No. 10-16797

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:09-cv-02402 JWS
The Honorable John W. Sedwick, District Judge.

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Arizona ("District Court") had original subject matter jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1343 because the case raises federal claims of discrimination under the Constitution and laws of the United States. The District Court granted Plaintiffs-Appellees' request for a preliminary injunction on July 23, 2010, and Defendants-Appellants timely filed a notice of preliminary injunction appeal on August 16, 2010. This Court has interlocutory appellate jurisdiction over the District Court's preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the District Court properly exercised discretion to maintain the status quo by preliminarily enjoining Defendant-Appellant state officials ("State Officials") from stripping Arizona state ("State") lesbian and gay employees of any means to qualify for family health insurance coverage, while heterosexual employees retain the option to qualify by marrying.

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, the primary authorities pertinent to this case, including Arizona Revised Statutes § 38-651(O) ("Section O") and

Arizona Administrative Code § R2-5-101, are contained in the Addendum to State Officials' Opening Brief (Dkt. #10-2).[1]

STATEMENT OF THE CASE

On September 4, 2009 Governor Janice Brewer signed legislation including a provision that, if allowed to take effect on January 1, 2011, will eliminate access to family health insurance coverage for only lesbian and gay State employees, and not their heterosexual co-workers. Ariz. Rev. Stat. § 38-651(O). After many years of foregoing this part of their compensation, Arizona's lesbian and gay State employees were offered access to family coverage for a same-sex life partner under Arizona Administrative Code § R2-5-101, a 2008 regulation promulgated under former Governor Janet Napolitano's administration. State Officials now seek to enforce Section O to eliminate this compensation parity for lesbian and gay employees, though these employees perform equivalent jobs and rely on family coverage to avoid the same stresses of family health emergencies as their heterosexual colleagues (Excerpts of Record ("E.R.") 169-210)—and though the State itself reports that this system has functioned smoothly since its inception. (E.R. 221-22.) If the status quo is altered and the existing access to coverage is terminated, State Employees, many of whom have a same-sex life partner with an

[1] All "Dkt." references are to filings in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). All "Dist. Ct. Dkt." references are to filings in the District Court.

immediate, urgent need for health coverage, will face irreparable harm. The District Court's preliminary injunction, which maintains State Employees' existing access to family health coverage, should be affirmed.

State Employees filed an amended complaint on January 7, 2010, seeking injunctive and declaratory relief to redress Section O's violation of their equal protection and substantive due process rights under the Fourteenth Amendment to the United States Constitution. (E.R. 253-99.)[2] State Officials moved to dismiss the case on January 25, 2010 (Dist. Ct. Dkt. #22), and State Employees moved for a preliminary injunction on April 1, 2010 to maintain their access to the State's group health plans (Dist. Ct. Dkt. #31-33). On July 23, 2010 the District Court partially granted State Officials' motion to dismiss, and granted State Employees' preliminary injunction request. (E.R. 32-33.) The District Court dismissed State Employees' due process claim, but found that State Employees properly had stated an equal protection claim. (E.R. 32.) The District Court preliminarily enjoined State Officials from enforcing Section O, requiring them to maintain family health insurance coverage for lesbian and gay State employees demonstrating sufficient indicia of commitment and interdependence. (E.R. 32-33.) No security was required, and the injunction took effect on August 6, 2010. (E.R. 33.)

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[2] Plaintiff-Appellee Judith McDaniel's claims recently became moot due to her obtaining a different job that provides family health insurance for her life partner. (Dist. Ct. Dkt. #31, p. 2:25-26.)

STATEMENT OF FACTS

In 2008 Arizona Administrative Code § R2-5-101 was amended to provide lesbian and gay State employees access to family coverage for a committed same-sex life partner or partner's qualifying children. Ariz. Admin. Code §§ R2-5-101(22), (23), (10)(a)(i).[3] To qualify, lesbian and gay State employees must demonstrate a high degree of financial interdependence with their committed life partner. *Id.* § R2-5-101(22)(a)-(j). In 2009, Governor Brewer signed a budget enactment including Section O that will terminate access to family coverage for lesbian and gay State employees by limiting such coverage to "spouses," a status that Arizona does not permit same-sex couples to obtain. Ariz. Const. art. 30, § 1.

All State Employees are in a loving, committed and economically interdependent relationship with a same-sex life partner that is founded on mutual pledges of emotional and financial support, and would marry that life partner if allowed by Arizona law. (E.R. 170; E.R. 175; E.R. 179-80; E.R. 184; E.R. 189; E.R. 193; E.R. 198; E.R. 202-03; E.R. 207-08.) All State Employees qualify for family coverage under Arizona Administrative Code § R2-5-101. (E.R. 170; E.R. 175; E.R. 179; E.R. 184; E.R. 189; E.R. 193; E.R. 198; E.R. 202-03; E.R. 207-08.)

[3] Arizona Administrative Code § R2-5-101 also provided domestic partner health coverage to heterosexual employees who have chosen not to marry their different-sex domestic partner. Starting January 1, 2010 these employees must marry to access family coverage, and State Employees do not challenge that portion of Section O.

With one exception, all enrolled for the 2009-2010 health plan year.[4] (E.R. 170; E.R. 175; E.R. 180; E.R. 185; E.R. 189; E.R. 193-94; E.R. 198; E.R. 203; E.R. 208.) All State Employees perform job duties equivalent to those of their heterosexual colleagues with comparable jobs. (E.R. 172; E.R. 176; E.R. 181; E.R. 186; E.R. 190; E.R. 195; E.R. 199; E.R. 203; E.R. 209.) Although Section O would reduce State Employees' compensation compared to their similarly situated heterosexual colleagues, no State Employee has had his or her job duties reduced because of his or her sexual orientation, or sex in relation to the sex of his or her committed life partner. *Id.*

The family coverage for the State's lesbian and gay employees, which was to terminate on October 1, 2010 (Dist. Ct. Dkt. #32, p. 2:15-20 and Dist. Ct. Dkt. 19, Ex. C), has been extended along with the current health plan year as part of the State's implementation of federal health care reform legislation. (E.R. 357.) The current health plan year, and access to family coverage for the State's lesbian and gay employees, will terminate on December 31, 2010. (*Id.*)

State Employees rely on family coverage as an important part of their compensation for the same reasons that their married, heterosexual colleagues do—to help care for their family members and to avoid the stress of health

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[4] For the reasons described below, Plaintiff-Appellee Corey Seemiller secured an alternative plan for her daughter that is far more expensive than the State health plan. (E.R. 180.)

emergencies that easily can lead to irreversible financial harm such as bankruptcy (E.R. 208-09), or, tragically, to permanent health consequences for serious, untreated medical conditions. (E.R. 194; E.R. 208; E.R. 188-90; E.R. 170-72; E.R. 185-86.)

Several State Employees have a life partner with a chronic condition that requires immediate and ongoing medical care. Keith B. Humphrey's committed life partner, Brett Klay ("Brett"), is a stay-at-home dad who cares for the couple's children, placed with them through the foster care system. (E.R. 193.) Brett has been (i) diagnosed with a torn carotid artery, a life-threatening condition requiring regular tests and a daily regimen of medication to prevent a potentially fatal blood clot; and (ii) preliminarily diagnosed with a degenerative joint disorder, a progressive condition that would require life-long monitoring and treatment. (E.R. 194.) Beverly Seckinger ("Beverly") repeatedly has been refused private health coverage for her life partner, Susan Taunton, who requires daily medication to prevent the life-threatening asthma attacks from which she suffered when her condition was previously left untreated. (E.R. 170-71.) Deanna Pfleger ("Deanna") feels significant stress at the prospect of losing family coverage for her partner, Mia LaBarbara ("Mia"), whose heightened colon and ovarian cancer risk, and periodic acute abdominal pain require regular monitoring and treatment, which they may be unable to secure through a private plan because Mia has a pre-existing

condition—high blood pressure. (E.R. 185-86.) Joseph R. Diaz's partner, Ruben Jiménez ("Ruben"), has an immediate need for daily medication and testing strips to manage his high cholesterol and diabetes. (E.R. 189.) They cannot find a private insurance plan willing to insure Ruben, and Ruben earns slightly too much income to qualify for Medicaid. (E.R. 189-90.) Diana Forrest ("Diana"), the life partner of Tracy Collins ("Tracy"), was previously uninsured while bedridden for years with a serious health condition, forcing Tracy to file for bankruptcy protection. (E.R. 207-08.) The couple now is extremely anxious about losing Tracy's family coverage because Diana has had a recurrence of some of her severe prior symptoms, which require regular medication to manage. (E.R. 208.)

All State Employees, regardless of the urgency of their life partner's health needs, face tremendous anxiety and stress at the prospect of losing this safety net. Stephen Russell was reminded of how vulnerable he and his life partner, Scott Neeley ("Scott"), would be without family coverage when Scott recently had a prostate cancer scare and had to undergo a series of tests. (E.R. 203.) Even for those who could secure alternative, albeit inferior and more expensive health coverage, this financial burden involves its own stresses. Corey Seemiller ("Corey"), in an effort to plan responsibly for implementation of Section O, secured alternate and far more expensive coverage for her eleven-month-old daughter, and has been forced to offset the expense by taking on more teaching

duties that keep her away from her family. (E.R. 180-81.) The State's pursuit of domestic partnership coverage was a significant factor in the decision that State Employee Carrie Sperling ("Carrie") and her life partner Sue Shapcott ("Sue") made to move to Arizona for Carrie's job, and to leave behind Sue's thriving business in Dallas, Texas. (E.R. 175.) Paying for more expensive coverage would be a distressing burden for the couple after they sacrificed Sue's income for the prospect of receiving family coverage through Carrie's job in Arizona. (E.R. 175-76.)

If Section O is enforced, other State Employees will have to bear the stress of doing without family coverage. As parents with young children, State Employee Leslie Kemp and Jennifer Morris ("Jennifer") cannot afford the inferior, costly coverage available through Jennifer's job. (E.R 198-99.) They worry that an uninsured illness likely would ruin their family financially and, if untreated, could cause potentially severe health consequences for Jennifer. (E.R. 199.) These stresses are compounded, for each State Employee, by the stigma of this unequal workplace treatment. (E.R. 171.)

In opposing State Employees' motion for preliminary injunction, State Officials introduced evidence purportedly about the cost of same-sex domestic partner health coverage, but in fact provided cost figures for *all* domestic partners in the State health plan, in which different-sex partners predominate. (E.R. 90-92.)

State Officials' evidence demonstrated that 893 domestic partners currently are enrolled for coverage, at an estimated cost of $5,490,660 for the 2009-2010 plan year. (E.R. 92.)

To correct the figures before the Court, State Employees introduced expert evidence from Professor Badgett, an economist with sixteen years of experience studying the business and economic implications of domestic partner health coverage and legal recognition for unmarried same-sex and different-sex couples. (E.R. 38.) Professor Badgett has authored or edited over 85 publications and reports on topics relating to economics and sexual orientation. (*Id.*) State Officials did not contest Professor Badgett's qualifications to render expert testimony on these issues, or her conclusions. Nor did State Officials introduce any rebuttal testimony.

Professor Badgett provided written testimony that providing family coverage only to same-sex partners of employees is notably less expensive than insuring different-sex domestic partners as well, because same-sex partners tend to increase plan enrollment only by 0.1% to 0.3%, while different-sex domestic partners typically outnumber same-sex partners many times over. (E.R. 39.) Several factors account for the relatively low proportion of same-sex partners who enroll, including the financial burden that results from the State and federal governments' treatment of the coverage as taxable income. (E.R. 40.) Professor Badgett

estimated that of the 893 same- and different-sex domestic partners currently insured, only 63 to 298 are same-sex partners, accounting for only $384,300 to $1,812,000 of the State's estimated $5,490,660 costs for the 2009-2010 plan year. (E.R. 40-41.) Based on information publicly available from the State, Professor Badgett estimated that the fractional expense of covering only same-sex partners is between 0.06% and 0.27% of the $681.6 million in spending on health benefits by the State in fiscal year 2008-2009, and at most 0.02% of the State's total approved 2010 expenditures. (E.R. 41.) She testified that research indicates that the cost of ensuring same-sex domestic partners is not disproportionately high compared to spouses. (E.R. 41.) Professor Badgett also testified that people with a same-sex partner are more likely to be uninsured or receive Medicaid coverage, and that employer-provided coverage is likely to reduce the number of uninsured and Medicaid enrollees, along with government spending on Medicaid and uncompensated care. (E.R. 42.)

State Employees introduced evidence that the Department of Administration ("Department"), which administers the State's health insurance plan, reported that during the plan's first year of offering domestic partner benefits the State's cost-sharing method "successfully made for a full, affordable bundle of insurance services" for all employees. (E.R. 221.) The Department's report also states,

> 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, strategic audit planning and efficient contracts management.

(E.R. 222.) Because State Employees do not challenge Section O's requirement that heterosexual employees marry to obtain benefits after January 1, 2010, the plan year described in the Department's report involved many more domestic partners than will be affected if State Employees prevail.

SUMMARY OF THE ARGUMENT

Though lesbian and gay State workers clock in at the same jobs as their heterosexual colleagues, Section O intentionally places State Employees on a lower pay scale by limiting family health coverage to spouses—a status available to all heterosexual couples, but to no lesbian or gay couples under Arizona law. The District Court properly found that Section O invidiously discriminates against State Employees based on their sexual orientation, and alternatively, Section O should be understood as classifying employees based on their sex in relation to that of each one's committed life partner. This discriminatory treatment should be subject to heightened scrutiny at a minimum, though Section O cannot withstand even rational basis review. No conceivable legitimate state interest sustains Section O, let alone any important or compelling reason, and the District Court properly found that State Employees will suffer irreparable harm in the absence of

a preliminary injunction. Finally, the District Court properly exercised its discretion in declining to require a bond.

ARGUMENT

I. STANDARD OF REVIEW.

The Ninth Circuit reviews a District Court's preliminary injunction decision under a "limited and deferential" abuse of discretion standard. *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007). Reversal "is appropriate only if the district court based its decision on clearly erroneous findings of fact or erroneous legal principles." *Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633 (9th Cir. 2007) (internal quotation marks omitted). The District Court's legal rulings are reviewed *de novo* and the findings of fact only for clear error, but as long as the District Court "got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Johnson v. Couturier*, 572 F.3d 1067, 1079 (9th Cir. 2009) (internal quotation marks omitted). The District Court's ruling applied the correct legal standards to this prohibitory injunction, and should only be reversed if it is "illogical, implausible, or without support in the inferences that may be drawn from the record." *North Dakota v. State Dep't of Educ.*, 600 F.3d 1104, 1111 (9th Cir. 2010). Contrary to State Officials' assertions, the District Court's well-reasoned opinion is none of these.

II. THE DISTRICT COURT PROPERLY FOUND THAT STATE EMPLOYEES ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM.

A. Section O Classifies State Employees For Differential Treatment Based On Their Sexual Orientation And Sex.

The District Court properly addressed the classification created by Section O as a threshold consideration in its equal protection analysis. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008) ("The first step in equal protection analysis is to identify the classification of groups.") (internal quotation marks omitted). State Officials argue that the District Court erred in finding that Section O classifies based on sexual orientation rather than marital status. (*See, e.g.,* Dkt. #6-1, pp. 11-12.) Aside from noting their disagreement with the District Court, however, State Officials offer no authority supporting a different result.

Consistent with the weight of analogous state and federal decisions, the District Court found that Section O does not treat all unmarried employees equally, but rather divides State employees into two categories—heterosexuals who can qualify a different-sex life partner for coverage by marrying, and gay employees who are denied any way to qualify a same-sex life partner. (E.R. 9-10.) These groups are distinguished only by their sexual orientation and their sex in relation to their committed life partner's sex, and Section O discriminates against State Employees on those bases. *See*, *e.g.*, *In the Matter of Brad Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (Reinhardt, J., decision following EDR proceeding)

(restricting partner benefits to married employees "cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation") (internal quotation marks omitted); *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788 (Alaska 2005) ("the proper comparison is between same-sex couples and opposite-sex couples" because a restriction requiring marriage does not "treat same-sex and opposite-sex couples the same," where heterosexuals "have the opportunity to obtain these benefits" and gay people do not); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (lower court erred in using marital status comparison and comparing employees with a same-sex partner to those with a different-sex partner instead); *Tanner v. Or. Health Sciences Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998). State Officials' argument that Section O treats all unmarried employees equally "misses the point." *Tanner*, 971 P.2d at 447-48. A law does not provide equal treatment by making a benefit "available on terms that, for gay and lesbian couples, are a legal impossibility." *Id.*

Section O can be understood as discriminating against State Employees based on sexual orientation and sex in at least two ways. First, this Court could find that Section O facially discriminates, as at least one other court has concluded based on an analogous law. *Alaska*, 122 P.3d at 788-89. When a "law by its own

terms classifies persons for different treatment, this is known as a facial classification." *Id*. at 788 (internal quotation marks omitted); *see also id.* at 788-89 (contrasting the heterosexuals-only status of "spouse" under Alaska law with the gender-neutral status of "veteran" considered in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979)). By "restricting the availability of benefits to spouses, the benefits programs by [their] own terms classify same-sex couples for different treatment," and thus discriminate on their face. *Alaska*, 122 P.3d at 788-789 (internal quotation marks omitted).[5]

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), provides another explanation of this error, noting—and rejecting—the argument "that Proposition 8 does not target gays and lesbians because its language does not refer to them." *Id.* at 996. The court found that this argument seeks to "mask" the discrimination apparent in a restriction of rights and responsibilities to those who marry. *Id.* Under such a restriction, those who wish to marry a different-sex partner, heterosexuals, do not have their choice of marital partner limited, while those who wish to marry a same-sex partner, gay people, do. *Id*. Anti-gay groups

[5] *Cf. Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("[a]ncestry can be a proxy for race"); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 211 (3d Cir. 2000) (excluding a group from benefits based on Medicare status violates the ADEA because "Medicare eligibility follow[s] ineluctably upon attaining age 65" and "is a direct proxy for age") (internal quotation marks omitted).

have long argued that discrimination against gay people's "conduct" in their family life targets behavior and not the group, but the courts have settled that status and conduct should not be distinguished in this way. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010). Rather, gay people's "conduct and identity together define what it means to be gay or lesbian … [and] are constitutionally protected and integral parts of what makes someone gay or lesbian." *Perry*, 704 F. Supp. 2d at 996. Thus, a restriction that limits gay people based on their family relationships *is* discrimination against gay people. Section O similarly targets State Employees and should be understood to do so facially because the absolute bar to access for lesbian and gay employees' life partners is apparent by the law's very terms.

Alternatively, this Court should affirm the District Court's conclusion that Arizona's Section O discriminates based on sexual orientation, rather than marital status, because Section O is "applied in a discriminatory manner or imposes different burdens on" gay people alone, and not heterosexuals whom Arizona allows to marry. *Lazy Y Ranch*, 546 F.3d at 589; *Levenson*, 560 F.3d at 1147 (quoting *In re Marriage Cases*, 183 P.3d 384, 441 (2008) (a "statute that limits [benefits] to a union of persons of opposite sexes, thereby placing [those benefits] outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation"); *cf. Feeney*, 442 U.S. at 272 (a rule

"that is ostensibly neutral but is an obvious pretext for racial discrimination" is invalid) (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

State Officials' only counterpoint is the observation that the 2008 domestic partner health insurance regulations insured both same-sex and different-sex partners and that different-sex couples now must marry to obtain benefits. It is precisely because heterosexual employees have that option that the District Court properly concluded Section O discriminates against gay employees, whose only option for qualifying for coverage has been eliminated. State Officials simply do not explain how the District Court's application of the prevailing recognition by courts since 1998, in the absence of any persuasive contrary authority, translates into legal error. It does not.

B. Section O's Facial Discrimination Obviates The Need To Find Intent, Though The Intent To Disadvantage Lesbian And Gay State Employees Is Manifest.

State Officials and the Center for Arizona Policy ("CAP") argue that Section O should be upheld because it does not intentionally disadvantage State Employees (Dkt. #6-1, p. 22; Dkt. #10-2, p. 11), but their argument fails for at least two

reasons.[6] First, as discussed above, Section O's restriction of coverage to a "spouse" is facially discriminatory, which obviates the need to demonstrate intent. Second, the legislature's intent to eliminate health coverage for the State's lesbian and gay employees is evident from the State's purposeful dismantling of State Employees' only option for accessing this portion of their compensation.

Section O need not include an explicit caveat that only "heterosexuals" can qualify for family coverage because its restriction of family coverage to a "spouse" has no ambiguity; it *is* a restriction to a "heterosexual spouse" because that is the only type of spouse Arizona recognizes. *See* Ariz. Const. art. 30, § 1. A facially discriminatory law does not require an additional showing of intent, and the Court should apply that rule here. *See Alaska*, 122 P.3d at 788.

Should this Court decline to find Section O facially discriminatory and examine intent instead, several well-established principles lead to one conclusion: a deliberate act to eliminate health coverage for *all* lesbian and gay employees, while allowing a path of access for *all* heterosexual employees is intentional, not accidental. Contrary to State Officials' and CAP's suggestion (Dkt. #10-2, p. 11), intentional discrimination does not require malevolent intent or a desire to harm a

[6] State Officials did not raise this issue below and thus cannot properly raise the issue before this Court, but State Employees respond to point out the clear deficiencies in their argument. State Employees also address in this brief the arguments submitted by proposed *amicus curiae* Center for Arizona Policy. (Dkt. #10-1; #10-2.)

group. Instead, intentional discrimination "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [group] than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976); *Yick Wo*, 118 U.S. at 373 (a facially neutral ordinance regulating laundries in wooden buildings, which excludes all Chinese owners as "its necessary tendency and ultimate actual operation," violates equal protection). Far from prohibiting only malign intent, equal protection prohibits even well-intentioned adverse treatment of a similarly situated group. *See*, *e.g.*, *Locke v. Davey*, 540 U.S. 712, 732 (2004) (Scalia, J., dissenting) (racial segregation could not have been saved by "a well-meaning but misguided belief that the races would be better off apart"); *United States v. Virginia*, 518 U.S. 515, 535-536 (1996) ("our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically").

Regardless of how charitably the State's interests may be viewed here, the Arizona Legislature's purposeful dismantling of domestic partner family coverage cannot be regarded as anything other than intentional. In 2008, the legislature referred to voters a constitutional amendment strictly limiting marriage to heterosexual couples. Senate Concurrent Resolution 1042 (2008). After the voters approved the amendment, the legislature then provided that State employees must marry to qualify for family coverage. Ariz. Rev. Stat. § 38-651(O). The

legislature's tying of family health coverage to a status that just the year before it helped bar to same-sex couples is not accidental or inadvertent but deliberate.

It is true, as CAP notes, that discriminatory purpose implies more than intent as awareness of consequences. (Dkt. #10-2 (citing *Feeney*, 442 U.S. at 279).) Far from disproving State Employees' claims, however, *Feeney* is consonant with the principles in this case. *Feeney* involved a challenge to hiring preferences for veterans—a facially neutral status that is available to women, even as veterans may disproportionately be men. *Feeney*, 442 U.S. at 275. *Feeney* provides that awareness of a disproportionate consequence for one group is not sufficient to prove intent in a *disparate impact* case, because equal protection does not recognize such claims. *Id.* at 273-74. Section O, on the other hand, creates an absolute targeted exclusion, not a neutral disparate one. While the existence of family coverage is not the source of the State's obligation to treat its employees equally, the purposeful eradication of that system is a stark display of the intent to deny equal treatment.

Alternatively, courts examine intent by testing whether the government has a legitimate nondiscriminatory interest in disadvantaging the minority group. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517

U.S. 620, 633 (1996); *see also Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). When "the proffered rationales for a law are clearly and manifestly implausible, a reviewing court may infer that animus is the only explicable basis." *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010). *See Romer*, 517 U.S. at 634 (a classification unsupported by any proper state interest "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"); *see also id*. at 634-35 (the absence of any other legitimate government purpose leaves one only with "a bare … desire to harm a politically unpopular group") (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *cf. Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (disproportionate impact may demonstrate unconstitutionality where the exclusion of one group is difficult to explain on unbiased grounds).

CAP tries to recast the relevant analysis by asking the wrong question. (Dkt. #10-2, p. 14 (stating that the District Court "inverted" the analysis by asking whether denying coverage to a same-sex life partner promotes marriage).) The question is not whether the State's intent to require heterosexual employees to marry for family coverage is justified, as State Employees do not challenge that aspect of the law. An interest in encouraging heterosexual marriage does not explain why lesbian and gay State employees have been intentionally deprived of family insurance. Even under rational basis review, a discriminatory law cannot be

sustained based simply on the majority's desire to keep a benefit for itself, without articulating a legitimate interest advanced by removing the benefit from the minority.[7] For this reason, the District Court correctly focused on whether an interest in favoring marriage by heterosexuals is served by the "aspect of Section O which is challenged, the denial of benefits to State employees' same-sex domestic partners." (E.R. 17.) Even in the most "ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632, 635 (Colorado's legitimate interest in fighting discrimination against other minority groups did not explain or justify the state's action of eliminating antidiscrimination protections for gay people). The District Court accurately observed that "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)," and thus the former does not justify the latter. (E.R. 17.)[8]

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[7] For example, if the State decided to deny health insurance to employees who are left-handed, this could not be justified by saying that health insurance benefits right-handed employees. What must be examined is whether there is an adequate justification for eliminating insurance for left-handed employees.

[8] CAP also tries to reframe the inquiry by focusing on the breadth of the State's interest in encouraging marriage, rather than the challenged classification. (Dkt. #10-2, p. 17 (stating that the State's "interest in promoting marriage is not as narrow as the district court envisioned; it is not limited to encouraging cohabiting employees to marry").) This approach, while inventive, is not correct. State Officials must justify the discriminatory classification and the exclusion it

Nor does asking the proper question—whether the state interests posited are rationally related to the challenged exclusion of the minority, not to the unchallenged inclusion of the empowered majority—mimic strict scrutiny, as CAP argues. (Dkt. #10-2, pp. 14-16.) *See Romer*, 517 U.S. at 632-33. As discussed further below, an interest in incentivizing heterosexuals to marry is unrelated to and not advanced by providing or withholding family coverage for gay employees and identifying that disconnect is not strict scrutiny analysis. CAP is correct that courts do not require mathematical nicety for legislative line drawing, but that concept applies to lines drawn between groups of people with legally relevant differences. *See Heller v. Doe*, 509 U.S. 312, 320-24 (1993) (imperfect line drawing between the mentally ill and mentally retarded is rational because of the "difference between the two conditions" in diagnosis and predictors of aggression). That concept does not inform the analysis here because State Employees are similarly situated to their heterosexual co-workers in every relevant respect and are excluded from family coverage as a purposefully delineated group based on the irrelevant characteristics of their sexual orientation and sex in relation to that of each one's life partner. *See Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (equal protection denies 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

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accomplishes, not social goals advanced with respect to the similarly situated group that retains state favor.

unrelated to the objective of that statute"); *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("A classification 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.") (internal quotation marks omitted).

CAP's reference to *Johnson v. Robinson*, 415 U.S. 361 (1974), does not improve their argument. CAP describes *Johnson* as supporting CAP's reformulation of the equal protection inquiry, suggesting that *Johnson* found that rational basis review is satisfied where the inclusion of one group promotes a legitimate government interest and the addition of others would not. (Dkt. #10-2, p. 14.) *Johnson*, however, addresses a very different issue. *Johnson* examined whether denying veterans educational benefits to conscientious objectors—a differently situated group that does not incur the same risks or loss of freedom as servicemembers—satisfies rational basis. *Id.* at 378-79. The unremarkable principle that differently situated groups may be treated differently does not alter the result here.

C. The District Court Correctly Found That Section O's Inferior Treatment Of Lesbian And Gay State Employees Must, At A Minimum, Receive More Searching Examination.

State Officials claim that the District Court erred in applying a more searching examination for a rational relationship between some legitimate state interest and Section O's classification. (Dkt. #6-1, p. 10.) The District Court noted

that sexual orientation classifications may warrant strict or heightened scrutiny but found it unnecessary to decide that question or to test the State's purported interests accordingly because they lack even a rational relationship to Section O's discriminatory treatment of State Employees. (E.R. 10-11.) The District Court correctly found that when a classification harms a politically unpopular group or personal relationships, the courts apply "a more searching form of rational basis review." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). State Officials complain that the District Court relied solely on Justice O'Connor's concurrence in *Lawrence* but perhaps overlooked the string of supporting authorities the District Court provided in footnote 38 of its opinion. *See also Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring). State Officials cite no authority of their own to demonstrate that the District Court's adherence to this established rule is legal error. More searching review of the targeted exclusion of gay employees from family coverage is particularly appropriate here, though not necessary to recognize Section O's unconstitutionality.

1. Sexual Orientation Classifications Should Be Strictly Scrutinized.

After determining the classification created, "[t]he next step … [is] to determine the level of scrutiny." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995) (internal quotation marks omitted). Though the District Court declined to reach the issue, this Court should. *See*, *e.g.*, *City of Cleburne v.*

Cleburne Living Center, 473 U.S. 432, 442-46 (1985) (deciding whether classifications based on developmental disability merit heightened review, even though the ordinance challenged could not withstand rational review). The appropriate scrutiny for sexual orientation classifications is unsettled in this circuit, and the arguments offered by CAP and State Officials in the District Court demonstrate that confusion will persist until this Court provides guidance. The Supreme Court has not answered the question, deciding in *Romer* to leave the issue in flux because the classification there "confound[ed]" and "defie[d]" even rational review. *Id.* at 632, 633. Nor did this Court decide the issue in *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), which merely noted in *dicta* that—in the context of the military, where judicial deference "is at its apogee"—the military's "Don't Ask, Don't Tell" policy satisfies rational basis review. Twenty years ago, this Court held in *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), that classifying lesbians and gay men for adverse treatment is not subject to heightened scrutiny "because homosexual conduct can … be criminalized." The support for that ruling, however, was repudiated in *Lawrence*, 539 U.S. at 578 ("*Bowers* [*v. Hardwick*, 478 U.S. 186 (1986),] was not correct when it was decided, and it is not correct today.").[9]

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[9] CAP's suggestion that the Ninth Circuit has reaffirmed rational basis as the proper level of scrutiny in *Flores v. Morgan Hill Unified School Disrict*, 324 F.3d 1130 (9th Cir. 2003), *Holmes v. California Army National Guard*, 124 F.3d 1126

A law that discriminates based on sexual orientation should be strictly scrutinized because lesbians and gay men have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks omitted). Lesbians and gay men indisputably have experienced a history of purposeful unequal treatment "on the basis of stereotyped characteristics not truly indicative of their abilities." *See id.* As the Ninth Circuit recognized over two decades ago, and recently reiterated, "homosexuals have suffered a history of discrimination." *High Tech Gays*, 895 F.2d at 573. *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"); *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., and Marshall, J.,

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(9th Cir. 1997) and *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997) is unavailing. *Flores*, issued a few months before the Supreme Court decided *Lawrence*, merely recites the now unsound holding of *High Tech Gays* in a discussion about a different issue—whether a gay student's right to be protected from peer harassment was clearly established law at a particular point in time (it was). *Flores*, 324 F.3d at 1136-1137. *Holmes* and *Philips*, shaped by the judiciary's extremely deferential review of military affairs, were decided six years before *Lawrence* reversed the underpinning for *High Tech Gays* by striking down *Bowers*. *Holmes*, 124 F.3d at 1133; *Philips*, 106 F.3d at 1425.

dissenting from denial of certiorari) ("homosexuals have historically been the object of pernicious and sustained hostility").

Sexual orientation does not bear upon on one's ability to contribute to society as a productive employee, as underscored by Arizona's Executive Order No. 2003-22 prohibiting discrimination against lesbian and gay State employees, and presidential Executive Order No. 13087. This long has been recognized by the federal courts. *See Watkins v. U.S. Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) ("Sexual orientation plainly has no relevance to a person's ability to perform or contribute to society.") (internal quotation marks omitted); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987) ("The American Psychological Association has declared that 'homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'"), *rev'd in part on other grounds*, 895 F.2d 563 (9th Cir. 1990); *Perry*, 704 F. Supp. 2d at 1002 (noting that the evidence presented showed that "by every available metric … as partners, parents and citizens, opposite-sex couples and same-sex couples are equal").

Section O's targeted elimination of State Employees' access to family health insurance is a stark illustration of the political vulnerability of lesbians and gay men. Such vulnerability is sadly commonplace for gay people in America, as recent years have seen both legislative and ballot measure attacks upon this

minority group, wrongfully eliminating basic rights and family protections that heterosexuals take for granted. *See*, *e.g.*, *Romer*, 517 U.S. at 635-36 (striking down state referendum designed to prevent any level of Colorado government from protecting gay people against discrimination); *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (invalidating Oklahoma statute that aimed to nullify adoptions of children by lesbian and gay couples). Arizona is one of forty-one states nationally that expressly deny same-sex couples the freedom to marry through state constitutional amendment or statute (Human Rights Campaign, *Statewide Marriage Prohibitions*, 2009, *available at* http://www.hrc.org/documents/marriage_prohibitions_2009.pdf), and the federal government refuses to respect for federal purposes the fact that there now are many thousands of married lesbian and gay couples in this country. *See* 1 U.S.C. § 7. Lesbians and gay men are not protected against discrimination in housing, public accommodations or private employment in Arizona, or under federal statute, and by many of these measures suffer greater legal disadvantages than did women, for example, when sex-based classifications were held to be quasi-suspect. At the time Title VII and the Equal Pay Act forbade sex discrimination, Congress already had approved and submitted to the states for ratification a proposed federal Equal Rights Amendment to the U.S. Constitution, and the U.S. Supreme Court had observed that "the position of women in America ha[d] improved markedly in

recent decades." *Frontiero v. Richardson*, 411 U.S. 677, 685, 687-88 (1973). Moreover, as women and racial minorities have achieved greater protection against discrimination through the political process, the scrutiny of sex- and race-based classifications has become no less searching.

Although the federal equal protection doctrine has never held immutability of a personal trait to be a prerequisite for determining that a classification based on that trait warrants strict scrutiny,[10] the Ninth Circuit already has recognized and reaffirmed that sexual orientation is immutable—an understanding that conforms with the settled consensus of the major professional psychology and mental health organizations. *See*, *e.g.*, *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."); *Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation"); *Perry*, 704 F. Supp. 2d at 964 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other

[10] Laws that classify based on religion, alienage and legitimacy all are subject to some form of heightened scrutiny, despite the fact that religious people may convert, undocumented people may naturalize, and illegitimate children may be adopted. *See also Watkins*, 875 F.2d at 725 (Norris, J., concurring) (the "Supreme Court has never held that only classes with immutable traits can be deemed suspect").

method, change his or her sexual orientation").

2. Heightened Scrutiny Is Appropriate Because Section O Discriminates Based On Sex.

State Employees assert a denial of equal protection based both on their sexual orientation and their sex in relation to the sex of each one's committed life partner. (E.R. 286-92.) Though the District Court did not expressly discuss sex discrimination in finding State Employees' equality claim likely to succeed, that theory provides an independent ground to affirm the preliminary injunction ruling.

Sex-based classifications require heightened scrutiny, *Virginia*, 518 U.S. at 524, and courts have recognized since 1993 that discrimination against gay people based on their forming a life partnership with a same-sex partner rather than a different-sex partner is sex discrimination. *See Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993); *Levenson*, 560 F.3d at 1147. *Perry* offers a particularly helpful explanation of the way in which "[s]exual orientation discrimination can take the form of sex discrimination." *Perry*, 704 F. Supp. 2d at 996. Sex and sexual orientation "are necessarily interrelated, as an individual's choice of romantic or intimate partner based on sex is a large part of what defines an individual's sexual orientation." *Id.* Restrictions such as Section O target lesbians and gay men "in a manner specific to their sexual orientation and, because of their relationship to one another … specifically due to sex." *Id.* A restriction arising because a lesbian or

gay man's life partner is same-sex not only is sexual orientation discrimination, "but this claim [also] is equivalent to a claim of discrimination based on sex." *Id.*

These principles operate similarly here. Section O's restriction of family coverage to employees in different-sex relationships who may marry means, for example, that if State Employee Tracy Collins were a man, she could secure health insurance for her beloved life partner, Diana Forrest, by marrying Diana. Simply because Tracy is a woman, however, she is denied that portion of her compensation. *Id.* ("Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage.").[11]

III. STATE OFFICIALS DO NOT HAVE ANY VALID INTEREST IN STRIPPING STATE EMPLOYEES OF THEIR FAMILY COVERAGE COMPENSATION.

State Officials raised in the District Court five purported interests in eliminating equal compensation for State Employees, including savings in cost and administration, that funds are "better spent" on heterosexuals who can marry, that the benefit might be most valuable to married persons who allegedly are more likely to have children, and encouraging marriage. (Dist. Ct. Dkt. #40, pp. 6-7.) State Officials attempt to assign legal error by claiming that the District Court

[11] State Officials appear to concede that Section O cannot withstand any form of close scrutiny, as they have not even attempted, in the District Court or this appeal, to offer a single state interest of arguably sufficient importance or close tailoring to satisfy heightened review.

wrongly placed the burden on them to "advance" each state interest (Dkt. #6-1, p. 11), though the District Court did not. After concluding that neither the law nor record could sustain any of the interests State Officials suggested, the District Court considered whether it could conceive of any additional interests to sustain Section O and concluded it could not. (E.R. 18.) While it is true that under rational basis review any conceivable interest may be considered even if not raised by the parties, it also is true that *someone* must in fact conceive of *some* valid interest to sustain the law. The absence of any such interest here does not create a legal error, as State Officials suggest, but rather the opposite.[12]

State Officials also claim that the District Court erroneously required them to "prove" state interests, arguing that the District Court found they had not "proven" an interest in cost savings or reducing administrative burden. (Dkt. #6-1, pp. 10-11.) But in fact, the District Court accepted these as valid interests without need of proof from State Officials. (E.R. 18 (noting that the "State's interests in cost control, administrative efficiency, and promotion of marriage are legitimate").) A valid interest, however, must be rationally related to the

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[12] Nor do State Officials posit any conceivable interests that they or the District Court overlooked below. State Officials profess concern that the District Court's ruling will require State Employees to "prove" their sexual orientation (Dkt. #6-1, pp. 21-22), but to the extent State Officials profess worry that the regulations invade State Employees' privacy, they should be reassured. State Employees who choose to insure their loved ones need not be protected from themselves, and other employees likewise can make their own choices about whether to forego coverage to avoid identifying as gay.

discriminatory classification to justify it. As demonstrated below, the District Court's conclusion that none of the state interests satisfied this standard is well-supported by both the law and the record.

A. Courts Are Not Charged To Enforce The Equality Rights Of Vulnerable Minorities Only When Doing So Is Free And Requires No Administration.

Federal courts repeatedly have rejected the idea that a state may "protect the public fisc by drawing an invidious distinction between classes of its citizens." *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). Accordingly, State Officials must "do more than show" that denying same-sex partner health insurance "saves money," *Shapiro*, 394 U.S. at 633, because their argument that the savings the State accrues justifies its discrimination against lesbian and gay employees does nothing "more than justify [their] classification with a concise expression of an intention to discriminate," *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (the court could "discern no principled reason to cut government expenditures at the particular expense of Plaintiffs," aside from a desire to express "disapprobation" of them).[13]

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[13] The cost-saving rationale also is implausible given that any savings would be negligible, if not "illusory." *See Mem'l Hosp.*, 415 U.S. at 265 (recognizing that delayed medical care can cause a patient needlessly to deteriorate, requiring more

State Officials demonstrate no legal error in the District Court's application of these principles to this case and cite no contrary authority. Nor did the District Court abuse its discretion in finding that State Employees' likely success on this argument was strengthened by the unrefuted facts before it. The undisputed evidence demonstrated that (i) coverage of same-sex partners through an employer's health plan tends to increase enrollment only 0.1% to 0.3% (E.R. 39); (ii) coverage for same-sex domestic partners in the current plan year is equivalent to only 0.06% and 0.27% of the State's total health benefits spending in 2008-2009 and only 0.02% of the State's total approved 2010 expenditures (E.R. 41); and (iii) the cost of ensuring same-sex domestic partners is not disproportionately high compared to different-sex spouses (*id.*). State Officials failed to rebut this evidence and provided "no information … as to the number of same-sex domestic partners participating in the State health plan, []or the total claims of same-sex domestic partners." (E.R. 27.) Having failed to offer relevant countervailing

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expensive care in the future and possibly causing disability, which can strain a state's social services). (*See also* E.R. 42 (people with a same-sex partner are more likely to receive Medicaid coverage, and employer-provided coverage reduces that Medicaid usage and associated government spending).) Additionally, the State recoups money from same-sex partners who, unlike different-sex spouses, are taxed on the value of the health coverage. (E.R. 40.)

evidence, State Officials cannot now meet their burden of demonstrating that the District Court's factual conclusions are clearly erroneous.[14]

Nor does purported administrative convenience justify singling out lesbian and gay employees for disfavored treatment. While "efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero*, 411 U.S. at 690 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)). The constitution's liberty and equality guarantees were "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials." *Stanley*, 405 U.S. at 656. *See also Reed*, 404 U.S. at 76-77 (reducing probate courts' workload through mandatory preference for men as administrators of estates over equally qualified women is not "consistent with the command of the Equal Protection Clause"); *Shapiro*, 394 U.S. at 636.

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[14] State Officials persist with the misleading figures they submitted in the District Court, and even suggest that the District Court erred in pointing out the data's limited relevance. (Dkt. #6-1, pp. 11, 24.) The District Court did not "ignore[]" State Officials' figures, as they claim (Dkt. #6-1, p. 11), but simply noted accurately that they did not provide information showing the far smaller costs for the same-sex partners, who are the only ones affected by this suit. Moreover, regardless of the cost, State Officials cannot demonstrate why equal protection permits them to push the brunt of the State's cost savings goal onto gay employees, any more than the State could eliminate family insurance coverage just for women or Jewish employees.

This is so even where "making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens." *Alaska*, 122 P.3d at 791. *See also Carrington v. Rash*, 380 U.S. 89, 96 (1965) (an interest in ensuring residency to qualify to vote did not excuse the state from administrative burden of verifying residency, even where "special problems may be involved" in making such determinations for servicemen).

State Officials also do not present an accurate picture of the administrative burden involved, and their distortions of the record certainly do not demonstrate any abuse of discretion. State Officials suggest that Arizona Administrative Code § R2-5-101's requirements must be applied to all domestic partner dependents in the plan, though the current participants already have qualified and enrolled for coverage. (Dkt. #6-1, p. 12.) State Employees offered unrefuted evidence that maintenance of a domestic partner family coverage plan requires even less effort than the initial implementation steps already completed by the State. (E.R. 44.) The District Court's finding that the State successfully has applied Arizona Administrative Code § R2-5-101 to the few lesbian and gay State employees in the State's group health plan—requiring little to no ongoing burden for those already enrolled, and a minimal burden for the "occasional new gay or lesbian applicant"—is not an abuse of discretion on this unrefuted record. (E.R. 15.) Moreover, the District Court recognized that the authority cited above provides an

answer as a matter of law, and properly applied the relevant rules to this case. (E.R. 14-15 (citing *Frontiero*, 411 U.S. at 690).)

B. Denying Lesbian And Gay Employees Family Coverage Does Not Further State Interests In Encouraging Heterosexual Marriage Or Supporting Heterosexual Couples And Their Children.

State Officials suggested below that (i) State funds are "better spent" on spouses, (ii) Section O furthers the government's interest in "favoring marriage," and (iii) family coverage might be most valuable to married persons who supposedly are more likely to have dependent children. (Dist. Ct. Dkt. #40, p. 7.) State Officials' first argument, however, is simply a restatement of the intent to discriminate, not a valid state interest. Professing a belief that funds are "better spent" on heterosexuals rather than gay people expresses an overt desire to privilege one class over another and offers the sort of judgment of unworthiness that offends equal protection guarantees. *See Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring); *Moreno*, 413 U.S. at 534.

State Officials' desire to "favor" heterosexual employees who are allowed to marry fails for the same reason. Because Arizona law restricts marriage to those in heterosexual relationships, Ariz. Const. art. 30, § 1, a decision to favor that group of employees simply restates an improper intent to disadvantage gay people along invidious lines. *Cf. Perry*, 704 F. Supp. 2d at 1002 (a belief that same-sex couples are not as good as different-sex couples "is not a proper basis on which to

legislate," whether "that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women") (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them.")).

Nor can Section O's restriction on same-sex partner family coverage be understood to *promote* marriage, and State Officials made the fallacy of their theory even clearer at the preliminary injunction hearing than they had in their District Court briefing:

> THE COURT: Well, let me ask you with respect to favoring marriage. How does it favor marriage to take a benefit away from people who, under the law of this state, can't marry?
>
> MR. GRUBE: Your Honor, what it does is it provides a—it's a decision to spend the scarce state dollars in favor of persons who are married under the law of this state. Now—
>
> THE COURT: Well, would you take that so far as to say that the state could pay a higher wage to a married woman than an unmarried woman? In order to favor marriage? Because that's what—
>
> MR. GRUBE: It's a very good question, Your Honor. I haven't taken it up with my client, but I'll—I'll opine for you on the strength of the 25-second analysis by Charles A. Grube, Assistant Attorney General. And I'll say that under an appropriate circumstance, I'll bet they could.
>
> THE COURT: Really.
>
> MR. GRUBE: Yes. Yes.
>
> THE COURT: Interesting.

(E.R. 326-27.)

The District Court properly rejected the State's illogic, explaining: "the denial of benefits to State employee's same-sex domestic partners, cannot promote marriage because gays and lesbians are ineligible to marry." (E.R. 17.) Nor is there any "indication here that denying benefits to public employees with same-sex domestic partners has any bearing on who marries [heterosexually]." *Alaska*, 122 P.3d at 793. Two recent district court decisions similarly have recognized that denying the benefits or status of marriage to lesbians and gay men has no connection to heterosexuals' decisions whether or not to marry each other and stripping lesbian and gay employees of family health coverage is still further removed. *Gill*, 699 F. Supp. 2d at 389 (government has no adequate interest in denying benefits simply "to make heterosexual marriage appear more valuable or desirable"); *Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."). Finally, it defies reason to suggest that State Employees, "having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them"— nor could the State have any valid interest in coercing State Employees to negate the enduring personal bond each has formed with his or her life partner, *Lawrence*, 539 U.S. at 567—and such sham marriages "would not

seem to advance any valid reasons for promoting marriage." *Alaska*, 122 P.3d at 793.

State Officials' interest in children's welfare is still further untethered from Section O's design and effect. Section O's elimination of health coverage for the children of lesbian and gay employees is so perversely "discontinuous" with a state interest in children's well-being as to fail any form of review. *Romer*, 517 U.S. at 632. Unquestionably, children do better when both they and their parents have access to health care and their families are spared the anxiety and financial hardship that untreated illness often creates. Heterosexual employees' children are not benefited in any way by the elimination of health insurance for lesbian and gay employees' children. *Cf. Gill*, 699 F. Supp. 2d at 388-89 (a denial of benefits to same-sex spouses "does nothing to promote stability in heterosexual parenting" and instead prevents "children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure") (internal quotation marks omitted). Nor is family health coverage, the need for which does not depend on employees' individual procreative capacity, limited to those heterosexuals who can, do or intend to have or adopt children. Section O cannot be said to promote the welfare of children because it accomplishes the opposite, by arbitrarily stripping benefits from one group of employees with children who are no less worthy of insurance. As the District

Court noted, where the government's proffered rationales for a law are "without footing in the realities of the subject addressed by" Section O's discriminatory classification, *Heller*, 509 U.S. at 321, it raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

C. Section O Is Not Related To Encouraging Reproductive Responsibility Among Heterosexuals.

CAP adds an additional theory to State Officials' argument about children that is imaginative but as illogical as its other discriminatory notions. CAP discusses marriage—which is not at issue in this case—as an institution designed principally to corral irresponsible heterosexuals into raising their children in legally binding family units. (Dkt. #10-2, pp. 21-22.) No party has explained how denying family health coverage to State Employees would prompt purportedly irresponsible heterosexuals to marry each other, and State Employees see no basis for believing that any heterosexual colleague would be inspired to take their vows by the assurance that their gay coworkers will be denied family coverage. Still more implausible is CAP's suggestion that Section O will influence heterosexuals' decisions to have children together, within marriage or otherwise. Can it possibly be that Tracy Collins' coworkers would be induced to have children within marriage upon learning that Diana will be unable to get needed medication through

the State health plan? There are not grounds for imputing such motives to any heterosexual State employees.

CAP suggests that heterosexuals tend towards reproductive irresponsibility and thus benefit from incentives to marry. (Dkt. #10-2, pp. 23-24.) But, even if this were true, it still would not explain the denial of family coverage to lesbians and gay men. CAP's argument—if founded—might justify the State's requirement that heterosexuals marry for family coverage, but State Employees do not challenge that aspect of the law. As discussed above, State Officials cannot rationalize the exclusion of equally deserving lesbian and gay State Employees from family coverage because the law purportedly serves some other purpose with respect to a different, preferred group of people, and CAP's cited authorities all suffer from that infirmity. (Dkt. #10-2, p. 24.)

To the extent CAP suggests that family coverage should be limited to heterosexual parents so gay people are discouraged from parenting and more children are raised by their biological parents, its argument is disconnected from the reality of divorce, infertility and adoption among heterosexuals, and raises profound constitutional issues about the rights of lesbian and gay parents and their children. Lesbian and gay Arizonans long have assumed the joys and responsibilities of parenthood, as have six of the State Employees in this case. *See* Williams Institute, Census Snapshot, Arizona, Jan. 2008 (approximately 18% of

Arizona's lesbians and gay men are raising children, accounting for over 5,300 of Arizona's children as of 2005), *available at* http://www.law.ucla.edu/williams institute/publications/ArizonaCensusSnapshot.pdf.

Lawrence recognized that decisions relating to procreation, child rearing and family life generally are constitutionally protected, and that lesbians and gay men may seek autonomy for these purposes just as heterosexuals do. *Id*. at 574; *Varnum*, 763 N.W.2d at 901 n.27 (a goal of deterring lesbians and gay men from having children "would raise serious due process concerns") (citing *Eisenstadt*, 405 U.S. at 453). Moreover, the contention that any credible social science research indicates that heterosexuals are better parents than lesbians and gay men (Dkt. #10-2, pp. 23-26) has soundly been debunked. *See*, *e.g.*, *Varnum*, 763 N.W.2d at 899 ("an abundance of evidence and research … support[s] the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents"; the opinions that dual-gender parenting is optimal "were largely unsupported by reliable scientific studies"), *Perry*, 704 F. Supp. 2d at 980 (heterosexual, lesbian and gay parents are equally likely to raise "healthy, successful and well-adjusted" children, and the "research supporting this conclusion is accepted beyond serious debate").

D. *Baker v. Nelson* Has No Relevance To State Employees' Claims.

Try as it might, CAP cannot turn this into a case about marriage. State Employees' claims are not about whether same-sex couples should be allowed to marry, nor whether they should receive the same collection of "marital benefits" that spouses receive. (Dkt. #10-2, p. 20.) This case is not about whether the State should provide same-sex couples with *any* relationship status, no matter how modest. State Employees' equality claim, which is about one incident of employment, is simple: The State has decided to provide family coverage as part of its employees' compensation, and the Fourteenth Amendment requires that it be done equally. Marriage is neither the means nor the ends for State Employees' claim—they need not be married to obtain this part of their paycheck, and receiving family coverage will not make them spouses. Qualifying under Arizona Administrative Code § R2-5-101 simply means that State Employees have demonstrated emotional and financial interdependence per several sexual orientation-neutral criteria and thus should be eligible for family coverage. State Employees receive no status or other benefit from the State, nor is their eligibility recognized by any third party for any purpose, as with a status such as marriage.

For all these reasons *Baker v. Nelson*, 409 U.S. 810 (1972), is irrelevant, as it is a decades-old summary dismissal of a case about whether same-sex couples have the right to marry—a right that State Employees do not seek here. *See*

Mandel v. Bradley, 432 U.S. 173, 176 (1977) (a summary dismissal binds lower courts based on "the specific challenges presented in the statement of jurisdiction"). CAP cites several cases concluding that *Baker* controls in various contexts (Dkt. #10-2, pp. 20-21), but all involved whether same-sex couples are entitled to marry, or to have the federal government honor their actual marital status for federal purposes. State Employees raise no similar question here, and thus *Baker*, which numerous doctrinal developments have stripped of precedential value, is of no consequence to this case. Nor is *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), meaningful here, as it likewise is about marriage.

E. Allowing Lesbian And Gay State Employees To Access The Same Family Coverage Their Colleagues Receive Is Not A "Special Right" Or Newly Created Fundamental Interest.

State Officials object to the District Court's ruling by suggesting that it creates a "special benefit only" for lesbian and gay State employees. (Dkt. #6-1, p. 21.) This blithely disregards that there is nothing "special" about having access to the same family insurance coverage as every heterosexual co-worker. The "special rights" mantra, repeatedly invoked to defeat gay people's right to *equal* treatment, is tired and authoritatively rejected in federal law. *See*, *e.g.*, *Romer*, 517 U.S. at 631 (antidiscrimination protections for gay people are not special rights). Protections from discrimination are "protections taken for granted by most people either because they already have them or do not need them." *Id.* There is "nothing

special" about the family coverage State Employees seek because it is the same that their co-workers receive, no more and no less. *See id.*

State Officials argue that the District Court's opinion creates a previously unrecognized fundamental right. (Dkt. #6-1, p. 21.) State Officials' argument resurrects a point of confusion that State Employees repeatedly corrected in the proceedings below, and which is irrelevant to this appeal, especially as the appeal does not include State Employees' dismissed substantive due process claim. (E.R. 21.) State Employees argued in the District Court that the extreme stress caused by Section O, coupled with the coercion of a policy that offers family coverage to employees who build their family lives with a heterosexual partner and not a lesbian or gay partner, violates the liberty right to conduct one's intimate family life without state pressure, as identified in *Lawrence*, 539 U.S. at 578. State Officials misapprehended this for a claim that State Employees were seeking a new fundamental right to domestic partner health benefits (Dist. Ct. Dkt. #22, p. 7), despite State Employees' unequivocal statements that their claim was based on infringement of the family intimacy right identified in *Lawrence* and explained in *Witt* (Dist. Ct. Dkt. #23, p. 13).

State Officials' argument about a purportedly new fundamental right "sees fire where there is no flame." *United States v. Virginia*, 518 U.S. 515, 536 n.8 (1996). The District Court did not preliminarily enjoin State Officials based on a

recognition of *any* fundamental right, let alone a novel fundamental "right to healthcare coverage." (Dkt. #6-1, p. 21.) The right at issue here is equal protection, and it is not newly "discovered" by the District Court, nor new for courts to confirm that gay people are included in its guarantees. (Dkt. #6-1, p. 21.) *Romer*, 517 U.S. at 635.

State Officials assert that "the State could not have been forced to offer domestic partner coverage if it had never offered it before," and claim the District Court decided that once the State offered such coverage, "the State can never change its mind." (Dkt. #6-1, p. 26.) State Employees never have argued, nor did the District Court decide, that State Employees' right to equal treatment arises only from the State's administrative enactment of a family coverage program. State Employees' equal protection rights did not spring into existence when Arizona Administrative Code § R2-5-101 was promulgated. State Employees have been entitled to equal treatment since the inception of their public employment, and the fact that they have been deprived of family coverage for some time does not diminish the equality violation and its harm. This case is thus manifestly distinguishable from *Crawford v. Board of Education*, 458 U.S. 527 (1982), cited by CAP. (Dkt. #10-2, p. 18.) Unlike *Crawford*, which involved school re-integration efforts that came to exceed equal protection requirements, Section O

does not meet the threshold of equal treatment below which no state may fall. U.S. Const. amend. XIV, § 1; 42 U.S.C. § 1983.

F. The District Court's Decision Is Strongly Supported By The Factual Record.

State Officials claim that the District Court erroneously relied on the assumed truth of the amended complaint's allegations in considering State Employees' likelihood of success, and the State's interests in Section O. (Dkt. #6-1, p. 8-9.) Tellingly, State Officials do not identify a single factual point in the District Court's analysis that rests on presumed facts from the complaint, instead complaining about principles of law that are both correct and unrefuted. They point only to two statements in the District Court's opinion that they claim have "severely" prejudiced them: (i) that a "bare … desire to harm a politically unpopular group cannot constitute a *legitimate* government interest" (E.R. 15); and (ii) that a State's intention to discriminate may raise "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." (Dkt. #6-1, p. 12.) As referenced above, these statements are principles of law from *Romer*, not factual findings as State Officials claim, and the District Court properly cites them as such. (E.R. 15-16.)[15]

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[15] In an effort to bolster this presentation, State Officials cite allegations upon which they claim the District Court relied, though none appears anywhere in the opinion. (*See* Dkt. #6-1, p. 12-13 (quoting passages from the Amended Complaint, not the District Court's decision).) State Officials do not identify a single fact that

IV. STATE EMPLOYEES SATISFY THE REQUIREMENTS FOR PRELIMINARY INJUNCTIVE RELIEF.

State Officials claim that the District Court identified an improper legal standard for irreparable harm by stating that "an alleged constitutional infringement *will alone* constitute irreparable harm," when the Ninth Circuit instead has said that "an alleged constitutional infringement *will often alone* constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (emphasis added) (quoting *Assoc. General Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)). This is a distinction without a difference. The District Court found that this is precisely the type of case in which the constitutional injury is not compensable and subjects State Employees to irreparable harm. "'Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.'" (E.R. 27) (quoting *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008).) There is "an inherent inequality in allowing some employees to participate fully" in the State's health plan, "while giving others a wad of cash to go elsewhere." *In re Golinski*, 587 F.3d 956, 960 (9th Cir. 2009) (Kozinski, C.J., decision following EDR proceeding). This "back of the bus" treatment, *id.*, relegates State Employees to a second-class status by imposing inferior workplace

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was assumed true and would have been viewed differently on consideration of the record.

treatment on them, inflicting serious constitutional and dignitary harms that after-the-fact damages cannot adequately redress. Consistent with these principles, the District Court found that the violation of State Employees' equal protection rights imposes upon them "the stigma of discriminatory treatment and the harm of receiving unequal compensation for equal work." (E.R. 29.) State Officials fail to answer the central question here: What is the price of the powerful, humiliating public message of stigma communicated by the State's decision to deny family coverage only to lesbian and gay employees? As the District Court recognized, no amount of money later can undo this ongoing harm to State Employees.[16]

Moreover, State Officials challenge only one ground of the District Court's irreparable harm analysis and ignore the other mutually supporting grounds, effectively conceding that they are not reasonably subject to attack. The District Court found that State Employees had in fact demonstrated "several kinds of irreparable harm," including the likelihood that they will "suffer extreme anxiety and stress in the absence of" family coverage. (E.R. 28.) The District Court had ample evidentiary support in the State Employees' affidavits to conclude that losing critical family coverage, like losing a job, "does not carry merely monetary

[16] Ninth Circuit authority also suggests that irreparable harm may be found where, as here, Eleventh Amendment immunity would bar suit against the State in federal court (*Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009)). While Plaintiffs believe strongly that Defendants have no qualified immunity defense from damages in their personal capacities, the courts might disagree, which would foreclose any avenue for seeking damages.

consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages." (*Id.* (quoting *Nelson*, 530 F.3d at 882).)[17]

For example, several State Employees submitted evidence that their life partner has a chronic condition requiring immediate and continuing medical care which, left untreated, likely will lead to irreversible health consequences. (*See*, *e.g.*, E.R. 189-90 (Joseph's partner has chronic diabetes and high cholesterol and cannot qualify for an individual insurance plan or Medicaid); E.R. 185-86 (Deanna's partner has high blood pressure that is likely to disqualify her from individual coverage—a frightening circumstance given her ongoing abdominal problems, and need for ovarian and colon cancer monitoring); E.R. 171 (Beverly repeatedly has been refused individual insurance coverage for her partner's chronic asthma); E.R. 208 (Tracy's partner requires medication for her near constant nausea and high blood pressure which they anticipate will make the partner uninsurable); E.R. 194 (Keith's partner requires medication and monitoring for a potentially life-threatening tear in his carotid artery and a preliminary diagnosis of a degenerative joint disorder, and they fear both conditions make him

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[17] State Officials argue that no State Employee risks losing his or her job, but for many if not all State Employees, losing family coverage is analogous to a constructive discharge. For a number of State Employees, it is not tenable to live without family coverage and they may in fact be forced to seek other employment, as Judith McDaniel has done. (E.R. 2 n.1.)

uninsurable).) Other State Employees recognize their vulnerability because of prior threatened illness. (E.R. 203 (a prostate cancer scare left Stephen acutely aware of his partner's vulnerability to uncovered serious illness, and the couple could only afford catastrophic coverage in the past).) Still others will be forced to cope without health insurance in the absence of family coverage through the State (E.R. 199 (Leslie would have to forego health insurance for her partner because of its much higher cost)); to cope with inferior coverage (E.R. 176 (securing more expensive alternative insurance would be a frustrating burden for Carrie and her partner)); or to spend time away from family members while working to pay for more expensive coverage (E.R. 181 (Corey has had to give up valuable family time with her small child to earn more money for the child's more expensive private health coverage)).

State Officials contend that State Employees should pay their medical bills out-of-pocket and seek reimbursement later, but that approach would not protect State Employees from the serious, irreparable harms they face. Without access to reliable medical care through a health plan, a partner's chronic condition quickly can deteriorate or develop complications that would have caused only nominal expenses for the State's plan but will dwarf a family budget, imposing an unconscionable choice between irreversible health consequences or bankruptcy. These threats and the related stresses are real (E.R. 208 (describing Tracy's

bankruptcy after her partner fell seriously ill, and her family's significant stress now that the partner's symptoms are recurring)) and are more than sufficient to demonstrate irreparable harm. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (holding that "substantial loss of business and perhaps even bankruptcy" meets the standard for granting interim relief); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55-56 (2nd Cir. 2004); *Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850, 876-77 (E.D. Mich. 2005) ("Alteration and elimination of retiree health benefits causes retirees and dependents health risk, uncertainty, anxiety, financial hardship, and other irreparable harm."); *Risteen v. Youth for Understanding*, *Inc.*, 245 F. Supp. 2d 1, 16 n.4 (D.D.C. 2002) (collecting authorities); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1267-68 (W.D. Mich. 1990) (the "financial hardship" of additional medical expenses, the possibility that people might choose to forego medical care, and the "uncertainty and worry" caused by not knowing how much is needed to cover medical expenses are noncompensable injuries for those on fixed incomes).

Even for State Employees fortunate enough to secure alternate private coverage, "it might be impossible to find an insurance plan on the private market that provides exactly the same benefits" as those afforded through the State's plan since group plans "almost always provide broader coverage than individual plans." *Golinski*, 587 F.3d at 960. State Employees cannot be compensated adequately

later for the harm of coping with markedly inferior health coverage for their loved ones. Nor would seeking access to Arizona's Medicaid program eliminate the irreparable harm. Equal protection would not permit State Officials to say to another minority group, such as African-American or Muslim employees, that their loved ones must use the State's poverty program while white or Christian employees receive access to the employer-provided health plan for families as part of their compensation.

V. THE DISTRICT COURT PROPERLY DECLINED TO REQUIRE A BOND IN THIS PUBLIC INTEREST CASE, BROUGHT BY ORDINARY CITIZENS WITH LIMITED MEANS.

The District Court's decision not to require a bond was a proper exercise of discretion, and State Officials' arguments to the contrary fail under the relevant authority.[18] Federal Rule of Civil Procedure 65(c) invests "the district court with discretion as to the amount of security required, if any." *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999). The standard on review is an abuse of discretion because the "district court is in a far better position to determine the amount and appropriateness of the security required under Rule 65." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) (internal quotation marks omitted), *overruled on other grounds by Winter v. Nat'l Res. Def. Council*,

[18] State Officials failed to raise this argument in their response to State Employees' motion for preliminary injunction and have thus waived it. State Employees respond, however, to point out the argument's clear deficiencies.

Inc., 129 S. Ct. 365 (2008). The language of Rule 65(c), however, does not "absolve [] the party affected by the injunction from its obligation of presenting evidence that the bond is needed." *Conn. Gen. Life Ins. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). Here, State Officials presented no evidence that a bond was needed, and thus cannot complain now that the District Court abused its discretion when it determined none should be required.

The Ninth Circuit has established "long-standing precedent that requiring nominal bonds is perfectly proper in public interest litigation." *Sonoran*, 408 F.3d at 1126. Requiring little or no bond serves a particularly critical purpose in litigation to vindicate the public interest by avoiding a security requirement that "would effectively deny access to judicial review." *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985). *See also GoTo.com*, *Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1211 (9th Cir. 2002) (refusing to increase lower bond amount when that "would risk denying … access to judicial review"); *Barahona-Gomez*, 167 F.3d at 1237 (upholding nominal bond where the cost to the government would be minimal, and the class advancing the public interest had unremarkable financial means).[19] Here, the District Court had

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[19] The courts take "special precautions" in upholding this judicial access "where Congress has provided for private enforcement of a statute." *Van De Kamp*, 766 F.2d at 1325-26. *See also Sonoran*, 408 F.3d at 1126. This principle should apply with particular force here, where Congress has provided a private right to enforce federal constitutional guarantees. 42 U.S.C. § 1983.

extensive evidence demonstrating that State Employees are citizens of ordinary means, as each testified that the expense of securing insurance on the private market would either be out of reach, or impose stressful financial burdens, in contrast with the negligible burden on the State.

Additionally, a "likelihood of success on the merits, as found by the district court, tips in favor of a minimal bond or no bond at all." *Van De Kamp*, 766 F.2d at 1326. *See also*, *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (noting "that another panel of this court has already granted an injunction and thus implicitly concluded that appellants have a lik[e]lihood of success," and ordering nominal bond in case involving "citizens, with limited resources"). The District Court's determination that State Employees are likely to succeed on the merits should weigh heavily in favor of affirming the preliminary injunction without a bond.

State Officials' arguments to the contrary and cited authority are unavailing. (Dkt. #6-1, p. 23-25.) The brief discussion of bond amount in *Couturier* observes that courts have discretion "as to the amount of security required, *if any*." *Id.* at 1086 (internal quotation marks omitted) (emphasis in the original). *Couturier* also notes that a bond is unnecessary where the enjoined party will suffer no damage, which stands as an additional exception to the bond requirement distinct from the Ninth Circuit authority above about public interest litigation by ordinary citizens.

Id. In no way does *Couturier* address, let alone diminish, the bond exception for litigation of this type.[20]

Lastly, *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 869 n.15 (9th Cir. 1983), suggested in dicta that the district court should address on remand its reasons for requiring no bond, where the reasons to forego security appeared "doubtful." The District Court's decision here, in contrast, is well-grounded in the law given the public interest nature of the case, the parties' relative financial positions, State Officials' failure properly to request a bond, and State Employees' likelihood of success on the merits.

CONCLUSION

For the reasons stated above, State Employees respectfully request that this Court affirm the District Court's preliminary injunction order.

DATE: October 12, 2010

Respectfully submitted,

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[20] Further, *Couturier* did not invalidate the preliminary injunction because of the judge's failure to discuss the reasons for the bond amount he chose. *Id.* In fact, that court upheld the preliminary injunction and simply remanded the question of the sufficiency of the bond to the district court. *Id.* at 1086-87. Thus, the fact that the District Court did not address the issue of a security bond in this case in no way affects the validity of the preliminary injunction.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellees certify that there are no known related cases pending in the United States Court of Appeals for the Ninth Circuit.

Dated: October 12, 2010

/s Tara L. Borelli
Tara L. Borelli

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman type style.

Dated: October 12, 2010

/s Tara L. Borelli
Tara L. Borelli

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 12, 2010.

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/s Jamie Farnsworth