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,

vs.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The court of appeals' published decision in this case held that Arizona Revised Statutes (A.R.S.) Section 38-651(O) (Section O), which extends healthcare benefits to state employees' spouses and dependents but does not extend such benefits to state employees' domestic partners, violated the Equal Protection Clause. The court of appeals reached this conclusion even though there was no evidence that the Legislature intended to discriminate based on sexual orientation and even though Section O furthers the State's interests in promoting marriage while also eliminating the additional expense and administrative burdens involved in providing healthcare benefits to state employees' domestic partners.

The Court should reject Respondents' argument that this is not an appropriate case for review. Although the court of appeals affirmed a preliminary rather than a permanent injunction, it erroneously decided an important federal *legal* question and its decision will govern this case on remand as well as federal-court challenges to the laws of States within the Ninth Circuit that condition some rights and benefits on marital status. This Court's review is appropriate and necessary because the court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Further, the court of appeals' conclusion that a statute that favors partners in a traditional marriage over partners in non-marital relationships serves no conceivable rational

purpose is contrary to this Court's precedent, as well as to federal and state appellate decisions, that hold that laws promoting traditional marriage do not violate the Federal Constitution. Unless this Court grants review, this aberrant and fundamentally wrong decision will not only ensure that Section O's enforcement is permanently enjoined but will also threaten the validity of countless other laws that favor traditional marriage.

ARGUMENT

I. The Court Should Review the Court of Appeals' Decision Because It Decided an Important Legal Question that Controls the Outcome of This Case and Is Binding Precedent in the Ninth Circuit.

Respondents argue that the Court should not grant review because the court of appeals affirmed a preliminary injunction that could ultimately be decided on a different legal theory with different facts. Opposition at 8-10. Respondents mischaracterize both the nature of the injunctive relief granted and the effect of the court of appeals' decision on the remand proceedings. This Court's review is necessary because the court of appeals has decided an important, dispositive legal issue that will govern remand and create binding precedent that will affect the laws of the States in the Ninth Circuit.

In *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam), the Court explained why it was reversing a lower-court decision before final judgment was entered:

> First, . . . the Court of Appeals' decision is clearly erroneous under our precedents. Second, the lower court's judgment has produced immediate consequences for Montana – in the form of a Rule 62(c) injunction against implementation of its law pending the District Court's resolution of respondents' motion for a preliminary injunction – and has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements.

(Footnote omitted.)

The reasons for granting review here are just as compelling as those that the Court articulated in *Mazurek*. The court of appeals' decision here is clearly erroneous under this Court's precedent.[1] See § II *infra*. And it has produced immediate consequences for Arizona and other States in the Ninth Circuit.

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[1] Contrary to Respondents' assertion, Opposition at 8, this Court does not require a petitioner to demonstrate that the lower court's decision is clearly erroneous before it will grant review of a preliminary injunction. *See*, *e.g., United States v. Arizona*, 132 S. Ct. 2492, 2503-07 (2012) (granting review of Ninth Circuit decision that affirmed the district court's preliminary injunction of the enforcement of four provisions of Arizona law and rather than finding the lower court's decision clearly erroneous, affirming the preliminary injunction as to three of the four provisions).

The district court entered an Order that enjoins Defendants from enforcing Section O "to eliminate family insurance eligibility for lesbian and gay State employees, and their domestic partners and domestic partners' children who satisfy the criteria set forth in Ariz. Admin. Code § R2-5-101" and orders the Defendants to "make available family health insurance coverage for lesbian and gay State employees . . . who satisfy the relevant eligibility criteria set forth in Ariz. Admin. Code § R2-5-101." (Pet. App. 56a.) The district court's Order thus enjoins enforcement of a state law. The court of appeals then affirmed the continuing consequences that the preliminary injunction imposes on Arizona.

The court of appeals' legal determination that Section O discriminates against gay and lesbian employees and does not meet the rational-basis test will govern the proceedings in this case on remand. *See Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (en banc) (stating that all published opinions – including those determining a legal issue at the preliminary-injunction stage, as occurred in that case – are "law of the circuit," that is, they "constitute[ ] binding authority which must be followed unless and until overruled by a body competent to do so"). The court of appeals' decision also effectively invalidates the laws of five States within the Ninth Circuit that condition at least some rights and benefits on marital status or permit local governments to do so. *See* States' Brief as Amici Curiae in Support of the Petition at 3.

Respondents do not contend that the court of appeals did not determine a legal issue but they argue that the case could ultimately be decided on a different legal theory. Opposition at 9-10. This is pure sophistry. The district court granted Respondents all the injunctive relief that they requested in the Complaint. *Compare* Appellants' Excerpt of Record filed in the Ninth Circuit below at 297-98 *with* Pet. App. 56a. Although the district court noted that "[s]ome form of heightened scrutiny might apply to plaintiffs' claims," it did not reach that issue because it found that Respondents demonstrated that there was no conceivable rational basis that might support Section O. Pet. App. 29a-38a. The court of appeals also determined that it did not "need to decide whether heightened scrutiny might be required" because it found that the district court correctly concluded that Section O did not rationally further any of the State's asserted justifications or any other conceivable interest. Pet. App. 7a-14a. Because the court of appeals affirmed the district court's conclusion that Section O violated the Equal Protection Clause under the rational-basis test, there is no reason for the district court to reach Respondents' theories that classifications based on sexual orientation are entitled to heightened constitutional scrutiny and that Section O discriminates based on sex.

II. The Court of Appeals' Decision Is Contrary to This Court's Precedent.

Respondents wrongly argue that the court of appeals' decision is consistent with this Court's precedent. Opposition at 14-21. Because the court of appeals misconstrued this Court's opinions and its decision contravenes this Court's authorities, the Court should grant certiorari. *See* Robert L. Stern et al., *Supreme Court Practice* § 4.5 at 233-34 (8th ed. 2002) ("Certiorari is often granted and the matter clarified where the court of appeals has allegedly misconstrued, misapplied, or misconceived an applicable Supreme Court opinion, or where the decision below 'seemed to be out of line with the authorities . . . .'") (quoting *Braen v. Pfeifer Transp. Co.,* 361 U.S. 129, 130 (1959)); (other citations omitted).[2]

[2] Respondents argue that the Court should not grant the Petition because the court of appeals' decision does not conflict with any other circuit court decision. Opposition at 10. Indeed, a commentator has noted that the court of appeals' decision "appears to present an issue of first impression in federal court." Benjamin K. Probber, Comment, *Diaz v. Brewer and the Equal Protection Clause: A Roadmap for the Retention of Same-Sex Public Employment Benefits*, 14 U. Pa. J. Const. L. 1351, 1354 (2012). But the decision merits review because the lower court decided an important federal issue that is contrary to this Court's precedent. Review is also warranted because the decision is seriously out of line with state and federal court equal-protection decisions concerning the States' legitimate interest in furthering traditional marriage and conditioning the receipt of certain benefits on marital status. *See* Petition at 18-31.

1. Respondents continue to rely on *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), to support their argument that there is no need to show intent to discriminate if a law disparately impacts an unpopular group. Opposition at 14-16. But Respondents misconstrue *Moreno* and ignore the distinctions between *Moreno* and the court of appeals' decision in this case. These distinctions demonstrate that *Moreno* provides no support for the court of appeals' decision; indeed, the decision conflicts with *Moreno*.

First, in *Moreno*, "the legislative history . . . indicate[d] that [the challenged law] was intended to prevent socalled 'hippies' and 'hippie communes' from participating in the food stamp program." 413 U.S. at 534. Here, Respondents did not provide any evidence – and the court of appeals did not refer to any evidence – of intent to discriminate against gay and lesbian employees. Respondents had the burden of demonstrating intent to discriminate in order to obtain the preliminary injunction. *See Mazurek*, 520 U.S. at 972 (noting the high burden of proof that a plaintiff must meet in order to be entitled to preliminary injunctive relief). And the type of evidence that would support a discriminatory-intent finding – legislative history and historical background – was available when the district court granted the preliminary injunction and neither the legislative history nor the historical background indicated that the Legislature enacted Section O based on discriminatory intent. *See* Petition at 13-15.

Second, Respondents ignore the fact that the Court did not depart from traditional rational-basis principles in *Moreno*,[3] whereas the court of appeals applied a distorted rational-basis test in this case. In *Moreno*, the Court found that the challenged law's definition of "household," which excluded households that contained a nonrelative, did not further the government's proffered fraud-prevention rationale because the alleged fraud-promoting group (the hippies) could rearrange their living conditions to retain their benefits under the challenged law. 413 U.S. at 537-39.[4] In contrast, Section O's provision of health-care benefits to state employees' spouses, and not to their domestic partners, furthers the State's interest in promoting traditional marriage because it encourages unmarried, opposite-sex couples to marry.

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[3] *See Lyng v. UAW*, 485 U.S. 360, 370 n.8 (1988) (stating that *Moreno* "is merely an application of the *usual* rational-basis test") (emphasis added).

[4] Respondents incorrectly assert that the practical operation of the challenged law in *Moreno* was "to exclude the disfavored group and *only* that group." Opposition at 15. The Court quoted the California Director of Social Welfare to support its conclusion that although Congress intended to prevent hippies (the disfavored group) from obtaining food stamps, most hippies could and would "'alter their living arrangements in order to remain eligible.'" *Moreno*, 413 U.S. at 537. On the other hand, although there was no evidence that Congress intended to affect AFDC mothers, the challenged law's practical operation excluded "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538.

2. Respondents also incorrectly argue that the court of appeals' conclusion that Section O must be viewed as camouflaged discrimination against gay and lesbian state employees is consistent with a long line of this Court's authority. Opposition at 16. Respondents' argument would be valid only if there was some evidence of discriminatory intent or there were no rational explanations for Section O other than the Legislature's intent to discriminate against gay and lesbian employees. *See Pers. Adm'r v. Feeney*, 442 U.S. 256, 274, 275 (1979) (finding that although the challenged law's impact on women was severe, the law did not violate the Equal Protection Clause because it was not enacted for the "purpose of discriminating against women" and its impact could be "plausibly explained on a neutral ground"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 229, 266 (1977) (stating that absent a clear pattern that is unexplainable on grounds other than animus toward the affected group, "impact alone is not determinative"); *see also Mazurek,* 520 U.S. at 972 (stating that the Court does "not assume unconstitutional legislative intent even when statutes produce harmful results").

Respondents argue that the court of appeals correctly determined that "Section O should be understood as intentionally discriminating against lesbian and gay State employees" because the Legislature conditioned "family health coverage on a status [marriage] that just the year before it helped to bar same-sex couples from entering." Opposition at 17. But these facts alone do not support a finding of

discriminatory intent provided that there is a plausible, nondiscriminatory reason for Section O's enactment. Section O rationally furthers the legitimate interest of encouraging marriage while also eliminating the additional expense involved in providing healthcare benefits to state employees' domestic partners. *See* Petition at 22-23. Respondents do not even mention these interests, much less try to explain why Section O does not further them.

Furthermore, Respondents ignore relevant, undisputed facts concerning Section O's historical background and legislative history that demonstrate that Arizona has historically limited marriage to a union between a man and a woman, that Arizona only briefly provided healthcare benefits to state employees' domestic partners and provided the vast majority of those benefits to state employees' heterosexual domestic partners,[5] and that Arizona decided to extend benefits *only* to state employees' spouses during a historic budget crisis. Petition at 3-5, 13-14. These facts do not support the Respondents' argument that discriminatory animus motivated the Legislature to enact Section O.

3. Like the court of appeals' decision, Respondents do not address Section O's *actual* classification,

[5] Given that the State provided only a small fraction of domestic-partner benefits to state employees' same-sex partners (Pet. App. 20a), Respondents did not even demonstrate that Section O had a disparate impact on gay and lesbian state employees.

which distinguishes between state employees' domestic partners and state employees' spouses. Instead, Respondents argue that the court of appeals correctly determined that domestic partners of gay and lesbian state employees are similarly situated to state employees' spouses. Opposition at 18-20. Respondents' argument – and the court of appeals' determination – would allow the courts to redraw legislative lines, which is contrary to this Court's authority governing the rational-basis test.

"The proper classification for purposes of equal protection analysis . . . begin[s] with the statutory classification itself." *Califano v. Boles*, 443 U.S. 282, 293-94 (1979). "Defining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – 'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315-16 (1993) (quoting *U.S.R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); alterations in original).

By holding that state employees' same-sex domestic partners must be treated the same as state employees' spouses, the court of appeals improperly changed the legislative classification. Because Section O provides benefits to state employees' spouses but not to state employees' domestic partners, the classification is rationally related to the State's interest in

encouraging heterosexual couples to marry. And, contrary to the court of appeals' conclusion (Pet. App. 13a-14a), Section O is not irrational in excluding benefits for same-sex domestic partners because the State is not trying to encourage same-sex couples to marry. *See Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory.").

III. The Court of Appeals' Decision Undermines All Laws Predicated on the Traditional Definition of Marriage.

Respondents claim that Petitioners wildly exaggerate the effect of the court of appeals' decision in claiming that it undermines all laws that provide benefits based on the traditional definition of marriage. Opposition at 21. Because the court of appeals determined that Section O's provision of benefits to state employees' spouses did not rationally further the State's interest in promoting marriage, it in effect concluded "that rules benefiting only traditional marriage serve no conceivable rational purpose." Pet. App. 67a (O'Scannlain, J., dissenting). Respondents do not refute that conclusion.

Respondents also argue that the court of appeals' decision is limited because it prevents government officials only "from eliminating existing family health

care coverage for the small number of lesbian and gay State employees in this one jurisdiction." Opposition at 22. Contrary to Respondents' contention, the court of appeals' rationale is not limited to instances where States have *withdrawn* previously extended benefits. Rather, the court of appeals addressed the "*distribution* of employee health benefits." Pet. App. 14a (emphasis added); *see also* Pet. App. 11a ("[W]hen a state chooses to *provide* [employment] benefits, it may not do so in an arbitrary or discriminatory manner." (emphasis added)); Pet. App. 13a-14a (stating that there was no rational basis for the "*denial,*" not the withholding, "of benefits to same-sex domestic partners" (emphasis added)). Thus, the district court in *Dragovich v. United States Department of Treasury* rejected the government's argument that the court of appeals' decision here concerned only the *withdrawal* of benefits, explaining that the decision stood for the proposition that "'when a state chooses to provide benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.'" ___ F. Supp. 2d ___, 2012 WL 1909603 at *15 (May 24, 2012) (quoting Pet. App. 11a).

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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