Jennifer C. Pizer (*Pro Hac Vice*)
Tara L. Borelli (*Pro Hac Vice*)
Desmund Wu (*Pro Hac Vice* application pending)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3325 Wilshire Boulevard, Suite 1300
Los Angeles, California 90010
jpizer@lambdalegal.org
tborelli@lambdalegal.org
dwu@lambdalegal.org
Telephone: 213.382.7600

Daniel C. Barr (#010149)
Rhonda L. Barnes (#023086)
PERKINS COIE BROWN & BAIN P.A.
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
DBarr@perkinscoie.com
RBarnes@perkinscoie.com
Telephone: 602.351.8000

Attorneys for Plaintiffs Tracy Collins, Keith B. Humphrey, Joseph R. Diaz, Beverly Seckinger, Stephen Russell, Deanna Pfleger, Corey Seemiller, Carrie Sperling and Leslie Kemp

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Tracy Collins, et al.,

Plaintiffs,

v.

Janice K. Brewer, in her official capacity as Governor of the State of Arizona, et al.,

Defendants.

No. CV09-2402-PHX-JWS

PLAINTIFFS' MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY INJUNCTION

Oral Argument Requested

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1 Plaintiffs Tracy Collins, Keith B. Humphrey, Joseph R. Diaz, Beverly Seckinger,
2 Stephen Russell, Deanna Pfleger, Corey Seemiller, Carrie Sperling and Leslie Kemp
3 (collectively, "Plaintiffs") move for a preliminary injunction pursuant to Federal Rule
4 Civil of Procedure 65.[1]
5 Plaintiffs seek a preliminary injunction enjoining Defendants Janice K. Brewer,
6 David Raber and Kathy Peckardt (collectively, "Defendants") from enforcing the portion
7 of Ariz. Rev. Stat. § 38-651(O) that restricts family health insurance to heterosexual State
8 employees with a different-sex spouse ("Section O") to the extent that Section O
9 eliminates Plaintiffs' eligibility to qualify for State employee family health insurance
10 covering each Plaintiff's same-sex life partner and that partner's qualifying children.
11 Section O violates Plaintiffs' equal protection and due process rights and, if enforced, will
12 cause Plaintiffs and their family members to suffer irreparable harm which cannot be
13 redressed by damages.
14 The motion is based upon this motion and memorandum of points and authorities,
15 Plaintiffs' amended complaint, the accompanying declarations and exhibits, and such
16 further evidence and arguments as may be presented.[2]

17 **INTRODUCTION**

18 The State of Arizona ("State") offers important employment compensation in the
19 form of family health insurance for heterosexual State employees who choose to marry,
20 which allows each such employee to obtain subsidized participation for his or her spouse
21 and spouse's qualifying children in the State's employee group health plans. In 2008, the
22 State amended a regulation to provide equal compensation for lesbian and gay State
23 employees by allowing them to obtain family insurance coverage for a committed,
24 financially interdependent domestic partner and partner's qualifying children. In 2009,

25 [1] Plaintiff Judith McDaniel's claims recently became moot due to her obtaining a
26 different job that provides family health insurance for her life partner, including coverage for the glaucoma that her partner could not insure on the private market.
27 [2] Plaintiffs' counsel conferred with Defendants' counsel before filing this motion to determine whether the parties could stipulate to the preliminary injunction Plaintiffs
28 request, but the parties were unable to reach agreement. (Declaration of Tara Borelli ("Borelli Dec.") ¶¶ 6-9.)

the State reversed this policy when Defendant Janice K. Brewer signed a budget enactment including a statutory provision that eliminates family coverage for lesbian and gay State employees by restricting such family coverage to "spouses," a status that Arizona does not afford to same-sex life partners. State officials have announced that this elimination of coverage will take effect on October 1, 2010, and Defendants will be responsible for enforcing Section O to strip lesbian and gay State employees of the family health insurance element of their compensation.

Plaintiffs seek a preliminary injunction to maintain the status quo by preventing the discriminatory termination of their family health insurance. The standards for preliminary relief strongly favor granting Plaintiffs' request because Plaintiffs are likely to prevail on their claims that Section O violates their equal protection and substantive due process rights and Plaintiffs face significant, irreparable harm in the absence of relief—not simply the deprivation of their constitutional rights, but also the extreme anxiety, stress, and risk that untreated, serious medical conditions will irreversibly harm the health of family members who cannot obtain other comparable insurance.[3] The balance of equities tips powerfully in Plaintiffs' favor, and retaining Plaintiffs' family members within the State's group health plans advances the public interest far more than would leaving Plaintiffs' family members to suffer through chronic health conditions, including those who are uninsurable on the private market for any price.

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[3] After counsel for the parties agreed informally to cooperate in seeking a merits determination in this case before October 1, 2010, Plaintiffs took steps to streamline the case through an amended complaint that seeks only declaratory and injunctive relief. Plaintiffs reserved the right to seek leave to reinstate their damages claims if injunctive relief does not issue in time. While Plaintiffs cannot be made whole with respect to many of the most serious harms they describe herein with money damages, Plaintiffs preserve their right to seek such damages if interim and permanent injunctive relief is denied.

Plaintiffs file this request for a preliminary injunction—recognizing that Defendants' Motion to Dismiss remains pending before the Court—because of the increasingly urgent need for a ruling before Section O's enforcement date of October 1, 2010. Should the Court deny Defendants' Motion, Plaintiffs would support the consolidation of a trial on the merits with the hearing on this motion pursuant to Federal Rule of Civil Procedure 65(a)(2), provided that would allow adequate time for the completion of discovery and a final ruling on the merits before October 1, 2010.

STATEMENT OF FACTS

In 2008 Arizona Administrative Code § R2-5-101 was amended to provide, *inter alia*, lesbian and gay State employees access to family coverage for a committed same-sex life partner and the partner's qualifying children. Ariz. Admin. Code §§ R2-5-101(22), (23), (10)(a)(i). To qualify, lesbian and gay employees must satisfy rigorous standards of proof of financial interdependence. *Id*. § R2-5-101(22)(a)-(j). In 2009, Defendant Brewer signed a budget enactment including Section O that will terminate family coverage for lesbian and gay State employees by limiting such coverage to "spouses," which is a status that Arizona does not permit same-sex couples to obtain. Ariz. Const. art. 30, § 1.

Section O specifies an intended effective date of October 1, 2009. Ariz. Rev. Stat. § 38-651(O). On September 25, 2009, the Arizona Department of Administration ("Department") announced on its website that the Department would recognize November 24, 2009 as the effective date for the statute, and that "[o]ther questions raised by" Section O, "such as the definition of dependent and its applicability after November 24, 2009, are still under review." (Borelli Dec. ¶ 2; Amended Complaint for Declaratory and Injunctive Relief ("Amended Compl."), Ex. B.) On October 9, 2009, the Department posted another announcement stating that the definition of "dependent" would not be affected by Section O for the October 1, 2009 through September 30, 2010 insurance plan year, to avoid unlawfully impairing the contract expectations of already enrolled State employees. (Borelli Dec. ¶ 3; Amended Compl., Ex. C.) The announcement stated that, "The definition of 'dependent' currently in place will remain effective through September 30, 2010. **Please note the definition of dependent defined in H.B. 2013** [now codified as Ariz. Rev. Stat. § 38-651(O)] **will apply as of October 1, 2010.**" (emphasis in original). (*Id.*)

Plaintiffs are nine lesbian or gay State employees who currently receive, or wish to receive, family health insurance for their committed life partner or life partner's child. (Declaration Of Tracy Collins ("Collins Dec.") ¶¶ 10, 13; Declaration Of Joseph R. Diaz ("Diaz Dec.") ¶¶ 5, 10; Declaration Of Keith B. Humphrey ("Humphrey Dec.") ¶¶ 6, 11;

1 Declaration Of Leslie Kemp ("Kemp Dec.") ¶¶ 5, 7; Declaration Of Deanna Pfleger
2 ("Pfleger Dec.") ¶¶ 8, 14; Declaration Of Stephen Russell ("Russell Dec.") ¶¶ 8, 10;
3 Declaration Of Beverly Seckinger ("Seckinger Dec.") ¶¶ 6, 11; Declaration Of Corey
4 Seemiller ("Seemiller Dec.") ¶¶ 8-9, 12; Declaration Of Carrie Sperling ("Sperling Dec.")
5 ¶¶ 5, 8.) Each plaintiff is in a loving, committed and economically interdependent
6 relationship with his or her life partner that is founded on mutual pledges of emotional and
7 financial support. (Collins Dec. ¶¶ 3-6; Diaz Dec. ¶¶ 3-4; Humphrey Dec. ¶¶ 3-4; Kemp
8 Dec. ¶¶ 3-4; Pfleger Dec. ¶¶ 3-6; Russell Dec. ¶¶ 3-6; Seckinger Dec. ¶¶ 3-5; Seemiller
9 Dec. ¶¶ 3-6; Sperling Dec. ¶¶ 3-4.) Each plaintiff has job duties and responsibilities that
10 are equivalent to the duties and responsibilities of their heterosexual colleagues with
11 comparable jobs. (Collins Dec. ¶ 13; Humphrey Dec. ¶ 11; Diaz Dec. ¶ 10; Seckinger
12 Dec. ¶ 11; Russell Dec. ¶ 10; Pfleger Dec. ¶ 14; Seemiller Dec. ¶ 12; Sperling Dec. ¶ 8;
13 Kemp Dec. ¶ 7.) Although Section O would cause Plaintiffs to be able to obtain less
14 compensation than their similarly situated heterosexual colleagues with different-sex
15 partners, no plaintiff has had his or her job duties reduced because of his or her sexual
16 orientation, or sex in relation to the sex of his or her committed life partner. (*Id.*)
17 Plaintiffs rely on family coverage as an important part of their compensation and for the
18 same reasons that their married, heterosexual colleagues do—to help care for their family
19 members and to avoid the stress of health emergencies that easily can lead to irreversible
20 financial harm such as bankruptcy (Collins Dec. ¶¶ 7, 12) or, tragically, permanent health
21 consequences for serious, untreated medical conditions. (Humphrey Dec. ¶¶ 7-8; Collins
22 Dec. ¶ 9; Diaz Dec. ¶¶ 6, 9; Seckinger Dec. ¶¶ 6, 10; Pfleger Dec. ¶¶ 9-13.)

23 Several plaintiffs have a life partner with a chronic condition that requires
24 immediate and ongoing medical care. Plaintiff Keith B. Humphrey's committed life
25 partner, Brett Klay ("Brett"), is a stay-at-home dad who cares for the couple's medically
26 fragile children who were placed with the couple through the foster care system.
27 (Humphrey Dec. ¶ 5.) Brett has been (i) diagnosed with a torn carotid artery, a life-
28 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. (Humphrey Dec. ¶¶ 7-8.) Plaintiff Beverly Seckinger 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. (Seckinger Dec. ¶¶ 6, 9.) Plaintiff Deanna Pfleger ("Deanna") feels significant stress at the prospect of losing family coverage for her partner, Mia LaBarbara ("Mia"), whose heightened colon 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. (Pfleger Dec. ¶¶ 9-13.) Plaintiff Joseph R. Diaz cannot find a private insurance plan willing to insure his life partner, Ruben E. Jiménez, who has an immediate need for daily medication and testing strips to manage his high cholesterol and diabetes. (Diaz Dec. ¶¶ 6-7.) Diana Forrest ("Diana"), the life partner of Plaintiff Tracy Collins ("Tracy"), was previously uninsured while bedridden for years with a serious health condition, forcing Tracy to file for bankruptcy protection. (Collins Dec. ¶¶ 6-8.) The couple is extremely anxious about losing Tracy's family coverage now that Diana is having a recurrence of some of her severe prior symptoms, including a near constant nausea that requires medication every six hours to manage. (Collins Dec. ¶ 9.)

Other plaintiffs' partners have experienced the threat of serious illness, and in the absence of family coverage can only hope that their loved one does not experience such illness. Plaintiff 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. (Russell Dec. ¶ 8.)

If Section O is enforced, some gay State employees' partners, while presently healthy, will be forced to go without health coverage and risk an unexpected illness or catastrophic accident while uninsured. As parents with young children, Plaintiff Leslie Kemp and Jennifer Morris ("Jennifer") cannot afford the inferior, costly coverage

available through Jennifer's job. (Kemp Dec. ¶¶ 5-6.) They worry that an uninsured illness likely would ruin their family financially and, if untreated, could cause potentially severe health consequences for Jennifer. (Kemp Dec. ¶ 6.) Plaintiff Corey Seemiller ("Corey"), in an effort to plan responsibly for Ariz. Rev. Stat., section 38-651(O)'s purported October 1, 2009 effective date, secured alternate and far more expensive coverage for her eleven-month-old daughter, and has been forced to offset the expense by taking more teaching duties that keep her away from her family—a harm that no amount of money adequately can redress. (Seemiller Dec. ¶¶ 9-11.)

Some lesbian and gay State workers were led by the prospect of obtaining coverage for their life partners to forego other employment opportunities that cannot now be recovered. For example, the State's pursuit of domestic partnership coverage was a significant factor in the decision that Plaintiff 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. (Sperling Dec. ¶ 6.)

ARGUMENT

I. PLAINTIFFS SATISFY THE STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). These standards strongly favor granting the injunction Plaintiffs seek, which merely will maintain the status quo *pendente lite*, and would impose at most negligible burdens on Defendants. Preliminary relief would require Defendants to do no more than maintain an existing system of access to state group health plans for lesbian and gay employees—a system based on a cost-sharing method that "successfully made for a full, affordable bundle of insurance services" for all employees during the first year that lesbian and gay employees participated, according to the Department's most recent annual

report. (Borelli Dec. ¶ 4, Ex. D, p. 2.)[4] In contrast, the harm to Plaintiffs of losing family insurance will be not only irremediable but grave and, effective October 1st, immediate.

A. Plaintiffs Are Likely To Prevail On Their Equal Protection And Substantive Due Process Claims.

1. Plaintiffs Will Prevail On Their Claim That Section O Deprives Them Of Equal Protection Based On Each One's Sexual Orientation And Sex.

Section O classifies Plaintiffs for differential treatment based on their sexual orientation and sex in relation to the sex of each Plaintiff's life partner. By design, intention and result, Section O eliminates for one group and one group only—gay employees—the ability ever to qualify a committed same-sex life partner for health insurance, while heterosexuals remain eligible to qualify a different-sex life partner by marrying. Section O is not a neutral policy that treats all unmarried employees equally. Rather, there are only two similarly situated groups of unmarried employees—those in a committed heterosexual relationship and those in a committed same-sex relationship. These groups are distinguished only by their sexual orientation and their sex in relation to the sex of their committed life partner, and Section O discriminates against Plaintiffs on those bases. *See, e.g., 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); *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'"), quoting *In re Marriage Cases*, 183 P.3d 384, 440 (Cal. 2008); *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447-48 (Or.

[4] *See also* Borelli Dec. ¶ 4, Ex. D, p. 3 ("the 2008-2009 Plan Year demonstrated a balance of expenses and premiums that allowed the State to offer members comprehensive and affordable insurance coverage").

Ct. App. 1998) (a law does not provide equal treatment by making a benefit "available on terms that, for gay and lesbian couples, are a legal impossibility").

A law that discriminates based on sexual orientation must be strictly scrutinized because lesbians and gay men easily meet the test described in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), of having 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." *Id*. at 313 (internal quotation marks omitted).[5] Lesbians and gay men indisputably have experienced a history of purposeful unequal treatment, based on irrational prejudice about a personal characteristic that does not indicate their capabilities. *See Id.* at 313. As the Ninth Circuit has recognized for at least two decades, "homosexuals have suffered a history of discrimination." *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 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*"); *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring) ("Discrimination against homosexuals has been pervasive in both the public and private sectors."); *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., and Marshall, J., 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

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[5] The Supreme Court has not yet determined the appropriate level of scrutiny for sexual orientation-based classifications. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (law failed even rational basis, making it unnecessary to decide whether higher level of review applies). *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), previously held that classifying lesbians and gay men for adverse treatment is not subject to heightened scrutiny "because homosexual conduct can … be criminalized." Because the authority for that ruling was repudiated in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), *High Tech Gays* can no longer be considered sound.

1 prohibiting discrimination against lesbian and gay State employees, and presidential
2 Executive Order No. 13087. This long has been recognized by the federal courts. *See*
3 *Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("Sexual orientation plainly has no
4 relevance to a person's ability to perform or contribute to society.") (internal quotation
5 marks omitted); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 668 F. Supp. 1361,
6 1374 (N.D. Cal. 1987) ("The American Psychological Association has declared that
7 'homosexuality per se implies no impairment in judgment, stability, reliability, or general
8 social or vocational capabilities.'"), *rev'd on other grounds*, 895 F.2d 563 (9th Cir. 1990).
9 Section O's targeting of lesbians and gay men by stripping Plaintiffs' partner health
10 benefits is a stark illustration of the political vulnerability of lesbians and gay men. Such
11 vulnerability is sadly commonplace for gay people in America, as recent years have seen
12 both legislative and ballot measure targeting of this minority group for wrongful
13 elimination of basic rights and family protections that heterosexuals take for granted. *See*,
14 *e.g.*, *Romer*, 517 U.S. at 635-36 (striking down state referendum designed to prevent any
15 level of Colorado government from protecting gay people against discrimination);
16 *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (invalidating Oklahoma
17 statute that aimed to nullify adoptions of children by lesbian and gay couples). Arizona is
18 one of 41 states nationally that expressly deny same-sex couples the freedom to marry
19 through state constitutional amendment or statute (Human Rights Campaign, *Statewide*
20 *Marriage Prohibitions*, 2009, *available at* http://www.hrc.org/documents/marriage_
21 prohibitions_2009.pdf), and the federal government refuses to respect the fact that many
22 gay people are validly married under state or another country's law, 1 U.S.C. § 7.
23 Lesbians and gay men are not protected against discrimination in public accommodations
24 or private employment in Arizona, or under federal statute, and by many of these
25 measures suffer greater legal disadvantages than did women, for example, when sex-based
26 classifications were held to be quasi-suspect. At that time, Title VII and the Equal Pay
27 Act forbade sex discrimination, Congress already had approved and submitted to the
28 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,[6] the Ninth Circuit already has found, and re-affirmed, that in legal terms, sexual orientation is immutable—an understanding that conforms with a consensus among major professional social and behavioral health organizations. *See 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") (emphasis in original).[7]

At a minimum, Section O should be subjected to heightened scrutiny because it discriminates on its face against Plaintiffs based on each one's sex in relation to the sex of his or her life partner. Section O's restriction of family benefits to employees in different-sex relationships who may marry means, for example, that if Tracy were a man, she could secure health insurance for her beloved life partner, Diana, by marrying her. Simply

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[6] 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").

[7] *See also* American Psychological Association, *Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel* (2008) (the notion that lesbians' and gay men's sexual orientation can be changed or cured "has been rejected by all the major health and mental health professions"), *available at* http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf; American Psychiatric Association, *Psychiatric Treatment and Sexual Orientation* (1998) (noting that the significant risks of "reparative therapy" are "great" and "include depression, anxiety, and self-destructive behavior"), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx.

because Tracy is a woman, however, she is denied that opportunity. *See Levenson*, 560 F.3d at 1147 (denying health benefits to man in same-sex relationship, where he could qualify for them if he were a woman and could marry his partner, is "sex-based"); *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993).

Even under rational basis review, Section O's class-based discrimination requires a more searching examination, though Section O cannot satisfy even the most deferential review. Rational basis analysis is not "toothless," and classifications that target a disfavored minority group require more meaningful review. *Mathews v. Lucas,* 427 U.S. 495, 510 (1976); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *see also Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (distinguishing between the rational basis test applied to "economic regulation" and the test applied to classifications discriminating against a particular group of people). As described further below, Defendants cannot advance any legitimate reasons for their intent to compensate Plaintiffs *un*equally for performing equal work.

2. Plaintiffs Will Prevail On Their Claims That Section O Impermissibly Infringes The Liberty Interest Recognized In *Lawrence v. Texas*.

Section O impermissibly burdens Plaintiffs' liberty interest in forming and sustaining intimate family relationships. *See Lawrence*, 539 U.S. at 578 (the federal constitution protects the choice to have an intimate relationship with a same-sex partner "without intervention of the government"). The Ninth Circuit has determined that a heightened standard of review applies "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*." *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). As described above, Section O will impose significant hardship and distress and cause irreparable harm to Plaintiffs and each one's life partner, placing an extraordinary burden

on their intimate family relationships. Pursuant to *Witt*, when the liberty interest recognized by *Lawrence* is burdened, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Id.* at 819. Defendants cannot meet this standard since they have not advanced an interest that would survive rational basis review, let alone the heightened scrutiny required here.

3. Defendants Have Not Raised Any Legally Cognizable Defense To Plaintiffs' Claims.

Neither Defendants' purported interests in cost-savings nor administrative efficiency (see Dkt. No. 22) can justify Section O's discrimination. A state may not "protect the public fisc by drawing an invidious distinction between classes of its citizens." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974). *See also Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (a state may not safeguard the fiscal integrity of its programs by drawing discriminatory lines between groups of its citizens), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (same). 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 (administrative convenience could not justify requirement that only female service members must show dependency of a spouse to receive benefits, and not male service members), *quoting Stanley v. Illinois*, 405 U.S. 645, 656 (1972). In fact, the Bill of Rights was "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 v. Reed*, 404 U.S. 71, 76-77 (1971) (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").

Nor do any of the Defendants' purported interests in favoring married people

immunize Section O's unlawful discrimination. (Dkt. No. 22.) Claiming that funds are "better spent" on heterosexual people who choose to become spouses than the gay people who are not provided any way of accessing family health insurance expresses an overt desire to privilege one class over another, and makes the sort of moral judgment that offends equal protection guarantees. *Id.*; *Romer v. Evans*, 517 U.S. 620, 634 (1996). There is no conceivable reason to believe that denying health coverage to lesbians and gay men will cause heterosexuals to marry each other (*Alaska,* 122 P.3d at 793), or gay people to marry a different-sex partner in contravention of their sexual orientation (*id.*, noting that such sham marriages "would not seem to advance any valid reasons for promoting marriage"). Nor can Section O be said to protect the interests of children, who are supported when both they and their parents have access to health care, and are spared the anxiety and hardship of untreated illness. Heterosexual employees' children are not benefited in any way by the elimination of health insurance for lesbian and gay employees' children. Section O harms, rather than promotes the welfare of children, by arbitrarily stripping benefits from one group of employees with children who are no less worthy of insurance.

B. Plaintiffs Will Suffer Irreparable Injury If Section O Is Enforced To Eliminate Their Family Health Insurance.

In the absence of the relief requested Plaintiffs will suffer certain, not merely likely, irreparable harm. *Winter*, 129 S. Ct. at 375 (a plaintiff must demonstrate likelihood of irreparable injury to obtain preliminary relief).[8] As detailed above, several plaintiffs have a life partner with a chronic condition requiring immediate and continuing medical care that, left untreated, likely will lead to irreversible health consequences. (Humphrey

[8] While preliminary injunctive relief typically requires immediate harm, a period of months before the threatened harm does not render the request premature, nor is the effect of Section O on Plaintiffs speculative or conjectural. Section O's enforcement will eliminate family health coverage for Plaintiffs, as the State has announced. (Borelli Dec. ¶ 3; Amended Compl., Ex. C.) *See Privitera v. California Bd. of Med. Quality Assurance*, 926 F.2d 890, 897 (9th Cir. 1991) ("it would have made no difference" if trial court enjoined activity closer to threatened harm where the activity "was and is a future event, and it is either enjoinable or it is not"; trial court thus erred by "simply delaying resolution of a question which could just as easily have been resolved at the time").

Dec. ¶¶ 7-8; Diaz Dec. ¶¶ 6, 9; Seckinger Dec. ¶¶ 6, 10; Pfleger Dec. ¶¶ 9-13). Other plaintiffs recognize their vulnerability because of prior threatened illness (Russell Dec. ¶ 8), or the recurrence of debilitating symptoms that now require ongoing care to manage (Collins Dec. ¶ 9). Still others will be forced to cope without health insurance in the absence of family coverage through the State (Kemp Dec. ¶ 6), to spend time away from family members while working to pay for more expensive coverage (Seemiller Dec. ¶ 11), or to do without the coverage that led them to forego other opportunities (Sperling Dec. ¶¶ 6-7).

In each instance, monetary damages would be wholly inadequate to compensate Plaintiffs for these harms. Even for plaintiffs 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 since group plans "almost always provide broader coverage than individual plans." *In re Golinski*, 587 F.3d 956, 960 (9th Cir. 2009) (Kozinski, C.J., decision following EDR proceeding). There also 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." *Id.* This "back of the bus" treatment (*id.*) relegates Plaintiffs to a second-class status by imposing inferior workplace treatment on them, inflicting serious constitutional and dignitary harms that after-the-fact damages cannot adequately redress. *See also Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).[9]

[9] 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 Court might disagree, which would foreclose any avenue for seeking damages.

C. The Extreme Hardship To Plaintiffs Of Foregoing Family Insurance, Or Paying Significantly More For An Inferior Alternative, Greatly Outweighs The Negligible Cost To Defendants Of Maintaining The Status Quo.

To qualify for injunctive relief, Plaintiffs must establish that "the balance of equities tips in [their] favor." *Winter*, 129 S. Ct. at 374. In assessing whether Plaintiffs have met this burden, the Court has a "duty … to balance the interests of all parties and weigh the damage to each." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). The relative size and strength of the parties may help the Court balance the relative hardships, and counsels strongly in favor of preliminary injunctive relief. *See Sardi's Restaurant Corp. v. Sardie*, 755 F.2d 719, 726 (9th Cir. 1985) ("the relative size of the respective businesses" is "certainly relevant" to a consideration of the equities; finding the "more established" restaurant better equipped to deal with restaurant name confusion than newer restaurant); *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 827 (9th Cir. 1993) ("the relative size and strength of each enterprise may be pertinent to" a balancing of the hardships).

Enjoining Defendants from enforcing Section O, and keeping Plaintiffs within a group health plan that the Department admits has functioned efficiently and successfully with Plaintiffs' participation (Borelli Dec. ¶ 4, Ex. D, p. 2), imposes a much smaller burden on Defendants, if any at all. Plaintiffs, on the other hand, lack the State's pooled resources and market power to secure affordable rates and broad coverage, and would face exponentially more difficulty in securing private insurance coverage. For some Plaintiffs, such coverage is simply an impossibility because of their life partners' chronic pre-existing conditions.

Any attempt to compensate Plaintiffs with damages would not only be plainly inadequate, but also more expensive for Defendants than allowing Plaintiffs to remain in the State's group health plans. Those plaintiffs fortunate enough to secure some form of private insurance unquestionably would pay more for inferior coverage than the cost of Plaintiffs' current family insurance, increasing Defendants' liability. And while the

1 State's market power allows the State to deliver "comprehensive" group benefits (Borelli
2 Dec. ¶ 4, Ex. D, p. 3), ejecting Plaintiffs from these group plans would impose on
3 Plaintiffs the noncompensable harm of coping with markedly inferior benefits.

4 **D. The Public Interest Favors Granting A Preliminary Injunction.**

5 Analysis of the public interest requires the Court to consider "'whether there exists
6 some critical public interest that would be injured by the grant of preliminary relief.'"
7 *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009),
8 quoting *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1458 (Fed. Cir. 1988). Even in a
9 fiscal "crisis," state "budgetary considerations do not … in social welfare cases, constitute
10 a critical public interest that would be injured by the grant of preliminary relief,"
11 "particularly when there are no adequate remedies available other than an injunction."
12 *Indep. Living Ctr. of S. Cal., Inc.*, 572 F.3d at 659 (there "is a robust public interest in
13 safeguarding access to health care" for those eligible for Medicaid which supports
14 enjoining enforcement of a Medicaid reimburse rate reduction).

15 This is particularly true where "the impact of a[n injunction] on the budget crisis
16 will be minimal at most." *Cal. Pharmacists Ass'n*, 563 F.3d at 852. Granting Plaintiffs
17 relief would have no more than a negligible effect on the State's budget, as admitted by a
18 Department spokesperson who identified the costs of domestic partners' insurance
19 coverage as a mere fraction of the State's overall health insurance budget. (Borelli Dec. ¶
20 5, Ex. E.) The public interest further favors preliminary relief where any financial gains
21 from eliminating Plaintiffs' family coverage would not only be minimal, but possibly
22 illusory. *See Memorial Hospital*, 415 U.S. at 265 (recognizing that delayed medical care
23 can cause a patient needlessly to deteriorate, requiring more expensive care in the future
24 and possibly causing disability, which can strain a state's social services). Public interest
25 considerations thus strongly support issuance of an interim injunction requiring that
26 Plaintiffs be allowed to retain family insurance coverage during the pendency of this
27 case.[10]

28 [10] The considerations described above also favor the Court's exercise of discretion

1 **CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their
3 request for a preliminary injunction.

4

5 Dated: April 1, 2010

6 **LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.**

7 Jennifer C. Pizer
8 Tara L. Borelli
Desmund Wu
9 3325 Wilshire Blvd., Ste. 1300
Los Angeles, California 90010

10 By: s/ Tara L. Borelli

PERKINS COIE BROWN & BAIN P.A.

Daniel C. Barr
Rhonda L. Barnes
2901 North Central Avenue, Ste. 2000
Phoenix, Arizona 85012-2788

Attorneys for Plaintiffs Tracy Collins,
11 Keith B. Humphrey, Joseph R. Diaz,
Beverly Seckinger, Stephen Russell,
12 Deanna Pfleger, Corey Seemiller, Carrie
Sperling and Leslie Kemp

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22 in setting a nominal bond pursuant to Federal Rule of Civil Procedure 65(c). In "non-
23 commercial" public interest cases a nominal bond is appropriate where supported by the "balance of the equities," considerations of public policy and likely irreparable harm. *See,*
24 *e.g., Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D. Cal. 1997) (upholding $100 bond because any additional cost to defendants would advance public
25 policy of accessible transportation for those with disabilities, without which plaintiffs would suffer irreparable harm); *Friends of Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th
26 Cir. 1975) (upholding nominal bond in environmental protection case involving "a private organization and citizens, with limited resources"); *Atlanta v. Metropolitan Atlanta Rapid*
27 *Transit Authority*, 636 F.2d 1084, 1094 (5th Cir. 1981) (parties "seeking to protect citizens … from perceived adverse economic and social consequences" were "engaged in
28 public-interest litigation," a "recognized … exception to the Rule 65 security requirement").