**No. 10-16797**

Heard by the Hon. Mary M. Schroeder and Sidney R. Thomas, Circuit Judges; and Mark W. Bennett, District Judge, Sitting by Designation
Unanimous opinion by Judge Schroeder
Filed September 6, 2011

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

*Plaintiffs-Appellees*,

v.

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

*Defendants-Appellants*.

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

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# PLAINTIFFS-APPELLEES' OPPOSITION TO PETITION FOR REHEARING EN BANC

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## I. INTRODUCTION

This case asks whether it is constitutional for the state of Arizona (the "State") to deny its lesbian and gay employees compensation that the State provides to its heterosexual workers. Plaintiffs-Appellees are lesbian and gay State employees ("Plaintiffs"), each of whom is in a loving, committed relationship with a same-sex partner. Each Plaintiff previously obtained health insurance coverage for his or her partner or his or her partner's child as part of State's provision of family health insurance coverage to its employees. In 2009, the State passed legislation known as "Section O" that stripped lesbian and gay employees, and them alone, of any way to obtain this health coverage.

Plaintiffs sued and the District Court granted a preliminary injunction against the named defendants ("State Officials") denying lesbian and gay employees continued access to this coverage, thereby preserving the status quo. The District Court concluded that Plaintiffs had established a likelihood of success on the merits because denying them any means for obtaining these employee benefits that the state continued to make available to its heterosexual coworkers violates the U.S. Constitution's guarantee of equal protection.

State Officials appealed the grant of preliminary injunctive relief and the appellate panel unanimously affirmed. State Officials now seek rehearing en banc based on mischaracterizations of Plaintiffs' arguments and the District Court's and

panel's rulings.

The panel decision properly affirmed the District Court's finding that Section O intentionally classifies employees based on their sexual orientation by dividing them into two groups: lesbian and gay employees, who are absolutely barred from accessing family health coverage under Section O; and heterosexuals, all of whom remain eligible to receive coverage by marrying. State Officials attempt to whitewash Section O as a "neutral" law in their effort to contrive a conflict with other precedent, but Section O is no more neutral than a rule prohibiting family coverage for employees who wear a yarmulke, or whose primary language is Spanish. The panel correctly applied Supreme Court and Ninth Circuit authority in affirming the grant of the preliminary injunction.

Nor does the panel's decision "attempt[] to indirectly invalidate Arizona's marriage laws." Petition for Rehearing En Banc (Dkt. 48-1 ("Petition"), at 19). Plaintiffs do not in this action challenge Arizona's marriage laws or even seek to marry in Arizona. The District Court's and panel's decisions in no way conflict with the cases cited by State Officials, even were they still good law.

Because State Officials fail to meet the high standard for en banc review that Federal Rule of Appellate Procedure 35 demands, their request should be denied.

## II. STATEMENT OF FACTS

Arizona's lesbian and gay State employees were offered access to family

health insurance coverage in 2008 for a same-sex life partner and partner's children under Arizona Administrative Code §§ R2-5-101(22), (23), (10)(a)(i). (Dkt. 48-2, Addendum 2.) 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, however, Governor Brewer signed a budget enactment including what was designated as "Section O," which limits family coverage to "spouses," Ariz. Rev. Stat. § 38-651(O) (Dkt. 48-2, Addendum 3), a status those in same-sex relationships cannot obtain in Arizona. Ariz. Const. art. 30, § 1. Rather than simply having a disparate impact on lesbian and gay State employees, Section O denies *all* lesbians and gay men family coverage, while allowing *all* heterosexual State employees to obtain such coverage by marrying their partners. Section O does this even though Plaintiffs perform the same job duties 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 even though the State itself reports that this system has functioned smoothly and cost-effectively (E.R. 221-22).

All Plaintiffs are in a loving, committed and economically interdependent relationship with a same-sex life partner founded on mutual pledges of emotional and financial support, and would marry that life partner if permitted. (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; *see*

*also* Dkt. 18, at 3 n. 2.) All Plaintiffs 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.)

Plaintiffs introduced expert evidence, which was neither contested nor rebutted, that same-sex partners tend to increase health plan enrollment only by 0.1% to 0.3%, and are not disproportionately expensive to insure (E.R. 39). Same-sex partners thus account for only a fraction of the cost figures State Officials cite in their brief, Petition, at 4, since those figures included the different-sex partners who previously predominated the plan when they were permitted to enroll. (E.R. 40-41.)[1] Nonetheless, even when the plan included that far greater number of different-sex domestic partners, the state reported to the legislature that the state's cost-sharing method "successfully made for a full, affordable bundle of insurance services." (E.R. 221.)

## III. STATE OFFICIALS FAIL TO JUSTIFY EN BANC REVIEW

"An en banc hearing is not favored and ordinarily will not be ordered unless . . . en banc consideration is necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). State Officials strain, but fail, to identify a conflict in the panel's decision with Supreme Court and Ninth Circuit

[1] Plaintiffs do not challenge the termination of family coverage for heterosexual employees who choose not to marry. They instead complain that *only* lesbian and gay State employees were denied any means of obtaining the coverage by Section O's elimination of the alternative way in which Plaintiffs previously had qualified.

precedent. The panel decision is firmly grounded in equal protection jurisprudence, and State Officials' distorted reading of the law does not justify the extraordinary remedy of en banc review. Instead, State Officials merely reargue their case—ignoring that this preliminary injunction appeal involved an abuse of discretion standard of review—and fall far short of the exacting standard that warrants the attention of the full court. *Id*.

### A. State Officials Fail to Demonstrate a Conflict with Supreme Court or Circuit Authority in the Panel's Application of Equal Protection Jurisprudence Regarding Discriminatory Intent.

As the Supreme Court has made clear, 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). State Officials mischaracterize the panel decision as concluding that disparate impact suffices for discriminatory intent, Petition, at 8, but that fundamentally distorts the panel's holding. Both the panel and the District Court instead applied long-standing Supreme Court jurisprudence to reach the correct conclusion: forthrightly examined, Section O can only be understood as intentionally discriminating against lesbian and gay State employees.

Noting Section O's striking similarities to the legislation considered in *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), the panel carefully applied *Moreno's* principles to this case. Panel Op., at 16907-08 (observing that here, "as

in *Moreno*, the legislature amended a benefits program in order to limit eligibility," though this case presents an even "more compelling scenario, since the plaintiffs in *Moreno*" could still receive food stamps by altering household arrangements, while *all* lesbian and gay State employees are strictly barred from family health coverage "by operation of law"). *Moreno* examined an ostensibly facially neutral law, which redefined "household" eligibility for food stamps, in the same way that Section O eliminated family health coverage for same-sex partners by redefining an eligible dependent as a "spouse." *See* 413 U.S. at 529. *Moreno* noted that the Food Stamp Act "[i]n practical effect" . . . "creates two classes of persons for food stamp purposes," *id.*, and the panel similarly recognized that Section O separates employees into two groups: those who can qualify for family coverage by marrying, *i.e.*, heterosexuals, and those who cannot, *i.e.*, lesbians and gay men. Panel Op., at 16904 (observing that Section O treats Plaintiffs differently by making coverage available on terms that are a legal impossibility for them).

State Officials' Petition itself cites a number of the Supreme Court decisions that sanction precisely this analysis. As *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), recognized, the "sensitive inquiry" required to determine discriminatory intent involves examining the enactment's surrounding circumstances and, even with facially neutral legislation, the inquiry is "relatively easy" when a clear, otherwise "unexplainable" pattern emerges. *Id.* at 266. Some

facially neutral laws create a pattern of exclusion so "stark" that it is appropriate to test whether the law is "unexplainable on grounds other" than the classification. *Id.*[2] Because Section O excludes lesbian and gay employees with 100% precision, this case is every bit as "stark" as the authorities collected in *Arlington Heights*.

The Supreme Court has reaffirmed this analysis repeatedly. "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, 634 (1996). The "search for the link between classification and objective," *id.* at 632, is thus central to testing whether the law is "a classification of persons undertaken for its own sake." *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). In the absence of a legitimate interest, such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.*; *see also Romer*, 517 U.S. at 634 (same); *id.* ("a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest") (internal quotation marks omitted) (emphasis in original); *Tucson Woman's Clinic v. Eden*, 371 F.3d 1173, 1185 (9th Cir. 2004) ("some laws are so irrational . . . it is clear they can be motivated by nothing other than animus

[2] *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (holding that a facially neutral ordinance regulating laundries in wooden buildings that excluded all Chinese owners as "its necessary tendency and ultimate actual operation" violated equal protection).

or prejudice against a group").[3]

The panel broke no new ground in applying this equal protection framework. Panel Op., at 16909 (finding the District Court's decision "consistent with long standing equal protection jurisprudence holding that some objectives, such as a bare . . . desire to harm a politically unpopular group, are not legitimate state interests") (internal quotation marks omitted), *citing Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring), *Moreno*, 413 U.S. at 534, and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447 (1985). The District Court and panel meticulously examined whether there was a legitimate government interest supporting Section O. Panel Op., at 16905-16909; E.R., at 12-18. The District Court also considered whether it could conceive of any other government interest, and properly concluded that it could not. Panel Op., at 16909; E.R., at 18. As in *Romer*, the absence of any possibly legitimate explanation for why the State sought to deny only lesbian and gay employees any way of obtaining family coverage establishes that animus-based intent exists. 517 U.S. at 632.

State Officials have not even suggested how the panel misapplied any higher

[3] State Officials do not seriously dispute the panel's careful application of *Moreno* to this case, and instead puzzlingly contend that the classification of "households" challenged in *Moreno* was not facially neutral. Petition, p. 11. Although the Supreme Court cited a reference to one senator's desire to exclude "hippies" within the "little legislative history" available, *Moreno's* central focus was on testing the law's validity by searching for a rational basis, which guided the panel in this case as well. 413 U.S. at 535-38.

authority in rejecting the state's purported interests in Section O. First, the Supreme Court has reinforced time and again that reductions in state expenditures may not be advanced at the sole expense of a vulnerable minority group. *See*, *e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) (a state may not "protect the public fisc by drawing an invidious distinction between classes of its citizens"); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (same).

Second, while "efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion), *quoting Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Such interests thus may not be achieved at the expense of a minority group without adequate government justification. *See 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).

Third, State Officials briefly reference the promotion of marriage as a legitimate interest supporting Section O, but the panel observed that on appeal "the state has not seriously advanced this justification," Panel Op., at 16909, and this is true of State Officials' Petition as well. *See* Petition, at 16. As the panel confirmed, excluding same-sex couples from family health coverage "cannot

promote marriage, since such partners are ineligible to marry." Panel Op., at 16908-09. Nor does the government have an interest in denying lesbians and gay men equality simply to express that heterosexual marriage is more valuable or desirable than the relationships formed by same-sex couples. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[T]he Constitution cannot control [private biases] but neither can it tolerate them.").[4]

None of the cases State Officials or *amici* cite require a different result. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979), involved a challenge to hiring preferences for veterans, a status available to both women and men. *Id.* at 275. While *Feeney* provides that awareness of a disproportionate consequence for one group is not sufficient to prove intent in a disparate impact case, Section O creates an absolute targeted exclusion, not a neutral disparate one. *See 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 "must be viewed as directly classifying and directing distinct

[4] *Amicus curiae* Eagle Forum Education & Legal Defense Fund tries to breathe life into a "responsible procreation" rationale, which was rejected by the District Court, and wisely eschewed by State Officials in their Petition. (Dkt. 53, at 8-9.) Section O, which regulates the terms of a form of employment compensation, is wholly unrelated to whether lesbians, gay men *or* heterosexuals become parents. Nor does stripping health coverage from same-sex parents and their children benefit *anyone's* family.

treatment based on sexual orientation") (internal quotation marks omitted).[5]

### B. State Officials Also Fail to Establish Any Conflict with Supreme Court or Circuit Authority in the Panel's Application of Rational Basis Review.

State Officials claim that the panel committed two errors in applying rational basis review: first, by allegedly requiring them to justify Section O's exclusion of lesbian and gay employees, and second, by finding that such workers are similarly situated to their heterosexual counterparts. Petition, at 15, 18. Neither claim has merit.

State Officials' first argument tries to wrap Section O in a cloak of neutrality, but Section O simply does not treat all unmarried employees equally. The Supreme Court repeatedly has confronted and rejected analogous attempts to mask discriminatory classifications. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *see also Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("[a]ncestry can be a proxy for race").[6] State Officials' notable dearth of Supreme Court precedent on this

[5] This also distinguishes this case from *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), which examined not a strict preclusion of disabled arrestees from equal treatment, but rather a risk of differential treatment under policies applied equally to all arrestees. *Id.* at 687.

[6] *Accord Feeney*, 442 U.S. at 272 (a rule "that is ostensibly neutral but is an obvious pretext for racial discrimination" is invalid); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (Oklahoma's facially neutral literacy test for voters, exempting all residents who could vote prior to the adoption of the Fifteenth Amendment, violates that amendment's race discrimination prohibition).

point is simple to explain: controlling authority supports the panel decision. The Supreme Court already has considered and discarded attempts to disguise discrimination against lesbians and gay men by tying restrictions to their family relationships, rather than their status. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."), *citing Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) (a law targeting an intimate same-sex family relationship "target[s] . . . more than conduct, and "is instead directed toward gay persons as a class"). State Officials' reliance on a series of antiquated state court decisions does not improve their argument, and it certainly does not demonstrate a Supreme Court or intra-circuit split.[7]

State Officials revive their mistaken claim from below that a classification excluding a minority group can be justified merely by re-stating State Officials' desire to privilege the favored majority. Petition, at 18. Once again, they cite no higher court precedent, as the Supreme Court also has repeatedly rejected this concept: "even in the ordinary equal protection case calling for the most

[7] *See, e.g., Hinman v. Dep't of Pers. Admin.*, 167 Cal. App. 3d 516, 526 (Cal. App. 1985) (denying equal coverage because, *inter alia*, the court could not discern any "natural, intrinsic or legal foundation" for the concept that same-sex couples could have "families"). In any event, the weight of state authority decidedly favors the panel's analysis. *See Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788 (Alaska 2005); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004); *Tanner v. Or. Health Sciences Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998).

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 (emphasis added). A mere desire to continue favoring the majority is insufficient, and State Officials must instead identify at least a conceivable interest in excluding the minority. *See, e.g.*, *Romer*, 517 U.S. at 635 ("conserving resources to fight discrimination against other groups" is not a rational basis for excluding gay people from antidiscrimination protections); *see also United States v. Virginia*, 518 U.S. 515, 545-46 (1996) (testing the state's interest in excluding women from a military education institution, rather than simply accepting the state's interest in including men).[8]

State Officials' second allegation of error, that lesbian and gay employees are not similarly situated to their heterosexual colleagues, finds no more traction in federal jurisprudence. No two groups are mirror images of each other—by that standard, almost every equality claim would fail; instead, it is an abiding equal protection principle that groups must be similarly situated for purposes *relevant* to the classification.[9] This case involves a form of compensation that the state

[8] Several state court cases cited by State Officials suffer from this error. *See, e.g.*, *Bailey v. City of Austin*, 972 S.W.2d 180, 189 (Tex. App. 1998); *Matter of Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105, 109 (N.Y. App. Div. 2007).

[9] *See Eisenstadt*, 405 U.S. at 447 (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 unrelated to the objective of that statute*") (emphasis added); *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("A classification

provides to its employees, and State Officials never have contested Plaintiffs' similarity to their heterosexual co-workers in all ways relevant to the workplace. As the District Court and panel understood, a state cannot select a status that the state itself strictly prohibits for the minority, and rely on that as a fair measure of the minority's difference. *Cf. Williams v. Vermont*, 472 U.S. 14, 27 (1985) ("The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps.")

### C. No Conflict Can be Manufactured by Resort to Decades-Old Decisions Addressing Entirely Different Issues.

Unable to identify any direct conflict with Supreme Court or Ninth Circuit precedent, State Officials outlandishly describe the panel's decision as "indirectly invalidat[ing] Arizona's marriage laws," Petition, at 19, in violation of *Baker v. Nelson*, 409 U.S. 810 (1972) and *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982). Continuing to provide a way for same-sex couples to access benefits outside of marriage does not even conflict with Arizona law. In 2006, Arizona voters *rejected* a constitutional amendment that would have barred recognition of domestic partnerships,[10] and subsequently approved a 2008 amendment limiting

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must … rest upon some ground of difference having a fair and substantial relation to the object of the legislation") (internal quotation marks omitted).

[10] *See* Proposition 107, State of Arizona Official Canvass, 2006 General Election – November 7, 2006, *available at* http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf.

*only* the status of marriage to heterosexuals, Ariz. Const. art. 30, § 1.

Even were this not the case, *Baker* and *Adams* dealt with the right to marry and federal treatment of state marriages, and in no way considered whether states can deny lesbian and gay employees equal compensation by putting them in the Catch-22 of limiting family health coverage to those who enter a status that is unavailable to lesbians and gay men.[11] Plaintiffs do not challenge whether they can enter that status. They instead challenge only the unequal denial of access to employment benefits—something not at all at issue in those cases.[12]

## CONCLUSION

For all of the reasons above, the Court should not grant rehearing en banc.

DATE: October 21, 2011

Respectfully submitted,

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[11] Moreover, because a summary dismissal binds lower courts only with respect to "the *specific* challenges presented in the statement of jurisdiction," *Baker* has no relevance here. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (emphasis added).

[12] For this reason, *amicus curiae* Center for Arizona Policy's ominous warning of "troublesome implications" misses the mark. (Dkt. 52-2, at 17-18) This closely tailored case focuses on the State's specific role as employer.

**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1**

I certify that pursuant to Circuit Rules 35-4 and 40-1(a) and the October 3, 2011 Order of this Court (Dkt. 51), the attached opposition to petition for rehearing en banc is in compliance with Fed. R. App. P. 32(c) and does not exceed 15 pages.

Dated: October 21, 2011

/s Tara L. Borelli
Tara L. Borelli

Counsel 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 21, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Jamie Farnsworth