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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' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

Defendants suggest they should be permitted to "experiment" with honoring and dishonoring lesbian and gay employees' right to equal treatment and due process—despite these employees' ongoing, real life needs for family health coverage. (Dkt. #40, p. 15:1-12.) Defendants' response opposing Plaintiffs' motion for preliminary injunction ("Opposition") disregards the core question before this Court: whether equal protection allows a majority to withdraw from a disfavored minority a benefit that it keeps for itself. The Court does not sit as a "superlegislature" in answering this question, as it is the Court's role to ensure that state officials' actions fall within constitutional parameters. Nor are the constitutional rights of equality and due process a matter of economic convenience that evaporate during tough economic times. Plaintiffs seek a preliminary injunction to maintain the same health insurance coverage that their heterosexual co-workers can access and have shown irreparable harm in the form of daily anxiety and stress caused by the risk that untreated medical conditions will irreversibly harm the health of family members unable to obtain other comparable insurance and that crushing medical expenses will overwhelm their family's finances.[1]

## ARGUMENT

### I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

#### A. Defendants Lack Any Adequate Interests For Denying Equal Compensation Based On Plaintiffs' Sexual Orientation And Sex.

Defendants' Opposition is more noteworthy for its silence on key points of equal protection analysis than for its arguments. Defendants disagree with the published ruling in *In the Matter of Brad Levenson,* 560 F.3d 1145, 1147 (9th Cir. 2009) (Reinhardt, J., decision following mandatory EDR proceeding), that restricting insurance coverage to

[1] There is nothing "fiction[al]" (Dkt. #40, p. 2:4) about Plaintiffs' request to enjoin Defendants from enforcing Section O. In keeping with the Eleventh Amendment, "a plaintiff may … compel a state official's prospective compliance with the plaintiff's federal rights," *Ex parte Young*, 209 U.S. 123, 156 (1908), even if it will have a "substantial ancillary effect on the state treasury," *Armstrong v. Wilson,* 124 F.3d 1019, 1025 (9th Cir. 1997) (internal quotation marks omitted).

heterosexual spouses classifies employees based on sexual orientation and sex (reflecting consensus of state appellate courts to consider the issue since 1998), but cite no binding or even persuasive contrary authority.[2] *See also Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788 (Alaska 2005) (holding that "the proper comparison is between same-sex couples and opposite-sex couples" because a marital restriction does not "treat same-sex and opposite-sex couples the same" if only heterosexual couples can "obtain these benefits").

Defendants imply that *Witt v. Department of Air Force* is "controlling" on the issue of the level of scrutiny for sexual orientation classifications (Dkt. #27, p. 5:4), though *Witt* merely noted in *dicta* that—in the context of "congressional authority to raise and support armies," where judicial deference "is at its apogee"—the military's "Don't Ask, Don't Tell" policy satisfies rational basis review. *Witt*, 527 F.3d 806, 821 (9th Cir. 2008). But the scrutiny appropriate for sexual orientation classifications outside the context of the armed forces is an open question. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (concluding that law's sexual orientation classification "confounds" rational basis, making it unnecessary to decide what greater scrutiny is required).[3] Nor do Defendants attempt to refute Plaintiffs' showing that sexual orientation classifications should receive strict, or at a minimum, heightened scrutiny. Defendants do not dispute (i) the history of discrimination lesbians and gay men have faced, *Perry v. Proposition 8 Official*

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[2] Defendants do not demonstrate any error in *Levenson's* analysis that a restriction of insurance to heterosexual spouses classifies employees by their sexual orientation and sex. Defendants merely note that Levenson's claims were decided under a dispute resolution plan rather than the Fourteenth Amendment and critique the California Supreme Court's ruling that allowed Levenson and his husband to marry as judicial "fiat." (Dkt. #40, p. 8:23.) Regardless of the antidiscrimination protection invoked, or Defendants' opinions about California's marriage law, the core question is the same: does selecting a health insurance criterion (heterosexual marriage) that bars gay, but not heterosexual, employees from qualifying, classify employees based on sexual orientation and sex? The answer is yes.

[3] The rejection in *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990), of heightened or strict scrutiny was premised largely on the criminalization of same-sex sodomy that *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), expressly overturned. Defendants rely on *High Tech Gays* as if it remains good law on the appropriate level of scrutiny, without acknowledging that its underpinning has been reversed. (Dkt. #27, p. 4:22-25.)

*Proponents*, 587 F.3d 947, 954 (9th Cir. 2009); (ii) that Plaintiffs' sexual orientation has no bearing on their ability to contribute to society or the workplace, Arizona Executive Order No. 2003-22; (iii) that gay people are a politically vulnerable group (*see* Plaintiffs' Dkt. #23, pp. 7:6-8:2); or (iv) the immutability of sexual orientation as a deeply held characteristic that generally is fixed at an early age, *Karouni v. Gonzales*, 399 F.3d 1163, 1171-1172 (9th Cir. 2005), and that the government should not require sexual orientation to be changed as a condition of equal treatment, *Hernandez-Montiel v. Immigration and Naturalization Serv.*, 225 F.3d 1084, 1087, 1093 (9th Cir. 2000). Defendants also leave Plaintiffs' claims of sex discrimination unanswered. *See Levenson*, 560 F.3d at 1147; *see also Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993).

Even if Section O needed only to survive rational basis review, which Plaintiffs believe is not the standard, Defendants cannot justify the law's discrimination for multiple reasons. First, Defendants' reliance on purported costs ignores that the constitution does not ration equal protection based on cost or efficiency savings. As Plaintiffs have shown (Dkt. #23, pp. 9:25-11:16; Dkt. #31, p. 13:8-27), the courts are not charged to enforce the equality rights of vulnerable minorities only when doing so is free and requires no administration. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). (*See also* Plaintiffs' briefing in Dkt. #23: pp. 9:25-11:10.)

Defendants have offered a few other purported state interests ostensibly furthered by Section O's antigay discrimination, most of which reduce to an overt desire to privilege one class (heterosexual workers who can marry) over another (gay workers who cannot). (Dkt. #40, p. 7:5-10.) The view that funds are "better spent" on heterosexual employees than on gay employees merely expresses moral disapproval that, "like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review." *Lawrence*, 539 U.S. at 582. Nor is there any conceivable reason to believe that excluding Plaintiffs from health coverage will "favor[] marriage" by inducing heterosexual employees to marry. *See Alaska Civil Liberties Union*, 122 P.3d at 793. So too for

Defendants' asserted interest in supporting children. (Dkt. #40, p. 7:7-8.) As Plaintiffs have explained (Dkt. #23, p. 12:9-19), heterosexuals' children are not benefitted by depriving same-sex couples' children of coverage, and the latter—who are no less worthy of the medical care and family stability that insurance affords—are harmed, not helped, by denial of coverage.

Lastly, Defendants' reliance on costs to justify the law's discrimination is even further off the mark because their projection of the supposed costs is misleading in the extreme. This case is about lesbian and gay employees who are denied equal compensation as a class because—unlike their heterosexual colleagues—they are denied any way to qualify for family benefits. (Dkt. #19, p. 2:15-17.) Defendants have inflated their expense estimate by citing the cost of the entire domestic partnership program, which currently is dominated by different-sex couples.[4]

### B. Defendants' Targeted Withdrawal Of Health Insurance From Gay Employees Burdens Plaintiffs' Substantive Due Process Rights As Recognized In *Lawrence v. Texas*.

Although Defendants continue to mischaracterize Plaintiffs' substantive due process claim (Dkt. #40, p. 9:10-16), Plaintiffs have never claimed that employer-provided health insurance is a fundamental right. Instead, Plaintiffs' claim engages the liberty interest in forming and sustaining an intimate family relationship recognized in *Lawrence* and applied in *Witt*. Ninth Circuit law is clear: where the government burdens

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[4] In fact, employees with a same-sex partner are likely to constitute only between 63 and 298 of the 893 participants currently enrolled in the plan. (Badgett Dec. ¶ 10; Dkt. #40, p. 4:9) Insuring lesbian and gay employees' dependents thus only costs between $384,300 and $1,812,000, not the $5.5 million Defendants allege (Dkt. #40, p. 4:10), which constitutes only between 0.06% and 0.27% of the Department of Administration's 2010 budget for employee health insurance, and is likely at most 0.02% of the State's overall budget. (Badgett Dec. ¶¶ 10-11.) There is nothing disproportionately expensive about offering equal family coverage to lesbian and gay employees. (*Id*. ¶ 12.) To the contrary, the relative cost is reduced by multiple factors including that, unlike heterosexual spouses, lesbian and gay employees pay taxes to the State on the value of their health benefits; are less likely to enroll dependents than heterosexual employees for several reasons, including the cost of the tax burden; and spending related to Medicaid and uncompensated health care for uninsured people is likely to fall. (*Id*. ¶¶ 9, 13, 17.) Nor is administering domestic partner health benefits unduly burdensome. (*Id*. ¶ 18.)

Plaintiffs renew their objection to Defendants' false claim that Plaintiffs' amended complaint admits a particular cost for family coverage. (*See* Dkt. #23, p. 10 n. 6)

or intrudes on this liberty interest, Defendants "must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819. Defendants appear to concede that no such heightened interest exists, as they do not suggest that any interest they describe rises above the level of "rational."

Defendants indicate that unless the burden on Plaintiffs' protected liberty interest satisfies certain litmus tests—*i.e.*, criminal prosecution, suspension from employment, or complete prevention or dissolution of the family relationship (Dkt. #27, p. 7:13-18; Dkt. #40, p. 9:19-22)—Plaintiffs' due process claims must fail. However, neither *Lawrence* nor *Witt* contain any such artificial limit, and nothing Defendants cite suggests otherwise. In fact, *Witt* makes clear that an adverse employment action may improperly infringe upon the personal relationship right recognized in *Lawrence* and does not hint that its holding is limited to employment suspensions. Nor did *Witt* address whether the suspension had ended or prevented Major Witt's long-term relationship. *Witt*, 527 F.3d at 809-10. Enforcement of Section O would place tremendous burdens on Plaintiffs and their family relationships, in the form of extreme anxiety and risk that untreated medical conditions will irreversibly harm family members who cannot obtain comparable insurance and of ruinous medical bills.

Finally, Defendants repeat their claim that equal compensation for equal work is a "subsidy" but again offer no insight as to how their cases support that assertion. (Dkt. #40, p. 9:22-24.) As Plaintiffs explained in opposition to the motion to dismiss (Dkt. #23, pp. 14-15), a desire to discriminate against one class of public employees does not make equal treatment of that class "optional," nor does it make equal compensation of the class a "subsid[y]." (Dkt. #40, pp. 2:11, 9:23.) A government employer may not withdraw compensation for equal work to be performed simply because Plaintiffs exercise their constitutional rights with a same-sex rather than a different-sex partner. The State may not accomplish indirectly—by discriminatorily ending a benefit, even one to which no employees are entitled—that which it cannot do directly. *Cf. Rumsfeld v. Forum for*

*Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (holding that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected … freedom of speech even if he has no entitlement to that benefit") (internal quotation marks omitted); *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (concluding that, although a person has no right to a public benefit and may be denied it on various grounds, "there are some reasons upon which the government may not rely," including constitutionally protected rights). Defendants have not demonstrated that *Witt's* due process analysis is inapposite and have not advanced any governmental interests that survive even rational basis review, let alone *Witt's* heightened standard.

### C. Plaintiffs Properly Seek To Enjoin Governor Brewer From Enforcing Section O.

Defendants confuse, once again, the nature of Plaintiffs' request to enjoin the Governor. As Plaintiffs have clarified (Dkt. #23, p. 15:4-7), they do not seek an order in connection with the Governor's signature of the bill that contained Section O but instead seek to prevent her from enforcing Section O in violation of the constitution. Defendants gain nothing from *Arizona Contractors Association v. Napolitano*, 526 F. Supp. 2d 968, 983 (D. Ariz. 2007), which affirms the principle that a governor may not be liable based on a generalized duty to enforce the laws. Plaintiffs do not rely solely on such generalized duty, Ariz. Const. art. 5 § 4, but rather on Governor Brewer's specific statutory duty to oversee the Department of Administration's operations to sever only gay employees' benefits, A.R.S. § 41-703(1). (Dkt. #19, pp. 36:22-37:12; Dkt. #23, p. 15:8-9.)

Governor Brewer also should be enjoined as an official with supervisory responsibility. Defendants cannot have subordinates accomplish what the law plainly would prohibit for Defendants. *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009) (affirming that "[d]irect, personal participation is not necessary to establish liability for a constitutional violation") (internal citation omitted). Supervisory liability does not rest merely on a theory of respondeat superior but rather "is imposed against a supervisory official in his individual capacity for his own culpable action or inaction" in failing to

train or control subordinates, or for reckless indifference to or acquiescence in violations of others' constitutional rights. *Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005) (internal quotation marks omitted); *see also al-Kidd*, 580 F.3d at 965. Plaintiffs agree that Governor Brewer cannot be enjoined based on vicarious liability, but that is not what they request of the Court here.

## II. SECTION O WILL CAUSE PLAINTIFFS IRREPARABLE HARM.

Defendants' attempt to diminish the harms facing Plaintiffs ignores key facts and advances a draconian view of irreparable injury that is not reflected in the case law. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 724 (9th Cir. 1999) (concluding that plaintiffs must demonstrate "a significant threat of irreparable injury, irrespective of the magnitude of the injury"). Enforcement of Section O will deny Plaintiffs access to group health plan coverage that cannot be duplicated in the private insurance market. *See In re Golinski*, 587 F.3d 956, 960 (9th Cir. 2009) (Kozinski, C.J., decision following mandatory EDR proceeding) (finding injunctive relief proper because "it might be impossible to find an insurance plan on the private market that provides exactly the same benefits" because group plans "almost always provide broader coverage than individual plans"). Yet Defendants stunningly assert that Plaintiffs, whose partners' chronic conditions require ongoing medical care—and likely will bar individual insurance coverage—do not face irreparable harm. *See, e.g.*, Dkt. #31-5 ¶¶ 6-9 (Robert Diaz's partner has chronic diabetes and high cholesterol and cannot qualify for an individual insurance plan or Medicaid); Dkt. #31-4 ¶¶ 9-13 (Deanna Pfleger'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); Dkt. #31-1 ¶ 9 (Beverly Seckinger's partner repeatedly has been refused individual insurance coverage for her chronic asthma); Dkt. #31-9 ¶¶ 9, 11 (Tracy Collins' partner requires medication for her near constant nausea and high blood pressure and the couple anticipates that these conditions will make her uninsurable); Dkt. #31-6 ¶¶ 7-8, 10 (Keith Humphrey'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 the couple fears both conditions make the partner uninsurable).[5]

Defendants minimize and disregard the health threats for Plaintiffs when they suggest that Plaintiffs should simply pay their medical bills out-of-pocket and seek reimbursement later. A partner's chronic condition can deteriorate or develop complications that would cause only nominal expenses for the State's health plan but would dwarf a family budget, imposing an unconscionable choice between irreversible health consequences or bankruptcy. These threats and the related stresses are real (*see* Dkt. #31-9 ¶¶ 7, 9-11, describing Tracy Collins' 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); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1267-68 (W.D. Mich. 1990) (concluding that "financial hardship" of additional medical expenses, the possibility that people with limited means 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); *see also FoodComm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003) (finding that a legal remedy need not be wholly ineffectual, rather it must be "seriously deficient as compared to the harm suffered").[6]

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[5] The health threats and related stress for the other Plaintiffs are irreparable for similar reasons. *See* Dkt. #31-8 ¶¶ 8-9 (a prostate cancer scare left Stephen Russell acutely aware of his partner's vulnerability to uncovered serious illness, and the couple could only afford catastrophic coverage in the past); Dkt. #31-7 ¶ 6 (Leslie Kemp would have to forego health insurance for her partner because of its much higher cost); Dkt. #31-3 ¶ 11 (Corey Seemiller has had to give up valuable family time with her small child to earn more money for the child's more expensive health coverage); Dkt. #31-2 ¶¶ 6-7 (Carrie Sperling's partner left behind a thriving business when they moved to Arizona with the anticipation that Carrie's job would provide them both health coverage).

[6] At least two additional bases support Plaintiffs' showing of irreparable harm. Constitutional violations "cannot be adequately remedied through damages and therefore generally constitute irreparable harm." *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008). Additionally, the possibility of an Eleventh Amendment qualified immunity defense against *any* monetary recovery (though Plaintiffs believe strongly that no such defense should apply) might leave injunctive relief as Plaintiffs' only potential remedy.

## III. SECTION O'S EXTREME HEALTH AND ANXIETY BURDENS FOR PLAINTIFFS SIGNIFICANTLY OUTWEIGH THE NOMINAL COST OF KEEPING PLAINTIFFS IN THE STATE'S WELL-FUNCTIONING PLAN.

Defendants falsely compare the cost of diabetes testing strips for Plaintiff Robert Diaz's partner to the entire projected cost of benefits for 893 different-sex and same-sex domestic partners, although the two obviously are not correlates. Plaintiffs do agree, however, that Mr. Diaz's circumstances help illuminate the imbalance of power and equities between Plaintiffs and Defendants. Whereas maintaining the status quo simply would require the State to incur a nominal cost within a group health plan that the Department of Administration admits has functioned efficiently and successfully with Plaintiffs' participation (Dkt. #32 ¶ 4, Ex. D, p. 2), stripping Plaintiffs of coverage would require Mr. Diaz and his partner to live with tremendous daily anxiety and risk. His partner does not qualify for Medicaid, as is likely, if not certain, for other Plaintiffs. (Dkt. #31-5 ¶ 8.) His partner's chronic, uninsurable health conditions would leave the couple responsible for all out-of-pocket costs for his diabetes and high cholesterol, and terrifyingly, any complications related to either condition or any other unexpected illness. (Dkt. #31-5 ¶ 7.) Such expenses quickly can overwhelm a family's finances, forcing decisions to forego medical care and imposing the stressful, humiliating risk of bankruptcy. In stark contrast, the State's burden is *de minimis*.

## IV. MAINTAINING PLAINTIFFS' COVERAGE TO PRESERVE THE STATUS QUO SERVES, AND DOES NOT INJURE, THE PUBLIC INTEREST.

Defendants confuse the proper test for the public interest with broad notions of "public policy for Arizona" and federalism. (Dkt. #40, p. 14:11, 15.) "The public interest analysis for the issuance of a preliminary injunction requires [the court] to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1114-15 (9th Cir. 2010) (internal quotation marks omitted).[7]

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*See Kansas Health Care Ass'n v. Kansas Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994).

[7] A petition for writ of certiorari has been filed in the United States Supreme Court

Defendants do not identify any public interest that would be harmed by equally compensating lesbian and gay employees with family health coverage, and there is none. No one is hurt when the State treats Plaintiffs as equally valued employees regardless of sexual orientation. The many salutary benefits of equal family health coverage underscore this point. (Badgett Dec. ¶¶ 14-16 (partner health coverage enhances employee morale and productivity, and recruitment and retention of top talent).) Defendants suggest that treating Plaintiffs equally may require difficult State budgetary choices, implying that blame for these choices may be laid at Plaintiffs' feet. This is misguided. The need to balance the budget is not a greater duty for gay employees than for those who are Latino, Muslim or targeted for any other unjustifiable reason. Everyone is entitled to the same compensation offered to the majority. Defendants' rhetoric about the public fisc does not show any injury to the public interest by a common, equal duty to share the budgetary pain. Indeed, there is no public interest in visiting the current budgetary pain on lesbian and gay employees solely because of their sexual orientation or sex. Plaintiffs respectfully request that the Court enjoin enforcement of Section O.

Dated: May 27, 2010

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seeking review of other issues decided in this case. *See Maxwell-Jolly v. Cal. Pharmacists Association*, Case No. 091158.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2010 I electronically transmitted the foregoing document to the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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