary plan.

50. "Pay status" means an employee is eligible to receive pay for work or for a compensated absence.

51. "Permanent status" means the standing an employee achieves after the completion of an original probation or a promotional probation.

52. "Plan" means a flexible or cafeteria employee benefit plan.

53. "Plan administrator" means the Director of the Arizona Department of Administration.

54. "Promotion" means a permanent change in assignment of an employee from a position in one class to a position in another class that has a higher pay grade.

55. "Promotional probation" means the specified period of employment following promotion of a permanent status employee for evaluation of the employee's work.

56. "Qualified" means an individual possesses the knowledge, skills, and abilities required of a specific position, as described in the class specification, and any unique characteristics required for the position.

57. "Qualified life event" means a change in an employee's family, employment status, or residence including but not limited to:

    a. Changes in the employee's marital status such as marriage, divorce, legal separation, annulment, death of spouse, domestic partnership, termination of domestic partnership, or death of domestic partner;

    b. Changes in dependent status such as birth, adoption, placement for adoption, death, or dependent eligibility due to age, marriage, or student status;

c. Changes in employment status or work schedule that affect benefits eligibility for the employee, spouse, domestic partner, or dependent; or

d. Changes in residence that affect available plan options for the employee, spouse, domestic partner, or dependent.

58. "Reclassification" means changing the classification of a position if a material and permanent change in duties or responsibilities occurs.

59. "Reduction" means the non-appealable movement of an employee from one position to another in a lower pay grade as a result of a reduction in force.

60. "Reemployment" means the appointment of a former permanent status employee who was separated by a reduction in force.

61. "Regular position" means a full-time equivalent (FTE) position in state service.

62. "Reinstatement" means the appointment of a former permanent status employee who resigned, was separated in good standing, or was separated without prejudice within two years from the effective date of separation.

63. "Repromotion" means the promotion of an employee who was reduced in pay grade due to a reduction in force to the pay grade held before the reduction in force or to an intervening pay grade.

64. "Reversion" means the return of an employee on promotional probation to a position in the class in which the employee held permanent status immediately before the promotion.

65. "Rules" means the rules contained in A.A.C., Title 2, Chapter 5.

66. "Separation without prejudice" means a non-disciplinary removal from state service, without appeal rights, of an employee in good standing.

67. "Special detail" means the temporary assignment of a permanent status employee to a covered position in the same agency.

68. "State service" is defined in A.R.S. § 41-762.

69. "Surviving spouse" means the husband or wife, as provided by law, of a current or former elected official, or active or retired officer or employee who survives upon the death of the elected official, officer, or employee.

70. "Temporary appointment" means an appointment made for a maximum of 1,500 hours in any one position per agency in each calendar year.

71. "Transfer" means the movement of an employee from one position in state service to another position in state service in the same pay grade.

72. "Uncovered position" means a position that is exempt under A.R.S. § 41.771 and not subject to the provisions of these rules.

73. "Underfill" means the appointment of a person to a class with a pay grade that is lower than the pay grade for the allocated class for that position.

74. "Voluntary pay grade decrease" means a change in assignment, at the request of an employee, to a position in a class with a lower pay grade.

APPENDIX F

Title 2, Ch. 5 ***Arizona Administrative Code (2008)***

Department of Administration –
Personnel Administration

R2-5-416. Health Benefit Plan

A. Eligibility.

1. A state employee, except an employee listed in subsection (A)(2), and the employee's eligible dependents may participate in the health benefit plan, if the employee complies with the contractual requirements of the selected health benefit plan. An eligible employee may enroll in a health benefit plan at any time within the first 31 days of employment or during an open enrollment period specified by the Director. To add an eligible dependent due to a qualified life event, an eligible employee shall submit an application for enrollment within 31 days of the qualified life event.
2. The following categories of employees are not eligible to participate in the health benefit plan:
    a. An employee who works fewer than 20 hours per week;
    b. An employee in a temporary, emergency, or clerical pool position;
    c. A patient or inmate employed in a state institution;

d. A non-state employee, officer, or enlisted personnel of the National Guard of Arizona;

e. An employee in a position established for rehabilitation purposes;

f. An employee of any state college or university:

i. Who works fewer than 20 hours per week;

ii. Who is engaged to work for less than six months; or

iii. For whom contributions are not made to a state retirement plan. This disqualification does not apply to a non-immigrant alien employee, an employee participating in a medical residency training program, a Cooperative Extension employee on federal appointment, or a retiree who returns to work under A.R.S. § 38-766.01.

B. Eligibility exception. An employee who is on leave without pay may continue to participate in the health benefit plan under the conditions in:

1. R2-5-405 for employees on leave without pay due to industrial illness or injury;

2. R2-5-413 for employees on medical leave without pay; or

3. R2-5-414 for employees on leave without pay for any other reason.

C. Dependent eligibility. Dependents eligible to participate in the health benefit plan include:

1. An employee-member's spouse as provided by law or domestic partner; and

2. Each child.

D. Enrollment of dependents. An eligible employee may enroll eligible dependents at the time of the employee's original enrollment, within 31 days of a qualified life event, or at open enrollment.

APPENDIX G

Title 2, Ch. 5 ***Arizona Administrative Code (2005)***

Department of Administration –
Personnel Administration

R2-5-101. Definitions

The following words and phrases have the defined meanings unless otherwise clearly indicated by the context.

1. "Agency" means a department, board, office, authority, commission, or other governmental budget unit of the state.
2. "Agency head" means the chief executive officer of an agency.
3. "Appeal" means a request for a review by the Personnel Board of a disciplinary action under A.R.S. § 41-782.
4. "Applicant" means a person who seeks appointment to a position in state service.
5. "Appointment" means the offer to and the acceptance by a person of a position in state service.
6. "Base salary" means an employee's salary excluding overtime pay, shift differential, bonus pay, special performance adjustment previously granted, or pay for other allowance or special incentive pay program.
7. "Business day" means the hours between 8:00 a.m. and 5:00 p.m. Monday through Friday, excluding observed state holidays.

8. "Candidate" means a person whose knowledge, skills, and abilities meet the requirements of a position and who may be considered for employment.

9. "Cause" means any of the reasons for disciplinary action provided by A.R.S. § 41-770 or these rules.

10. "Child" means:

    a. For purposes of R2-5-416(C), pertaining to the health benefit plan, R2-5-418(B), pertaining to the retiree health benefit plan, and R2-5-419(C), pertaining to the health benefit plan for former elected officials, an unmarried person who falls within one or more of the following categories:

        i. A natural child, adopted child, or stepchild who is younger than age 19 or younger than age 25 if a full-time student;

        ii. A child who is younger than age 19 for whom the employee-member, retiree, or former elected official has court-ordered guardianship;

        iii. A foster child who is younger than age 19;

        iv. A child who is younger than age 19 and placed in the employee-member's, retiree's, or former elected official's home by court order pending adoption; or

v. A natural child, adopted child, or stepchild who was disabled prior to age 19 and continues to be disabled under 42 USC 1382c and for whom the employee-member, retiree, or elected official had custody prior to age 19.

b. For purposes of R2-5-417(C) and (D), pertaining to the life and disability income insurance plan, and R2-5-421(B), pertaining to the life insurance plan for former elected officials, an unmarried person who falls within one or more of the following categories:

i. A natural child, adopted child, or stepchild who is younger than age 19 or younger than age 25 if a full-time student;

ii. A child who is younger than age 19 for whom the employee or former elected official has court-ordered guardianship;

iii. A foster child who is younger than age 19;

iv. A child who is younger than age 19 and placed in the employee's or former elected official's home by court order pending adoption; or

v. A natural child, adopted child, or stepchild who was disabled prior to age 19 and continues to be disabled under 42 USC 1382c and for whom

the employee or former elected official had custody prior to age 19; or

c. For purposes of R2-5-207(D), pertaining to the employment of relatives, R2-5-404, pertaining to sick leave, R2-5-410, pertaining to bereavement leave, the term includes a natural child, adopted child, foster child, or stepchild; and

d. For purposes of R2-5-411, pertaining to parental leave, the term includes a natural child, adopted child, foster child, or stepchild.

11. "Class" means a group of positions with the same title and pay grade because each position in the group has similar duties, scope of discretion and responsibility, required knowledge, skills and abilities, or other job-related characteristics.

12 "Class series" means:

a. For purposes of R2-5-902(B), pertaining to the administration of reduction in force, and R2-5-903(A), pertaining to a temporary reduction in force, a group of related classes that is listed in the Arizona Department of Administration, Human Resources Division, Occupational Listing of Classes as a subsection of the occupational group; and

b. For purposes of R2-5-902(D), pertaining to the calculation of retention points for length of service, a group of related classes that is listed in the Arizona Department

of Administration, Human Resources Division, Occupational Listing of Classes as a subsection of the occupational group, including a position that has been reclassified or reassigned to the class series within five years before the effective date of the reduction in force.

13. "Class specification" means a description of the type and level of duties and responsibilities of the positions assigned to a class.

14. "Clerical pool appointment" means the noncompetitive, temporary placement of a qualified individual in a clerical position.

15. "Competition" means the process leading to the identification of candidates for employment or promotional consideration that includes an evaluation of knowledge, skills, and abilities and the development of a hiring list in accordance with these rules.

16. "Covered employee" means an employee in state service who is subject to the provisions of these rules.

17. "Covered position" means a position in state service, as defined in A.R.S. § 41-762.

18. "Days" means calendar days.

19. "Demotion" means a change in the assignment of an employee from a position in one class to a position in another class with a lower pay grade that results from disciplinary action for cause.

20. "Department" means the Arizona Department of Administration.

21. "Director" means the Director of the Arizona Department of Administration, and the Director's designee with respect to personnel administration.

22. "Eligible dependent" means the employee-member's, retiree's, or former elected official's spouse under Arizona law or an unmarried child who falls within one or more of the following categories:

    a. A natural child, adopted child, or stepchild who is younger than age 19 or younger than age 25 if a full-time student;

    b. A child who is younger than age 19 for whom the employee-member, retiree, or former elected official has court-ordered guardianship;

    c. A foster child who is younger than age 19;

    d. A child who is younger than age 19 and placed in the employee-member's, retiree's, or former elected official's home by court order pending adoption; or

    e. A natural child, adopted child, or stepchild who was disabled prior to age 19 and continues to be disabled under 42 USC 1382c and for whom the employee-member, retiree, or former elected official had custody prior to age 19.

23. "Emergency appointment" means an appointment made without regard to the recruitment, evaluation, referral, or selection requirements of these rules in response to a governmental emergency.

24. "Entrance salary" means the minimum rate of the pay grade established for a specific class.

25. "Essential job function" means the fundamental job duties of a position that an applicant or employee must be able to perform, with or without a reasonable accommodation.

26. "Evaluation" means the procedure used to determine the relative knowledge, skills, and abilities of an applicant.

27. "Flexible or cafeteria employee benefit plan" means a plan providing benefits to eligible employees that meets the requirements of Section 125 of the Internal Revenue Code.

28. "FLSA" means the federal Fair Labor Standards Act.

29. "FLSA exempt" means a position that is not entitled to overtime compensation under the FLSA.

30. "FLSA non-exempt" means a position that is entitled to overtime compensation under the FLSA.

31. "FMLA" means the federal Family and Medical Leave Act.

32. "Good standing" means the status of a former employee at the time of separation from state service for reasons other than disciplinary action or anticipated disciplinary action.

33. "Grievance" means a formal complaint filed by an employee, using the procedure established in Article 7 of these rules, that alleges discrimination, noncompliance with these rules, or concerns other work-related matters that directly and personally affect the employee.

34. "Human Resources Employment Database" means the database that contains the resume of an applicant interested in employment within state service.

35. "Incumbent" means the officer or employee who currently holds an office or position.

36. "Institution" means a facility that provides supervision or care for residents on a 24-hour per day, 7-day per week, basis.

37. "Knowledge, skills, and abilities" means the qualifications and personal attributes required to perform a job that are generally demonstrated through qualifying service, education, or training.

    a. Knowledge is a body of information applied directly to the performance of a function;

    b. Skill is an observable competence to perform a learned psychomotor act; and

c. Ability is competence to perform an observable behavior or a behavior that results in an observable product.

38. "Limited appointment" means an appointment to a position that is funded for at least six months but not more than 36 months.

39. "Limited position" means a position in state service that is established for at least six months but not more than 36 months based on the duration of funding.

40. "Manifest error" means an act or failure to act that is, or clearly has caused, a mistake.

41. "Mobility assignment" means the assignment of a permanent status employee to an uncovered position or to a covered or uncovered position in another state agency.

42. "Original probation" means the specified period following initial appointment to state service in a regular or limited position for evaluation of the employee's work.

43. "Original probationary appointment" means the initial appointment to a regular or limited position in state service.

44. "Parent" means, for purposes of R2-5-403, pertaining to annual leave, R2-5-404, pertaining to sick leave, and R2-5-410, pertaining to bereavement leave, birth parent, adoptive parent, stepparent, foster parent, grandparent, parent-in-law, or anyone who can be considered "in loco parentis."

45. “Participant” means an employee who is enrolled in the state’s insurance program.

46. “Part-time” means, for purposes of R2-5-402, pertaining to holidays, R2-5-403, pertaining to annual leave, R2-5-404, pertaining to sick leave, R2-5-902, pertaining to reduction in force, and R2-5-903, pertaining to temporary reduction in force, employment scheduled for less than 40 hours per week.

47. “Pay grade” means a salary range in a state service salary plan.

48. “Pay status” means an employee is eligible to receive pay for work or for a compensated absence.

49. “Permanent status” means the standing an employee achieves after the completion of an original probation or a promotional probation.

50. “Plan” means a flexible or cafeteria employee benefit plan.

51. “Plan administrator” means the Director of the Arizona Department of Administration.

52. “Promotion” means a permanent change in assignment of an employee from a position in one class to a position in another class that has a higher pay grade.

53. “Promotional probation” means the specified period of employment following promotion of a permanent status employee for evaluation of the employee’s work.

54. "Qualified" means an individual possesses the knowledge, skills, and abilities required of a specific position, as described in the class specification, and any unique characteristics required for the position.

55. "Qualified life event" means a change in an employee's family, employment status, or residence including but not limited to:

    a. Changes in the employee's marital status such as marriage, divorce, legal separation, annulment, or death of spouse;

    b. Changes in dependent status such as birth, adoption, placement for adoption, death, or dependent eligibility due to age, marriage, or student status;

    c. Changes in employment status or work schedule that affect benefits eligibility for the employee, spouse, or dependent; or

    d. Changes in residence that affect available plan options for the employee, spouse, or dependent.

56. "Reclassification" means changing the classification of a position if a material and permanent change in duties or responsibilities occurs.

57. "Reduction" means the non-appealable movement of an employee from one position to another in a lower pay grade as a result of a reduction in force.

58. "Reemployment" means the appointment of a former permanent status employee who was separated by a reduction in force.

59. "Regular position" means a full-time equivalent (FTE) position in state service.

60. "Reinstatement" means the appointment of a former permanent status employee who resigned, was separated in good standing, or was separated without prejudice within two years from the effective date of separation.

61. "Repromotion" means the promotion of an employee who was reduced in pay grade due to a reduction in force to the pay grade held before the reduction in force or to an intervening pay grade.

62. "Reversion" means the return of an employee on promotional probation to a position in the class in which the employee held permanent status immediately before the promotion.

63. "Rules" means the rules contained in A.A.C., Title 2, Chapter 5.

64. "Separation without prejudice" means a nondisciplinary removal from state service, without appeal rights, of an employee in good standing.

65. "Special detail" means the temporary assignment of a permanent status employee to a covered position in the same agency.

66. "State service" is defined in A.R.S. § 41-762.

67. "Surviving spouse" means the husband or wife, as provided by law, of a current or former elected official, or active or retired officer or employee who survives upon the death of the elected official, officer, or employee.

68. "Temporary appointment" means an appointment made for a maximum of 1,500 hours in any one position per agency in each calendar year.

69. "Transfer" means the movement of an employee from one position in state service to another position in state service in the same pay grade.

70. "Uncovered position" means a position that is exempt under A.R.S. 41-771 and not subject to the provisions of these rules.

71. "Underfill" means the appointment of a person to a class with a pay grade that is lower than the pay grade for the allocated class for that position.

72. "Voluntary pay grade decrease" means a change in assignment, at the request of an employee, to a position in a class with a lower pay grade.