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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Tracy Collins, et al.,

Plaintiffs,

v.

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

Defendants.

No. CV09-2402-PHX-JWS

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Oral Argument Requested

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I. INTRODUCTION

In their Motion to Dismiss ("Motion"), Defendants Governor Janice K. Brewer, Interim Director David Raber, and Director of Human Resources Kathy Peckardt (collectively, "Defendants") fundamentally mischaracterize Plaintiffs' suit and fail to carry their burden. Defendants misrepresent Plaintiffs' constitutional claims as a request that the Court sit as a "superlegislature" and evaluate Section O based on "policy" arguments. (Motion, 2:16, 6:2.) Plaintiffs' claims are a legal challenge to a law that Defendants cannot defend for what it is—a deliberate decision to provide lower compensation to lesbian and gay State employees than to their heterosexual co-workers simply because of the employees' sexual orientation and sex. Defendants try to paint family health benefits as an "optional subsidy" the State may offer or withhold from its workers willy-nilly. But this case is not about whether the State is free to eliminate payment for certain benefits for *all* its workers, but whether it may do so for only some of them, in a way that discriminates in violation of the federal Constitution.

Offering no answer to Plaintiffs' claims of sexual orientation and sex discrimination, Defendants argue instead that Section O merely distinguishes between married and unmarried employees. But as both federal and state courts have recognized, and logic underscores, a system for providing valuable employee benefits that offers one group of unmarried employees (heterosexuals) a way to qualify using a particular measure of family commitment (marriage) and denies access entirely for the other group of unmarried employees (gay people) by denying them any way to show adequate family commitment, cannot be said to treat all unmarried employees equally. Rather such a system favors one group and excludes the other. This distinction between these groups, drawn along invidious lines of sexual orientation and sex, should be subjected to at least heightened scrutiny. But here, the State's discrimination against its lesbian and gay employees cannot survive even rational basis review because it fails to advance any legitimate reason for the government to treat one group of people worse than the other.

Defendants likewise offer no answer to Plaintiffs' charge that Section O—which will impose extreme financial, emotional and health-related hardships on Plaintiffs—wrongfully burdens the due process right recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), of every American adult freely to form and maintain an intimate family relationship with a same-sex partner, as with a different-sex partner. Boldly defying the principles emphasized in *Lawrence*, Section O selects benefits criteria that dock the compensation of lesbian and gay State workers who are exercising their constitutional liberty by building family life with a same-sex life partner. At the same time, the State provides a means by which its workers who are pursuing the same dreams of family life, but with a different-sex life partner, can obtain greater compensation for the same work. Just as the Constitution would not permit states to have two different pay scales for gay and heterosexual employees, likewise they may not offer or withhold family health insurance using criteria that favors or penalizes their employees according to those employees' sexual orientation and sex.

II. ARGUMENT

A. The Standard Of Review.

The Court's review of the Amended Complaint must take all allegations of material fact as true—"even if doubtful in fact"—and construe them in the light most favorable to Plaintiffs. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A dismissal for failure to state a claim must either be premised on "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Plaintiffs' claims must meet a facial plausibility standard, which "is not akin to a 'probability requirement.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), quoting *Twombly*, 550 U.S. at 556. A complaint meets this standard if it allows a reasonable inference that the defendants are liable (*Iqbal*, 129 S. Ct. at 1949), or—as is appropriate in a suit such as this for prospective declaratory and injunctive relief—that defendants will be liable if they enforce an unconstitutional law.[1]

[1] Counsel for the parties have agreed informally to cooperate in seeking a merits

Plaintiffs have pleaded their claims in ample detail to show how Defendants have violated federal constitutional standards and, accordingly, why Defendants' motion fails.

B. Section O Creates Two Classes Of State Employees, Denying Plaintiffs Equal Protection Based On Their Sexual Orientation And Sex.

Defendants are silent regarding Section O's classification of Plaintiffs for unequal treatment based on sexual orientation and sex, perhaps because, as described further below, such classifications should receive at least heightened scrutiny under federal law. Defendants instead rely entirely on the argument that Section O classifies Plaintiffs for differential treatment based *only* on marital status. But this mischaracterizes Section O's purpose and actual operation. The Court's proper identification of the classification created by Section O is a critical "first step" in the analysis. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589 (9th Cir. 2008). Section O deliberately classifies state employees into two groups—heterosexual employees who are offered a way to qualify for family health insurance (by marrying), and lesbian and gay State employees who are deprived of any way to qualify for those benefits. Section O thus imposes a harsh and explicit disability on lesbian and gay employees that is not equally imposed on their heterosexual co-workers. By intention, design and result, Section O treats employees differently based on their sexual orientation and thus is not a neutral policy that treats all unmarried employees equally. Instead, by strictly barring unmarried lesbians and gay men from obtaining family benefits, while providing a path of access for unmarried heterosexuals, Section O expressly creates two classes of unmarried State employees and discriminates against the unmarried gay ones. Every state appellate court to examine the issue since 1998 has reached the same conclusion. *See Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781, 788 (Alaska 2005) (holding that "the proper comparison is between

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determination in this case before Defendants' intended enforcement of Section O as of October 1, 2010. Plaintiffs accordingly have streamlined the case through an Amended Complaint ("Compl.") that seeks only declaratory and injunctive relief. Plaintiffs reserve the right to seek leave to reinstate their damages claims if Plaintiffs subsequently discover that a merits determination may not be accomplished before October 1, 2010, which would lead to Plaintiffs incurring damages.

same-sex couples and opposite-sex couples" because a restriction requiring marriage does not "treat same-sex and opposite-sex couples the same," where heterosexuals "have the opportunity to obtain these benefits" and gay people do not); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 452 (Mont. 2004) (holding that lower court erred in using marital status comparison and comparing employees with a same-sex partner to those with a different-sex partner instead); and *Tanner,* 971 P.2d at 525.

The restriction of partner benefits to married employees "'cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation.'" *In the matter of Brad Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (Reinhardt, J., decision following EDR proceeding) (quoting *In re Marriage Cases*, 183 P.3d 384, 440 (Cal. 2008)). "'A statute that limits [benefits] to a union of persons of opposite sexes, thereby placing [those benefits] outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation.'" *Id.* at 1147 (quoting *Marriage Cases*, 183 P.3d at 440 (brackets in the original)). Defendants claim that Section O treats all unmarried employees equally, but this "reasoning misses the point." *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 447-48 (Or. Ct. App. 1998). A law does not provide equal treatment by making a benefit "available on terms that, for gay and lesbian couples, are a legal impossibility." *Id*.[2]

C. Sexual Orientation Classifications Are Suspect And Should Be Strictly Scrutinized. At A Minimum, Section O's Classification Of Plaintiffs Based On Their Sex Requires Heightened Scrutiny.

Defendants do not dispute that a law classifying Plaintiffs for adverse treatment based on their sexual orientation and sex must be supported by an adequately tailored compelling, or at least important, governmental interest, yet they fail to offer anything other than purportedly rational reasons for enforcing the law (Motion, 8:4 - 10:10). A law that discriminates based on sexual orientation must be strictly scrutinized because lesbians

[2] *Cf. Erie County Retirees Assn. v. County of Erie*, 220 F.3d 193, 215 (3rd Cir. 2000) (employers cannot discriminate against employees under Age Discrimination in Employment Act based on proxies for age, such as Medicare eligibility).

and gay men have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (internal quotation marks omitted).[3]

Lesbians and gay men indisputably have experienced a history of purposeful unequal treatment, based on irrational prejudice about a personal characteristic that does not indicate their capabilities. *See Murgia*, 427 U.S. at 313. As the Ninth Circuit has recognized for at least two decades, "homosexuals have suffered a history of discrimination." *High Tech Gays*, 895 F.2d at 573. *See also Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 954 (9th Cir. 2009) (observing that defendants would be "hard pressed to deny that gays and lesbians have experienced discrimination in the past in light of the Ninth Circuit's ruling in *High Tech Gays*"); *Watkins v. United States Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring) ("Discrimination against homosexuals has been pervasive in both the public and private sectors."); *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., and Marshall, J., dissenting from denial of certiorari) ("homosexuals have historically been the object of pernicious and sustained hostility").

Sexual orientation does not bear upon on one's ability to contribute to society as a productive employee, as underscored by Arizona's Executive Order No. 2003-22 prohibiting discrimination against lesbian and gay State employees, and presidential Executive Order No. 13087. This long has been recognized by the federal courts. *See Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("Sexual orientation plainly has no

[3] The Supreme Court has not yet determined the appropriate level of scrutiny for sexual orientation-based classifications. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (law failed even rational basis, making it unnecessary to decide whether higher level of review applies). *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990), previously held that classifying lesbians and gay men for adverse treatment is not subject to heightened scrutiny "because homosexual conduct can … be criminalized." Because the authority for that ruling was repudiated in *Lawrence*, 539 U.S. at 578 ("*Bowers* [*v. Hardwick*, 478 U.S. 186 (1986)] was not correct when it was decided, and it is not correct today"), *High Tech Gays* can no longer be considered sound.

relevance to a person's ability to perform or contribute to society.") (internal quotation marks omitted); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1374 (N.D. Cal. 1987) ("The American Psychological Association has declared that 'homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'").

Section O's targeting of lesbians and gay men by stripping Plaintiffs' partner health benefits is a stark illustration of the political vulnerability of lesbians and gay men. Such vulnerability is sadly commonplace for gay people in America, as recent years have seen both legislative and ballot measure targeting of this minority group for wrongful elimination of basic rights and family protections that heterosexuals take for granted. *See, e.g.*, *Romer*, 517 U.S. at 635-36 (striking down state referendum designed to prevent any level of Colorado government from protecting gay people against discrimination); *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (invalidating Oklahoma statute that aimed to nullify adoptions of children by lesbian and gay couples). Arizona is one of 41 states nationally that expressly deny same-sex couples the freedom to marry through state constitutional amendment or statute (Human Rights Campaign, *Statewide Marriage Prohibitions*, 2009 (*available at* http://www.hrc.org/documents/marriage_prohibitions_2009.pdf), and the federal government refuses to respect the fact that many gay people are validly married under state or another country's law, 1 U.S.C. § 7. Lesbians and gay men are not protected against discrimination in public accommodations or private employment in Arizona, or under federal statute, and by many of these measures suffer greater legal disadvantages than did women, for example, when sex-based classifications were held to be quasi-suspect. At that time, Title VII and the Equal Pay Act forbade sex discrimination, Congress already had approved and submitted to the states for ratification a proposed federal Equal Rights Amendment to the U.S. Constitution, and, the U.S. Supreme Court had observed that "the position of women in America ha[d] improved markedly in recent decades." *Frontiero v. Richardson*, 411 U.S. 677, 685, 687-88 (1973). Moreover, as women and racial minorities have achieved

greater protection against discrimination through the political process, the scrutiny of sex- and race-based classifications has become no less searching.

Although the federal equal protection doctrine has never held immutability of a personal trait to be a prerequisite for determining that a classification based on that trait warrants strict scrutiny,[4] the Ninth Circuit already has found, and re-affirmed, that sexual orientation is immutable—at least as that term is used in equal protection cases—an understanding that conforms with a consensus among major professional social and behavioral health organizations. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (same); *Watkins*, 875 F.2d at 725 (Norris, J., concurring) ("it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation") (emphasis in original).[5]

At a minimum, Section O should be subjected to heightened scrutiny because it discriminates on its face against Plaintiffs based on each one's sex in relation to the sex of his or her life partner. Section O's restriction of family benefits to employees in different-sex relationships who may marry means, for example, that if Plaintiff Tracy Collins were a man, she could secure health insurance for her beloved life partner, Diana Forrest, by marrying Diana. Simply because Tracy is a woman, however, she is denied that opportunity. *See Levenson*, 560 F.3d at 1147 (holding that denial of health benefits to

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

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

man in same-sex relationship, where he could qualify for them if he were a woman and could marry his partner, is "sex-based"); *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). Classifications based on sex require heightened scrutiny, *United States v. Virginia*, 518 U.S. 515, 524 (1996), and Defendants have not even attempted to offer a single state interest of even arguably sufficient importance or close tailoring to satisfy this standard.

D. Even Under Rational Basis Review, Section O's Class-Based Discrimination Requires A More Searching Examination, And Cannot Satisfy Even That Deferential Review.

Ignoring the classifications created by Section O, Defendants claim the law creates merely an economic or regulatory distinction and argue that this Court should apply only a deferential review. (Motion, 7:9-10.) But rational basis analysis is not "toothless," and classifications that target a disfavored minority group require a more searching review. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *Kelo v. City of New London*, 545 U.S. 469, 490-91 (2005) (Kennedy, J., concurring) (distinguishing between the rational basis test applied to "economic regulation" and the test applied to classifications discriminating against a particular group of people). Defendants do not dispute that Section O intentionally eliminates the possibility of health benefits for lesbian and gay State employees with a same-sex life partner, instead offering reasons why the legislature may have wished to accomplish that. Under the meaningful rational basis review appropriate here, the Court must consider whether this desire to compensate lesbian and gay State employees *un*equally for working equally is a legitimate goal. The unsound nature of Defendants' attempted justifications, discussed below, demonstrates that it is not.

Defendants claim that cost-savings justify Section's O differential treatment of lesbian and gay State employees (8:4-8). But federal courts consistently have rejected the idea that a state may "protect the public fisc by drawing an invidious distinction between classes of its citizens." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263

(1974). *See also Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (holding that a state may not safeguard the fiscal integrity of its programs by drawing discriminatory lines between groups of its citizens), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (same). Accordingly, Defendants must "do more than show" that denying same-sex partner health benefits "saves money," *Shapiro*, 394 U.S. at 633, because their argument that the savings the State accrues justifies its discrimination against lesbian and gay employees does nothing "more than justify [their] classification with a concise expression of an intention to discriminate," *Plyler v. Doe*, 457 U.S. 202, 227 (1982). In other words, this purported state interest is inadequate on its face.[6]

Nor does purported administrative convenience justify singling out lesbian and gay employees for disfavored treatment. While "efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency.'" *Frontiero*, 411 U.S. at 690 (holding that administrative convenience could not justify requirement that only female service members must show dependency of a spouse to receive benefits, and not male service members), quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). In fact, the Bill of Rights was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials." *Stanley*, 405 U.S. at 656. *See also Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (reducing probate courts' workload through mandatory preference for men as administrators of

[6] The cost-saving rationale also is implausible given that any savings would be negligible, if not "illusory." *See Memorial Hospital*, 415 U.S. at 265 (recognizing that delayed medical care can cause a patient needlessly to deteriorate, requiring more expensive care in the future and possibly causing disability, which can strain a state's social services). Defendants misleadingly claim that Plaintiffs "admit" that eliminating partner health benefits for lesbian and gay employees will save the State "millions of dollars." (Motion, 5:3-4.) In fact, however, the Amended Complaint clearly avers that same-sex couples are a "small fraction" of the approximately 800 unmarried employees whose benefits reportedly cumulatively cost $3.3 million (or 0.033% of the total state budget), meaning that the cost of family benefits for lesbian and gay State employees is only a small fraction of that amount. And Plaintiffs certainly have not conceded that protecting the public fisc is "a legitimate goal" that would permit the State to discriminate against one group of employees, as Defendants imply. (Motion, 5:6-7.)

estates over equally qualified women is not "consistent with the command of the Equal Protection Clause"); *Shapiro*, 394 U.S. at 636 ("The argument that the waiting period [for welfare benefits] serves as an administratively efficient rule of thumb for determining residency similarly will not withstand scrutiny.").

This is so even where "making a less-clearly-defined (compared to spouses) category of persons eligible for employment benefits would create administrative burdens." *Alaska*, 122 P.3d at 791. *See also Carrington v. Rash*, 380 U.S. 89, 96 (1965) (concluding that 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).

Defendants' authorities do not support a different result. *Califano v. Jobst*, 434 U.S. 47 (1977), addressing allocation of Social Security funds, speaks about the power of Congress to assume that children who are adults, married, non-disabled or non-students may as a group be less likely to need support, but expressly qualifies this ruling with the caveat that "a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons." *Id.* at 53.

Defendants' reference to *Irizarry v. Board of Education*, 251 F.3d 604 (7th Cir. 2001), is still more puzzling. *Irizarry* involved a challenge to a public school system's health benefits program that offered same-sex partner coverage to its gay employees because they could not marry. *Id.* at 606. The court rejected plaintiff's claim that unmarried heterosexual employees should be entitled to the same domestic partner benefits—a claim that no plaintiff raises here—and held that the school board had valid grounds for declining to inquire into the nature of the domestic relationships of *heterosexual* employees "who can if they wish marry." *Id.* at 610. In fact, the court found the school board's policy, requiring employees with a same-sex life partner to satisfy eligibility criteria similar to those in Ariz. Admin. Code § R2-5-101, satisfied rational basis review. *Id.* at 606, 610-11.

Finally, Defendants offer several marriage-related, purported state interests

ostensibly furthered by Section O: (i) the funds are "better spent" on spouses; (ii) the benefit might be most valuable to married persons who supposedly are more likely to have dependent children; and (iii) Section O furthers the government's interest in "favoring marriage." (Motion, 10:4-10.) The first ground is a restatement of the intent to discriminate, not a valid state interest. *See Romer*, 517 U.S. at 633. Professing a belief that funds are "better spent" on heterosexuals rather than gay people expresses an overt desire to privilege one class over another, and offers the sort of moral judgment that offends equal protection guarantees. *Id.* at 634.

To the extent that Defendants' second proffered interest professes to protect children—who do better when both they and their parents have access to health care, and are spared the anxiety and financial hardship that untreated illness creates—such a purpose is so "discontinuous" with Section O's stripping of any way for lesbian and gay State employees to qualify for insurance for their partners and their partners' children as to fail any form of review. *See id*. at 632. Heterosexual employees' children are not benefited in any way by the elimination of health insurance for lesbian and gay employees' children. Nor are family health benefits limited to those heterosexuals who have or intend to have children. Section O cannot be said to promote the welfare of children because it accomplishes the opposite, by arbitrarily stripping benefits from one group of employees with children who are no less worthy of insurance.

Finally, Defendants' purported interest in "favoring" marriage cannot justify Section O. Because marriage is limited to heterosexual couples under Arizona law, a wish to "favor" that group of employees simply restates an intent to privilege those employees along invidious lines. If Defendants intend to suggest that Section O *promotes* marriage, they offer no explanation of how Section O's elimination of a way for lesbian and gay couples to obtain insurance is even rationally related to that goal. There is no indication that denying gay employees family benefits will induce heterosexuals to marry each other. *See Alaska*, 122 P.3d at 793. Nor is there any indication that Plaintiffs, once denied benefits, will "seek opposite-sex partners with an intention of marrying them," and any

such sham marriages "would not seem to advance any valid reasons for promoting marriage." *Id.*[7] Defendants have failed to offer even a single permissible rational basis for Section O, and thus the law thus fails any level of constitutional review.

E. Because Section O Burdens Plaintiffs' Freedom To Form And Sustain Intimate Family Relationships, It Is Subject To Heighted Scrutiny, Which It Fails To Meet.

Contrary to Defendants' suggestion, Plaintiffs' substantive due process claim does not assert that there is a fundamental right to health care or health insurance benefits, but rather challenges the burden their government employer is imposing upon each Plaintiff's liberty interest in engaging freely in "private intimate conduct and [a] family relationship" with a same-sex life partner, as addressed in *Lawrence.* (Compl. 42:4-5). *See Lawrence*, 539 U.S. at 578 (finding that the federal constitution protects the choice to have an intimate relationship with a same-sex partner "without intervention of the government").

The Ninth Circuit has determined the standard of review that applies "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*," though remarkably, Defendants do not even cite this authority. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). Such an intrusion is not appropriately examined under the rational basis review Defendants would have the Court apply. *Id.* at 816 ("We cannot reconcile what the Supreme Court did in *Lawrence* with the minimal protections afforded by traditional rational basis review."). Rather, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Id.* at 819. Abstaining from any argument that Section O meets such heightened review, Defendants simply assert that

[7] *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. App. 1998) casts no light on this issue. Defendants cite *Bailey* as upholding a revocation of partner benefits because it "saved on the costs of administering a benefits package" (Motion, 10:21-23). Yet *Bailey* actually reaffirmed *Shapiro's* ruling that a state may not increase cost savings by drawing invidious lines between classes of citizens (*id.* at 188), and upheld the revocation based on a purported interest in favoring marriage. But the decision failed to examine how excluding same-sex couples from partner health benefits could be seen to advance such an interest (*id.* at 188-89), and conceded it was exercising only a very "limited review."

Section O does not "affect any relationship" or "place any burdens upon" Plaintiffs. (Compl. 12:13-15). Taking Plaintiffs' well-pleaded facts as true, the Amended Complaint provides copious details establishing how Section O will impose significant hardship, distress and burden on Plaintiffs' intimate relationships. (*See, e.g.*, Compl., 3:8-22, 13:1 - 30:23.) Defendants seem to argue that *Lawrence's* protections apply only to criminal punishment or the assessment of a financial penalty. (Motion, 12:18-19.) But, *Witt* made clear that adverse employment actions—such as Section O's elimination of valuable health benefits—constitute sufficient injury to give rise to an actionable due process claim. *Witt*, 527 F.3d at 812 (concluding that suspension from work resulting in loss of pay and points toward promotion and retirement is sufficient grounds for *Lawrence*-based claim). Defendants suggest that Section O does not burden Plaintiffs' relationships because Plaintiffs have succeeded in forming those committed, long-term relationships despite the lack of family benefits in the past. But Defendants have cited no authority, and Plaintiffs are aware of none, that would suggest a relationship is only burdened when it is prevented from forming or fails to last long-term, and by that measure even the plaintiffs in *Lawrence* could not have stated a substantive due process claim.

Defendants attempt to cast partner health benefits for lesbian and gay employees as a "subsidized" and "optional" benefit. (Motion, 12:19.) But the "availability of health insurance for oneself and one's family is a valuable benefit of employment," *In re Golinski*, 2009 U.S. App. LEXIS 25778, *1 (9th Cir. 2009) (Kozinski, C.J., decision following EDR proceeding), provided in exchange for one's work as opposed to being a free subsidy and, while it may be optional for an employer to provide such benefits to any employees, that does not mean the state has the "option" to adopt criteria that discriminatorily deny some employees any ability to qualify for those benefits. *See Alaska*, 122 P.3d at 783 (denying same-sex partner benefits requires court to determine whether government may "pay public employees who are in committed domestic relationships with same-sex partners less in terms of employee benefits than their co-

workers who are married").[8]

F. As The State's Chief Executive Officer, Governor Brewer Is A Proper Party In This Suit To Enjoin Her From Implementing An Unconstitutional Law.

Defendants correctly state that Defendant Brewer's act of signing Section O into law is entitled to immunity. (Motion at 14:11-12.) Plaintiffs do not base their claims against Defendant Brewer on her having signed Section O into law, but on her implementation of the law as required by statute. *See* A.R.S. § 41-101(A)(1); and A.R.S. § 41-703(1) (the Department of Administration and Personnel Board Director is "directly responsible to the governor for the direction, control and operation of the department"). The governor is the proper party to a lawsuit challenging the constitutionality of a statute that the governor is tasked to implement. *Robinson v. Kansas*, 295 F.3d 1183, 1192 n.13 (10th Cir. 2002) (holding that "the governor and the named officials of the Board of Education are charged with enforcing [the state's school financing scheme]" and are proper parties to a lawsuit challenging the statute's constitutionality); *Bradley v. Milliken*, 433 F.2d 897, 905 (6th Cir. 1970) (holding that the governor was the proper party when challenging an act of the legislature that suspended a school board's integration plan).

If the Governor's statutory role in implementing Section O does not establish her liability as a matter of law, as Plaintiffs believe it does, factual disputes about the Governor's conduct relative to her statutory duties cannot be resolved against Plaintiffs on this motion to dismiss. In *State Employees Bargaining Agent Coalition v. Rowland*, the Second Circuit considered a case that, like the one before this Court, concerned employee

[8] Defendants' cited authority supports this conclusion. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), explains the principle that the government need not subsidize even a fundamental right: "although government may not place obstacles in the path of a [person's] exercise of … freedom of [speech], it need not remove those not of its own creation." *Id.* at 549-50 (internal quotation marks omitted). Section O is unquestionably a barrier of the government's creation. Unlike *Regan* and *Ysursa v. Pocatello Education Association*, 129 S. Ct. 1093 (2009), which involved a subsidy of payroll deductions for a third party *union*, the health benefits here are compensation for work performed. The government does not "subsidize" an employee in an optional manner by providing family benefits as a component of the employee's compensation and the government cannot adopt a scheme that uses constitutionally impermissible grounds to deny some employees the ability provided others to get that form of compensation.

benefits and a budget crisis. 494 F.3d 71 (2d Cir. 2007). In that case, the plaintiffs claimed that they had been terminated from their state employment as retaliation for being members of a union and "sought reinstatement to their previous positions, or to other positions in the state workforce, and an array of other forms of relief including a prohibition against retaliating against plaintiffs." *Id.* at 76. The Governor contended that approximately 3,000 unionized employees had been terminated in response to the state's budget crisis. *Id.* at 78. Like Defendant Brewer, Governor Rowland moved for dismissal on the grounds that his actions were legislative as they were a part of the budgeting process. *Id.* at 76. The Second Circuit, however, upheld the district court's holding that "discovery [wa]s necessary to assess whether legislative immunity may bar any of plaintiffs' claims for reinstatement to their previous positions." *Id.* Where there remains a factual question with regard to the governor's responsibility in implementing a challenged statute, the matter cannot be resolved through a motion to dismiss.

Governor Brewer acts as the chief executive officer of the State, Ariz. Const. art. 5, § 4, and thus it is her responsibility to implement the law challenged by this action. Plaintiffs have specifically alleged that, consistent with her constitutional and statutory duties, Defendant Brewer is "charged to supervise the official conduct of all executive and ministerial officers, and to ensure that all offices are filled and all duties performed." (Compl. 6:10-12.) Plaintiffs have also asserted that "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 committed same-sex life partner, thereby proximately causing Plaintiffs' injury." (*Id.* at 36:22-27.)

Defendants correctly state the law that vicarious liability does not apply to Section 1983 actions. (*Id.* at 15:9-10.) However, a claim for requiring those under her supervision to deprive certain State employees of benefits based on the sexual orientation or sex of those employees does not invoke a vicarious liability theory. Rather, by

requiring that those under her supervision implement Section O, Defendant Brewer is personally involved in the deprivation of Plaintiffs' constitutional rights, just as the Connecticut governor was personally involved in dismissing union employees, *Rowland*, 494 F.3d 71, and the Kansas governor was personally involved in implementing a school funding scheme, *Robinson*, 295 F.3d 1183, and the Michigan governor was personally involved in implementing an anti-integration law, *Bradle*, 433 F.2d 897. *See also al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009) (stating test for supervisory liability).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss.

Dated: February 11, 2010

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I hereby certify that on February 11, 2010 I electronically transmitted the foregoing document to the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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