No. 12-23

IN THE

Supreme Court of the United States

JANICE K. BREWER, in her official capacity as Governor of the State of Arizona; SCOTT SMITH, in his official capacity as Director of the Arizona Department of Administration; KATHY PECKARDT, in her official capacity as Assistant Director of Human Resources for the Arizona Department of Administration,

PETITIONERS,

v.

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

RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any conflict among the federal circuits or state courts of last resort, this Court should review an interim order arising from an interlocutory appeal of a preliminary injunction, which merely preserves the status quo pending the district court's final decision on the merits by restraining a single state from dismantling existing domestic partner health coverage for a small number of lesbian and gay state employees.

PARTIES TO THE PROCEEDING

The Petition for Writ of Certiorari (the "Petition" or "Pet.") lists all parties to this proceeding. Pet. ii.

Petitioners Arizona Governor Janice K. Brewer, Director of Arizona Department of Administration Scott Smith, and Assistant Director of Human Resources for the Arizona Department of Administration Kathy Peckardt, who are all parties in their official capacities only (collectively, "Defendants") mistakenly describe Judith McDaniel, a Plaintiff-Appellee below, as no longer employed by the State of Arizona (the "State"). Ms. McDaniel remains a State employee, but her claims became moot after she obtained an additional job that afforded health care coverage to her domestic partner. District Court Docket ("Dist. Ct. Dkt.") No. 54. Ms. McDaniel was dismissed without prejudice in the District Court, *id.* at No. 55, but remained listed in the caption for all Ninth Circuit Court of Appeals proceedings because Defendants noticed their appeal before the District Court entered its order dismissing Ms. McDaniel as a plaintiff. *Id.* at No. 49.

In addition, Respondent Leslie Kemp's claims recently become moot after she separated from her former domestic partner.

Thus, the only Respondents who currently have an interest in the outcome of these proceedings are Joseph R. Diaz, Keith B. Humphrey, Beverly Seckinger, Stephen Russell, Deanna Pfleger, Carrie Sperling, and Corey Seemiller (collectively, "State Employees").

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INTRODUCTION

None of the extraordinary circumstances described in Supreme Court Rule 10 as grounds for granting review on a writ of certiorari are presented by this case. To the contrary, Defendants seek interlocutory review of a unanimous Circuit Court decision, denied en banc consideration, that simply affirmed the District Court's grant of a preliminary injunction based on a likelihood of success on one of several claims and the balance of harms shown. The preliminary injunction preserves the status quo at this initial juncture of the case by restraining Defendants from eliminating existing family health coverage for domestic partners of lesbian and gay Arizona state employees "pending trial in this action or further order of the" District Court. Appendix to Petition for Writ of Certiorari ("Pet. App.") 56a.

This case was filed in response to circumstances making it quite unusual and even more unworthy of this Court's review at this time. The State had provided family health coverage for both different-sex and same-sex domestic partners of State employees, but then dismantled that option, leaving marriage as the only way to access coverage for a partner. This step allowed heterosexual employees to marry and obtain the coverage, while making it impossible solely for lesbian and gay State employees to do so. Moreover, the State took this step after having issued a report that the prior system was affordable and functioning smoothly.

Furthermore, Defendants appealed the District Court's preliminary injunction and now seek Supreme Court review even before the parties have

conducted any discovery or Defendants have introduced any relevant evidence supporting their asserted defenses. Indeed, Defendants do not even try to show this Court the actual cost of maintaining domestic partner coverage while the case proceeds for the small number of lesbian and gay State employees involved.

There is no division among the federal circuits on the question of whether a state can deprive only its lesbian and gay employees of any path to obtain employer-provided health insurance coverage for their partners — let alone whether the state can be preliminarily enjoined from doing so pending the outcome of a challenge in district court — after having afforded the coverage under a system the state itself had determined was working and affordable. In light of the fact-bound nature of this case and its preliminary stage, it is not surprising that no other Court of Appeals or any state court of last resort has spoken on this or even a related question.

Defendants labor mightily to give the impression not only that this case already has been fully litigated on its merits, but also that it is about a host of issues not actually raised in the complaint or decided by the courts below in considering whether preliminary injunctive relief was warranted. This case does not seek to allow same-sex couples to marry, and the courts below did not consider that issue. Instead, the preliminary injunction ruling involved a narrow determination that the State is unlikely to be found to have an adequate justification to eliminate family health coverage for its lesbian and gay

employees that remains available to their heterosexual co-workers — as well as that the balance of hardships and public interest weigh in favor of maintaining the status quo during the proceeding. The State Employees' narrowly-tailored claim, which has yet to be fully developed below, is not ripe for this Court's review. The Petition accordingly should be denied.

STATEMENT OF THE CASE

As part of its employee compensation system, the State provides its qualifying employees access to a group health plan as well as family health coverage for their eligible dependents. Pet. App. 17a-18a. In April 2008, the State amended its administrative code to provide access to the health plan for an employee's same-sex or different-sex domestic partner as well as the domestic partner's qualifying children. *Id.* at 3a. The administrative code required an employee to demonstrate a high degree of financial inter-dependence with his or her committed life partner to qualify the partner for family health coverage. *See id.* at 18a-20a (quoting eligibility criteria, including at least one year of shared permanent residence and at least three indicia of financial interdependence such as a joint mortgage, joint debt liabilities, and assumption of financial responsibility for each other's welfare). The State Employees, each of whom is lesbian or gay, enrolled a same-sex domestic partner, or domestic partner's child, in the State's group employee health plan in 2008 or 2009. *Id.* at 4a-5a.

In August 2009, the Arizona legislature enacted, and Petitioner Brewer signed, legislation adding to

Arizona Revised Statute § 38-651 a new provision, codified as § 38-651(O) ("Section O"). Section O provides that only a "spouse" can qualify as an employee's dependent for family health coverage. Pet. App. 21a. Because the State prohibits same-sex couples from marrying, Ariz. Rev. Stat. § 25-125(A); Ariz. Const. art. XXX, § 1; Pet. 3, Section O bars State Employees by operation of law from qualifying a same-sex life partner for family health coverage. Heterosexual employees, on the other hand, can continue to qualify a life partner for coverage through marriage. Ariz. Rev. Stat. § 38-651(O).

State Employees commenced suit and filed an amended complaint on January 7, 2010, seeking declaratory and injunctive relief from Section O as a violation of federal equal protection and due process guarantees. Pet. App. 22a. State Employees do not challenge the portion of Section O requiring that heterosexual couples marry to receive family health coverage. They have contested only the portion of the law that creates an absolute bar making it impossible for lesbian and gay employees to obtain the same compensation available to their heterosexual co-workers — compensation that the State previously made available to its lesbian and gay employees as well. Ninth Circuit Docket ("Ninth Cir. Dkt.") No. 18 at 4 n.3. State Employees' amended complaint alleges, and Defendants have never disputed, that State Employees are highly skilled, with job duties equivalent to those of their heterosexual colleagues. Pet. App. 4a.

Defendants moved to dismiss the case. State Employees moved for a preliminary injunction to

maintain their family health coverage, which was otherwise scheduled to terminate on December 31, 2010, and thus preserve the status quo while the case proceeds. Pet. App. 17a, 22a. State Employees sought preliminary injunctive relief on multiple grounds, including a due process claim and several distinct equal protection theories. Dist. Ct. Dkt. No. 31 at 8-13.

Defendants opposed the preliminary injunction by introducing a few figures about the cost of domestic partner coverage for *both* different-sex and same-sex couples, even though the relief sought in this case involves coverage *only* for same-sex couples, who alone have no access to coverage for a partner. Pet. App. 48a-49a. Defendants repeat the same misleading statistic in their Petition, noting generally that the cost of domestic partner coverage was $4 million in 2008 and $5.5 million in 2009. Pet. 4, 14. Defendants fail expressly to acknowledge that those costs were chiefly comprised of health care claims by unmarried *different-sex* couples, irrelevant here given that the preliminary injunction maintains coverage pending resolution in the District Court only for those State employees in *same-sex* relationships. Pet. App. 56a.

On reply, State Employees introduced expert testimony from an economist, Dr. M.V. Lee Badgett, to rebut Defendants' contentions. Pet. App. 48a; Dist. Ct. Dkt. No. 42. Because no party had yet conducted discovery, and Defendants' figures did not separately account for same-sex domestic partners, Dr. Badgett generated estimates from the available data. *Id.* at 4-5. Dr. Badgett testified that same-sex

couples were likely a small fraction of the domestic partner participants in the health plan and the costs of insuring them were likely a negligible 0.06% to 0.27% of the State's total expenditures on employee health coverage. Pet. App. 48a.

State Employees also submitted in their reply a publicly available report issued by the State for the 2008-09 benefits plan year. *Id.* at 47a-48a. Even including the far larger segment of different-sex domestic partners beyond the small fraction of same-sex partners participating in coverage in that period, the State reported that the plan year "demonstrated a balance of expenses and premiums that allowed . . . comprehensive and affordable insurance coverage" for its employees, and that allowed the State to "effectively control[] . . . health care costs. . . ." *Id.* at 47a.

Defendants introduced no contrary evidence; nor did they contest or rebut Dr. Badgett's expert testimony. *Id.* at 48a-49a. Defendants now concede that only a "small fraction" of the approximately 800 State employees with a qualifying domestic partner received coverage for a partner of the same sex. Pet. 4, 14, 24.

The District Court heard argument on both Defendants' motion to dismiss and State Employees' motion for a preliminary injunction. The court dismissed State Employees' due process claim, but denied the motion to dismiss as to State Employees' equal protection theories. Pet. App. 55a-56a. The District Court preliminarily enjoined enforcement of Section O during pendency of the case before it, Pet. App. 56a, requiring Defendants to maintain the

existing family health insurance coverage of what Defendants concede is an "admittedly limited group" of lesbian and gay State employees, Pet. 24. The District Court based its preliminary injunction ruling on its prediction of a likelihood of success on the merits, once the case is fully litigated, on one of the equal protection theories advanced by State Employees, *i.e.*, sexual orientation discrimination that cannot even be justified under the rational basis test. Pet. App. 27a-38a, 46a-49a. The District Court further found, based on facts specific to the State Employees, that in the absence of a preliminary injunction they will likely suffer irreparable harms, including potential irreversible health consequences for their domestic partners. *Id.* at 49a-51a. The court found that continuing coverage for this small group of employees would have minimal impact on the State, which had not even "provided any evidence showing the costs" of providing such coverage. *Id.* at 53a. The court concluded that the balance of equities and interests of the public weighed in favor of granting the preliminary injunction while the case proceeds. *Id.* at 54a-55a.

Defendants noticed an interlocutory appeal of the preliminary injunction to the Ninth Circuit Court of Appeals on August 16, 2010. Dist. Ct. Dkt. No. 49. The District Court stayed all proceedings on October 13, 2010. *Id.* at No. 55. The Court of Appeals unanimously upheld the District Court's order on September 6, 2011. Pet. App. 2a. The Court of Appeals reviewed the District Court's "careful order," finding that the lower court "applied the appropriate standards for the grant of preliminary injunctive relief." *Id.* at 7a-8a.

Defendants sought en banc review, and the Court of Appeals denied that request on April 3, 2012, with two judges dissenting. *Id.* at 57a-58a. The Petition to this Court followed. On June 18, 2012, the District Court renewed its stay pending the disposition of this Petition. Dist. Ct. Dkt. No. 66.

REASONS FOR DENYING THE PETITION

I. Review Should Not Be Granted To Consider The Propriety Of The Circuit Court's Affirmance Of The District Court's Preliminary Injunction, Which Simply Maintains The Status Quo Pending A Determination On The Merits, Particularly Given The Specific Circumstances Involved Here.

Review of interlocutory orders deviates from this Court's general practice and is especially unwarranted in this case. This Court "generally await(s) final judgment in the lower courts before exercising . . . certiorari jurisdiction," *Va. Military Inst. v. United States*, 508 U.S 946, 946 (1993) (explaining denial of certiorari), and reviews decisions granting preliminary injunctions only in situations where the grant was "clearly erroneous." *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam). *See also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (that consideration is sought of an order sustaining a preliminary injunction "alone furnishe[s] sufficient ground for the denial" of review). Review of interlocutory orders thus should be exercised only if declining review will "have immediate consequences for the petitioner." E. Gressman, K. Geller, S.

Shapiro, T. Bishop & E. Hartnett, Supreme Court Practice § 4.18 at 281 (9th Ed. 2008) (citing cases). This presumption against review makes particular sense where, as here, (1) the interlocutory order merely maintains the status quo, *i.e.*, continued provision of existing health benefits to a small set of domestic partners of State lesbian and gay employees, and (2) a legal theory different from the premise for preliminary injunctive relief could ultimately be dispositive when the final merits are reached.

1. Defendants have not met the high standard required for review of an interlocutory order. Preliminary injunction rulings are exactly that — preliminary — and rest on, among other things, a fact-sensitive inquiry that balances the parties' respective harms. This is precisely why such orders are reviewed only for an abuse of discretion. *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005). Though Defendants work hard to inject purported merits issues into their petition, at most only an abuse of discretion examination would apply to this interlocutory appeal. While such review might be justifiable in some extraordinary circumstances, none exist here. Defendants fail to show why a preliminary order merely maintaining for a small number of employees benefits already provided by the State demands this Court's review pending the District Court's resolution of the case.

2. In addition, the District Court granted a preliminary injunction based on only one of the several legal theories offered by the State Employees, which also include a sexual orientation

discrimination claim under heightened constitutional scrutiny and a sex discrimination theory, both of which remain viable before the District Court. *See* Dist. Ct. Dkt. No. 31 at 8-13. The theory accepted by the District Court for purposes of deciding the preliminary injunction may never be presented on a subsequent appeal if the case is resolved on a different ground. In that event, Defendants' contentions in the petition about the reasoning of the courts below would be moot. This is the very epitome of when review of a preliminary injunction is ill-advised.

II. The Court of Appeals' Decision Neither Conflicts With Any Decision Of Another Federal Circuit Or State Court Of Last Resort Nor Raises An Important Federal Question Requiring Review At This Time.

Under Supreme Court Rule 10, a petition for certiorari may be appropriate when a federal court of appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." Defendants do not cite even one federal court of appeals decision that actually conflicts with the decision below. *See* Pet. 9, 18, 21, 26 (claiming conflict only with state court decisions).

Moreover, none of the state court decisions cited by Defendants as supposedly in conflict with the decision of the court below comes from a state court of last resort. *See Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516 (Colo. App. 1994) (mid-level

state appellate court decision); *Rutgers Council of AAUP Chapters v. Rutgers State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997) (same); *Matter of Langan v. State Farm Fire & Cas.*, 48 A.D.3d 76 (N.Y. App. Div. 2007) (same); *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. App. 1998) (same); *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992) (same).

Furthermore, three of these decisions involved only state law, not federal, claims. *Rutgers Council,* 689 A.2d at 829; *Bailey*, 972 S.W.2d at 184, n.3; *Phillips*, 482 N.W.2d at 123-24. The cursory consideration of federal law in the remaining two rested on significantly different facts. *Ross*, 883 P.2d at 518, 521-22 (without discussion of any federal authorities, rejecting claim for benefits that, unlike here, were not previously provided to lesbian and gay employees under a functioning, cost-effective system); *Matter of Langan*, 48 A.D.3d at 79-81 (declining to require, for the first time, that workers' compensation death benefits be afforded to an individual who entered a civil union in another state, based on reasoning of prior state cases).

Even were the rulings cited in the Petition decisions of state courts of last resort with facts analogous to this case, the supposed conflict asserted by Defendants does not raise important federal questions requiring review at this time. S. Ct. R. 10. As noted above, review could always be had once a final judgment is issued rather than in this preliminary posture. Likewise, any supposed conflict the Court of Appeals' interlocutory decision allegedly creates with these few lower state cases may well be

short-lived, given that this action ultimately could be resolved on one of the other grounds advanced by State Employees.

Moreover, should this case ultimately be decided on the same legal grounds considered in the District Court's preliminary injunction ruling, any consideration by this Court would be more appropriate after discovery and full presentation of evidence and arguments to the District Court, with review by the Circuit Court. In the current posture, the Court would merely be considering whether the lower courts erred in concluding that State Employees had shown a likelihood of success on the merits and that the public interest and balance of equities weighed in favor of granting preliminary injunctive relief. *See* Pet. App. 8a.

Defendants also illogically suggest that review should be granted in this case to address opinions of lower courts, which briefly cite the decision below, in challenges to the federal Defense of Marriage Act, and to offer guidance for future cases. Pet. 27-28. In fact, the two decisions cited by Defendants are both currently on appeal. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal docketed*, Nos. 12-15388, 12-15409 (9th Cir. Feb. 24, 2012), *petition for cert. before judgment filed by U.S. Solicitor General*, No. 12-16 (U.S. July 3, 2012) (hereafter "*Golinski*, *petition for cert.*, No. 12-16"); *Dragovich v. U.S. Dep't of Treasury*, 2012 U.S. Dist. LEXIS 72745 (N.D. Cal. May 24, 2012), *appeal docketed*, No. 12-16461 (9th Cir. June 26, 2012) (both addressing whether the federal government must recognize state marriages and other formalized state

statuses available to same-sex couples). Whether the principles of law applied in those cases were correct can be determined in those appeals. Likewise, how other courts may cite or apply aspects of the decision below would best be considered by review of final decisions in those cases rather than through interlocutory review of whether a preliminary injunction was appropriately granted in this one.

In fact, *Golinski* did not even rely on any aspect of the Court of Appeals' decision below about which Defendants object. *Golinski* merely cited a reference in the decision to a more "searching" form of rational basis review, 824 F. Supp. 2d at 996, but the Court of Appeals below expressly concluded that the preliminary injunction could be affirmed without reaching whether *any* form of "heightened scrutiny might be required." Pet. App. 7a. If this Court is to examine the level of judicial scrutiny due sexual orientation classifications, then *Golinski* itself, which exactingly analyzed the appropriate level of scrutiny based on a fully developed record with extensive expert testimony, 824 F. Supp. 2d at 985-90, is a far better vehicle than the ruling below. Indeed, the United States Solicitor General has taken the step of seeking certiorari in *Golinski* prior to judgment because that case presents such a strong vehicle for this Court's consideration of the question. *See Golinski*, *petition for cert.*, No. 12-16.

III. The Court of Appeals Properly Applied This Court's Governing Precedent To Conclude That State Employees Demonstrated A Likelihood Of Success On The Merits.

Defendants attempt to argue the merits of this case as though the merits had been reached and decided. Of course, all that has occurred below thus far is a preliminary injunction determination of a "likelihood" of success on the merits of one aspect of State Employees' equal protection claim. In so ruling, the Court of Appeals properly applied this Court's governing precedent with respect to: 1) the intentional discrimination that occurred here; 2) State Employees' similarity to heterosexual employees for purposes relevant to the facts of this case; and 3) the appropriate standard of review.

1. Defendants wrongly argue that the courts below erred in concluding that Section O may be held to create an intentional classification along arbitrary and invidious lines. As the Court of Appeals noted, this case bears striking similarities to this Court's decision in *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), which reveals the flaw in Defendants' argument that a "facially neutral" statute cannot be found to be intentionally discriminatory. Pet. App. 11a-12a. *Moreno* examined an amendment to the Food Stamp Act that redefined "household" to "limit the program's eligible recipients to groups of related individuals," so that households with unrelated individuals no longer qualified for food stamp benefits. Pet. App. 11a. As

the Court of Appeals observed, *Moreno* has direct parallels to the questions here.

First, both cases involve the amendment of an *existing* benefits program to restrict "benefits for a particular group perceived as unpopular." *Id.* Second, both involve the use of a facially neutral term to target an unpopular group — in Section O, the term "spouse," and in *Moreno's* Food Stamp Act, the term "household." *Id.* Third, the "practical operation" of the challenged law in each case was to exclude the disfavored group and *only* that group. Pet. App. 12a (quoting *Moreno*, 413 U.S. at 538).

The statute challenged in *Moreno* redefined the facially neutral term "household" to eliminate non-relative households' eligibility for food stamps, in the same way that Section O redefined a qualifying dependent as a "spouse" to eliminate same-sex couples' eligibility for family health coverage. *See* 413 U.S. at 529. *Moreno* noted that the legislation "[i]n practical effect . . . creates two classes of persons for food stamp purposes." *Id.* The Court of Appeals here similarly applied that reasoning to find that Section O creates two classes of employees for family health coverage: those who can qualify by marrying (heterosexuals), and those who cannot (lesbians and gay men). Pet. App. 12a (observing that Section O treats lesbian and gay State employees differently by making coverage available through a status they may not enter). In fact, the Court of Appeals noted that this case presents an even "more compelling scenario, since the plaintiffs in *Moreno*" could still receive food stamps by altering household arrangements, while all lesbian and gay State employees are strictly

barred from family health coverage "by operation of law." *Id.*

The Court of Appeals' examination of Section O's intentional classification along invidious lines, modeled carefully after *Moreno*, is consistent with a long line of authority from this Court. In fact, this Court repeatedly has observed the fallacy of analogous arguments for camouflaging discriminatory classifications. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("[a]ncestry can be a proxy for race"). *Accord Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (a rule "that is ostensibly neutral but is an obvious pretext for racial discrimination" is invalid); *Guinn v. United States*, 238 U.S. 347, 365 (1915) (Oklahoma's facially neutral literacy test for voters, exempting all residents who could vote prior to the adoption of the Fifteenth Amendment, violated that amendment's race discrimination prohibition).

This Court already has considered and discarded attempts to justify discrimination against lesbians and gay men by tying restrictions to their personal relationships, rather than their status. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."), *citing Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (a law targeting an intimate same-sex relationship "target[s] . . . more than conduct," and "is instead directed toward gay persons as a class").

The Court of Appeals' conclusion that, for purposes of a preliminary injunction determination, Section O should be understood as intentionally discriminating against lesbian and gay State employees was particularly easy to reach under the unusual circumstances of this case. In 2008, the State legislature referred to voters a proposed constitutional amendment limiting marriage to different-sex couples. *See* Senate Concurrent Resolution 1042 (2008), *available* at http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/scr1042h.htm&Session_ID=86. Voters approved the amendment in the 2008 general election, Pet. 3, and the legislature voted the following year to restrict family health coverage to committed couples who may marry, by enacting Section O. Pet. 5.

The legislature's conditioning of family health coverage on a status that just the year before it helped to bar same-sex couples from entering was not accidental or inadvertent but deliberate. And as this Court has made clear, intentional discrimination "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [group] than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Section O could not present a more striking example, where the legislature helped ensure that same-sex couples cannot marry, and then voted within a year to strip them of family coverage by limiting it to those who can marry. This case is thus entirely different from the veterans' hiring preference challenged in *Feeney*, which did not foreclose women from that preference but merely had a disparate

impact on them. 442 U.S. at 280. In contrast, Section O forecloses *all* lesbian and gay state workers from family health coverage, while it remains available to *all* heterosexual workers.

Even the authorities on which Defendants rely approve this analysis. As *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), recognized, the "sensitive inquiry" required to determine discriminatory intent involves examining the enactment's surrounding circumstances and, even with facially neutral legislation, the inquiry is "relatively easy" when a clear, otherwise "unexplainable" pattern emerges. *Id.* at 266. Some facially neutral laws create a pattern of exclusion so "stark" that it is appropriate to test whether the law is "unexplainable on grounds other" than the classification. *Id.* Section O is precisely such a law. Section O excludes same-sex couples with 100% precision, and allows 100% of heterosexual couples to qualify through marriage. As the Court of Appeal correctly found, this case is every bit as "stark" as the authorities collected in *Arlington Heights*.

2. Defendants' argument that the Court of Appeals erred in finding lesbian and gay employees similarly situated to their heterosexual colleagues, Pet. 23, 25-26, fares no better. Defendants cite no federal authority even suggesting that the Court of Appeals' analysis was incorrect. Of course no two groups are ever likely to be entirely identical in all respects; by that standard, almost every equality claim would fail. Instead, it is an abiding equal protection principle that groups must be similarly

situated for purposes *relevant* to the classification. *See Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (equal protection denies states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria *wholly unrelated to the objective of that statute*") (emphasis added); *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("A classification must . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation") (internal quotation marks omitted).

This case involves a form of compensation the State provides its employees, and Defendants never have contested State Employees' similarity to their heterosexual co-workers in all ways relevant to the workplace. In fact, Arizona's Executive Order No. 2003-22 prohibits discrimination against the State's lesbian and gay employees, acknowledging that no basis exists to treat them differently as employees. And as Defendants have left undisputed, State Employees rely on family coverage as an important part of their compensation for the same reasons that their married, heterosexual colleagues do — to help care for their family members and to avoid the stress of health emergencies that easily can lead to irreversible financial harm such as bankruptcy, or, tragically, to permanent health consequences for serious, untreated medical conditions. Excerpts of Record in the Court of Appeals, 170-72, 193-94.

In providing family coverage to lesbian and gay employees previously, the State itself recognized both that these employees have the same need as their co-

workers for such coverage, and that a simple administrative mechanism would allow them to demonstrate the financial interdependence that similarly situates them to their heterosexual colleagues. Defendants now point to other unrelated attributes tied to marriage, Pet. 25-26, but offer no explanation of their relevance to this form of workplace compensation. As the lower courts understood, a state cannot select a status that the state itself strictly prohibits for the minority, and rely on that as a fair measure of the minority's difference.

3. Defendants also fail to show why their claim that the lower courts erred in application of the rational basis test demands review by this Court, and particularly at this time. This Court "rarely" grants review based merely on an arguable "misapplication of a properly stated rule of law." S. Ct. R. 10. But, beyond that, the arguments of error ignore (1) the evidence that providing family coverage to domestic partners was neither administratively difficult nor costly, Pet. App. 34a, 47a-48; (2) the case law that such government interests cannot be pursued by treating a minority group adversely unless there is an independent justification for doing so, *see*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228-29 (1982); Pet. App. 31a-35a; (3) the Court of Appeals' cogent explanation that any interest in "promoting traditional marriage" is not furthered by eliminating health care coverage for the partners of lesbian and gay employees, whom the State does not allow to marry, Pet. App. 13a-14a; and (4) that this case is not over and a final judgment would be a better vehicle for review of such mixed questions of law and fact.

For all the reasons above, Defendants fail to demonstrate that the Court of Appeals' decision was wrongly decided. They certainly fail to show that affirmance of a status-quo-preserving preliminary injunction — granted in light of largely uncontested facts showing a likelihood of success on the merits, the public interest, and the balance of harms — "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

IV. Exaggerated Concerns Raised By Defendants About Issues Not Decided Below Are Not Grounds For Review.

Contrary to the wildly exaggerated claims of Defendants, the decision below was not "premised . . . on an indirect invalidation of Arizona's statutory and constitutional provisions defining marriage as a union between a man and a woman," Pet. 10, and did not "implicit[ly] hold[] that the State cannot constitutionally limit marital benefits to unions between a man and a woman." Pet. 28. The preliminary injunction does nothing to change the fact that same-sex couples may not marry in the State, and the validity of that restriction was not decided or even discussed below.

Instead, the preliminary injunction addressed a form of employment compensation that many employers provide to workers who are *not* married, *see* Bureau of Labor Statistics, Employee Benefits in the United States – March 2011, Table 8 (July 26, 2011), available at http://www.bls.gov/ncs/ebs/sp/ebnr0017.txt (30% of all employers provide health

insurance benefits to same-sex domestic partners), just as the State did previously. Obtaining such coverage does not bestow a marriage status on those who receive it.

The question here is not whether marriage can be limited to different-sex couples, *see* Pet. 6 (conceding that State Employees do "not claim that Arizona's laws defining marriage [a]re unconstitutional" in this case), but rather whether the State can eliminate health coverage it previously provided for employees' partners and their children by conditioning such coverage on a status inaccessible to only lesbian and gay employees. Thus, cases like *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.) (summary dismissal of appeal addressing whether same-sex couples had the right to marry under certain circumstances) are wholly inapposite. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (a summary dismissal binds lower courts based on "the specific challenges presented in the statement of jurisdiction").

Defendants' further claim that the Court of Appeals' decision "directly" impacts and threatens other governmental entities' decisions about family health coverage eligibility, Pet. 10, 20, also is untrue. The only direct impact of the preliminary injunction is to prevent Defendants from eliminating existing family health care coverage for the small number of lesbian and gay State employees in this one jurisdiction pending the District Court's resolution of this case.

While another case may someday raise the kinds of questions about which Petitioner speculates — *e.g.*, where a governmental employer has never previously

provided such coverage, Pet. 20, n.7, let alone self-reported that its existing plan worked well and was affordable, Pet. App. 47a-48a — such questions are best resolved in a case that actually and finally presents them.

CONCLUSION

For the foregoing reasons, Respondent State Employees respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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