No. 10-16797

United States Court of Appeals for the Ninth Circuit

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

v.

JANICE K. BREWER, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARIZONA; DAVID RABER, IN HIS OFFICIAL CAPACITY AS INTERIM DIRECTOR OF THE ARIZONA DEPARTMENT OF ADMINISTRATION AND PERSONNEL BOARD; KATHY PECARDT, IN HER OFFICIAL CAPACITY AS DIRECTOR OF HUMAN RESOURCES FOR THE ARIZONA DEPARTMENT OF ADMINISTRATION AND PERSONNEL BOARD,
Defendants-Appellants,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CIVIL ACTION NO. 2:09-02402, HON. JOHN W. SEDWICK

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS' PETITION FOR RECONSIDERATION AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: October 7, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this brief with the consent of all the parties.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported states' autonomy from federal oversight in areas – including discretionary, non-discriminatory public expenditures – that are of traditionally local concern. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

INTRODUCTION

In this action, nine homosexual employees of the State of Arizona (collectively, "Plaintiffs") sue Arizona's Governor, the Director of its Department of Administration and Personnel Board, and the Director of Human Resources of that Department in their official capacities (collectively, "Arizona") to invalidate A.R.S. § 38-651(O) ("Section O"). As Arizona's petition demonstrates, the panel failed to follow controlling

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[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Supreme Court precedent and the weight of authority from other jurisdictions. In this brief, *amicus* Eagle Forum focuses on the controlling authority *from this Circuit* that the panel failed to follow. The resulting intra-circuit splits require review by the *en banc* Court.

Section O defines "dependent" as "spouse" for Arizona's employee health benefits program. For approximately a year prior to enacting Section O, Arizona had – by regulation – included domestic partners within the definition of "dependent" for purposes of eligibility for state-employee health benefits. (E.R. 261; A.A.C. R2-5-101(22), (23) (April 25, 2008).) Although Section O is facially neutral as between same-sex and opposite-sex domestic partners, Plaintiffs claim that Section O is discriminatory because Arizona's Constitution defines "marriage" – and thus "spouse" – as "[o]nly a union of one man and one woman," ARIZ. CONST. art. XXX, §1, thereby impacting same-sex domestic partners (who cannot marry each other) more than it impacts opposite-sex domestic partners (who could marry each other). To find that this disparate impact violates the Equal Protection Clause, the panel had to ignore numerous controlling Supreme Court *and Circuit* precedents.

Significantly, the federal courts of appeals have the authority and

the obligation to adopt "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941). This Court has provided that the *en banc* Court must resolve intra-circuits splits in authority:

> We now hold that the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision. A panel faced with such a conflict must call for en banc review, which the court will normally grant unless the prior decisions can be distinguished. Despite the "extraordinary" nature of en banc review, *United States v. American-Foreign Steamship Corp.,* 363 U.S. 685, 689, 80 S.Ct. 1336, 1339, 4 L.Ed.2d 1491 (1960), and the general rule that en banc hearings are "not favored," FED.R.APP.P. 35(a), en banc review is proper "when consideration by the full court is necessary to secure or maintain the uniformity of its decisions." FED.R.APP.P. 35(a)(1); *see also American-Foreign Steamship,* 363 U.S. at 689-90, 80 S.Ct. at 1339-40.

Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*). Although that is not the only way to resolve intra-circuit splits,[2] it is how this Circuit has decided to do so. In this brief,

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[2] Several circuits have adopted a rule that the first-decided case of an intra-circuit split governs, reasoning that the second three-judge panel lacked authority to deviate from binding circuit precedent. *See,*

amicus Eagle Forum follows Arizona's substantive outline, but focuses on intra-circuit splits in authority that the panel decision creates. Under *Wards Cove,* these splits fall to the *en banc* Court to resolve.

I. *EN BANC* REVIEW IS NECESSARY TO RESOLVE AN INTRA-CIRCUIT SPLIT ON WHEN FACIALLY NEUTRAL LEGISLATION WITH NO INTENTIONAL DISCRIMINATION VIOLATES EQUAL PROTECTION

Nothing in the record demonstrates that Arizona acted to discriminate against homosexuals or same-sex domestic partners *because* they are homosexuals or same-sex domestic partners. Instead, Section O facially distinguishes between married couples and *all* domestic partners (*i.e.,* same-sex *and* opposite sex domestic partners). Under controlling Circuit precedent, that does not violate the equal-protection principles, and the panel erred by holding that it does.

To state a claim for violation of the Equal Protection Clause, "a plaintiff must show that the defendants acted with an intent or purpose

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e.g., McMellon v. U.S., 387 F.3d 329, 333 (4th Cir. 2004) (*en banc*); *LaShawn v. Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*); *Southwestern Bell Tel. Co. v. City of El Paso,* 243 F.3d 936, 940 (5th Cir. 2001); *Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985); *Hiller v. Oklahoma ex rel. Used Motor Vehicle & Parts Comm'n,* 327 F.3d 1247, 1251 (10th Cir. 2003). Of course, under this alternate approach, the panel here lacked authority to make new law.

to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir. 2001) (citations omitted). Even for the most highly protected classifications, both "to state an equal protection claim" and "[t]o avoid summary judgment, [a plaintiff] must produce evidence sufficient to permit a reasonable trier of fact to find by a preponderance of the evidence that [the] decision ... was racially motivated." *Bingham v. City of Manhattan Beach,* 341 F.3d 939, 948-49 (9th Cir. 2003) (collecting Circuit cases), *abrogated in part on other grounds by Virginia v. Moore,* 553 U.S. 164, 176 (2008).[3] Plaintiffs make no showing that Section O was motivated by Plaintiffs' status either as homosexuals or as same-sex domestic partners.

To the contrary, Plaintiffs' claim in essence is that – in treating domestic partners differently than married couples – Arizona did *not make an exception* for domestic partners who cannot marry each other. That claim must fail, however, because "[m]ere indifference to the

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[3] *See Edgerly v. City & County of San Francisco,* 599 F.3d 946, 956 n.14 (9th Cir. 2010) (recognizing that *Moore* abrogated *Bingham* "to the extent that *Bingham* [is] inconsistent with *Moore*" on Fourth Amendment grounds).

effects of a decision on a particular class does not give rise to an equal protection claim." *Thornton v. City of St. Helens,* 425 F.3d 1158, 1167 (9th Cir. 2005); *see also McLean v. Crabtree,* 173 F.3d 1176, 1185 (9th Cir. 1999) (proof of discriminatory intent is required to show that state action having a disparate impact violates the Equal Protection Clause). Simply put, the "Equal Protection Clause, prohibits only purposeful discrimination and therefore does not permit claims of disparate impact." *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,* 470 F.3d 827, 839 (9th Cir. 2006) (*en banc*). Thus, for example, the overwhelmingly disparate impact that crack cocaine sentences have had on young black men in America did not trigger strict-scrutiny, equal-protection review because the disparity in sentencing was not "traceable to a discriminatory legislative purpose" on the part of Congress. *U.S. v. Dumas,* 64 F.3d 1427, 1429 (9th Cir. 1995) (*citing Washington v. Davis,* 426 U.S. 229 (1976) *and Pers. Admin. of Mass. v. Feeney,* 442 U.S. 256 (1979)). Plaintiffs present no plausible theory why the *lower* rational-basis standard of review should lead to a different conclusion here.

Instead, for "local economic regulation" such as a state's decision on what benefits to provide its employees, "this court may presume the

constitutionality of the ... discriminations and require only that the classification challenged be rationally related to a legitimate state interest.'" *Country Classic Dairies, Inc. v. State of Mont., Dept. of Commerce Milk Control Bureau,* 847 F.2d 593, 596 (9th Cir. 1988) (interior quotations omitted). As explained in Section II, *infra,* the panel failed to follow binding Circuit precedent on rational-basis review for equal-protection cases. That requires review by the *en banc* Court.

II. *EN BANC* REVIEW IS NECESSARY TO RESOLVE INTRA-CIRCUIT SPLITS ON THE APPLICATION OF RATIONAL-BASIS REVIEW UNDER EQUAL PROTECTION

The panel failed to follow Circuit precedent in several respects for equal-protection claims under the rational-basis test. These failures require the *en banc* Court's review.

Arizona faults the panel for requiring Arizona to defend a rationale on which Arizona *did not* base Section O, rather than addressing the rationale on which Arizona *did* base Section O. Pet. at 15. In this respect, Arizona is only half right, but the difference helps Arizona, not Plaintiffs. First, Arizona is right that a reviewing court must consider the rationale on which Arizona acted. But, second, as explained below, a reviewing court also needs to consider the rationales

on which Arizona plausibly *may have acted.* Plaintiffs and a reviewing court must negative *both sets of rationales* – Arizona's actual rationales and its plausible rationales – in order to strike Section O under the rational-basis test.

Specifically, a successful rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988) ("the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective") (interior quotations omitted). It is enough, for example, that Arizona legislators may have considered marriage to have benefits for responsible procreation and childrearing:

> The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based *rationally may have been considered to be true by the governmental decisionmaker,* and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Neither Plaintiffs nor the panel negative the bases on which Arizona acted and the other plausible bases on which it might have acted.

Significantly, "a legislative choice" like Section O "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993); *Heller v. Doe,* 509 U.S. 312, 320 (1993) (same). Plaintiffs could not prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463-64 (1981) (emphasis in original). Unfortunately for the Plaintiffs, the data simply do not exist to negative the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce.

A. Arizona Rationally Can Limit Health Benefits to Married Couples to Support Marriage for Purposes of Stable and Responsible Procreation

The most widely recognized purpose of marriage is to provide a

stable and loving structure for procreation and childrearing. As defined by Arizona, marriage serves that legitimate end. *Loving v. Virginia,* 388 U.S. 1, 12 (1967) (tying marriage to "our very existence and survival"). Children born within a marriage have the uniquely valuable opportunity to know their own biological mother and father. Numerous reported decisions and common understanding clearly establish these social goals as both worthy and well-served by marriage as defined by Arizona.

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820 (11th Cir. 2004). By contrast, same-sex marriage obviously cannot serve these goals.

One straw-man argument often used against the procreation-childrearing rationales for opposite-sex marriage is that allowing infertile opposite-sex couples to marry somehow disproves those rationales. That argument is meritless under rational-basis review. First, unlike strict scrutiny, the rational-basis test does not require the

state to narrowly tailor marriage to the legitimate purposes (*e.g.,* procreation or childrearing): "[r]ational basis review … is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and "[a] statute does not fail rational-basis review because it is not made with mathematical nicety or because *in practice it results in some inequality*." *Doe v. U.S.,* 419 F.3d 1058, 1063 (9th Cir. 2005) (interior quotations omitted, emphasis added); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316 (1976). Second, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Third, by reinforcing the family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

Although the typical rational-basis plaintiff has a difficult evidentiary burden to negative every possible basis on which the legislature may have acted, Plaintiffs here face an *impossible* burden. There are no longitudinal studies that purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Plaintiffs *never* will be able to negative the value of traditional husband-wife families for

childrearing, Plaintiffs clearly cannot prevail when the data *required by their theory of the case* do not yet exist. Unlike legislators, Plaintiffs cannot ask that we take their word (or their evidence) for it.

B. The Panel Impermissibly Shifted the Burden of Demonstrating that Similarly Situated Third Parties Receive Better Treatment

Under longstanding Circuit precedent, "[t]he first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies,* 847 F.2d at 596. Put another way, "[i]n order to subject a law to any form of review under the equal protection guarantee, one must be able to demonstrate that the law classifies persons in some manner." *Christy v. Hodel,* 857 F.2d 1324, 1331 (9th Cir. 1988) (*quoting* 2 R. Rotunda, J. Nowak & J. Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.4, at 343-44 (1986)). "A classification may be demonstrated in one of three ways: by showing that the law, on its face, employs a classification; by showing that the law is applied in a discriminatory fashion; or by showing that the law is 'in reality ... a device designed to impose different burdens on different classes of persons.'" *Id.* (quoting Rotunda, CONSTITUTIONAL LAW, §18.4, at 343-44). Plaintiffs cannot and do not make any of these

showings.

The "groups" identified in the first step "must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton,* 425 F.3d at 1167. Plaintiffs cannot state "[a]n equal protection claim … by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." *Id.* (interior quotations omitted). In other words Arizona's classification is not married couples and opposite-sex domestic partners versus same-sex domestic partners. Section O plainly distinguishes between married couples and *all* domestic partners, with no demonstrated connection to animus against either homosexuals or same-sex domestic partners.

In addition to its legitimate interest in promoting marriage, *see* Section II.A, *supra,* Arizona argues that domestic partners are not similarly situated to married couples under Arizona law. *See* Pet. at 18 (*citing* A.R.S. §13-3611). Other than their indirect attack on Arizona's limiting marriage to "a union of one man and one woman," ARIZ. CONST.

art. XXX, §1,[4] neither Plaintiffs nor the panel rebuts this flaw in Plaintiffs' equal-protection claim. Unless Plaintiffs succeed in their indirect attack on Arizona's definition of marriage, "the plaintiff still bears the burden of proving that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Thornton,* 425 F.3d at 1167 (*quoting SeaRiver Mar. Fin. Holdings, Inc. v. Mineta,* 309 F.3d 662, 679 (9th Cir. 2002)). Because Plaintiffs bear the burden of proving their similar situation to married couples, and because Plaintiffs neither met nor can meet that burden, their equal-protection claim fails under binding Circuit precedent. The panel's contrary holding requires review by the *en banc* Court.

C. Section O Is a Rational Response to Arizona's Budget Crisis for Purely Financial Reasons

Finally, although Arizona does not press the marginal cost of excluding the "admittedly limited" group of same-sex domestic partners, *see* Pet. at 17 & n.5, Plaintiffs do not contest that Section O's *overall* savings on domestic-partner claims exceed $4,000,000 for the 2008-2009

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[4] *Amicus* Eagle Forum addresses the indirect attack on Arizona's Constitution in Section III, *infra.*

plan year. (E.R. 92.) Because same-sex domestic partners do not have any plausible right to be treated differently than opposite-sex domestic partners, *see* Section I, *supra,* this Court should recognize that Arizona had every right to cut $4,076,822 in the face of a budget deficit.

Assuming *arguendo* that a budget deficit was the *only* conceivable basis for legislative action, a plaintiff theoretically could avoid dismissal for failure to state a claim by denying "the very existence of a … shortage," *Lockary v. Kayfetz,* 917 F.2d 1150, 1155 (9th Cir. 1990). Unlike the water shortage in *Lockary,* however, Arizona's available funds always will be limited when compared to all possible uses of public funds. Moreover, unlike the federal government, Arizona must balance its budget. ARIZ. CONST. art. IX, §3. Even if funding shortages eventually end, the Equal Protection Clause does not empower federal courts to second guess sovereign states on nondiscriminatory funding priorities. In any event, for the foreseeable future, reductions in health-plan coverage will remain ubiquitous in the private sector and necessary in Arizona's public sector.

III. *EN BANC* REVIEW IS NECESSARY TO RESOLVE AN INTRA-CIRCUIT SPLIT ON WHETHER LIMITING MARRIAGE TO UNIONS BETWEEN ONE MAN AND ONE WOMAN COMPORTS WITH EQUAL PROTECTION

As Arizona argues, the panel's holding relies on an implicit finding that Arizona cannot, consistent with equal-protection principles, limit marriage to unions between one man and one woman. Pet. at 19-20. Working under the equal-protection component of the Due Process Clause, this Court already has held that:

> Congress's decision to confer spouse status ... only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements.

Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982). The Due Process Clause's equal-protection component at issue in *Adams* is equivalent to the Fourteenth Amendment's Equal Protection Clause at issue here. *Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *High Tech Gays v. Defense Indus. Sec. Clearance Office,* 895 F.2d 563, 570 (9th Cir. 1990); *Christy,* 857 F.2d at 1331. As such, *Adams* is Circuit law, and the panel's implicit holding to the contrary requires *en banc* review.

CONCLUSION

The petition for reconsideration and rehearing *en banc* should be granted.

Dated: October 7, 2011 Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 3,145 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: October 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2011, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that none of the participants in the case were unregistered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph