

--- F.3d ---, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608

(Cite as: 2011 WL 3890755 (C.A.9 (Ariz.)))

## H

United States Court of Appeals,  
Ninth Circuit.

Joseph R. DIAZ; Judith McDaniel; Keith B. Humphrey; Beverly Seckinger; Stephen Russell; Deanna Pflieger; Carrie Sperling; Leslie Kemp; Corey Seemiller, Plaintiffs–Appellees,

v.

Janice K. BREWER, in her official capacity as Governor of the State of Arizona; David Raber, in his official capacity as Interim Director of the Arizona Department of Administration and Personnel Board; Kathy Peckardt, in her official capacity as Director of Human Resources for the Arizona Department of Administration and Personnel Board, Defendants–Appellants.

No. 10–16797.

Argued and Submitted Feb. 14, 2011.

Filed Sept. 6, 2011.

**Background:** Lesbian and gay state employees with committed same-sex life partners brought action alleging that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees violated Equal Protection Clause. The United States District Court for the District of Arizona, John W. Sedwick, J., 727 F.Supp.2d 797, entered preliminary injunction on behalf of employees. State appealed.

**Holdings:** The Court of Appeals, Schroeder, Circuit Judge, held that:

(1) employees were likely to prevail on merits of their equal protection claim and

(2) district court did not abuse its discretion in not requiring state employees to post bond.

Affirmed.

West Headnotes

### [1] Civil Rights 78 1457(6)

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1457 Preliminary Injunction

78k1457(6) k. Employment practices.

### Most Cited Cases

Lesbian and gay state employees with committed same-sex life partners were likely to prevail on merits of their claim that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees violated Equal Protection Clause, and thus were entitled to preliminary injunction; impact of law on state's expenditures was minimal, cost savings dependent upon distinguishing between homosexual and heterosexual employees, similarly situated, could not survive rational basis review, and denial of benefits did not further state's purported interests in cost savings, administrative efficiency, and favoring marriage and families with children. U.S.C.A. Const.Amend. 14; A.R.S. § 38–651(O).

### [2] Constitutional Law 92 3596

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)7 Labor, Employment, and Public Officials

92k3592 Public Employees and Officials

92k3596 k. Compensation, pensions, and benefits. Most Cited Cases

Although state employees and their families are not constitutionally entitled to health benefits, when a state chooses to provide such benefits, the equal protection clause prevents the state from doing so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular. U.S.C.A. Const.Amend. 14.

### [3] Constitutional Law 92 3039

92 Constitutional Law

92XXVI Equal Protection

92XXVI(A) In General

92XXVI(A)5 Scope of Doctrine in General

92k3038 Discrimination and Classifica-

--- F.3d ---, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608  
(Cite as: 2011 WL 3890755 (C.A.9 (Ariz.)))

tion

92k3039 k. In general. Most Cited

Cases

Under equal protection jurisprudence, some objectives, such as a bare desire to harm a politically unpopular group, are not legitimate state interests. U.S.C.A. Const.Amend. 14.

#### [4] Civil Rights 78 1457(6)

78 Civil Rights

78III Federal Remedies in General

78k1449 Injunction

78k1457 Preliminary Injunction

78k1457(6) k. Employment practices.

Most Cited Cases

District court did not abuse its discretion in not requiring lesbian and gay state employees to post bond after granting preliminary injunction on their behalf and considering arguments as to whether bond was required, in action alleging that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees violated Equal Protection Clause. U.S.C.A. Const.Amend. 14; Fed.Rules Civ.Proc.Rule 65(c), 28 U.S.C.A.; A.R.S. § 38-651(O).

#### [5] Injunction 212 148(2)

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)4 Proceedings

212k148 Bond or Undertaking

212k148(2) k. Amount. Most Cited

Cases

When granting a preliminary injunction, a district court retains discretion as to the amount of security required, if any. Fed.Rules Civ.Proc.Rule 65(c), 28 U.S.C.A.

West Codenotes

Validity Called into Doubt A.R.S. § 38-651(O) Tara L. Borelli, Los Angeles, CA, for plaintiffs-appellees Joseph R. Diaz, et al.

Charles A. Grube, Deputy State Attorney General,

Phoenix, AZ, for defendants-appellants Janice K. Brewer, et al.

Appeal from the United States District Court for the District of Arizona, John W. Sedwick, District Judge, Presiding. D.C. No. 2:09-cv-02402-JWS.

Before: MARY M. SCHROEDER and SIDNEY R. THOMAS, Circuit Judges, and MARK W. BENNETT, District Judge.<sup>FNI\*</sup>

#### **OPINION**

SCHROEDER, Circuit Judge:

\*1 The State of Arizona appeals the district court's order granting a preliminary injunction to prevent a state law from taking effect that would have terminated eligibility for health-care benefits of state employees' same-sex partners. In a published opinion, the district court found that the plaintiffs demonstrated a likelihood of success on the merits, because they showed that the law adversely affected a classification of employees on the basis of sexual orientation, and did not further any of the state's claimed justifiable interests. Collins v. Brewer, 727 F.Supp.2d 797 (D.Ariz.2010).<sup>FNI</sup> The court also found that the plaintiffs had established a likelihood of irreparable harm in the event coverage for partners ceased. The district court's findings and conclusions are supported by the record and we affirm.

#### **BACKGROUND**

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

In November of 2008, however, the Arizona voters approved Proposition 102, also known as the *Marriage Protection Amendment*, which amended the Arizona Constitution to define marriage as between one man and one woman: "Only a union of one man and one woman shall be valid or recognized as a

--- F.3d ----, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608

(Cite as: 2011 WL 3890755 (C.A.9 (Ariz.)))

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

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

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

A group of gay and lesbian state employees (“Plaintiffs”) filed a complaint on November 17, 2009 amended on January 7, 2010, seeking injunctive and declaratory relief to redress Section O’s claimed violation of their equal protection and substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. According to the factual allegations of the complaint, which are not disputed, all of the plaintiffs are highly skilled state employees whose job duties are equivalent to the duties of their heterosexual colleagues. Each of the nine plaintiffs and his or her domestic partner have enjoyed a long-term, committed, and financially interdependent relationship, and would marry if Arizona law permitted same-sex couples to marry. Each plaintiff enrolled his or her domestic partner and the domestic partner’s qualifying children (if any) for family coverage during the 2008 or 2009 open enrollment period. Each plaintiff, domestic partner, and partner’s child met the eligibility requirements for coverage at the time of enrollment and continue to meet those requirements. Each named plaintiff would lose health insurance coverage for his or her domestic partner, and his or her partner’s children if Section O were to go into effect.

\*2 The complaint also reflects that such a loss would cause all of the plaintiffs serious financial and emotional harm. For example, one of the plaintiffs, Beverly Seckinger, a Professor and Interim Director of the School of Media Arts at the University of Arizona, has been in an exclusive and financially interdependent relationship with Susan Taunton for over 22

years. The two registered as domestic partners with the City of Tucson in October 2005. Susan enrolled in the state’s family coverage in 2008, and remains enrolled. Susan is the primary caregiver for her 89-year-old mother, who has dementia and needs much more caregiving help than her assisted living facility can provide. The care of her mother precludes Susan from obtaining full-time employment.

Private insurers have consistently refused to insure Susan because of her chronic asthma. Beverly’s declaration stated that “[e]ven if [she] were to persuade a private insurer to provide Susan with health coverage, [she] would not be able to secure a health plan with equivalent coverage.” Moreover, due to Beverly’s financial support, it is possible that Susan no longer qualifies for medical coverage through the state’s Medicaid program.

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

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

Plaintiffs opposed the motion and sought a preliminary injunction barring enforcement of the law. They submitted affidavits and other material to support their position that the law did not further any legitimate financial or administrative interest of the

--- F.3d ----, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608

(Cite as: 2011 WL 3890755 (C.A.9 (Ariz.)))

state. The supporting materials included the analysis of an expert that the entire state expenditure for domestic partner benefits represented a tiny fraction of the total employee healthcare benefits.

In a careful order, the court considered each of the possible state interests the law might be said to further and ruled that the law and the record negated each of them. Although plaintiffs argued heightened scrutiny was required, the district court applied rational basis review, but noting that such review is more searching when a classification adversely affects unpopular groups. *Collins*, 727 F.Supp.2d at 804 (citing *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring)). We do not need to decide whether heightened scrutiny might be required.

\*3 While the district court noted that Section O was not discriminatory on its face, because it affected both same-sex and different-sex couples, the court held that Section O had a discriminatory effect. This is because, under Arizona law, different-sex couples could retain their health coverage by marrying, but same-sex couples could not. *Id.* at 802–03. Therefore, the district court granted plaintiffs' request for a preliminary injunction on equal protection grounds.

The court applied the appropriate standards for the grant of preliminary injunctive relief. See Fed.R.Civ.P. 65; see also *Winter v. NRDC*, 555 U.S. 7, 24–25, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126–27 (9th Cir.2009). It concluded that the plaintiffs had established a likelihood of success on the merits and that they were likely to suffer irreparable harm if the injunction did not issue. *Collins*, 727 F.Supp.2d at 811–14. In assessing the likelihood of success, the court examined each of the interests the state contended the statute furthered and found the statute was not rationally related to them. In addition, the district court tried to conceive of any additional interests to sustain Section O and concluded it could not.

The likelihood of the plaintiffs suffering irreparable harm was well documented by the plaintiffs' affidavits. The health problems of domestic partners facing loss of healthcare benefits included a life-threatening torn carotid artery, chronic asthma, and inability to obtain private insurance because of diabetes and high cholesterol. The court also consid-

ered the public interest and found it, as well as the balance of the equities, weighed in favor of granting injunctive relief. See *Stormans*, 586 F.3d at 1138–40.

The district court, however, denied plaintiffs' claim that the law violated substantive due process rights, *Collins*, 727 F.Supp.2d at 809, and that claim is not before us. The court also held that the governor was not immune from a suit seeking injunctive relief. *Id.* at 809–11; see *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir.2000). Finally, the court considered the arguments of the parties concerning a bond and ruled that plaintiffs' were not required to post one.

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

## DISCUSSION

[1] Defendants' principal argument on appeal is that the district court, in granting the preliminary injunction, improperly accepted all of the plaintiffs' allegations as true. This argument is premised on a fundamentally distorted misreading of the district court's opinion. The court's opinion was dealing with two separate and discrete motions. The first was the defendants' motion to dismiss the complaint. The law is well settled that in deciding such motions the court is to accept the plaintiffs' allegations as true. See *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir.2010). The district court properly did so here and its order makes it apparent that it understood the proper application of the rule. *Collins*, 727 F.Supp.2d at 802.

\*4 After denying the defendants' motion to dismiss, the court then considered the plaintiffs' motion for a preliminary injunction. The court applied the appropriate standards, looking first at the likelihood of success on the merits. It reviewed each of the justifications for the law in light of the evidence in the record. *Id.* at 804–05. The most important was that the change furthered the state's economic interests by reducing costs.

Of particular significance to the district court was the fact that while the plaintiffs produced expert

--- F.3d ---, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608

(Cite as: 2011 WL 3890755 (C.A.9 (Ariz.)))

analysis on the impact of the law on the state's expenditures and found it minimal, *id.* at 811–12, the court was not provided any evidence of the actual amount of benefits the state paid for same-sex partners:

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

*Id.* at 812 (footnote omitted).

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

[2] The defendants, on appeal, also contend that the district court's order impermissibly recognized a constitutional right to healthcare. Again, this contention rests on a misunderstanding of the court's decision. The court held that the withholding of benefits for same-sex couples was a denial of equal protection. The state is correct in asserting that state employees and their families are not constitutionally entitled to health benefits. But when a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular. The most instructive Supreme Court case involving arbitrary restriction of benefits for a particular group perceived as unpopular is *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). In that case, Plaintiffs challenged the constitutionality of an amendment to the Food Stamp Act of 1964, which redefined the term “household” to limit the program's eligible recipients to groups of related individuals. *Id.* at 529–30, 93 S.Ct. 2821. While noting the “little legislative history” available on the amendment, the Court concluded that the legislation was aimed at groups that were unpopular. The “amendment was intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.” *Id.* at 534, 93 S.Ct. 2821.

In defending the amendment under rational basis review, the government contended that Congress might rationally have thought that the amendment would prevent fraud given the relative instability of households with unrelated individuals. *Id.* at 535, 93 S.Ct. 2821. The Court rejected both justifications. The Court held that the “practical operation” of the amendment would allow the hippies, with means, who were allegedly abusing the program, to rearrange their housing status to retain eligibility, while excluding those who were financially unable to do so, i.e., “only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.” *Id.* at 538, 93 S.Ct. 2821. Those excluded were like the same-sex partners in this case who, because they cannot marry, are unable to alter their living arrangements to retain eligibility. The Court concluded that the “hippie” amendment's classification was “wholly without any rational basis.” *Id.* We must reach the same conclusion.

\*5 Here, as in *Moreno*, the legislature amended a benefits program in order to limit eligibility. Since in this case eligibility was limited to married couples, different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so. The Arizona Constitution, however, prohibits same-sex couples from doing so. Thus, this case may present a more compelling scenario, since the plaintiffs in *Moreno* were prevented by financial circumstances from adjusting their status to gain eligibility, while same-sex couples in Arizona are prevented by operation of law.

Defendants nevertheless contend on appeal that this law is rationally related to the state's interests in cost savings and reducing administrative burdens. As the district court observed, however, the savings depend upon distinguishing between homosexual and heterosexual employees, similarly situated, and such a distinction cannot survive rational basis review. The Supreme Court in *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), was well aware of this principle when it quoted the eloquent words of Justice Robert H. Jackson, decrying the selective application of legislation to a small group:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unrea-

--- F.3d ---, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608  
(Cite as: 2011 WL 3890755 (C.A.9 (Ariz.)))

sonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Eisenstadt, 405 U.S. at 454, 92 S.Ct. 1029 (quoting Ry. Express Agency v. New York, 336 U.S. 106, 112–113, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring)).

The state has also argued that the statute promotes marriage by eliminating benefits for domestic partners, but the plaintiffs negated that as a justification. The district court properly concluded that the denial of benefits to same-sex domestic partners cannot promote marriage, since such partners are ineligible to marry. Collins, 727 F.Supp.2d at 807. On appeal, the state has not seriously advanced this justification.

[3] In sum, the district court correctly recognized that barring the state of Arizona from discriminating against same-sex couples in its distribution of employee health benefits does not constitute the recognition of a new constitutional right to such benefits. Rather, it is consistent with long standing equal protection jurisprudence holding that “some objectives, such as ‘a bare ... desire to harm a politically unpopular group,’ are not legitimate state interests.” Lawrence, 539 U.S. at 580, 123 S.Ct. 2472 (O’Connor, J., concurring) (quoting Moreno, 413 U.S. at 534, 93 S.Ct. 2821) (alteration in the original); see also City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Moreover, the district court properly rejected the state’s claimed legislative justification because the record established that the statute was not rationally related to furthering such interests. Collins, 727 F.Supp.2d at 807. Contrary to the state’s assertions, the court did not place the burden on the state to prove a legitimate interest. After concluding that neither the law nor the record could sustain any of the interests the state suggested, the district court considered whether it could conceive of any additional interests Section O might further and concluded it could not.

On appeal, the state does not suggest any interests it or the district court may have overlooked. The court ruled the plaintiffs had established a likelihood of success in showing the statute furthered no legitimate interest.

\*6 [4][5] Finally, the state contends that the district court committed clear error by not considering whether plaintiffs should post a bond as required under Federal Rules of Civil Procedure Rule 65(c). Rule 65(c) provides that a district court may grant a preliminary injunction, “only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” The district court retains discretion “as to the amount of security required, if any.” Johnson v. Couturier, 572 F.3d 1067, 1086 (9th Cir.2009) (internal quotation marks and citations omitted) (emphasis in the original). Here, the parties disputed whether a bond was required. The district court considered the arguments and properly invoked its discretion not to have plaintiffs post a bond in this matter. There was no error.

#### AFFIRMED.

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

FN1. On June 6, 2011, the panel granted Plaintiff Tracy Collins’s unopposed motion to dismiss without prejudice.

C.A.9 (Ariz.),2011.  
Diaz v. Brewer

--- F.3d ---, 2011 WL 3890755 (C.A.9 (Ariz.)), 113 Fair Empl.Prac.Cas. (BNA) 248, 11 Cal. Daily Op. Serv. 11,475, 2011 Daily Journal D.A.R. 13,608

END OF DOCUMENT

727 F.Supp.2d 797  
 (Cite as: 727 F.Supp.2d 797)

## H

United States District Court,  
 D. Arizona.

Tracy COLLINS; Keith B. Humphrey; Joseph R. Diaz; Judith McDaniel; Beverly Seckinger; Stephen Russell; Deanna Pfleger; Corey Seemiller; Carrie Sperling; and Leslie Kemp, Plaintiffs,

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 Peckhardt, in her official capacity as Director of Human Resources for the Arizona Department of Administration and Personnel Board, Defendants.

No. 2:09-cv-02402 JWS.  
 July 23, 2010.

**Background:** Lesbian and gay state employees with committed same-sex life partners brought action alleging that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees violated Equal Protection Clause. State moved to dismiss, and employees moved for preliminary injunction.

**Holdings:** The District Court, John W. Sedwick, J., held that:

- (1) employees had no fundamental right to subsidized dependent health benefits;
- (2) employees stated claim of supervisory liability against governor; and
- (3) employees were likely to prevail on merits of their equal protection claim.

Motions granted in part and denied in part.

West Headnotes

### 11 Constitutional Law 92 3057

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(A) In General  
92XXVI(A)6 Levels of Scrutiny

92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

Although Equal Protection Clause does not deny to states power to treat different classes of people in different ways it does, deny states power to legislate that different treatment be accorded to persons placed by statute into different classes on basis of criteria wholly unrelated to objective of that statute. U.S.C.A. Const.Amend. 14.

### 12 Constitutional Law 92 3057

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(A) In General  
92XXVI(A)6 Levels of Scrutiny  
92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

Equal Protection Clause requires that classification be reasonable, not arbitrary, and rest upon some ground of difference having fair and substantial relation to object of legislation, so that all persons similarly circumstanced shall be treated alike. U.S.C.A. Const.Amend. 14.

### 13 Constitutional Law 92 3057

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(A) In General  
92XXVI(A)6 Levels of Scrutiny  
92k3052 Rational Basis Standard; Reasonableness

92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

Whether statute challenged under Equal Protection Clause bears rational relationship to legitimate state interest is primarily objective inquiry. U.S.C.A. Const.Amend. 14.

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

**[4] Constitutional Law 92 ↪ 3438**

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(B) Particular Classes  
92XXVI(B)12 Sexual Orientation  
92k3436 Families and Children  
92k3438 k. Marriage and civil unions.  
Most Cited Cases

**States 360 ↪ 64.1(2)**

360 States  
360II Government and Officers  
360k56 Compensation of Officers, Agents and Employees  
360k64.1 Retirement and Incidental Benefits  
360k64.1(2) k. Constitutional and statutory provisions. Most Cited Cases

Allegation by lesbian and gay state employees with committed same-sex life partners that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees was not rationally and substantially related to state's interests in cost control, administrative efficiency, and promotion of marriage was sufficient to state claim under Equal Protection Clause. U.S.C.A. Const.Amend. 14; A.R.S. § 38-651(O) (2009).

**[5] Constitutional Law 92 ↪ 1040**

92 Constitutional Law  
92VI Enforcement of Constitutional Provisions  
92VI(C) Determination of Constitutional Questions  
92VI(C)4 Burden of Proof  
92k1032 Particular Issues and Applications  
92k1040 k. Equal protection. Most Cited Cases

Statute is presumed constitutional, and burden is on those attacking rationality of legislative classification under the equal protection clause to negative every conceivable basis that might support it. U.S.C.A. Const.Amend. 14.

**[6] Constitutional Law 92 ↪ 2970**

92 Constitutional Law  
92XXV Class Legislation; Discrimination and Classification in General  
92k2970 k. In general. Most Cited Cases

Although state has valid interest in preserving fiscal integrity of its programs, state may not, under the equal protection clause, attempt to limit its expenditures by invidious distinctions between classes of its citizens. U.S.C.A. Const.Amend. 14.

**[7] Constitutional Law 92 ↪ 3438**

92 Constitutional Law  
92XXVI Equal Protection  
92XXVI(B) Particular Classes  
92XXVI(B)12 Sexual Orientation  
92k3436 Families and Children  
92k3438 k. Marriage and civil unions.  
Most Cited Cases

**States 360 ↪ 64.1(2)**

360 States  
360II Government and Officers  
360k56 Compensation of Officers, Agents and Employees  
360k64.1 Retirement and Incidental Benefits  
360k64.1(2) k. Constitutional and statutory provisions. Most Cited Cases

State employees had no fundamental right to subsidized dependent health benefits, and thus Arizona statute limiting eligibility for family health care coverage to married heterosexual employees did not violate substantive due process rights of lesbian and gay state employees with committed same-sex life partners. U.S.C.A. Const.Amend. 14; A.R.S. § 38-651(O) (2009).

**[8] Civil Rights 78 ↪ 1395(8)**

78 Civil Rights  
78III Federal Remedies in General  
78k1392 Pleading  
78k1395 Particular Causes of Action  
78k1395(8) k. Employment practices.  
Most Cited Cases

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

Allegations by lesbian and gay state employees with committed same-sex life partners that governor directly caused action by others to enforce and implement Arizona statute limiting eligibility for family health care coverage to married heterosexual employees and engaged in conduct demonstrating reckless and callous indifference to employees' constitutional rights were factually sufficient to state claim of supervisory liability in employees' § 1983 action to enjoin statute's implementation. 42 U.S.C.A. § 1983; A.R.S. § 38-651(O) (2009).

## 19 Civil Rights 78 1457(6)

### 78 Civil Rights

#### 78III Federal Remedies in General

#### 78k1449 Injunction

#### 78k1457 Preliminary Injunction

#### 78k1457(6) k. Employment practices.

#### Most Cited Cases

Lesbian and gay state employees with committed same-sex life partners were likely to prevail on merits of their claim that Arizona statute limiting eligibility for family health care coverage to married heterosexual employees violated Equal Protection Clause, and thus were entitled to preliminary injunction, where employees presented evidence that cost of family coverage for lesbian and gay employees comprised between 0.06% and 0.27% of state's total spending on health benefits, that denial of benefits did not further state's purported interests in cost savings, administrative efficiency, and favoring marriage and families with children, and that they were likely to suffer extreme anxiety and stress in absence of injunction. U.S.C.A. Const.Amend. 14; A.R.S. § 38-651(O) (2009).

## 110 Civil Rights 78 1450

### 78 Civil Rights

#### 78III Federal Remedies in General

#### 78k1449 Injunction

#### 78k1450 k. In general. Most Cited Cases

Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.

### West Codenotes

Validity Called into Doubt A.R.S. § 38-651(O) \*799  
Desmund Wu, Jennifer C. Pizer, Tara L. Borelli, Lambda Legal Defense & Education Fund Inc., Los Angeles, CA, James Evans Barton, Rhonda Lorraine Barnes, Daniel Clayton Barr, Perkins Coie Brown & Bain PA, Phoenix, AZ, for Plaintiffs.

Alisa Ann Blandford, Charles Arnold Grube, Office of the Attorney General, Phoenix, AZ, Kathryn J. Winters, Office of the Attorney General, Tucson, AZ, for Defendants.

## ORDER AND OPINION

JOHN W. SEDWICK, District Judge.

### *I. MOTIONS PRESENTED*

At docket 22, defendants Governor Janice K. Brewer, David Raber, and Kathy Peckhardt (collectively “the State”) move to dismiss the amended complaint filed by plaintiffs Tracy Collins, Keith B. Humphrey, Joseph R. Diaz, Judith McDaniel,<sup>FN1</sup> Beverly Seckinger, Stephen Russell, Deanna Pflieger, Corey Seemiller, Carrie Sperling, and Leslie Kemp (collectively “plaintiffs”). At docket 23, plaintiffs oppose the motion. The State replies at docket 27. In addition, plaintiffs have filed a motion for preliminary injunction at docket 31. At docket 40, the State opposes the motion. Plaintiffs reply at docket 41. Oral argument on both motions was heard on June 28, 2010.

<sup>FN1</sup>. Plaintiff Judith McDaniel's claims recently became moot due to her obtaining new employment which provides family health insurance for her domestic partner. Doc. 31 at p. 2 n. 1.

### *II. BACKGROUND*

As part of the State's personnel compensation system, the State provides subsidized health care benefits to eligible employees and their dependents. The Arizona Administrative Code currently defines dependents eligible to participate in the health benefit plan as an “employee-member's spouse as provided by law or domestic partner,” and “[e]ach child,”<sup>FN2</sup> which is defined as including a “natural child, adopted child, or stepchild of the employee-member, retiree, former elected official, or domestic partner.”<sup>FN3</sup>

<sup>FN2</sup>. Ariz. Admin. Code § R2-5-416(C).

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

FN3. Ariz. Admin. Code § R2-5-101(10).

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

- \*800 a. Shares the employee's or retiree's permanent residence;
- b. Has resided with the employee or retiree continuously for at least 12 consecutive months before filing an application for benefits and is expected to continue to reside with the employee or retiree indefinitely as evidenced by an affidavit filed at time of enrollment;
- c. Has not signed a declaration or affidavit of domestic partnership with any other person and has not had another domestic partner within the 12 months before filing an application for benefits;
- d. Does not have any other domestic partner or spouse of the same or opposite sex;
- e. Is not currently legally married to anyone or legally separated from anyone else;
- f. Is not a blood relative any closer than would prohibit marriage in Arizona;
- g. Was mentally competent to consent to contract when the domestic partnership began;
- h. Is not acting under fraud or duress in accepting benefits;
- i. Is at least 18 years of age; and
- j. Is financially interdependent with the employee or retiree in at least three of the following ways:
  - i. Having a joint mortgage, joint property tax identification, or joint tenancy on a residential lease;
  - ii. Holding one or more credit or bank accounts jointly, such as a checking account, in both names;

iii. Assuming joint liabilities;

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

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

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

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

Currently, state employees in homosexual domestic partnerships may obtain the same coverage bestowed upon married heterosexual couples, provided the lesbian or gay employee and her or his partner can satisfy the above criteria.<sup>FN4</sup> The State provides approximately \$750 million in health, dental, life disability, and vision benefits to approximately 140,000 State employees, retirees, and their dependents.<sup>FN5</sup> Such employment benefits are commonly valued “at between one-fifth and one-third of total compensation.”<sup>FN6</sup> Approximately 800 of the 140,000 participating State employees receive benefits for a qualifying domestic partner. A small fraction of those 800 employees receive benefits for a same-sex domestic partner.<sup>FN7</sup>

FN4. Ariz. Admin. Code § R2-5-101.

FN5. Doc. 19 at p. 7.

FN6. Id. at p. 33.

FN7. Id. at p. 31.

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

727 F.Supp.2d 797  
 (Cite as: 727 F.Supp.2d 797)

ployees and their eligible dependents. The amendment added a new section, Section O, which provides that “[f]or the purposes of \*801 this section, beginning October 1, 2009, ‘dependent’ means a spouse under the laws of this state, a child who is under nineteen years of age or a child who is under twenty-three years of age and who is a full-time student.”<sup>FN8</sup>

FN8. A.R.S. § 38-651(O).

Section O eliminates family coverage for non-spouse domestic partners, whether they are of the same or different sex. Heterosexual domestic partners may continue to receive subsidized family health coverage by getting married. Same-sex couples are precluded from obtaining coverage because Section O limits coverage to “spouses” under the laws of Arizona. The Arizona Constitution prevents same-sex couples from marrying and prohibits the State from honoring a civil marriage entered by a same-sex couple in another jurisdiction.<sup>FN9</sup> Similarly, the Arizona Revised Statutes limit marriage to “a male person and a female person.”<sup>FN10</sup> Governor Brewer signed H.B. 2013 on September 4, 2009.

FN9. Ariz. Const. Art. 30 § 1.

FN10. A.R.S. § 25-125.

Section O specified an intended effective date of October 1, 2009. On September 25, 2009, the Department of Administration announced that it would recognize November 24, 2009 as the effective date of the statute. On October 9, 2009, the Department posted another announcement indicating that, based on legal advice from the Office of the Attorney General, the definition of “dependent” for the State insurance plan year beginning October 1, 2009 would not be affected by H.B. 2013 so as not to impair the contractual expectations of State employees. On July 22, 2010, the State filed a notice indicating that the State's current benefit plan, including domestic partner coverage, will be extended through December 31, 2010.<sup>FN11</sup> The definition of “dependent” currently in place will remain effective through December 31, 2010; the new definition of “dependent” in H.B. 2013 will go into effect on January 1, 2011.

FN11. Doc. 46.

On January 7, 2010, plaintiffs filed an amended complaint against the State seeking declaratory and injunctive relief.<sup>FN12</sup> Plaintiffs' amended complaint alleges in part,

FN12. Doc. 19.

The selective withdrawal of family coverage from lesbian and gay State employees-while leaving family coverage intact for heterosexual State employees with a legally recognized spouse-will deny each Plaintiff equal compensation for equal work and discriminatorily inflict upon each Plaintiff and his or her family members anxiety, stress, risk of untreated or inadequately treated health problems, and potentially ruinous financial burdens.<sup>FN13</sup>

FN13. Doc. 19 at p. 3.

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

Plaintiffs' complaint further requests the court to permanently enjoin defendants' enforcement of the portion of A.R.S. § 38-651(O) that limits eligibility to an employee-member's spouse and spouse's child to the exclusion of lesbian and gay State employees with a same-sex life partner. In addition, plaintiffs request an order requiring defendants to “maintain family coverage,\*802 on terms equal to the family coverage [d]efendants offer to heterosexual State employees who marry a different-sex life partner, for [p]laintiffs and other qualifying lesbian and gay State employees with a committed same-sex life partner who satisfy the relevant eligibility criteria specified in the Ariz. Admin. Code § R2-5-101.”<sup>FN14</sup>

FN14. Id. at p. 46.

All of the plaintiffs are highly skilled State employees whose job duties are equivalent to the duties of their heterosexual colleagues.<sup>FN15</sup> Each of the nine plaintiffs and his or her domestic partner have enjoyed

727 F.Supp.2d 797  
 (Cite as: 727 F.Supp.2d 797)

a long-term, committed, and financially interdependent relationship and would marry if Arizona law permitted same-sex couples to marry.<sup>FN16</sup> Each plaintiff enrolled her or his domestic partner and/or domestic partner's qualifying children for family coverage during the 2008 or 2009 open enrollment period, and each plaintiff and her or his domestic partner or partner's children met the eligibility requirements for coverage at the time of enrollment and continue to meet those requirements.<sup>FN17</sup> As result of the adoption and enforcement of Section O, each named plaintiff will lose health insurance coverage for his or her domestic partner, and/or domestic partner's children on October 1, 2010.

FN15. *Id.* at p. 12.

FN16. *Id.* at pp. 13-30.

FN17. *Id.* at p. 10.

### III. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint.<sup>FN18</sup> In reviewing a Rule 12(b)(6) motion to dismiss, “[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party.”<sup>FN19</sup> “Conclusory allegations of law, however, are insufficient to defeat a motion to dismiss.”<sup>FN20</sup> A dismissal for failure to state a claim can be based on either “the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”<sup>FN21</sup> To avoid dismissal under Rule 12(b)(6), plaintiffs' complaint must aver “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>FN22</sup>

FN18. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir.1978).

FN19. *Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir.1997).

FN20. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir.2001).

FN21. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990).

FN22. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir.2009) (quoting *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal citation omitted)).

## IV. DISCUSSION

### A. Motion to Dismiss

#### 1. Equal Protection Claim

The State first argues that plaintiffs' complaint fails to state a claim under the Equal Protection Clause of the Fourteenth Amendment because Section O passes constitutional muster under rational basis review. “The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike.”<sup>FN23</sup> The first step in equal \*803 protection analysis, therefore, is to identify the classification of groups within the statute or regulations in question.<sup>FN24</sup> “To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people.”<sup>FN25</sup>

FN23. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (quotation omitted).

FN24. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir.2008).

FN25. *Id.* (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir.1995)).

The State contends that Section O is a neutral policy that treats all unmarried employees equally. Plaintiffs argue that “Section O deliberately classifies State employees into two groups-heterosexual employees who are offered a way to qualify for family health insurance, and lesbian and gay State employees who are deprived of any way to qualify for those benefits,”<sup>FN26</sup> and as such are denied equal compensation for equal work. Section O, when read together with Arizona Constitution Article 30 § 1, treats unmarried heterosexual State employees differently than unmarried homosexual employees. Heterosexual domestic partners may become eligible for family cov-

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

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

FN26. Doc. 23 at p. 4.

While Section O is not discriminatory on its face, as applied Section O “unquestionably imposes different treatment on the basis of sexual orientation,” FN27 and makes benefits available on terms that are a legal impossibility for gay and lesbian couples. As a result, Section O denies lesbian and gay State employees in a qualifying domestic partnership a valuable form of compensation on the basis of sexual orientation. As early as 1990, the Ninth Circuit recognized that “state employees who treat individuals differently on the basis of their sexual orientation violate the constitutional guarantee of equal protection.” FN28 Because the spousal limitation in Section O imposes different burdens on the basis of sexual orientation, it is subject to scrutiny under the Equal Protection Clause.

FN27. *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir.2009) (quoting *In re Marriage Cases*, 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 441 (2008)).

FN28. *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1137 (9th Cir.2003) (quoting *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir.1990)).

[1][2][3] “The basic principles governing the application of the Equal Protection Clause of the Fourteenth Amendment are familiar.” FN29 In applying the Equal Protection Clause, the Supreme Court “has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of people in different ways.” FN30 The Equal Protection Clause does, however, deny States “the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the

objective of that statute.” FN31 “A classification ‘must \*804 be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ ” FN32 Whether a statute “bears a rational relationship to a legitimate state interest is primarily an objective inquiry.” FN33

FN29. *Eisenstadt v. Baird*, 405 U.S. 438, 446, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (citing *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971)).

FN30. *Reed*, 404 U.S. at 75, 92 S.Ct. 251.

FN31. *Id.* at 75-76, 92 S.Ct. 251.

FN32. *Id.* at 76, 92 S.Ct. 251 (quoting *Rovster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920)).

FN33. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1165 (9th Cir.2010).

[4] Plaintiffs contend that some form of heightened scrutiny should apply to an evaluation of Section O's constitutionality, because it treats State employees differently on the basis of their sexual orientation; because homosexuals have experienced a history of purposeful unequal treatment and are politically vulnerable; and because sexual orientation is an immutable characteristic which does not bear upon a person's ability to contribute to society as a productive employee. Some form of heightened scrutiny might apply to plaintiffs' claims, but it is unnecessary to decide whether or which type of heightened scrutiny might apply to plaintiffs' claims because plaintiffs have averred in their complaint sufficient factual matter, accepted as true, to state an equal protection claim that is plausible on its face even under the rational basis standard of review. FN34

FN34. See *In re Levenson*, 587 F.3d 925, 931 (9th Cir.2009).

[5] Applying the rational basis standard, the question before the court is whether the spousal limitation in Section O bears “a rational relationship to an independent and legitimate legislative end.” FN35 The

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

statute is presumed constitutional, and the burden is on those attacking the rationality of the legislative classification “to negative every conceivable basis which might support it.”<sup>FN36</sup> However, “even the standard of rationality ... must find some footing in the realities of the subject addressed by the legislation.”<sup>FN37</sup> Moreover, the court applies a “more searching form of rational basis review” when a classification harms politically unpopular groups or personal relationships.<sup>FN38</sup>

FN35. *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

FN36. *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (internal citations and quotation omitted).

FN37. *Immigrant Assistance Project of Los Angeles County Federation of Labor v. I.N.S.*, 306 F.3d 842, 872 (9th Cir.2002) (quoting *Heller*, 509 U.S. at 321, 113 S.Ct. 2637).

FN38. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973) (holding that an amendment preventing households containing unrelated individuals from receiving food stamps violated equal protection because it was intended to prevent “hippies” from participating in food stamp program); *Romer*, 517 U.S. at 632, 116 S.Ct. 1620 (finding that an amendment that made it more difficult for one group of citizens-homosexuals-to seek aid from the government denies equal protection of the laws); *Eisenstadt*, 405 U.S. at 454, 92 S.Ct. 1029 (concluding that under the Equal Protection Clause, the State could not outlaw distribution of contraceptives to unmarried persons but not to married persons).

The State offers the following rationales for Section O: (1) the statute “will save the State millions of

dollars per year”; (2) the statute will be “much easier to administer”;<sup>FN39</sup> (3) “scarce funds for employee benefits are better spent on employees and \*805 dependents as defined in the new statute”; (4) “this benefit would be most valuable to married persons, who are more likely to have dependent children”; and, (5) the new statute “would further the rational, long-standing and well-recognized government interest in favoring marriage.”<sup>FN40</sup> Plaintiffs argue there is no legitimate interest served by denying lesbian and gay State employees, including plaintiffs, equal compensation in the form of subsidized family coverage.

FN39. Doc. 22 at 8-9.

FN40. *Id.* at 10.

#### a. Cost Savings

[6] The State argues that the cost savings of limiting benefits to “spouses” of employee-members is sufficient to satisfy the rational basis test. Plaintiffs argue that the State may not “protect the public fisc by drawing an invidious distinction between classes of its citizens.”<sup>FN41</sup> The court must agree, for the Supreme Court has held that, although “a State has a valid interest in preserving the fiscal integrity of its programs,” the State may not attempt to “limit its expenditures ... by invidious distinctions between classes of its citizens.”<sup>FN42</sup> That proposition applies here because the spousal limitation in Section O rests on an invidious distinction between heterosexual and homosexual State employees who are similarly situated.<sup>FN43</sup>

FN41. Doc. 23 at 9 (quoting *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974)).

FN42. *Graham v. Richardson*, 403 U.S. 365, 374, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969)).

FN43. *Eisenstadt*, 405 U.S. at 454, 92 S.Ct. 1029.

Plaintiffs allege that offering family coverage to “the small pool of lesbian and gay State employees who otherwise are categorically barred from family

727 F.Supp.2d 797

(Cite as: 727 F.Supp.2d 797)

coverage because they cannot marry causes only negligible costs for the State.” <sup>FN44</sup> Plaintiffs’ complaint specifically alleges that “family coverage for lesbian and gay State employees with a same-sex life partner costs far less than the half-of-one-percent-of-health-costs figure ... attributable to unmarried domestic partners generally,” <sup>FN45</sup> and that “the minimal costs of offering family coverage to lesbian and gay State employees is offset by the resulting reduced use of AHCCCS,” <sup>FN46</sup> which is more costly on average to the State than allowing employees to share the cost of their health insurance by paying a portion of the premium for family coverage.” <sup>FN47</sup> For purposes of the motion to dismiss, these facts must be accepted as true. Thus, plaintiffs have demonstrated that denying benefits to same-sex domestic partners of State employees is not rationally, much less substantially, related to the purported rationale of cost savings.

<sup>FN44</sup>. Doc. 19 at p. 31.

<sup>FN45</sup>. *Id.*

<sup>FN46</sup>. Arizona Health Care Cost Containment System (“AHCCCS”) is Arizona’s Medicaid agency.

<sup>FN47</sup>. Doc. 19 at p. 32.

Moreover, if the State’s interest were “simply saving money, the companion goal of promoting marriage would seem to do the opposite.” <sup>FN48</sup> If Section O succeeds in promoting marriage, the State will have to provide health benefits to more people, thus increasing the State’s expenditures.

<sup>FN48</sup>. *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781, 790 (Alaska 2005).

#### b. Administrative Efficiency

The State next argues that restricting the definition of “dependent” to “spouse” in Section O results in a benefits system that is easier to administer, and that “simplifying a complex administrative program is the sort of rational basis that justifies a \*806 distinction between married and unmarried participants.” <sup>FN49</sup> Plaintiffs claim that “purported administrative convenience [cannot] justify singling out lesbian and gay employees for disfavored treatment.” <sup>FN50</sup>

<sup>FN49</sup>. Doc. 22 at p. 9.

<sup>FN50</sup>. Doc. 23 at p. 10.

The Supreme Court noted in *Frontiero v. Richardson* that “although efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency.’ ” <sup>FN51</sup> While the State claims that “the restricted definition of dependent results in a benefits system that is much easier and less expensive to administer,” the savings arise from an impermissible invidious classification which imposes costs on lesbians and gays by stripping their dependents of health care benefits, which the dependents of their heterosexual counterparts would continue to enjoy.

<sup>FN51</sup>. 411 U.S. 677, 690, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)).

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

#### c. Funds Better Spent on Heterosexual Spouses

The State contends that another rational basis for the spousal limitation in Section O is that “scarce funds for employee benefits are better spent on employees and dependents as defined in the new statute.” <sup>FN52</sup> Plaintiffs argue that the State’s rationale is discriminatory on its face, and not a rational state interest. The court concurs. The State’s justification raises “the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected,” <sup>FN53</sup> namely toward same-sex domestic partners who by law cannot become spouses. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>FN54</sup> “Romer makes clear that a simple desire to treat gays and lesbians differently is not, in and of itself, a proper justification for government actions. Discrimination against gays and lesbians, or same-sex couples, must, at the very least, serve some more substantive and lawful function.”<sup>FN55</sup>

FN52. Doc. 22 at p. 10.

FN53. *Romer*, 517 U.S. at 635, 116 S.Ct. 1620.

FN54. *Id.* (quoting *Moreno*, 413 U.S. at 534, 93 S.Ct. 2821).

FN55. *Levenson*, 587 F.3d at 932 (citing *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996)).

#### d. Interest in Favoring Marriage and Families with Children

The State also contends that limiting family coverage to “spouses” and their children is rational because it would further the “long-standing and well-recognized government interest in favoring marriage” and family coverage “would be more valuable to married persons, who are more likely to have dependent children.”<sup>FN56</sup> \*807 Plaintiffs argue that the State’s purpose to favor or promote marriage “simply restates an intent to privilege [heterosexual] employees along invidious lines.”<sup>FN57</sup> In addition, plaintiffs indicate that six out of the nine same-sex couples represented in this action are raising children together. Plaintiffs further claim that “Section O cannot be said to promote the welfare of children” when its effect is to “arbitrarily strip[ ] benefits from one group of employees with children who are no less worthy of insurance.”<sup>FN58</sup>

FN56. Doc. 22 at p. 10.

FN57. Doc. 23 at p. 12.

FN58. *Id.*

The State cites *Irizarry v. Board of Education of the City of Chicago*<sup>FN59</sup> for the proposition that the government’s interest in favoring marriage and pro-

creation is “rational, long-standing and well-recognized.”<sup>FN60</sup> However, *Irizarry* did not decide the question of whether the promotion of marriage was a rational justification for distinguishing between heterosexuals and homosexuals.<sup>FN61</sup> In any event, unlike *Irizarry*, the question before this court is whether Section O’s distinction between heterosexual and homosexual employees is rationally related to the State’s interest in promoting marriage and families with children. The court concludes that it is not.

FN59. 251 F.3d 604 (7th Cir.2001).

FN60. Doc. 22 at 10 (citing *Irizarry*, 251 F.3d at 607).

FN61. *Irizarry*, 251 F.3d at 607-08.

The Supreme Court has characterized marriage as “the most important relation in life,”<sup>FN62</sup> but construing the facts of the complaint as true it cannot be said that Section O’s distinction between heterosexual and homosexual employees is legitimately, rationally, and substantially related to promoting that interest. Certainly, that aspect of Section O which is challenged, the denial of benefits to State employee’s same-sex domestic partners, cannot promote marriage because gays and lesbians are ineligible to marry.<sup>FN63</sup> It is only by denying benefits to heterosexual domestic partners that marriage might be promoted. However, denying benefits to heterosexual partners (who can marry in order to obtain benefits) does not require denial of those benefits to homosexual partners (who cannot marry). It is possible that the State’s proffered interest in promoting or protecting marriage and procreation is a *post hoc* justification in response to litigation.<sup>FN64</sup>

FN62. *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (quoting *Maynard v. Hill*, 125 U.S. 190, 205, 8 S.Ct. 723, 31 L.Ed. 654 (1888)).

FN63. *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781, 793 (Alaska 2005).

FN64. *United States v. Virginia*, 518 U.S. 515, 532, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (“The justification must be genuine, not hypothesized or invented *post hoc* in re-

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

sponse to litigation.”)

The State's interests in cost control, administrative efficiency, and promotion of marriage are legitimate. However, construing the facts alleged in the complaint as true, the absolute denial of benefits to employees with same-sex domestic partners is not rationally and substantially related to these governmental interests. Moreover, the court cannot identify any other governmental interests that might be served by denying plaintiffs the same access to family medical coverage afforded to heterosexual State employees. <sup>FN65</sup> Accordingly, the court denies the State's motion to dismiss plaintiffs' equal protection claim.

FN65. *Levenson*, 587 F.3d at 934.

#### \*808 2. Substantive Due Process Claim

The State next moves to dismiss plaintiffs' claims under the Substantive Due Process Clause of the Fourteenth Amendment for failing to state a claim upon which relief may be granted. Plaintiffs argue that Section O burdens their fundamental right to form and sustain intimate family relationships under the substantive due process framework articulated in *Lawrence v. Texas* <sup>FN66</sup> and *Witt v. Department of the Air Force*. <sup>FN67</sup>

FN66. 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

FN67. 527 F.3d 806 (2008).

The State argues, on the other hand, that the State's refusal to fund the exercise of even a fundamental right does not amount to an interference with that right, citing *Ysursa v. Pocatello Education Association*. <sup>FN68</sup> The State further asserts that Section O in no way burdens plaintiffs' liberty interests because, assuming plaintiffs' allegations are true, their “long-term and stable relationships ... flourished years before the domestic partner benefit was first established in 2008.” <sup>FN69</sup> Finally, the State claims that “[i]t cannot be seriously contended that optional employees health insurance is deeply rooted in the Nation's history and traditions” <sup>FN70</sup> and, therefore, “is not a fundamental right protected by due process.” <sup>FN71</sup>

FN68. --- U.S. ----, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009).

FN69. *Id.*

FN70. *Id.* at 13.

FN71. Doc. 27 at 7.

[7] The State has the more persuasive argument. As an initial matter, *Ysursa* held, in the context of a free speech challenge to Idaho's ban on public-employee payroll deductions for political activities, that a State's “decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.” <sup>FN72</sup> Thus, even if the court were to find that plaintiffs' right to form and sustain intimate family relationships was indirectly burdened, it would be constitutionally permissible, under rational basis review, for the State to discontinue funding health benefits. While plaintiffs are correct that the availability of health insurance is a “valuable benefit of employment,” there is no fundamental right to such a benefit. Although it likely would put the State at a competitive hiring disadvantage, it is free to refuse its employees health benefits under the U.S. Constitution.

FN72. *Ysursa*, 129 S.Ct. at 1098 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)).

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

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

Plaintiffs' argument that *Witt* "made clear that adverse employment actions-\*809 such as Section O's elimination of valuable health benefits-constitute sufficient injury to give rise to an actionable due process claim" ignores the salient limitation in *Witt*, namely, that *Lawrence*-based claims must involve a government intrusion of some sort. Indeed, *Witt* set forth the following heightened scrutiny analysis to be used in evaluating a *Lawrence*-based substantive due process claim,

[W]hen the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.<sup>FN73</sup>

FN73. *Witt*, 527 F.3d at 819.

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

### 3. Immunity of Defendant Brewer

Finally, the State contends that "because Governor Brewer is entitled to legislative immunity for signing [H.B.] 2013 and 42 U.S.C. § 1983 does not permit claims for vicarious liability, she should be dismissed from this lawsuit."<sup>FN74</sup> Plaintiffs argue that they do not seek an order in connection with Governor Brewer's signing H.B. 2013 or an order based on vicarious liability.<sup>FN75</sup> Rather, plaintiffs seek to enjoin Governor Brewer from enforcing Section O based on her specific statutory duty in A.R.S. § 41-703(1) to oversee the Department of Administration's operations to eliminate family health insurance eligibility

for same-sex domestic partners of State employees.<sup>FN76</sup> Plaintiffs' amended complaint alleges in pertinent part:

FN74. Doc. 27 at p. 11.

FN75. Doc. 41 at pp. 7-8.

FN76. A.R.S. § 41-703(1) provides that the director of the Department of Administration shall "[b]e directly responsible to the governor for the direction, control and operation of the department."

168. Upon information and belief, Defendant Brewer has the duty and authority to ensure that the Department implements Section O, and through her own individual actions, has acted and, if not enjoined, will continue to act personally to violate Plaintiffs' right to equal protection by implementing Section O to strip Plaintiffs discriminatorily of access to family coverage for a committed same-sex life partner, thereby proximately causing Plaintiffs' injury.<sup>FN77</sup>

FN77. Doc. 19 at p. 36.

The State argues that if plaintiffs' argument is accepted, Governor Brewer "could be sued every time someone challenges the constitutionality of any statute ... based on the general theory that a state's chief executive is charged with the enforcement of all its laws."<sup>FN78</sup> Perhaps that is so, but it \*810 is hard to see why that makes a difference. Moreover, in another action pending before this court which seeks injunctive and declaratory relief based on the passage of Senate Bill 1017, Governor Brewer sought and received leave to intervene "both in her official capacity and on behalf of the State of Arizona-pursuant to her role as the highest executive voice in the State and to ensure that SB 1070 is 'faithfully executed.'" In support, Governor Brewer argued that "Article 5, Section 4 of the Arizona Constitution provides [the governor] with the duty to 'take care that the laws be faithfully executed' and to 'transact all executive business with the officers of the government....'"<sup>FN79</sup> Governor Brewer is subject to suit in her role as "the highest executive voice in the State" in this action as well.

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

FN78, Doc. 27 at p. 9.

FN79, *Friendly House v. Whiting*, 2:10-cv-01061, Doc. 51 at p. 5.

Citing *al-Kidd v. Ashcroft*,<sup>FN80</sup> plaintiffs also seek to enjoin defendant Brewer based on her status as an official with supervisory responsibility. The State argues that even if Governor Brewer is responsible for supervising the other named defendants, “a supervisor may be liable only if the supervisor is personally involved in the constitutional deprivation or there is a causal connection between the supervisor’s conduct and the constitutional violation.”<sup>FN81</sup>

FN80, 580 F.3d 949 (9th Cir.2009).

FN81, Doc. 22 at p. 15.

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

Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinate; or (4) for conduct that shows a ‘reckless or callous indifference to the rights of others.’<sup>FN82</sup>

FN82, *al-Kidd*, 580 F.3d at 965.

“Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation.”<sup>FN83</sup>

FN83, *Id.*

Plaintiffs’ amended complaint alleges that defendant Brewer “directly caused action by others to enforce and implement Section O which [she] knew, or reasonably should have known, would cause others to inflict these constitutional injuries upon Plaintiffs”; “knowingly refused to prevent anticipated action by others who are charged to implement State law and

policies under her supervision, including Section O’s elimination of family coverage for Plaintiffs”; “has caused and acquiesced in this constitutional deprivation to be effectuated by her subordinates”; and, “has engaged in conduct demonstrating a reckless and callous indifference to the constitutional rights of Plaintiffs.”<sup>FN84</sup>

FN84, Doc. 19 at p. 37

[8] Taken as true, plaintiffs have pled enough facts to state a claim of supervisory liability against defendant Brewer that is plausible on its face. “Were this case before [the court] on summary judgment, and were the facts pled in the complaint the only ones in the record, [the court’s] decision might well be different.”<sup>FN85</sup> However, the plausibility standard “does not impose a probability requirement at the pleading stage; it simply calls for enough \*811 fact to raise a reasonable expectation that discovery will reveal evidence to prove that claim.”<sup>FN86</sup>

FN85, *al-Kidd*, 580 F.3d at 977.

FN86, *Id.*

## B. Motion for Preliminary Injunction

Plaintiffs seek a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 enjoining the State from enforcing the portion of A.R.S. § 38-651(O) that restricts family health insurance to State employees with a spouse “to the extent that Section O eliminates Plaintiffs’ eligibility to qualify for State employee family health insurance covering each Plaintiff’s same-sex life partner and that partner’s qualifying children.”<sup>FN87</sup> As explained by the Supreme Court, “plaintiffs seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest.”<sup>FN88</sup>

FN87, Doc. 31 at p. 2.

FN88, *Sierra Forest Legacy v. Rev*, 577 F.3d 1015, 1021 (9th Cir.2009) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)).

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

### 1. Likelihood of Success on the Merits

[9] The State argues that plaintiffs “have no chance of success on the merits unless they can establish that there is no possible rational basis for the new definition of dependent.” <sup>FN89</sup> As discussed above, construing the facts alleged in the complaint as true, plaintiffs have demonstrated that the absolute denial of benefits to employees with same-sex domestic partners is not rationally and substantially related to the State's purported interests in cost savings, administrative efficiency, and favoring marriage and families with children.

<sup>FN89</sup>. Doc. 40 at p. 6.

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

In review, the 2008-2009 Plan Year demonstrated a balance of expenses and premiums that allowed the State to offer members comprehensive and affordable insurance coverage. The State effectively controlled the rise in health care costs through quality benefit design, administrative oversight, strategic audit planning and efficient contracts management. <sup>FN90</sup>

<sup>FN90</sup>. Doc. 32-1 at p. 8.

Plaintiffs also attach evidence showing that domestic partner coverage for both same-sex and opposite-sex partners costs the State about \$3 million in 2008-2009, in comparison to the \$625 million the State spent on health insurance for other employees. <sup>FN91</sup> Plaintiffs further provide an economist's estimate that “when employees' same-sex partners are provided access to an employer's health plan, enrollment tends to increase by 0.1% to 0.3%.” <sup>FN92</sup> The economist further states that the cost of family coverage for lesbian and gay employees comprises “between 0.06% and 0.27%” of the State's total spending

on \*812 health benefits. <sup>FN93</sup> This evidence further increases the likelihood of plaintiffs' success on the merit of their equal protection claim.

<sup>FN91</sup>. Doc. 32-2 at p. 2.

<sup>FN92</sup>. Doc. 42 at p. 3.

<sup>FN93</sup>. *Id.* at p. 5.

In opposition to the motion for a preliminary injunction, the State attaches a spreadsheet indicating that a total of 698 domestic partners participated in the State's health plan in the 2008-2009 plan year, and 893 domestic partners participated in the 2009-2010 plan year. The spreadsheet also lists the total of \$4,076,822 claims for domestic partners in 2008-2009, and \$5,490,660 for domestic partner claims in the 2009-2010 plan year to date. <sup>FN94</sup> However, no information is provided as to the number of same-sex domestic partners participating in the State health plan, nor the total claims of same-sex domestic partners.

<sup>FN94</sup>. It is unclear whether these figures reflect premiums paid by employees.

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

### 2. Irreparable Harm

[10] In *Winter*, the Supreme Court “clarified that preliminary injunctive relief is available only if plaintiffs ‘demonstrate that irreparable injury is likely in the absence of an injunction,’ ” not merely possible. <sup>FN95</sup> Plaintiffs have demonstrated several kinds of irreparable harm. First, because plaintiffs have shown a likelihood of success on the merits of their equal protection claim, plaintiffs have demonstrated the harm of unconstitutional discrimination based on sexual orientation if injunctive relief is not granted. The Ninth Circuit has stated that “an alleged constitutional infringement will alone constitute irreparable harm.” <sup>FN96</sup> “Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.” <sup>FN97</sup>

727 F.Supp.2d 797

(Cite as: 727 F.Supp.2d 797)

FN95. *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir.2009) (quoting *Winter*, 129 S.Ct. at 374).

FN96. *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir.1997) (quoting *Assoc. General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir.1991)).

FN97. *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir.2008).

Plaintiffs have also demonstrated that they are likely to suffer extreme anxiety and stress in the absence of an injunction enjoining the State from enforcing Section O to eliminate family health insurance eligibility for lesbian and gay State employees. Like the loss of one's job, the loss of one's job benefits "does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages." <sup>FN98</sup> Plaintiffs' declarations document that some of them might not be able to secure private health coverage for their domestic partners who have serious pre-existing health conditions and have been refused private coverage in the past. <sup>FN99</sup> Several plaintiffs' domestic partners have medical conditions requiring daily medication and consistent treatment that if left untreated will likely lead to irreversible health consequences. <sup>FN100</sup> In addition, plaintiffs' **813** declarations substantiate the stress of incurring greater financial burdens to provide private insurance coverage for their domestic partners and their children. <sup>FN101</sup>

FN98. *Id.*

FN99. See, e.g., Doc. 31-1 at pp. 2-4; Doc. 31-4 at p. 3; Doc. 31-5 at pp. 2-3; Doc. 31-6 at p. 3, Doc. 31-9 at p. 3.

FN100. See, e.g., Doc. 31-1; Doc. 31-4; Doc. 31-5; Doc. 31-6.

FN101. See, e.g., Doc. 31-3 at p. 4; Doc. 31-4 at p. 3.

Plaintiffs further document the financial hardship that losing family coverage through the State health

plan will impose on their families. <sup>FN102</sup> While "[i]t is true that economic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award," <sup>FN103</sup> all plaintiffs have demonstrated other harms than economic injury, including the stigma of discriminatory treatment and the harm of receiving unequal compensation for equal work.

FN102. See, e.g., Doc. 31-3 at p. 4; Doc. 31-4 at p. 3; Doc. 31-5 at p. 3; Doc. 31-7 at p. 3; Doc. 31-8 at p. 3; Doc. 31-9 at p. 4.

FN103. *Rent-A-Center, Inc. v. Canyon Television*, 944 F.2d 597, 603 (9th Cir.1991).

The State argues that plaintiffs will not suffer irreparable harm because they will likely be able to obtain coverage for their domestic partners and their children either through private insurance coverage, the Arizona Medicaid agency, or through the employers of their domestic partners. Even assuming that is true, the Ninth Circuit has recognized there is "an inherent inequality" in allowing some employees to participate fully in the State's health plan, while expecting other employees to rely on other sources, such as private insurance or Medicaid. "This 'back of the bus' treatment relegates Plaintiffs to a second-class status by imposing inferior workplace treatment on them, inflicting serious constitutional and dignitary harms that after-the-fact damages cannot adequately redress." <sup>FN104</sup> For all of the above reasons, plaintiffs have demonstrated the likelihood of irreparable harm in the absence of injunctive relief.

FN104. Doc. 31 at p. 15 (quoting *In re Gollinski*, 587 F.3d 956, 960 (9th Cir.2009))

### 3. Balance of Equities

"To qualify for injunctive relief, the plaintiffs must establish that 'the balance of equities tips in [their] favor.'" <sup>FN105</sup> "In assessing whether the plaintiffs have met this burden, the district court has a 'duty ... to balance the interests of all parties and weigh the damage to each.'" <sup>FN106</sup> Plaintiffs argue that the "extreme hardship to plaintiffs of foregoing family insurance, or paying significantly more for an inferior alternative, greatly outweighs the negligible cost to [the State] of maintaining the status quo." <sup>FN107</sup> Plaintiffs further argue that continuing plaintiffs' coverage in a group health plan that the Department of Admin-

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

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

FN105. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir.2009) (quoting *Winter*, 129 S.Ct. at 374)

FN106. *Id.* (citing *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir.1980)).

FN107. Doc. 31 at p. 16.

The State argues that the balance of equities favors the State, contending that plaintiffs' out-of-pocket expenses and private health insurance costs would be minimal compared to the costs of continuing domestic partner coverage. The State, however, has not provided any evidence \*814 showing the costs to the State of providing coverage for same-sex domestic partners who meet the criteria set forth in Ariz. Admin. Code § R2-5-101. To the contrary, although the State suggests entry of a preliminary injunction will worsen the State's budget shortfall, the record indicates that the impact of an injunction on the State's budget shortfall would be minimal, particularly in light of the unrefuted estimate that the cost of family coverage for lesbian and gay employees comprises "between 0.06% and 0.27%" of the State's total spending on health benefits.<sup>FN108</sup>

FN108. Doc. 42 at p. 5.

The State further argues that granting preliminary injunctive relief and awarding plaintiffs' domestic partner benefits, even temporarily, would "cause harm to other constituents of State services," suggesting that continuing plaintiffs' domestic partner benefits "would cause potential budget cuts for education, indigent health care, public safety, social programs, or perhaps layoffs for some more State employees like the plaintiffs, in order to pay for the domestic partner coverage."<sup>FN109</sup> The State's argument, which is not supported by any evidence, is speculative at best, and discriminatory at worst. Contrary to the State's suggestion, it is not equitable to lay the burden of the

State's budgetary shortfall on homosexual employees, any more than on any other distinct class, such as employees with green eyes or red hair. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."<sup>FN110</sup> Based on the record, the court concludes that the balance of equities tips in favor of plaintiffs.

FN109. Doc. 40 at p. 14.

FN110. *Romer*, 517 U.S. at 633, 116 S.Ct. 1620 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)).

#### 4. Public Interest

"The public interest analysis for the issuance of a preliminary injunction requires us to consider 'whether there exists some critical public interest that would be injured by the grant of preliminary relief.' "<sup>FN111</sup> The State contends that the public's interest in reducing the cost of State employees' health coverage would be injured by granting injunctive relief. However, as discussed above, the record demonstrates that the impact of injunctive relief on the Arizona's total expenditures for health coverage for State employees would be minimal. Accordingly, the State's budgetary considerations do not "constitute a critical public interest that would be injured by the grant of preliminary relief."<sup>FN112</sup>

FN111. *Independent Living Center of Southern California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir.2009) (quoting *Hybritech Inc. v. Abbott Labs.*, 849 F.2d 1446, 1458 (Fed.Cir.1988)).

FN112. *Id.*

On the other hand, it would not be in the public's interest to allow the State to violate the plaintiffs' rights to equal protection when there are no adequate remedies to compensate plaintiffs for the irreparable harm caused by such violation.<sup>FN113</sup> The public interest weighs in favor of injunctive relief. Because plaintiffs have demonstrated that they are likely to succeed on the merits of their equal protection claim, that they face a significant threat of irreparable injury, and that the balance of equities and the public interest favor them, the court will grant the motion for preliminary injunction.

727 F.Supp.2d 797  
(Cite as: 727 F.Supp.2d 797)

FN113. California Pharmacists Ass'n, 563 F.3d at 852-853.

**\*815 V. CONCLUSION**

For the reasons set forth above, the State's motion to dismiss at docket 22 is **GRANTED** in part and **DENIED** in part as follows: (1) the motion is **DENIED** with respect to plaintiffs' equal protection claim; (2) the motion is **GRANTED** with respect to plaintiffs' substantive due process claim; and (3) the motion is **DENIED** as to defendant Brewer's claim of immunity.

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

1) Defendants are enjoined from enforcing A.R.S. § 38-651(O) to eliminate family insurance eligibility for lesbian and gay State employees, and their domestic partners and domestic partners' children who satisfy the criteria set forth in Ariz. Admin. Code § R2-5-101;

2) Defendants are required to make available family health insurance coverage for lesbian and gay State employees, including plaintiffs, who satisfy the relevant eligibility criteria set forth in Ariz. Admin. Code § R2-5-101 to the same extent such benefits are made available to married State employees;

3) The preliminary injunction shall take effect within ten (10) business days and shall remain in effect pending trial in this action or further order of the court.

D.Ariz.,2010.  
Collins v. Brewer  
727 F.Supp.2d 797

END OF DOCUMENT